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JOSEPH E. WARNER,
1926 - 1929

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 the Acts of 1930, chapter 426, section 227b.

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.

JOSEPH E. WARNER,
Attorney-General.

Boston, January, 1931.

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OPINIONS

OF

JAY R. BENTON, ATTORNEY-GENERAL

CONSTITUTIONAL LAW — AUTHORITY OF A TELEPHONE COMPANY TO TRANSFER ITS LOCATIONS — RIGHT OF A FOREIGN TELEPHONE OR TELEGRAPH COMPANY TO DO BUSINESS IN MASSACHUSETTS.

In the absence of special enactment, one telephone or telegraph company may assign to another the right to use its locations.

The right of a foreign telegraph company to operate lines within the State is established by act of Congress, but the State may impose reasonable restrictions and regulations.

The State may not deny to a foreign telephone company desiring to construct lines in Massachusetts the same right to use public ways which is given to domestic companies, provided the use is for interstate communication.

To the Governor. 1926 January 7.

You ask my opinion as to the authority of a Massachusetts telephone company to permit a foreign telephone company to use its locations, and what authority a foreign telephone company has to construct and operate equipment on the locations of a domestic company.

The right to construct lines for the transmission of electricity, including telephone and telegraph lines, is given to companies incorporated for the purpose by G. L., c. 166, § 21, originally enacted in St. 1849, c. 93. Under this statute (§ § 22 and 25) locations in public ways may be granted by the cities and towns through which the lines are to pass.

A telephone company is a public service corporation, dealing in a public utility. Such a corporation cannot, without legislative authority, part with its property, franchises and privileges, including locations in public streets, so as to disable itself from performing its public duties. *Commonwealth* v. *Smith*, 10 Allen, 448, 455, 456; *Richardson*

v. *Sibley*, 11 Allen, 65; *Pierce* v. *Drew*, 136 Mass. 75; *French* v. *Jones*, 191 Mass. 522; *Weld* v. *Gas & Electric Light Commissioners*, 197 Mass. 556; *Attorney-General* v. *Haverhill Gas Light Co.*, 215 Mass. 394. Locations given to public service corporations in public streets by cities and towns are not contracts or franchises, but are in the nature of permits or licenses which are subject to revocation. *Springfield* v. *Springfield St. Ry .Co.*, 182 Mass. 41, 47, 48; *Metropolitan Home Tel. Co.* v. *Emerson*, 202 Mass. 402. Where a license is required by statute the question whether it is transferable depends upon the legislative intent. *Quinn* v. *Middlesex Electric Light Co.*, 140 Mass. 109; *Commonwealth* v. *Lavery*, 188 Mass. 13.

Your questions involve a consideration, first, of the right of a foreign corporation to engage in the transmission of intelligence by telephone in Massachusetts, and, secondly, of the transferability of rights in locations. As to the latter question, there is nothing in the general statutes of the Commonwealth indicating an intention to make locations granted under G. L., c. 166, § § 22 and 25, personal to the immediate grantee; and in *Postal Telegraph Cable Co.* v. *Chicopee*, 207 Mass. 341, 343, it was said that such rights passed by assignment to the plaintiff from its predecessors. In the absence of some special enactment, therefore, limiting the right of transfer with respect to some particular company, the granting by one company to another of permission to use its locations, so long as it does not thereby disable itself from doing business, and the use of such locations by the other company, otherwise qualified to do business in the Commonwealth, would seem to be without legal objection.

But the question of the right of a foreign telephone company to exercise the franchise of carrying on its business in Massachusetts is more doubtful. It has been held that the authority given by G. L., c. 166, § 21, is limited to domestic companies only. *Commonwealth* v. *Boston*, 97 Mass. 555. But in *Postal Telegraph Cable Co.* v. *Chicopee*, *supra*, the

court expressed the view that under the Federal law, and under the Massachusetts statutes as well, a foreign telegraph company, the plaintiff's predecessor in title, had a right to construct and maintain a telegraph line in this State which was part of an interstate system. This question, therefore, cannot be answered with certainty in the light of the decisions of our court alone. It involves a consideration of Federal law applicable to the subject.

The right of telegraph companies to operate lines within the State, regardless of any franchise from the State, seems to be established by the Act of Congress approved July 24, 1866 (14 Stat. 221, c. 230, Rev. Stat. § 5263, *et seq.*), and a series of decisions interpreting the act. That act was an exercise of the power of Congress over interstate commerce and over military and post roads. Its effect was to deny to a State the authority to say that a telegraph company may not operate lines constructed over postal routes within its borders; limiting the right of the State to the imposing of reasonable restrictions and regulations. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 548, 554; *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92, 104, 105; *Western Union Tel. Co.* v. *Penn. R. R. Co.*, 195 U. S. 540; *Western Union Tel. Co.* v. *Richmond*, 224 U. S. 160, 169, 170; *Essex* v. *New England Tel. Co.*, 239 U. S. 313; *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259.

In *Western Union Tel. Co.* v. *Richmond*, the court said: —

> The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. . . . It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations, or because of its wish to erect a monopoly of its own. . . . It has been held to prevent a State from stopping the operation of lines within the act by injunction for failure to pay taxes. . . . But except in this negative sense the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of commerce among the States,

gives the appellant no right to use the soil of the streets, even though postroads, as against private owners or as against the city or State where it owns the land.

In *Essex* v. *New England Tel. Co., supra,* it was said that "a city may not arbitrarily exclude the wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations"; and in *Postal Telegraph-Cable Co.* v. *Richmond, supra,* it was assumed that "the occupation of its streets by a telegraph company engaged in interstate commerce, which has accepted the act of Congress of 1866, cannot be denied by a city." In the Essex case the town authorities had permitted the company, a Massachusetts corporation, to locate and construct its lines along the highways of the town, and for many years had acquiesced in their maintenance and operation. Consequently, the town was said to be estopped from asserting that locations had not been formally granted, and the company was held, under the circumstances, to have acquired the right to maintain those lines under the Federal law. *Postal Telegraph-Cable Co.* v. *Chicopee,* 207 Mass. 341, 343, referred to above, was cited with approval.

Telephone companies, however, are not within the purview of the Federal act. *Richmond* v. *Southern Bell Tel. Co.,* 174 U. S. 761, 773–777. But even though Congress has not acted, a State is not permitted to interfere directly or by discrimination in the domain of power confided to the Federal government by the Constitution; and so it may not impose a direct burden on interstate commerce or discriminate against foreign corporations engaged therein. *Crutcher* v. *Kentucky,* 141 U. S. 47; *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 33–37; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 290, 291; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596, 597. Accordingly, the United States Supreme Court has held that where a State grants the use of its highways to domestic corporations engaged in intrastate transportation of a commodity (natural gas), the denying of

that right to foreign corporations engaged in interstate commerce in the same commodity is a discrimination against interstate commerce which the court will restrain. *Oklahoma* v. *Kansas Nat. Gas Co.*, 221 U. S. 229, 262. See also *Buck* v. *Kuykendall*, 267 U. S. 307.

Following the reasoning of the Oklahoma case, in my opinion the Massachusetts statute must be construed as giving to foreign telephone companies desiring to construct lines in Massachusetts for the purpose of interstate communication the same right to use the public ways for that purpose which is accorded to domestic companies. They can have, however, no greater right, and are equally bound to make application for locations to the proper authorities. *Richmond* v. *Southern Bell Tel. Co.*, 174 U. S. 761, 770–773. Moreover, this right is limited to the use of such ways in interstate commerce. The power of a State to exclude a foreign corporation from doing a local business within its borders, separate from its interstate business, where Congress has not acted, is undoubted. *Paul* v. *Virginia*, 8 Wall. 168; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21; *The Minnesota Rate Cases*, 230 U. S. 352; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *The Shreveport Case*, 234 U. S. 342; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560; *Wisconsin R. R. Comm.* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Attorney-General* v. *Electric Storage Battery Co.*, 188 Mass. 239; *Barrows* v. *Farnum's Stage Lines, Inc.*, 254 Mass. 240. In my opinion, this power of the State extends over franchises in public ways for use in intrastate commerce although they are post roads, in the absence of action by Congress. Nor should the fact that such use has heretofore been made without objection estop the Commonwealth from asserting that power if it chooses so to do. *Attorney-General* v. *Methuen*, 236 Mass. 564, 578, 579; *Attorney-General* v. *Revere Copper Co.*, 152 Mass. 444; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 540, 541.

Pardons — Commutation of Sentence — Report submitted to the Legislature by the Governor.

A pardon, as generally known, secures the release of the convict with or without conditions attached to such release.

If there are conditions attached, it is the duty of the Governor and Council to order the convict remanded for the unexpired term if they find that he has violated the conditions.

A commutation of sentence is an exercise of the pardoning power.

Under G. L., c. 127, § 152, the Governor should report to the Legislature every exercise of the pardoning power.

To the Governor. 1926 January 7.

You request my opinion whether you should include in the list of pardons submitted by you to the General Court the case of a prisoner whose sentence was commuted by you, with the advice and consent of the Council.

G. L., c. 127, § 152, provides, in part: —

> The governor shall annually transmit to the general court a list of the pardons granted by him with the advice and consent of the council during the preceding year.

Mass. Const., pt. 2nd, c. II, § I, art. VIII, provides, in part: —

> The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council; . . .

In *Kennedy's Case*, 135 Mass. 48, 51, the court said: —

> The power of pardoning offences, as conferred on the executive authority by the Constitution of the Commonwealth, is exceedingly comprehensive, extending to all offences except those of conviction by the Senate upon impeachment. It is only limited in its exercise by the provision that pardons shall not be granted before conviction. *Perkins* v. *Stevens*, 24 Pick. 277. This power includes that of mitigating the sentence, as by diminishing its duration where imprisonment has been ordered, or by commutation, so that a milder punishment is inflicted. It includes also the right to grant conditional pardons, either to take effect upon the performance of some precedent condition, or to become void by a failure to comply with some subsequent condition.

In *Opinion of the Justices*, 190 Mass. 616, 621, the justices said: —

The commutation of a sentence is a pardon upon condition that the convict voluntarily submits to a lighter punishment.

In *Opinion of the Justices*, 210 Mass. 609, 610, 611, the justices said: —

The words "the power of pardoning offences" are comprehensive. They include not only that absolute release from the penalty which is referred to commonly as a pardon, but those lesser exercises of clemency which are described as conditional pardon, commutation of sentence and respite of sentence. . . .

. . . A commutation of sentence, which is the substitution of a lighter for a more severe punishment, is an exercise of the pardoning power and must be in accordance with the Constitution.

See also *United States* v. *Wilson*, 7 Pet. 150, 160.

It is thus clear that a commutation of sentence is an exercise of the pardoning power and is a pardon upon condition. It is not, however, commonly referred to as a pardon. The effect of the act which is commonly known as a pardon is to secure the release of the convict, with or without conditions attached to such release. If there are conditions imposed and they are violated, the duty is placed upon the Governor and Council by G. L., c. 127, § 156, to ascertain the facts and to order the convict to be remanded and confined for the unexpired term of the sentence, if it appears that he has violated the conditions of his pardon. A commutation of sentence does not necessarily involve the release of the prisoner. It may merely make the prisoner eligible for parole, and his release is left to the discretion of the parole authority, which is not the Governor and Council, acting in accordance with the statutes governing the situation. If the prisoner is paroled and he violates the terms of the parole, the parole authority is empowered to ascertain the facts and to order the convict to be confined. See G. L., c. 127, §§ 128–150.

There is thus a sharp difference in effect between a commutation of sentence and what is commonly known as a pardon. Does the word "pardons" as used in G. L., c. 127,

§ 152, include commutations of sentences? The section appears in the General Laws under the heading "Pardons." But sections 154 and 157 refer to a pardon or commutation of sentence. Taking everything into consideration, I am constrained to the view that the General Court by the enactment of section 152 intended to require the Governor to report to it every exercise of the pardoning power, and that the answer to your question should be in the affirmative.

I suggest for your consideration, so that the Legislature might be fully advised as to the manner in which the pardoning power was exercised by you, the advisability of heading your report with the caption, "Exercise of the Pardoning Power," and of so listing the cases thereunder as to show the number of absolute pardons, pardons with conditions as commonly understood, commutations of sentences and respites of sentences.

Accrediting of State Treasury Receipts — General Revenue and Special Funds.

Contributions and assessments for repairing, improving and constructing ways, paid by cities and towns in 1925 to the State Treasurer after the passage of St. 1925, c. 288, providing for crediting contributions to Highway Fund, are to be accredited to general revenue, as having been estimated in the anticipated revenue, subject to appropriation in the budget and supplemental budget of 1925 (St. 1925, cc. 211 and 347).

To the Commission on Administration and Finance. 1926 January 12.

You request my opinion as to whether or not the contributions and assessments paid into the State treasury by cities, towns and counties during the fiscal year 1925, for maintaining, repairing, improving and constructing ways, should have been credited to the general fund in the treasury of the Commonwealth or to the Highway Fund created by St. 1925, c. 288.

Prior to the passage of St. 1925, c. 288, referred to above, G. L., c. 90, § 34, as amended, provided that the fees and fines received by the Registrar of Motor Vehicles should be

paid into the Treasury of the Commonwealth to be expended, if appropriated, as therein directed.

St. 1925, c. 288, § 1, struck out said section 34, and inserted in place thereof the following: —

> The fees and fines received under the preceding sections, together with all other fees received by the registrar or any other person under the laws of the commonwealth relating to the use and operation of motor vehicles, shall be paid by the registrar or by the person collecting the same into the treasury of the commonwealth, and said fees and fines, together with all contributions and assessments paid into the state treasury by cities, towns or counties for maintaining, repairing, improving and constructing ways, whether before or after the work is completed, and all refunds and rebates made on account of expenditures on ways by the division, shall be credited on the books of the commonwealth to a fund to be known as the Highway Fund. Said Highway Fund, subject to appropriation, shall be used as follows:
>
> . . . . . .

The remainder of said section 1 specified the purposes for which the fund was to be used. The act was approved on April 29, 1925, and took effect ninety days thereafter.

I am informed that the contributions and assessments for the year 1925 from cities, towns and counties for maintaining, repairing, improving and constructing ways had not been received when this act took effect, but it is represented to me that the estimated amount of such contributions and assessments to be received during the entire fiscal year of 1925 was used as a part of the bases for the budget and the supplemental budget of 1925, and was appropriated by the general appropriation act (St. 1925, c. 211) and the supplemental appropriation act (St. 1925, c. 347), by which all the estimated revenue, including these contributions and assessments from cities, towns and counties for the year, was totally exhausted. The supplemental appropriation act, approved May 1, 1925, contains items of specific appropriation from the Highway Fund (items 216, 600*a*, 641*a* and 303*a*, totalling $153,503.61). There was at that time a balance of receipts from motor vehicle fees and fines

on hand which was more than sufficient to meet these specific appropriations.

The answer to your question requires the Attorney-General to ascertain the intention of the Legislature, and that intention, when found, must be given 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; VI Op. Atty. Gen.'s, 209.

In view of the action of the Legislature in appropriating anticipated revenue from the contributions and assessments referred to, without reference to the Highway Fund, it is my judgment that the Legislature could not have intended that those contributions and assessments should be placed in the Highway Fund, where they would be unavailable to meet the requirements of the two appropriation acts. I am of the opinion, however, that it was the Legislature's intention that the balance of the receipts from motor vehicle fees and fines then on hand, that is, the day that chapter 288 took effect, and fees and fines subsequently received should be placed in the Highway Fund, these fees and fines being more than sufficient to meet the appropriations made specifically therefrom, to wit: items 216, 600*a*, 641*a* and 303*a* of the supplemental appropriation act.

Registry of Probate — Record — Photostatic Copies.

The permanent records of the Probate Courts kept by the registers as required by G. L., c. 215, § 36, may lawfully take the form of bound volumes of photostatic copies, provided that it is practicable to use therefor paper of the sort required by G. L., c. 66, § 3, and the requisite durability can be achieved.

To the Commissioner of Administration and Finance.
1926
January 21.

You have requested my opinion whether the use of photostatic copies of decrees, orders, wills and like matters would satisfy the requirements of existing laws with respect to the permanent records which are to be kept by the various registries of probate.

The provisions of G. L., c. 215, § 36, are as follows: —

> Decrees and orders of probate courts shall be in writing, and the registers shall record in books kept therefor all such decrees and orders, all wills proved in the court, with the probate thereof, all letters testamentary and of administration, all warrants, returns, reports, accounts and bonds, and all other acts and proceedings required to be recorded by the rules of the court or by order of the judge.

These words are far from prescribing in detail and with exactness the method of recording. The word "record" looks more to the end to be achieved, namely, the preserving in durable and intelligible form of the acts and proceedings in question. There is no satisfactory ground for assuming that R. S., c. 83, § 7, the earliest of the predecessors of G. L., c. 215, § 36, was intended to restrict the methods of recording to those made available by the progress of invention to the year 1836. I am of the opinion that a series of photostatic copies, properly arranged and bound into a permanent volume, constitutes a compliance with the fair meaning of the duty imposed upon the registers to "record in books kept therefor" the various matters which by G. L., c. 215, § 36, are required to be recorded.

The provisions of G. L., c. 4, § 7, cl. 26th, are as follows: —

> "Public records" shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, city or town which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, city or town has received or is required to receive for filing, and any book, paper, record or copy mentioned in sections five to eight, inclusive, and sixteen of chapter sixty-six.

There can be no doubt that these permanent records of the Probate Courts are intended to be public records, and that any construction of G. L., c. 215, § 36, that authorizes a method of recording which would withdraw these records from the definition given in the section last quoted above would be subject to grave doubt.

The word "print," in its primary significance, imports the use of pressure, the physical striking on to the paper or other material of the letters or designs. In that sense a photostatic copy is not a written or printed book or paper but is a copy made through photographic processes of a written or printed book or paper. The word "print," however, has its place in the language of photographers. "To print a positive picture from a negative" is the expression which is customarily used, and there is perhaps no other word than "print" which has been taken aptly to describe the process. With some hesitancy it is my view that a photostatic copy would be deemed "printed" within the meaning of G. L., c. 4, § 7, cl. 26th, and that the interpretation of G. L., c. 215, § 36, is therefore not varied thereby.

I direct your attention, however, to G. L., c. 66, § 3, which is as follows: —

> The word "record" in this chapter shall mean any written or printed book, paper, map or plan. All public records other than maps and plans shall be entered or recorded on paper made of linen rags and new cotton clippings, well sized with animal sizing and well finished, and preference shall be given to paper of American manufacture marked in water line with the name of the manufacturer.

This provision, which is intended to secure durability to public records, would have to be complied with, whatever method of recording be selected. It is not for me, however, to pass upon the practical question whether the kind of paper which this section requires is suitable to be used in making photostatic copies or records.

Assuming that there is, as I have said above, a considerable degree of discretion which may be exercised in the choice of the method of recording, and that that discretion may be exercised in favor of the use of photostatic copies, I do not understand you to ask, and I do not answer the question, to what person or body of persons that discretion is by law entrusted. The inquiry which is answered above appears to bear such a reasonable relation to the duties of your office as to permit the rendering of an opinion with respect thereto.

Constitutional Law — Boston Elevated Railway Company — Sale of Elevated Structures.

A bill authorizing the trustees of the Boston Elevated Railway Company, with the consent of the directors, to execute contracts for the purchase by governmental agencies of the elevated structures of the company and for the lease to the company of the property so acquired, not to become effective until accepted by vote of a majority of the company's stockholders, would be constitutional, if enacted.

To the House of Representatives. 1926 February 1.

You ask my opinion as to the constitutionality of a bill entitled "An Act relative to the purchase by the city of Boston and conveyance by the Boston Elevated Railway Company of elevated structures within the limits of said city." The bill contains the following provisions, with many details which it is not necessary now to state: —

First: The transit department of the city of Boston is authorized to execute with the company, with the consent of the directors, a contract for the purchase by the city of the elevated structures within the city, at a price to be determined, to be paid from the proceeds of an issue of bonds of the city, and another contract for the lease of the property so acquired, for a term ending with the termination of the present leases of tunnels and subways in the city, at a rental as therein provided.

Second: The Department of Public Utilities is similarly authorized to execute with the company, with the consent of the directors, a contract for the purchase by the Commonwealth of the elevated structures outside the city, at a price to be determined, to be paid from the proceeds of an issue of bonds of the Commonwealth, and another contract for the lease of the property so acquired, for a term ending with the termination of the present lease of the Cambridge subway, at a rental as therein provided; and it is provided that any excess or deficiency of revenues as compared with interest and sinking fund requirements shall be apportioned among the cities and towns constituting a district to be created.

Third: The company is required to use the amounts paid

to it by the city and by the Commonwealth, for the property conveyed, to restore and maintain the reserve fund created by Spec. St. 1918, c. 159, to reimburse the Commonwealth for amounts paid to the company under that act for distribution among the cities and towns, and to use the balance for capital purposes.

Fourth: Upon the execution of the contracts with the city referred to above the transit department is required to extend the Washington Street tunnel to Sullivan Square, and is authorized to execute with the company, with the consent of the directors, a contract for the lease of the extension, for a term ending with the termination of the present lease of the tunnel, at a rental as therein provided; and there are suitable provisions for acquiring land or interests therein by eminent domain or otherwise, and for paying the cost of the extension from an issue of bonds of the city.

Fifth: Upon the completion of the extension, the intervening elevated structure is to be removed and the company to be relieved of all rental obligations with respect thereto.

Sixth: It is provided that the act is to take effect upon its acceptance by the city of Boston and other cities in the district and by a majority vote of the stockholders of the company.

Most of the provisions of this bill are similar to provisions to be found in Gen. St. 1919, c. 369, providing for the purchase by the Commonwealth of the Cambridge subway, or in St. 1923, c. 480, providing for the extension of the Dorchester tunnel. So far as these provisions fall within the scope of Spec. St. 1918, c. 159, they are consistent with its terms. The proposed act does not become effective until accepted by a vote of a majority of its stockholders. Under those conditions the trustees of the company, with the consent of the directors, may clearly, in my opinion, contract to sell the elevated structures of the company in accordance with the provisions of the bill without violating the constitutional rights of any dissenting stockholders. See *Boston* v. *Treasurer & Receiver General*, 237 Mass. 403;

Durfee v. *Old Colony & Fall River R. R. Co.*, 5 Allen, 230; *Attorney-General* v. *Boston & Albany R. R. Co.*, 233 Mass. 460; V Op. Atty. Gen. 320; opinion to Joint Special Committee on Boston Elevated and Metropolitan Transportation District, September 28, 1925. Without passing upon matters of detail, I observe no constitutional defect in the main provisions of the proposed measure as outlined above.

CONSTITUTIONAL LAW — EMINENT DOMAIN — POWER OF THE LEGISLATURE TO GRANT AUTHORITY TO LEASE PROPERTY.

An act which authorizes a town to acquire by purchase or to take by eminent domain certain property, and to maintain and operate the same as a wharf or "to lease said property, in whole or in part for any purpose," is unconstitutional.

To the Governor. 1926 February 4.

You have transmitted to me a copy of the engrossed bill of House 1058, entitled "An Act authorizing the town of Fairhaven to acquire the Union Wharf property in said town."

The substance of this bill is that the town of Fairhaven is authorized to purchase, for an amount not exceeding $25,000, or, in the alternative, to take by eminent domain, a wharf property in Fairhaven known as Union Wharf; and is further authorized to maintain and operate the same as a wharf or "*to lease said property, in whole or in part, for any purpose.*"

After an examination of the authorities I am constrained to advise you that, in my judgment, this bill is unconstitutional, for the following reasons.

It is true that a statute which authorizes a taking may also provide that the municipal authorities may sell the lands taken at a later date, whenever they determine that such property is no longer needed for public use. But such a power, which is latent in every taking, is very different from a power to take land with a contemporaneous knowl-

edge and purpose that a definite and separable part thereof is not then necessary for the public use.

The words of the statute which authorize the town authorities of Fairhaven, after the wharf has been taken, to lease said property, in whole or in part, for any purpose, are not restricted as to time. These words form an integral part of the act, and are to operate contemporaneously with all its other provisions. There is nothing to require a determination that by reason of changed conditions the wharf, deemed necessary at the time of the taking, is no longer needed. The invalidity of such a statutory enactment is conclusively shown by the decision in the case of *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 374, *et seq.*

It was said by the Supreme Court of the United States, speaking through Mr. Justice Harlan, in *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 251: —

> It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle . . . grows out of the essential nature of all free governments.

In *Salisbury Land & Improvement Co.* v. *Commonwealth*, *supra*, the court said, at page 377: —

> 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. These principles have been expounded at length in early decisions and recent opinions of this court with affluent citation of authorities.

These fundamental principles, too well settled to be open to question, are also stated in the case of *Wright* v. *Walcott*, 238 Mass. 432, 434, as follows: —

There are certain fundamental principles too well settled to be open to question. Moneys raised by taxation and all public funds can be expended only for public purposes. Private property cannot be taken by eminent domain or by contract of purchase except for a public use. It cannot be so taken or purchased from one person or set of persons with the design of handing it over directly or indirectly to another person or set of persons for their private advantage. The taking of private property except for ends which are of a public nature, even though accompanied by full compensation to the owner is contrary to fundamental principles of American jurisprudence and violative of the essential character of a free government. Legislation designed or framed to accomplish the ultimate object of placing property in the hands of one or more private persons, after it has been taken by the superior power of the government from another private person avowedly for a public use, is unconstitutional. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, and cases there reviewed and collected. *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242. *Opinion of the Justices*, 237 Mass. 597, 608, 609, and cases there collected. *Lynch* v. *Forbes*, 161 Mass. 302, 309. *Wheelock* v. *Lowell*, 196 Mass. 220, 225. *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 251. *Hairston* v. *Danville & Western Railway*, 208 U. S. 598, 606.

Constitutional Law — Power of Legislature over Charitable Foundations.

A statute purporting to authorize an application of funds held upon a charitable trust to distinct and foreign purposes is unconstitutional.

To the House Committee on Rules. 1926 February 6.

You have asked my opinion whether a bill for legislation authorizing the trustees of the Haverhill Congregational Ministerial Fund to dispose of said fund would, if enacted, be constitutional.

"It is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of *cy pres*. *Cary Library* v. *Bliss*, 151 Mass. 364. *Crawford* v. *Nies*, 224 Mass. 474, 488." (*Opinion of the Justices*, 237 Mass. 613, 617.)

The trustees of the Haverhill Congregational Ministerial Fund are a corporation established by St. 1822, c. 32, for the

purpose of holding in trust donations which might be made to the said trustees for the support and maintenance of the gospel ministry in the First Parish (Congregational) in the town of Haverhill. All funds so given are unequivocally devoted to the support of a regular, ordained, gospel minister, except that the surplus income over and above the sum of $600 per annum may be applied "for other parochial purposes, if said parish, at a legal meeting holden for that purpose, so direct." St. 1822, c. 32, § 10. The purport of the present bill is to authorize a thorough deviation from those purposes. In my opinion, it will, if enacted, be unconstitutional.

City of Boston — Authority of the Street Commissioners to regulate Traffic — Boulevard Stop Regulation.

The authority to regulate street traffic in the city of Boston is vested in the street commissioners by St. 1908, c. 447.

The provisions of G. L., c. 89, § 8, and G. L., c. 90, § 18, do not cut down the authority given by St. 1908, c. 447, except in so far as regulations adopted thereunder may be inconsistent with those provisions.

The so-called boulevard stop regulation for the highways of Boston would not necessarily be inconsistent with the provisions of G. L., c. 89, § 8, or of G. L., c. 90, § 18.

To the Police Commissioner of Boston. 1926 February 10.

You ask my opinion whether city officials can establish the so-called boulevard stop regulation for the highways of Boston without G. L., c. 89, § 8, having first been repealed, and without obtaining the approval of the Registrar of Motor Vehicles in accordance with G. L., c. 90, § 18.

The authority to regulate street traffic in the city of Boston is vested in the street commissioners by St. 1908, c. 447, which authorized the commissioners "to pass, and to amend or change from time to time, all regulations for such purpose, not inconsistent with law, which they shall deem needful to prevent the congestion and delay of traffic, and for other purposes." Under the authority of this statute a

comprehensive code of street traffic regulations and rules for driving has been established.

G. L., c. 89, on the law of the road, provides in section 8 as follows: —

> Every driver of a motor or other vehicle approaching an intersecting way, as defined in section one of chapter ninety, shall grant the right of way, at the point of intersection to vehicles approaching from his right, provided that such vehicles are arriving at the point of intersection at approximately the same instant; except that whenever traffic officers are standing at such intersection they shall have the right to regulate traffic thereat.

G. L., c. 90, regulating the use of motor vehicles, provides in section 18, in part, as follows. —

> The city council or the selectmen and park commissioners, on ways within their control, may make special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, and may prohibit the use of such vehicles altogether on certain ways; provided, that no such special regulation shall be effective unless it shall have been published in one or more newspapers, if there be any, published in the town in which the way is situated, otherwise in one or more newspapers published in the county in which the town is situated; nor unless notice of the same is posted conspicuously by the town or park commissioners making the regulation at points where any way affected thereby joins other ways; nor until after the registrar shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests; . . .

The provisions in these sections do not cut down the authority given by St. 1908, c. 447, except in so far as regulations adopted thereunder may be inconsistent with the provisions of these sections. *Commonwealth* v. *Newhall*, 205 Mass. 344; *Commonwealth* v. *Gile*, 217 Mass. 18. G. L., c. 90, § 18, provides for special regulations as to the speed of motor vehicles and as to the use of such vehicles on particular ways, including the prohibition of such use. The regulation about which you inquire seems to be of a different sort, and therefore it is my opinion that section 18 would not be applicable to it. The proposed regulation, however, must

not be inconsistent with the provisions of G. L., c. 89, § 8. Without a draft of the proposed regulation I cannot tell whether there is any inconsistency between the two. I do not see that such inconsistency is necessarily involved.

CLERK OF THE SUPREME JUDICIAL COURT — RETIREMENT ASSOCIATION — COMPULSORY MEMBERSHIP — TEMPORARY EMPLOYMENT.

The clerk of the Supreme Judicial Court for the Commonwealth is a public officer and not an employee.

He cannot be required to become a member of the Retirement Association of the Commonwealth.

There is no provision of law prohibiting the temporary employment of a person over seventy years of age.

A person employed on several successive temporary requisitions is not eligible to membership in the Retirement Association.

To the Board of Retirement 1926 February 10.

You request my opinion whether the clerk of the Supreme Judicial Court for the Commonwealth is a compulsory member of the Retirement Association of the Commonwealth.

G. L., c. 32, § 2, provides that "there shall be a retirement association for the employees of the commonwealth." Section 1, as amended by St. 1922, c. 341, § 1, defines "employees" as "persons permanently and regularly employed in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service."

G. L., c. 32, § 2 (3), as amended by St. 1921, c. 439, § 1, provides, in part: —

> An official under fifty-five years of age when appointed or reappointed by the governor for a fixed term of years, *may*, if his sole employment is in the service of the commonwealth, become a member of the association by making written application for membership within one year from the date of his original appointment or subsequent reappointment to the same office.

The clerk of the Supreme Judicial Court for the Commonwealth is appointed by the justices of that court for a term of five years and may be removed by them. G. L., c. 221, § 1. The duties of the clerk are defined in the subsequent sections of that act.

In *O'Connell* v. *Retirement Board of the City of Boston*, 254 Mass. 404, 406, the court held that the clerk of the Municipal Court of the Roxbury District of the City of Boston "is not an employee but is a public officer clothed with official functions of a highly important nature." See also V Op. Atty. Gen. 547. It seems clear upon the authorities that the clerk of the Supreme Judicial Court for the Commonwealth is a public officer and not an employee, in the sense in which that term is usually used.

Does the term "employee," as defined in G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, include public officers? The use of the phrase "persons permanently and regularly employed" in place of the phrase "permanent and regular employees" does not in and of itself warrant the construction that public officers are included in the term "employees." The distinction between a public office and a public employment has been so sharply recognized as to require, in my opinion, clear and unmistakable language to warrant the inclusion of public officers in the term "employees." See *Attorney-General* v. *Drohan*, 169 Mass. 534; *Attorney-General* v. *Tillinghast*, 203 Mass. 539. Moreover, section 1 of chapter 32, as amended, should be read in the light of section 2 (3) of that act, as amended by St. 1921, c. 439, § 1, which *permits* officials appointed by the Governor for a fixed term of years to become members of the Retirement Association, but does not require them to become members. Yet such officials are "persons" in the service of the Commonwealth.

I am therefore of the opinion that the clerk of the Supreme Judicial Court for the Commonwealth cannot be required to become a member of the Retirement Association of the Commonwealth.

Your next question is as follows: —

May a person who is a temporary employee, whose employment was authorized for a definite time, be employed after reaching seventy years of age —

(*a*) In a regular State department;

(*b*) By a temporary commission created by an act of the Legislature to report upon a special subject?

G. L., c. 32, § 2 (4), as amended by St. 1925, c. 12, provides for the retirement of any "member" who reaches the age of seventy. I know of no provision of law which prohibits the temporary employment of a person who has passed the age of seventy. I therefore answer this question in the affirmative.

Your next question reads as follows: —

May a person who has been employed on a temporary requisition for three months' service, followed by another temporary requisition for a like length of service, and who has worked for several months under several such appointments, be considered an employee for the purposes of membership in the Retirement Association?

Would it be consistent with the law for the Board of Retirement to adopt a by-law to include such persons as "permanently and regularly employed" after a reasonable length of continuous service?

G. L., c. 32, applies to persons "permanently and regularly employed." Section 3 (3) provides that "the board may make by-laws and regulations consistent with law." A person who is employed on several successive temporary requisitions is not, by the very terms of the requisition, "permanently and regularly employed." Such person is therefore not eligible to membership in the Retirement Association. The board cannot by a regulation or by-law treat a temporary employment as a permanent one. I therefore answer this question in the negative.

You further inquire whether there are any classes of officials exempt from membership in the Retirement Association in addition to those appointed by the Governor and Council and those elected by popular vote. Your question

does not refer to any specific officials or any specific officers. The Attorney-General will not undertake to determine in advance of any inquiry directed toward specific officers all possible problems which may arise. I therefore respectfully ask to be excused from answering that question.

DEPARTMENT OF PUBLIC WORKS — REGULATION OF BILLBOARDS — SIGNS ADVERTISING PERSONS OCCUPYING OR BUSINESS DONE ON THE PREMISES.

Under G. L., c. 93, § 30, as amended by St. 1924, c. 334, advertising devices otherwise lawful, indicating the person occupying the premises or the business done thereon, need not conform to the regulations of the Department of Public Works.

What signs advertise the business transacted on the premises is a question of fact, and the rule is, in general, broad enough to allow devices which indicate the manufacturer of goods sold on the premises.

To the Commissioner of Public Works. 1926 February 15.

You have asked my opinion upon certain questions respecting the interpretation and effect of G. L., c. 93, § 30, relating to the regulation of billboards and other advertising devices, as amended by St. 1924, c. 334. The provisions of that section are as follows: —

> No person, firm, association or corporation 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, whether erected before August twenty-fifth, nineteen hundred and twenty, or not, which advertises or calls attention to any business, article, substance or any other thing, unless such billboard or device conforms to the rules and regulations and ordinances or by-laws established under the preceding section; provided, that this section shall not apply to signs or other devices erected and maintained in conformity with law and which advertise or indicate either the person occupying the premises in question or the business transacted thereon, or advertise the property itself or any part thereof as for sale or to let and which contain no other advertising matter.

1. You ask whether the words "erected and maintained in conformity with law," as found in G. L., c. 93, § 30, amended by St. 1924, c. 334, include within their significance conformity with the rules and regulations made by

the Division of Highways under the authority of G. L., c. 93, § 29, as amended by St. 1924, c. 327. I think that they do not. Any other conclusion than this would take away from this portion of G. L., c. 93, § 30, all force and effect whatever.

2. You also ask whether the words "or the business transacted thereon," found in said section 30, permit the erection of advertising devices which advertise the manufacturer of articles or products sold on the premises. What is the business transacted upon given premises, is a question of fact in each case. What devices advertise or indicate such business is a further question of fact in each case. In my opinion, this provision is broad enough to permit not only a device stating the general nature of the business but also a device which advertises or indicates a particular detail of the business which may be thought reasonably calculated to attract custom. The advertising of a particular commodity as exposed for sale upon the premises may well include matter indicating the manufacturer of the commodity. The proprietor of the business may consider that the manufacturer's name constitutes an additional recommendation of the particular product. It is difficult to answer categorically a question which so largely involves varying considerations of fact, but so far as it is possible I answer your question in the affirmative. There will be, however, a line in fact between devices which, as an incident to the advertising or indicating of the business done on the premises, also advertise the manufacturer of an article sold thereon and devices which only advertise the manufacturer and ignore the business. The latter type of device does not come within the scope of the permission.

Massachusetts Agricultural College — Trustees — President — Acceptance of Gift.

The president of the Massachusetts Agricultural College is without authority to accept gifts for the college; such power lies in the board of trustees.

You have asked my opinion upon the following matter: —

The president of the Massachusetts Agricultural College informs me that a group of farmers wish to present a Ford truck to the college for the use of the Cranberry Station. He wishes me to ascertain whether or not he can legally accept the gift of the truck.

To the Commission on Administration and Finance. 1926 February 16.

The Massachusetts Agricultural College is a State institution, managed and administered on behalf of the Commonwealth by a board of trustees appointed under G. L., c. 15, § 20. The president of the college is elected by the trustees, who define his duties. G. L., c. 75, § 13. I am of the opinion that the president of the college has no authority to accept gifts for the use of the institution, but that the trustees are empowered so to do.

The college is not for all purposes an independent entity, but functions within the Department of Education as one of the many forms of the Commonwealth's activities.

The physical property which the college uses has its title vested in the Commonwealth, and gifts to the college are in effect gifts to the Commonwealth. The Commonwealth alone has power to accept or reject donations offered to it. Such power may, however, be delegated by the Commonwealth through the Legislature to its administrative subdivisions.

G. L., c. 75, § 7, provides: —

> The trustees shall administer property held in accordance with special trusts, and shall also administer grants or devises of land and gifts or bequests of personal property made to the commonwealth for the use of the college, . . .

The board of trustees, as constituted under G. L., c. 15, § 20, is a branch of the administrative government of the Commonwealth, and in view of the powers specifically con-

ferred upon it by G. L., c. 75, it may be inferred that it has the power to receive unconditionally gifts of personal property, such as an automobile truck, for the use of the college, title to which vests in the Commonwealth. VI Op. Atty. Gen. 636.

The president of the college is elected by the trustees, and his duties are defined by them. The Legislature has conferred upon him no powers with relation to holding or administering property. The office itself carries with it no implied power to place the Commonwealth in the position of a donee of a preferred gift, and there is no legislative enactment indicating any intent to confer such authority upon him. He is not such an administrative officer of the Commonwealth as may accept gifts upon its behalf, and a gift to the college is in effect a gift to the Commonwealth.

Constitutional Law — Maintenance of Athletic Field by a City — Admission Fee.

A bill which provides that the director of the department of public property of the city of Lawrence, under the direction of its city council, may maintain an athletic field in said city and may permit the use of said field for athletic games and other entertainments of a public nature, at which an admission fee may be charged, but which does not provide that such field is to be used exclusively for rental purposes, would be constitutional.

To the Senate Committee on Cities. 1926 February 19.

You have requested my opinion as to the constitutionality and legality of Senate Bill No. 179, now before your committee, entitled "An Act relative to the maintenance of an athletic field in the city of Lawrence." This act provides as follows: —

Section 1. The director of the department of public property of the city of Lawrence, under the direction of its city council, may maintain an athletic field, with suitable equipment, on land on Osgood Street and Winthrop Avenue, owned by the city and now known as Memorial Park, and may permit the use of said field for athletic games and other entertainments of a public nature, at which an admission fee may be charged, to such person or persons and upon such conditions as may be fixed by the said director, with the approval of the city council.

It does not appear in what manner this land was acquired by the city of Lawrence, whether by a taking under the right of eminent domain, purchase or gift.

In *Wright* v. *Walcott*, 238 Mass. 432, the court said: —

> Land acquired by a city or town by eminent domain or through expenditure of public funds, held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. The power of the General Court in this regard is supreme over that of the city or town. When title in fee is acquired in the land by the municipality for such a public use, there is no right of reversion to the original owner. He has been divested of every vestige of title when he parted with the fee. *Higginson* v. *Treasurer & School House Commissioners of Boston*, 212 Mass. 583. *Stewart* v. *Kansas City*, 239 U. S. 14, 16.

The Legislature may, under our Constitution, authorize the sale or lease of land held for a public purpose when the public purpose designated has been completely accomplished, or when through the lapse of time or changed conditions continued ownership of the land by the public agency is no longer necessary or needed for the public purpose for which the land was acquired. *Chase* v. *Sutton Mfg. Co.*, 4 Cush. 152; *Winnisimmet Co.* v. *Grueby*, 209 Mass. 1; *Bancroft* v. *Cambridge*, 126 Mass. 438; *Worden* v. *New Bedford*, 131 Mass. 23; *Dingley* v. *Boston*, 100 Mass. 544; *Davis* v. *Rockport*, 213 Mass. 279; *Wright* v. *Walcott*, *supra*; *Sweet* v. *Rechel*, 159 U. S. 380. But legislation designed or framed to accomplish the ultimate object of placing property under the control of one or more private persons after it has been taken by the superior power of the government from another private person avowedly for a public purpose, is unconstitutional. *Wright* v. *Walcott*, *supra*; *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371.

In the absence of any evidence that Memorial Park, referred to in the bill under consideration, was given to the city of Lawrence by devise, grant, bequest, in trust or upon

condition, I assume that it was purchased or taken by eminent domain for park purposes. If the park is already under the control and management of park commissioners, so that the result of the bill is to work simply a change of control of said park land by taking it from one official who holds it for a public use and transferring it to another to hold in the same manner for precisely the same public use, there may well be a constitutional objection. To such a situation the case of *Cary Library* v. *Bliss*, 151 Mass. 364, seems applicable.

The bill under consideration does not involve any taking of property either from a private person or from the public. There is nothing in the bill which takes away from the city its legal title to the land. It merely authorizes the use of said land for athletic games and other entertainments of a public nature, at which an admission fee may be charged, to such person or persons and upon such conditions as may be fixed by the director of the department of public property of the city of Lawrence, with the approval of the city council.

The law seems settled in this Commonwealth that while a municipality cannot purchase or take land and buildings or erect buildings for business or speculative purposes, nevertheless, having such land and buildings, acquired in good faith for proper municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for a compensation. Such a use is within its legal authority and is in fact common in many cities and towns. For example, operating a ferry, see *Davies* v. *Boston*, 190 Mass. 194; letting a public hall for profit, *Little* v. *Holyoke*, 177 Mass. 114, *Oliver* v. *Worcester*, 102 Mass. 489, 499; managing a farm, partly for the support of its poor, partly for the maintenance of its highway department and partly for the production of income, *Neff* v. *Wellesley*, 148 Mass. 487; operating a stone crusher for profit, *Duggan* v. *Peabody*, 187 Mass. 349, *Collins* v. *Greenfield*, 172 Mass. 78. In such cases, where the city does not devote the property exclusively to public purposes but lets it, or a part of it, for its own ad-

vantage and emolument by receiving rents or otherwise, it is of course liable, while it is so let, in the same manner as a private owner would be. See *Davis* v. *Rockport, supra.* In practically all of the deciding cases the property was held and administered for some purely public purpose, the use of unneeded or unused portions of it for the profit of the municipality being merely incidental and a minor use.

The bill under consideration, while it does not in terms provide that the park referred to shall be used exclusively for income purposes, nevertheless, as it reads, that would seem to be the major purpose, and the money for the maintenance and equipment of the athletic field apparently is to be raised by general taxation. These features should be carefully considered, as they make the bill clearly distinguishable from the adjudicated cases. The difficulty lies not in the statement of the governing principles of law but in their application to particular facts. With some hesitancy I arrive at the conclusion that inasmuch as the bill does not provide that the said athletic field is to be used exclusively for rental purposes, and apparently may be used also for municipal purposes for the benefit of all the citizens, the use for profit may well be considered to be merely incidental. Under this view of the question I believe the bill is constitutional.

Constitutional Law — Retroactive Tax Laws.

A statute reviving a liability to tax under a prior law, while retroactive, is not for that reason unconstitutional.

Bills amending G. L., c. 63, § 52, and St. 1925, c. 343, § 13, examined and held to be free from constitutional defect.

To the House Committee on Ways and Means. 1926 February 19.

You ask me to advise your committee relative to the form and constitutionality of House Bills Nos. 1085 and 1086, and at the same time to give the committee any suggestions that may occur to me as to the merit or demerit of the proposed legislation.

House Bill No. 1085 amends G. L., c. 63, § 52, which was under consideration by the court in the recent case of *W. & J. Sloane* v. *Commonwealth*, 253 Mass. 529. Section 52 provides, in substance, that if the excise imposed by section 32 on domestic business corporations, or that imposed by section 39 on foreign corporations, is declared unconstitutional by the Supreme Court of the United States or the Supreme Judicial Court of the Commonwealth, the whole corporation excise tax law enacted in 1919 shall be null and void and the prior law shall be revived, that all taxes which have become due under such prior law shall be assessed forthwith, and that the time for making such assessment and for applying to the court for abatement of taxes under section 32 or section 39 shall be extended for six months from the date of the determination.

The proposed substitute provides separately for the excise imposed by section 32 and that imposed by section 39. It revives the prior law only for the period beginning with the calendar year prior to the determination of the court. It extends the time for assessing taxes and enforcing rights for a period of a year instead of six months, and it provides that excises paid under the law declared unconstitutional shall be credited against taxes assessed under the prior law.

The liability to tax under prior law revived and made applicable for a period already passed by section 52, as it now is and in the proposed amended form, is, of course, retroactive; but that feature does not make it unconstitutional. "Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection and not impairing vested rights, are not forbidden by the Federal Constitution." *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 152. See also *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, 332; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 20; *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338. The limitation of the right to recover taxes assessed under the law held unconstitutional to the period beginning with the calendar year prior to the

decision does not affect the constitutional rights of the taxpayer, which, as the court has several times held, are sufficiently protected by section 77. *W. & J. Sloane* v. *Commonwealth, supra; International Paper Co.* v. *Commonwealth,* 232 Mass. 7; *Lever Brothers Co.* v. *Commonwealth,* 232 Mass. 22; *Burrill* v. *Locomobile Co.,* 258 U. S. 34.

House Bill No. 1086 amends St. 1925, c. 343, § 13, which contains provisions similar to section 52 made applicable to the tax imposed on banks and trust companies. The proposed amendment is similar in form to the amendment made by House Bill No. 1085, except that taxes under the prior law, when revived, are to be assessed for the year 1926 and subsequent years instead of from and after the calendar year preceding the date of the decision, and taxes assessed under the invalid law are to be credited for a corresponding period.

In my opinion, these bills, if enacted, would be constitutional, and they seem to me to be in proper form and reasonably adapted to cure defects and difficulties which became apparent in connection with the proceedings instituted by W. & J. Sloane.

Taxation — Exemption of Veterans.

A statute amending G. L., c. 59, § 5, cl. 23rd, adding to the class of veterans thereby given a partial exemption from local property taxation, would be constitutional, if enacted.

To the Governor. 1926 February 24.

You have transmitted to me for examination and report Senate Bill No. 172, entitled "An Act granting to certain veterans a partial exemption from local property taxation."

This bill proposes to amend G. L., c. 59, § 5, cl. 23rd, exempting soldiers and sailors who served in the War of the Rebellion from payment of a poll tax and to the amount of one thousand dollars from taxation of their property and the property of their wives or widows if they are not entitled to exemption under clause 22nd, with certain provisos.

The amendment includes in the class of persons entitled to the one thousand dollar exemption "soldiers and sailors who served in the military or naval service of the United States in the Spanish war or in the Philippine insurrection or the China relief expedition and were honorably discharged or honorably released therefrom."

"Reasonable classification so far as concerns taxation or exemption from taxation may be made by the Legislature." *Massachusetts General Hospital* v. *Belmont*, 233 Mass. 190, 201. The payment of military aid out of State funds to persons who have served in the army or navy of the United States is a public use justifying such expenditure. *Opinion of the Justices*, 211 Mass. 608. Partial exemption from taxation has been granted to soldiers and sailors, under our statutes, since 1894. The proposed amendment merely adds to the class of soldiers and sailors entitled to the benefits of one of the exemptions provided.

In my opinion, the bill, if enacted into law, would be constitutional.

CONSTITUTIONAL LAW — POWER OF LEGISLATURE OVER CHARITABLE FOUNDATIONS — CHANGE OF NAME OF SCHOOL — VALIDATION OF ACTS OF CHARITABLE CORPORATION — ALTERATION OF NUMBER AND QUALIFICATIONS OF TRUSTEES — CONTRACT CLAUSE — STATE LEGISLATION PRIOR TO THE UNITED STATES CONSTITUTION — POWER OF DONOR TO RELEASE CONDITIONS.

Charitable trusts held by municipalities are, in the absence of express restriction on the gift, subject to a certain amount of statutory regulation with respect to the mode of administration.

Statutes purporting to vary the substance or express administrative provisions of a charitable trust are ordinarily unconstitutional.

A statute purporting to change the name of a school founded by a private donor, who expressly provided for its name, varying the apparent purpose of the school from "agricultural" to "vocational" is unconstitutional.

A statute changing the name of such a school, so as to include the word "academy" rather than "school," may not, under given circumstances, be unconstitutional.

The charter of a corporation established in 1784, without reservation of right to amend, cannot be altered without the consent of the corporation.

A statute purporting to "validate" the acts of a charitable corporation done under a name other than the corporate name is at least valid as a release of any right of the Commonwealth to complain thereof.

Where, prior to the adoption of the United States Constitution, the Legislature altered a charitable foundation by an act changing the number of trustees from that provided for by the donor, the Legislature may now, with the corporation's consent, further alter the number of trustees.

Where, under such circumstances, the original donor had by his will requested the abolition of a requirement as to the residence of the trustees, the Legislature may, with the consent of the corporation, alter the charter to comply with such request.

To the House Committee on Education. 1926 March 2.

You have asked my opinion whether House Bill No. 301 and House Bill No. 351, §§ 1 and 2, both relating to certain charitable foundations, would, if enacted into law, violate the conditions of the original gifts. I assume that your ultimate question is whether the bills, if enacted, would be constitutional.

I take up first House Bill No. 301. This purports to authorize the change of name of Smith's Agricultural School, an institution carried on by the city of Northampton, under the will of Oliver Smith, to Smith Vocational School. The will, the provisions of which were accepted by the then town of Northampton in 1847, is emphatic in providing that the

name of the institution, for the establishment of which a substantial sum of money was given, should be "Smith's Agricultural School." Although it provides for the establishment, "on the premises," of a "School of Industry," the dominant emphasis of the relevant portion of the will is upon the "Art and Science of Husbandry and Agriculture." The name reflects, and was intended to reflect, this dominance.

Whether or not changed circumstances, coming with the passage of time, now would warrant a court of equity in making the change which this bill seeks to effectuate, is not the present question. It is whether the Legislature can do it. The power of the General Court over charitable trusts held by municipalities is considerable. *Opinion of the Justices*, 237 Mass. 613, 618. In respect to the mechanics of administration, the donor who confides his trust to a city or town without express restrictions subjects it to a certain amount of regulation flowing from the general power of the Legislature over the public affairs of the trustee of his selection. *Ware* v. *Fitchburg*, 200 Mass. 61. But a measure which undertakes to vary the substance of the trust, or even an administrative provision which is express and unequivocal, will ordinarily pass the bounds of this power. *Cary Library* v. *Bliss*, 151 Mass. 364. In my opinion, this bill is of such a character, and, if enacted, will be unconstitutional. *Opinion of the Justices, supra*, 617.

House Bill No. 351 purports to alter the charter of a corporation established in 1784, St. 1784, c. 32. This cannot be done without the consent of the corporation. *Opinion of the Justices*, 237 Mass. 619, 622. The bill is deficient in that it is not made conditional upon such consent. As, however, this may be remedied by amendment, I will give my opinion upon its various provisions as if such amendment had been made.

1. The bill purports to change the name of the corporation from "The Trustees of Derby School" to the "Trustees of Derby Academy." The difference between the words

"school" and "academy" is not a wide one, and the former word is not more appropriate to the expressed purposes of the particular institution. The deed by which the school was founded did not directly provide for the name of "Derby School" but rather that the trustees should secure an act of incorporation under the name of the "Trustees of Derby School," a condition which has been fulfilled. The change from a school to an academy, whatever the significance of such a change may be thought to have been, was undertaken by St. 1797, c. 9. Under these circumstances, I should hesitate to say that the change of the corporate name now contemplated would violate the obligation of any contract between the original donor and the trustees or corporation, or would so modify the charity itself as to amount to a usurpation of judicial power.

2. The bill purports to validate all acts of the corporation done under the name of the Trustees of Derby Academy after June 17, 1797, to the same extent as if done under the name of the Trustees of Derby School, and to confirm as the property of the corporation, the Trustees of Derby Academy, all property, real and personal, now standing in the name of the Trustees of Derby School or the Trustees of Derby Academy. These provisions can be construed as intended merely to release whatever rights the Commonwealth might otherwise have to complain of the business of the corporation having been done under an erroneous name, and to authorize specifically the future dealing with the corporate property under the name which the bill confers. Thus construed, they would be constitutional. It is therefore unnecessary to consider whether, given some broader construction calculated to affect the rights of third persons, they would be unconstitutional.

3. There is a provision in the bill changing the number of trustees, and removing a limitation hitherto existing as to the residence of the trustees. There was no express provision in the original deed as to the number of trustees, although the conveyance was in fact to ten named persons and

contained provision for the filling of vacancies. The Legislature, in the charter of 1784, undertook to deal comprehensively with the subject, and provided for a board of not more than eleven nor less than nine, of whom five should constitute a quorum. The provision superseded the implications of the deed at a time when the Constitution of the United States had not been adopted. It cannot, therefore, be attacked upon the ground of the Contract Clause. It furnished a new starting point for the future, creating a contract with the corporation, in the sense in which a charter is a contract, but creating no contract in any sense with the original donor. I have not been advised of the existence of any subsequent donors. In my opinion, this administrative feature is now subject to further change by the Legislature, with the consent of the corporation. As to the removal of the limitation respecting the residence of the trustees, this comes in response to the specific request of the founder, in the codicil to her will, which request must release, if anything can release, her personal right to have the charity conducted, in this respect, upon the original terms. See *Cary Library* v. *Bliss*, 151 Mass. 364, 379.

Upon the facts which have been presented, although several aspects of House Bill No. 351, §§ 1 and 2, are not free from doubt, I am not prepared to say that the measure, if enacted, will not be held constitutional.

Constitutional Law — Taxation — Corporate Franchise Tax — Foreign Telephone Company.

The tax imposed by G. L., c. 63, § 56A, on foreign telephone companies is sufficiently definite so that it is not open to the objection that legislative power is unlawfully delegated to the Commissioner.

There is not such discrimination in the tax imposed, by reason of its application to foreign telephone companies only, as to constitute a denial of the equal protection of the laws.

To the Senate. 1926 March 15.

You have requested my opinion as to the constitutionality of G. L., c. 63, § 56A, inserted in said chapter by St. 1923, c. 310. The section is as follows: —

A foreign telephone company carrying on part of its business outside of the commonwealth may, within the time when its franchise tax return under this chapter is due to be filed, request determination of the value of its corporate franchise subject to taxation in the commonwealth by a method other than that hereinbefore provided and hereinafter referred to as "the statutory method." Such a foreign telephone company shall within thirty days thereafter file with the commissioner, under oath of its treasurer, a statement showing in detail the value of its corporate franchise as aforesaid, and such other information as the commissioner shall require for assessment of the tax. The commissioner shall in such case ascertain the value of such franchise as aforesaid and to that end may determine such value by a method other than "the statutory method" but nothing herein contained shall be construed to prevent the application of "the statutory method" in case the commissioner shall deem such method equitable.

G. L., c. 63, §§ 53–58, impose a tax upon the corporate franchise of certain corporations, not taxable under the corporation excise tax law, including foreign telephone, telegraph, railroad, street railway and electric railroad corporations. The tax is measured by the value of the corporate franchise less certain deductions, which are different in the cases of different classes of corporations, specified in section 55. In the case of a foreign telephone company the deductions allowed are "so much of the value of its capital stock as is proportional to the number of telephones used or controlled by it, or under any letters patent owned or controlled by it, without the commonwealth"; and "the value

of its works, structures, real estate, machinery, poles, underground conduits, wires and pipes subject to local taxation within the commonwealth" (clauses third and fourth). The tax so imposed is a tax upon the corporation on account of property owned and used by it within the State. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, 552; *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S. 40, 45. In enacting section 56A the Legislature no doubt had in mind that a tax levied on a foreign telephone company under section 55 and clauses third and fourth might result in an unconstitutional burden on such a corporation. *Fargo* v. *Hart*, 193 U. S. 490; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275; *Wallace* v. *Hines*, 253 U. S. 66. A somewhat similar alternative method for determining value for the purpose of laying excise taxes on foreign business corporations is to be found in G. L., c. 63, § 42.

In considering the question of the constitutionality of section 56A there appear to be two possible lines of inquiry:

First, whether the tax imposed is so defined that it may not be open to the criticism that legislative power is delegated to the Commissioner; and

Secondly, whether, in applying the provision to foreign telephone companies alone, there is some unconstitutional discrimination in favor of or against such corporations.

I interpret the term "value of its corporate franchise subject to taxation in the commonwealth," which by section 56A is to be ascertained by the Commissioner, to mean value of its corporate franchise employed within the Commonwealth. So interpreted, the tax is imposed upon property subject to taxation by the Commonwealth. *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Adams Express Co.* v. *Ohio*, 166 U. S. 185, 223–225; *Atlantic, etc., Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 163; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, 453; *Union Tank Line* v. *Wright*, 249 U. S. 275; *Air-Way Corporation* v. *Day*, 266 U. S. 71; *Bass, Ratcliff & Gretton, Ltd.*, v. *State Tax Com-*

mission, 266 U. S. 271. In my opinion, the tax imposed by the statute is sufficiently definite so as not to be open to the objection of an unlawful delegation of legislative power. The New York tax law for many years imposed an annual franchise tax upon foreign and domestic corporations to be computed upon the basis of the amount of its capital stock employed within the State, without further defining the method by which the value of the stock so employed was to be determined. Laws of New York, 1880, c. 542; Tax Law, § 182. I conclude, therefore, that so far as the first question is concerned the section is not unconstitutional.

The second inquiry is whether there is such discrimination in the tax by reason of its application to a foreign telephone company only as to constitute a denial of the equal protection of the laws under the United States Constitution. Concerning this question the Supreme Court of the United States has recently said: —

> It is unnecessary to say that the "equal protection of the laws" required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy.

Royster Guano Co. v. *Virginia*, 253 U. S. 412, 415. In *Beers* v. *Glynn*, 211 U. S. 477, 484, the court said: —

> The power of the State in respect to the matter of taxation is very broad, at least so far as the Federal Constitution is concerned. . . . It may tax one class of property by one method of procedure and another by a different method.

See also *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237. Tax laws classifying foreign corporations and impos-

ing a particular tax different from other taxes upon foreign corporations of a certain class have several times been upheld. *Michigan Central R. R.* v. *Powers*, 201 U. S. 245, 293; *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322; *Northwestern Life Insurance Co.* v. *Wisconsin*, 247 U. S. 132. It is my opinion that in this aspect, while the question may be open to some doubt, section 56A is not unconstitutional.

I therefore advise you in response to your request that, in my opinion, G. L., c. 63, § 56A, is constitutional.

INSURANCE — CONTRACTS — SERVICE AGREEMENTS

A contract to make repairs caused by accident may be a contract of insurance and not a service agreement when the element of hazard enters into the terms of the undertaking.

To the Commissioner of Insurance.
1926
March 15.

You have requested my opinion as to whether or not an agreement issued by the Eastern Auto Body Service Corporation, which you have submitted to me for examination, is a contract of insurance within the meaning of G. L., c. 175, § 2.

By the foregoing statute 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 instant agreement recites in its provisions that it is not a policy of insurance but is a "service agreement." Its true character, however, must be determined from analysis of its terms. Various contracts of a similar nature have been considered by me and by my predecessors in office, and the general principles applicable to the distinction between contracts to render service and contracts of insurance have been set forth at length in many opinions (VI Op. Atty. Gen. 150; VII Op. Atty. Gen., p. 139, and others there cited).

An essential element of a contract of insurance is hazard. An insured receives indemnity from loss by reason of the happening of events without his control or the control of the insurer. If a contract be merely an agreement to perform work for another at the option of the latter, or to make ordinary repairs upon an instrumentality of another as they may become necessary by the usual operation of such instrumentality, and not when created by accident resulting from the intervention of some cause foreign to the usual operation, it is not a contract of insurance. I Op. Atty. Gen. 544, 547. If, however, a contract calls for indemnity in money or the making of repairs, in the event of damage to an instrumentality of one of the contracting parties, which can only be made necessary by the happening of an accident, the contract may be one of insurance.

The service contracts which have been the subject of previous opinions by the Attorney-General and his predecessors, and have been said not to be contracts of insurance, have lacked the element of hazard and have differed in their terms from the instant agreement in important particulars.

In the agreement submitted to me the Eastern Auto Body Service Corporation promises, in consideration of the payment of a sum of money, to make certain enumerated kinds of repairs during one year to a designated automobile of the other party to the contract, and to make such repairs regardless of the cause thereof, whether accident, collision, negligence or of whatever character. A large proportion of the enumerated kinds of repairs which the corporation agrees to make are of a sort which more commonly are made necessary by damage caused by the accidental application of external violence than by the ordinary operation of an automobile. The removal of dents in the body, in the metal part of the top, in the doors, in the hood, in the fenders, on the gasoline tank and brackets, which are enumerated repairs required by the contract, are, as a matter of common knowledge, more likely to result from

accident than from the ordinary wear and tear of the mere operation of an automobile. The replacement of glass in an automobile, "that may be broken, resulting from any act, event or fact whatsoever other than wilful destruction," which is one of the enumerated repairs that the corporation agrees to make, is a form of repair which almost invariably is made necessary by damage resulting from force accidentally applied to a car, rather than from its usual operation. Clause (3) of the instant agreement, relative to towing, provides for the rendering of service not merely at the option of the assured but when the car is disabled, whether by causes incident to its ordinary operation or by accident or collision."

In view of the intimate connection between accidental violence and the kinds of damage as to which the corporation is to make the holder of the agreement whole by performing the necessary and stipulated repairs, I am constrained to say that such an element of hazard enters into the contract that it is plainly distinguishable from other service contracts which have been held, by reason of the lack of this characteristic, not to be contracts of insurance. The agreement under consideration provides for virtual reimbursement for loss to the other contracting party by the performance of acts valuable to him, namely, the making of repairs. It is supported by a valid consideration. Although possibly it is somewhat broader in its scope, providing, as it perhaps does, for repairs made necessary by ordinary usage as well as by accident, yet, read as an entirety, it is virtually a contract of insurance not unlike the type commonly known as collision sustained, except that it provides only for the making of certain repairs instead of for the payment of money to the insured.

I am of the opinion that the contract which you have submitted to me is one of insurance, within the meaning of G. L., c. 175, § 2.

Agriculture — Inspection of Apples — Foreign Law.

An inspector of apples from another State is without authority to inspect apples grown in such State when stored within the Commonwealth.

To the Commissioner of Agriculture. 1926 March 16.

You request my opinion as to the authority of an inspector representing the New Hampshire Department of Agriculture to make inspection of New Hampshire apples in market and storage houses within this Commonwealth.

I am unaware of any statute of Massachusetts or of the United States which confers such authority upon inspectors of the New Hampshire Department of Agriculture. No such power is given by G. L., c. 94, §§ 104–111, as amended, nor by U. S. Compiled Statutes of 1918, §§ 8574–8, commonly known as the United States Apple Grading Law. In the absence of specific statutory authority, no foreign inspector possesses any such power as you refer to in your letter. Such an inspector might have access to local market and storage houses and might inspect apples therein lawfully if permission so to do were given by the owners of the buildings and of the apples.

Motor Vehicle — Transportation of Intoxicating Liquor — Forfeiture.

A motor vehicle conveying intoxicating liquor in bottles or other receptacles is not a "vessel" under G. L., c. 138, § 64, but may be an "implement of sale" thereunder.

To the Commissioner of Public Safety. 1926 March 18.

You request my opinion upon the following questions: —

May an automobile used for the transportation or sale of liquors, contrary to the laws of the Commonwealth, be deemed, within the meaning of the law, an implement for the sale of such liquors or a container thereof, and therefore subject to forfeiture and disposition as an implement or container?

Or may an automobile when especially equipped for the transportation or sale of liquors, contrary to the laws of the Commonwealth, be deemed, within the meaning of the law, an implement for the sale of such liquors or a container thereof, and therefore subject to forfeiture and disposition as an implement or container?

G. L., c. 138, § 64, provides: —

> The officer to whom the warrant is committed shall search the premises and seize the liquor described in the warrant, the casks or other vessels in which it is contained, and all implements of sale and furniture used or kept and provided to be used in the illegal keeping or sale of such liquor, if they are found in or upon said premises, and shall convey the same to some place of security, where he shall keep the liquor and vessels until final action is had thereon.

I will take up first the question whether a motor vehicle may be considered a "vessel," under the provisions of the above statute. A vessel is "a hollow receptacle of any form or material, but especially one capable of holding a liquid, as a pitcher, bottle, vase, kettle, or cup." Standard Dictionary.

The bottles, cans, containers or other receptacles in which the liquor is held are the "vessels in which it is contained." Intoxicating liquor found in receptacles in or upon a motor vehicle will not transform such a vehicle into a vessel in which said liquor is contained, under the meaning of the statute.

It is conceivable, however, that a motor vehicle might be constructed or equipped with tanks or other receptacles, as part thereof, capable of holding liquor in volume, in which case such a vehicle could "be found to be an implement of sale or container," or vessel, within the intendment of the statute. *Commonwealth* v. *Certain Intoxicating Liquors*, 253 Mass. 581.

Whether motor vehicles may be "implements of sale . . . used or kept and provided to be used in the illegal keeping or sale of . . . liquor," is the other part of the inquiry under consideration.

An implement is defined as "an instrument used in work." Standard Dictionary. Also, "that which fulfils a want or use." *Davis* v. *Anchor Mutual Fire Ins. Co.*, 96 Ia. 70.

Whether a motor vehicle is an implement of sale or vessel used in the illegal keeping or sale of intoxicating liquors is a question of fact for the court or jury, upon all the evidence

in the particular case. *Commonwealth* v. *Certain Intoxicating Liquors, supra.*

A succinct statement of the law on the points raised in your letter is found in the language of the court in the opinion just cited above. He stated as follows: —

> The various provisions of the statute plainly show that this is a proceeding *in rem;* it relates to the liquors, containers and implements of sale. The question in issue was whether the truck was used as an implement of sale or container used in the illegal keeping or sale of intoxicating liquor. . . .
>
> The contention that the truck could not be found to be an implement of sale or a container cannot be sustained. The evidence before the jury is not before us and we are unable to say that it did not justify the finding.

LICENSE — STORAGE OF GASOLINE — STATE FIRE MARSHAL.

Where notice of a hearing on an application for a license to store gasoline in the city of Boston was not given as required by G. L., c. 148, § 14, as amended by St. 1925, c. 335, § 1, the State Fire Marshal has authority, under G. L., c. 148, §§ 30, 31 and 45, on appeal from an order of the board of street commissioners granting the license, to rescind the action of the board because of the want of proper notice.

To the Commissioner of Public Safety. 1926 March 18.

You ask my opinion in regard to a petition filed by the Jenney Manufacturing Company with the board of street commissioners of Boston for a license to keep and store gasoline in a structure within the city limits. The provisions for granting such a license are contained in G. L., c. 148, § 14, as amended by St. 1925, c. 335, § 1, which provides, in part, as follows: —

> No building or other structure shall, except as provided in section fifteen, be used for the keeping, storage, manufacture or sale of any of the articles named in section ten, except fireworks, firecrackers and torpedoes, unless the aldermen or selectmen shall have granted a license therefor for one year from the date thereof, after a public hearing, held in the case of cities by the aldermen or any committee thereof designated by them, notice of the time and place of which hearing shall have been given, at the expense of the applicant, by the clerk of the city or by the

selectmen, by publication, not less than seven days prior thereto, in a newspaper published in the representative district, if any, otherwise in the city or town, wherein the land on which such license is to be exercised is situated, and also by the applicant by registered mail, not less than seven days prior to such hearing, to all owners of real estate abutting on said land, and unless a permit shall have been granted therefor by the marshal or by some official designated by him for the purpose; . . .

G. L., c. 148, § 30, gives to the State Fire Marshal, within the Metropolitan District, the powers given by section 14 and other specified sections with respect to the granting of licenses and permits. Section 31, as amended by St. 1921, c. 485, § 5, authorizes the Marshal to delegate the granting and issuing of licenses or permits to other designated officers. Section 45 authorizes the Marshal to hear and determine all appeals from acts and decisions of persons acting or purporting to act under his authority. I understand that in the city of Boston the board of street commissioners is authorized to act under authority delegated to them in accordance with the provisions of section 31.

You state that the board of street commissioners ordered that notice be issued for a hearing on the petition on October 26, 1925, that the Commonwealth, through the Department of Public Works, owns real estate adjoining the property with respect to which the license was sought, and that notice was not given by the applicant by registered mail not less than seven days prior to the hearing, as required by the statute. The board of street commissioners granted the license and an appeal was taken to you. You ask whether you have authority on the appeal to rescind the order of the board of street commissioners granting the license, because of non-compliance by the applicant with the requirement for giving notice by registered mail to abutting owners.

In my opinion, your authority to rescind the action of the board for the reason assigned cannot be questioned, and I so advise you. See V Op. Atty. Gen. 718; VI Op. Atty. Gen. 329; VII Op. Atty. Gen. 293, 450.

CONSTITUTIONAL LAW — ARBITRARY DISCRIMINATION — EXEMPTION OF INDIVIDUAL FROM OPERATION OF GENERAL LAW.

A statute conferring on an individual the privilege of exemption from the operation of a general law is unconstitutional, because of arbitrary discrimination.

A bill exempting a named individual from the operation of the civil service law and rules would be unconstitutional, if enacted.

To the Governor. 1926 March 20.

You have referred to me for examination and report House Bill No. 798, entitled "An Act providing for the appointment of Dennis J. O'Donnell, Junior, as a member of the regular police force of the city of Newton."

The bill purports to authorize the city of Newton "to appoint Dennis J. O'Donnell, Junior, a member of its regular police force without civil service examination, notwithstanding any provision of the civil service laws and the rules and regulations made thereunder."

It is a settled principle of constitutional law that a statute conferring on a particular individual the privilege of exemption from the operation of a general law applicable to other persons similarly situated is unconstitutional. Such a statute violates the fundamental principle that the law must apply equally to all and that there shall be no arbitrary discrimination between different classes of persons. It is in violation of the principles underlying the system of government established by the Constitution of the Commonwealth as proclaimed in the Declaration of Rights, more particularly in the following provisions: —

ARTICLE VI. No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; . . .

ARTICLE VII. Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: . . .

. . . . . .

ARTICLE X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. . . .

Holden v. *James,* 11 Mass. 396; *Simonds* v. *Simonds,* 103 Mass. 572; *Brown* v. *Russell,* 166 Mass. 14, 21–25; *Commonwealth* v. *Hana,* 195 Mass. 262, 266, 267; *Bogni* v. *Perotti,* 224 Mass. 152, 156, 157; VII Op. Atty. Gen. 331; *cf. Opinion of the Justices,* 166 Mass. 589. See also *Lewis* v. *Webb,* 3 Me. 326; *Milton* v. *Bangor Railway & Electric Co.,* 103 Me. 218; *Hamann* v. *Heekin,* 88 Ohio St. 207; 12 C. J. 1117. It is also in violation of the provision in the Fourteenth Amendment to the Constitution of the United States guaranteeing to all persons the equal protection of the laws. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369–374; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 155, 165; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 102–112; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 558–563; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417; *Truax* v. *Raich,* 239 U. S. 33; *Truax* v. *Corrigan,* 257 U. S. 312, 332–339. See also *Commonwealth* v. *Interstate, etc., St. Ry. Co.,* 187 Mass. 436, 438.

The proposed act is a special act purporting to exempt the individual named from the operation of the civil service laws and rules. The civil service rules have the force of laws. *Opinion of the Justices,* 138 Mass. 601; *Opinion of the Justices,* 145 Mass. 587, 590; *Attorney General* v. *Trehy,* 178 Mass. 186, 188; *Ransom* v. *Boston,* 192 Mass. 299, 304. In my opinion, it is beyond the constitutional authority of the Legislature to grant to any individual exemption from the operation of the law, and the rules and regulations of the Commissioner which have the force of law, respecting the civil service.

Civil Service — Suspension — Separation from the Service.

Where a fireman was not suspended indefinitely but his suspension was expressly made for a definite period, with loss of pay, he is not actually separated from the service, within the meaning of the Civil Service Rules.

To the Commissioner of Civil Service. 1926 March 22.

You request my opinion as to whether or not a civil service employee who was suspended for a definite period of time, in accordance with G. L., c. 31, § 43, is thereby actually separated from the service. You state that a permanent member of the Cambridge fire department was suspended under G. L., c. 31, § 43, from November 9, 1925, until April 1, 1926, with loss of pay, for the reason that he was intoxicated while on duty. The chief of the fire department has now requested his reinstatement, and you desire to know whether or not you can properly consider that when the fireman was suspended he was separated from the service, and therefore, under Civil Service Rule 23, section 3, you are given a discretion either to allow or to refuse such reinstatement.

G. L., c. 31, § 43, provides, in part, as follows:

> Except as otherwise provided in this chapter, every person holding office or employment in the classified public service of the commonwealth, or of any county, city or town thereof, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation or suspended, or without his consent transferred from such office or employment to any other, except for just cause, and for reasons specifically given him in writing within twenty-four hours after such removal, suspension, transfer or lowering in rank or compensation.

It is to be noted that this statute uses the words "removed . . . or suspended," showing clearly that the Legislature did not intend the two terms to be synonymous. To "suspend" merely means, according to Bouvier, a temporary stop for a time, and accordingly "suspended" is defined as temporarily inactive or inoperative, held in abeyance, caused to cease for a time.

Civil Service Rule 23, section 3, provides as follows: —

> With the consent of the Commissioner, upon good cause shown, an appointing officer may reinstate in the same position or in a position in the same class and grade any person who has been separated from the service; provided, however, that the Commissioner shall not allow reinstatement of a person discharged for cause.

This expressly refers only to a person who has been "separated" from the service.

In the case under consideration the fireman was not suspended indefinitely, but his suspension was expressly made from November 9, 1925, until April 1, 1926, with loss of pay. Had he been indefinitely suspended, the question might present more difficulty; but in view of the fact that his suspension was for a definite period, I am of the opinion that he is not actually separated from the service within the meaning of the civil service rule above quoted, and that therefore you have no discretion either to allow or to refuse his reinstatement solely on the ground that he was separated from the service.

Constitutional Law — Power of Legislature over Charitable Foundations — Enlargement of Powers of Charitable Corporations as to the Holding of Property — Enlargement of Purposes of Such Corporations.

There is no constitutional objection, ordinarily, to a statute enlarging the capacity of a charitable corporation to hold property.

A charter granted in 1890 may be altered without the consent of the corporation, except as to matters infringing upon the terms of the charitable foundation or invading the judicial province with respect to administration *cy pres*.

Where the founder of a school which later obtained an act of incorporation, prescribed with some particularity as to the characteristics of the school, it may be observed with respect to a statute purporting to authorize the corporation to run a school having additional and different characteristics —

(*a*) That as a mere enlargement of the corporate powers, it may be constitutional, but that this construction is of questionable soundness;

(*b*) That as anything further, authorizing the conducting of a single school in such way as to affect materially the characteristics prescribed for the institution by the donor, it would be unconstitutional.

To the House Committee on Rules. 1926 March 22.

On behalf of the House committee on rules, you have asked my opinion relative to the constitutionality, if enacted, of a proposed measure amending the charter of the Tabor Academy, a corporation chartered by St. 1890, c. 153. There has been submitted with your request a bill accompanying a "petition of Donald W. Nicholson relative to the powers of the corporation known as The Tabor Academy," and also what purports to be an alternative draft of suggested changes in the charter. I assume that you desire my opinion upon both these proposals. There has also been provided a copy of the will and codicil of the founder.

Each suggested amendment contemplates an increase in the amount of property which may be held by the corporation to a sum which is apparently left wholly indefinite and unlimited. Viewing this feature entirely apart from the other aspects of the proposals, I perceive no constitutional objection. The circumstance that such unlimited authority is comparatively unusual commends itself only to considerations of policy.

In view of the date at which this institution was incor-

porated, there is no objection to be raised under U. S. Const., art. I, § 10, to the alteration of its charter, within the limits of the proposed amendments by legislative enactment and without the consent of the corporation, unless those amendments infringe upon the provisions made by the donor of the charity or invade the exclusive province of the court to administer charitable funds *cy pres*. See VI Op. Atty. Gen. 66; *Opinion of the Justices*, 237 Mass. 613.

Mrs. Tabor's will manifests an intention to found and endow an academy for the education of both sexes, which should be available to the young people of her native village of Marion Lower Village, reasonably meeting the wants "of all classes of the community amid which it is located," and which also should gradually enlarge to draw as students "youth of all portions of the country who may desire to participate in its advantages." To these ends she invested the trustees, whom she required to procure an act of incorporation, with wide discretionary powers. The charter, granted in 1890, conforms with fair accuracy to the will and codicil.

The codicil provides that no tuition fee shall be required of any of the inhabitants of the town of Marion, "it being my will that as to them the advantages of said school shall be free to all pupils having the requisite qualifications for entering it." One of the principal objects of the proposed amendments manifestly is to enable the corporation to hold property received by it in the future free of this provision — unless otherwise specified by the donors of such future property — and thus conduct an institution which will be free to inhabitants of the town of Marion only to the extent that the present property of the corporation can be said to support the privilege. The amendments made by the bill which has been submitted are in the following terms: —

> And said corporation is authorized to take and hold any other and further estate, real or personal, in addition to the amount stated in this section, which may be acquired by said corporation by gift or otherwise together with all accumulations of the same and to appropriate

the same and the income thereof (1) for purposes of education in connection with an institution of learning or other educational foundation in accordance with all the restrictions imposed upon said property when received by said corporation or (2) for the use and benefit of the Tabor Academy, or either the boys' or girls' department thereof, when thus designated by the donor and any property received by said corporation and so designated to be for the use of Tabor Academy, or any department thereof, shall be held by said corporation and applied for the benefit of said academy, or the specified department thereof, the same to be, unless the contrary is declared in the gift, free from any preferences in the will of Elizabeth Tabor favoring the town of Marion or its inhabitants.

The alternative draft of changes is along the same general lines but in some respects more drastic.

I would not wish to say, upon what I have before me, that upon the production of proper evidence a case could not be made out warranting a court of equity in permitting the trustees to do some, if not all, of the things which these measures contemplate. That is, however, a judicial question, to be decided in a cause to which the Attorney-General may well be an active party charged with the usual duties pertaining to his office with respect to charitable trusts. It seems unwise to anticipate to any great extent in this opinion the issues of such a cause. It seems unlikely that the trustees, with or without the enactment of these amendments, will deem it safe to proceed along such lines without obtaining the instructions of a court of competent jurisdiction. I therefore indicate my views upon these amendments as follows:

If they can be construed as merely enlarging the corporate purposes so as to make the proposed conduct not *ultra vires* of the corporation, they may be constitutional. Grave doubt, however, is cast upon the correctness of such a construction by the circumstance that, as a practical matter, it will be difficult, if not impossible, to take steps pursuant to such enlarged powers without materially affecting the characteristics of the institution which Mrs. Tabor founded and which this corporation administers. If they are to be construed as purporting fully and directly to authorize

the trustees to act along the lines indicated, it seems to me that, upon the whole, they either authorize action which might be permitted by a court of equity under the *cy pres* doctrine or else go further and attempt to vary material features of the trust in a way which would lie beyond the power of the court, and in either event are unconstitutional. There is one other possibility, that they can somehow be construed as authorizing conduct which is already within the general implications of the will and codicil, but in that case they are unnecessary.

Constitutional Law — Power of the Legislature — Special Law — Colleges.

A special law giving to an institution the right to use the word "college" when such institution has not the power to confer degrees is in contravention of G. L., c. 266, § 89, and unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

To the House Committee on Education. 1926 March 23.

The committee on education has requested my opinion as to the constitutionality of House Bill No. 1224, if enacted, and has called my attention specifically to G. L., c. 266, § 89, in connection therewith.

The proposed act is entitled "An Act authorizing the Congregation of the Sisters of St. Joseph, of Boston, to establish the Regis College for Young Women."

It is in its nature a special and not a general law. It provides that the Congregation of the Sisters of St. Joseph, a religious and educational corporation, is authorized to conduct and maintain a school for the higher education of young women, to be called Regis College for Young Women. The directors of the corporation are authorized to establish courses in instruction, but they are not empowered to grant degrees.

G. L., c. 266, § 89, a general law, provides in the last sentence thereof as follows: —

Any individual, school, association, corporation or institution of learning, not having power to confer degrees under a special act of the general court, using the designation of "university" or "college" shall be punished by a fine of one thousand dollars; but this shall not apply to any educational institution whose name on July ninth, nineteen hundred and nineteen, included the word "university" or "college."

We have no constitutional provision in this Commonwealth which prohibits the enactment of special laws of the character of the proposed act. It is a principle of statutory interpretation that a special law directly in contravention of the provisions of a general law is to be treated as creating an exception to the terms of the general law. *Ackerman* v. *Green*, 201 Mo. 231; *Jones* v. *Broadway Co.*, 136 Wis. 595; *State* v. *Johnson*, 170 N. C. 685; *Jersey City* v. *Hall*, 79 N. J. L. 559; *Hawkins* v. *Bare & Carter*, 63 W. Va. 431. Such a mode of interpretation applied to the proposed act would, in my opinion, have the effect of making inapplicable to the college authorized therein, or to the corporation, the prohibitory and penal provisions of G. L., c. 266, § 89, even although the intent of the Legislature in this respect is capable of expression in a more definite form.

The Fourteenth Amendment to the Constitution of the United States provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Corporations have been held to be "persons" within the meaning of the amendment, and it is a denial of the equal protection of the laws to discriminate in legislation between corporations of the same class. A denial of the equal protection of the laws exists both as to privileges conferred and as to liabilities imposed, the effect of privileges given to some being the same in relation to others of the class as burdens placed upon designated individuals.

As regards the granting or withholding of charter powers, the Legislature may discriminate between corporations of the same class as much as it will, but when the effect of such discrimination be to grant to a corporation a privilege, exception or immunity from the operation of a general law

enacted under the police power and applicable to all other corporations of the same class, the Legislature is violating the constitutional provisions as to equal protection of the laws.

Corporations as to which a reasonable difference exists in character or situation may be dealt with differently, and the Legislature has broad powers in making classifications based on such difference for the purpose of providing different treatment. There is nothing, however, in the proposed act itself which indicates an attempt at reasonable classification whereby the particular corporation therein referred to should be segregated in a class by itself to receive the privilege of exception from a general penal statute applicable to all other corporations. If no reasonable ground for such classification exists, the constitutionality of the proposed bill, if enacted, could not be sustained.

The Legislature could relieve the corporation in question from the prohibitions of chapter 266 by giving to it in the act the power to confer degrees, but I am of the opinion that without the grant of such power the instant bill, if enacted, would violate the constitutional provisions of the Fourteenth Amendment.

License for the Sale of Gasoline — Public Ways — Curb Pumps.

A curb pump is a structure used for the sale of gasoline, and its use must be licensed under St. 1925, c. 335.

A license issued by the street commissioners of the city of Boston permitting the use of part of a public street for the storage and sale of merchandise is distinct from the license required by St. 1925, c. 335, and the issuing of one does not preclude the necessity of obtaining the other.

To the Commissioner of Public Safety. 1926 March 26.

You ask my advice on questions regarding the power of the State Fire Marshal, or persons designated by him, to license the use of curb pumps for the storage or sale of gasoline within the lines of public ways.

You ask whether a curb pump is subject to the restrictions

of St. 1925, c. 335, amending G. L., c. 148, § 14, as a "building or other structure . . . used for the keeping, storage, manufacture or sale" of gasoline if the only gasoline contained in it is that which may remain in the pipes of the pump when not in operation or such as flows through the pipes in delivery of gasoline to a purchaser. The word "structure" is defined broadly as any production or piece of work artificially built up, or composed of parts joined together in some definite manner. Century Dictionary. *Stevens* v. *Stanton Construction Co.*, 153 App. Div. 82; *Nash* v. *Commonwealth*, 174 Mass. 335. While such a pump may not be used, strictly speaking, for the keeping or storage of gasoline, it seems clearly to be used for the sale of gasoline, and therefore, in my opinion, its use must be licensed under St. 1925, c. 335.

You ask whether a person holding a license issued to him by the street commissioners of the city of Boston under St. 1907, c. 584, to use duly specified parts of a public street in that city for the storage and sale of merchandise, including gasoline, may lawfully store or sell gasoline in or from appliances or structures suitable for such storage or sale within such specified spaces without a license or permit therefor under the provisions of St. 1925, c. 335. The Attorney-General has heretofore on several occasions pointed out that the requirement of a license for the erection and maintenance of a garage and the requirement of a license for the storage of gasoline are separate and distinct, and that the issuing of one does not preclude the necessity of obtaining the other. V Op. Atty. Gen. 718; VI Op. Atty. Gen. 329, 580. See also *Foss* v. *Wexler*, 242 Mass. 277. For the same reasons the license required by St. 1907, c. 584, is distinct from the license required by St. 1925, c. 335. My answer to this question is therefore in the negative.

The answer just given largely disposes of your remaining question: whether the Fire Marshal, or persons designated by him, may lawfully issue a license or permit to the owner of the soil underlying a public way for the use within the

limits of such way of a curb pump for the storage or sale of gasoline. Such a license may properly be granted, but it will not authorize the obstruction of the way or obviate the necessity of obtaining a license under St. 1907, c. 584, for the use of parts of public streets in the city of Boston for the storage and sale of merchandise. *Cf. Commonwealth* v. *Packard*, 185 Mass. 64, 67; VII Op. Atty. Gen. 293.

Regulation of Traffic by Cities and Towns — Approval by Registrar of Motor Vehicles.

A regulation of a city providing that no vehicle should go upon certain streets between 8 A.M. and 2.30 P.M. when public schools are in session does not require the approval of the Registrar of Motor Vehicles, under the provisions of G. L., c. 90, § 18.

To the Commissioner of Public Works. 1926 March 26.

You ask my opinion arising out of the following situation.

It appears that the board of aldermen of the city of Newton recently made a regulation providing that no vehicle of any description should go upon certain streets in that city between 8 A.M. and 2.30 P.M. on any day that the public schools of said city are in session.

Thereafter, this regulation was submitted to a deputy registrar of motor vehicles for certification in writing, after a public hearing, that this regulation was consistent with the public interests. The deputy, apparently thinking that the provisions of G. L., c. 90, § 18, applied to the making of this regulation, gave his approval.

From this decision a citizen of Newton has appealed to the Division of Highways for an annulment of this decision, under G. L., c. 90, § 28.

You ask my opinion as to whether or not it was necessary, before this regulation excluding all vehicles from a certain street in Newton should become effective, to obtain the certificate of the Registrar of Motor Vehicles, in writing, after a public hearing, that the regulation was consistent with the public interests.

It appears that you have on file in your department an opinion of the Attorney-General which answers the question raised by you. IV Op. Atty. Gen. 7.

I also call your attention to the case of *Commonwealth* v. *Newhall*, 205 Mass. 344, in which, in an exhaustive opinion, Mr. Justice Hammond reviews the statutes regarding the operation of automobiles in this Commonwealth and their relation to other statutes that have to do with the regulation of street traffic regulations and rules for driving in general.

Soon after the general appearance of automobiles upon the public ways of the Commonwealth it became apparent that, by reason of their great speed, danger was likely to arise, and the Legislature began to act. The first statute is found in St. 1902, c. 315. In 1908, the Legislature, thinking that the laws as to automobiles and motor cycles should be codified, directed the Highway Commission, with the assistance of the Attorney-General, to perform the work and report to the then next Legislature. Res. 1908, c. 127. The resolve called for a complete consolidation and arrangement of the laws of the Commonwealth relating to automobiles and motor cycles, so that the same might be concise, plain and intelligible. This commission made its report to the Legislature of 1909, and thereafter St. 1909, c. 534, was passed. Section 17 of that chapter was practically the same as it now appears in G. L., c. 90, § 18. The present law, so far as is pertinent to your inquiry, reads as follows: —

> The city council . . . , on ways within their control, may make special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, and may prohibit the use of such vehicles altogether on certain ways; provided, that no such special regulation shall be effective . . . until after the registrar shall have certified in writing, after a public hearing, that such regulation is consistent with the public interests; . . .

The original law, as passed in 1909, was exactly the same, except that the words "the Massachusetts highway commission" appeared in place of the word "registrar."

Mr. Justice Hammond, in his opinion, points out that there existed, not only this new codification of the law, which related specifically to the regulation of automobiles and motor cycles, but also various statutes which authorized the municipal authorities to pass ordinances, by laws and regulations relative to street traffic or to the movement, stopping and standing of all vehicles. These two groups of statutes are separate and distinct.

In the opinion of the Attorney-General already referred to (IV Op. Atty. Gen. 7), the facts were practically the same as those presented at this time. The city of Lawrence passed an ordinance regulating the use of streets and highways in that city, and it related to vehicles of all kinds. The city authorities then referred the matter to the Highway Commission, and the question arose as to whether or not the approval of the Commission was required by St. 1909, c. 534, § 17 (now G. L., c. 90, § 18). In conclusion, the Attorney-General ruled as follows: —

> In my opinion this provision was not intended to require that regulations relating to the use of public streets and general regulations of traffic thereon should be approved by the Massachusetts Highway Commission and is applicable only to special regulations as to the speed of motor vehicles and as to the use of such vehicles upon particular ways, including their exclusion therefrom. Since the particular ordinance submitted to said commission involves a general regulation of traffic, and is not a special regulation applicable only to motor vehicles, it follows that the Massachusetts Highway Commission is not required to certify in writing that such ordinance is consistent with the public interests.

I concur in this finding, and therefore advise you that the approval of the Registrar was not necessary to make the Newton regulation effective, and that the pending appeal is not properly before you.

Constitutional Law — Impairment of Contract — Boston Consolidated Gas Company.

Changes in the purpose and object of a corporation or in its capital stock cannot be made without the express or implied consent of the stockholders.

A bill which proposes merely to repeal provisions of an earlier statute fixing a maximum limit as to the price to be charged for gas and the rate of dividends, if enacted, would be constitutional.

To the Governor. 1926 April 2.

You have referred to me for examination and report House Bill No. 493, entitled "An Act repealing a certain act regulating the price of gas in the city of Boston and certain neighboring municipalities." Section 1 repeals St. 1906, c. 422, and provides that the Boston Consolidated Gas Company shall thereafter be subject to the provisions of the general law as to all matters theretofore regulated by that chapter. Section 2 provides that the act shall not take effect unless and until its provisions are accepted by vote of the board of directors of that corporation and an attested copy of such vote is filed with the State Secretary.

The Boston Consolidated Gas Company was organized in accordance with St. 1903, c. 417, providing for the consolidation of certain existing gas companies through the incorporation of the Boston Consolidated Gas Company, which was authorized to acquire their properties and stock. The provisions of this act were accepted by the incorporators, and the corporation was organized under date of December 10, 1903. By St. 1905, c. 421, the act of 1903 was amended, and the Boston Consolidated Gas Company was further required to file with the Board of Gas and Electric Light Commissioners an agreement to reduce the maximum price of gas to be charged by it to ninety cents per thousand cubic feet.

St. 1906, c. 422, fixed the standard price to be charged by the Boston Consolidated Gas Company for gas supplied to its customers at ninety cents per thousand feet and the standard rate of dividends to be paid by the company to its stockholders at seven per cent per annum, and provided that the price and rate so fixed should not be increased

except as therein provided. The act further provided that if during any year the maximum net price was less than the standard price, the company might during the following year pay dividends exceeding the standard rate, in a specified ratio. At the end of ten years it was provided that the Board of Gas and Electric Light Commissioners should have authority, upon the petition of the company or of city or town officials, to lower or raise the standard price to such extent as might justly be required. The act was to be void unless the corporation should accept its provisions by authority of its board of directors. I understand that this act was duly accepted by the board of directors.

G. L., c. 164, §§ 93 and 94, authorize the Department of Public Utilities, upon complaint of city or town officials or customers or upon petition of a gas company, and after public hearing, to fix the price of gas.

For the purposes of this discussion it may be assumed that the act of 1906 constituted a contract between the corporation and the Commonwealth in regard to the price of gas and the rate to be paid on its stock. *Boston* v. *Treasurer and Receiver General*, 237 Mass. 403, 413; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 660–673; *Detroit* v. *Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Minneapolis* v. *Minneapolis St. Ry. Co.*, 215 U. S. 417, 426, 430, 431; II Op. Atty. Gen. 261; III Op. Atty. Gen. 400; VII Op. Atty. Gen. 331. If the nature of the contract was such that the directors alone, without ratification by the stockholders, could not bind the corporation to comply with its terms (*Nashua R. R.* v. *Lowell R. R.*, 136 U. S. 356, 384), the contract at any rate became valid by subsequent acquiescence. *Blandford* v. *Gibbs*, 2 Cush. 39.

With respect to the bill which you have referred to me there may be a possible question whether it constitutes an attempt to abrogate a contract involving rights of the stockholders of the corporation, which the directors would not have power to approve, and which therefore, in order to be valid, must be approved by the stockholders. The rule

has been stated to be that "changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members," *i.e.*, the stockholders of the corporation. *Railway Co.* v. *Allerton*, 18 Wall. 233, 235. Acts of such nature are beyond the power of the directors alone. *Nashua R. R.* v. *Lowell R. R.*, 136 U. S. 356, 384; *Commercial National Bank* v. *Weinhard*, 192 U. S. 243, 249; VI Op. Atty. Gen. 396. The act before me, however, proposes merely to repeal provisions of the earlier statute, which, in so far as they fix the maximum limit of the price of gas and of the rate of dividends, were a burden on the corporation, and which, in so far as they conferred a possible benefit by permitting the corporation to petition the Board of Gas and Electric Light Commissioners to raise the standard price of gas, are contained in the general laws, to which by the proposed act the corporation is made subject. To agree to provisions of that kind must be clearly within the power of the directors.

It is my opinion, therefore, that the bill, if enacted, will be constitutional.

Constitutional Law — Mass. Const. Amend. LXVI — Massachusetts Agricultural College.

The intention of Mass. Const. Amend. LXVI was to systematize the administration of the State's business by placing the activities in not more than twenty departments, and to give the General Court full power to work out the scheme of organization.

A bill amending G. L., c. 15, § 4, by adding a provision that "nothing in this chapter shall be construed as affecting the powers and duties of the trustees of the Massachusetts Agricultural College as set forth in chapter seventy-five," is not in conflict with the terms of Mass. Const. Amend. LXVI, properly interpreted.

To the Committee on State Administration. 1926 April 3.

You have asked my opinion as to the constitutionality, in view of Mass. Const. Amend. LXVI, of a proposed act amending G. L., c. 15, § 4, defining certain of the powers and duties of the Commissioner of Education. The proposed act is as follows: —

> Nothing in this chapter shall be construed as affecting the powers and duties of the trustees of the Massachusetts Agricultural College as set forth in chapter seventy-five.

Chapter 15 relates to the Department of Education, and chapter 75 relates to the Massachusetts Agricultural College.

Mass. Const. Amend. LXVI is 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.

This provision contains three requirements. The first relates to the process of organizing the executive and administrative work of the Commonwealth, which was to be done by establishing not more than twenty departments and which had to be completed by January 1, 1921. The second requirement is that every executive and administrative office, board and commission, except officers serving

directly under the Governor or the Governor and Council, must be placed in some one of those departments. The third requirement is that those departments shall be subject to the supervision and regulation of the General Court through its legislative acts.

In discovering the meaning of a constitutional provision adopted in convention, the proper interpretation of which is in doubt, the debates in the convention on the adoption of the provision may be an important source of information, and the record of such debates may properly be examined for the purpose of understanding how it came into existence and how it appears then to have been received and understood by the convention. *Loring* v. *Young*, 239 Mass. 349, 368. An examination of the debate in the convention on the subject of the sixty-sixth amendment will afford some illumination as to the understanding of the convention concerning the object to be accomplished by that amendment.

The committee having in charge the administration of the State's business reported a resolution for the adoption of an amendment in three sections, as follows: —

1. The executive branch of the government of the Commonwealth shall include all executive and administrative functions, offices, boards and commissions. The appointment of executive or administrative officers shall be classed as an executive function. The executive and administrative work of the Commonwealth shall be organized in not less than seven nor more than fifteen executive departments as herein provided. Every executive and administrative office, board and commission now or hereafter established, excepting the Civil Service Commission and offices coming directly under the Governor or the Council, shall be placed in one of such departments.

2. The Governor shall recommend to the General Court for the year nineteen hundred and nineteen, a plan for organizing such departments in accordance herewith; such plan may include the abolition or consolidation of any such offices, boards or commissions, except constitutional offices, or any changes in the powers or duties thereof, and shall include the establishment of an office, board or commission as the head of each department, with such powers as the General Court may provide. Such head, unless his election is provided for by the Constitution, shall

be appointed by the Governor with the consent of the Council, and shall be removable in such manner as may be provided by law. The General Court shall thereupon provide by law for organization of the executive departments in any manner consistent with the provisions hereof: *provided*, that if the General Court fails to pass such a law at its first session after the adoption of this amendment an organization in conformity herewith shall be established by an order passed by the Governor and Council, which shall have the effect of law. The organization of departments hereunder may from time to time be changed by law.

3. Heads of such executive departments shall upon request made to the Governor by either branch of the General Court attend such branch in person and furnish information on departmental matters as requested, unless the Governor shall state in writing that he deems it incompatible with the public interest that such information be given. (III Debates in the Constitutional Convention, p. 1021.)

In explaining the proposed amendment it was stated that the committee intended to leave to the General Court the determination of the powers of heads of departments, whether they should be responsible for the finances of the department and whether they should have general supervision over it, and that the General Court might want to make one provision for one department and another for another, particularly where there were quasi judicial powers to be exercised. It was stated as the opinion of the committee that all the details of the plan should rest with the General Court. It was further stated that the object was simply to prohibit in the Constitution the countless establishment of various commissions. The primary purpose was said to be to reduce the number of commissions, to provide for their supervision and regulation, to put a constitutional limit on the number of departments, and to systematize the business of the Commonwealth. III Debates, pp. 1029, 1086, 1099–1105. There was much discussion of the matter and a great diversity of opinions. Several amendments were offered, including one to strike out the second and third sections. The amendments were all rejected and then the resolution itself was rejected by the convention. On the following day the convention voted to reconsider, and a substitute

resolution containing the substance of section 1 was proposed and passed. III Debates, pp. 1095, 1102, 1103, 1106.

Following the ratification of this amendment by the people in 1918, the Legislature of 1919, in compliance with its mandate, passed an act entitled "An Act to organize in departments the executive and administrative functions of the Commonwealth." Gen. St. 1919, c. 350. By section 1 of this statute fifteen new departments were established, together with the Metropolitan District Commission, and it was provided that "all executive and administrative offices, boards, commissions and other governmental organizations and agencies, except those now or by virtue of this act serving directly under the governor or the governor and council, are hereby placed in the said departments and said commission, as hereinafter provided." It was provided in section 8 that reports required by law to be made by agencies affected by the act should be made by the head of the department in which the agency was placed. In part III the executive and administrative departments, including these new departments, were dealt with in turn, some existing offices, boards and commissions were abolished, and some were placed in one or another of the departments, with differing provisions as to their relations and their control in the departments. Some of the departments were placed in charge of a commissioner and some in charge of a board of commissioners. In some an advisory board was provided and in many the work of the department was subdivided into different divisions. The Department of Banking and Insurance was organized with three separate divisions, each in charge of an independent commissioner, and the Department of Civil Service and Registration was placed in charge of two independent officers. Many subordinate activities were incorporated in the different departments, with explicit provision for their supervision. As to others, the only provision was that they were placed in some department. Such was the provision regarding the trustees of the Massachusetts Agricultural College. Section

56 provided that they and other boards and commissions "are hereby placed in and shall hereafter serve in the said department (of education)." Sections 57 and 58 (now G. L., c. 15, §§ 1 and 4) defined the powers and duties of the commissioner under whose supervision and control the department was placed. By section 60 (now G. L., c. 15, § 5) it was provided that the commissioner might also appoint agents, clerks and other assistants, with certain exceptions which in the consolidation of the provision in the General Laws were made to include the institutions under the department.

A strict construction of Mass. Const. Amend. LXVI would be satisfied by a mere grouping of the various governmental agencies under departmental titles. While doubtless the amendment is not to be construed so narrowly, in my opinion it was not intended by its adoption to provide that all agencies combined in the different departments should necessarily lose their independence and be subject to the supervision of the heads of those departments. The intention, as I conceive it, was to systematize the administration of the State's business by placing the activities in a limited number of departments, and to give the General Court full power to work out the scheme of organization. This view is borne out, it seems to me, both by the debates in the convention and by the action of the Legislature in fulfilling the constitutional mandate, which may properly be regarded as "contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 297. See also Mass. Law Quarterly, vol. IV, p. 366; Report of Commission on State Administration and Expenditures, 1922, House Document No. 800.

The Massachusetts Agricultural College was made a State institution by Gen. St. 1918, c. 262, and the trustees of the corporation were made the trustees of the State institution with the powers and duties which they had before held. In the consolidation of the laws this act was carried over into G. L., c. 75, which contains provisions empowering

the trustees to manage and administer the college and its property, and provides that they shall direct expenditures and make a complete accounting of receipts and expenditures.

As I have stated, Gen. St. 1919, c. 350, pt. III, § 56, provided that the trustees of the Massachusetts Agricultural College, with other boards and commissions, should be placed and should serve in the Department of Education. Section 57 provided that the department should be under the supervision and control of the Commissioner of Education and the Advisory Board, and section 58 provided that the Commissioner should be the executive and administrative head of the department (G. L., c. 15, §§ 1, 4). These latter provisions may present a seeming inconsistency with the provisions of G. L., c. 75, conferring on the trustees the power to manage the college. If so, the difficulty would be solved by the passage of the proposed legislation. In my opinion, the provisions of the bill as to which you have asked my advice are not in conflict with the terms of Mass. Const. Amend. LXVI as it should properly be interpreted, and the bill, if enacted, would be constitutional.

Initiative and Referendum — Additional Information to Voters as to Measures submitted.

The Legislature has authority to provide that the Attorney-General shall prepare for the Secretary of the Commonwealth a brief statement of information on measures submitted to the people under the initiative and referendum.

To the Governor. 1926 April 3.

You have requested me to consider House Bill No. 1178, entitled "An Act relative to supplying additional information to voters as to measures submitted under the initiative and referendum."

This bill amends G. L., c. 54, § 53, which section provides that the election commissioners and registrars of voters, within a certain specified time before the biennial State elections, shall send to the Secretary of the Commonwealth

revised mailing lists of voters, and the Secretary shall send to each voter, with copies of the measures, arguments for and against measures to be submitted under Mass. Const. Amend. XLVIII, which amendment refers to the initiative and referendum. The amendment proposed under the act which is being considered provides that the Attorney-General shall prepare brief statements of the proposed measures.

Mass. Const. Amend. XLVIII, General Provisions, pt. IV, provides that the Secretary of the Commonwealth shall cause to be printed and sent to each registered voter the full text of every measure to be submitted to the people, "and shall, in such manner as may be provided by law, cause to be prepared and sent to the voters other information and arguments for and against the measures."

In G. L., c. 12, § 9, it is provided that "he (the Attorney-General) shall, when required by either branch of the general court, attend during its sessions *and give his aid and advice in the arrangement and preparation of legislative documents and business.*"

The only question for consideration, therefore, is: Has the Legislature the right to add new duties to the already many duties of the Attorney-General?

In *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, 386, the court said: —

> Its (Attorney-General's) powers and duties continued as a part of the common law of the Commonwealth save as changes have been made by the General Court and in the customs of the Commonwealth. . . . It often has been recognized that the powers of the Attorney-General are not circumscribed by any statute, but that he is clothed with certain common law faculties appurtenant to the office.

It is evident that in the act under consideration the Attorney-General's duties are not circumscribed but are added to. The Attorney-General has often by acts of the Legislature served as a member of a board or commission, and has been requested to perform certain acts and duties by the Legislature. It is apparent from the decisions that

the Legislature has the right to add to the specific duties of the Attorney-General. It is evident that it is proper for the Legislature to make provision so that the voters shall receive desired information on all measures that go on the ballot.

Therefore, in my opinion, the proposed bill, if enacted, would be constitutional.

CONSTITUTIONAL LAW — POWER OF THE LEGISLATURE — PAYMENT TO ONE WHO STOOD IN LOCO PARENTIS TO A DECEASED SOLDIER.

The Legislature may not lawfully authorize the payment of a sum of money to one who stood *in loco parentis* to a deceased soldier when it cannot be said that the Legislature, in the exercise of a reasonable judgment, could have determined that the payment was for the purpose of discharging a moral obligation on the part of the Commonwealth.

To the Governor. 1926 April 7.

You have submitted to me for examination and report House Bill No. 906, entitled "Resolve in favor of Mary Leahan of Boston."

The object of this resolve is to pay the sum of $100 to a woman, after an appropriation has been made, for the purpose, as the bill recites, of discharging the moral obligation of the Commonwealth. The resolve sets forth the essential facts which the Legislature has deemed to constitute the moral obligation, namely, that the beneficiary supported and educated one Edward H. Leahan, who died in the military service October 4, 1918. The relationship, if any, between the beneficiary and the deceased is not recited, but the payment is stated to be in lieu of the State bonus on account of the deceased's military service, to which the beneficiary would have been entitled had she legally adopted the deceased. The precise character of the deceased's military service is not set forth, but it may be presumed that it was of such a character as to have entitled him to the benefit of the bonus under Gen. St. 1919, c. 283, as amended.

It may likewise be assumed that the beneficiary stood *in loco parentis* to the deceased during his life.

Under those principles of constitutional law which validate the original soldiers' bonus act it would not have been unreasonable for the Legislature to have included in such act, among those persons who were to be entitled to the bonus upon a soldier's death, persons who had in fact occupied the position and discharged the duties of a parent to the soldier, and it cannot be said that it is now unreasonable for the Legislature to say that there is a moral obligation upon the part of the Commonwealth to pay such bonus to such a person after the soldier's death, if he left no dependent nor heir at law.

It does not, however, appear by the terms of the instant resolve that the deceased soldier left none of the dependent relatives who, by the provisions of Gen. St. 1919, c. 283, § 3, are entitled to the amount of the bonus, nor does it appear that he left no heirs at law who by the terms of the said act are entitled to the amount of the unpaid bonus when the soldier dies without such dependents. In the absence of a statement of facts relative to the non-existence of such dependents and heirs at law, it cannot be said that the pronouncement of the Legislature as to the existence of a moral obligation on the part of the Commonwealth, in this particular instance, is a reasonable one.

If any such dependents or heirs at law are living, they have a valid legal claim against the Commonwealth for the amount of the bonus. If a payment were made under the instant resolve to the named beneficiary, unless the intent of the bill be to prevent any further payments, and then, if one or more of the persons entitled by existing law to a like amount were to present a claim, it would have to be honored, and, together with the sum disbursed by virtue of the instant resolve, it would make the payment a total amount of $200 as bonuses for the military service of this particular soldier, as against $100 in all cases following the terms of the original act. Gen. St. 1919, c. 283, as amended,

is a law of general application. To vary the beneficiaries under such a law by special legislation, such as the instant bill, so as to cut off those otherwise entitled, by paying the bonus of $100 to a person outside the classes mentioned in the general act and to no other, if that be the meaning of the instant bill, would work such a denial of the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution as to be manifestly unconstitutional. The same result — unequal protection of the laws — is produced under either mode of interpreting the legislative will as to the aggregate amount to be paid out. No moral obligation can reasonably be said to exist in such a situation. Since the recitals of the resolve do not indicate that a pronouncement of the existence of a moral obligation on the part of the Commonwealth toward this beneficiary or to any other person can reasonably be made, the payment would appear to be in the nature of a gratuity such as may not be given from the public treasury, and I am constrained to express the opinion that the instant resolve, if enacted, would not be constitutional.

City of Boston — Highways — Boulevard Stop Regulation.

A regulation of the street commissioners of the city of Boston requiring every vehicle and street car, except emergency vehicles, to be brought to a full and complete stop before entering or crossing certain streets is not inconsistent with G. L., c. 89, § 8, regarding right of way at an intersecting way.

To the Police Commissioner of Boston. 1926 April 8.

You have called my attention to an opinion rendered you on February 10, 1926 (VIII Op. Atty. Gen. 18), relative to the so-called boulevard stop regulation for highways in Boston, and enclosed a copy of the proposed regulation, which is as follows: —

Every vehicle and street car except emergency vehicles shall be brought to a full and complete stop before entering or crossing these streets, provided, however, that when the intersection is controlled by a police

officer or by a signalling device, all vehicles shall comply with orders or directions of such officer or device.

You ask whether, in my opinion, this regulation is inconsistent with G. L., c. 89, § 8, which provides as follows: —

> Every driver of a motor or other vehicle approaching an intersecting way, as defined in section one of chapter ninety, shall grant the right of way, at the point of intersection to vehicles approaching from his right, provided that such vehicles are arriving at the point of intersection at approximately the same instant; except that whenever traffic officers are standing at such intersection they shall have the right to regulate traffic thereat.

In my opinion, the regulation is not inconsistent with the statute. The requirement that vehicles shall be brought to a full and complete stop before entering or crossing a boulevard may be enforced without diminishing the effect of the statutory requirement, which would still be applicable to vehicles traveling on boulevards, that they shall grant the right of way at cross streets to vehicles approaching from the right.

Constitutional Law — Impairment of Contract — Boston Elevated Railway Company.

It is the duty of the Attorney-General to deal with questions of law only, and it is not within his province to determine questions of fact.

The duty of the Attorney-General to advise a committee of the Legislature is limited by statute to the consideration of the legal effect of proposed legislation pending before such committee.

The requirement in St. 1923, c. 480, § 2, that reasonable and adequate passenger service over a certain branch shall be furnished by the Boston Elevated Railway Company cannot be construed as diminishing the right of the trustees to determine the character and extent of the service to be furnished, under Spec. St. 1918, c. 159, § 2.

A bill requiring the Boston Elevated Railway Company to construct a street railway station would violate the provisions of Spec. St. 1918, c. 159, and would impair the obligation of the contract executed under St. 1923, c. 480, § 5, and for both reasons would be unconstitutional.

To the Joint Committees on Metropolitan Affairs and Street Railways. 1926 April 8.

You have called to my attention certain provisions of St. 1923, c. 480, providing for the extension of rapid transit facilities in the Dorchester district of Boston, and House Bill No. 251, purporting to amend that statute by providing for a station at or near Harrison Square, and you have propounded certain questions concerning the existence of an obligation to furnish such a station.

The scope of your questions requires me to state that it is the duty of the Attorney-General to deal with questions of law only, and that it is not within his province to determine questions of fact (I Op. Atty. Gen. 275 and 462; II Op. Atty. Gen. 153 and 405); and furthermore, that the duty of the Attorney-General to advise a committee of the Legislature is limited by statute to the consideration of the legal effect of proposed legislation pending before such committee. G. L., c. 12, § 9; III Op. Atty. Gen. 111; VI Op. Atty. Gen. 147; *cf. Opinion of the Justices*, 148 Mass. 623; *ibid.*, 208 Mass. 614; *ibid.*, 217 Mass. 607.

Spec. St. 1918, c. 159, § 2, provides, in part: —

> They (the board of trustees) shall have the right to regulate and fix 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 facilities to be furnished*, and in these respects their

authority shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission.

St. 1923, c. 480, contains the following provisions: —

Section 2 requires the transit department of the city of Boston to extend the Dorchester tunnel, bringing the tunnel to the surface on the westerly side of the tracks of the New York, New Haven and Hartford Railroad Company at a point between Dorchester Avenue and Columbia Road, and to construct a line of surface railway parallel to the location of the railroad tracks to the Harrison Square station, and from that point along the location of the Shawmut branch to Mattapan. The department is also required to "lay out and construct suitable areas, enclosed or otherwise, stations and shelters at or near Columbia road, Savin Hill avenue and at such other points as may be agreed upon between the company (Boston Elevated Railway Company) and the department." After the completion of the line of surface railway, it is provided that "thereupon reasonable and adequate passenger service over said Shawmut branch shall be furnished by the lessee of the premises."

Section 4 requires the department to prepare and file a plan showing the proposed route, with stations, etc., and provides that after the execution of the contract with the company, referred to in section 5, no changes shall be made without the written consent of the company.

Section 5 authorizes the department to execute a contract with the company, upon the terms and conditions prescribed therein, for the use of the premises and equipment by the company, for a term extending to the termination of the present lease of the Dorchester tunnel, at a rental of 4½ per cent on the fair and reasonable cost of the premises and equipment as determined by the Department of Public Utilities, with a certain proviso.

Section 14 provides that the provisions of the act, except section 4, shall take effect upon its acceptance by the city and by the company by vote of its Board of Directors.

On several different occasions the Attorney-General has ruled that the provisions of Spec. St. 1918, c. 159, quoted above, constitute a contract between the company and the Commonwealth. VI Op. Atty. Gen. 396; VII Op. Atty. Gen. 11, and 331.

The obligations of the company under St. 1923, c. 480, in my opinion, are enlarged only and are governed by the contract authorized by section 5, which I understand has now been executed. Provision was made in section 14 for acceptance of the act by the directors because of the provision in Spec. St. 1918, c. 159, § 3, that no contracts for the operation or lease of additional lines involving the payment of rental beyond the period of public control should be made without their consent. The requirement in section 2 that "thereupon reasonable and adequate passenger service over said Shawmut branch shall be furnished by the lessee of the premises," cannot be construed as diminishing the right of the trustees to "determine the character and extent of the service and facilities to be furnished," granted by Spec. St. 1918, c. 159, § 2. I am informed that no station at or near Harrison Square was agreed upon between the company and the department, that the plan filed by the department did not show the location of a proposed station at that point, that the company has not consented to such a change in the plan, and that the Department of Public Utilities has determined the fair and reasonable cost of the premises and equipment without including therein the cost of such station.

You ask whether House Bill No. 251, if enacted into law, would require the construction and maintenance of a street railway station at Harrison Square. Such seems to be the purport of the provisions of this bill. It is my opinion, however, that in that respect the bill is unconstitutional, both because it violates the provisions of Spec. St. 1918, c. 159, giving to the trustees the right to determine the character and extent of the service facility to be furnished, and the provisions giving to the directors a right to pass on

contracts for operation or lease of additional lines involving the payment of rental beyond the period of public control, and because it impairs the obligation of the contract which, I am informed, has been executed between the company and the department in accordance with the authority given by St. 1923, c. 480, § 5.

Constitutional Law — Estate Tax — Federal Statute.

While a tax law must prescribe the rule under which the tax is to be laid, it may be measured by a standard fixed by some other law or under its authority.

An act imposing a tax on the transfer of the estate of deceased residents, equal to the amount by which eighty per cent of the estate tax payable to the United States under the Federal Revenue Act of 1926 exceeds the aggregate amount of all estate, inheritance, legacy and succession taxes paid to the several States in respect to the decedent's property, would be constitutional.

To the House Committee on Ways and Means. 1926 April 12.

You ask my opinion as to the constitutionality of provisions contained in section 7 of House Bill No. 1363. This bill is entitled "An Act to establish an estate tax," and it proposes, by section 1, to impose a tax on the transfer of the estate of deceased residents of the Commonwealth, the amount of which shall be the amount by which eighty per cent of the estate tax payable to the United States under the Federal Revenue Act of 1926 exceeds the aggregate amount of all estate, inheritance, legacy and succession taxes paid to the several States in respect to the decedent's property.

Title III of the Federal act, in section 301 (a), imposes a graduated tax on the transfer of the net estate of decedents; and in clause (b) provides that the tax so imposed shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any State or Territory or the District of Columbia, in respect to the decedent's property, not exceeding 80 per cent of the Federal tax.

Section 7 of the proposed act provides that the act shall be null and void in respect to persons dying subsequently, upon the repeal of the provision in the Federal act for a

credit of taxes paid to the States not exceeding 80 per cent of the Federal tax, and that it shall be null and void, and all taxes paid thereunder shall be refunded, if that provision of the Federal act is declared void.

I see no constitutional objection to section 7. If the Federal provision is repealed or held invalid, no tax would be payable under section 1, and the act would have no practical future effect, regardless of section 7. If the Federal provision were held to be unconstitutional, I see no ground of invalidity in the provision for refunding taxes already paid. The meaning of the words "shall be declared void" might be more definite if the words "by the Supreme Court of the United States" were added.

There is, however, a question as to the constitutional validity of the tax imposed by section 1 which should not be overlooked, and I assume that your inquiry will permit me to offer a statement of my views thereon.

The Legislature is the sole repository, under the Constitution, of the power to make laws, and it cannot delegate that power to any other body. *Brodbine* v. *Revere*, 182 Mass. 598, 600; *Boston* v. *Chelsea*, 212 Mass. 127. For that reason, it cannot constitutionally provide that the substantive law of the Commonwealth shall change automatically so as to conform to prospective Federal enactments and official regulations. *Opinion of the Justices*, 239 Mass. 606, 610; VI Op. Atty. Gen. 179. For that reason, again, a tax law must prescribe the rule under which the tax is to be laid, though it need not prescribe the details. Cooley on Taxation, p. 50; Nichols, Taxation in Massachusetts, 2d ed., p. 16. But the Legislature may by enactment adopt a standard fixed by some other law or under its authority. *Opinion of the Justices*, 239 Mass. 606, 612. In *Clark & Murrell* v. *Port of Mobile*, 67 Ala. 217, a tax the amount of which was made to depend on foreign legislation was held invalid, but the weight of authority seems to hold the contrary. *People* v. *Fire Association of Philadelphia*, 92 N. Y. 311; *cf. Bliss* v. *Bliss*, 221 Mass. 201.

The tax imposed by the proposed act is measured by a standard fixed by Congress. In accordance with the authority cited above, it is my opinion that the bill, if enacted, would be constitutional. I express no opinion on the constitutionality of the Federal statute, as against the objection that it is lacking in geographical uniformity or that its apparent object is not to raise revenue for the purposes of the Federal government but to enforce throughout the country a uniform policy of taxation of the passing of property by devolution.

LICENSE — STORAGE OF GASOLINE — BOARD OF LICENSE COMMISSIONERS IN THE CITY OF CAMBRIDGE — STATE FIRE MARSHAL.

The authority given to the board of license commissioners in the city of Cambridge by St. 1922, c. 95, to grant, suspend or revoke licenses was not intended to include the authority to disapprove the granting of a license by the Fire Marshal, given to the city council of a city or the selectmen of a town by G. L., c. 148, § 30.

To the Commissioner of Public Safety. 1926 April 15.

You ask my opinion in regard to the effect of St. 1922, c. 95, relative to the Board of License Commissioners in the city of Cambridge, upon the authority of the State Fire Marshal to issue licenses under G. L., c. 148, § 14, as amended.

St. 1922, c. 95, amends Spec. St. 1919, c. 83, establishing a board of License Commissioners in the city of Cambridge. It contains the following provisions: —

> The authority now vested by law in cities or towns, or in the city of Cambridge or any official thereof, to grant, suspend or revoke any of the licenses hereinafter mentioned, shall upon its organization be exercised in said city by said board exclusively, except that nothing herein contained shall affect the authority of the state fire marshal in respect to the performance of his duties pertaining to the metropolitan fire prevention district.

Among the licenses named are licenses to use a building or other structure for the keeping, storage, manufacture or sale

of articles named in G. L., c. 148, § 10, except fireworks, firecrackers and torpedoes.

G. L., c. 148, § 30, gives to the Fire Marshal, within the Metropolitan District, the powers given by section 14 and other sections to license persons or premises and to grant permits for the storage and sale of the articles named in section 10. Thus by section 30 the powers given by section 14 to aldermen and selectmen to grant licenses for the use of a building or other structure for the keeping, storage, manufacture or sale of any of the articles named in section 10, except fireworks, firecrackers and torpedoes, are, within the Metropolitan District, to be exercised by the Fire Marshal; and by the express provision of St. 1922, c. 95, his authority in that respect is not affected by the terms of that act.

G. L., c. 148, § 30, contains the following provision: —

> 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.

You ask my opinion whether this provision of section 30 is applicable to the action of the Board of License Commissioners in the city of Cambridge in refusing a license for the construction and maintenance of a garage in that city. I am informed that the Fire Marshal has delegated to the Board of License Commissioners in the city of Cambridge, under G. L., c. 148, § 31, the power to grant licenses and permits in that city reposed in him by section 30, and that an appeal is pending before him upon their refusal to grant the license referred to in your inquiry. I assume that the action of the board may be interpreted as a refusal to exercise the delegated authority conferred by sections 30 and 31.

I am of the opinion that the authority given to the Board of License Commissioners in the city of Cambridge by St. 1922, c. 95, "to grant, suspend or revoke any of the licenses hereinafter mentioned" was not intended to include the authority to disapprove the granting of a license or permit

by the Fire Marshal, given to the City Council of a city or the selectmen of a town by G. L., c. 148, § 30, both because the words used in their natural sense are not sufficiently broad, and because it is expressly provided that the authority of the Fire Marshal shall not be affected thereby. I think that the action of the board in refusing to grant a license is to be construed not as an attempt to express such disapproval but as an exercise of the delegated power of the Fire Marshal under sections 30 and 31.

I therefore advise you that the Fire Marshal is authorized to hear the appeal and to grant a license under section 30 unless the City Council should pass an order disapproving such grant.

Boston and Maine Railroad — Issue of Convertible Bonds — Department of Public Utilities.

Convertible bonds of a railroad corporation cannot be issued without the approval of the Department of Public Utilities, and such approval cannot be given unless the issue is authorized by statute.

The authority given by St. 1925, c. 336, § 2, to the Boston & Maine Railroad to issue convertible bonds and additional stock may be construed to include authority to deliver in exchange for such bonds stock already issued.

An agreement to deliver stock not then owned by the corporation in exchange for a bond, or to pay the conversion value of the bond in the alternative, is not illegal under the stock-jobbing act (G. L., c. 259, § 6).

To the Department of Public Utilities.
1926
April 22.

You have submitted to me a draft of an agreement between the Boston and Maine Railroad and trustees for the benefit of bondholders, relative to mortgage bonds which the railroad proposes to issue, and containing provisions for the conversion of those bonds into prior preference stock or the payment of the conversion value thereof. The material portion of said agreement is as follows: —

(2) The Railroad agrees (except as otherwise expressly provided in this agreement) that if the holder of any bond herein referred to shall deposit said bond with the Corporate Trustee on and after January 1, 1930, and before January 1, 1940, accompanied by a written request for the conversion of said bond into stock as herein provided, the Railroad

will thereupon, if it shall then be lawful for the Railroad to do so under the provisions of State and Federal legislation then in force, issue in the name of such holder and deliver to the Corporate Trustee for such holder in exchange for the bond so deposited new and additional shares not previously issued of the seven per cent prior preference stock of the Railroad at the rate of Five (5) shares of such stock for each Five Hundred (500) Dollars in principal amount of bonds so deposited, said shares to be delivered forthwith by the Corporate Trustee to said holder. The Railroad further agrees that it will use its best efforts to obtain such further legislation and such approval by State and/or Federal authorities as may be necessary in order to make lawful as aforesaid the conversion of bonds into stock as aforesaid. The Railroad further agrees (except as otherwise expressly provided in this agreement) that if at the time of the deposit of any bond as aforesaid it shall not be lawful as aforesaid for the Railroad to issue shares in exchange therefor as aforesaid the Railroad will then within thirty (30) days after the deposit of said bond either

(*a*) deliver to the Corporate Trustee for such holder in exchange for said bond, at the rate aforesaid, shares of said prior preference stock previously issued, said shares to be delivered forthwith by the Corporate Trustee to said holder;

or at the option of the Railroad

(*b*) pay to the Corporate Trustee for the benefit of such holder a sum of money equal to the then conversion value of said bond determined as hereinafter provided, said sum to be paid and said bond then to be returned forthwith by the Corporate Trustee to said holder.

This proposed agreement follows St. 1925, c. 336, entitled "An Act authorizing the Boston and Maine Railroad to issue preferred stock and to make certain of its bonds convertible and relative to extending the maturity of certain outstanding bonds." Section 1 authorizes the issue of a new class of preferred stock, having an annual cumulative dividend rate not exceeding seven per cent, and callable and redeemable at not exceeding $110 a share, the issuance and terms all being subject to the approval of the Department of Public Utilities. This stock, I understand, is the prior preference stock referred to in the agreement. Section 2 of the act is as follows: —

"Said Boston and Maine Railroad may also by vote of a majority of all its outstanding stock, with the approval of said department and

by appropriate agreement with the holders of all or any part of any bonds of said corporation heretofore or hereafter issued provide and agree that such bonds shall be convertible at par at a future time at the option of such holders into shares of the new class of preferred stock hereby authorized upon such terms and conditions as may be fixed in such vote with the approval of said department, and upon the decision of said department approving such provision and agreement the shares of such preferred stock required for the conversion of said bonds shall be a part of the authorized capital stock of said corporation, and may be issued from time to time thereafter for the conversion of said bonds, but not otherwise, without any further authorization, order, or decree by said department.

You state that the agreement, in so far as it provides for the conversion of bonds into stock to be afterwards issued, is, you think, an appropriate agreement. It appears, however, that the authority of the Federal government and of other States in which the Boston and Maine Railroad is incorporated, to issue new stock for the purpose of conversion into bonds, has not been obtained, and in order to cover the contingency that such authority may not be obtained the agreement contains the supplemental provisions that, in that event, the railroad may deliver in exchange for bonds presented for conversion either (*a*) prior preference stock previously issued, or at the option of the railroad (*b*) a sum of money equal to the conversion value of such bonds. You ask my opinion whether the department may legally approve the agreement containing these supplemental features.

Under G. L., c. 160, § 48, the bonds referred to in the agreement cannot be issued without the approval of the Department of Public Utilities. The provision requiring such approval is as follows: —

Before any railroad corporation shall issue any shares of capital stock or any bonds, notes or other evidences of indebtedness payable at periods of more than one year after the date thereof, it shall apply to the department for its approval of the proposed issue to such amount as the department shall determine to be reasonable and proper . . . Any order of the department approving any such issue of stock, bonds, notes or other

evidences of indebtedness may provide for the application of the proceeds thereof to such particular uses as the department shall by that order or by some subsequent order specify, and the corporation shall not apply such proceeds otherwise than as thus specified in such orders. The decision of the department as to the amount of stock reasonably necessary for the purpose for which such stock is proposed to be issued shall be based upon the price at which such stock is to be issued, and the department shall refuse to approve any particular issue of stock, if, in its opinion, the price at which it is proposed to be issued is so low as to be inconsistent with the public interest.

It has been held that the approval so required goes not merely to the amount but to the issue itself, and that such approval cannot be given to an issue of convertible bonds unless the issue is authorized by statute. *Bulkeley* v. *New York, New Haven & Hartford R.R. Co.*, 216 Mass. 432, 433, 434, 440. *Cf. Brown* v. *Boston & Maine R.R.*, 233 Mass. 502, 512.

Accordingly, the provision made in clause (*a*) for the delivery in exchange for bonds of shares of prior preference stock previously issued, in my opinion, cannot be approved unless it is authorized by St. 1925, c. 336. Section 2 of that act, quoted above, provides for two things: first, the issuance of bonds which may be converted into shares of prior preference stock; and secondly, the issuance of additional shares of such stock required for the conversion of the bonds. The agreement with the bondholders for the issuance of convertible bonds may contain such terms and conditions as may be fixed by vote of a majority of the stockholders, with the approval of the Department of Public Utilities.

While the exchange of these bonds for stock already issued seems not to have been contemplated, nevertheless, as I read the wording of section 2 such a provision is not contrary either to the literal meaning of the section or to its spirit. The earlier part of section 2, authorizing the issuance of convertible bonds, contains the limitation only that the conversion shall be "at par at a future time at the option of such holders into shares of the new class of preferred stock hereby authorized (*i.e.*, in section 1)," and it also, as I have

said, permits the terms and conditions of the agreement with the bondholders to be fixed by the stockholders, with the approval of the department. The latter part of section 2 provides simply for the issuance of such shares of the preferred stock not already issued as may be required for the conversion of the bonds, and provides that such shares may thereafter be issued for the purpose of conversion, but not otherwise. It is my opinion that the statutory authority contained in section 2 may properly be construed to include the making of an agreement such as that contained in clause (*a*).

The fact that the corporation, in order that it may proceed under clause (*a*), must purchase, hold and then deliver its own stock, in my opinion, does not introduce into the agreement any element of illegality. The rule is well established that a corporation under its general powers may purchase its own stock unless there is some positive provision of law to the contrary. The rule seems to be equally applicable to corporations engaged in public service and to corporations having the power to take by eminent domain, as well as to other corporations. *Dupee* v. *Boston Water Power Co.*, 114 Mass. 37, 43; *New England Trust Co.* v. *Abbott*, 162 Mass. 148, 152; *Leonard* v. *Draper*, 187 Mass. 536. Furthermore, the agreement in clause (*a*), in my judgment, is not open to attack under the stock-jobbing act (G. L., c. 259, § 6), because the stock the delivery of which is there provided for was not owned by the corporation at the time of the agreement. While the result might be otherwise if the corporation were bound by the agreement to deliver stock which at the time of the making of the agreement it did not own, in this case the presence of the alternative option would seem to remove any objection under the statute referred to. See *Pratt* v. *American Bell Telephone Co.*, 141 Mass. 225; *Barrett* v. *Mead*, 10 Allen, 337; *Wood* v. *Farmer*, 200 Mass. 209, 215.

The alternative agreement contained in paragraph (*b*), it seems to me, may properly be regarded as one of the

"terms and conditions" which, when fixed by the vote of stockholders, may receive the approval of the department. In this connection it should be observed that this prior preference stock is callable and redeemable at a price which cannot exceed $110 a share.

As to the alternative provisions contained in clauses (*a*) and (*b*) it should be observed that the question arises only on the authority of the department to approve an issue of convertible bonds which the department is authorized to approve upon terms and conditions fixed by the stockholders, and that there is no statutory limitation contained in G. L., c. 160, § 48, or elsewhere, upon the rate of interest which bonds requiring such approval shall carry or the price at which they may be issued or redeemed. The objection stated in *Bulkeley* v. *New York, New Haven & Hartford R.R. Co.*, 216 Mass. 432, 439, to an obligation requiring the approval of the department which has in it an inherent element of uncertainty and speculation is met by the fact that the convertible feature has already received the approval of the Legislature. There is no objection to the performance of the agreements set out in clauses (*a*) and (*b*) which is not inherent in the performance of the contract to convert bonds into stock. I therefore conclude that it is within the power of the Department of Public Utilities to approve the form of agreement submitted, and I so advise you.

MOTOR VEHICLE — SALE OF BUSINESS BY DEALER, MANUFACTURER OR REPAIR MAN — REBATE — REGISTRATION FEE.

A dealer, manufacturer or repair man who sells his business, and with it the motor vehicle registered under his distinguishing number, is entitled to a rebate under G. L., c. 90, § 2.

To the Commissioner of Public Works. 1926 April 27.

You have requested my opinion upon the following question: Can a rebate be legally paid to a dealer, manufacturer or repair man who sells out his business and with

it all the vehicles registered under his distinguishing number, in the same manner that a rebate is paid to an individual selling a car under the provisions of G. L., c. 90, § 2? The material part of G. L., c. 90, § 2, applicable to the question under consideration provides: —

> A person who before the first day of August in any year transfers the ownership or loses possession of any vehicle registered in his name, and who applies for the registration of another vehicle of less horse power or carrying capacity than that of the vehicle so transferred or lost, shall be entitled, upon payment of the proper fee set forth in section thirty-three, to a rebate equivalent to one half the difference between the fee for the higher and the fee for the lower horse power or carrying capacity; and a person under like conditions who does not apply for the registration of another vehicle, but who, on or before the first day of September in the same year, files in the office of the registrar a written application for a rebate shall be entitled to a rebate of one half the fee paid for the registration of such vehicle; . . .

G. L., c. 90, § 1, provides that the word "persons" shall have the following meaning unless a different meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intention of the Legislature: —

> "Persons," wherever used in connection with the registration of a motor vehicle, all persons who own or control such vehicles as owners, or for the purpose of sale, or for renting, as agents, salesmen or otherwise.

It is clear that, by the definition quoted, dealers, manufacturers or repair men are included within its scope, and that they may be persons "who own or control such vehicles . . . for the purpose of sale . . . or *otherwise.*" I find nothing in the enactment which would indicate a legislative intent to make a distinction in the matter of a "rebate" between "an individual selling a car" and "a dealer, manufacturer or repair man who sells out his business and with it all the vehicles registered under his distinguishing number."

I am therefore of the opinion that a "dealer, manufac-

turer or repair man" who "transfers the ownership or loses possession of any vehicle (or vehicles) registered in his name" is entitled to a rebate, in accordance with the provisions of G. L., c. 90, § 2.

Constitutional Law — County and Boston Retirement Systems.

An act requiring the retirement at seventy years of age of all employees, including public officers, except judges, would be constitutional.

Legislation applicable to a particular class will be sustained if there is a reasonable basis for the distinction, but not where it results in an arbitrary discrimination between classes.

Discrimination between public officers who have been treated as members of a retirement association, although they were not legally such, and other public officers, giving to the former the right to become members and excluding the latter, is arbitrary, and a bill making such discrimination would be unconstitutional.

To the Senate.
1926
May 3.

You request my opinion as to the constitutionality, if enacted into law, of two engrossed bills relative, respectively, to county retirement systems and to the Boston retirement system, being, respectively, Senate Bill No. 307 and Senate Bill No. 317, as passed to be enacted by the House and Senate.

Senate Bill No. 307 is entitled "An Act establishing the status of certain officials and public officers in respect to certain county retirement systems." This bill proposes certain changes in the county retirement systems authorized by G. L., c. 32, §§ 20–25. It will be convenient to state some of the important provisions of the law on that subject as it now is.

Section 20, as amended by St. 1924, c. 281, § 2, defines the meaning of certain words. The word "employees" is defined as follows: —

> "Employees," permanent and regular employees in the direct service of the county whose sole or principal employment is in such service, except teachers employed in any day school conducted under sections twenty-five to thirty-seven, inclusive, of chapter seventy-four.

Section 22 as is as follows: —

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. Persons over fifty-five who enter the service of the county after the establishment of the system shall not be allowed to become members, and no such employee shall remain in the service of the county after reaching the age of seventy.

(3) No officer elected by popular vote, except in Worcester county, nor any employee who is or will be entitled to a pension from any county for any reason other than membership in the association may become a member.

(4) Any member who reaches the age of sixty and has been in the continuous service of the county for fifteen years immediately preceding may retire, or be retired by the board upon recommendation of the head of the department in which he is employed, and any member who reaches the age of seventy shall so retire.

(5) Any member who has completed thirty-five years of continuous service may retire, or be retired upon recommendation of the head of the department in which he is employed, if such action be deemed advisable for the good of the service.

Section 24, in subsection (2), provides for deposits in the retirement fund by members from their wages or salary, and contributions by the county. Section 25, in subsection (2), provides for the payment of annuity and pension funds to members of a county retirement system. These payments are of three classes: first, (A) refunds to members ceasing to be employees before becoming entitled to the benefits given upon retirement; secondly, (B) annuities from employees' deposits upon retirement; and thirdly, (C)

pensions derived from contributions by the county upon retirement, based upon subsequent service, and also pensions based upon prior service, allowing a credit in certain instances for service before the system was established.

Under the retirement system thus authorized, all employees are required to leave the service after reaching the age of seventy, and employees who are members of the system upon their retirement receive the benefits provided by the statute, including, in certain instances, credit for prior service. As to membership, it is provided that all employees of the county on the date of the establishment of the system may become members, and shall unless written notice is given to the contrary; that all employees who enter the service of the county thereafter, except persons then over fifty-five, shall become members; that persons over fifty-five so entering shall not become members; and that no officer elected by popular vote, except in Worcester County, and no employee who is or will be entitled to any other pension from a county may become a member.

Section 1 of the proposed act amends section 20, as previously amended, in substance, by adding to the definition of "employees" the following: "Any officials or public officers whose compensation is paid by the county, whether employed or appointed for a stated term or otherwise, except, in counties other than Worcester, an official or public officer elected by the people."

Section 2 of the proposed act purports to validate the membership in any county retirement association of every person who "presumptively entered any such system," in so far as such membership was illegal or invalid because of his being an official or a public officer, and also to ratify all acts done by any such association or any officer thereof in connection with any such presumptive evidence, as if the amendment introduced by section 1 of the proposed act had been in effect at the time.

Regarding the general effect of the proposed changes, it should be observed that they are of considerable im-

portance. Whereas, under the decision of our court in *O'Connell* v. *Retirement Board of the City of Boston*, 254 Mass. 404, the term "employees," as used in a similar retirement act, did not include public officials, now, with respect to county retirement systems, such officials, whether employed or appointed for a stated term or otherwise, are to be included. No person over seventy years of age, if the bill is enacted into law, hereafter may be employed by a county for any sort of service unless (except in Worcester) he is elected by the people. All persons so employed must retire on reaching the age of seventy. But, with the exception hereafter stated, this presents no feature of unconstitutionality. It is settled that the occupant of a public office may be deprived of that office by act of the Legislature changing its tenure, in the absence of constitutional restriction, and that he has no cause of action on that account. *Taft* v. *Adams*, 3 Gray, 126, 130; *Opinion of the Justices*, 117 Mass. 603; *Donaghy* v. *Macy*, 167 Mass. 178; *Graham* v. *Roberts*, 200 Mass. 152, 157; *Opinion of the Justices*, 216 Mass. 605; *Attorney General* v. *Tufts*, 239 Mass. 458, 480.

Justices of district courts are paid by the counties, and therefore come within the terms of the provisions of the bill. As to them, the provisions are plainly unconstitutional, being in direct violation of Mass. Const., pt. 2nd, c. III, art. I. If the bill were enacted in its present form, however, it would not be held to be wholly invalid on that account, but the court would, in my judgment, apply the principle that the statute must be interpreted as intended to apply only to that class of persons to whom it would be constitutionally applicable. *Attorney General* v. *Electric Storage Battery Co.*, 188 Mass. 239; *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, 390. The bill, however, must, I think, be regarded as defective for this reason.

The observation should also be made that, while by the original statute the establishment of a county retirement system was made to depend upon the acceptance of such a system by the voters of the county (St. 1911, c. 634, § 2,

G. L., c. 32, § 21), no opportunity is given them to vote upon the proposed amendment. To this feature of the bill I find, however, no constitutional objection. *Opinion of the Justices*, 138 Mass. 601, 603; *Graham* v. *Roberts*, 200 Mass. 152, 156.

The language of section 2 of the bill is somewhat obscure. It seems inapt to describe persons who could not lawfully become members of a retirement system as having "presumptively" entered that system. The natural presumption would seem to be that the members of the system were those who were legally entitled to become members. I infer, however, that the intention is to describe those persons who, although they were public officers and therefore, under the decision in the O'Connell case, were not authorized to join, nevertheless did not give notice in writing of their unwillingness to join, have paid their contributions and have been treated as members.

A distinction is thus drawn between public officers who have been treated as members and those who have not. The membership of the former is validated, so that they are entitled to all the benefits thereof from the beginning, including credit for prior service. But no provision is made for the latter class whereby they may have any of the benefits of membership, or even the privilege of becoming members thereafter. G. L., c. 32, § 22, providing that membership shall begin with the establishment of the system or the entry of the employee into service, cannot give them that privilege, since those provisions cannot be applicable to a person already in the service who now becomes an employee by definition. *Wilson* v. *Head*, 184 Mass. 515; *Wheelwright* v. *Tax Commissioner*, 235 Mass. 584. The possible presumption of a legislative intent that public officers who have not been treated as members are now to be regarded as having been members from the time of the establishment of the system or their entry into service, is rebutted by the fact that the Legislature has made that provision only for persons who are presumptively members.

Legislation applicable to a particular class, thereby distinguishing that class from other classes, will be sustained if a reasonable basis for the distinction can be found; but it will not be sustained where the distinction results in an arbitrary discrimination between classes. Classifications and distinctions must be based upon some sound reason, in order to avoid the objection that they are violative of the Fourteenth Amendment to the Constitution of the United States, guaranteeing to all persons the equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369–374; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 155, 165; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 102–112; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558–563; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417; *Truax* v. *Raich*, 239 U. S. 33; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Truax* v. *Corrigan*, 257 U. S. 312, 332–339; *Brown* v. *Russell*, 166 Mass. 14; *Opinion of the Justices*, 166 Mass. 589; *Commonwealth* v. *Interstate, etc., St. Ry. Co.* 187 Mass. 436, 438, 439; *Commonwealth* v. *Hana*, 195 Mass. 262, 266; *Massachusetts General Hospital* v. *Belmont*, 233 Mass. 190, 200–202; V Op. Atty. Gen. 56; VII Op. Atty. Gen. 331.

In my opinion, the discrimination contained in section 2 between those public officers who made deposits and were treated as members of the association and other public officers, whereby the former are given a right to the benefits of membership as if they had been members from the beginning, while the latter are not given that right and apparently have not even the privilege of becoming members hereafter, cannot be based on any sound and reasonable ground justifying such a distinction between persons none of whom, as the court has held, have hitherto been legally members. For this reason, the bill in its present form, if enacted, would, in my opinion, be unconstitutional, within the principle of the decisions cited above.

In giving this opinion I am assuming that there are public officers, paid by counties, who fall within the latter

of the two classes. If in fact there are not, the bill, while it might perhaps be better phrased to avoid the appearance of discrimination, would not be open to the objection of unconstitutionality on that account.

Section 2 also purports to ratify and confirm acts done by a county retirement association in connection with the presumptive entrance of a public official into membership. The general principle is that a Legislature may by statute ratify the doing of an act which it could have authorized at the time, unless vested rights are impaired thereby. *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331, 332; *United States* v. *Heinszen & Co.,* 206 U. S. 370; *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338; *Charlotte Harbor Ry.* v. *Welles,* 260 U. S. 8. VI Op. Atty. Gen. 175. I see no constitutional objection to this provision.

Senate Bill No. 317 is entitled "An Act establishing the status of officials and public officers paid by the City of Boston or the County of Suffolk or both in respect to the Boston retirement system, and relative to the retirement from the service of said city or county by certain officers thereof." This bill proposes certain changes in the Boston retirement system. It amends sections 2 and 9 of St. 1922, c. 521, as previously amended, establishing that system, and contains other provisions affecting it. Before summarizing the provisions of the bill it will be convenient to refer to the prior law.

Section 2 of St. 1922, c. 521, as amended by St. 1923, c. 381, § 3, and by St. 1925, c. 18, defines the meaning of certain words and phrases used in the act. The word "employee" is defined as follows: —

> "Employee" shall mean any regular and permanent employee of the city of Boston or county of Suffolk (except teachers who, on September first, nineteen hundred and twenty-three, are employed by the city of Boston and are members of the state teachers' retirement association) whose employment is such as to require that his time be devoted to the service of the city or county, or both, in each year during one half or more of the ordinary working hours of a city employee, or any regular

and permanent employee of this commonwealth whose compensation is wholly paid by the city of Boston or by the county of Suffolk, and the working superintendent and his employees of the index commissioners of the county of Suffolk.

Section 3 requires the retirement system to be established on February 1, 1923.

Section 5 provides for membership in the retirement system, and terminates the services of an employee who is not a member at the age of seventy. Following are significant portions of that section: —

All persons who are employees on the date when this retirement system is established may become members of the system. Every employee in service on said date, except an employee then covered by any other pension or retirement law of this commonwealth, shall, on the expiration of sixty days from said date, be considered to have become a member of this retirement system unless within that period he shall have sent notice in writing to the retirement board that he does not wish to join the system. Employees declining to join this retirement system within sixty days from the establishment of the system may thereafter be admitted to membership but no employee shall receive credit for prior service unless he applies for membership or becomes a member of the retirement system within one year from the date of the establishment of the system.

. . . . . .

On and after January first, nineteen hundred and twenty-six, the services of an employee, not a veteran of the Civil war, of the Spanish war or Philippine insurrection or the World war as defined in section fifty-six of chapter thirty-two of the General Laws, or not a member of the judiciary or not a teacher, who attains or has attained the age of seventy and who is not a member of this system, shall terminate forthwith.

Section 6, as amended by St. 1924, c. 251, § 1, creates certain funds, made up from deductions from the compensation of members and contributions by the city.

Section 9, as amended by St. 1924, c. 251, § 2, provides for the retirement of members of the system. It contains the following provision: —

A member of this retirement system who shall have attained age seventy shall be retired for superannuation within thirty days, except

members of the judiciary, heads of departments and members of boards in charge of departments, and except that a school teacher shall be retired on the thirty-first day of August following his attaining the age of seventy.

Section 10, as amended by St. 1924, c. 251, § 3, provides for a retirement allowance for members of the retirement system, consisting of an annuity, a pension and an additional pension, with certain minimum and maximum provisions. The provisions establishing the annuity, pension and additional pension are as follows: —

(*a*) An annuity which shall be the actuarial equivalent of his accumulated deductions at the time of his retirement, and

(*b*) A pension equal to the annuity, and

(*c*) If a member was an employee at the time the system was established and became a member within one year thereafter and has not since become a new entrant, an additional pension having an actuarial value equivalent to twice the contributions which he would have made during his prior service had the system then been in operation, together with regular interest thereon.

By the terms of clause (*c*) it will be observed that any employee who became a member of the system on or before February 1, 1924, is entitled to receive an additional pension based on the length of his prior service. This privilege was extended by St. 1924, c. 251, § 4, which permitted heads of city departments and members of boards in charge of city departments to become members on written application within sixty days after the act took effect, and provided that, after being so admitted, they should receive credit for prior service, notwithstanding any provision of St. 1922, c. 521. I am informed that June 22, 1924, the date mentioned in section 3 of Senate Bill No. 317, was sixty days after the effective date of the 1924 statute. The privilege was again extended by St. 1925, c. 90, which permitted employees who had not previously joined to become members by making written application for such membership within ninety days of the effective date of the act, and provided that an employee so becoming a member of the retire-

ment system should receive credit for prior service, notwithstanding any provision of St. 1922, c. 521.

Section 1 of the proposed act amends St. 1922, c. 521, § 2 (*b*), defining the word "employee," so as to include in the class of employees "any official or public officer whose compensation is paid by said city or county or both, whether employed or appointed for a stated term or otherwise," except persons elected by the people, court officers of the Supreme Judicial and Superior Courts appointed prior to February 1, 1923, and teachers who, on September 1, 1923, were employed by the city of Boston and were members of the State Teachers' Retirement Association.

Section 2 of the proposed act amends St. 1922, c. 521, § 9, so as to include in the class of members of the retirement system not subject to retirement for superannuation at seventy officials and public officers originally appointed prior to February 1, 1923, by the Governor, with the advice and consent of the Council, whose salaries are paid by the County of Suffolk or by the city of Boston, or by both, and members of the system who were originally appointed prior to that date by the justices of the Supreme Judicial or Superior Courts, and whose salaries are paid in like manner.

Section 3 of the proposed act purports to validate the membership in the retirement system of every person who "purportedly entered said system," either at any time by reason of becoming a "new entrant," or, prior to June 22, 1924, by any other method, whose membership was invalid by reason of the fact that he was at the time an official or a public officer. For the purpose of such validation the provisions of section 1 are made retroactive as if they had been in effect on and after February 1, 1923.

Section 4 of the proposed act permits persons appointed by the Governor, with or without the advice and consent of the Council, whose membership in the system is made legal and valid by sections 1 and 3, to withdraw from membership on written notice.

Section 5 provides that the act shall take effect upon its

passage, differing in that respect from St. 1922, c. 521, St. 1924, c. 251, and St. 1925, c. 90, which provided for submission to the city council for acceptance.

The result of this bill, if enacted, will be that public officers whose compensation is paid by the city or county (with the enumerated exceptions), now for the first time made employees by definition, and hence subject to retirement for superannuation at seventy, will be entitled to the benefits of the retirement system if they attempted to do an act which they could not legally do by purporting to become members of that system, either as new entrants, or, prior to February 1, 1924, under St. 1922, c. 521, § 5, or, prior to June 22, 1924, under St. 1924, c. 251, § 4; but that persons who did not make the attempt to do that invalid act and persons who did make the attempt under St. 1925, c. 90, will not be entitled to receive those benefits. Among the benefits so conferred are the right to a pension and to credit for prior service, as explained above, and the right not to be retired for superannuation at seventy, if the person is of the class of public officers described in section 2 of the bill.

Because of this apparently arbitrary discrimination between classes, and for the reasons stated in discussing Senate Bill No. 307, it is my opinion that this bill in its present form, if enacted into law, would be unconstitutional.

CONSTITUTIONAL LAW — POWER OF THE LEGISLATURE — PAYMENT TO THE FAMILY OF A DECEASED MEMBER OF THE HOUSE OF REPRESENTATIVES.

The Legislature may lawfully authorize the payment of the balance of a yearly salary to the family of a deceased member of the House of Representatives if, in the exercise of its reasonable judgment, it determines that such payment is for a purpose which will promote the general public welfare.

To the Governor. 1926 May 18.

You have submitted to me for examination and report House Bill No. 1485, entitled "Resolve in favor of the estate of the late Frederick A. Warren."

The purpose of this resolve is to authorize the payment to the estate of a deceased member of the present House of Representatives the balance of his salary for the current year.

Payment of the nature authorized by this legislation is a pure gratuity and may not be made by the Legislature if it is merely an appropriation of public moneys for a private purpose. A gratuity of this nature may be, and often is, made for a purpose which can fairly be considered as serving the public good, and for this latter purpose the General Court has the right to grant money, and the distinction as to what are and what are not public purposes must in a large measure be left to the conscientious decision of the Legislature itself. *Opinion of the Justices*, 190 Mass. 611. If the public purpose to be served by the appropriation is not clear, the Legislature is bound to recite in the instrument of appropriation such words as will indicate the existence of facts and of a legislative reason for the determination that the purpose is in a true sense public and not private. Unless it can fairly be said that the judgment of the General Court in the premises was manifestly unreasonable, their expressed finding that the public good will be promoted by the payment authorized in their enactment in connection with certain facts therein set forth, the measure cannot be said to be unconstitutional. *Opinion of the Justices*, 240 Mass. 616.

In the instant resolve it is clearly stated that the payment authorized therein is made for the purpose of promoting the public good, and that the services of the deceased in the General Court were long and meritorious. There is a declaration of legislative purpose. Facts relating to it in connection with the deceased and his services are specified, although meagerly, and are presumably matters of public knowledge. It is therefore plain, and does not need merely to be inferred from the language of the bill, as was the case in the matter before the court in *Opinion of the Justices*, 240 Mass. 616, that these considerations actuated the

Legislature in reaching a conclusion that the public good would be promoted by an "unstipulated reward" for the deceased's services.

In my opinion, the proposed resolve, if enacted, would be constitutional.

Constitutional Law — Time of Taking Effect of a Statute.

The Legislature has not the constitutional power to provide that an act shall take effect as of a date prior to its passage, although the act might be made to operate retroactively.

To the Governor. 1926 May 21.

You have submitted to me for examination and report a Senate bill printed as House Bill No. 1479, entitled "An Act authorizing annual allowances to commissioned officers of the National Guard for uniforms."

The purpose of this bill is to provide for the payment, as of April first in each year, of an allowance, to each commissioned officer in the National Guard who served for the year preceding, of a maximum of thirty-five dollars for uniforms. The bill is of such a character that a retroactive effect given to its terms by general provisions would not make it unconstitutional. The bill, however, provides specifically in section 2: "This act shall take effect as of April first of the current year." It was not passed to be enacted until May 19th. It has an emergency preamble declaring it to be an emergency law, necessary for the immediate preservation of the public convenience.

It is provided in Mass. Const. Amend. XLVIII, under the heading *The Referendum, I*, that —

> 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.

The plain implication of the provisions under the heading *II Emergency Measures* is that such laws are to take effect

upon their passage. Furthermore, Mass. Const., pt. 2nd, c. I, § I, art. II, provides: —

> No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal.

It further provides that if he approves he shall signify his approbation by signing it, and if not, then if two-thirds of both branches of the Legislature upon reconsideration so vote, it "shall have the force of a law." See also G. L., c. 4, § 1; *Opinion of the Justices*, 3 Mass. 567; *ibid.*, 3 Gray, 601, 606, 607; *Kennedy* v. *Palmer*, 6 Gray, 316; *McLaughlin* v. *Newark*, 57 N. J. L. 298.

Because of its inconsistency with the constitutional provisions cited above, I am of the opinion that, irrespective of the question whether the Legislature has the power to declare that a bill shall take effect as of a date prior to its passage, the enacting clause of the instant bill is beyond the power of the Legislature. The difficulty is, however, one which may readily be cured by amendment, since, as I have said, the nature of the bill is such that it may properly be made to operate retroactively. *Spaulding* v. *Nourse*, 143 Mass. 490; *Adams* v. *Adams*, 211 Mass. 198.

CONSTITUTIONAL LAW — EMINENT DOMAIN — "TAKING."

> The word "taking" as used in Mass. Const. Amend. XXXIX, may be construed in a comprehensive sense as including acquisition of private property for a public use by purchase as well as by eminent domain.

To the Governor. 1926 May 22.

You have referred to me for examination and report House Bill No. 1480, entitled "An Act relative to the widening of Bridge Street in the city of Haverhill."

This bill, in section 1, authorizes and directs the county commissioners of the County of Essex to lay out, widen and construct Bridge Street in the city of Haverhill, and provides that for that purpose they may "take in fee by eminent

domain under chapter seventy-nine of the General Laws by one or more takings, or by purchase or otherwise, the land and property" therein specified and described, the same being stated to be more land and property than are needed for the actual construction of the street, and no more in extent than would be sufficient for suitable building lots on the street; and it is also provided that after appropriating for the street so much of the specified and described land and property as is needed therefor, the county commissioners may sell the remainder. Provision is made in the following sections for payment of the costs and expenses, not to exceed fifty thousand dollars, assessment upon and payment by the city of Haverhill of two-thirds of the cost, payment of the remaining cost by the county, and the issuing of bonds and notes by the county and the city. Section 5 provides that the act shall take effect upon its acceptance by the county commissioners, provided that such acceptance occurs during the current year.

Mass. Const. Amend. XXXIX makes the following provision: —

> The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the Commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: *provided, however,* that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

The provision in section 1 authorizing the county commissioners to take in fee by eminent domain, or by purchase or otherwise, the land and property specified, which is stated to be more than is needed for the actual construction of the street, since the property which is not needed for the street is not to be acquired for a public purpose, is beyond the power of the Legislature unless it is authorized by Mass.

Const. Amend. XXXIX; and it is not so authorized unless it is a "taking in fee," within the meaning of the words as used in the amendment. The meaning of the word "taking," as used in a statute authorizing a railroad to "purchase or otherwise take in fee" land for a station, was carefully considered by the court in *Saltonstall* v. *New York Central R.R. Co.*, 237 Mass. 391, 394, 395, in which the court indicated its view to be that the word "taking," used in its comprehensive sense, may include acquisition of private property for a public use either by purchase through private negotiation or by seizure through the exercise of eminent domain. The court there pointed out that an agreement of parties for purchase, effected under the terms of statutory language similar to that used in section 1 of this bill, must have been made in view of knowledge by all concerned that the right to exercise eminent domain was present as an element to be taken into account in the bargaining, and that the right to acquire title to property for public use by negotiation rather than by resort to a formal taking relates to the means rather than the end, and does not affect the use to which the property is to be put when acquired nor the rights of others arising from such use.

Mass. Const. Amend. XXXIX amends Mass. Const., pt. 1st, art. X, which provides expressly that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," and contains other provisions which are regarded as a source of the rule that the expenditure of public money must be for a public purpose. *Lowell* v. *Boston*, 111 Mass. 454, 461, 462. The effect of Mass. Const. Amend. XXXIX necessarily is to make an exception to each of these constitutional principles. I see no reason for limiting the exception to the rule which requires the expenditure of public funds to be for public uses to those cases only where land is taken rather than acquired by agreement with the owner. The primary purpose of Mass. Const. Amend. XXXIX was to do away with

all constitutional obstacles to the acquisition of property by public authority under the circumstances to which the amendment relates. The accomplishment of such acquisition by negotiation rather than by a formal taking, as the court has stated, relates to the means rather than the end. In my opinion, therefore, while the question cannot be free from doubt, the word "taking," as used in Mass. Const. Amend. XXXIX, may properly be construed in a comprehensive sense as including all forms of acquisition.

Weekly Wages paid by Check — Valid Set-off under G. L., c. 149, § 150.

Payment of weekly wages by check, if the employee assents thereto, is permitted under G. L., c. 149, § 148. It is not a valid set-off under G. L., c. 149, § 150.

To the Commissioner of Labor and Industries. 1926 May 27.

You state that a railroad company to which the provisions of G. L., c. 149, § 148, as amended, are applicable has announced its intention to discontinue payment of wages of employees in currency and to make payment by check. You inform me that "some of the employees reside in remote townships of the State, where, it is alleged, it will not be possible for them to be paid according to these requirements of the statute, and others, because of the nature of their duties, may not be able to reach the banks with which arrangements have been made by the railroad company for the cashing of pay checks, within the period fixed by law." You request my opinion upon the following questions: —

1. If payment of wages by check is tendered to employees on seventh day after wages are earned and facilities are not available to cash the check, or nature of employment prevents this from being done until the eighth or ninth day after they are earned, is it a violation of G. L., c. 149, § 148?

2. Is payment of wages by check permitted by this statute?

3. Is payment by check a "valid set-off" as alluded to in G. L., c. 149, § 150?

G. L., c. 149, § 148 (as amended by St. 1921, c. 51, St. 1923, c. 36, St. 1924, c. 145, and St. 1925, c. 165) and § 150, in those portions applicable, provide as follows: —

> Section 148. Every person engaged in carrying on . . . within the commonwealth a . . . railroad . . . shall pay weekly each employee engaged in his business, . . . the wages earned by him to within six days of the date of said payment if employed for six days in a week or to within seven days of the date of said payment if employed seven days in the week, . . . No person shall by a special contract with an employee or by any other means exempt himself from this section. . . .
>
> . . . . . .
>
> Section 150. . . . On the trial (on complaint of the Department of Labor and Industries for violation of § 148) no defence for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of the payment of the wages so earned by him, shall be valid.

Section 148 does not specifically require the payment of wages in cash or forbid the issuance of checks in payment thereof.

In its legal import, the term "payment" means the full satisfaction of a debt by money, but that is payment which the parties contract shall be accepted as payment. *First National Bank* v. *Watkins*, 154 Mass. 385, 387; *Hill* v. *Fuller*, 188 Mass. 195, 200.

When a debt is payable in dollars, it is payable in whatever the laws of the United States declare to be legal tender. *Miller* v. *Lacy*, 33 Tex. 351. A check on a bank, handed by the debtor to the creditor and deposited by the creditor in his bank, is not cash payment. *Breck* v. *Barney*, 183 Mass. 133, 137.

A check is not in itself money. It is an order for the payment of money. G. L., c. 107, § 208. *Bullard* v. *Randall*, 1 Gray, 605, 606; *Minot* v. *Russ*, 156 Mass. 458, 459. If taken, treated and received in payment as money, it may be regarded as the equivalent of a money payment

(*Wall* v. *Lakin*, 13 Met. 167; *Cushman* v. *Libbey*, 15 Gray, 358, 361); but not otherwise (*Dennie* v. *Hart*, 2 Pick. 204).

A check is merely evidence of a debt due from the drawer, and its mere receipt is not payment of the debt for which it is delivered. *Taylor* v. *Wilson*, 11 Met. 44, 51; *Feinberg* v. *Levine*, 237 Mass. 185, 187; *National Wholesale Grocery Co.* v. *Mann*, 251 Mass. 238, 250; *Keystone Grape Co.* v. *Hustis*, 232 Mass. 162, 165; *Ansin* v. *Mutual Life Ins. Co.*, 241 Mass. 107, 111; *Shea* v. *Manhattan Life Ins. Co.*, 224 Mass. 112. It is only conditional payment. *Weddigen* v. *Boston Elastic Fibre Co.*, 100 Mass. 422; *Houghton* v. *Boston*, 159 Mass. 138; *Goodwin* v. *Mass. Loan etc. Co.*, 152 Mass. 189, 201. A certified check, if certified for the benefit of the drawer, is not payment. *Minot* v. *Russ*, 156 Mass. 458.

The acceptance of a check implies an undertaking to use due diligence in presenting it for payment (*Houghton* v. *Boston*, 159 Mass. 138, 142; G. L., c. 107, § 209) and in giving notice of dishonor; and if the party for whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment. *Taylor* v. *Wilson*, 11 Met. 44; *Small* v. *Franklin Mining Co.*, 99 Mass. 277. If a check is given and received by agreement of the parties, in settlement of a debt, it is payment. *Barnard* v. *Graves*, 16 Pick. 41; *Getchell* v. *Chase*, 124 Mass. 366.

Presentment for payment and receipt of the amount would be evidence of acceptance upon the terms on which it was given (*Illus. Card & Nov. Co.* v. *Dolan*, 208 Mass. 53, 54), and payment on presentation would relate back to the date when the check was given (*Hunter* v. *Wetsell*, 17 Hun [N.Y.], 135).

Whether a check is payment, and is to be considered as money, depends upon the understanding of the parties to the transaction. If an employee declines to accept the check at the time payment is due under the statute, the check is not a payment.

Section 150, pertaining to trials for violation of section 148, forbids any defense other than those therein recited,

namely, an attachment by trustee process, a valid assignment, a valid set-off against the same, absence of employee from regular place of labor at time of payment, or an actual tender to the employee at time of payment.

A set-off is a cross claim or demand which a defendant holds in his own right against a plaintiff, recoverable in an action of contract, which, because so unconnected with the plaintiff's claim, could not be shown at common law in payment or reduction of the amount due. The right to set-off exists only by statute. *Cook* v. *Mills*, 5 Allen, 36, 37; *American Bridge Co. of New York* v. *Boston*, 202 Mass. 374, 375. The nature of such a claim is described in G. L., c. 232, §§ 1–11, as a claim, express or implied, for property sold, for money paid, for money had and received, for services performed, and for an amount which is liquidated or may be ascertained by calculation. It is substantially a cross action; an independent claim. *Cutter* v. *Middlesex Factory Co.*, 14 Pick. 483, 484; *Goldthwait* v. *Day*, 149 Mass. 185, 187. Payment is not ground for set-off, and is available only by way of plea. *Jewett* v. *Winship*, 42 Vt. 204. Delivery of a check as payment, therefore, is not a claim in set-off.

A tender is the offer of everything which the creditor is entitled to receive in satisfaction of a debt, so that the creditor may reduce it to possession. *Sands* v. *Lyon*, 18 Conn. 18. The debtor cannot require the creditor to call upon a third party for the money any more than the creditor can compel the debtor to make a tender to a person whom he should appoint, instead of himself. By depositing the money in the hands of a stakeholder who agrees to perform the service, the debtor does not relieve himself of responsibility on account of the debt. The debt is not extinguished by the tender. *Town* v. *Trow*, 24 Pick. 168. The general rule is, that an offer of a bank check for the amount due is not a good tender (38 Cyc. 146), nor a deposit in a bank, if the obligation is not payable at such depositary (p. 152). A tender of a check, therefore, if not agreed to, is not a tender of payment of wages at the time of payment.

In describing the requirement of a weekly payment of wages, the court said, in *Mutual Loan Co.* v. *Martell*, 200 Mass. 482, 485, that "it has been deemed important that they be received by the employee regularly and promptly after they are earned." Insomuch as this may be said to be an expression of one of the intents of the statute, the enforced acceptance of a check in payment of weekly wages is in opposition to the principle of the statute, in that it subjects the employee to certain legal responsibilities with respect to the presentation of the check and to delay in the prompt receipt of money for wages earned, where facilities for cashing the check are unavailable or where the nature of the employment prevents presentation.

Although there is no obligation to pay in lawful money if the employee is willing to accept a check, the use of a check, instead of currency, gives rise to the question whether, in each instance, depending upon the intention and conduct of the parties, the check was given and received as payment, within the meaning of the statute. The employee, in my opinion, is entitled to be paid his wages in cash unless he agrees to be paid in some other medium.

Answering your interrogatories, I am of the opinion, therefore, that payment of wages by check, if accepted in payment, tendered at time of payment and cashed on a later date, is not a violation of G. L., c. 149, § 148; if not so accepted and cashed, it is; that payment of wages by check is permitted under the provisions of G. L., c. 149, § 148, if the employee assents thereto; that payment by check is not a "valid set-off" under the provisions of G. L., c. 149, § 150.

Constitutional Law — County Retirement Systems.

A bill amending G. L., c. 32, § 20, as amended by St. 1924, c. 281, § 2, by including public officers in the definition of employees, validating the membership in any county retirement system of public officers who had theretofore presumptively entered the system, and giving to other public officers the opportunity to become members, would be constitutional, if enacted.

To the Governor. 1926. May 28.

You have referred to me for examination and report Senate Bill No. 307, entitled "An Act establishing the status of certain officials and public officers in respect to certain county retirement systems."

This bill, in section 1, amends G. L., c. 32, § 20, as amended by St. 1924, c. 281, § 2, in its definition of the word "employees" by substituting the following definition: —

> "Employees," any persons permanently and regularly employed in the direct service of the county whose sole or principal employment is in such service, except teachers employed in any day school conducted under sections twenty-five to thirty-seven, inclusive, of chapter seventy-four, and also any officials or public officers whose compensation is paid by the county, whether employed or appointed for a stated term or otherwise, except, in counties other than Worcester, an official or public officer elected by the people.

Section 2 validates the membership in any county retirement association of every person who "presumptively" entered the system in so far as such membership was invalid by reason of his being a public officer, and ratifies the acts of any county retirement association in connection therewith. Section 3 provides that any public officer who has not presumptively entered such system shall be admitted to membership on request, if otherwise eligible, and thereupon shall, upon retirement, be entitled to pension benefits for prior service.

Senate Bill No. 307 as originally passed to be enacted was returned by Your Excellency at the request of the Senate, and my opinion was requested as to its constitutionality. In response to that request I stated my opinion to be that the bill was defective because, literally interpreted, it included justices of district courts within its terms requiring

retirement at the age of seventy, and was unconstitutional because of certain discriminations made between public officers who have heretofore been treated as members of the retirement association and other public officers. The bill as originally passed to be enacted has since been amended by adding section 3, which, in my opinion, removes the objection based on unconstitutional discrimination, but no change has been made in the definition of the word "employees," which, as I have stated, if literally interpreted must include justices of district courts.

As I stated in my opinion to the Senate, the bill, if enacted with such a definition of the word "employees," would not be held to be wholly invalid on that account, but the court would, in my judgment, apply the principle that the statute must be interpreted as intended to apply only to that class of persons to whom it would be constitutionally applicable. This principle of construction is well established, and the bill, if enacted, therefore, would necessarily receive the construction that justices of district courts are not included within the definition of the word "employees." Apparently this is in accordance with the intention of the Legislature. I see no urgent reason, therefore, why the bill in its present form should not receive Your Excellency's approval.

Compulsory Automobile Liability Security — Commissioner of Insurance — Classification of Owners of Motor Vehicles for Purposes of Liability Insurance — Rates for Policies and Bonds.

Fleet rates, so called, may not be established.

Classification based upon the locality in which a motor vehicle is kept is not necessarily unreasonable.

Classification based upon a merit rating plan, so called, is not necessarily unreasonable if sufficient data is available to the Commissioner to enable him to establish such classification with reasonable accuracy and certainty.

The Commissioner of Insurance is not required to establish schedules of charges for premiums on bonds differing in amount from those established for policies.

To the Commissioner of Insurance.
1926
June 7.

You have asked my opinion upon certain questions relative to the duties imposed upon you by law to establish classifications of motor vehicle liability insurance risks and a schedule of premium charges, under the provisions of St. 1925, c. 345, and G. L., c. 175, § 113B.

Such classifications and schedule are to be used and charged by all companies authorized to transact liability insurance on motor vehicles or to transact a surety business, under G. L., c. 175, § 47, cl. 4, and § 105, which propose to issue bonds for the owners of motor vehicles, under St. 1925, c. 346, commonly known as the Compulsory Automobile Insurance Law.

1. The first set of facts to which you direct my attention and your question as to the law applicable thereto are as follows: —

(*a*) It is now the practice of some of the liability insurance companies to issue automobile liability policies at what is termed a "fleet" rate; that is, a given insured owning a certain number of motor vehicles receives automobile liability insurance at a lesser rate or for a lesser premium in the aggregate than an insured who owns only one car.

(1) Under the provisions of the said statutes may the Commissioner lawfully approve "fleet" rates, as outlined in (*a*), *supra?*

St. 1925, c. 345, § 2, provides, in part: —

The said commissioner shall examine said classifications and premium charges to determine whether such classifications are fair and

reasonable and such premium charges are adequate, just, reasonable and non-discriminatory.

He shall, after a full hearing and due investigation, establish such classifications of risks as shall be fair and reasonable and such schedule of premium charges as shall be adequate, just, reasonable and non-discriminatory which shall be used and charged by all such companies for such motor vehicle liability policies and bonds issued or executed in connection with the registration of motor vehicles or trailers for the first year to which section one A of said chapter ninety shall apply, and shall be in force until modified, altered or revised by the said commissioner under section one hundred and thirteen B of chapter one hundred and seventy-five of the General Laws or, in the event of a petition for review under section three, until otherwise ordered by the court.

The terms of the various sections of St. 1925, c. 346, which by amendments to G. L., c. 175, deal with the same classifications and schedule that the Commissioner is required to make under St. 1925, c. 345, § 2, do not alter, but confirm in specific language, the character of the classification and schedule which he is to establish under the former statute. The classification of risks is to be "fair and reasonable," and the schedule of rates or premium charges is to be "adequate, just, reasonable and non-discriminatory." These provisions are in harmony with the general principles of law governing classification for proper purposes by legislative authority. When established by the Commissioner, the classification is, by the terms of the statute, to be used and the rates made are to be charged by all companies for motor vehicle liability policies and bonds until changed or modified by the Commissioner.

Apart from the particular statutes under consideration, rate fixing for premium charges on insurance policies and necessary classification for that purpose have been held a proper exercise of the general police powers inherent in a State Legislature. The classification must not be unreasonable nor arbitrary and must rest on a real difference in subject-matter, having some relation to the classification made and the objects sought to be obtained by the legislation. *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389.

An administrative board or commissioner, acting under legislative authority, may exercise the power given to them or him to make classifications, but only within the same limitations as apply to the Legislature. St. 1925, cc. 345 and 346, which to a certain extent must be read together in determining the legislative intent of each, expressly set out, in terms aptly stating the general principles of law, the mode in which the Commissioner is to use his authority in connection with the powers of rate fixing which have been entrusted to him. An application of these principles of law determines the answer to your first question.

It has been held in previous opinions of Attorneys-General that the practice of insurance companies in charging premiums to insurants of the same general class, based solely on the amount of business furnished by the insureds, was an improper one, because a discrimination was made upon no reasonable basis and was in violation of statutes forbidding the giving of special favors by companies to insureds or prospective buyers of policies. V Op. Atty. Gen. 543; VII Op. 214. I assume, from the facts stated in your letter, that a "fleet" rate, so called, discriminates between insurants of the same class, and permits the payment of a smaller premium charge per car to such insureds as take out a policy or policies covering more than one car than is exacted from the owner of a single car, solely by reason of the difference in the number of cars insured. The duty of determining the facts in regard to the various situations arising from the sale of policies rests upon you, but I am of the opinion that the establishment of a rate for premium charges of a lower amount than that allowed for a single car of the same general class, based solely upon the fact that one insured had more cars covered than did the other, would not, as a matter of law, be "reasonable," within the meaning of the statute.

I answer your first question in the negative.

2. Your second statement of facts and the question based thereon are —

(*b*) The premium rates now charged for automobile liability insurance are fixed not only with reference to the type of motor vehicle but also with reference to the locality in which the vehicle is usually kept.

(2) Do the said statutes require as a matter of law that the premium charges be uniform throughout the Commonwealth for a given classification or may the rates be established with respect to the territory in which the vehicle is usually kept, assuming that the Commissioner finds that there is a reasonable basis in fact for territorial rating?

It cannot be said that a mode of classification of risks based upon the locality in which a motor vehicle is kept would necessarily be unreasonable. It may be that the customary keeping of a motor vehicle in a rural district has a tendency to make the hazard of its use less great than one habitually kept in a city. Such a mode of classification is not prohibited by the statutes.

3. Your third statement of fact and question are —

(*c*) Some companies grant automobile liability insurance to a particular insured at a reduced rate or premium under what is called a "merit rating plan"; that is, to an insured who has what the company considers a favorable record for careful operation of a motor vehicle.

(3) Under the said statutes may the Commissioner lawfully establish premium charges which will be subject to variation at the option of the companies if in their judgment the insured qualifies under a "merit rating plan," as described in (*c*), *supra?*

If, as a matter of fact, it be possible to ascertain with reasonable accuracy from sufficiently reliable data that motor vehicle operators possessing certain well defined attainments, experience and demonstrated skill in operation are, to a clearly defined extent, less hazardous risks than other operators, it could not well be said that a classification and schedule of premium charges, lower than for others, established by the Commissioner for cars driven solely by such operators, would be unreasonable or discriminatory.

If, however, as a matter of fact, in the judgment of the Commissioner data is not available or experience is not tabulated in sufficient quantities to demonstrate with reasonable certainty the lessening in hazard to the insurer by the driving of cars by such persons instead of others,

the adoption of such a classification, with incidental lower premium charges, would be unfair, unreasonable and discriminatory.

To adopt a classification based merely upon the so-called merit rating plan of individual companies, not of general use or recognition, would not be a fair, reasonable or non-discriminatory mode of procedure on the part of the Commissioner. To establish a classification on a so-called merit rating basis which was not itself prescribed by the Commissioner but was an adoption by him of a system used by individual companies, resting only upon the judgment of such companies as to what did or did not constitute conduct or ability entitling an insured to the lower rate, could not be said to be fair, reasonable or non-discriminatory, within the meaning of the statute. Obviously, such an adoption of a merit rating plan set up and controlled by companies themselves would be open to great abuse, and would in reality substitute the opinion of others for the exercise of the judgment or discretion vested in the Commissioner by the statutes.

As your third question is worded I answer it in the negative.

4. Your fourth statement of fact and question based thereon are —

(*d*) At the present time, I understand, no corporate surety company executes a bond as surety conditioned on the satisfaction by the principal of judgments rendered against him arising out of the operation of a motor vehicle. The condition of the bond and the coverage of the policy required of applicants for registration by said chapter 346 are substantially the same. The question has been raised whether under the provisions of said sections the Commissioner may lawfully establish premium charges to be paid to a corporate surety company for executing a bond which are less than those established by the Commissioner for policies issued by an insurance company, having in mind the common practice of corporate surety companies ordinarily not to execute a bond as surety unless the principal deposits with it approved collateral or furnishes it with suitable indemnity agreements.

(4) Do the said statutes require as a matter of law that the premium charges must be identical for policies and bonds, or may the Commis-

sioner establish one rate of coverage under a policy in respect to a certain classification and a different rate for coverage under a bond executed in respect to a motor vehicle falling within the same classification?

Although the facts which you set forth indicate that the practice relative to the execution of surety bonds is not the same as that which prevails in relation to the issuing of policies of insurance, in that the person covered by the bond is required to deposit collateral while the insured is not, I am of the opinion that the intent of the Legislature, as indicated by the language used in St. 1925, cc. 345 and 346, was that there should be a single schedule of premium charges applicable alike to companies issuing policies and those executing bonds, for the purposes of the Compulsory Automobile Insurance Law, so called. The condition of a bond and the provision of a policy issued for such purposes are, as you state, not dissimilar. The existence of the common practice of surety companies, to which you refer, was doubtless not unknown to the Legislature, and I am inclined to the view that, had the Legislature desired that different premium charges for similar risks under identical classifications should be created by the Commissioner, it would have so stated in the statutes under consideration.

The language employed by the Legislature in both statutes appears to indicate that it was not intended that insurance companies and surety companies should be treated differently in respect to the establishment of premium charges for the same kinds of risks, as to which the ultimate duty of payment by both sorts of companies is virtually the same. No explicit authorization is given to the Commissioner to differentiate between the two types of companies in regard to the premium charges for identical risks, and I am of the opinion that no implied authority inheres in the Commissioner in this respect from the statutes as they stand. Insurance companies and surety companies described in St. 1925, c. 345, § 1, are referred to together in section 2 as "such companies," and the classification and charges established are provided to "be used and charged by all

such companies for such motor vehicle liability policies and bonds issued or executed in connection with the registration of motor vehicles." The words "policies or bonds" are repeatedly used throughout both statutes as if their premiums were to stand upon the same basis.

I answer your fourth question to the effect that the statutes do not contemplate different schedules of charges for premiums on bonds from those on policies.

REGISTRATION OF MOTOR VEHICLES — PARTNERSHIPS — APPLICATION.

Under G. L., c. 90, § 2, the signing of an application for registration of a motor vehicle owned by a partnership may be in the partnership name by one of the partners, when the partnership has a usual firm name; but if no firm name is in use, all the partners must sign.

To the Commissioner of Public Works. 1926 June 14.

You have asked my opinion relative to the legality of a practice prevailing in the Registry of Motor Vehicles in regard to the registration of motor vehicles owned by partnerships. Your statement of the practice is as follows: —

It has been the custom of the Registry to allow either or any partner in a co-partnership to sign the application, provided, of course, the co-partnership name is given in answer to question 13 on the registration blank. In case of a joint ownership both owners are required to sign.

G. L., c. 90, § 2, provides: —

Application for the registration of motor vehicles and trailers may be made by the owner thereof. The application shall contain . . . a statement of the name, place of residence and address of the applicant.

No specific provision is made with relation to owners who are partnerships.

In *Crompton* v. *Williams*, 216 Mass. 184, the Supreme Judicial Court, in construing the requirement that an application for registration shall contain the name, place of residence and address of the applicant, under St. 1909, c. 534, § 2, held that an individual's use, in good faith, of the recognized trade name under which he did business, in his

application and registration was a compliance with the statute. The court said: —

> A corporation, a partnership or an individual may adopt a trade name under which business can be transacted, actions instituted, or defended, and the title to property acquired and transmitted. . . . The plaintiff's application and the registration followed the name in which he did business.

The court went on to say that the use of a fictitious name for the purpose of concealing identity would not be a compliance with the statute "because the record would not show, nor the certificate contain, a descriptive statement by which the true owner could be ascertained."

Partnerships are commonly operated under a firm name. When the ownership of the vehicle is in a partnership which adopts and uses a partnership name, the signing of the application for registration with the partnership name by one of the partners is a sufficient compliance with the provisions of law relative to registration. When no such partnership name is in fact adopted and used by the firm, the names of all the partners should be signed to the application.

I am of the opinion that the practice, as described in your letter, which you are now pursuing is a proper one.

Teachers' Retirement Association — Effect on Payments of Death of Applicant for Retirement occurring before Action taken upon Application — Apportionment of Instalments.

The retirement of a member unqualifiedly eligible to retire because of age takes effect at the date fixed in his application, and requires no action of the retirement board in order to become effective; it is therefore not affected by the fact that the applicant for retirement dies before action by the board is taken upon such application.

The estate of such a member who dies after the date for retirement fixed by his application is not entitled to receive the member's assessments under G. L., c. 32, § 11 (4).

The estate, under such circumstances, the member having elected to receive an annuity under G. L., c. 32, § 10 (3) (*a*), is only entitled to the ratable proportion of the allowance for the period between the dates of retirement and death, with any sum held by the board in excess of the amount usable to found an annuity.

Under circumstances otherwise similar, but where the member had elected an annuity under G. L., c. 32, § 10 (3) (*b*), the estate would be entitled, in addition, to the sum used to purchase the annuity less the portion of any accrued instalment of the allowance which was derived from the annuity.

To the Commissioner of Education. 1926 June 15.

You have asked my opinion upon certain questions relating to retirement allowances under the teachers' retirement system. The first two questions, which concern a single situation, are as follows: —

If a member of the Retirement Association sixty years of age or over filed with the office of the retirement board a written application for retirement, on the form provided by the board, stating in the application a definite date on which retirement was to take effect, and died subsequent to that date but death taking place before the retirement board had taken any action on the application or established the retiring allowance to which the member was entitled, what amount is due the estate if the member elected an annuity to be paid in accordance with the provisions of G. L., c. 32, § 10 (3) (*a*)?

Shall the retirement board, after the death of the member, determine the retiring allowance to which the member was entitled on the retirement date designated by him and pay the estate a pro rata amount due for the period from that date to the date of death, or shall the retirement board return the member's contributions and interest and make no payment of pension to the estate?

It is provided by G. L., c. 32, § 11 (4), that "if a member who is not receiving payments under paragraph (1) or (2)

of this section" (which the member now in question was not) "dies before retirement, the full amount of his assessments, with regular interest thereon, shall be paid to his estate." It is therefore necessary to ascertain whether at the date of his death the member had been retired.

The board, according to your statement of facts, had taken no action whatever upon the application for retirement. If some action on the part of the board is, by the terms of the statute, a necessary step precedent to retirement, the member had not, therefore, been retired, and his estate is entitled to the benefit of G. L., c. 32, § 11 (4). The member was, however, eligible to retire, and had evidenced by his application an election to retire at a date selected by him. He died subsequently to that date, and if those facts, without any action by the board, had already brought about a retirement at that date, his death before the taking of such action did not vacate the retirement, and his estate is not entitled to payment under G. L., c. 32, § 11 (4). I am of the opinion that the latter view is correct.

In the original law, St. 1913, c. 832, there were provisions for retirement under several different sets of circumstances. Thus it was provided that any member on attaining the age of sixty years "may retire," section 6 (1); that any member at any time after reaching the age of sixty, if incapable of rendering satisfactory service, "may, with the approval of the retirement board, be retired" by the employing school committee, section 6 (1); and that any member on attaining the age of seventy years "shall be retired," section 6 (2). St. 1917, c. 233, § 2, added a provision that a member, under certain conditions, who before reaching the age of sixty, becomes disabled physically or mentally, "may, with the approval of the retirement board, be retired" by the employing school committee.

Nowhere in the law as it existed prior to the General Laws is to be found any further requirement of action by the retirement board to make retirement effective. The approval of the board was a condition precedent to retire-

ment for disability; but retirement at age seventy was compelled by the direct force of the statute, and retirement at age sixty was a right of the member which his choice alone sufficed to put into operation.

The present case is governed by that portion of G. L., c. 32, § 10 (1), which is as follows: —

> Any member of the association shall, on written application to the board, be retired from service in the public schools on attaining the age of sixty, or at any time thereafter.

It will be noticed that the words "shall, on written application to the board, be retired," stand in substitution for the words "may retire" which were to be found in St. 1913, c. 832, § 6 (1). Presumptively, this change, occurring for the first time in the codification of the General Laws, was not intended to work a change in the nature of the right to retire. *Cf. Derinza's case,* 229 Mass. 435, 442; *Commonwealth* v. *Kozlowsky,* 238 Mass. 379, 387. Doubtless the commissioners considered it advisable to compel the teacher to manifest in writing his election to retire, and for that purpose altered the language so as to make such writing a prerequisite to retirement. But this conferred no added power upon the board. There was an important substantive change in G. L., c. 32, § 10 (1), traceable through the preliminary report of commissioners to consolidate and arrange the General Laws, vol. I, pp. 166–7, St. 1918, c. 257, § 113, and the statutes by which the operation of the last cited act was deferred; but it did not affect the aspect of this section now under consideration.

The member's retirement became effective at the date fixed in his application, and was not affected by his subsequent death. Had he lived, his allowance would have been computed as of that date, and upon the basis of his then age. His estate can take nothing under G. L., c. 32, § 11 (4). Any other course would, in the long run, bring results in contradiction of any mortality table which might be used

as the basis of computing annuities under G. L., c. 32, §§ 8 (4) and 10 (3).

If any quarterly instalment of the retirement allowance, under G. L., c. 32, § 10 (3) (4) and (5), had accrued prior to the member's death, it is now payable to his estate, in accordance with G. L., c. 32, § 33. Whether any proportion of a quarterly instalment, corresponding to a period of less than a quarter, can be paid is a question of more difficulty. The statute, by making express provision for quarterly payments, has made the annuity, viewed strictly as an annual sum, apportionable to that extent. See *Wiggin, Admr.* v. *Swett,* 6 Met. 194, 202. But there is no express provision for the payment, pro rata, of part of a quarterly instalment upon the death of a member between quarter days; and at common law annuities and like payments are not apportionable. *Wiggin, Admr.* v. *Swett, supra; Dexter* v. *Phillips,* 121 Mass. 178, 180.

The general policy of this Commonwealth with respect to apportionment is now expressed in G. L., c. 197, § 27 (see report of the Joint Special Committee on Consolidating and Arranging the General Laws, vol. II, p. 1846, Note), as follows: —

> A person entitled to an annuity, rent, interest or income, or his representative, shall have the same apportioned if his right or estate therein terminates between the days upon which it is payable unless otherwise provided in the will or instrument by which it was created; but no action shall be brought therefor until the expiration of the period for which the apportionment is made.

Whether or not this provision is directly applicable to a retirement allowance may be a question, but it would probably dominate the interpretation of the statute which we are considering. One of my predecessors rendered an opinion to that effect with respect to the pension of a retired county employee. The conclusion is perhaps more easily reached because of the consideration that these allowances are plainly intended for the daily support of the recipients. See *Dexter* v. *Phillips, supra,* 180.

I am of the opinion that the member's estate is entitled to receive the ratable proportion of the allowance for the period between the date of retirement and the date of death. Also, of course, any sum held by the board in excess of the maximum amount which could be used to found an annuity. See G. L., c. 32, § 9 (2).

Your third and fourth questions also concern a single situation: —

> In case of the death of the member under conditions exactly as stated above, except that the member elected an annuity to be paid in accordance with the provisions of G. L., c. 32, § 10 (3) (*b*), what amount is due the estate?
>
> Shall the retirement board determine the retiring allowance to which the member was entitled and pay a pro rata amount of pension due to the date of death and also the contributions with interest of the member which were used to purchase the annuity, or shall the retirement board make no payment of pension but return to the estate the contributions with interest?

As stated above, the member is to be considered retired from the date fixed in the application. His estate is entitled to receive any sum held in excess of the maximum which could be used to found an annuity; a pro rata amount of the retirement allowance for the period between retirement and death; and the difference between the portion thereof which is paid by way of annuity and the whole sum used to purchase the annuity. G. L., c. 32, § 10 (3).

It follows, of course, that the board must determine the retirement allowance in each case.

ATTORNEY-GENERAL — ADVICE TO COUNTY COMMISSIONERS — REPRESENTATIVE DISTRICTS — ORGANIZATION OF COMMISSIONERS FOR THE PURPOSE OF REDISTRICTING.

It is doubtful whether county commissioners are entitled to seek opinions of the Attorney-General, but when they are acting in connection with the division of the State into representative districts he may properly render a personal opinion with respect thereto.

Mode of organization of county commissioners, including the filling of vacancies, and of proceedings for the purpose of establishing representative districts, discussed.

To the County Commissioners of Hampden County. 1926 June 23.

You request my opinion as to the manner in which your board should be organized for the purpose of dividing Hampden County into representative districts. There is serious doubt whether county commissioners fall within that class of "state departments, officers and commissions" to whom the Attorney-General is the duly constituted legal advisor. See G. L., c. 12, § 3. However, inasmuch as in this instance you are, while acting only within your county, participating, nevertheless, in the constitutional process whereby the entire State is divided into districts for the election of representatives, who are State officers, it seems to me that I may properly express to you my personal views, for such weight as you may see fit to ascribe to them. *Cf.* V Op. Atty. Gen. 9, 12.

Mass. Const. Amend. XXI assigns the first Tuesday of August, next, as the date at which the county commissioners are to assemble and proceed to make the apportionment. Whatever action you may take prior to that date will be unofficial, preliminary and without any legal significance. It is the board of commissioners as it may be constituted when it assembles on that date which will exercise the power delegated by the Constitution.

You state that there are at present two commissioners and two associate commissioners, there being a vacancy, created by death, in the office of one commissioner. If, prior to the first Tuesday of August, you see fit to fill that vacancy in the manner authorized by G. L., c. 54, § 144, a different state of affairs will then exist from that upon which

your present questions are predicated. It is therefore not possible to give at this time an unqualified reply to your inquiry.

G. L., c. 34, § 12, provides as follows: —

> In case of a vacancy, inability to attend, or interest in a question before the commissioners, or if any part of a highway relative to which they are to act lies within the town where a commissioner resides, the members qualified to act shall give notice to one or both the associate commissioners, as the case may be, who shall then act as commissioners. They may, however, receive a petition, issue an order of notice thereon, or take a recognizance, whenever two members are competent to act. If they cannot otherwise organize, residence shall not disqualify.

It is my understanding of the legislative intent that the board should, whenever it assembles, be composed of three members present and participating in its deliberations. When there is an associate commissioner able to attend and not disqualified, no two commissioners should undertake alone to organize and act. If there is a single vacancy, within the meaning of the above section, among the commissioners, the remaining two commissioners should summon one of the associate commissioners to attend, and, assuming that both associate commissioners are able to attend and not disqualified, have absolute power to choose which one to call in attendance. The board should never be composed of more than three persons. Only in case there is only one commissioner able to act, should both associate commissioners act as commissioners.

The foregoing will perhaps cover most of the contingencies as to membership which are likely to arise. I ought perhaps to say, in addition, that while the remaining commissioners may perhaps feel that, in view of the importance of their duties with respect to redistricting, they ought to take the necessary steps to elect a third commissioner under G. L., c. 54, § 144, I nevertheless find nothing in the Constitution or statutes which leads me to believe that they are any more bound to do so than they would be if confronted only by the ordinary routine duties of their office.

Commissioner of Public Health — Duties in Relation to Buildings of the Norfolk State Hospital.

Under St. 1926, c. 391, the Commissioner of Public Health is empowered to condition and equip the Norfolk State Hospital but not to erect new buildings.

To the Commissioner of Public Health. 1926 July 2.

You request my opinion as to whether or not, under the provisions of St. 1926, c. 391, § 4, you are limited to the repair and equipment of existing buildings at the Norfolk State Hospital, or whether you are allowed to make additions.

Said section 4 reads as follows: —

> For the purpose of providing immediate care and treatment for persons suffering from cancer, the department is hereby authorized to make use of the Norfolk state hospital and may suitably condition and equip the same. Subject to appropriation, there may be expended for the purposes of this section during the current fiscal year a sum not exceeding one hundred thousand dollars.

It is my opinion that by this section the Legislature did not intend that you should proceed to erect any new buildings, but that you should proceed to use the buildings as they now exist at the hospital. However, I do not believe that you are precluded from connecting the administration building with one of the pavilions if it is a fact, found by you after study, that this is necessary in order suitably to condition and equip the hospital properly to care for and treat persons suffering from cancer.

National Guard — Band — Civilian Function — Uniform — Payment.

The commanding officer of a battalion has no right to "order" its band to play at a civilian function. But if such band has received special permission of its company commander or other competent authority, it may play at a civilian function wearing the uniform of the National Guard, provided such service is rendered by the personnel of said band upon their own voluntary venture and enterprise and not by virtue of an official order or command; and provided further, that compensation for such service, if any, is not to be paid from any State or Federal fund or appropriation.

To the Adjutant General. 1926 July 8.

You request my opinion as to the right of the commanding officer of a battalion of infantry to order the band of said battalion to play at a civilian function, wearing the uniform of the National Guard. You state that the particular question applies to the band of the 372nd Infantry, which does not rate a band, but certain members of the headquarters company who are musicians have provided their own instruments and have volunteered to act as a band for the battalion. These men are regularly enlisted men in the headquarters company and are not rated as bandsmen.

The law of this Commonwealth governing the organization and duties of the militia is found in G. L., c. 33, as amended by St. 1924, c. 465. Section 15 vests in the commander-in-chief the authority to prescribe in orders the organization of the Massachusetts Volunteer Militia, the designation and location of all units, and the numbers, titles, grades and duties of all officers and enlisted men, as he deems the interest of the service demands; provided, that the organization shall not conflict with the laws of the United States relating to the organized militia. Section 79 (*b*) provides: —

> The national guard of Massachusetts shall consist of such regiments, corps or other units as the commander-in-chief may from time to time authorize to be formed, all to be organized in accordance with the laws of the United States affecting the national guard and the regulations issued by the secretary of war.

In the absence of an order of the commander-in-chief or of a regulation of the Secretary of War designating the play-

ing at civilian functions as a part of the duty of militia bands or bands of the National Guard, I am of the opinion that the commanding officer of the battalion has no right to "order" the band in question to play at a civilian function.

There remains to be considered the question as to whether or not this band can lawfully play at a civilian function voluntarily while wearing the uniform of the National Guard. The use of the uniform of the United States army, navy, marine corps, revenue cutter service, coast guard and national guard is strictly regulated. See St. 1924, c. 219. St. 1924, c. 465, § 112, provides that the uniforms, arms, equipments and other property provided by the Commonwealth shall be used only for military purposes, under regulations prescribed by the commander-in-chief, who shall provide how and where such property shall be kept and used, and shall be returned when ordered by the commander-in-chief. Playing at civilian functions cannot ordinarily be said to be "military purposes," but section 119 provides that "no soldier shall wear or use, except upon military duty or by special permission of his company commander or other competent authority, any uniform or other article of military property belonging to the commonwealth." Section 112 must be construed and interpreted in the light of section 119. It is a general principle of statutory construction that a body of laws enacted at one time is to be construed so as to constitute, so far as practicable, an harmonious entity.

I am accordingly of the opinion that if the band in question has received special permission of its company commander or other competent authority it may play at a civilian function, wearing the uniform of the National Guard, provided such service is rendered by the personnel of said band upon their own voluntary venture and enterprise and not by virtue of an official order or command; and provided further, that compensation for such service, if any, is not to be paid from any State or Federal fund or appropriation.

Forest Warden — Dismissal.

A forest warden appointed by a board of selectmen of a town, which appointment has been approved by the State Forester, may be removed or dismissed at any time at the pleasure of the board of selectmen which appointed him. The board of selectmen can thereafter appoint another person as forest warden, but such appointment will not be effective unless approved by the State Forester.

To the Commissioner of Conservation. 1926 July 12.

You request my opinion as to whether or not a forest warden is subject to dismissal at any time at the pleasure of the board of selectmen which appoints him.

G. L., c. 48, § 8, as amended by St. 1921, c. 274, provides as follows: —

> The mayor in cities and, except as provided in section forty-three, the selectmen in towns shall annually, in January, appoint a forest warden, and forthwith give notice thereof to the state forester, in this chapter called the forester. Such appointment shall not take effect unless approved by the forester. When so approved notice of the appointment shall be given by the mayor or selectmen to the person so appointed. Whoever having been duly appointed fails within seven days after receipt of such notice to file with the city or town clerk his acceptance or refusal of the office shall, unless excused by the mayor or selectmen, forfeit ten dollars. The same person may hold the offices of tree warden, selectman, chief of fire department and forest warden. Upon the failure of the mayor of a city or the selectmen of a town to make such appointment in the month of January, the forester shall notify the mayor or selectmen so to do, and if the mayor or selectmen fail to comply within fourteen days after receipt of such notice, the forester may appoint as forest warden in such city or town a suitable person, who shall be a resident thereof.

Under this statute the power of appointment of the forest warden is vested in the board of selectmen in towns, but such appointment does not become effective unless approved by the State Forester. The power of removal is incident to the power of appointment. The general rule is, that where a power of appointment is conferred in general terms and without restriction the power of removal in the discretion and at the will of the appointing power, and without notice or a hearing, is implied and always exists, unless

restrained and limited by some other provision of law or by appointment for a fixed term.

If the exercise of the power of appointment is subject to the approval of another board or officer, this does not invest the officer or board whose approval is required with the power to appoint or make it or him responsible for the acts of the appointee, and such board or officer, by virtue of the requirement of its approval of appointment, is not vested with any power to remove. The power of removal remains with the appointing power, in this case the board of selectmen.

The statute does not provide for a fixed term for forest wardens, nor is there any express limitation upon the power of removal of such appointee, nor is there any evidence that the forest warden is a civil service appointee. I am accordingly of the opinion that a forest warden appointed by a board of selectmen of a town, which appointment has been approved by the State Forester, may be removed or dismissed at any time at the pleasure of the board of selectmen which appointed him. The board of selectmen could thereafter appoint another person as forest warden. Such appointment, however, would not be effective unless approved by the State Forester.

LICENSE TO MAINTAIN GARAGE AND KEEP GASOLINE — STREET COMMISSIONERS OF BOSTON — STATE FIRE MARSHAL — APPEALS — TIME FOR APPEAL.

No appeal to the State Fire Marshal lies from the granting of a garage permit by the street commissioners of the city of Boston, under St. 1913, c. 577, and St. 1914, c. 119.

Appeals to the State Fire Marshal from the granting of gasoline licenses under authority delegated by the Marshal must be taken within a reasonable time.

What constitutes a reasonable time is ordinarily a question of fact, but may under some circumstances be dealt with as a question of law. A delay of a month and a half after the issuance of the license, of ten days after the commencement of the work, and of seven days after actual notice to the appellant, may not be unreasonable.

To the State Fire Marshal. 1926 July 23.

You have requested my opinion as to the extent of your authority to entertain and decide an appeal from a decision of the board of street commissioners of the city of Boston granting a permit to erect a public garage and to keep, store and sell three thousand gallons of gasoline in an underground tank upon the garage premises, under the following circumstances:

The hearing before the street commissioners upon the petition for the permit was duly held. The charitable corporations which now appeal from the granting of the permit, having their premises upon the opposite side of the street and therefore not being abutters (*Foss* v. *Wexler*, 242 Mass. 277, 281), were given no notice of the pendency of the application for the permit. The permit was granted May 15, 1926. Work on the premises, pursuant to the permit, was begun June 21, 1926, and on June 24, 1926, an officer of one of the appellants for the first time received actual information that the building activities which had been begun contemplated the erection of a public garage. After communications back and forth between various officers of the appellants and conferences between the appellants and their attorney, the appeal was filed at the office of the Fire Marshal on July 1, 1926. Between the dates of June 21st and July 1st the permittee incurred expense in excess of $2,000, of which $1,124.40 represented the cost of surveying,

labor and the work of carpenters, and the balance represented a commission paid upon the negotiation of a construction loan. (I find nothing either in your letter or in the testimony making certain beyond all doubt whether the construction loan was dependent upon the work actually going through, and whether this commission is or is not an amount which the permittee will be out of pocket even if the permit is finally refused.)

Although but a single permit was granted by the street commissioners and a single appeal therefrom was filed, the appeal comes before you in contemplation of law as though two separate permits had been granted, one for the erection and maintenance of a garage and one for the storage and sale of gasoline; the first such permit being founded upon the authority of St. 1913, c. 577, as amended by St. 1914, c. 119, and the second being founded upon the authority delegated to the street commissioners by the Fire Marshal, pursuant to G. L., c. 148, §§ 14, 15, 28, 30 and 31.

As to so much of the permit as is founded upon the 1913 statute, the authority of the board of street commissioners is "directly and exclusively vested in them" (*Foss* v. *Wexler, supra*, 279), and you have, in my opinion, no authority to entertain an appeal therefrom. There is nothing in your letter to indicate that the premises are located in a residential district, and that you therefore have the appellate power conferred by the Boston zoning act. Section 3, subsection 9. See *Marcus* v. *Commissioner of Public Safety*, 255 Mass. 5. It follows that although the decision of *General Baking Co.* v. *Street Commissioners*, 242 Mass. 194, is entirely applicable to this aspect of the permit, it is not really necessary to invoke the doctrine of that case, for the more fundamental reason that no appeal to the Fire Marshal from the decision of the street commissioners is authorized, expressly or impliedly, by St. 1913, c. 577, as amended. Indeed, the decision in the General Baking Company case, even though possibly reaching the same result, would have had to have been based on somewhat different reasons if

it had been thought that the decision of the street commissioners was subject to review upon an appeal.

As to so much of the permit, however, as relates to the keeping and storing of gasoline, your authority to review upon appeal is unquestioned (G. L., c. 148, § 45), and I assume that the appellants come reasonably within the description of persons "aggrieved." Neither in the general laws nor in any rules or regulations promulgated by your department is to be found any provision regulating the time within which an appeal under this section must be taken. It must, therefore, be taken within a reasonable time, and, if taken within a reasonable time, it is, in my opinion, a matter of indifference whether between the date of the permit and the date of the appeal actual expense of construction has been incurred by the permittee. The holder of the permit has no absolute right to rely, in incurring such expense, upon the permit until the time for appeal is passed.

What constitutes a reasonable time is ordinarily a question of fact, but may be dealt with as a question of law where no room for dispute remains. *Orr* v. *Keith*, 245 Mass. 35, 39. In the present case the appeal was filed a month and a half after the issuance of the permit, but within ten days after the beginning of actual work on the ground and within seven days after actual knowledge of the nature of the work was brought home to a responsible representative of one of the appellants. While the primary question is not the amount of expenditure made by the holder of the permit in purported reliance upon his permit, but rather what was a reasonable time within which the appellant should act under all the circumstances, the fact that no obvious, elaborate and expensive construction was being carried on by the holder of the permit may be considered as one of the circumstances under which the reasonableness of the appellant's conduct is to be determined. I cannot advise you that, as matter of law, the appeal was or was not filed within a reasonable time. This question remains a question of fact for your determination, and if you determine that the

appeal was seasonably filed, you then have authority to decide whether or not so much of the permit as relates to the storage and sale of gasoline should be denied.

CIVIL SERVICE — VETERAN — EXTENT OF PREFERENCE IN APPOINTMENT — EXTENT OF PREFERENCE AS TO CONTINUOUS EMPLOYMENT OR REINSTATEMENT.

A veteran of the Civil War is entitled to absolute preference in appointment over all persons not veterans.

Other veterans are entitled only to preference in certification upon the eligible list for appointment.

When men are laid off, for lack of work or other temporary cause, a veteran is not entitled to preference in reinstatement ahead of others similarly laid off.

To the Commissioner of Civil Service. 1926 July 26.

You ask my opinion upon certain questions relative to the extent of the preference given to veterans by G. L., c. 31, § 24, and related provisions.

A draft of a reply to these questions was prepared shortly after receiving your letter. It seemed to me, however, that if the pending suit to which your letter refers, brought by Alphonse Bois against the officials of Fall River, were to be decided speedily by the full bench of the Supreme Judicial Court, I ought not to seek to anticipate by an opinion the outcome of that case, with its manifest bearing upon your questions. Upon making inquiry of the clerk of courts at Taunton I find that the bill of exceptions of the defendants in that case, filed after the decision of a single justice that the writ of mandamus should issue in accordance with the veteran's contention, was filed one day late. What effect this may have upon the progress of the case and whether it may prevent its being heard and decided by the full bench, I do not undertake to predict. But it is apparent that it will be some time before any such decision is rendered, and that in the meantime you may require my advice upon these questions for its bearing upon your own duties. The situation is in this respect different from that which is referred to in the opinion of my predecessor (VI Op. Atty. Gen. 438)

declining to give an opinion upon a controversy pending in the courts between third parties, where the inquiry bore no direct relation to the duties of the officer by whom it was made.

You will perceive that the answers to your questions are not in accord with the views which your letter attributes to various justices of the Supreme Judicial Court sitting at *nisi prius*. I do not feel that I can adhere to those views in the absence of a compelling decision by the full court. I must leave to you the question of what weight you will give to this advice under these circumstances.

1. You ask whether a veteran, within the meaning of G. L., c. 31, § 24, is entitled to a preference in appointment or employment in the service.

In *Corliss* v. *Civil Service Commissioners*, 242 Mass. 61, it was held that under G. L., c. 31, § 23, applying to positions classified under the civil service, the preference given to veterans extends only to priority upon the eligible lists, and does not entitle a veteran to preference in appointment, except so far as the position of the veteran upon the eligible list may of itself tend to effectuate such preference.. The court said, at page 64: —

> It is obvious that the statute contains no provision which compels the appointment and employment of a veteran. While he is given preference on the certified lists submitted by the civil service commission, it seems apparent that the statute leaves to the appointing power the right to exercise his discretion in selecting an appointee therefrom.

The conclusion reached in the decision from which these words are quoted flows naturally from the fact that the Legislature omitted from Gen. St. 1919, c. 150, and from the corresponding provisions of the General Laws relating to veterans' preference, all expressions which might be thought to confer a right to preferential appointment or employment. The veterans to whom R. L., c. 19, § 21, had applied had been given by the express words of that section a right to be "preferred in appointment or employment to all per-

sons not veterans." The preference thus given to veterans of the Civil War was expressly preserved by Gen. St. 1919, c. 150, § 5. See *Corliss* v. *Civil Service Commissioners, supra*, p. 64.

G. L., c. 31, § 23, was amended by St. 1922, c. 463, entitled "An Act providing a preference to disabled veterans in civil service appointments." That act provided expressly that "a disabled veteran shall be appointed and employed in preference to all other persons, including veterans," while leaving unchanged the words of section 23 as applying to veterans not disabled. Another illustration is thus furnished of the fact that whenever it has been intended to confer a direct right to preference in appointment the Legislature has used words plainly calculated to bring about that result.

The provisions of G. L., c. 31, § 24, relating to the labor service of the Commonwealth and of cities and towns, differ in no presently significant respect from the provisions of G. L., c. 31, § 23, relating to positions classified under the civil service. The name of the veteran is to be placed on the eligible list for the place 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, as was the case in *Corliss* v. *Civil Service Commissioners, supra*, there are certified, pursuant to the civil service rules, names to a greater number than the number of vacancies, I am of the opinion that the person whose duty it is to employ the men called for may select for employment any of the men whose names are so certified. He is not required to give preference to any veteran.

2. You ask whether a veteran is entitled to a preference in reinstatement, when laid off for lack of work or any other temporary cause, such as the lack of money.

The answer to this question is governed in spirit by the answer given to the foregoing question. The statutes con-

tain no language dealing expressly with this problem. There seems, however, to be no good reason for assuming that the Legislature meant to confer an absolute right to preference as to continuous employment upon men to whom it gave no absolute right to preference as to initial employment. Statutes extending special privileges are to be strictly construed. *Phillips* v. *Metropolitan Park Commission*, 215 Mass. 502.

In *Ransom* v. *Boston*, 193 Mass. 537, it was held that a veteran of the Civil War employed in the labor service of the city of Boston, who had been refused further employment although there was work to be done which he was able and ready to do, was entitled to the issuance of a writ of mandamus to "compel the respondents to perform the public duty to continue his employment which rests upon them." There is language in the decision in that case and in the case of *Ransom* v. *Boston*, 192 Mass. 299, indicating that the court considered that the veteran was entitled to preference as to continuous employment. It is to be borne in mind, however, that the evidence of the legislative intent to confer such a preference was to be found in the express words of R. L., c. 19, § 21 — "shall be preferred in the appointment and employment"; words which are not to be found in the present law, and the omission of which it may be assumed was intentional and advised.

It is therefore my opinion that a veteran is not entitled to a preference under the circumstances referred to in your second question.

ARMORY — USE OF ARMORY LAND FOR RAISING MONEY.

Under existing law pertaining to armories, military authorities in charge have no right to permit the use of armory land for the purpose of regularly engaging in the business of parking automobiles for hire, even though the purpose is to raise funds for the benefit of the military units stationed in the armory.

To the Adjutant General. 1926 July 28.

You request my opinion as to the right of the military authorities to permit the use of Commonwealth land adjoining an armory for the purpose of raising money for the company funds of the units stationed in the armory. You state that the specific instance is the use of the large field owned by the State, adjoining the Commonwealth Armory, for parking purposes, with the object of raising funds as aforesaid. It does not appear to what use such funds are to be put; that is, whether they are to be devoted to "public" or "private" purposes.

G. L., c. 33, § 52, as amended by St. 1924, c. 257, provides, in part, as follows: —

> Armories provided for the militia shall be used by the militia for the military purposes or purposes incidental thereto designated by the commander-in-chief.

The statute permits military units stationed in an armory to use the armory, without charge, for social activities or athletics, subject to the rules and regulations promulgated by the military custodian of such armory and approved by the Governor and Council, provided such use does not interfere with its military use. The statute expressly sets forth the purposes for which armories may be used temporarily, all of which purposes are public in their nature. The use of an armory as a parking place for privately owned vehicles, for hire, does not appear among the uses expressly permitted.

Armories are provided from funds raised by taxation, and are to be used for public purposes only. Any use other than for the military purpose for which they are created should be closely scrutinized to determine whether such use is public. If the principal purpose of the use of an armory is

private, an incidental benefit to the public will not alter the fact that the use is for private rather than for public purposes and hence is not authorized by the statute.

There can be no distinction between the armory building itself and the land to which it belongs. The term "building" includes the real estate on which it is situated, unless the general meaning is modified by the language of the context. Accordingly, the same rule must be applied to the "armory land" adjoining the armory as pertains to the structure itself.

The question, in its last analysis, is one of taxation. The principle of law is definitely established that taxes can only be laid for public purposes. The power to tax is based upon and derived from the inherent purposes of the State as a social organization that is to exist for the benefit of all. It accordingly follows that in the absence of constitutional permission to the contrary, taxation must be for public as distinguished from private purposes. Accordingly, a serious question is presented as to whether or not the State may engage in any enterprise of a private nature, especially if the carrying on thereof involves the use of public funds or other public property. Attempted legislation expressly authorizing the use of public funds in the carrying on of enterprises of a private nature or in assisting private business has generally been held invalid. See *Lowell* v. *Boston*, 111 Mass. 454; *Opinion of the Justices*, 155 Mass. 598; *ibid.*, 182 Mass. 605; *ibid.*, 204 Mass. 607; *ibid.*, 211 Mass. 624; *Byfield* v. *Newton*, 247 Mass. 46, and cases cited.

It has been quite generally recognized that it would be a perversion of the function of government for the State to enter as a competitor into the field of industrial enterprise with a view to profit, it being obvious that in such case the private competitor would be compelled to pay taxes for the establishment and maintenance of a rival. This is contrary to our theory of government. Public money can only be used for a public purpose. In time of war, public exigency, emergency or distress the providing of food and

other common necessaries of life is a public function. See Mass. Const. Amend. XLVII. Even the police power of the State to regulate a business does not include the power to engage in carrying it on.

Obviously, the facts presented in your question are to be differentiated from the right of the Commonwealth or a municipality to sell or lease property no longer needed for the public purpose for which it was acquired.

The statute under consideration does not authorize armories to be used for any *private* purpose whatever. See VI Op. Atty. Gen. 72.

I am accordingly of the opinion that under the existing law pertaining to armories the military authorities have no right to permit the use of armory land for the purpose of regularly engaging in the business of parking automobiles for hire, even though the purpose is to raise funds for the benefit of the military units stationed in the armory.

Burial Permit — Death Certificate — Medical Examiners.

When a death certificate does not comply with the requirements set forth in G. L., c. 114, § 45, as amended by St. 1922, c. 176, in that it does not properly state the cause of death, a town clerk or board of health may properly refuse to issue a burial permit. The same requirements apply to certificates of medical examiners in this regard as are required of other officials.

The medical examiner can certify as to the cause and manner of death to the best of his knowledge and belief.

A medical examiner has no right to delay filing the certificate until judicial inquiries have been concluded and certified.

To the Secretary. 1926 July 29.

You request my opinion as follows: —

1. Can a town clerk or board of health refuse to issue a burial permit as provided in G. L., c. 114, § 45, as amended by St. 1922, c. 176, when the death certificate does not properly state the cause of death?

2. Are medical examiners any exception to the provisions of law which require a death certificate to be filed before a burial permit is issued, which contains a statement of the cause of death, so stated that it may be classified in accordance with the International Classification of Causes of Death, as required by G. L., c. 46, § 9, and c. 38, § 7?

3. Does the cause of death required by G. L., c. 38, § 7, mean anything more than what, in the opinion of the medical examiner, is the cause and manner of death, or can he delay filing the certificate referred to until the judicial inquiries have been concluded and certified.

1. G. L., c. 46, § 1, provides that each town clerk shall receive or obtain and record in separate columns the following facts relative to . . . deaths in his town: —

In the records of death, date of record, date of death, name of deceased, sex, color, condition (whether single, widowed, married or divorced), supposed age, residence, occupation, place of death, place of birth, names and places of birth of the parents, maiden name of the mother, disease or cause of death, defined so that it can be classified under the international classification of causes of death, place of burial, name of the cemetery, if any, and if deceased was a married or divorced woman or a widow, her maiden name and the name of her husband.

The above provisions of law are mandatory. Section 9 requires a physician or registered hospital medical officer forthwith, after the death of a person whom he has attended during his last illness, at the request of an undertaker or other authorized person or of any member of the family of the deceased, to furnish for registration a standard certificate of death, stating to the best of his knowledge and belief the name of the deceased, his supposed age, the disease of which he died, defined as required by section 1, where the disease was contracted, the duration of his last illness, when last seen alive by the physician or officer and the date of his death. A penalty of fifty dollars is imposed upon any physician or any such officer neglecting or refusing to make such certificate or making a false statement therein.

G. L., c. 114, § 45, as amended by St. 1922, c. 176, provides that no undertaker or other person shall bury or otherwise dispose of a human body in a town until he has received a permit from the board of health or its agent appointed to issue such permits, or, if there is no such board, from the clerk of the town where the person died. It is expressly provided that: —

No such permit shall be issued until there shall have been delivered to such board, agent or clerk, as the case may be, a satisfactory written statement containing the facts required by law to be returned and recorded, which shall be accompanied, in case of an original interment, by a satisfactory certificate of the attending physician, if any, as required by law, or in lieu thereof a certificate as hereinafter provided. If there is no attending physician, or if, for sufficient reasons, his certificate cannot be obtained early enough for the purpose, or is insufficient, a physician who is a member of the board of health, or employed by it or by the selectmen for the purpose, shall upon application make the certificate required of the attending physician. If death is caused by violence, the medical examiner shall make such certificate. The board of health or its agent, upon receipt of such statement and certificate, shall forthwith countersign it and transmit it to the clerk of the town for registration. The person to whom the permit is so given and the physician certifying the cause of death shall thereafter furnish for registration any other necessary information which can be obtained as to the deceased, or as to the manner or cause of the death, which the clerk or registrar may require.

It is to be noted that the town clerk or board of health is expressly required not to issue a burial permit unless a "satisfactory" written statement "containing the facts required by law to be returned and recorded," accompanied by a "satisfactory" certificate of the attending physician, if any, as required by law, has been delivered to such board, agent or clerk, as the case may be. I am accordingly of the opinion that when the death certificate does not comply with these requirements, in that it does not properly state the cause of death, a town clerk or board of health may properly refuse to issue a burial permit, and I so answer your first question.

2. The duties of medical examiners are set forth in G. L., c. 38, § 6. It is therein provided that "medical examiners shall make examination upon the view of the dead bodies of only such persons as are supposed to have died by violence." Section 7 requires that medical examiners "shall in all cases certify to the town clerk or registrar in the place where the deceased died his name and residence, if known; otherwise a description as full as may be, with the cause and manner of death." G. L., c. 114, § 45, as amended by St.

1922, c. 176, governing the issuance of burial permits, expressly provides that "if death is caused by violence, the medical examiner shall make such certificate." It accordingly follows that the same requirements apply to certificates of medical examiners in this regard as are required of other physicians, and I so answer your second question.

3. G. L., c. 38, § 7, requires that the medical examiner in making his certificate to the town clerk or registrar, as therein required, shall certify "the cause and manner of death." I am of the opinion that this cannot be construed to mean anything more than that the medical examiner certifies the cause and manner of death to the best of his knowledge and belief. Obviously, he can do no more than that at the time. Further investigation may disclose that the cause and manner of death were different. The law provides the proceedings governing inquests and what is required in connection therewith (G. L., c. 38, §§ 8–13, as amended by St. 1923, c. 362, § 53). I am accordingly of the opinion that a medical examiner has no right to delay filing the certificate referred to until judicial inquiries have been concluded and certified, and I so answer your third question.

LOCAL BOARDS OF HEALTH — BAKERIES — REVOCATION OF APPROVAL OF BUILDING PLANS AND EQUIPMENT — APPEAL.

Under G. L., c. 111, § 48, no appeal lies to the Department of Public Health or to the Superior Court unless a permit has been refused.

The health department of the city of Boston cannot revoke its approval of a new bakery, granted under G. L., c. 111, § 48, if the owner or licensee has acted upon the strength of the permit and in good faith has incurred expense thereunder, where it does not appear he has violated the laws of the Commonwealth.

To the Commissioner of Public Health. 1926 July 31.

You request my opinion as to whether or not the health department of a city, having approved the building plans and equipment proposed to be used in the establishment of a new bakery, may subsequently revoke such approval if

construction work has commenced between the time of granting such approval and revoking the same.

G. L., c. 111, § 48, provides: —

> No new bakeries shall be established unless the building plans and equipment proposed to be used have been approved by the local board of health. The board shall refuse a permit for such bakery if the building and equipment do not comply with sections thirty-nine to forty-five, inclusive, and sections two to six, inclusive, of chapter ninety-four and rules and regulations made thereunder, provided that any party in interest may appeal to the department or to the superior court. Said department or court may affirm, reject or modify the findings of the board, and the said board shall thereupon proceed in accordance with the order of the court or department.

It would seem that under said section no appeal would lie to the Department of Public Health or to the Superior Court unless a permit was "refused." It was evidently the intention of the Legislature that if the plans and equipment proposed to be used met with the approval of the local board of health, a permit should be granted. The board is only empowered to refuse a permit for a new bakery if the building and equipment do not comply with sections 39 to 45, inclusive, and sections 2 to 6, inclusive, of chapter 94, and rules and regulations made thereunder. There is no provision in the statute authorizing the board to revoke such a permit if it has been granted and acted upon. Where such power exists, it is usually conferred in express terms.

While permits respecting purely personal privilege or dependent upon governmental permission may be revoked for sufficient legal reason, even where the power to revoke is not expressly conferred, yet where, as in the present case, a regulation of the right of ownership and use of land is involved, a permit lawfully granted and acted upon cannot be revoked unless the power so to do is conferred in express terms.

In *General Baking Co.* v. *Street Commissioners*, 242 Mass. 194, 196, the Supreme Judicial Court of this Commonwealth says, at pages 196–7: —

The erection and use of buildings for innocuous purposes cannot ordinarily be left to the untrammeled and unregulated discretion of local officers. By analogy of reasoning the taking away of a permit once granted to make valuable and expensive improvements upon land, without hearing and without the statement of any grounds, in the absence of express statutory authority transcends the power of local boards. . . . When permission is obtained, the landowner reasonably may infer that, so long as he complies with the requirements under which the privilege has been granted, he may claim protection until further legislation impairs his rights. It follows that a permit of this nature lawfully granted and acted upon by the landowner cannot be revoked.

See also *Lowell* v. *Archambault,* 189 Mass. 70, and cases cited.

This statement of the law applies with equal force to the present case, and I am accordingly of the opinion that the health department of the city of Boston cannot revoke its approval of a new bakery granted under G. L., c. 111, § 48, if the owner or licensee has acted upon the strength of the permit and in good faith has incurred expense thereunder, where it does not appear that he has violated the laws of the Commonwealth.

Compulsory Automobile Liability Security — Insurance Policies, Binders and Endorsements.

A definite basic form of liability insurance policy is required by G. L., c. 90, § 34A, but to this endorsements of more extended coverage may be added.

The issuance of both a policy of liability insurance and a binder which together cover the total period of registration of a motor vehicle may constitute a compliance with the provisions of St. 1925, c. 346, as amended.

To the Commissioner of Insurance. 1926 August 19.

You have requested my opinion upon certain questions relative to motor vehicle liability insurance under the provisions of St. 1925, c. 346, as amended by St. 1926, c. 368, and of the General Laws.

1. Your first question is as follows: —

May the Commissioner lawfully approve a form of motor vehicle liability policy under G. L., c. 175, § 113A, which covers against liability for death or personal injuries arising out of the operation of a motor

vehicle on the ways of this Commonwealth, and which also covers against liability for death or personal injury occurring elsewhere, and/or against liability for damage to another's property and/or against loss to the insured car caused by collision, assuming that the limited coverage demanded by St. 1925, c. 346, is separately stated in the policy and is granted at the rate determined by the Commissioner under St. 1925, c. 345, and that the premium therefor is separately stated in the policy?

A motor vehicle liability policy is defined by G. L., c. 90, § 34A (enacted by St. 1925, c. 346, § 2, as amended), its requisite provisions enumerated and a definite basic form of policy is set forth. No policy whose coverage is less in extent or whose terms are less favorable than the minimum requirements of the section can be approved, but it does not appear to have been the intention of the Legislature to prohibit the combination in one policy of the required provisions with other lawful ones more extensive in character, when no confusion with the required provisions of the statutory "motor vehicle liability policy" arises. G. L., c. 175, § 113A (enacted by St. 1925, c. 346, § 4, as amended), provides that the motor vehicle liability policy may contain other provisions than those required by the section, when the same are not inconsistent with the terms of the chapter or with G. L., c. 90, § 34A, and are approved by the Commissioner.

I answer your first question in the affirmative.

2. Your second question is: —

May the Commissioner lawfully approve a form of rider or endorsement under said section 113A or 192 to be attached to a motor vehicle liability policy covering only against liability for death or personal injuries arising out of the operation of a motor vehicle on the ways of the Commonwealth, which form of rider or endorsement extends the coverage of the policy to liability for death or personal injuries arising from such operation elsewhere than on said ways and/or liability for damage to another's property and/or against loss or damage by collision?

To extend the coverage of a motor vehicle liability policy by adding, by way of a rider or endorsement, new terms as to additional coverage of a lawful character not inconsistent with the required statutory provisions, and not in such a

form as to be confused therewith, does not appear to be prohibited by the terms of the statutes. The same considerations as to legislative intent apply in relation to the extension of coverage by endorsement upon the statutory motor vehicle liability policy as are applicable to extended coverage in an original policy, raised by your first question. Riders are permitted to be used with the motor vehicle liability policy when not in conflict with the provisions of G. L., c. 175, and c. 90, § 34A. An extended coverage, such as is indicated in your question, is not of such a character as to be in conflict with such statutory provisions.

I answer your second question in the affirmative.

3. Your third question is: —

> May the Commissioner lawfully approve under said section 113A, as a "form" of "motor vehicle liability policy," a form of automobile liability policy not containing the provisions required by said section, but bearing a form of rider or endorsement which incorporates therein the said provisions, or does said section and St. 1925, c. 345, § 4, contemplate and require that only a distinct basic form of policy — as distinguished from a form of policy bearing an amendatory rider or endorsement — containing said provisions shall be approved by the Commissioner?

I am of the opinion that it was the legislative intent, as manifested in the provisions of St. 1925, c. 345, as amended, to require a definite and distinct policy form embodying in itself the terms set forth in the definition of "motor vehicle liability policy" in G. L., c. 90, § 34A (enacted by St. 1925, c. 346, § 2, as amended), that such an original basic form of policy is referred to in G. L., c. 175, § 113A (enacted by St. 1925, c. 346, § 4, as amended), and that a policy form originally containing other provisions brought within the statutory terms by a rider is not such a form of policy as the Commissioner is empowered to approve. The word "policy," as used by the Legislature quite generally throughout St. 1925, c. 346, as amended, appears to have a definite and limited meaning, referring specifically to the policy or binder forms themselves rather than to the contract of insurance as such, evidenced thereby. G. L., c. 175,

§113A, refers to a specific form of basic policy defined in G. L., c. 90, § 34A, and its language as used is not broad enough to cover a contract of insurance prepared, as your question indicates, by a modification of an older form of policy, not the defined "motor vehicle liability policy," by an endorsement which creates new terms similar to those of the new statutory type.

I answer your third question to the effect that the approval by the Commissioner of Insurance, as a form of motor vehicle liability policy, of a policy and an endorsement such as you describe in the question is not within the powers vested in him by the statutes.

4. Your fourth question is as follows: —

> May the Commissioner lawfully approve under said section 113A or 192, a form of rider or endorsement designed to be attached to the present form of automobile liability policies issued in 1926 and to incorporate therein the provisions required by said section 113A, or, has he no authority to approve such a rider or endorsement on the ground that it is not to be attached to a "motor vehicle liability policy" as defined in said chapter 346, and that the provisions of said section 192 relative to riders and endorsements apply only to riders and endorsements to be attached to policies, the form of which the Commissioner is by law required to approve?

I am of the opinion that the provisions of G. L., c. 175, § 192, do not apply to the approval of endorsements to be attached to policies which themselves do not require approval. As stated in my answer to your third question, the approval of an old policy bearing an endorsement couched in the language of the motor vehicle liability policy and modifying the original policy terms may not be approved by the Commissioner as a "motor vehicle liability policy."

5. Your fifth question, which is in three parts, is as follows: —

> (*a*) If in your opinion the Commissioner may lawfully approve a form of rider or endorsement as stated in question 4, may a company attach to an automobile liability policy issued in 1926 and expiring in 1927

before December 31st, an approved form of rider or endorsement amending the contract to incorporate therein the provisions required by said section 113A, and concurrently with the attaching of such rider or endorsement may it issue to the applicant for registration a binder on a form approved under said section 113A, insuring him in respect to the operation of the motor vehicle from the date of expiration of said policy in 1927 to December 31, 1927?

(*b*) May a company lawfully issue to an applicant for registration for the year 1927 a motor vehicle liability policy expiring in 1928 before December 31st, and in connection with the registration for the year 1928 may it issue to the applicant a binder under said section 113A, insuring him in respect to the operation of the car until December 31, 1928, from the date of expiration of the policy?

(*c*) Or, does said section 34A permit or require the issuance of a certificate in respect to a policy *or* a binder, and not in respect to both, and should therefore any such amendatory rider or endorsement referred to in (*a*) *supra*, extend the term of the policy issued in 1926 to expire on December 31, 1927?

(*a*) My answer to your fourth question precludes an affirmative answer to this question.

(*b*) and (*c*) In so far as these questions relate to policies of a later date than 1926, which latter are covered by my answer to your fourth question, I am of the opinion that the issuance of both a policy and a binder covering the period for which registration is desired is lawful. The effect of a policy and a binder issued as you describe is the creation of coverage for the whole period of the registration. The purpose of the act is carried out by such a form of coverage, and G. L., c. 90, § 34A, gives to the words "motor vehicle liability policy" two specific meanings, the second of which is "binder," and the issuance of binders is provided for in G. L., c. 175, § 113A. The certificate to be issued by the insurance company, *which is to be accepted* by the Registrar (G. L., c. 90, §§ 34A, 34B), is defined as a certificate stating that a motor vehicle liability policy running for a period at least coterminous with the registration has been issued or a binder executed. Since "motor vehicle liability policy" is given, by section 34A, either the meaning of policy or binder, it would seem that, where the policy and the binder

supplement each other as to coverage and are together coterminous with the period of registration, the requirements for the certificate were fulfilled by the issuance of both, and that under the statutory definition the certificate might state that coverage was by a "motor vehicle liability policy." It may have been assumed by the Legislature, when enacting chapter 346, that policies would be issued for exact calendar years, but an intent to forbid the use of policies and binders in the manner indicated by your question cannot be gathered from the language of the statute, more particularly in view of the phraseology and definitions contained in section 34A.

6. Your sixth question is as follows: —

> If in your opinion the company may lawfully amend an existing policy issued in 1926 and may lawfully issue a binder therewith, as stated in question 5 (*a*), or if in your opinion it may lawfully issue a motor vehicle liability policy and a binder, as stated in question 5 (*b*) *supra*, should the certificate issued by it under section 34A for filing with the Registrar of Motor Vehicles —
>
> (*a*) recite that it has issued a motor vehicle liability policy running for a period at least coterminous with that of the registration; or,
>
> (*b*) should it state that it has issued such a policy expiring on a certain date in 1927 and that it has also executed a binder running from said date of expiry until December 31, 1927, pending the issue of a policy; or,
>
> (*c*) should it, or may it, issue two certificates, one in respect to the policy and one in respect to the binder?

Inasmuch as by the terms of G. L., c. 90, § 2, the words "motor vehicle liability policy" mean either policy or binder, it would not seem to be improper or unlawful for an insurance company, issuing both to cover a period of registration, to certify to the issuance of "a motor vehicle liability policy" running for a period coterminous with the registration.

INSURANCE — GUARANTY INSURANCE — FOREIGN COMPANY.

A foreign insurance company authorized by its charter to write policies guaranteeing the fidelity of individuals and to transact other descriptions of ordinary guaranty business is empowered to act as surety on official bonds.

To the Commissioner of Insurance.
1926
August 28.

You have asked my opinion as to whether a foreign corporation engaged in the business of writing policies of insurance and guaranty of various sorts, and authorized by its charter to issue "policies guaranteeing the fidelity of individuals filling or about to fill situations of trust or confidence, *and such other descriptions of ordinary guaranty business as the company may from time to time think fit to conduct,*" may be licensed by you to transact the kind of business specified in G. L., c. 175, § 47, cl. 4th (*b*), which is described in said clause 4th (*b*) as acting "as surety on official bonds and for the performance of other obligations."

G. L., c. 175, § 152, as amended, provides that "no foreign (insurance) company shall transact in this commonwealth any kind of business not specified in its charter," and section 107 makes the foregoing section applicable to companies becoming sureties on bonds.

The business of guaranty insurance, as conducted today, commonly embraces the writing of a wide variety of contracts, and the words "guaranty insurance" are not ordinarily used with any hard and fast meaning and have been said to be generic in scope and substance. *People* v. *Potts*, 264 Ill. 522. The business frequently covers a variety of somewhat similar types or forms of insurance, which are described generally by the use of the words "guaranty insurance," and more specifically by particular titles, such as, "fidelity guarantee insurance" or "fidelity insurance," which terms accurately denote the type of business authorized by said section 47, clause 4th (*a*), and the form of business which the charter under consideration in the first part of its section 2 (*d*) empowers the foreign corporation to transact. In the second part of section 2 (*d*) of the company's charter, joined to the first part by the conjunction

and, the corporation is given a wider power, which embraces, in addition to that of writing fidelity guarantee insurance, that of transacting such other description of "guaranty business" as the company may desire to carry on, and, in my opinion, the power to act as surety on official bonds and for the performance of other obligations, as used in said section 47, clause 4th (*b*), is comprehended in this broad power given to the corporation by this second part of section 2 (*d*) of its charter.

The exact distinction which exists between contracts of suretyship and guaranty is not always carefully preserved either in statutes or in common usage, and the words are often used as though synonymous. Accurately used, guaranty insurance is a contract to indemnify against loss from the breach of an agreement, real or implied. Accurately used, "to act as surety" means to become collaterally liable for payment or performance by another. The obligations of the surety and the guarantor are very similar, but the latter's are greater in extent and comprehend in their scope all the advantages which flow to others from the contract of the surety. Guarantor and surety, as descriptive of an obligor, and corresponding adjectives describing a business corporation or the kind of business to be undertaken by a company, are not infrequently used interchangeably.

A *surety company* has been defined as "a corporation incorporated for the purpose of making, *guaranteeing* or becoming a surety upon bonds or undertakings required or authorized by law." (32 Cyc. 303.)

The statement has been made that guaranty insurance may be regarded as merely a mode of compensated suretyship. 2 May on Insurance, § 540. "Surety insurance" has been said to be a synonym for guaranty insurance as commonly used in the business world. *People* v. *Potts*, 264 Ill. 522, 531. The business of guaranty insurance or guaranty business, as the words are used in the charter under consideration, cannot, without too narrow an interpretation of

words, be said not to include the power to act as surety, itself a position similar to and less onerous than that of a guarantor.

The general laws (as amended) of the State of Connecticut, whose Legislature, by a special act, granted the instant charter, contain no specific differentiation between the formation of corporations for the purpose of guaranteeing the fidelity of persons and their formation for the purpose of acting as surety on bonds, as does G. L., c. 175, § 47, cl. 4, in respect to domestic corporations. In the absence of such differentiation in the laws of the State of incorporation, it cannot be said that the foreign corporation under consideration is not organized for the purpose of transacting both kinds of business specified in section 47.

Accordingly, I answer your question in the affirmative.

Municipalities — Expenditure of Money for the Purpose of Entertaining Conventions.

The authority of a town to appropriate and expend money raised by taxation is derived from the statutes of the Commonwealth, and such money can be expended only for public purposes sanctioned by law.

In the absence of a statute permitting municipalities to expend public moneys for the purpose of entertaining conventions, municipalities have no power to do so.

To the Commissioner of Corporations and Taxation.
1926
October 6.

You request my opinion as to whether or not municipalities may legally expend sums of money for the purpose of entertaining conventions. I assume that by this question you mean to ask whether or not municipalities may lawfully pay out of the public treasury for the board, lodging, banqueting, transportation and entertainment of delegates and other members of such conventions while the conventions are being held within the municipality.

The law is well settled and laid down in numerous decisions in this Commonwealth that municipalities are creatures of the Legislature, existing solely to aid in the administration of government. Their powers respecting raising and expending money are strictly limited to the public purposes for

which they are created. The money they expend is raised through taxation. Such money can be expended only for a purely public purpose. To permit it to be spent otherwise would be taking private property for a private use, which is illegal.

In the case of *Whittaker* v. *Salem*, 216 Mass. 483, 484, 485, the court said: —

> 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.

There is no simple and merely logical test by which the limit can be fixed. It must be determined by practical considerations. The question is one of degree. See *Hubbard* v. *City of Taunton*, 140 Mass. 467.

The authority of a town to appropriate and expend money raised by taxation is derived from the statutes of the Commonwealth, and it can be expended only for public purposes sanctioned by law. It accordingly follows that in the absence of a statute permitting municipalities to expend public moneys for the purpose of entertaining conventions, municipalities have no power to do so.

G. L., c. 40, outlines the powers and duties of cities and towns. Section 1 provides that, except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special laws, and all laws relative to towns shall apply to cities. Section 5 contains the purposes for which towns may appropriate money. Clause 26 permits the appropriation of money for public band concerts or for music furnished for public celebrations, not exceeding $500. Clause 27 permits towns to appropriate money for the celebration of the Fourth of July, or for the observance of an old home week or day, during which the town may conduct appropriate celebrations in honor of returning residents and other invited guests and hold

exercises of historical interest, and for the celebration of the anniversary of its settlement or incorporation at the end of a period of fifty or any multiple of fifty years therefrom, and for publishing the proceedings thereof. G. L., c. 40, § 9, authorizes cities to appropriate money for the celebration of holidays. This is apparently as far as the Legislature has permitted municipalities to expend public money for entertainment.

In *Waters* v. *Bonvouloir,* 172 Mass. 286, the Supreme Court of this Commonwealth held that an appropriation of money to defray the expenses of a committee composed of certain officers of the city to attend a convention of American municipalities in another State was unauthorized either by the general laws or by the charter of the city, and that the city treasurer might be enjoined from the payment of the money. See also *Ducey* v. *Inhabitants of Webster,* 237 Mass. 497. The decisions of other States are in accord with this principle. *Stevens* v. *Sedgwick County,* 5 Col. App. 115; *Beauchamp* v. *Snider,* 170 Ky. 220; *Hitchcock* v. *State,* 34 So. Dak. 124; *James* v. *Seattle,* 22 Wash. 654. If it is unlawful to expend public money to pay the expenses of the members of a city government to attend a convention elsewhere, it would seem that it is likewise illegal for a municipality to pay the expenses for entertaining delegates from other places while visiting such municipality. The principle of law involved is the same in both cases.

I am accordingly of the opinion that, in the absence of a statute expressly permitting municipalities to appropriate money raised by taxation for the purpose of entertaining conventions, such expenditures are illegal.

Escape from Reformatory for Women — Felony or Misdemeanor.

An attempt to escape from the Reformatory for Women may be a felony or a misdemeanor.

The Reformatory for Women being an institution where women may be sentenced for a felony or a misdemeanor, the original sentence should be the controlling factor in deciding whether an escape from the Reformatory is a felony or a misdemeanor.

To the Commissioner of Correction. 1926 October 6.

You have requested my opinion as to whether or not an attempt to escape from the Reformatory for Women is a felony or a misdemeanor.

At the present time the definition of a felony has almost lost its significance. In *Jones* v. *Robbins*, 8 Gray, 329, it was decided that a definition of a felony or a misdemeanor depended upon the institution to which the criminal must be sent and not upon the nature of the crime. Under the recent statutes, prisoners may be sent to reformatories, training schools, prison camps, etc., for the commission of felonies, and this complicates the issue considerably. It is very difficult today to make a distinct classification in defining a felony or misdemeanor.

G. L., c. 274, § 1, defines a felony as "a crime punishable by death or imprisonment in the state prison," and a misdemeanor as any other crime. The statutes providing that persons may be sent to a reformatory for felonies, however, complicate this issue. G. L., c. 279, § 19, provides that a woman convicted of a felony shall be sent to the Reformatory for Women. In *Moulton* v. *Commonwealth*, 215 Mass. 525, the court held that a woman felon may be sent nowhere but to the Reformatory for Women. In G. L., c. 279, § 16, it is provided that: —

> A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the reformatory for women.

The statutes have provided for a separate prison for women.

In view of the statutes and the cases, the definition of a felony or a misdemeanor will be controlled by the place

where the prisoner is to serve his sentence. The statutes provide that for a misdemeanor persons may be sentenced to the reformatory for an indeterminate term. The underlying principle is, of course, to give the prisoner an opportunity to reform and become a useful citizen of the community, and that that reform cannot be obtained unless there is an indeterminate sentence so that the necessary moral and educational training be accomplished.

In the case in issue we have a woman sentenced to the reformatory for fornication, and on her attempt to escape she is resentenced to the reformatory. There is nothing in our statutes which specifically states that escape from an institution is a felony. G. L., c. 268, § 16, provides that the penalty for escaping or attempting to escape from a penal institution shall be punishment by imprisonment in the institution to which he was originally sentenced for a term not exceeding five years.

The original sentence was for a misdemeanor, and the prisoner was given an indeterminate sentence. Her attempt to escape is not any greater crime than her original crime, in view of the statute requiring the return to the "same institution." A felony being a crime that is punishable by imprisonment in State Prison and not the sentence itself, the institution to which a person may be sentenced being the controlling factor in deciding what is a felony or a misdemeanor, and the Reformatory for Women being an institution where a woman may be sentenced for a felony and a misdemeanor, and, further, there being nothing in the statutes classifying escapes from institutions, it seems to me to be equitable and fair that the original sentence should be the controlling factor in deciding whether escape is a felony or a misdemeanor. I cannot see how any other conclusion can be reached, where the statutes are silent in regard to classifying or distinctly stating whether an escape from an institution is a felony or a misdemeanor.

It is my opinion, therefore, that the escape from the Reformatory for Women in the case in issue was a mis-

demeanor, and that consideration of escapes from the Reformatory for Women should be governed by the original sentence given for the crime which was originally committed.

Sale, Rental and Leasing of Firearms — Non-Resident — License.

A non-resident of Massachusetts must obtain a permit to purchase, rent or lease firearms, as provided by St. 1926, c. 395, §§ 131A and 123.

To the Commissioner of Public Safety. 1926 October 6.

You request my opinion whether a non-resident of Massachusetts must obtain a permit to purchase firearms, as provided by St. 1926, c. 395, § 131A, and whether a non-resident must comply with the other provisions of the law as set forth in St. 1926, c. 395, more specifically section 123 of said act.

St. 1926, c. 395, § 123, is an act regulating the sale, rental and leasing of certain firearms and prohibiting loans of money thereon. The second condition of said section reads as follows: —

> That every licensee shall before delivery of a firearm make or cause to be made a true entry in a sales record book to be furnished by the licensing authorities and to be kept for that purpose, specifying the description of the firearm, the make, number, whether single barrel, magazine, revolver, pin, rim or central fire, whether sold, rented or leased, the date and hour of such delivery, and shall, before delivery as aforesaid, require the purchaser, renter or lessee personally to write in said sales record book his full name, sex, residence and occupation. The said book shall be open at all times to the inspection of the licensing authorities and of the police.

The eighth condition of said section provides: —

> That no firearm shall be sold, rented or leased to a person who has not a permit, then in force, to purchase, rent or lease a pistol or revolver issued under section one hundred and thirty-one A.

The ninth condition provides: —

> That upon a sale, rental or lease of a firearm, the licensee . . . shall take up such permit and shall endorse upon it the time and place of said sale, rental or lease, and shall forthwith transmit the same to the commissioner of public safety.

St. 1926, c. 395, § 131A, provides: —

> A licensing authority under the preceding section, upon the application of a person qualified to be granted a license thereunder by such authority, may grant to such a person, other than a minor, a permit to purchase, rent or lease a pistol or revolver if it appears that such purchase, rental or lease is for a proper purpose, and may revoke such permit at will. Such permits shall be issued on forms furnished by the commissioner of public safety, shall be valid for not more than ten days after issue, and a copy of every such permit so issued shall within one week thereafter be sent to the said commissioner. Whoever issues a permit in violation of this section shall be punished by imprisonment for not less than six months nor more than two years in a jail or house of correction.

There is nothing in this law which makes any distinction relating to residents or non-residents of this State. The act reads that "persons" shall do or shall be prohibited from doing. It is very apparent that by the precise language used whoever purchases a firearm in Massachusetts must comply with the provisions of this act. This act is a prohibition to sellers, and makes it mandatory that full knowledge and information be given to the proper authorities before a person can purchase a revolver or a firearm. The purpose and scope is to prevent the promiscuous sale, rental or lease of firearms to irresponsible persons or criminals. The purpose is that the traffic of firearms shall be exposed to the scrutiny of the proper authorities and that criminals and irresponsible persons shall be unable to obtain firearms easily. This law makes it mandatory that records be kept, that persons purchasing, leasing or renting firearms must sign personally, in a book kept for that purpose, their name, residence, sex, etc., and must first show good reason why a permit should be issued to them for the purchase, rental

or lease of firearms. It is very apparent, therefore, that the act was intended to apply to all persons.

In my opinion, this act applies to all persons who purchase, rent or lease a firearm in Massachusetts, whether resident or non-resident.

COMPULSORY AUTOMOBILE LIABILITY SECURITY — DIVISION OF HIGHWAYS — DEPOSITS BY OWNERS OF MOTOR VEHICLES.

Savings bankbooks may be accepted as deposits under G. L., c. 90, § 34E.
Securities deposited should be so prepared as to be immediately available for sale when necessary.
Liability for loss of deposits might arise by reason of negligence.
All deposits are to be held for at least one year after expiration of registration of motor vehicles.

To the Commissioner of Public Works. 1926 October 22.

You have asked my opinion in regard to seven questions connected with the practical operation of St. 1925, c. 346, as amended, commonly called the Massachusetts Compulsory Automobile Liability Security Act. The principal portion of the law applicable to a consideration of all these questions is now set forth in G. L., c. 90, § 34E.

Your first question is as follows: —

Should the Division of Highways accept properly transferred savings bank account books as cash or security?

Savings bank account books are evidences of indebtedness such as are included in the words of said section 34E, in which the applicant for registration is authorized to deposit with the Division, in lieu of cash, "bonds, stocks or other evidences of indebtedness satisfactory to the division, of the market value of not less than five thousand dollars, as security." If such books are properly transferred so that they can be disposed of in the manner provided by the statute, if it becomes necessary to liquidate them, and are of the prescribed value, it is within the discretion of the Commission to accept them as security.

Your second question is as follows: —

Where registered bonds, stock, etc., are deposited with the Division, is it necessary that the depositor cause the ownership to be transferred on the company's books?

Said section 34E provides a mode of turning the securities deposited with the Commission into money when necessary to liquidate, the mode being a sale by public auction. Bonds, stocks and other evidences of indebtedness deposited with the Division should be transferred on the company's books, or such other action should be taken in regard to them as will make the right to possession and control, for the purposes of the statute, in the Commission apparent and the securities immediately available for sale by the Commission at any time when it may become necessary to liquidate, without the necessity of any further steps being taken by the depositor.

Your third question is as follows: —

In case of loss by theft, or otherwise, of deposit, is the Division of Highways, or any member thereof, liable in any way for the amount lost?

The individual members of the Division of Highways might be liable for loss of securities deposited with them, either by theft or otherwise, if such loss was due to the negligence of any member or members of the Commission, respectively, in regard to securing the reasonable safety of the same.

Your fourth question is as follows: —

Should all deposits be held by the Division for one year after expiration of registration term?

G. L., c. 90, as amended by St. 1926, c. 368, § 2, provides, in section 34G, that the Division shall retain cash or securities deposited with them, and shall not deliver the same or the balance thereof to the registrant, the depositor, or his order, until the expiration of the time within which actions, the payment of judgments in which are secured by such deposits, may be brought.

G. L., c. 260, § 4, as amended by St. 1926, c. 368, § 10, provides that "actions of tort for bodily injuries or for death, the payment of judgments in which is required to be secured by chapter ninety, . . . shall be commenced only within one year next after the cause of action accrues."

These sections make necessary the retention by the Division of securities for at least one year after the expiration of the registration term. Nor, where written notice is filed with the Division stating that an action has been brought against the registrant, may the securities be returned to the depositor until such action is finally disposed of, as provided in said section 34G.

Your fifth question is as follows: —

> If a deposit is made to cover registration of motor vehicle, and the owner during the fiscal year sells or exchanges said motor vehicle, procuring a new motor vehicle in place of the previously registered vehicle, is it necessary that additional cash or securities be deposited for the new vehicle, holding the previous deposit for one year after the date of disposal of the first vehicle?

The intention of the Legislature, as disclosed in the statutes under consideration, is to provide that the prescribed amount of security shall be provided with relation to each motor vehicle registered. It would therefore be necessary, under the circumstances described in your question, that the deposit made to cover the motor vehicle originally registered should be held for at least one year after the expiration of the registration upon that particular car, and that a new deposit should be made to cover a second motor vehicle registered thereafter.

Your sixth question is as follows: —

> In case a certified check is deposited, should the check be converted to cash by the Division and reinvested in savings banks, or should it be held as a check in trust of the Division?

A certified check is not evidence of indebtedness, within the meaning of said section 34E, and should be converted into money, and in the latter form retained and deposited

by the Commission in accordance with the provisions of said section.

Your seventh question is as follows: —

> If a deposit is made to cover registration of a motor vehicle and the owner takes out liability insurance before the expiration of the year covered by the registration, can the deposit be returned when the insurance becomes effective, or must it be held, and for how long?

The liability insurance policy taken out by the owner of the motor vehicle, as described in your seventh question, would not afford coverage to such owner for accidents which might have occurred prior to the taking out of the policy, and it would therefore be necessary for the Division to retain the deposited security for a period of at least a year from the time when such policy was taken out, to protect persons who might have suffered injury due to the operation of the motor vehicle during such period.

United States Apple Grading Law — Massachusetts Apple Grading Law — Interstate Commerce.

The United States Apple Grading Law refers to apples packed in barrels only, and does not apply to apples packed or repacked in this Commonwealth in boxes. The Massachusetts Apple Grading Law applies to apples packed in boxes, even though they purport to be branded in accordance with the United States Apple Grading Law.

The powers of the Commissioner of Agriculture under the Massachusetts Apple Grading Law can be exercised only while the apples are still within the jurisdiction of the Commonwealth of Massachusetts and have not been shipped in interstate or foreign commerce. Exportation is generally held not to begin until the product is committed to a carrier for transportation out of the State to the State of destination, or has actually started on its ultimate passage to that State. Until then it is reasonable to regard the product as not only within the State of its origin but as a part of the general mass of property of that State, and subject to its jurisdiction.

Apple inspectors, in performing their duties under the Massachusetts Apple Grading Law, are limited to apples packed or repacked in this Commonwealth but not in process of actual shipment out of the State. Violations of such law may be prosecuted by complaint entered in the municipal, district or police court or in the Superior Court of the Commonwealth.

To the Commissioner of Agriculture. 1926 November 4.

You request my opinion on the following questions: —

1. Does the "United States Apple Grading Law" apply to apples packed or repacked in the Commonwealth in boxes, when the Federal law specifically provides for barrel containers?

2. In the event that the "United States Apple Grading Law" does not apply to apples packed or repacked in the Commonwealth because of failure to pack or repack in containers authorized by the Federal law, does the Massachusetts Apple Grading Law apply to apples packed or repacked in boxes branded in accordance with the "United States Apple Grading Law"?

3. How far would the activities of the apple inspectors of the Department of Agriculture, under G. L., c. 94, § 110, be restricted where apples packed or repacked in the Commonwealth and marked or branded in accordance with the "United States Apple Grading Law" but failing to comply with this law in respect to containers or packages, are shipped in foreign commerce and the consignor has a receipt from a foreign steamship company for said shipment of apples?

4. Does G. L., c. 94, § 114, refer only to apples that have actually commenced their final movement for transportation from the State of their origin to that of their destination?

5. Does G. L., c. 94, § 110, apply to apples packed or repacked in the Commonwealth and packed and branded in accordance with the "United States Apple Grading Law" but not actually in their final movement for transportation from the State of their origin to that of their destination?

6. If G. L., c. 94, § 114, refers only to apples that have commenced their final movement from the State of their origin to that of their destination, and if apple inspectors of the Commonwealth may inspect and take samples from "barreled apples" marked or branded in accordance with the "United States Apple Grading Law" but not in the process of actual shipment out of the State, in what court or courts should alleged violations under said act be prosecuted?

1. U. S. Const., art. I, § 8, vests in Congress the power to "fix the standard of weights and measures." Acting under this power, Congress has enacted the United States Apple Grading Law, known as the Sulzer Bill (Public, No. 252, 61st Congress, H. R. 21480, approved August 3, 1912), which is an act to establish a standard barrel and standard grades for apples when packed in barrels. Section 1 of said act establishes the dimensions of the standard barrel for apples. Section 2 provides the standard grades for apples "when packed in barrels which shall be shipped or delivered for shipment in interstate or foreign commerce, or which shall be sold or offered for sale within the District of Columbia or the Territories of the United States." Said act refers to apples packed in barrels only, and does not provide grades for apples packed in boxes. It accordingly follows that the United States Apple Grading Law does not apply to apples packed or repacked in this Commonwealth in boxes, and I so answer your first question.

2. The Commonwealth of Massachusetts has an apple grading law which regulates the grading, packing, marking, shipping and sale of all apples packed or repacked in Massachusetts and intended for sale either within or without the Commonwealth. This act is found in G. L., c. 94. Section 100 provides the dimensions of the standard barrel and the standard box for apples. Section 101 provides the requirements of the standard grades of apples when packed or repacked in closed packages within the Commonwealth. While the United States Apple Grading Law does not apply to apples packed or repacked in the Commonwealth in boxes, the Massachusetts Apple Grading Law specifically does

apply to apples packed or repacked in boxes, and I am accordingly of the opinion that the Massachusetts Apple Grading Law applies to such boxes even though they purport to be branded in accordance with the United States Apple Grading Law.

3. Under G. L., c. 94, § 110, the Commissioner of Agriculture is empowered to make and modify rules and regulations for enforcing the specified provisions of the Massachusetts Apple Grading Law, and is authorized, either in person or by his assistant, to have free access at all reasonable hours to each building or other place where apples are packed, stored, sold, or offered or exposed for sale, and further, may in person or by his assistant, open each box, barrel or other container, and upon tendering the market price may take samples therefrom. This power can, of course, be only exercised over such apples while they are still within the jurisdiction of the Commonwealth of Massachusetts and have not been shipped in interstate or foreign commerce, over which Congress has control. U. S. Const., art. I, § 8. Until said product has actually been "shipped" in interstate commerce, the Massachusetts Apple Grading Law applies thereto, and the powers and activities of the apple inspectors thereby granted may be fully exercised. The Massachusetts Apple Grading Law is not and cannot be a direct regulation of interstate or foreign commerce. It does not affect interstate or foreign commerce in any way and imposes no burden upon it. The statute is an attempt to protect the public against fraud in the sale of apples, and to insure to all like measure and grade when buying the same. See *Commonwealth* v. *Gussman*, 215 Mass. 349.

There is a point of time when goods cease to be governed exclusively by State law and begin to be governed and protected by the national law of commercial regulation, and that moment has been defined as the one in which they commence their final movement for transportation from the State of their origin to that of their destination. When a consignor has delivered his goods to a foreign steamship

company and holds a receipt therefor, he has completed the last step in their final movement for transportation, and the goods themselves have become subject to the laws relating to foreign commerce. It accordingly follows that the activities of the apple inspectors under G. L., c. 94, § 110, cannot be exercised over such apples, and I so answer question 3.

4. G. L., c. 94, § 114, provides as follows: —

> Apples shipped in the course of interstate commerce and packed and branded in accordance with the act of congress approved August third, nineteen hundred and twelve, and known as "The United States Apple Grading Law," shall be exempt from sections one hundred and one to one hundred and seven, inclusive, one hundred and nine, one hundred and ten, one hundred and twelve and one hundred and thirteen.

By its terms this section applies only to apples actually "shipped in the course of interstate commerce," and I am accordingly of the opinion that it refers only to apples that have actually commenced their final movement for transportation from the State of their origin to that of their destination, and I so answer your fourth question.

5. It follows from my answer to question 3, that G. L., c. 94, § 110, applies only to apples packed or repacked in the Commonwealth but not actually in their final movement for transportation from the State of their origin to that of their destination, and, in my opinion, this is true regardless of the fact that said apples purport to be branded in accordance with the United States Apple Grading Law, inasmuch as under such circumstances such apples are not yet exports nor are they in process of exportation. Exportation is generally held not to begin until the product is committed to a carrier for transportation out of the State to the State of destination, or has actually started on its ultimate passage to that State. Until then it is reasonable to regard the product as not only within the State of its origin but as a part of the general mass of property of that State and subject to its jurisdiction. See *Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82, and cases cited; *Commonwealth* v. *Gussman, supra.*

6. Inasmuch as it is my opinion that G. L., c. 94, § 114, refers only to apples that have commenced their final movement from the State of their origin to that of their destination, and have accordingly become objects of interstate commerce, apple inspectors, in performing their duties under the Massachusetts Apple Grading Law, are limited to apples packed or repacked in this Commonwealth but not in process of actual shipment out of the State. If in the course of their duties alleged violations of the law of this Commonwealth are discovered, such violations may properly be prosecuted by a complaint entered in the municipal, district or police court, or, if preferred, in the Superior Court of the Commonwealth, within whose jurisdiction the offense occurred, and, if found guilty, the offender is subject to the punishment provided by G. L., c. 94, §§ 112 and 113, and I so answer your sixth and last question. See G. L., c. 218, §§ 26–37.

Constitutional Law — Biennial Sessions.

The Constitution provides that the General Court shall assemble every year on the first Wednesday of January.

A change to biennial sessions can be made only by amendment to the Constitution under Mass. Const. Amend. XLVIII.

To the Governor. 1926 November 11.

You have asked me to advise you what would be the procedure in order to give the people an opportunity of voting on the question of biennial sessions, providing the Legislature refuses to put it on the ballot.

The Constitution provides that "the general court shall assemble every year on the first Wednesday in January." See Mass. Const., pt. 2nd, c. I, § I, art. I; Mass. Const. Amends. X and LXIV.

The only provision for amendment to the Constitution is contained in Mass. Const. Amend. XLVIII, under which a constitutional amendment may be made in one of three ways: (1) by initiative petition; (2) by legislative substitute; and (3) by legislative amendment. See VII Op.

Atty. Gen. 377. In order to be brought before the people, a proposal for amendment must first be introduced into the General Court, either by a member or by an initiative petition signed by not less than 25,000 qualified voters. Subsequent proceedings are governed by the provisions of Mass. Const. Amend. XLVIII.

BOARD OF REGISTRATION IN PHARMACY — APPLICANT FOR EXAMINATION — CONVICTION OF VIOLATION OF ANY OF THE LAWS OF THE COMMONWEALTH — ASSISTANT PHARMACIST.

The Board of Registration in Pharmacy cannot properly refuse to examine an applicant for registration as a pharmacist or as an assistant pharmacist, although such applicant has been convicted of a violation of any of the laws of the Commonwealth, if such applicant has furnished satisfactory evidence complying with the law and regulations of the Board as to age, drug store experience and citizenship; but the Board may withhold for a time or refuse registration as a pharmacist or as an assistant pharmacist to an applicant who has been examined and who has obtained a passing mark, if it appears to the Board that he has been recently convicted of a violation of any laws of the Commonwealth which have such bearing on the practice of the business of a pharmacist as in the opinion of the Board would disqualify him from registration.

A registered assistant pharmacist desiring to do business as a pharmacist shall, upon payment of five dollars to the Board of Registration in Pharmacy, be entitled to examination, and, if found qualified, shall be registered as a pharmacist and receive a certificate signed by the president and secretary of the Board.

To the Board of Registration in Pharmacy. 1926 November 15.

You request my opinion on the following questions: —

First. — Can the Board of Registration in Pharmacy refuse to examine an applicant for registration as a pharmacist or as an assistant pharmacist who has been convicted of a violation of any of the laws of the Commonwealth, the applicant having furnished satisfactory evidence complying with the law and the regulations of the Board as to age, drug store experience and citizenship?

Second. — Can the Board of Registration in Pharmacy withhold for a time or refuse registration as a pharmacist or as an assistant pharmacist to an applicant who has been examined and who has obtained a passing mark, because of court conviction of a violation of any laws of the Commonwealth?

Third. — An applicant for registration as an assistant pharmacist

has been examined and registered as an assistant pharmacist; is it necessary under the statute that this applicant should wait for the expiration of three months before he may be examined for registration as a pharmacist?

I answer your questions in the order submitted.

First. — The law governing the examination of applicants for registration as pharmacists is contained in G. L., c. 112, § 24, as amended by St. 1924, c. 53. Section 27 empowers the Board of Registration in Pharmacy to hear all complaints made to it, against any person registered as a pharmacist, charging him in his business as a pharmacist with violating any laws of the Commonwealth. Section 28 empowers the full Board, sitting at such hearing, to suspend the effect of the certificate of registration as a pharmacist for such term as it fixes, if it finds such person guilty. Section 61, as amended by St. 1921, c. 478, authorizes the Board of Registration in Pharmacy, after a hearing, by a majority vote of the whole Board, to suspend, revoke or cancel any certificate, registration, license or authority issued by it, if it appears to the Board that the holder thereof is insane, or is guilty of deceit, malpractice, gross misconduct in the practice of his profession, or of any offense against the laws of the Commonwealth relating thereto.

It is to be noted that the power of the Board of Registration in Pharmacy, with respect to pharmacists convicted of violation of laws of the Commonwealth, is limited to registered pharmacists, not to applicants for registration as pharmacists. I am of the opinion that under the express language of G. L., c. 112, § 24, any person who desires to do business as a pharmacist shall, upon payment of five dollars to the Board of Registration in Pharmacy, be entitled to examination. It accordingly follows that the Board of Registration in Pharmacy cannot properly refuse to examine an applicant for registration as a pharmacist or as an assistant pharmacist, although such applicant has been convicted of a violation of any of the laws of the Commonwealth, if such applicant has furnished satisfactory

evidence complying with the law and regulations of the Board as to age, drug store experience and citizenship, and I so answer your first question.

Second. — A literal construction of St. 1924, c. 53, undoubtedly requires the Board of Registration in Pharmacy to examine any person applying therefor, upon payment of five dollars, and to issue to him a certificate as a pharmacist "if found qualified." While the qualification apparently refers to the examination, nevertheless I am of the opinion that the Board of Registration in Pharmacy is vested with some discretion in order to prevent the registration of unfit persons as pharmacists. The certificate of the Board of Registration in Pharmacy is a license to the holder thereof to do a business which the Legislature has seen fit to regulate, under its authority to make laws for the welfare and good of the citizens of the Commonwealth, and to a large extent the Legislature has vested in the Board of Registration in Pharmacy the authority of executing those laws. No man has the right to conduct the business of a pharmacist or assistant pharmacist until he has satisfied the Board that he is "qualified."

You do not state just what laws of the Commonwealth have been violated by the applicant. Obviously, minor infractions of the law which have no reference or bearing upon the fitness of an applicant to engage in the business of a pharmacist would not be sufficient to cause the Board of Registration in Pharmacy to refuse registration, if such applicant has successfully passed his examination. Again, you do not state how long ago such convictions occurred, which might well have an important bearing upon the question. I am of the opinion, however, that the matter is entirely within the sound discretion of the Board of Registration in Pharmacy.

It accordingly follows that the Board of Registration in Pharmacy may withhold for a time or refuse registration as a pharmacist or as an assistant pharmacist to an applicant who has been examined and who has obtained a passing

mark, if it appears to the Board that he has been recently convicted of a violation of any laws of the Commonwealth which have such bearing on the practice of the business of a pharmacist as, in the opinion of the Board, would disqualify him from registration.

Third. — G. L., c. 112, § 24, authorizes the Board of Registration in Pharmacy to grant certificates of registration as assistants, after examination, upon the same terms as are required for registration as pharmacists. The obligation to wait three months before taking an examination applies only to a person failing to pass an examination. It accordingly follows that a registered assistant pharmacist desiring to do business as a pharmacist shall, upon payment of five dollars to the Board of Registration in Pharmacy, be entitled to examination, and, if found qualified, shall be registered as a pharmacist and shall receive a certificate signed by the president and secretary of the Board.

LICENSE TO KEEP GASOLINE — PROCEDURE UPON APPLICATIONS — BOARD OF STREET COMMISSIONERS OF BOSTON.

The board of street commissioners of the city of Boston, on application for licenses to keep gasoline, addressed to them as persons designated by the State Fire Marshal, under G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 1, to grant such licenses, proceeds under the provisions of G. L., c. 148, § 14, as amended, and not under the provisions of St. 1913, c. 577, §§ 1 and 2.

To the Commissioner of Public Safety. 1926 November 22.

You state that the board of street commissioners of the city of Boston has been designated by the State Fire Marshal, under the provisions of G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 1, to grant licenses for the keeping, storage and sale of gasoline. You request my opinion as to whether, in giving notice of the time and place of hearings upon application for such licenses, the board of street commissioners proceeds according to the provisions of G. L., c. 148, § 14, as amended by St. 1925, c. 335, or according to the provisions of St. 1913, c. 577, §§ 1 and 2.

The provisions of St. 1913, c. 577, as amended by St.

1914, c. 119, relate to the regulation of the erection and maintenance of buildings as garages for the storage, keeping or care of automobiles in the city of Boston. They do not describe the motive power of the automobiles to be stored, kept or cared for. They require the issuance of a permit from the board of street commissioners before a building may be erected and maintained for such use. They regulate construction. They designate the authorization for such use a "permit," not a "license." They specify the details to be observed in application for and issuance of the permit, compliance with which details affects the jurisdiction of the board. See *Marcus* v. *Board of Street Commissioners*, 252 Mass. 331, 335. They vest authority to issue such permits in the street commissioners exclusively. *Foss* v. *Wexler*, 242 Mass. 277, 279. The permit, when granted, partakes of a personal privilege and grant which attaches to the land whereon the building is to be so erected and maintained. *Hanley* v. *Cook*, 245 Mass. 563, 565.

The authority of the board of street commissioners is entirely distinct from the authority of the Fire Marshal, in him vested by G. L., c. 148, § 30 (formerly St. 1914, c. 795, § 3), and exercised by the board on delegation to it by him under the provisions of G. L., c. 148, § 31. V Op. Atty. Gen. 718. VI Op. Atty. Gen. 329, 580. See also *McPherson* v. *Street Commissioners*, 251 Mass. 34, 38.

It follows, therefore, that, in the exercise of powers of the Fire Marshal, delegated to it by him, under the provisions of G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 1, to grant licenses for the keeping, storage and sale of gasoline, the board of street commissioners should proceed according to the provisions of G. L., c. 148, § 14, as amended by St. 1921, c. 485, § 3, St. 1924, c. 254, and St. 1925, c. 335, § 1, relating to such licenses, authority for the grant of which in the Metropolitan District is vested in the Fire Marshal by G. L., c. 148, § 10 (as amended by St. 1921, c. 273 and c. 485, § 2) and § 30.

Permit to keep Gasoline — State Fire Marshal — Consideration of Welfare of a Community.

In determining the grant of a permit to keep gasoline, under G. L., c. 148, § 14, outside the Metropolitan District, the State Fire Marshal has not the same right to consider the inconvenience and annoyance of persons affected and the general order and welfare of the community, as well as fire hazard, as in making a decision upon an appeal to him, under G. L., c. 148, § 45, from a decision of a board issuing a license to conduct or maintain a garage within the district.

In the given case, where the sole objection to the granting by the State Fire Marshal of a permit to keep gasoline, under G. L., c. 148, § 14, outside the Metropolitan District, is danger to school children, anticipated to be occasioned by persons or vehicles in passing to, from or upon the site of the purposed keeping, the State Fire Marshal is confined to consideration of fire hazard.

To the Commissioner of Public Safety. 1926 November 22.

You inform me that the board of selectmen of Needham has granted a license for the keeping, storage and sale of gasoline, acting under the statutory authority of G. L., c. 148, § 14, and not under any delegated authority of the Fire Marshal; that application was made to the Fire Marshal for a permit required by G. L., c. 148, § 14; that at the hearing upon the application the sole objection was that of danger to school children, and that the Marshal has the application under advisement. You request my opinion whether the State Fire Marshal, in determining the issuance of a permit, has the same right to consider not only fire hazard but the inconvenience and annoyance to persons affected and the general good order and welfare of the community, as the Attorney-General advised him, in an opinion dated November 28, 1923, he had in making a decision upon an appeal from the action of the board of license commissioners of Cambridge in granting a license to conduct or maintain a garage and to keep or store volatile inflammable fluids in connection therewith.

G. L., c. 148, § 14, as amended by St. 1925, c. 335, provides, in part, as follows: —

> No building or other structure shall . . . be used for the keeping, storage, manufacture or sale of any of the articles named in section ten (inflammable fluids, etc.) . . . unless the . . . selectmen shall have granted a license therefor . . . after a public hearing, . . . and unless a

permit shall have been granted therefor by the marshal or by some official designated by him for the purpose; . . .

There are two distinct prerequisites for the use of a building or other structure for the keeping of inflammables. One is a license; the other is a permit. Though the words are frequently employed as synonyms, the statute makes a distinction between them by differing appellations. One is issued by a local tribunal; the other is granted by an official at the State House, or by some local officer designated by him. G. L., c. 148, § 19, as amended by St. 1921, c. 485, § 4. One is determined by a power vested in an agency, the personnel of which is several; the other, by a power vested in an agency which is single. Thus, in the process of determination of one, opportunities, enabling more embracing consideration, are more immediate both for the determining power and the general public; in the other, they are more remote. A public hearing and attendant formalities are prescribed antecedents to the determination of one, but not to the other. Thus, the issuance of one is statutorily premised upon an inquiry compulsory and comprehensive; in the grant of the other it is not.

The requirement of a license by the mayor and aldermen or selectmen for the storage and keeping in any city or town appears first in St. 1865, c. 285, § 1; the requirement of a permit by the State Fire Marshal in St. 1904, c. 370, § 3, which office was created by St. 1894, c. 444, § 1, with duties relating to investigations of causes and circumstances of fires occurring in the Commonwealth (§ 2). By St. 1905, c. 280, § 3, power to issue permits was vested in the Chief of the District Police. By Gen. St. 1919, c. 350, pt. III, all powers of the District Police were transferred to the Department of Public Safety, to be exercised, in certain respects relating to fire prevention, by the State Fire Marshal (§§ 99–104). Historically, therefore, they are distinct, in that the exercise of the power to grant permits for keeping and storage of inflammables in localities outside the Metropolitan District has been vested in appointive officials whose

functions have related to police protection and fire prevention, and the power to issue licenses has been vested in officials, elected by the localities, whose functions related to the administration of general municipal business.

In cities and towns in the Metropolitan District the Fire Marshal has the power of selectmen to license persons or premises. G. L., c. 148, § 30. The power to issue a license and the power to grant a permit are vested therein in one and the same official. In the determination of issuance and grant the Fire Marshal may entertain considerations which the powers peculiarly vested in him in the district require for their exercise. In the exercise in the district of the powers of local tribunals to pass upon and determine whether a license should be issued, you were advised, in an opinion dated November 28, 1923, relating to the issuance of a license in the city of Cambridge, that the Fire Marshal had the right to consider the general good order and welfare of the community. (VII Op. Atty. Gen. 293.)

Cambridge is included in the Metropolitan District; Needham is not. G. L., c. 148, § 28.

In the pending application for the grant of a permit in a locality outside the district, wherein the exercise by the Fire Marshal of the power of issuance of a license is not invoked, I am of opinion that the Fire Marshal may consider the fire hazard only.

Corporations — Articles of Organization — Illegal Corporate Purposes.

The purpose of carrying on the business of wine and liquor dealers is not a lawful one which may be included in the powers of a corporation organized to carry on the business of hotel and innkeeper.

The Commissioner of Corporations is not required to perform any duty in regard to articles of organization containing an illegal purpose, after their return to him by the Secretary of the Commonwealth without the issuance of a certificate of organization by the latter.

The act of filing articles of organization with the Secretary of the Commonwealth does not of itself give corporate life to the body to which they relate, if they contain illegal purposes.

To the Commissioner of Corporations and Taxation. 1926 November 24.

You have asked my opinion relative to your official actions in relation to the organization or attempted organization of a certain corporation.

You state that the purposes for which the corporation was to be formed, as originally contained in the articles of organization, were as follows: —

To carry on the business of hotel and innkeepers, restaurant keepers, caterers, keepers of livery stables and garages for horse-less conveyances and motor vehicles of all kinds, warehousemen, tobacconists, dealers in provisions, wine and liquor dealers, barbers and hair dressers, news dealers and proprietors or managers of theaters, opera houses and other places of public entertainment.

To purchase, lease, hire or otherwise acquire, to hold, own, maintain, improve, alter and to sell, convey, mortgage or otherwise dispose of real estate and personal property, and any interest therein, in or out of this state, and in any state in the United States or any foreign country, incidental to the purposes of the corporation.

To acquire use and to dispose of any real or personal property which may be deemed useful and convenient in the carrying out of the main purposes for which the corporation is formed and organized and in general to do things which may be necessary and desirable for the carrying on of a hotel business.

You have advised me that the last sentence of such purposes, as it appears on the first page of your letter, was in fact added to the original description of purposes, contained in the articles of organization to which you gave your approval October 4, 1926, and transmitted to the Secretary of the Commonwealth on the same day, after the return

to you, on October 19th, by the Secretary of the Commonwealth of such articles of organization. You have advised me that the addition of such sentence was made by you personally to the original articles of association, with the approval of some of the subscribers thereto but without any action on their part; that the articles of organization with the said sentence so written in by you, but without any action in relation thereto having been taken by the subscribers or any new endorsement of approval of the articles having been made by you, were again transmitted by you to the Secretary on or about October 19th; and that on November 4th the Secretary again returned the articles to you and declined to issue a certificate of incorporation.

The sentence added by you to the purposes contained in the original articles of organization, made subsequent to your approval of and after the transmission of such articles to the Secretary, was not properly a part of the articles of organization which were transmitted to the Secretary for filing, and a consideration of the effect of such additional sentence upon the purposes of the organization is not, under the circumstances, essential in answering the questions in your letter. The added sentence as given in your communication reads thus: "The business of dealing in wines and liquors prohibited under the laws is to be carried on only outside the United States and its possessions or dependencies."

The specific questions which you ask me in your letter are: —

1. Have I approved corporation purposes which are contrary to law?

2. If not, shall I hand to the Secretary of the Commonwealth these articles of organization?

3. If I have approved articles of organization contrary to the law, and it appears that corporate existence begins on the filing with the Secretary of the articles of organization, what action shall I take as regards these articles of organization?

1. The main purpose of the proposed corporation, as described in the articles of organization, is "to carry on the business of hotel and innkeepers." All the other purposes are obviously intended, from the context, to be exercised in connection therewith. To carry on the business of "wine and liquor dealers," more particularly in relation to the general business of an hotel or innkeeper, is not, in my opinion, a lawful purpose for which a corporation may be organized in this Commonwealth.

The ordinary meaning attaching to the words "the business of wine and liquor dealers," without limiting or qualifying adjectives in relation to them, is not that of dealers in non-intoxicating beverages alone. The words in their natural use have not so limited a meaning but at least include, if, indeed, they do not invariably mean solely, dealers in intoxicating wines and liquors. All the modes of business which a "dealer" in such intoxicating beverages commonly carries on are made specifically unlawful by statute in this Commonwealth.

There is nothing in the articles of organization concerning the purposes of the proposed corporation which tends so to qualify or limit the words "the business of wine and liquor dealers" as to bring the proposed power within any of the existing exceptions to the illegality under our laws of dealing in wines and liquors. It is possible that under some circumstances a corporation might be organized for the purpose of carrying on the business of wine and liquor dealers, where, by a proper use of words in the articles of organization, it was made plain that the power given in this respect was so limited as to authorize the doing of nothing contrary to the laws of the State of incorporation or to those of any place where the corporation might seek to do business.

I answer your first question in the affirmative.

2. As to your second question, inasmuch as your approval has been given to articles of organization containing an illegal purpose, you are not required to perform any

further duty in regard to such articles, now that they have been returned to you by the Secretary.

3. As to your third question: G. L., c. 156, § 11, is as follows: —

> The articles of organization, the agreement of association, and the record of the first meeting of the incorporators, including the by-laws, shall be submitted to the commissioner, who shall examine them and who may require such amendment thereof or such additional information as he deems necessary. If he finds that the provisions of law relative to the organization of the corporation have been complied with, he shall endorse his approval on the articles. Thereupon, the articles shall, upon payment of the fee provided by section fifty-three, be filed in the office of the state secretary, who shall cause them and the endorsement thereon to be recorded.

G. L., c. 156, § 12, is, in part, as follows: —

> Upon the approval and filing as above provided of the articles of organization of a corporation organized under general laws, the state secretary shall issue a certificate of incorporation in the following form:
>
> . . . . . .
>
> If such corporation is organized with capital stock without par value, the form of said certificate may be modified to conform thereto.
>
> The state secretary shall sign the certificate of incorporation and cause the great seal of the commonwealth to be thereto affixed, and such certificate shall have the force and effect of a special charter. The existence of every corporation organized under general laws shall begin upon the filing of the articles of organization in the office of the state secretary. The state secretary shall also cause a record of the certificate of incorporation to be made, and such certificate, or such record, or a certified copy thereof, shall be conclusive evidence of the existence of such corporation.

Although section 12 states that "the organization of every corporation organized under general laws shall begin upon the filing of the articles of organization in the office of the state secretary," it does not follow that a body organized for an illegal purpose, among others, gains a corporate existence by the apparent performance of the acts required by the law as preliminary to incorporation. Where purposes are illegal a body has not been organized under general laws into a corporation, within the meaning of sections 6

and 12, and the act of filing articles with the Secretary, even when the articles have been approved by you, does not give corporate life to the body nor fix the date upon which its existence begins, more particularly in the absence of a certificate of incorporation.

I am not advised that the subscribers of the articles of agreement under consideration intend to attempt to exercise corporate powers without the certificate of incorporation which has been refused them. It rather appears from the letter of the Secretary to you of November 4th that they do not intend so to do, but, rather, plan to seek to incorporate under new articles which shall not contain mention of an illegal purpose. I am of the opinion that at the present time you are not required to take any action relative to the articles of organization.

Division of Highways — Alteration of State Highway — Abandonment.

Upon an abandonment of any part of a State highway, formerly an existing town way, title to the land so abandoned is in the former owners, free of any easement in favor of a town for purposes of a way.

To the Commissioner of Public Works
1926
December 6.

You have asked my opinion upon the following question: —

"Whether or not, in cases where new cut-off lines are laid out and built by the Division of Highways and the existing State highway for which the cut-off line is substituted is abandoned by the Division of Highways, such abandonment causes the title in the old State highway to revert to the abutting owners, or does it revert in part to the abutting owners and in part to the town, the portion reverting to the town being that portion which was a town way before the State highway was originally laid out?

I assume that the question relates to an "alteration" of a State highway which has been laid out in part over an old town way, upon a petition made under the provisions of G. L., c. 81, § 4, or earlier statutes of similar import.

It is provided by G. L., c. 81, § 5, as amended by St. 1921, c. 427, that, after the Division of Highways has acted upon such petition and has duly laid out and taken charge of the way referred to therein, "*thereafter said way shall be a state highway.*"

I am of the opinion that the laying out and taking charge of an existing town way as a State highway, or the laying out and taking charge of a new way which follows to such an extent the lines of an existing town way as practically to supersede it, although not following its lines exactly at all places, as a State highway, under G. L., c. 81, § 4, and § 5 as amended, works a discontinuance of any easement which a town may have acquired by an earlier taking by eminent domain for such a town way; and that upon the abandonment by the Division of Highways while acting under section 6 of any part of the land formerly used as such a town way, title to such land is then in the former owners or their legal representatives, free of any easement in favor of the town for purposes of a way.

It is an established principle of law that the public lose their right to a highway by discontinuance, where they have abandoned it and accepted another in its stead under provisions of law (*Commonwealth* v. *Boston & Albany R.R. Co.*, 150 Mass. 174; *Bliss* v. *Deerfield*, 13 Pick. 102; *Hobart* v. *Plymouth*, 100 Mass. 159, 163), and the acts done under sections 4 and 5 afford ample evidence of the abandonment of an old and the acceptance of a new way in place thereof on the part of the inhabitants of a town formerly having the old way. See also *Tinker* v. *Russell*, 14 Pick. 279. The intent of the Legislature that the petition for and the laying out of the State highway should, by force of the statute, work a complete discontinuance of the rights of municipal bodies in old ways superseded and physically converted into a new highway, appears to be expressed in G. L., c. 81, and in the earlier statutes upon the subject, particularly by the use of the words "and thereafter said way shall be a state highway." The Legislature has full control over public

ways, and they may be discontinued by direct enactment or through such instrumentalities as the Legislature may designate. *Cones* v. *Benton County*, 137 Ind. 404.

The complete incorporation of identity of the older way in the new highway and the extinguishment of any existing rights therein when the new highway took the place of the existing way is also indicated to some degree by the fact that prior to St. 1921, c. 427, in which specific power to discontinue a State highway was given, the Division was without authority to discontinue any part of a State highway once the same had been laid out under the provisions of G. L., c. 81, and earlier statutes of similar import. II Op. Atty. Gen. 378; III *ibid.* 113. In I Op. Atty. Gen. 284, it was said by one of my predecessors in office, in considering one of such earlier statutes: —

> I am of the opinion that these proceedings constitute a taking of the highway by the Commonwealth analogous to the taking of land for the purposes of a highway by county commissioners and by municipal boards; and that . . . the way, if an existing town or county way, ceases to be such and becomes a State highway. If it is a new way, then it is by such proceedings established as a State highway, in the same sense that a new way is established by the proceedings of local boards. It follows that the liability of the town to keep the road is determined by these acts; when the commission "takes charge" of the highway, the town is discharged.

It is to be noted that although provisions for the alteration of a State highway are set forth in G. L., c. 81, § 6, and provisions for the abandonment of land or rights taken for such highway were contained in G. L., c. 81, § 12, and are now embodied in section 12, as amended by said St. 1921, c. 427, in which it is stated that after such an abandonment title to the land or rights given up shall revest "in the persons in whom it was vested at the time of the taking, or their heirs and assigns," it was held in an opinion of one of my predecessors in office (III Op. Atty. Gen. 113), with which I concur, that these provisions for revesting title relate only to that portion of an existing location which is not to be incorporated into the highway as finally con-

structed for use, and hence have no applicability to the facts which you set forth and upon the existence of which your question is predicated.

If, however, the highway which was laid out by the Division was not "an existing way" within the meaning of G. L., c. 81, § 4, and does not follow to such an extent the lines of an old town way as practically to supersede it, then I am of the opinion that as to any land abandoned by the Division which was part of such old way the same is charged after such abandonment with an easement as against the abutting owners for the purposes of a way, if acquired by a previous taking of a town by eminent domain (*New England Tel. & Tel. Co.* v. *Boston Terminal Co.*, 182 Mass. 397; *Perley* v. *Chandler*, 6 Mass. 455); but if the town previously acquired the fee in the land occupied by such way by deed, then the abutting owners would not have rights other than easements therein.

CIVIL SERVICE — LABORER — RETENTION IN EMPLOYMENT.

The fact that a laborer in the employ of the Commonwealth was convicted of keeping and exposing intoxicating liquor for sale does not of itself warrant the Department of Civil Service and Registration in refusing to allow his retention in the service of the Commonwealth, under G. L., c. 31, § 17.

To the Commissioner of Civil Service. 1926 December 8.

You state that a certain man has been properly employed under civil service as a laborer in the public works department of Boston for over ten years. On May 7, 1926, at the request of the public works department, his temporary employment as an inspector was authorized for three months, and was extended for three months on August 11, 1926. He was employed as inspector only in cases of emergency, and has continued at all times on the payroll as a laborer, at laborer's wages. On February 17, 1926, he was convicted of keeping and exposing liquor for sale and was fined fifty dollars. On receipt of notice of this record of conviction on October 27, 1926, and acting under G. L., c. 31, § 17, you immediately revoked the authorization for

his appointment as inspector and refused to allow his further employment either as laborer or inspector and withheld the payment of compensation to him. You further state that the case has been appealed to the full board of Civil Service Commissioners, which board has requested you to obtain my opinion on the following question: Does the provision in G. L., c. 31, § 17, apply to this case on the facts presented?

G. L., c. 31, § 17, as amended by St. 1922, c. 36, provides as follows: —

> 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; provided, that the commissioner may in his discretion authorize the appointment or employment, within said year, of a person convicted of a violation of any rule or regulation made under section thirty-one of chapter ninety or of any of the provisions of said chapter ninety relating to motor vehicles except those of sections twenty-three to twenty-five, inclusive.

It is significant that the first part of said section, referring to persons habitually using intoxicating liquors to excess, provides that no such person shall be appointed, employed "or retained" in any position, while the provision referring to a person convicted of any crime against the laws of the Commonwealth provides that no such person shall "be appointed or employed," the word "retained" being omitted in this instance. An examination of the history of said section 17 discloses that this omission was intentional on the part of the Legislature.

St. 1884, c. 320, is entitled "An Act to improve the civil service of the Commonwealth and the cities thereof." Section 3 of said chapter provides: —

> No person habitually using intoxicating beverages to excess, shall be appointed to, or retained in any office, appointment or employment to which the provisions of this act are applicable; nor shall any vendor of intoxicating liquor be so appointed or retained.

Section 4 provides: —

> No person shall be appointed to or employed in any office to which the provisions of this act are applicable within one year after his conviction of any offence against the laws of this Commonwealth; and if any person holding such an appointment or in any such employment shall be convicted of the violation of any such law, he shall be immediately discharged from such appointment or employment.

In the third annual report of the board of police for the city of Boston (December, 1887), at page 5, is the following recommendation: —

> The Board recommends that chapter 320, Acts of 1884, entitled "An Act to improve the Civil Service of the Commonwealth and the cities thereof," be amended by striking out all the words in section 4 after the semi-colon, to wit, "and if any person holding such an appointment or in any such employment shall be convicted of the violation of any such law, he shall be immediately discharged from such appointment or employment." This provision is a constant menace to the police force and has a tendency to materially affect its efficiency.

Presumably as a result of this recommendation, the Legislature in the following year enacted St. 1888, c. 334, amending St. 1884, c. 320, § 4, by striking out the last clause thereof, so that, as amended, said section should read as follows: —

> No person shall be appointed to, or employed in, any office to which the provisions of this act are applicable, within one year after his conviction of any offence against the laws of this commonwealth.

In this form the law in this particular was carried into the Revised Laws (c. 19, § 17), section 16 referring to persons habitually using intoxicating liquors to excess and to vendors of intoxicating liquors.

Gen. St. 1915, c. 76, entitled "An Act exempting vendors of intoxicating liquors from certain disqualifying provisions of the civil service laws," amended R. L., c. 19, § 16, by striking out said section and inserting in place thereof the following: —

> No person habitually using intoxicating liquors to excess shall be appointed to or retained in any office, appointment or employment to which the provisions of this chapter apply.

In the General Laws, R. L., c. 19, §§ 16 and 17, as amended, are combined in one section, to wit, G. L., c. 31, § 17.

The history of this legislation and also the phraseology of section 17 clearly indicate that the provision therein, "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," applies solely to applicants for appointment or employment and not to appointees or employees, while no person habitually using intoxicating liquors to excess shall be appointed, employed "or retained" in any position to which said chapter applies.

There are many crimes against the laws of the Commonwealth, both felonies and misdemeanors. Some of the latter are *mala prohibita* and do not involve any degree of moral turpitude or even criminal intent. It is obvious that the Legislature never intended that one holding a civil service position should lose such position and not again be appointed or employed under civil service within one year after his conviction of each and every crime against the laws of the Commonwealth.

In the case to which you have directed my attention you state that the person referred to was convicted of the crime of keeping and exposing liquor for sale. I am accordingly of the opinion that in the absence of any allegation that said person habitually used intoxicating liquors to excess, G. L., c. 31, § 17, does not apply to the case under consideration, and that, on the facts presented, the Department of Civil Service and Registration is not authorized to refuse to allow his further employment as laborer or to withhold the payment of compensation to him.

Division of Highways — Removal of Buildings from Land taken — Procedure.

Three modes of procedure are available to the Division of Highways to effect the removal of buildings from land taken for the widening of a State highway.

To the Commissioner of Public Works. 1926 December 11.

You have asked my advice relative to the following matter set forth in your letter to me: —

Early this year the Division of Highways widened the State highway in Weymouth and made takings for the widening under the provisions of G. L., c. 79. There are two buildings the owners of which have not conformed with the orders of the Division to remove the same, and it is desired to know just what procedure to take in order to get the buildings removed. (See G. L., c. 79, § 13.)

The following modes of procedure to effect the removal of the buildings, which I assume stand upon land taken for the purposes described in the paragraph quoted above from your letter, but which were not themselves taken, are open to the Division of Highways:

(1) If a time for the removal of such buildings was specified in the order of taking, and has now elapsed, the Division may proceed under G. L., c. 79, § 13, to sell the buildings at public auction. If at the sale no one bids for them, under the terms of section 13 the owner will be taken to have relinquished his right in them, and the Division may remove them or deal with them in such manner as is deemed best to relieve the highway from obstruction occasioned by them. The Division will have such implied authority by virtue of the provisions of section 13 as will enable it to go upon the adjoining land of the owner for the purpose of making such removal. If the buildings are purchased at such sale and the new owner fails to remove them after reasonable notice in writing from the Division, he will be held to have relinquished his right therein, under the concluding sentence of section 13, and they may be removed. By virtue of the taking and of the sale under the authority of the statute, the buildings are to be considered as so severed from the realty as to have become personal property,

within the meaning of the last sentence of the section, and therefore by failure to remove in accordance with the provisions of such sentence the right of the owner acquired by the sale will be taken as relinquished to the body who acquired the land by eminent domain. If notice to remove was not embodied in the original order of taking, this procedure will not be open to you.

(2) A further method of proceeding is available to the Division, irrespective of the mode provided for in G. L., c. 79, § 13. Under the provisions of G. L., c. 81, § 22, the Division of Highways may give the owner or occupant of the buildings written notice to remove them forthwith from the highway. If he fails to comply with the order, the Division may remove the buildings to the adjoining land of the owner or occupant. For the purpose of removing the buildings to such adjoining land, the Division has implied authority, under the terms of section 22, to enter upon the adjoining land for all purposes necessary to effect such removal. The Division has no authority under this section to cut a building in parts, if only a portion protrudes into the highway, and remove one part of the building alone.

(3) If procedure under G. L., c. 79, § 13, cannot be adopted, and if it is in fact impossible by reason of lack of sufficient space in the adjoining land to remove the buildings to such land (or further back upon such land if the necessities of the case require only the latter form of removal), then recourse is to be had to the courts to compel the owner or occupant of the building to abate a public nuisance caused by the obstruction of the highway by so much of the building as projects therein, and the owner may be required by a court to make such abatement, either by cutting off the portion of the building which so projects or by some other feasible mode, at his own expense.

Massachusetts Agricultural College — Expenditure of Funds from Federal Government — Commission on Administration and Finance.

Employees of the Massachusetts Agricultural College are State employees even if their salaries are paid out of funds provided by the Federal government; and money received from the sale of products raised at the college is the property of the Commonwealth even if such products are produced by the aid of funds provided by the Federal government.

The Commission on Administration and Finance has authority to approve publications of the Experiment Station of said college, paid for out of money provided by the Federal government, but has no authority to approve or disapprove of expenditures for travel paid for out of money so provided.

To the Commissioner of Education. 1926 December 14.

You have asked my opinion upon certain questions relating to the administration of funds received by the Massachusetts Agricultural College from the Federal government for the use of the Agricultural Experiment Station from appropriations made under the Acts of March 2, 1887, March 16, 1906, and February 24, 1925; 24 U. S. Stat. at L. 440; 34 *ibid.* 63; 43 *ibid.* 970.

The first of these acts, known as the Hatch Act, provided for the establishment of agricultural experiment stations under the direction of the land grant colleges created in accordance with the Act of July 2, 1862 (12 U. S. Stat. at L. 503). It was declared to be the object and duty of those experiment stations to conduct researches and experiments relative to plants, animals, soils, etc., and bearing on the agricultural industry of the United States; and annually to make to the governor of the State a full and detailed report of its operations, including a statement of receipts and expenditures, copies of which were to be sent to the Secretary of Agriculture and the Secretary of the Treasury. For the purpose of paying the expenses of conducting such researches and experiments and publishing the results an annual sum of money was appropriated to each State, to be paid "to the treasurer or other officer duly appointed by the governing boards of said colleges to receive the same." It was further provided that nothing in the act should be construed to impair or modify the legal relation existing between

the colleges and the State governments; and the grants of money authorized were made subject to the legislative assent of the several States. The two later acts, known respectively as the Adams Act and the Purnell Act, made additional appropriations "for the more complete endowment and maintenance" of said agricultural and experiment stations. It was further provided in those two acts that the officers receiving the funds should make detailed statements to the Secretary of Agriculture of the amount so received and of its disbursement. These acts and the grants of money therein provided were each severally accepted by the Legislature of Massachusetts. St. 1887, c. 212; St. 1906, c. 330; St. 1925, c. 253. In the act of 1906 it was further provided that "the Massachusetts Agricultural College is hereby authorized and designated to receive said grant of moneys," and in the act of 1925 it was provided that "the trustees of the Massachusetts Agricultural College, in charge of the Massachusetts agricultural experiment station, are hereby authorized to receive the funds granted by said act and to use and expend the same in furtherance of the purposes and objects therein set forth."

The Massachusetts Agricultural College was incorporated, pursuant to the Federal act of 1862, by act of the Massachusetts Legislature (St. 1863, c. 220) as a public charitable corporation. See III Op. Atty. Gen. 308. By Gen. St. 1918, c. 262, the corporation was dissolved, and it was provided that thereafter the college should be maintained as a State institution under the same name, and that all employees of the institution should be considered State employees. Gen. St. 1919, c. 350, § 56, provided that the trustees of the college should serve in the Department of Education. See G. L., c. 75, § 1; c. 15, § 19.

The grant made by the act of 1862 was to the several States for the purposes therein mentioned. It has been conclusively determined that this grant was to the States and not to the institutions established by the State pursuant to the statute. *Wyoming Agricultural College* v.

Irvine, 206 U. S. 278, 283; *Massachusetts Agricultural College* v. *Marden*, 156 Mass. 150, 156; VI Op. Atty. Gen. 105. But the provisions in the acts establishing and endowing agricultural experiment stations are different, in that, while the appropriation is to the State, payment is required to be made directly to the officers of the institution. With reference to the Hatch Act the court said in *Wyoming Agricultural College* v. *Irvine, supra:* —

> By the Act of March 2, 1887 (24 Stat. 440), Congress directed that a certain sum should be annually appropriated "to each State" for the support of agricultural experiment stations at the institutions established under the Act of 1862. The law provides that the appropriation shall be paid to the treasurer of the institution where the experiment station is established, and no money has come or will come into the hands of the state treasurer. It is, therefore, unnecessary to consider further the provisions of this act.

Gen. St. 1918, c. 262, § 3, provided that the trustees of the Massachusetts Agricultural College "shall manage and administer any grant or devise of land, and any gift or bequest of money or other personal property, made to the Commonwealth for the use of said institution, and shall carry out said trusts." See G. L., c. 75, § 7. With respect to these Federal funds the same authority is given to the trustees and duty imposed on them by the acts of the Legislature accepting the Federal grants, and, as I have shown, the 1925 statute expressly directs the trustees "to use and expend the same in furtherance of the purposes and objects therein set forth." In my opinion, accordingly, these funds are received by authority of the Legislature under a trust or charge that they shall be administered and expended in accordance with the provisions of the Federal statutes.

It may be questioned whether, since the adoption of Mass. Const. Amend. LXIII, section 1 of that amendment does not require the trustees or the treasurer of the Massachusetts Agricultural College receiving these Federal funds to pay them into the State treasury. Section 1 is as follows:

Collection of Revenue. — All money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof.

In my opinion, this provision is applicable only to the revenues of the State, which, under the amendment, must be paid into the treasury and can be paid out under the Constitution (pt. 2nd, c. II, § I, art. XI) only by legislative act, and does not apply to trust funds which are required to be expended in a particular manner. This department has previously held that while a gift to a branch of the State government must be paid into the treasury, gifts upon conditions which constitute a trust may be accepted by State officers or departments if authorized by statute so to do. VI Op. Atty. Gen. 636; 643.

The questions which you have asked I am at liberty to answer only in so far as they concern the performance of the duties of your department. As a former Attorney General has stated (II Op. Atty. Gen. 100): —

Officers of the State government are entitled to the opinion of the Attorney-General upon questions necessary or incidental to the discharge of the duties of their office.

1. Are employees of the College who receive full pay from one or more of these funds (Purnell, Adams or Hatch) State employees?

By section 13 of G. L., c. 75, the trustees are required to elect officers of the College, fix their salaries and define the duties and tenure of office, and by section 18 they are required to appoint a director of the Massachusetts Agricultural Experiment Station, a chemist and necessary assistants. Section 16 provides that the Experiment Station shall be a part of the College. It was provided in Gen. St. 1918, c. 262, § 5, that "all employees of the institution shall be considered state employees," but this provision was omitted in the General Laws (G. L., c. 75, § 24), apparently for the reason that the commissioners regarded it as unnecessary.

An employee is a servant, agent or representative, and

the payment of compensation as such is not a necessary element of employment. *Commonwealth* v. *Griffith,* 204 Mass. 18, 21; *Commonwealth* v. *Riley,* 210 Mass. 387, 395, 396. The employees you speak of are, in my opinion, clearly State employees. See VI Op. Atty. Gen. 105.

2. Are such employees eligible to and required to take membership in the State Retirement Association?

The salaries received by the employees you refer to are not paid by the Commonwealth, since they are paid out of the Federal funds and not by appropriation from the State. See VI Op. Atty. Gen. 105. Whether or not such employees are or should be members in the State Retirement Association, it seems to me, is not a question necessary or incidental to the discharge of the duties of the officers in your department, and therefore not one on which I should express an opinion.

3. Is publication under the terms of these bills subject to the approval of the Commission on Administration and Finance?

The duties and powers conferred by G. L., c. 7, § 9, upon the Supervisor of Administration have been transferred to the Commission on Administration and Finance. St. 1922, c. 545, § 1; St. 1923, c. 362, § 92. G. L., c. 7, § 9, required the approval of the Supervisor of Administration of any publication issued by or on behalf of the Commonwealth, except publications "issued by the officers of either branch of the General Court, or issued under special authority given by the General Court," with certain other exceptions not here material. In my opinion, the publications of the Experiment Station, although founded upon and paid for out of the various Federal appropriations, are issued "by or on behalf of the commonwealth" and are none the less subject to the approval of the Commission on Administration and Finance by reason of their being issued under the terms of the Federal statutes.

4. Is out-of-state travel on any of these funds subject to the approval of the Commission?

The Commission on Administration and Finance has no statutory authority to deal with the question of out-of-state travel. By G. L., c. 6, § 10, it is provided that "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. . . ." The statutory limitation relates only to travel at "public expense." In my opinion, travel the expense of which is paid out of these Federal funds is not travel at public expense requiring the authorization of the Governor.

5. Do receipts from the sale of products which may be produced on these funds revert to the State.

There is nothing in the acts themselves which reserves to the Federal government any right to the products resulting from the performance of the duties imposed by the acts. The purposes of the acts are completely accomplished when the funds are expended as therein provided and the other duties imposed are performed. There is therefore no trust property which can be traced in to the products. In my opinion, all such products are the property of the Commonwealth, and any funds therefrom are the property of the Commonwealth. I should assume, however, that such proceeds should be accounted for in the "full and detailed report" made to the Governor, a copy of which is sent to the Commissioner of Agriculture and to the Secretary of the Treasury, which report is to include a statement of receipts and expenditures, and is, under the Hatch Act, to be made the basis of the determination of the Secretary of the Treasury whether any portion of the preceding annual appropriation remains unexpended.

State Reclamation Board — Reclamation District — Assessment Roll — Correction of Error.

There is no authority in the State Reclamation Board or in reclamation district commissioners to change or modify the determination of such commissioners as to an item in an assessment roll, made under G. L., c. 252, as amended, if no objection thereto is filed within fifteen days.

To the Commissioner of Agriculture. 1926 December 14.

You request my opinion with regard to the power of the State Reclamation Board or the district commissioners to correct an error in the following matter. It appears that in the Green Harbor Reclamation District, on an "assessment roll as printed and sent to the individual proprietors Mrs. Cadigan is charged with owning lots 13 and 14 of the Beach Meadow subdivision, but in acreage owned and charged for she was charged for three lots instead of two. Reference to the papers from which this official roll was made out shows Mrs. Cadigan also owning lot 85 of the same subdivision. The assessment roll that went out was therefore incorrect as to the numbers of the lots with which she was charged, but correct as to the acreage and corresponding money charged. That is as far as information was available at the time the roll was made up. This information came from the registry of deeds and the town assessors' lists."

G. L., c. 252, as amended by St. 1922, c. 349, St. 1923, c. 457, § 7, St. 1924, c. 93, § 3, and St. 1926, c. 393, § 5, provides as follows: —

> As soon as the district shall have been organized under the provisions of the preceding section the commissioners shall, under the direction of the board, cause the necessary surveys and investigations to be made and shall prepare a plan showing in detail the boundaries of the district and the improvements to be effected. On the basis of such surveys and investigations the commissioners shall prepare an estimate of the total expense of the proposed improvements and shall determine the percentage of such expense to be paid by each proprietor, based on the estimated special benefit to his land in excess of the damage thereto by the use thereof for the proposed improvements. If such damage to the land of any proprietor exceeds the special benefit thereto they shall award him damages for such excess. They shall report their plan, estimate and determination to the

board, which shall approve, disapprove or modify such plan and estimate. The commissioners shall also notify each proprietor of such determination by delivering a copy thereof at his residence or by sending the same by registered mail to his last known address and shall certify to the board the date on which such notice is given. If any proprietor is aggrieved by the determination of the commissioners he may, within fifteen days after notice thereof, file with the board his objections thereto and if no such objections are filed by any proprietor within the fifteen days above specified then the determination of the commissioners shall be final.

The information upon which "the determination" of the district commissioners was based was procured from public records. The acreage credited to the proprietors was obtained from said records, and the percentage to be paid by said proprietor was properly based thereon. The assessment roll received by the proprietor made reference to a plan and a sub-plan of all the lots in the district. These plans were accessible to her, and therefore further information with regard to ownership of the lots was available had she desired to obtain the same. It further appears that "the assessment roll that went out was . . . correct as to the acreage and corresponding money charged." It therefore seems that the proprietor was sufficiently informed as to the determination of the district commissioners, even though the number of a particular lot was omitted from the assessment roll. The proprietor not having filed with the State Reclamation Board her objections to the determination "within fifteen days after notice thereof," the determination must be considered final. The limitation placed upon the time for filing objections is reasonable and necessary to prevent delay in carrying out the proposed improvements in the district.

I find no authority vested in the district commissioners or in the State Reclamation Board to change or modify the determination of the commissioners if no objection is filed thereto within the prescribed period of fifteen days. I am therefore of the opinion that the assessment as determined must continue upon your records.

Commission on Probation — Adoption — Illegitimate Child.

The consent of the mother of an illegitimate infant is a prerequisite to its adoption, even though such mother has been committed to the Reformatory for Women, and the Commission on Probation has no authority to effect an adoption without such consent.

To the Commission on Probation. 1926 December 20.

You request my opinion on the following case: There is before the Superior Court for trial the appeal of a man charged with bastardy, the appeal being taken from the adjudication of the Municipal Court of the City of Boston in September, 1926. The complainant in the case was committed to the Reformatory for Women at Sherborn from the Municipal Court on August 5, 1926, on a charge of larceny. The child in question was born July 7, 1926, and the presiding justice of the Municipal Court ordered the child to be committed to the Reformatory with her mother. A lump sum in settlement of the bastardy case has been suggested, and arrangements have apparently been made for the permanent care and ultimate adoption of said child. You state that this is for the best interests of the child, as the mother has no liking whatsoever for it and it is her intention when released from the Reformatory to give the child up to any one who will take it. You further state that in view of this arrangement preparations were made to carry out said plan, when you learned of the child's commitment to the Reformatory for Women with the mother. You request my opinion as to what right your department or the mother of said child has to sign away the mother's right in the child at the present time.

The mother, having been found guilty of the crime of larceny under G. L., c. 266, § 30, was committed to the Massachusetts Reformatory for Women, the mittimus reading, in part, as follows: —

> For which offence the said defendant is sentenced by said Court to be committed to the said Reformatory for Women, — there to be kept imprisoned, employed and detained according to the rules of the same.
>
> And to take, convey and to deliver to said Superintendent an infant

child under the age of eighteen months and you said Superintendent in the name of this Commonwealth aforesaid are hereby commanded to receive the said defendant into your custody in said Reformatory for Women.

And you said Superintendent are hereby further commanded to receive said child (and place it in the care and custody of said . . . its mother).

In committing the child to the Reformatory with the mother the court acted under the authority conferred by G. L., c. 127, § 95, which provides as follows: —

If the mother of a child under eighteen months is imprisoned in a jail, house of correction, workhouse or other place of confinement and is capable and desirous of taking care of it, the keeper shall, upon the order of the court or magistrate committing her, or of any overseer of the poor, receive the child and place it under the care and custody of its mother.

The mother and child are being held at said Reformatory in accordance with this mittimus.

Under such circumstances the method provided by statute for removal of a child from the institution is contained in G. L., c. 127, § 96, which provides as follows: —

If the officers having charge of such institution are of opinion that the health and comfort of such child require its removal, or that it is expedient that it should be removed, they shall give notice to the father or other kindred thereof, or, if no kindred can be found to receive it, to the overseers of the poor of the town where it has a legal settlement, who shall receive it. If it has no settlement in the commonwealth, it shall be sent to the state infirmary, as is provided in the case of alien paupers.

Your specific question, however, concerns the right of the Commission on Probation or the mother to sign away the mother's right in the child at the present time.

G. L., c. 119, § 16, provides as follows: —

The mother of an illegitimate infant under two years of age who is a resident of this commonwealth may, in writing signed by her and with the consent of the department, give up such infant to it for adoption; and if it deems such action for the public interest, the department may, in its discretion and on such conditions as it imposes, receive such infant and provide therefor. Such surrender by the mother shall operate as a consent by her to any adoption subsequently approved by the department.

The department mentioned in said section is the Department of Public Welfare.

G. L., c. 210, § 3, provides, in part, as follows: —

> A giving up in writing of a child, for the purpose of adoption, to an incorporated charitable institution shall operate as a consent to any adoption subsequently approved by such institution.

G. L., c. 210, § 1, provides that a person of full age may petition the Probate Court in the county where he resides for leave to adopt as his child another person younger than himself. Section 2 provides that a decree for such adoption shall not be made, except as hereinafter provided, without the written consent "of the mother only of the child, if illegitimate." Section 3 provides that the consent of the persons named in the preceding section (§ 2) shall not be required if such person "is imprisoned in the state prison or in a house of correction in this commonwealth under sentence for a term of which more than three years remain unexpired at the date of the petition."

It appears that the mother in the instant case was found guilty of a charge of larceny of chattels of the value of approximately fifteen dollars. Under G. L., c. 266, § 30, "if the value of the property stolen does not exceed one hundred dollars" the punishment is "by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars."

The sentence to the Reformatory for Women was in accord with G. L., c. 279, § 16, which provides: —

> A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the reformatory for women.

The duration of her imprisonment is governed by G. L., c. 279, § 18, which provides as follows: —

> A female sentenced to the reformatory for women for larceny or any felony may be held therein for not more than five years, unless she is sentenced for a longer term, in which case she may be held therein for such longer term; if sentenced to said reformatory for any other offence, she may be held therein for not more than two years.

As the mother in the case before me was not imprisoned "in the state prison or in a house of correction," the exception to the requirement of the consent of the mother of an illegitimate child to its adoption under G. L., c. 210, § 3, does not apply.

I find no authority vested in the Commission on Probation to sign away this mother's rights in her child. In my opinion, under the existing circumstances, a giving up or adoption of said child can only be made with the mother's consent first obtained.

Motor Vehicles — Registration — Private Charitable Hospital.

A private charitable hospital may not register a motor vehicle unless such hospital complies with the provisions of the statutes relative to compulsory automobile liability insurance.

To the Commissioner of Public Works.
1926
December 21.

You have asked me for my opinion upon the following matter: "As to whether or not a hospital which is not liable in tort for the negligence of its servants will be compelled to present to the Registrar of Motor Vehicles a certificate from an insurance company before he can register its motor vehicle."

I assume that the hospital which you describe is eleemosynary in character and is not an institution conducted by the Commonwealth or one of its subdivisions.

I am of the opinion that a motor vehicle owned by such a hospital may not be registered unless the application for registration is accompanied by a certificate as defined in G. L., c. 90, § 34A (as amended by St. 1926, c. 368, § 2). Such a hospital is not mentioned in the statute as one of the exceptions to the general provisions relative to owners of motor vehicles and the requirement that they shall produce a certificate as a prerequisite to registration of such vehicles and trailers. G. L., c. 90, § 1A (as amended by St. 1926, c. 368, § 1). No intent to include such a hospital within

the exceptions to the general provisions can be inferred from the character or scope of the statutes relative to registration. The coverage of the policy, bond or deposit required by statute with relation to a registered motor vehicle extends not only to the liability of the owner and his or its employees but to that of any person responsible for its operation, maintenance, control or use with the express or implied consent of the owner. It cannot be said to be beyond the power of the Legislature to require such a hospital to provide security for liability on the part of such others as are designated by the statute when operating, maintaining, controlling or using its motor vehicle with its express or implied consent, even though its own liability for negligence be limited by familiar principles of law.

Insurance — Mutual Liability Company — By-Laws — Issuance of Policies.

If existing by-laws of a mutual liability insurance company provide that amendments to the same are to be made at stated annual meetings, such amendments may not be made at a special meeting.

The filing of agreements to take policies in a mutual liability insurance company upon condition that they should be executed on or before a day certain is insufficient compliance with G. L., c. 175, § 73, as amended, if the certificate of the Commissioner permitting the issuance of policies was granted not more than thirty days previous to such filing.

1. You have submitted to me the following statement of facts: —

To the Commissioner of Insurance. 1926 December 23.

The by-laws of one of the mutual liability insurance companies recently incorporated but which has not been authorized to issue policies provide that "Amendments to these by-laws may be made at any annual meeting by vote of a majority of those present, ten days' notice of such amendment having been given." The by-laws provide that "An annual meeting of the members of the company shall be held at two P.M. on the second Tuesday of January of each year.

At a special meeting of the Company, all of the incorporators being present, it was voted unanimously to amend one of the articles of the by-laws. This amendment increases the contingent liability of the members

from an amount equal to and in addition to the cash premium written in the policy to double said amount.

You have asked my opinion upon a question of law relative thereto as follows: —

I request your opinion on the question whether the company has authority to amend its by-laws by a unanimous vote of the incorporators at a meeting at which all are present, but not an annual meeting.

I answer your question to the effect that the company described by you, under the statement of facts which you set forth in your communication, was without authority to amend its by-laws in the manner which you have detailed.

The general inherent power which a corporation possesses to amend its by-laws is subject to such limitations as have been placed upon the exercise of the power in the by-laws already adopted. An amendment cannot be effected except by substantial compliance with the rules governing the making of amendments in the by-laws as they exist. Where, as in the instant case, existing by-laws provide for amendments to be made at annual meetings, with ten days' notice, such meetings to be held on the second Tuesday of January, the adoption of an amendment to the by-laws at a special meeting of the incorporators prior to the annual meeting is not a substantial compliance with the existing by-laws. See *Torrey* v. *Baker*, 1 Allen, 120. It is obvious that the adoption of an amendment such as you have set forth, increasing the contingent liability of members of a mutual liability insurance company in a manner and at a time not provided for in the existing by-laws might be prejudicial to the interests of persons not then members of the company; as, for example, persons who had subscribed for policies on the basis of the contingent liability as established in the by-laws as originally drawn, and in reliance upon the provisions of the by-laws that there should be no amendment thereof prior to the annual meeting on the second Tuesday of January, which date might be subsequent to

the time when they would have taken their policies under the terms of their subscriptions.

2. You have also submitted to me the following statement of facts relative to a mutual liability insurance corporation:—

> The company submitted to the department applications for insurance in which an agreement was made to take the insurance applied for on or before a specified date. In a large percentage of these applications the agreement was made to take the insurance on or before December 31, 1926.

You have asked my opinion relative thereto as follows: —

> I request your further opinion on the question whether, assuming all other requirements of the statute were complied with, and the license issued on some date not more than thirty days previous to said December 31st, the filing of said agreements would be a compliance with the requirements of the statute.

The insurance company, in relation to its right to begin issuing policies, is governed by G. L., c. 175, § 73, as amended by St. 1926, c. 53, which provides that no policy may be issued —

> until a list of the subscribers for insurance, with such other information as he may require, shall have been filed with the commissioner, nor until the president and secretary of the company shall have certified on oath that every subscription for insurance in the list so filed is genuine and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within thirty days of the granting by the commissioner of a certificate to issue policies as provided by section thirty-two.

I am of the opinion that, although subscriptions for insurance in the instant case were, as you state, made upon condition that they should be executed before a day certain rather than within a period described by the language of the statute, yet, if in fact the required certificate was granted prior to such date certain, and not more than thirty days previous thereto, then the agreements of the subscriptions as written would be in substantial compliance with the terms of the statute, and their filing and verification in the manner provided for in section 73 would fulfill the require-

ments thereof. Much the same principle of law as governs conditional subscriptions for stock, which are held to be binding upon the fulfillment of the conditions before the time set for the execution of such subscriptions (*Central Turnpike Corp.* v. *Valentine,* 10 Pick. 142), is applicable to the state of facts set forth by you.

BOARD OF PAROLE — TERMS AND CONDITIONS OF PAROLE — TIME FOR GRANTING PAROLE.

Prisoners eligible for permits to be at liberty may not be held beyond the term of their minimum sentence unless they refuse to assent to lawful and reasonable terms and conditions for parole, seasonably presented to them in writing.

To the Commissioner of Correction
1926
December 23.

You request my opinion upon the following questions: —

1. When and under what circumstances may prisoners who have not been punished be held beyond the term of their minimum sentence?

2. May the Board of Parole impose terms and conditions upon an inmate?

3. May the Board of Parole withhold the issuance of the permit if at the time set for release those terms and conditions precedent have not been complied with?

4. Must such terms and conditions be in writing, or what other formalities should be gone through with?

I answer your questions in the order submitted.

First. —G. L., c. 127, § 133, provides: —

If the record of a prisoner sentenced to the state prison for a crime committed on or after the first day of January in the year eighteen hundred and ninety-six shows that he has faithfully observed all the rules of the prison and has not been subjected to punishment, the board of parole shall, upon the expiration of his minimum term of sentence, grant him a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence, upon such terms and conditions as it shall prescribe. If the record shows that he has violated the rules of the prison, he may be given a like permit at such time after the expiration of the minimum term of his sentence as the board shall determine. If the prisoner is held in the prison upon two or more sentences, he shall be entitled

to receive such permit when he has served a term equal to the aggregate of the minimum terms of the several sentences, and he shall be subject to all the provisions of this section until the expiration of a term equal to the aggregate of the maximum terms of said sentences.

This statute expressly states that the Board of Parole "shall" grant such prisoner a permit to be at liberty during the unexpired portion of the maximum term of his sentence, "upon such terms and conditions as it shall prescribe."

In an opinion of one of my predecessors to the Board of Parole, dated July 17, 1918 (V Op. Atty. Gen. 235), this section of the statute (then R. L., c. 225, § 115) was construed as follows: —

> In my opinion, the section in question imposes upon your Board two duties. It first must determine whether the record of a prisoner who comes within its terms "shows that he has faithfully observed all the rules of the prison and has not been subjected to punishment." If this determination is made in favor of the prisoner, it becomes the duty of the Board to "issue to him a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence, upon such terms and conditions as they shall prescribe." This plainly imposes a second duty upon your Board of determining what shall be the terms and conditions under which the permit to be at liberty is to be issued. It seems to be within the discretion of your Board to impose any reasonable terms and conditions upon such a permit which are not inconsistent with any other provisions of this section or of the statutes in general. In my judgment, therefore, under the terms of this section the warden of the State Prison is not authorized to release any prisoner except upon a permit to be at liberty duly granted by your Board, after an investigation of the matter by you. If the terms and conditions imposed by your Board in connection with the issuance of such a permit require the assent or acceptance of the prisoner, the permit cannot be issued or the prisoner released until he has indicated his assent or acceptance.

In my opinion, if the Board of Parole ascertains that a prisoner who comes within the terms of the statute has faithfully observed all the rules of the prison and has not been subjected to punishment, it is the duty of the Board of Parole formally to prepare forthwith express terms and conditions upon which a permit to be at liberty shall be

issued. Such terms and conditions must, of course, be reasonable and must not violate any provision of law. They will of necessity vary somewhat in accordance with the facts of each particular case and the objects to be accomplished. But the Board must formulate authoritative, definite and express "terms and conditions," which should be presented to the prisoner at the time when under the statute he becomes eligible for a permit to be at liberty. It seems obvious that when that time comes, in view of the mandatory language of the statute, a prisoner cannot properly be held in confinement thereafter simply because the Board of Parole has not formulated "terms and conditions" governing his permit to be at liberty. Such a construction would, in my opinion, defeat the main purpose of the statute. It is obviously not merely the right but the duty of the Board of Parole to prepare the terms and conditions so that they will be available at that time.

One of the terms and conditions imposed by the Board of Parole may properly be that the assent to or acceptance of such terms and conditions by the prisoner is required as a condition precedent to the granting of the permit to be at liberty. If in such case the prisoner refuses so to assent the Board may properly refuse to issue to him a permit to be at liberty until he has indicated his assent or acceptance.

I accordingly answer your first question that prisoners eligible under the statute for permits to be at liberty cannot properly be held beyond the term of their minimum sentence unless at the expiration of such minimum term such prisoners have definitely refused to assent to lawful and reasonable terms and conditions prepared by the Board of Parole and formally presented to such prisoners for their acceptance or rejection at that time.

Second. — I have already answered your second question in my answer to your first question.

Third. — It is reasonable to suppose that many of the terms and conditions imposed upon such prisoners are aimed to govern their movements after release, and accord-

ingly the prisoners cannot be said to have broken them until their conduct after release so demonstrates. But as I stated in my answer to your first question, it is my opinion that one of the terms and conditions may be that the prisoner shall signify his assent to all or some of the terms and conditions imposed in his particular case before he receives his permit to be at liberty. If he refuses so to assent the Board may properly refuse him such permit, at least until he does so assent.

Fourth. — The statute does not expressly require the terms and conditions therein referred to be in writing, and accordingly I cannot say that they must be; but from the use of the word "prescribe," such an intention may properly be inferred. In my opinion, a matter of such importance should require the practice of preparing such terms and conditions in writing in order that no controversy, misunderstanding or ambiguity should arise in relation thereto. Such terms and conditions may be few or many, as the Board of Parole may decide, according to the particular facts of each case, and in all fairness it seems to me that the prisoner should be furnished with a copy at the time his permit is granted, and that they should be clearly explained to him. If thus always available to him and clearly expressed, no prisoner can thereafter plead ignorance or misunderstanding of them. A copy should also be preserved with the records pertaining to said prisoner. I understand that this is substantially the custom in such cases.

Department of Public Health — Quarantine — Typhoid Carrier.

The Department of Public Health has no authority to establish quarantine regulations for, or forcibly to restrain, typhoid carriers, in the absence of reasonable regulations with relation to such carriers made by local boards.

To the Commissioner of Public Health.
1926
December 24.

You have asked my opinion relative to the following matter: —

The Department is faced with the problem of control of a typhoid carrier who has repeatedly been the cause of sickness, not only in this State but elsewhere. The difficulty of control is that he moves from one community to another and may be outside a local jurisdiction at the time the sickness is recognized. Under G. L., c. 111, § 7, the Department is given "co-ordinate powers as a board of health, in every town, with the board of health thereof."

In your opinion, is it within the power of the Department to establish quarantine regulations in this particular case and to cause the arrest and forcible restraint of this individual if the regulations are broken?

The duties of the Department of Public Health are contained in G. L., c. 111. Section 5, as amended by St. 1921, c. 322, provides as follows: —

The department shall take cognizance of the interests of health and life among the citizens of the commonwealth, make sanitary investigations and inquiries relative to the causes of disease, and especially of epidemics, the sources of mortality and the effects of localities, employments, conditions and circumstances on the public health, and relative to the sale of drugs and food and adulterations thereof; and shall gather such information relating thereto as it considers proper for diffusion among the people. It shall advise the government concerning the location and other sanitary condition of any public institution; and shall have oversight of inland waters, sources of water supply and vaccine institutions; and may, for the use of the people of the commonwealth, produce and distribute antitoxin and vaccine lymph and such specific material for protective inoculation, diagnosis or treatment against typhoid fever and other diseases as said department may from time to time deem it advisable to produce and distribute; and may sell, under such rules, regulations or restrictions as the council may establish, such amounts of the various biologic products prepared or manufactured in the laboratories of the department, as constitute an excess over the amounts required for the diagnosis, prevention and treatment of infectious diseases within the commonwealth. It shall

annually examine all main outlets of sewers and drainage of towns of the commonwealth, and the effect of sewage disposal.

Section 6 authorizes the Department of Public Health to define what diseases shall be deemed to be dangerous to the public health. Section 7 provides as follows: —

> If smallpox or any other contagious or infectious disease declared by the department to be dangerous to the public health exists or is likely to exist in any place within the commonwealth, the department shall make an investigation thereof and of the means of preventing the spread of the disease, and shall consult thereon with the local authorities. It shall have co-ordinate powers as a board of health, in every town, with the board of health thereof. It may require the officers in charge of any city or state institution, charitable institution, public or private hospital, dispensary or lying-in hospital, or any board of health, or the physicians in any town to give notice of cases of any disease declared by the said department to be dangerous to the public health. Such notice shall be given in such manner as the department may deem advisable. If any such officer, board or physician refuses or neglects to give such notice, he or they shall forfeit not less than fifty nor more than two hundred dollars.

City and town boards of health are expressly given power to make reasonable health regulations. G. L., c. 111, § 31, as amended by St. 1924, c. 180.

By G. L., c. 111, § 92, each city, except Brockton, shall, and each town may, and upon request of the Department shall, establish and maintain constantly within its limits one or more hospitals for the reception of persons having smallpox, diphtheria, scarlet fever, tuberculosis or other diseases dangerous to the public health as defined by the Department, unless there already exists therein a hospital satisfactory to the Department for the reception of persons ill with such diseases, or unless some arrangement satisfactory to the Department is made between neighboring municipalities for the care of such persons. Section 95 provides as follows: —

> If a disease dangerous to the public health breaks out in a town, or if a person is infected or lately has been infected therewith, the board of health shall immediately provide such hospital or place of reception and such nurses and other assistance and necessaries as is judged best for his

accommodation and for the safety of the inhabitants, and the same shall be subject to the regulations of the board. The board may cause any sick or infected person to be removed to such hospital or place, if it can be done without danger to his health; otherwise the house or place in which he remains shall be considered as a hospital, and all persons residing in or in any way connected therewith shall be subject to the regulations of the board, and, if necessary, persons in the neighborhood may be removed. When the board of health of a town shall deem it necessary, in the interest of the public health, to require a resident wage earner to remain within such house or place or otherwise to interfere with the following of his employment, he shall receive from such town during the period of his restraint compensation to the extent of three-fourths of his regular wages; provided, that the amount so received shall not exceed two dollars for each working day.

Local boards of health are vested with drastic powers relative to nuisances and causes of sickness. G. L., c. 111, § 122, provides as follows: —

The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town, or on board of vessels within the harbor of such town, which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town or into or from any vessel. Whoever violates any such regulation shall forfeit not more than one hundred dollars.

The power of the Department of Public Health to make rules and regulations is limited to certain specified objects, while the power of local boards of health to make reasonable health regulations is broad and embracing, disclosing the intention of the Legislature to vest control largely in local boards rather than in the Commonwealth through the Department of Public Health.

In the absence of express power vested in the Department of Public Health to establish quarantine regulations in the case of a person who has been found to be a typhoid carrier, such right does not exist unless it can be implied from the sentence in G. L., c. III, § 7, providing that the Department "shall have co-ordinate powers as a board of health, in every

town, with the board of health thereof." The word "co-ordinate" is usually defined as "existing or occurring together in equal degree or similar relation" or "to place in harmonious or reciprocal relation; combine or adjust for action or for any end." Standard Dictionary. For example, the word "co-ordinate," whenever used with reference to the three departments of state, implies equality and rank, importance, independence and dignity. *Woods* v. *Sheldon*, 69 N. W. 602. It is not the same as "concurrent." See *Commonwealth* v. *Nickerson*, 236 Mass. 281.

In an opinion to the State Board of Health (III Op. Atty. Gen. 81), defining R. L., c. 75, § 8, now G. L., c. 111, § 7, it was said: —

> It appears from this section that the principal duty of the Board created by this section of the statute, with relation to matters of health, was the investigation of contagious or infectious diseases and the prevention of such diseases, and it is therefore provided that the Board shall consult with the local authorities thereon. Then follows the phrase under consideration, — "and shall have co-ordinate powers as a board of health, in every place, with the board of health," etc.
>
> The strong reason for assuming that the powers referred to are conferred only where contagious disease exists or is likely to exist is the fact that they are mentioned in a section which purports to treat only of contagious or infectious diseases.

In my opinion, if a local board of health has established reasonable health regulations it may be that the Department of Public Health has "co-ordinate powers" as a board of health in every town with the board of health thereof with respect to their enforcement, but in the absence of such health regulations, duly enacted by a local board of health, it is my opinion that it is not within the power of the Department of Public Health to establish quarantine regulations under the facts contained in your letter, or to cause the arrest and forcible restraint of the person referred to, under the law as it now exists.

Right of Access to Land taken for Park Purposes — Abutting Owners — Gasoline Filling Station.

The fact that land is taken for a public park does not necessarily give the abutting owners a right of access to such land. The abutting owners may have a right of access to such land used as a parkway, by virtue of and governed by the terms of a deed, given by their predecessor in title, to a city.

To the Metropolitan District Commission.
1926
December 31.

You request my opinion as to the right of the Beacon Oil Company, owner of land abutting on Memorial Drive in Cambridge, to access to said drive in connection with a gasoline filling station maintained or to be maintained on the owner's premises. You ask specifically: —

1. Does the fact that the land was taken for a public park give the abutting owners a common-law right of access such as was given in the Anzalone case?

2. Do the present owners of the abutting land have a right of access by virtue of the provisions of the deed referred to?

You state: —

This land was taken by the city of Cambridge for park purposes under the provisions of St. 1892, c. 341, and St. 1893, c. 337. In March, 1897, the then owner of the land to which the Beacon Oil Company petitions for these driveway entrances and of land taken for the park in front, now incorporated in Memorial Drive, conveyed to the city of Cambridge the land included in the taking by a stereotyped form of deed then in use by the city, which contained, among others, the following provision, in substance:

"And for the above-named consideration and the further consideration that said City of Cambridge shall construct along the boundary line of said park, within said parcel of land, a roadway and walk to which we and our heirs and assigns, owners or occupants of adjoining lands of grantor, shall have free access, with the right to use the same for the purposes of a way, subject to such reasonable rules and regulations as may from time to time be made by the Park Commissioners of said City or by any other board or department having for the time being the control and management of said park, we hereby, for ourselves and our heirs, executors and administrators, covenant with the said City of Cambridge that we and our heirs and assigns will hold our remaining land abutting upon said park and to a distance of one hundred feet therefrom, subject to the following restrictions, which shall be inserted or referred to in any con-

veyance hereafter made by us or them of the whole or any part of said restricted land:

1. No building erected or placed upon said premises shall be used for a livery or public stable or for any mechanical, mercantile or manufacturing purposes. . . ."

Then followed a provision, in substance, that the restrictions above set forth shall continue in force so long as such roadway and walk shall be maintained by said city of Cambridge, and the grantor, his heirs and assigns, owners or occupants of the grantor's adjoining land, shall have free access thereto and liberty to use the same for the purposes of a way subject to the rules and regulations aforesaid.

It is my understanding that the land described as Memorial Drive became the property of the Commonwealth and came under the control of the Metropolitan District Commission by virtue of St. 1920, c. 509. Section 2 of said act reads as follows: —

Upon the conveyance of the said lands as provided in section one, the metropolitan district commission shall have all the powers and duties in respect thereto conferred upon the metropolitan park commission by chapter four hundred and seven of the acts of eighteen hundred and ninety-three and acts in addition thereto and in amendment thereof.

I answer your first question in the negative.

In an opinion given by me to your Commission under date of September 19, 1923 (VII Op. Atty. Gen. 259), it is said: —

There are two classes of roads which may be constructed under the terms of our statutes by your Commission. The first of these consists of roads constructed under the provisions of G. L., c. 92, § 33, formerly St. 1893, c. 407, and consists, in general, of roads laid out upon or bordering upon spaces taken by the Commission for exercise and recreation. In the absence of particular facts relative to any one of such roads, these roads may fairly be said not to be public ways (*Gero* v. *Metropolitan Park Commission*, 232 Mass. 389); and in the absence of an easement given by the Commonwealth to some adjoining landowner, the adjoining landowner will not have any right of way from his land to such road.

The roadway involved in the Anzalone case to which you refer (*Anzalone* v. *Metropolitan District Commission*, 257 Mass. 32) was constructed under St. 1894, c. 288.

I answer your second question in the affirmative.

Under the reasoning in the Anzalone case the abutting owner has a right of access under the provisions of the deed above referred to. *Anzalone* v. *Metropolitan District Commission,* 257 Mass. 32, 36. I assume that the landowner is not violating the restrictions set forth in the deed. Also, it is settled by the decision in the Anzalone case and in the case of *Metropolitan District Commission* v. *Cataldo,* 257 Mass. 38, that the right of access is "subject to reasonable restrictions and requirements as to location, construction, and use deemed by the Commissioners to be necessary for the public safety and convenience." *Metropolitan District Commission* v. *Cataldo,* 257 Mass. 38, 42.

Land in Tidewater — Compensation for Rights therein — Licenses.

The Governor and Council may determine the compensation to be paid for rights relative to the placing of structures granted in land of the Commonwealth in tidewater; but if only a revocable license to build structures thereon is granted by the Division of Waterways and Public Lands, no compensation is required by the statute to be paid.

To the Commissioner of Public Works. 1927 January 4.

You ask my opinion whether charges can be made by the Governor and Council under G. L., c. 91, § 22, or otherwise, as compensation for rights granted in land of the Commonwealth by licenses to place cables, wires, pipes and similar structures upon such land in tidewater. You ask me also whether G. L., c. 91, requires a license from the Division of Waterways and Public Lands for the placing of cables and wires in the tidewaters of the Commonwealth, whether the Governor and Council may determine the compensation to be paid irrespective of any license, whether such structures may be declared a public nuisance under section 23 if unlicensed or if compensation has not been paid, and whether if compensation is paid permanent rights are acquired that can be revoked only by legislative act or

repayment of compensation, notwithstanding the insertion of a revocable clause in the license.

Your inquiry requires first an analysis of the statutory provisions governing the issuing of licenses for structures in tidewater and the interpretation of those provisions by the court and by the Attorney-General. In the General Laws these provisions appear in chapter 91, and so far as material to this inquiry are as follows: —

Section 14. The division may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in tide water below high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the governor and council, beyond the line of riparian ownership. . . .

Section 15. Every authority or license granted since eighteen hundred and sixty-eight or hereafter granted by the commonwealth to any person to build a structure or do other work . . . upon ground over which the tide ebbs and flows, except Boston harbor, or to fill up or to enclose the same, whether such ground is above or below low water mark, or within or beyond one hundred rods from high water mark, or whether private property or property of the commonwealth, shall be subject to the following conditions, whether expressed in the act, resolve or license granting the same or not: such authority or license shall be revocable at the discretion of the general court and shall expire in five years from its date, except as to valuable structures, fillings or enclosures actually and in good faith built or made under the authority or license during the term thereof; but if compensation has been paid to the commonwealth under section twenty-two or under any similar provision of law, the rights and privileges for which it has been paid shall not so terminate or be revoked unless provision is made for repayment of such compensation.

. . . . . .

Section 22. If authority or a license is granted by the general court or by the division to a person to build a wharf or other structure upon, or to fill or otherwise occupy, land in tide water, or to build or extend any structure or drive piles, fill land or make any obstruction, encroachment or excavation in, over or upon the waters of any great pond, he shall, before the work is begun, pay to the commonwealth such compensation for the rights granted in any land the title to which is in the commonwealth as shall be determined by the governor and council. . . .

Section 23. Every erection made and all work done within tide water, . . . not authorized by the general court or by the division, or made or

done in a manner not sanctioned by the division, if a license is required as hereinbefore provided, shall be considered a public nuisance. . . .

Legislation regulating erections and works in tidewaters was first enacted in St. 1866, c. 149, establishing the Board of Harbor Commissioners and giving to them the general care and supervision of all the harbors and tidewaters and of all the flats and lands flowed thereby within the Commonwealth, except the Back Bay lands, in order to prevent and remove unauthorized encroachments. By section 4 of the act the commissioners were given power to supervise the building of certain structures and the filling of flats in tidewaters authorized by the Legislature, and were required to ascertain the amount of tidewater displaced, for which compensation was to be paid to the Commonwealth. Section 5 declared unauthorized erections and works within tidewaters to be a public nuisance.

St. 1869, c. 432, provided that all authority or license granted during that session of the Legislature, or that might be thereafter granted by the Commonwealth, to build any structure upon ground over which the tide ebbs and flows, or to fill up or enclose the same, should be subject to the condition that such license or authority should be revocable at any time at the discretion of the Legislature and should expire at the end of five years from its date, except where and so far as valuable structures, fillings or enclosures should have been actually and in good faith built or made under the same.

St. 1872, c. 236, in section 1, provided that "any person may build or extend a wharf or construct a pier, dam, seawall, road, bridge or other structure, fill land or flats, or drive piles in or over tidewater below high-water mark within the line of riparian ownership, on any shore and within whatever harbor lines there may be at the time established by law along such shore: *provided* the license of the board of harbor commissioners is first obtained in the manner provided by" St. 1866, c. 149, § 4. Section 2 provided that the Board of Harbor Commissioners might grant licenses to build or ex-

tend such structures or fill land or flats in or over tidewater below high water mark and beyond the line of riparian ownership, upon such terms as they might prescribe, with the provisos that no such license beyond the line of riparian ownership should be valid unless approved by the Governor and Council or except where a harbor line had been established, and that no such license should have effect beyond such harbor line except in relation to a structure authorized by law outside such line. The power to grant such licenses beyond the line of riparian ownership where no harbor line had been established was given to the board by St. 1874, c. 347, subject to certain restrictions.

St. 1874, c. 284, provided that whenever any authority or license was thereafter granted by the Legislature or by the Board of Harbor Commissioners, with the approval of the Governor and Council, to build any wharf or other structure or to fill or otherwise occupy land in tidewater below low water mark, the person so authorized should pay to the Commonwealth such compensation for the rights and privileges granted in such land as should be determined by the Governor and Council to be just and equitable; and it also provided that when such compensation had been paid the rights and privileges so granted should not, under St. 1869, c. 432, terminate in five years, and should not be revocable unless provision was made in such revocation for repayment by the Commonwealth of the amount thereof.

The provisions of these acts were combined in P. S., c. 19, §§ 6–18, the Board of Harbor and Land Commissioners having then replaced the previous Board of Harbor Commissioners. By subsequent enactments the powers of that board were transferred to the Commission on Waterways and Public Lands and finally to the Division of Waterways and Public Lands. G. L., c. 91, §§ 14, 15, 22 and 23, are substantially continuations, with an exception referred to later, of P. S., c. 19, §§ 9, 12, 16 and 17.

An account of the history of this legislation is given in

I Op. Atty. Gen. 412, and in *Attorney General* v. *Boston & Lowell R.R. Co.*, 118 Mass. 345.

Licenses granted by the General Court to build structures in tidewater prior to St. 1869, c. 432, have generally been construed to be irrevocable. The court has said that it was the common understanding that they operated as grants and not as mere revocable licenses. *Fitchburg R.R. Co.* v. *Boston & Maine R.R.*, 3 Cush. 58, 87; *Bradford* v. *McQuesten*, 182 Mass. 80; *Treasurer and Receiver General* v. *Revere Sugar Refinery*, 247 Mass. 483, 489. In that respect they differ fundamentally from locations granted to public service corporations to occupy the public streets. *Pierce* v. *Drew*, 136 Mass. 75; *Springfield* v. *Springfield St. Ry. Co.*, 182 Mass. 41, 47, 48; *Metropolitan Home Tel. Co.* v. *Emerson*, 202 Mass. 402; *Connecticut Valley St. Ry. Co.* v. *Northampton*, 213 Mass. 54, 63, 64; *Union Institution for Savings* v. *Boston*, 224 Mass. 286. This rule of construction is, of course, a rule for determining the legislative intention in granting such licenses. It would therefore not prevail as against an expressed purpose that a license should be temporary or revocable.

St. 1869, c. 432, as amended by St. 1874, c. 284 (G. L., c. 91, § 15), provided, in substance, that such licenses, granted by the Commonwealth after 1868, should expire in five years or might be sooner revoked by the General Court unless in the meantime valuable structures, fillings or enclosures were built or made under the license, and with the further proviso that if compensation had been paid to the Commonwealth for the rights granted the license should not terminate or be revoked unless provision was made for repayment of that compensation. In effect, all licenses thereafter granted, irrespective of other terms and conditions, were made subject in any event to forfeiture for non-user of the rights granted, with the exception in case compensation had been paid. *Cf. Treasurer and Receiver General* v. *Revere Sugar Refinery*, 247 Mass. 483, 489. Manifestly it could not and was not intended to curtail the power of future legisla-

tures to grant licenses subject to other conditions as to expiration or revocation.

By St. 1872, c. 236 (G. L., c. 91, § 14), the Legislature, as we have seen, authorized the Harbor Commissioners to license and prescribe the terms for the construction or extention of structures, the filling of lands or flats, and the driving of piles in tidewater below high water mark. The purpose of this statute was doubtless to relieve the Legislature of the burden of granting such licenses by special act. I Op. Atty. Gen. 412, 415. While the grant of power to prescribe the terms of licenses is without express limitation, it is, of course, subject to such limitations as may be found in the statutes as well as to the general requirement that the terms must be reasonable. *Keefe* v. *Lexington & Boston St. Ry. Co.*, 185 Mass. 183; *Selectmen of Clinton* v. *Worcester, etc., St. Ry. Co.*, 199 Mass. 279, 285; *Treasurer and Receiver General* v. *Revere Sugar Refinery*, 247 Mass. 483, 491; *Grand Rapids* v. *Braudy*, 105 Mich. 670, 678; *Schwuchow* v. *Chicago*, 68 Ill. 444.

The only statutory provision which for our purposes needs to be considered here as containing possible limitations on the general power to prescribe terms is St. 1869, c. 432, as amended (G. L., c. 91, § 15), providing for the expiration or revocation by the General Court of licenses under which action has not been taken.

Whether this statute should be construed as governing the subject of revocation so as to preclude the Division from prescribing as a term of any license any provision with regard to the revocability thereof different from that contained in the statute, might, if it were a new question, be a matter of some doubt. But I am informed that it has been the practice of the Board of Harbor Commissioners and its successors, since 1872, to grant licenses for the erection of temporary structures upon condition that they shall be removed at the request of the Board and that the licenses so granted may be revoked or modified, that many such licenses have been issued from that time on, and that the authority to do so has not been questioned. It is a general rule in the inter-

pretation of statutes that the practical construction put upon a legislative act by those charged with its enforcement is entitled to considerable weight. *Burrage* v. *County of Bristol*, 210 Mass. 299, 301; *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306, 310.

Again, the Board of Harbor and Land Commissioners was advised by former Attorney-General Herbert Parker, in an opinion dated January 15, 1906 (not published), that the Board had the right in granting a license to reserve expressly the right to revoke it for some reasonable cause, and that the provisions of R. L., c. 96, § 21 (G. L., c. 91, § 15), were not in conflict. As to those provisions he said: —

> The Legislature has limited the time in which a man may act under a license to five years from the date thereof, and has made such license revocable at its discretion. But that the Legislature has seen fit to place a maximum limit upon the length of time during which a license shall remain in force, and has retained the power to put an end to it sooner, is not an adequate reason for the position that the Board may not still further limit the existence of the license by virtue of its right to prescribe terms.

On the whole, therefore, it is my opinion that the Division has the power to prescribe as a term of a license that it shall be revocable and that structures built thereunder shall be removed upon such revocation if, under the circumstances of the particular case, such requirement is a reasonable one. But the last clause in the act of 1869, as amended, does contain a clear limitation of authority in the cases to which it relates. By virtue of that proviso the Division would not have power to prescribe as a term of a license for which compensation had been paid that it should terminate or be revocable without making adequate provision for repayment of such compensation.

The duty imposed upon the Governor and Council by section 22 is to determine the compensation to be paid for rights granted in land of the Commonwealth. Where the license given by the Division is a revocable one, no right in

land of the Commonwealth is granted, and therefore no compensation is required to be paid by section 22.

Section 23 provides that "every erection made and all work done within tide water, . . . not authorized by the general court or by the division, . . . if a license is required as hereinbefore provided, shall be considered a public nuisance." While in the General Laws there is no specific provision requiring a license from the Division or from the General Court for the erection of a structure, such requirement is doubtless a plain inference. In that connection the provision in St. 1872, c. 236, § 1, requiring a license for the building or extension of the structures described in section 2 (G. L., c. 91, § 14) should be observed. The court has said that structures cannot be placed in tidewater without a license from public authority. *Wyman* v. *County Commissioners*, 157 Mass. 55, 57; *N. Ward Co.* v. *Street Commissioners*, 217 Mass. 381, 385; and the absence of a license has been said to be sufficient evidence that a structure is a public nuisance. *Fuller* v. *Andrew*, 230 Mass. 139, 145.

Whether cables, wires and pipes are structures, within the meaning of section 14, is a question of considerable doubt. The word "structure" is defined broadly as any production or piece of work artificially built up, or composed of parts joined together in some definite manner. See *Stevens* v. *Stanton Construction Co.*, 153 App. Div. 82; *Nash* v. *Commonwealth*, 174 Mass. 335. Railroad tracks have frequently been held to be structures. *Giant-Powder Co.* v. *Oregon Pac. Ry. Co.*, 42 Fed. 470; *Ban* v. *Columbia Southern Ry. Co.*, 117 Fed. 21, 30; *New York, N. H. & H. R.R. Co.* v. *New Haven*, 70 Conn. 390; *Flanagan* v. *F. W. Carlin Const. Co.*, 134 App. Div. 236. Filling was held to be a structure in *Clement* v. *Putnam*, 68 Vt. 285, and so were poles and wires in *Forbes* v. *Willamette Falls Electric Co.*, 19 Or. 61.

The objects and purposes for which licenses may be granted by the Division are described in section 14 as "for the construction or extension of a wharf, pier, dam, sea wall,

road, bridge or other structure, or for the filling of land or flats, or the driving of piles in tide water below high water mark." The words "or other structure" are used in conjunction with words describing things which are not merely laid on the land but are constructed thereon. The filling of land and the driving of piles are separately described. In the interpretation of statutes the principle of *ejusdem generis* or *noscitur a sociis* requires that the application of general words should be confined to things of similar import with more particular words preceding. *Commonwealth* v. *Lowell Gas Light Co.*, 12 Allen, 75, 77; *Clark* v. *Gaskarth*, 8 Taunt. 431; *Renick* v. *Boyd*, 99 Pa. St. 555; *Matter of Hermance*, 71 N. Y. 481, 486, 487; *People* v. *New York, etc., Ry. Co.*, 84 N. Y. 565, 568, 569; *The J. Doherty*, 207 Fed. 997, 999, 1000; Endlich, Interpretation of Statutes, §§ 405, 406; *cf. Reed* v. *Tarbell*, 4 Met. 93, 101.

In determining the extent of the authority granted to the Division by section 14, so far as concerns cables and wires, the effect of G. L., c. 166, § 21, authorizing the construction of lines for transmitting electricity in public ways and waters of the Commonwealth, must also be considered. The Legislature has there expressly authorized the construction of such lines across and under any waters in the Commonwealth so long as navigation is not endangered or interrupted. G. L., c. 166, § 21, is as follows: —

> A company incorporated for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise, or for the transmission of electricity for lighting, heating or power, or for the construction and operation of a street railway or an electric railroad, may, under this chapter, construct lines for such transmission upon, along, under and across the public ways and across and under any waters in the commonwealth, by the erection or construction of the poles, piers, abutments, conduits and other fixtures, except bridges, which may be necessary to sustain or protect the wires of its lines; but such company shall not incommode the public use of public ways or endanger or interrupt navigation.

The succeeding sections in that chapter contain provisions for the granting of locations in public ways, but there are

no such provisions with respect to the granting of locations across or under the waters in the Commonwealth. The court has held that the general subject of the construction of lines for transmitting electricity is regulated by G. L., c. 166, and that it was intended to govern and be a code for the whole subject. *Metropolitan Home Tel. Co.* v. *Emerson*, 202 Mass. 402, 406, 407.

On the other hand, I am informed that for many years it has been the custom of the Board of Harbor and Land Commissioners to grant licenses to lay cables and wires in tidewater, reserving the right to require the removal or change in location of such cables and wires.

Notwithstanding this practical construction of the statute as giving authority to the Board to grant licenses in such cases, it is my opinion that it cannot prevail as against the plain language of chapter 166, as interpreted by the court, by which authority is given to companies duly incorporated to construct lines for transmitting electricity across and under any waters in the Commonwealth, that cables and wires, especially if used for transmitting electricity, are not structures within the meaning of G. L., c. 91, § 14, that the Division is not authorized to grant licenses to place them in tidewater, and that the placing of such cables and wires in tidewater cannot be a public nuisance under section 23, since no license is required.

As to water pipes, gas pipes and sewers, while the question whether they are structures within the meaning of sections 14 and 23 is doubtful, I am inclined to hold that they are and that the Division has full authority with respect to them.

My answers to your questions more specifically are as follows: —

I think that the present practice of the Division as to cables and wires is wrong in the respects which I have pointed out, and that charges for compensation as to them cannot be made by the Governor and Council. Cables and wires authorized under G. L., c. 166, § 21, require no license from the Division, are not subject to payment of compensa-

tion, and are not a public nuisance unless they endanger or interrupt navigation. As to pipes, I think, as I have said, that they are structures for which licenses may be issued by the Division and compensation charged if rights in land of the Commonwealth are granted.

You state that the Postal Telegraph-Cable Company has taken the position that, being authorized by the Post Road Act of July 24, 1866 (14 U. S. Stat. 221, Rev. Stat., § 5263, *et seq.*), to lay lines under, over and across any and all navigable waters of the United States, it may construct and operate such lines without any permit from the State. That, however, is not an accurate statement of the law. The effect of the Federal statute was to deny to a State the authority to say that a telegraph company may not operate lines constructed over postal roads within its borders; but the State has, nevertheless, the right to impose reasonable restrictions and regulations. See *Western Union Tel. Co.* v. *Richmond*, 224 U. S. 160, 169, 170; *Essex* v. *New England Tel. Co.*, 239 U. S. 313; *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259; VIII Op. Atty. Gen. 1.

In my opinion, the State has the power to require the granting of licenses for the construction of interstate lines under its waters, and may delegate the power to supervise such construction. I do not find, however, that it has done so.

Statutory provisions for the regulation of structures and works in tidewater have remained substantially unaltered for fifty years. In several important respects the power of the Division to grant licenses, to prescribe their terms and to supervise works in tidewater needs definition and, it may be, enlargement. This is a matter which you may think it wise to bring to the attention of the General Court.

State Employees — Mechanics' and Tradesmen's Pay — Permanent Employees.

The Commonwealth is not required by G. L., c. 149, § 26, to pay mechanics and tradesmen, permanently in its employ on an annual and full time basis, the customary and prevailing rate of wages.

To the Commission on Administration and Finance. 1927 January 18.

You request my opinion as to whether or not the Commonwealth is by law required to pay mechanics and tradesmen not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality where public works are under construction if such mechanics and tradesmen are on the regular maintenance payroll and are part of the permanent force of employees maintained by the various State institutions.

You state that the various State institutions maintain a permanent force of employees, such as carpenters, masons, plumbers, steamfitters and like skilled tradesmen, who are paid on an annual basis and employed full time throughout the year. In fixing the compensation of such employees the factors of permanency and year-round employment are taken into consideration and balanced against the going rates for intermittent employment in such trades under private employers.

The answer to your question depends upon the construction of G. L., c. 149, § 26, which provides as follows: —

> In the employment of mechanics, teamsters and laborers in the construction of public works by the commonwealth, or by a county, town or district, or by persons contracting therewith for such construction, preference shall first be given to citizens of the commonwealth who have served in the army or navy of the United States in time of war and have been honorably discharged therefrom or released from active duty therein, and who are qualified to perform the work to which the employment relates; and secondly, to citizens of the commonwealth generally, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States; and every contract for such work shall contain a provision to this effect. The wages for a day's work paid to mechanics and teamsters employed in the construction of public works as aforesaid shall be not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality where such public works are constructed;

provided, that no town in the construction of public works shall be required to give preference to veterans not residents of such town, over citizens thereof. Any contractor who knowingly and wilfully violates this section shall be punished by a fine of not more than one hundred dollars.

In my opinion, this section does not apply to the permanent force of State employees, who are paid on an annual basis and employed full time throughout the year. Such permanent employees are not paid "wages for a day's work" but are paid compensation for regular services throughout the year, in the fixing of which compensation the factors of permanency and year-round employment are taken into consideration. A per diem employee may usually recover wages only on proof of actual work on a particular job, while a permanent employee who is paid on an annual basis and employed full time throughout the year usually receives his compensation at the rate fixed by his contract, regardless of the particular job he is called upon to do from day to day within the scope of his employment.

Soldier — Dishonorable Discharge — World War.

A soldier who received a "bad conduct" discharge from the service prior to the expiration of his full term of enlistment is not entitled to the benefits of Gen. St. 1919, c. 283, even though such discharge was subsequent to the close of the World War and the enlistment prior thereto.

To the Treasurer and Receiver General.
1927
January 18.

You request my opinion as follows: —

Under date of October 9, 1919, Hon. Henry A. Wyman advised this department that Gen. St. 1919, c. 283, § 5, should be construed to exclude from the benefit of the act all persons discharged for causes other than honorable. This section provides, in part, as follows: —

"No person shall be eligible for any benefit accruing under this act who . . . shall have received a dishonorable discharge from the service of the United States."

Does this opinion refer to those persons discharged prior to November 11, 1918, or does it include those discharged subsequent to that date for causes other than honorable?

This specific case before me is that of a man who enlisted for four years

in December, 1917, performed honorable service until June, 1919, subsequent to which his conduct became so bad as to necessitate a "bad conduct" discharge in August, 1920.

In the opinion to which you refer (V Op. Atty. Gen. 405), my predecessor, in considering Gen. St. 1919, c. 283, § 5, said: —

> In my judgment, this provision, when read in the light of the purpose of the act as declared in section 1, must not be strictly construed as referring only to persons who receive discharges expressly declared by their terms to be dishonorable. It should, rather, in my judgment, be given a broader construction and be held to exclude from the benefits of the act all persons who did not receive an honorable discharge. It was the purpose of the statute, as declared in section 1, to recognize all services rendered in the army or navy by citizens of Massachusetts "to the full extent of the demands made upon them and of their opportunity." I cannot persuade myself that the services rendered by a man who so conducted himself as a member of the army of the United States that it became necessary to discharge him therefrom for misconduct were services of the character intended to be recognized. I am unwilling to assume that the General Court intended thus to reward any man who so failed to perform his duties that he was discharged for misconduct.

In the specific case you mention the term of enlistment was for four years, to wit, from December, 1917, to December, 1921. Before this term expired, the soldier received a "bad conduct" discharge, to wit, in August, 1920.

It accordingly follows that the soldier in question did not render the service his term of enlistment called for, "to the full extent of the demands made upon him and of his opportunity."

The opinion does not refer only to those persons discharged prior to November 11, 1918, but includes those who actually entered the official service during the period specified in the statute, but who were discharged subsequent to that date for causes other than honorable.

OPINIONS

OF

ARTHUR K. READING, ATTORNEY-GENERAL

METROPOLITAN DISTRICT COMMISSION — CHARLES RIVER BASIN — PRIVATE CANAL — REPAIRS.

The Metropolitan District Commission has no authority to compel the owners of land abutting on the private canal known as Broad Canal to make repairs to walls and wharves thereon.

To the Metropolitan District Commission.
1927
January 31.

You have requested my opinion as to the authority of the Metropolitan District Commission to require owners of lands abutting on Broad Canal, East Cambridge, on the west bank of the Charles River Basin, to remedy conditions on their premises which threaten to cause obstructions to the canal and expense to the Commonwealth in removing the same in order to maintain certain depths of water required by statute.

You have also submitted to me a letter from the Boston Sand & Gravel Company, which, assuming the facts therein stated to be accurate, tends to show that certain buildings and bulkheads situated on lands formerly owned by the Mead-Morrison Company, title to which is now in the Holland System Company, are in such condition that they are likely to fall into the canal and obstruct the passage of boats. I am informed that the Boston Sand & Gravel Company is the owner of land bordering on said canal and maintains thereon a wharf for unloading boats which come up Broad Canal from the Charles River Basin; that the land of the Holland System Company, 31–45 Main Street, Cambridge, to which attention has been particularly di-

rected, also borders the canal between the property of the Boston Sand & Gravel Company, 77–89 Main Street, and the entrance to the canal.

Broad Canal, on the westerly side of the Charles River, did not exist prior to 1806, when steps towards its construction were taken by private owners of flats who desired suitable access to the river from their lots by boat. By an agreement and deed dated July 8, 1806, recorded Middlesex South District Deeds, January 11, 1808, book 172, page 496, all the owners of the land over which Broad Canal was to be laid out entered into an agreement among themselves for the construction of such canal, and jointly conveyed to each other all the land over which the canal was to be laid in designated undivided proportions, and by agreement provided for the payment of the expenses incident to the construction of the canal, by an allocation of such expenses to each of such owners, based apparently upon the frontage of lots owned by them severally on the proposed canal. This agreement and deed does not appear to have been signed by one of the named grantors, Josiah Mason, Jr., from whom both the Holland System Company and the Boston Sand & Gravel Company derive title to their respective lots, but the projected canal was laid out immediately after the execution of the deed, according to a plan dated May 31, 1806, and recorded with Middlesex South District Deeds, record book 166, at end, and said Mason accepted the benefits of the canal as laid out, and after his death in 1839 subsequent holders of the title to the land which had been his referred to it in the descriptions in their conveyances of all portions sold as being bounded by the canal. The other owners whose parcels at the present time now abut on the canal derive their titles from Mason or from others named as grantors in the agreement of 1806.

The canal was laid out and constructed and has been maintained since 1808 as private property, the title in the fee of the strip of land in which the canal was dug resting

in the owners of the adjoining lands or in the heirs of the original parties to the agreement.

Prior to the enactment of the statutes hereinafter referred to no action had been taken by the Commonwealth with relation to the canal, nor was anything done by any subdivision thereof which disturbed or in any way tended to abrogate private ownership of the canal, its walls or wharves, and it is operated at the present time as a private canal, title to which is in individuals, above described. Before the enactment in 1903 of legislation providing for the Charles River Basin and its dam along its present lines, a report was made to the Legislature by a committee appointed under chapter 105 of the Resolves of 1901, in which it was stated as follows: —

> The Broad Canal is owned by the proprietors of the banks as tenants in common under an agreement dated in 1806, by which they are authorized to maintain a Canal at a depth of 9 feet, and they undoubtedly have certain riparian rights of access to tidewater. Any act authorizing the building of a dam should contain a provision that the owners of private property above the dam should recover damages for any injury occasioned to their property by reason of the construction of a dam and the consequent reduction of the water level.

It is apparent, then, that the Legislature, in enacting the statutes relative to the Charles River Basin, hereinafter referred to, had in mind the fact of private ownership of Broad Canal. In subsequent statutes the Legislature provided against the reduction of the water level in the canal, and thereby prevented an occasion for the recovery of damages.

In 1903, under chapter 465 of the acts of that year (and subsequent amendments), the Charles River Basin Commission was appointed and constructed a dam across the Charles River below Broad Canal, forming a basin above the dam. St. 1909, c. 524, transferred all the powers, rights, duties and liabilities of the Charles River Basin Commission to the Metropolitan Park Commission, and the Charles River Basin Commission was abolished. By

Gen. St. 1919, c. 350, § 123, the Metropolitan Park Commission was abolished and all its rights, powers, duties and obligations were transferred to the Metropolitan District Commission.

In this connection it may be noted that another canal, constructed and situated much as is Broad Canal, leading from the Charles River between the dam and Broad Canal, is referred to by the Supreme Judicial Court in *Wellington* v. *Cambridge*, 214 Mass. 35, and is there held to be private property. It is also to be noted that the Charles River Basin Commission, before proceeding under the terms of St. 1903, c. 465, at the beginning of the work to dredge and to strengthen the walls and wharves in Broad Canal, took a release from the owners of the parcels abutting on the canal discharging the Commonwealth from liability for all claims for damages which might accrue to the owners through the acts of the Commission in doing such work, the parties to the release apparently recognizing by its execution the fact that there had been no appropriation of any of the property in question to a public use. It follows from these considerations that Broad Canal and its walls and wharves are private property. As it lies over flats situated within the line of private ownership and not within the lines of the Charles River Basin, the Commission, in the absence of specific statutory authority, could have had no obligation to prevent the filling up of such canal nor any duty relative to its maintenance.

The situation of the Commission in its relation to Broad Canal is not affected by St. 1909, c. 524, § 5, as amended by St. 1910, c. 582, § 1, which authorizes the Commission to make reasonable rules and regulations "for the care, maintenance, protection and policing of the Charles River Basin as herein defined," since the definition of the word "basin" in said chapter 524, while it includes the Charles River, the water thereof, public navigable arms, tributaries and inlets, does not mention the canals which open thereon.

The relation of the Commission to Broad Canal is not

affected by St. 1913, c. 741, wherein the Commission is required to rebuild the wall on the premises of the estate of John J. Horgan, the predecessor in title to the property of the Boston Sand & Gravel Company, because this act is entirely special in its application, requiring the then landowner to pay one-third of the cost and to sign an agreement holding the Commonwealth harmless on account of the work which it might do on such wall, and providing further that no repairs or rebuilding of such wall thereafter should be required to be done by the Commonwealth. The special requirement made by the Legislature for repairs to this particular piece of wall bordering the canal, referred to in the statute as a sea wall on the estate of Horgan, tends to show that in the legislative mind, in 1913, there was still no intent to treat Broad Canal or the walls along its borders as anything other than private property.

The only statutory provision which has been made relative to this canal, from which it might conceivably be said that a duty relative to the maintenance of its walls rested upon the Commission, lies in St. 1910, c. 583, § 2, amending St. 1909, c. 524, § 6, and is as follows: —

> The metropolitan park commission throughout the year shall operate the locks and any drawbridges connected with said dam, without charge, and shall maintain said locks and the channels and canals authorized by section four of said chapter four hundred and sixty-five, at the depths provided for in said act and clear of obstructions caused by natural shoaling or incident to the building of said dam, and shall maintain the water in the basin at such level, and the locks, channels and canals sufficiently clear of obstructions by ice, so that any vessel ready to pass through the lock, and requiring no more depth of water than is provided for by said section four, can pass through to the wharves therein mentioned.

St. 1903, c. 465, § 4, referred to in said section 6, reads as follows: —

> The commission shall dredge navigable channels in the basin from the lock to the wharves between the dam and Cambridge bridge, to Broad canal and to Lechmere canal, the channel to be not less than one hundred feet in width and eighteen feet in depth; shall dredge Broad canal to such depths as will afford to and at the wharves thereon not less than seven-

teen feet of water up to the Third Street draw, not less than thirteen feet of water from the Third Street draw to the Sixth Street draw, and not less than eleven feet of water from the Sixth Street draw to the railroad draw, and not less than nine feet of water for one hundred and twenty-five feet above the railroad draw; shall dredge Lechmere canal to such depths as will afford to and at the wharves thereon not less than seventeen feet of water up to and including Sawyer's lumber wharf, and not less than thirteen feet of water from said wharf up to the head of the canal at Bent Street; all depths aforesaid to be measured from the water level to be maintained in the basin.

The commission shall do all such dredging and all strengthening of the walls of the canals and of the basin where dredging is done by the driving of prime oak piles two feet on centres along the front of said wharves or walls, and all removing and relocating of pipes and conduits made necessary by such dredging, so that vessels requiring a depth of water not exceeding the respective depths above prescribed can lie alongside of, and in contact with, the wharves; and this work shall be done in such manner as to cause the least possible inconvenience to abutters, and shall be finished on or before the completion of the dam; and after the walls or wharves have been so strengthened, all repairs on or rebuilding of the walls and wharves shall be done by the abutters.

It is apparent that the duty placed upon the Commission by said section 6 relates only to maintaining water at a certain level in the canal, keeping the canal clear of obstructions caused by natural shoaling or incident to the building of said dam (which latter contingency is now a thing of the past), and keeping the canal clear of obstructions by ice, which duties I understand your Commission discharges. No other provision relative to duties connected with the canal after the completion of the work of constructing the basin is provided by any statute.

As the Commission is not now charged with the duty of removing from the canal obstructions caused by other means than natural shoaling and ice, a cave-in of the walls of the canal or the wharves would not necessarily add to the burdens of the Commission in discharging their duties. The requisite depth of water in the canal might be maintained notwithstanding obstructions therein not resultant from natural causes, and the Commission, as has been

pointed out, has no duty placed upon it to remove such obstructions.

St. 1903, c. 465, does not purport to take from the owners of the land bordering Broad Canal any of their real property nor any of the rights or easements which they possessed with relation thereto, nor has there ever been any such taking by any subdivision of the Commonwealth. In providing, by the provisions of the various statutes noted, for the doing of work of the various sorts mentioned, upon and about the canal by the commissions charged with the control of the basin, it may be assumed that the Legislature had determined that the doing of such work, which immediately benefited and still benefits the owners of this private property, ultimately inures to the benefit of the public as a necessary part of the general scheme for the creation and maintenance of the basin as a whole. To construe the act otherwise would render its constitutionality in such parts as deal with the canals extremely doubtful, as providing in effect for the application of money to a purely private purpose, namely, the benefit of the private owners of the canals and their walls and wharves. Moreover, since there has been no taking from the owners of the canal and they are left in possession of their private property, the Legislature could not impose upon them without compensation a duty to perform work upon their own property by repairing, rebuilding or otherwise. To do so would exceed the constitutional power of the Legislature, and would amount, in effect, to a taking of rights without compensation. The words of St. 1903, c. 465, § 4, to the effect that "after the walls and wharves have been so strengthened (by the original commission) all repairs on or rebuilding of the walls and wharves shall be done by the abutters," must be construed as limiting the duties of the Commission to the doing of the original work, and as making it plain that no duty of repairing from time to time rested upon such body, rather than as a mandatory provision requiring the owners to make repairs upon their own private property.

I am of the opinion, therefore, that your Commission has no authority to compel the owners to make repairs upon their private property abutting on the private canal known as Broad Canal. Doubtless, as between themselves, rights to unobstructed usage of the canal exist by virtue of the agreement of 1806 in the various owners of the canal and adjoining land, which they may be able to enforce by appropriate proceedings in the courts, but the Commission is not the possessor or holder of such rights and cannot enforce them as between the owners or on its own behalf.

Your Commission is charged with the performance of certain specific duties with relation to the canal by the statutes, which have been already cited. These consist in freeing the canal of natural accumulations therein, of removing ice therefrom and of maintaining the depth of the water at a designated level. No contractual obligations exist on the part of the owners with the Commonwealth to do or to refrain from doing any acts upon their own property, and none arise under the circumstances from the provisions of the statutes. If a situation should occur by reason of failure to make repairs on the part of the owners whereby the canal became filled with obstructions not arising from natural causes but from the acts or omissions to act of such owners, so that it became physically impossible to perform the duties with relation to the canal which have been placed upon your Commission, then, inasmuch as at the present time it would seem that the performance of such duties benefits the private owners chiefly, at least in the first instance, the Commission might appropriately seek for relief in connection with such duties from the Legislature.

Constitutional Law — Interstate Commerce — Quarantine on Plants.

G. L., c. 128, §§ 16–31, the Massachusetts Nursery Inspection Law, is effective as regards plants in interstate commerce, by reason of a joint resolution of Congress, approved by the President on April 13, 1926.

To the Commissioner of Agriculture.
1927
February 1.

I have your letter of January 11, 1927, in which, in view of the circumstances recited therein, you ask for a reconsideration by this department of the question whether or not it will be necessary for the General Court to reenact certain sections of the Massachusetts Nursery Inspection Law, which is now G. L., c. 128, §§ 16–31.

The sections in question seem to be sections 20 and 27. They may be briefly summarized as follows: —

Section 20 provides that no nursery stock shall be brought into the Commonwealth unless it bears an unexpired certificate of inspection. Section 27 provides that the Director of the Division of Plant Pest Control may, after a public hearing, prohibit the delivery within the Commonwealth of nursery stock from outside thereof, under certain circumstances.

In view of the opinion I have reached, I do not deem it necessary to make any more elaborate summary of the act and of its 1923, 1925 and 1926 amendments.

Section 20 was first enacted by the General Court as St. 1902, c. 495, § 5. Section 27 was first enacted by the General Court as chapter 103 of the Resolves of 1911, and took effect in June of that year.

By the Act of Congress of August 20, 1912, 37 Stat. 315, c. 308, the Federal Congress forbade the shipment from one State to another of any nursery stock imported into the United States without notifying the Secretary of Agriculture. By the Act of Congress of March 4, 1917, 39 Stat. 1165, c. 179, the Federal Congress authorized the Secretary of Agriculture to quarantine any State when he should determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation

new to or not already widely prevalent or distributed within and throughout the United States.

On March 1, 1926, the Supreme Court of the United States decided the case of *Oregon-Washington Railroad & Navigation Co.* v. *State of Washington*, 270 U. S. 87. That action was a suit in equity begun by the State of Washington against the Oregon-Washington Company to restrain that company from transporting infected alfalfa from Idaho into Washington in violation of a quarantine established on September 17, 1921, by the Washington Director of Agriculture under a Washington statute passed in 1921. The company defended the suit on the ground that the quarantine and the Washington statute were in contravention of the interstate commerce clause of the Federal Constitution and in conflict with the acts of Congress stated above. A majority of the court, in an opinion by Chief Justice Taft, decided, as I read the opinion in that case, the following points: —

1. In the absence of action by Congress a State may, in the exercise of its police power, establish quarantines against infected plants or trees, in spite of the fact that such quarantines necessarily affect interstate commerce.

2. That the Washington statute and the action of the Director of Agriculture of that State created a genuine quarantine.

3. That the exercise by a State of its police power of quarantine, in spite of its interfering with interstate commerce, is permissible under the interstate commerce clause of the Federal Constitution, "subject to the paramount authority of Congress if it decides to assume control."

4. That it is impossible to read the Act of Congress of August 20, 1912, as amended by the Act of March 4, 1917, without attributing to Congress the intention to take over to the Agricultural Department of the Federal government the care of the horticulture and agriculture of the States, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which

by reason of its character can convey disease to and injure trees, plants and crops.

5. That in the relation of the States to the regulation of interstate commerce by Congress there are two fields: —

(*a*) One in which the State cannot interfere at all, even in the silence of Congress; and

(*b*) One in which the State may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded State action. Quarantine is in the latter field.

6. That when Congress has acted and occupied the field, as it has here, the power of the States to act is prevented or suspended.

7. That pending the existing legislation of Congress as to quarantine, the statute of Washington on the subject cannot be given application.

8. That the States may not act even in the absence of any action by the Secretary of Agriculture.

9. That with the Federal law in force, State action is illegal and unwarranted.

On April 13, 1926, the President approved a joint resolution of Congress further amending the Act of August 20, 1912, as already amended by the Act of March 4, 1917, by providing that, until the Secretary of Agriculture shall have duly established a quarantine, nothing in the act shall be construed to prevent any State "from promulgating, enacting and enforcing" any quarantine prohibiting or restricting the transportation of any class of nursery stock, etc., into or through such State, and providing further that any nursery stock, etc., a quarantine with respect to which shall have been established by the Secretary of Agriculture, shall when transported into any State, in violation of such quarantine, be subject to the operation and effect of the laws of that State enacted in the exercise of its police powers to the same extent and in the same manner as though it had been produced in that State.

On the above facts I am of opinion that it will not be

necessary for the General Court to reenact the above-described sections of G. L., c. 126, and I will give you briefly my reasons.

It was unquestionably within the police power of this Commonwealth to enact chapter 103 of the Resolves of 1911 at the time it was enacted. Up to that time Congress had not occupied the field of plant quarantine with respect to interstate commerce. When, in 1917, the Congress did occupy that field the efficacy of the State law was suspended, and action by State officials under it was prevented, and if taken would have been illegal and unwarranted. But I do not think that the State statute was, by the Federal act of 1917, nullified. The facts and decision in the case of *In Re Rahrer,* 140 U. S. 545, are of assistance in this connection. In the *Rahrer* case the Kansas Legislature had passed an act prohibiting the sale of intoxicating liquor, which by its terms was broad enough to apply to sales of imported liquor in original packages. At that time the Federal law was that a State could not interfere with sales of imported liquor in original packages. On August 8, 1890, there went into effect an Act of Congress which provided, in substance, that intoxicating liquor transported into a State should, upon arrival therein, become subject to the operation and effect of the laws of that State as though it had been produced there, even though it was still in the original package. In July, 1890, a carload of intoxicating liquor was shipped from Missouri to Rahrer in Kansas. On August 9, 1890, Rahrer sold a part of that liquor, still in the original package. For that sale he was arrested by a Kansas sheriff, and he applied to a Federal court for a writ of habeas corpus. By appeal his case went to the Supreme Court, which, by a majority decision written by Chief Justice Fuller, decided adversely to Rahrer. In the course of the opinion the court used the following language:—

> This (the Kansas prohibitory statute) is not a case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could

not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reenactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property.

In Re Rahrer has been followed in *First National Bank in St. Louis* v. *Buder*, 8 Fed. (2d) 883, 885, and in *Missouri Pacific R.R. Co.* v. *Boone*, 270 U. S. 466.

On the approval, on April 13, 1926, by the President of the joint resolution of Congress, the Federal obstacle to the efficacy of a Massachusetts quarantine on plants in interstate commerce was removed, and thereupon the Massachusetts statute (and the powers of Massachusetts officials to act under it) became again in full force and effect.

Taxation — Corporate Excess — Excise.

Classification of corporations for the purpose of taxation may not be made in an unreasonable manner.

To the Joint Committee on Taxation. 1927 February 3.

You have asked my opinion as to the legality and constitutionality, if enacted into law, of House Bill No. 506, entitled "An Act relative to the taxation of business corporations."

This act, by amendment of G. L., c. 63, as previously amended, makes certain changes in the manner of ascertaining and determining the "corporate excess" of business corporations for the purpose of taxation and the levying of excise taxes upon such corporations.

These changes, in brief, consist for the most part in providing that such corporate excess shall be the fair value of capital stock on the last day of the taxable year, as determined by G. L., c. 63, § 30, par. 6, instead of on the first day of April, and in determining that the surplus and undivided profits shall be included when estimating the value of the capital stock. This manner of estimating is rather a declaration of the manner as substantially in use at the

present time, rather than an adoption of any radical departure from the existing practice. These changes and others, such as that made in G. L., c. 57, bring the provisions of the statute into harmony, and as to these there does not appear to be any illegality or unconstitutionality.

A change of a different character is made in the existing law by the clause placed by the proposed act at the end of section 31, namely:

> No debt shall be considered which arises or is allowed to remain as a medium whereby the parent or affiliated corporation supplies any such corporation with the capital reasonably necessary to carry on or continue business.

The practical application of this provision, applied as an exception to the general deductions to be made from the corporate excess of a domestic or foreign corporation for the purpose of determining the amount of a tax, would result in such a distinction being made between corporations of the same general class as would work an improper and unreasonable discrimination among them. For example, one corporation might borrow money from an individual or from a bank for the purpose of enabling it to continue in business without the necessity of a sale of capital stock, and such corporation would be entitled to have the amount of such debt deducted from the fair value of its capital stock in determining the amount of its tax, whereas another corporation borrowing a similar amount of money for a similar purpose from a parent or affiliated corporation would not be entitled to a like deduction. A classification of corporations, for the purpose of ascertaining the amount of a tax, into those which borrow from parent or affiliated corporations and those which borrow from individuals, partnerships or unaffiliated corporations is not a reasonable mode of classification.

While the Legislature possesses a very wide measure of discretion in making classifications of individuals and corporations for purposes of taxation, nevertheless, such

classifications must not be arbitrary or unreasonable, and discriminations may not be made in tax statutes between persons or corporations in substantially like situations.

Though taxation is to a very great degree a matter of public policy and the determinations of the Legislature with relation thereto not to be lightly treated, yet the principle of equality of protection of the law cannot *constitutionally* be disregarded. While the matter is not entirely free from doubt, I am of the opinion that the enactment into law of the proposed clause of section 31 under consideration would be unconstitutional, as a violation of the Fourteenth Amendment to the Constitution of the United States.

BOARD OF EXAMINERS OF PLUMBERS — LICENSES — RULES.

If the holder of a license as a master plumber does not renew it on or before May 1st in any year, a renewal thereof may not issue subsequently.

The approval of rules of the Board by the Department of Public Health is essential to their validity, but the rules may be revised without such approval, upon petition of a local board of health.

A master plumber's license may not be loaned to another by the person to whom it is issued.

A duly licensed journeyman plumber may engage in the plumbing business if he does not employ other journeyman plumbers to assist him.

A corporation may not have as one of its employees, for the purpose of enabling it to receive plumbing permits, a master plumber.

To the Director of Registration. 1927 February 17.

1. You have asked my opinion as to whether it is illegal for the Board of Examiners of Plumbers to issue a renewal license on May 2nd, and if so, whether another examination is required.

G. L., c. 142, § 6, provides: —

> Licenses shall be issued for one year and may be renewed annually on or before May first upon payment of the required fee.

A license under the above chapter is a permit to engage in the plumbing business only during the term of the license (which must be for one year) and renewals thereof. There is no authority permitting an extension of the original license except in so far as the statute states that it may be

renewed annually on or before May 1st upon payment of the required fee. If the holder of the license does not renew it on or before that date, it is my opinion that the Board may not issue a renewal thereof subsequent to that date.

I am further of the opinion that if a person holding a license under this chapter and the amendments thereto does not procure a renewal thereof on or before May 1st, he must be treated as a new applicant and submit to the same requirements and examinations as a person who has never had a license.

2. In the third question of your letter you ask whether or not St. 1909, c. 536, § 2, has been repealed, whereby it is not necessary to have the approval of the State Board of Health (now the Department of Public Health) of such rules as are made by the Examiners under the authority of that section.

This section has been repealed by G. L., c. 282. G. L., c. 142, § 4, however, provides: —

> The examiners may make such rules as they deem necessary for the proper performance of their duties, which shall take effect when approved by the department of public health.

In my opinion, therefore, the approval by the Department of Public Health is necessary to the validity of any rule made by the Examiners.

3. In the sixth question of your letter you ask whether or not a master plumber's license can be loaned to another to conduct a plumbing business, and if not, how this practice can be stopped.

A master plumber's license is a permit issued by the State Examiners of Plumbers authorizing the licensee to engage in the business of a master plumber. Such license is issued only to applicants who successfully pass an examination as prescribed by G. L., c. 142, § 4. Public safety and health require that only such persons as are competent to perform the work secure a license, and obviously it can be exercised only by those persons who meet the standard and require-

ments of the Examiners. It is the clear intent of the Legislature that such a permit or license shall be used and exercised only by the licensee, and shall not be loaned or in any way transferred to another person. Unless this were so, the very evils and perils which the Legislature sought to avert by subjecting the applicant to an examination before granting him a license would still persist. I am of the opinion, therefore, that a master plumber's license may not be loaned to another to conduct a plumbing business.

As to how this practice, if it is prevalent, can be stopped, I respectfully suggest that this is a matter for your department to regulate and control. It seems to have the character and aspect of an administrative problem rather than of a legal problem, and I do not believe that it is within the scope of this Department to make recommendations or suggestions of this character.

4. In the seventh question of your letter you ask whether or not a journeyman plumber may engage in the business of plumbing and advertise as such.

I am of the opinion that a duly licensed journeyman plumber may engage in the business of plumbing to the extent that he has the right to work for himself and to take contracts for, or to do by his own labor, plumbing on buildings, but under the statutes he has no right to employ other journeyman plumbers to assist him in doing such work. *Commonwealth* v. *McCarthy,* 225 Mass. 192. I am of the opinion that he may lawfully advertise to the same extent that he may perform.

5. In the eighth question of your letter you ask whether a corporation or company can employ a master plumber to enable it to receive plumbing permits.

R. L., c. 103, §§ 1 and 2, provided for the issuance of such a license to a corporation, and stated that a license issued to the manager of a corporation was sufficient compliance with that chapter. R. L., c. 103, §§ 1 and 2, are expressly repealed by G. L., c. 282. The present law, G. L., c. 142, makes no provision for a license to a corporation except in

so far as the word "person" applies to corporations as well as to individuals. That part of R. L., c. 103, which provides that a license issued to a manager of a corporation satisfies the requirements of the chapter is also omitted from G. L., c. 142. These omissions are significant in that the present act not only fails to provide for the issuing of a license to a corporation but also fails to indicate what member of the corporation shall take the examination and receive the license.

There is, therefore, no method under the present law whereby a corporation may engage in the plumbing business, and it follows, in my opinion, that a corporation may not have as one of its employees a master plumber for the purpose of enabling it to receive plumbing permits.

6. In the twelfth question of your letter you ask whether your Board can change or amend plumbing rules made under the provisions of St. 1909, c. 536, § 5, and if so, whether they must be approved by any one.

St. 1909, c. 536, § 5, was repealed by G. L., c. 282. G. L., c. 142, § 8, provides: —

> Upon petition of the board of health of any town which has not prescribed regulations relative to plumbing under section thirteen or corresponding provisions of earlier laws, the examiners shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing work within such town, which rules, when approved by the department of public health and accepted by the said board of health and published once a week for three consecutive weeks in some newspaper published in said town, shall have the force of law. Such rules may be revised by the examiners upon the petition of the board of health.

Under this section it is clear that the Examiners may revise the rules described therein, and it is my opinion that the approval of the Department of Public Health is not necessary to such revision. The approval of the Department of Public Health is necessary to such rules as are formulated by the Examiners, but as to such rules as are revised no approval is necessary.

It may be difficult in some cases to determine whether a

purported revision is in fact a revision of an existing rule or a formulating of a new rule, but each case as it arises must be governed and determined by the particular circumstances surrounding it.

STATE TEACHERS' RETIREMENT ASSOCIATION — RETIREMENT FUND — BENEFICIARIES.

A regulation of the Teachers' Retirement Board prohibiting members from designating beneficiaries who are to receive a payment only in the event of the death of other named beneficiaries is not improper.

To the Teachers Retirement Board.
1927
February 24.

You have asked my opinion as to whether or not your Board had the right to make the following regulation, which you have previously established: —

A member shall not be permitted to provide that the amount due his estate from the retirement fund shall be divided and paid to two or more beneficiaries, nor shall a member be permitted to provide for payment to one beneficiary, with the additional provision that in the event of the death of the named beneficiary, the payment shall be made to a second beneficiary.

You advise me that your request for my opinion had the sanction, and was made at the request, of the Commissioner of Education, who is at the present time away from the city on official business, and for that reason the letter of request was not signed by him but by the secretary of your Board. Under these peculiar circumstances I am complying with your request and give my opinion to your Board.

G. L., c. 32, § 11, as amended by other acts and by St. 1926, c. 212, provides: —

(5) All sums due the estate of a deceased member from the annuity and pension funds of the association shall be paid to such beneficiary as he shall have named in writing on a form furnished by the board and filed with the board, properly executed, prior to his death, and such payment shall be a bar to recovery by any other person; provided, that if there be no named beneficiary surviving the deceased member, the amount due the estate shall be paid in accordance with section thirty-three. A member may at any time revoke or change the designation of a beneficiary by a

written instrument duly executed by him and filed with the board prior to his death, the form for this purpose to be furnished by the board.

The language of the foregoing statute does not indicate any intention on the part of the Legislature that a member of the State Teachers' Retirement Association should be entitled to the privilege of naming more than a single beneficiary to receive the benefits accruing by virtue of his membership in the retirement system after his death. Changes in the beneficiary are permissible, but not more than one person at any given time may stand in such relation to a member and to the association. The words used in the statute relative to the beneficiary referred to therein are such as indicate provision for only one individual at a time in such capacity. My opinion in this respect is confirmed by reference to other parts of G. L., c. 32, as amended, more particularly section 5, as amended by St. 1925, c. 244, where a similar intent to limit the privilege of naming beneficiaries of other classes of persons subject to the terms of the same statute is plainly shown. Your Board has authority to make regulations for the management of the teachers' retirement system not inconsistent with law, and I am of the opinion that the regulation which you have laid before me is such as may be established within the authority of the Board.

DIVISION OF HIGHWAYS — ALTERATION — "CUT-OFF" LINE.

An alteration in a State highway is the substitution of one way for another, and its character is not necessarily changed by the fact that it calls for the construction of a "cut-off" line one and one-half miles in length.

To the Commissioner of Public Works. 1927 February 25.

You request my opinion as to whether your department has power to proceed under G. L., c. 81, § 6 (St. 1921, c. 446), in straightening an existing State highway by constructing a "cut-off" line running practically one and one-half miles in length and at a variable distance of about 500 feet from the old line.

G. L., c. 81, § 6, as amended by St. 1921, c. 446, reads as follows: —

> The division may alter the location of a state highway in a city or town by filing a plan thereof and a certificate that the division has laid out and taken charge of said state highway, as altered in accordance with said plan, in the office of the county commissioners for the county where said highway is situated, and by filing a copy of the plan or location as altered in the office of the clerk of such city or town.

I understand that the proposed new line will be merely a part of the same highway of which the present line forms a part, that when constructed it will be used in substitution for the old line, which will be abandoned, and that both the old and the proposed new line lie wholly within one town.

The doubt in the matter arises from the fact that the proposed change involves the highway line to a rather great extent. Must the making of such a change be held to be something more than to "alter" the location of the highway?

In my opinion, the department has power to proceed under the section of the statute above quoted. The question does not, I think, depend upon the number of feet involved in the change. "An 'alteration' *ex vi termini* means a change or substitution of one thing for another." *Johnson* v. *Wyman*, 9 Gray, 186, 189. "A technical alteration is the substitution of one way for another." *Bigelow* v. *City Council of Worcester*, 169 Mass. 390. See, also, *Bliss* v. *Deerfield*, 13 Pick. 102; *Bennett* v. *Wellesley*, 189 Mass. 308; III Op. Atty. Gen. 113.

RECLAMATION DISTRICTS — TOWNS — ASSESSMENTS.

Towns are not underwriters of the assessments of reclamation districts, and may not borrow money for the advance payment of such assessments.

To the Commissioner of Agriculture. 1927 February 26.

You have asked my opinion in connection with two matters pertaining to the reclamation service.

1. In relation to the first matter referred to in your

communication, namely, the authority of towns to borrow money for the purpose of paying, in advance of collection, amounts assessed upon certain proprietors of land within their boundaries for the financing of the improvements of a reclamation district, governed by St. 1923, c. 457, as amended, I am constrained to advise you that towns possess no authority to borrow money for such a purpose.

There is no specific authority given by any statute to towns to negotiate loans for such an object as that described in your communication. The creation of a reclamation district and the assessment upon individual proprietors therein of their proportionate shares of the expense incident thereto does not of itself create any debt upon the part of a town wherein such proprietors' land may lie, such as the town is required by legal obligation to discharge. It is provided by St. 1923, c. 457, that towns shall collect the sums assessed upon individual proprietors and pay over the same to the district's treasurer. The manner of collecting the assessment is to be the same as that provided for the collection of the town tax (G. L., c. 252, § 11, as amended by St. 1923, c. 457, § 1), and it is to be noted that by G. L., c. 80, § 4, it is provided "that the owners of the land assessed shall not be personally liable for the assessment thereon," but the relation of the town to the reclamation district, under the statute, is merely that of an agency for the purpose of effecting the necessary collection. The statute does not make the towns underwriters or insurers of the amount of the total assessment or of any part thereof.

It follows as a necessary corollary of the foregoing considerations that a town is without power to borrow money to carry out such a scheme for the advance payment of the assessments made by the district as you have outlined in your communication. The duty of the towns is to collect the assessments certified to them, respectively, and to pay over such collections to the district. If the payments of the assessments are spread over a term of years by virtue of G. L., c. 80, § 13, the obligation of the town still remains

the same, to collect by its collector of taxes the assessments when due and to pay such collections to the district. The duty of the town does not include the borrowing of money to pay advancements thereon to the district.

2. The second matter set forth in your communication concerns the administration of a district established under G. L., c. 252, before its amendment. The statutory provisions with relation to such a district and the towns lying therein differ from those affecting towns in St. 1923, c. 457, as amended, hereinbefore considered, and are not subject thereto (St. 1923, c. 457, § 1).

Under G. L., c. 252, the expense of contemplated improvements is to be apportioned by commissioners to, and paid for by, those towns, respectively, in which any of the land in the district which is to be improved may lie. Each town is required to pay the sum ascertained to be due from it, by its treasurer to the county wherein it lies, in equal annual installments, these installments to be collected by the town from its inhabitants in the same manner as town taxes, but by section 14 the amount to be paid to the town is to be divided by the assessors among the owners of the various parcels of land in the town actually benefited by the improvements of the district, and these owners, and not the taxpayers generally, are the ones from whom the collection is to be made by the town. These payments by the owners of the land beneficially affected are to be assessed as betterments, under G. L., c. 80, and such payments may be apportioned or spread over a given succession of equal annual installments, and the payment by the town is likewise to be spread over a given number of years (G. L., c. 252, § 13). The particular questions upon which you desire my opinion in regard to this second matter are set forth in your communication as follows: —

(*a*) Since only one town is concerned, can the district commissioners omit the hearing called for in the first sentence of section 13? This hearing is to determine only the portion to be paid by each town when more than one town is involved.

(*b*) Will there be any legal obstacle to prevent the assessors requesting the land owners to pay before March 31, and the town treasurer paying the amount so collected to the county?

(*c*) Can the additional interest paid by the county on sums uncollected after March 31, as noted in (*b*), be charged against the owner who elects to wait for the regular fall assessment before paying?

(*d*) Or will it be necessary to include in the assessment, interest on the county note from March 31 to December 31, and to abate for those paying before March 31 their proportion of this interest?

It is required by G. L., c. 252, § 13, that the commissioners shall determine what portions of the total expenses of the improvement are to be paid by each town in which any of the land lies, and the commissioners are required to return their award as to this to the drainage board, which in turn transmits copies to the towns, and any town aggrieved has an appeal to the courts. I am of the opinion that the above-noted provisions of section 13 are to be observed and should be complied with even if only a single town appears likely to be affected, and I therefore answer your question (*a*) in the negative.

It is provided by said chapter 252 that the county commissioners may vote to pay, in the first instance, the total expense of the proposed improvement, except such as is borne by the Commonwealth, and the county may borrow money for such purpose. The total expense incurred by the county, including the money advanced to the district and the interest or cost of borrowing the same, is ultimately to be repaid to the county by the towns where the improved land lies. The money may be collected by the towns from the individuals benefited, in the same manner as other similar betterments are assessed and collected.

If the county commissioners have made a loan which expires on March 31, it might be advantageous if money were paid to them by the several towns, and, as a necessary preliminary, paid to the towns by the individuals ultimately benefited, on or before March 31. There can be no objection to proper requests for such payments being made. I therefore answer your question (*b*) in the affirmative.

Nevertheless, the assessments due the town from the individuals in this matter are to be collected in the ordinary manner under the provisions of G. L., c. 80, § 4, and, as I assume from such facts as are set forth in your communication that assessments of this character, like town taxes, are not required by vote or by-law of the town to be paid prior to October 15 (see G. L., c. 59, § 57), I am of the opinion that their collection by the town cannot be enforced prior to March 31, nor can individuals paying before March 31 receive any benefit by reason thereof over other individuals who pay later but at a proper time, nor can such individuals so paying later be penalized for thus doing. If, therefore, the amount necessary to discharge the obligation of the county on March 31 is not voluntarily paid prior to that date, whatever new loan is necessary to be obtained by the county should be negotiated, and the expense or interest thereon added to the expense or interest of the original loan plus the amount of the principal will be the total expense which is to be paid by the towns, and by them collected from the individual proprietors by assessments made and collected in the usual course, so that the burden of the entire sum will fall equally upon all such proprietors by a proper allocation of the same. I therefore answer your questions (*c*) and (*d*) in the negative.

Constitutional Law — Governor — Pardoning Power.

Under the Constitution of the Commonwealth the power of pardoning cannot be shared with the Governor by the courts.

To the Governor. 1927 February 27.

You request my opinion as to the advisability of a constitutional amendment affecting the pardoning power of the Governor, as recommended in your address of this year to the two branches of the Legislature.

Your recommendation is in the following form: —

AUTHORITY TO GRANT RESPITES.

At present it occasionally happens in capital cases, after the courts have set the period within which the sentence pronounced by them shall be carried out, that hearings on exceptions or other court proceedings necessitate postponing the execution of the sentence. Strangely enough, the courts themselves have no power of postponement in such cases, and were it not for the intervention of the Governor the accused might be executed before the courts had finally determined the questions of law presented. The Governor has nothing to do with court proceedings, and the state of the law which requires his intervention under these circumstances should not continue. The power of respite should at such times belong to the courts. I am informed that the necessary change can be brought about only by an amendment to the Constitution.

I recommend that the necessary proceedings be instituted to place the courts in complete control of this matter.

I believe that by statute the courts could be given additional powers relative to staying and modifying sentences; and so far as the court should see fit to exercise such powers, if granted, the Governor would be relieved of the burden of passing upon petitions for respite. Such a statute might provide, in effect, that when, after sentence has been imposed in a capital case, a motion for a new trial is made within the time allowed by law, the court which imposed sentence shall have power, in its discretion, until said motion is finally disposed of, to suspend and modify said sentence from time to time by refixing the date set for the execution thereof. But, without an amendment to the Constitution, by which the pardoning power is vested in the Governor, it is impossible "to place the courts in complete control of this matter." In my opinion, a constitutional amendment would be inadvisable. The people of this Commonwealth have for generations regarded the pardoning power of the Governor as a safeguard. An amendment impairing this power probably could not, and I think should not, be obtained. Moreover, as is stated in your address, the situation referred to occurs only "occasionally," and the question then presented, namely, whether respite should be granted pending the disposal of proceedings in court brought after

sentence, is one regarding which the Governor might well rely largely upon the advice of the judges and the Attorney-General, and is one which in most cases should not be difficult of solution.

State Boxing Commission — Licenses — Boxing Matches and Exhibitions.

The State Boxing Commission is not required to perform the duties laid upon it by G. L., M. 147, except as to matches or exhibitions which are required to be licensed.

To the Commissioner of Public Safety.
1927
March 3.

You have asked my opinion as to the jurisdiction of the State Boxing Commission, which serves in the Department of Public Safety and of which the Commissioner of the said Department is, *ex officio*, chairman. You have directed my attention in particular to boxing matches held in clubs.

G. L., c. 147, §§ 32–51, provide, in substance: (1) that no boxing or sparring match or exhibition for a prize or purse shall take place or be conducted, except a license therefor be granted by the State Boxing Commission; (2) that no boxing or sparring match or exhibition at which an admission fee is charged shall take place or be conducted, except a license therefor be granted by said Boxing Commission. A fee, to be established by the Commission within certain amounts and upon a basis set forth in section 32, is to accompany the application for the license as to both classes, and there are provisions as to the giving of a bond.

(1) The necessity for a license as a prerequisite to holding a boxing or sparring match or exhibition for a prize or purse under all conditions, irrespective of whether admission is or is not charged to spectators of the same, is absolute and without exception. Certain exceptions to the requirements relative to the prescribed license, which are set forth in the statute and which will be dealt with hereafter, are not applicable to this class of matches or exhibitions. Whether a given event is a match or exhibition, whether it consists of

boxing or sparring, whether it is for a prize or purse are questions of fact, to be determined in the first instance by the Commission.

(2) As to the second class of events for which a license is a prerequisite, they must, as a matter of fact, be matches or exhibitions, they must consist of boxing or sparring, and they must be ones at which an admission fee is charged.

Section 32 provides, in substance, that the admission fee charged will be such as to bring the match within the requirement of the statute for a license, if it be charged "directly or indirectly, in the form of dues or otherwise."

The fee referred to in the statute is by its terms one for admission to a match. No evasion of the terms of the statute can be successfully accomplished, as a matter of law, by calling, levying or applying the particular admission fee as dues to a club or organization. If, as a matter of fact, charges made to individuals attending are for admission to a match or exhibition, the bout falls within the class for which a license is necessary. Questions of fact, difficult of solution, may arise under various circumstances, but if payments, under whatever name, are made as a charge for admission to a match, that match is one requiring a license.

Conditions under which club dues were charged specifically upon members attending a match, for the purpose of giving them admission thereto, are described in some detail in *Commonwealth* v. *Mack*, 187 Mass. 441. In a case where a match is held by a club, for members only, as an unusual form of entertainment, dues being payable annually and without any relation to such match, it might be said, as a matter of fact, that no admission fee to the match is charged, either directly or indirectly in the form of dues or otherwise. In another instance members might pay annual dues to a club purporting to hold boxing matches from time to time, for club members only, with the understanding that the payment of such dues would entitle them to admission to matches to be held, and with that prospect as the compelling motive in joining the club and paying the dues, under cir-

cumstances which, as a matter of fact, might make such dues constitute an indirect payment of an admission fee to a match or matches subsequently held; such match or matches would then be of such a character as to fall within the second class mentioned above, and would require to be licensed. The view that dues which are capable of classification under the provisions of section 32 must of necessity be dues paid with relation to an allocation to a particular match or matches and not as annual dues to a club or organization covering in general a variety of privileges, to which a match is only an occasional and unspecified addition, is confirmed by the provisions of section 40 with relation to payments to the State Treasurer from gross receipts of matches by licensees. These provisions are obviously intended to relate to admission charges capable of allocation by reason of their manner of payment, even though indirect, to a particular match.

It is to be noted that by the last sentence of section 32 an exception is made among licensees conducting matches or exhibitions where admission is charged, in favor of those conducting amateur bouts. A special license without the requirement of a bond may be issued to them, whereas a bond is required of other licensees of this class. A special provision is made in section 46 permitting the granting of special permits to certain exhibitions of boxing where no decision is to be made, when provision is made for such permit by the rules and regulations of the Commission.

Your request does not call for an expression of opinion as to the manner of performance of the various duties laid upon the State Boxing Commission by the pertinent sections of chapter 147. Such duties are to be performed in connection with all boxing or sparring matches or exhibitions which by the terms of the statute are required to receive any of the kinds of licenses specified therein, in the manner and to the extent prescribed in sections 32 to 51, but the Commission is not required to perform such duties with

relation to any events other than those which must be licensed, all of which have been noted herein.

A boxing or sparring match or exhibition which is not for a prize or purse and for which no admission fee is charged, within the meaning of the phrase as outlined above, whether it be for a decision or not, does not require the grant of a license as a prerequisite to its being held, and the authority of the Commission does not extend to such a match or exhibition, nor do the provisions of sections 32 to 51 apply thereto. In the absence of rules and regulations made by the Commission under section 46, which I am advised do not exist, no license is required for the particular form of boxing exhibition described in its provisions.

Board of Dental Examiners — Graduates of Dental Colleges — Examinations.

The Board of Dental Examiners is required to examine graduates of foreign dental colleges.

To the Director of Registration. 1927 March 7.

You have asked my opinion as to whether the Board of Dental Examiners is required, under G. L., c. 112, § 45, to examine graduates of all reputable dental colleges, whether within the United States or of foreign countries, with particular reference to graduates of dental colleges of foreign countries which refuse to examine graduates of reputable dental colleges within the United States.

If an applicant otherwise satisfies and conforms to the provisions of G. L., c. 112, and amendments thereto, the mere fact that he is a graduate of a reputable dental college of a foreign country which refuses to examine graduates of reputable dental colleges of the United States does not justify the Board in refusing to examine him. Section 45 of said chapter states: —

> Any such applicant twenty-one years or over and of good moral character who shall furnish the board with satisfactory proof that he has received a diploma from the faculty of a reputable dental college as defined in the

following section shall, upon payment of twenty-five dollars, be entitled to be examined by the board.

Section 46 of said chapter, as amended by St. 1926, c. 215, sets no limitation or restriction based upon the location of the dental college.

G. L., c. 112, § 48, provides for the registration without examination of a dentist who has been lawfully in practice for at least five years in another State, provided that such other State shall require a degree of competency equal to that required of applicants registered in this Commonwealth. This section is amended by St. 1922, c. 221, which adds a further proviso that the dentist must have practiced in a State which extends a like courtesy to dentists registered in this Commonwealth.

In view of the fact that the language in sections 45 and 46, above referred to, is mandatory and makes no exceptions based upon the location of the dental college, and in view of the fact that the Legislature, by the amendment to section 48 above referred to, added a proviso restricting the application of that section to such States as extend a like courtesy to dentists registered in this Commonwealth, but did not so restrict or limit section 45, I am of the opinion that the Board of Dental Examiners is required to examine graduates of all reputable dental colleges, whether within the United States or of foreign countries, provided such applicants otherwise comply with, and conform to, the requirements of the law.

Secretary of the Commonwealth — Ballot — Question for Voters.

If a question proper to be submitted to voters of a city at a certain annual election is not placed upon the ballot at such election, it may not be submitted at a later time.

To the Secretary. 1927 March 12.

You have submitted to me copies of certain correspondence had between your office and certain officials and others in the city of Lowell, and you request my opinion upon the question whether the official ballot for use in the city of Lowell at the annual State election held November 2, 1920, should have had placed upon it the question of the acceptance by that city of St. 1920, c. 166, entitled "An Act to provide for one day off in every eight days for certain police officers."

This act, the tenor of which is for present purposes sufficiently indicated by its title, contained the following provisions with respect to its application to the various cities and towns and with respect to its submission to the voters in such cities and towns for acceptance.

St. 1920, c. 166, §§ 4 and 5, are as follows: —

Section 4. This act shall not apply to the police force of the city of Boston nor to the police force of the metropolitan district commission, nor to any city or town already granting one day off in eight to the members of its police department.

Section 5. This act shall be submitted to the voters of every city and town to which it is applicable at the annual state election in the current year, and shall take effect in any such city or town upon its acceptance by a majority of the voters voting thereon; otherwise it shall not take effect. The act shall be submitted in the form of the following question to be placed upon the official ballot: — "Shall chapter of the acts of nineteen hundred and twenty which authorizes the granting of one day off in every eight days to police officers without loss of pay, be accepted by this city (or town)?"

As I gather the situation from the correspondence submitted by you, your predecessor in office refrained from placing this question upon the ballot for use in the city of Lowell because of a communication received by him from

the city clerk, advising him that on September 30, 1920, which date was subsequent to the passage of the statute but prior to the annual State election of that year, the council of the city of Lowell voted to direct the commissioner of public safety to grant the members of the Lowell police department one day off in eight. Apparently he assumed that the exemption from the operation of the act given by section 4 to cities and towns "already" granting one day off in eight to the members of its police department was available to any city or town which should grant this privilege to its police force at any time prior to the date when the preparation of the ballots had finally to be completed.

The language in St. 1920, c. 166, itself, seems to cast considerable doubt upon the soundness of this construction. The word "already" is found in that portion of the statute under which the cities and towns in which the act is to be submitted for acceptance are determined, and is, therefore, in the portion of the statute which takes effect without acceptance, and speaks from the date of such taking effect. The vote of the city council was passed a number of months after the statute, in this aspect, went into effect. To speak of a state of affairs created by a vote had at a subsequent date as having been "already" in existence at a prior date is not in accordance with the common use of the language.

However that may be, it seems to me clear that the annual State election in 1920 having gone by without the submission of this act to the voters in the city of Lowell for acceptance, there is no authority for a late submission, and that the question whether the judgment of your predecessor was sound is not a question upon which any practical consequences in the administration of your office now attend. I therefore do not feel that it is a question upon which I am called upon to arrive at a definite conclusion.

State Fire Marshal — Storage of Gasoline — Appeal.

The State Fire Marshal has authority to entertain an appeal from a decision of the board of license commissioners of Quincy refusing a license for the storage of gasoline.

To the Commissioner of Public Safety. 1927 March 15.

You have requested my opinion whether the State Fire Marshal may, under G. L., c. 148, § 45, entertain an appeal from a decision of the board of license commissioners of Quincy refusing a license for the keeping, storage and sale of gasoline.

The board of license commissioners of the city of Quincy was established by St. 1920, c. 70, sections 1, 2 and 4 of which are as follows: —

Section 1. There is hereby established in the city of Quincy a board of license commissioners to consist of the city clerk of the city and the chiefs of the police and fire departments all of whom shall serve without extra compensation.

Section 2. All authority to grant licenses and permits and, except as is hereinafter provided, to suspend and revoke the same, now or hereafter vested by law in the mayor and city council of said city or in the mayors and city councils and boards of aldermen of cities of the commonwealth, except the authority to grant licenses for the sale and transportation of intoxicating liquors and permits to public service corporations for locations in the streets and ways of the city for any purpose, shall hereafter be exercised exclusively by said board of license commissioners: *provided*, that nothing herein shall affect the authority of the director of the division of fire prevention of the department of public safety succeeding to the powers of the fire prevention commissioner for the metropolitan district.

. . . . . .

Section 4. The city council of said city shall retain all authority which it now possesses or which is hereafter granted to it, or to cities generally, to establish ordinances relating to the manner in which the holder of any such license or permit may exercise the rights granted thereunder. The board of license commissioners shall not establish any rules or regulations relating to licenses or permits inconsistent with the provisions of any law of the commonwealth or any ordinance of the city of Quincy.

The powers of the Fire Marshal in the premises are derived from G. L., c. 148, §§ 30, 31 and 45, which are as follows: —

Section 30. 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, firecrackers, 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 31. 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 45. 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 section 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.

The powers given to the Fire Marshal within the metropolitan district by G. L., c. 148, § 30, were originally taken away from the local authorities in the cities and towns and vested in the Fire Prevention Commissioner for the metropolitan district by St. 1914, c. 795, § 3. For a time thereafter local officers had no control over the granting of gasoline licenses, except as they might, by delegation under St. 1914, c. 795, § 4, exercise in the first instance the powers of the Fire Prevention Commissioner. By St. 1916, c. 138, however, a proviso was added as follows: —

Provided, however, that the mayor and city council of a city or the board of 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.

This proviso is now found in G. L., c. 148, § 30.

Prior to March 31, 1920, the outstanding delegation of power under what is now G. L., c. 148, § 31, was a delegation by the Fire Prevention Commissioner to the mayor and city council of Quincy of the power to grant or refuse gasoline licenses. After March 31, 1920, there was in force a similar delegation running from the State Fire Marshal to the board of license commissioners.

If the effect of St. 1920, c. 70, was to transfer to the board of license commissioners the power of disapproval theretofore vested by Gen. St. 1916, c. 138, in the mayor and city council, the license commissioners, when they acted upon the license now in question, may be considered as having exercised two separate powers emanating from two distinct sources, — the power to grant or refuse, delegated to them by the Marshal, and the power to "disapprove," derived directly from the authority of the statutes.

It is to be noted that these two powers differ with respect to the possibility of appeal. The exercise of the delegated power is always subject to appeal to the Fire Marshal under G. L., c. 148, § 45, while the exercise of the power of disapproval, being a veto power intended as a local check upon the action of the Fire Marshal, is never subject to such an appeal.

Strictly, it would be a sufficient answer to your question to say that the decision of the board of license commissioners, in its aspect as an exercise of the delegated power, is always subject to appeal, and that the Fire Marshal may entertain an appeal therefrom. But your inquiry is, as I understand it, really directed to the further question whether, upon such an appeal, the Marshal will not be bound by the decision of the local board if that decision, in another aspect, was a valid exercise of the power of "disapproval"

under G. L., c. 148, such "disapproval" by the express words of the law compelling the refusal of the license.

It is therefore necessary to examine the provisions of St. 1920, c. 70, quoted above, and upon such examination it is not wholly clear whether the power of "disapproval" was thereby transferred from the mayor and city council to the board of license commissioners or not.

The authority which is purported to be transferred by St. 1920, c. 70, § 2, is the authority to "grant," "suspend" and "revoke," none of which terms appropriately describe the power of disapproval, which is a power to veto the granting of a license by that body in whom the power to "grant, suspend or revoke" is vested.

In the second place, it is provided by that same section that —

> nothing herein shall affect the authority of the director of the division of fire prevention of the department of public safety succeeding to the powers of the fire prevention commissioner for the metropolitan district.

This proviso clearly excludes from the operation of the act the authority derived by delegation from the Fire Prevention Commissioner (and later from the Fire Marshal); but it is also capable of being construed as excluding from the operation of the act the "authority" of the officer succeeding to the powers of the Fire Prevention Commissioner, in every aspect of that authority, including the limitation placed upon that authority by Gen. St. 1916, c. 138, conferring the power of disapproval upon the mayor and city council.

It is true that it appears from St. 1920, c. 70, § 4, that the legislature adverted to the question of what powers, if any, were to be retained by the council, and, nevertheless, made no express provision that the power of disapproval should be so retained. Such a provision, however, might well have been deemed unnecessary after the proviso of section 2.

On this state of things I am of the opinion that the power of disapproval under Gen. St. 1916, c. 138, and G. L., c. 148,

§ 30, remains in the city council of Quincy, and that the decision of the board of license commissioners cannot be deemed an exercise of that power. Consequently, not only has the Fire Marshal jurisdiction to entertain the appeal, but there is no outstanding disapproval of the granting of the license by any competent authority, so far as the decision of the board goes or your letter discloses.

COMMISSIONER OF STATE AID AND PENSIONS — SOLDIERS' RELIEF — WIDOW — CONFLICT OF LAWS.

It is the duty of the Commissioner of State Aid and Pensions to recognize as valid a foreign divorce, in the absence of a judicial determination thereon in this Commonwealth.

To the Commissioner of State Aid and Pensions. 1927 March 16.

You have asked my opinion relative to the performance of your duties under G. L., c. 115, §§ 17 and 18, in connection with the payment of soldiers' relief to a certain person claiming to be the widow of an officer in the Army of the United States in the World War. You have submitted to me certain statements of fact and the findings of a justice of the Superior Court made in a suit in equity, wherein the claimant was a party. You do not advise me whether an appeal is pending from such findings. The findings of the justice contain a determination of a great number of facts relative to the status of the claimant, and certain rulings of law applicable to her status under the laws of this Commonwealth.

It is not the province of the Attorney-General to pass upon questions of fact. For the purpose of this opinion I assume that the facts relative to the status of the claimant, as found by the justice of the Superior Court, are true. I also assume from the statements in the letters submitted to me that the claimant has a legal settlement in the city of Fitchburg. I am also advised by the communications submitted that another woman is at the present time receiving State aid or soldiers' relief and adjusted compensation from the United States as the widow of the deceased soldier.

Although upon the facts placed before me, as aforesaid, it may well be that the courts of this Commonwealth, in a proceeding before them where the direct issue as to the status of the claimant as the widow of the deceased soldier was presented for adjudication, would determine that she was such widow, yet, a divorce obtained from her by her husband in the State of Washington still stands. It does not devolve upon you, as an administrative official, to refuse to recognize such divorce as valid, and to treat the claimant as the deceased's widow for the purposes of soldiers' relief, as against the other woman who married the deceased subsequent to such divorce, whom you have heretofore dealt with as the true widow and who is now, under your rulings, in receipt of aid. Pending a final decision by a court of this Commonwealth in a proceeding to determine the right of the claimant to the relief which she seeks, you are justified in continuing to recognize the other woman as the widow of the deceased and in making no recommendation to the city of Fitchburg for soldiers' relief for the claimant.

Treasurer and Receiver General — Registers of Probate — Fees.

It is the duty of the Treasurer and Receiver General to institute proceedings against registers of probate to collect from them for the Commonwealth the amount of fees which have been collected by such registers, or which they were required by law to collect, from persons filing certain papers with them.

To the Treasurer and Receiver General. 1927 March 17.

You have asked my opinion regarding your duties in relation to fees collected by registers of probate, which are required by law to be paid to you by such registers under St. 1926, c. 363.

It is provided by G. L., c. 217, § 20, that —

> 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.

Inasmuch as there are reciprocal duties upon the register of probate and yourself, on the part of the former to account for and pay over and on your part to receive the accounting and the payment of sums due from the register as designated by the statutes, it is proper for you to ascertain whether such accounts and payments are correct and are the full payments required to be made by the register to you, and if the payments are not correct the duty rests upon you, as the direct representative of the Commonwealth, which is the ultimate recipient of such payments, to institute proper proceedings to enforce full and complete payments by the register of the money due from him to the Commonwealth.

By G. L., c. 217, § 12, registers of probate, upon their induction into office, are required to give bond to the Treasurer and Receiver General for the faithful performance of official duties, with sureties. This bond runs directly to you in your capacity as Treasurer, and may be sued upon by you as well as by your predecessors. If a register of probate fails to pay over to you funds which he has actually collected as fees, you may bring an action against him upon his bond, in your own name for the benefit of the Commonwealth, to recover the sums which he has illegally withheld. Furthermore, in a suit upon this bond, which is for the faithful performance of his duties, you may also seek to recover the amount of fees which a register should have collected from litigants, under the provisions of the applicable statutes, but which he refused or neglected so to collect and failed to indemnify the Commonwealth therefor.

A register or clerk of courts who neglects or refuses to collect fees inuring to the benefit of the county or State, collection being required by law, or who extends credit to litigants for fees which they are required by law to pay, does so at his own peril as far as regards his liability for the amount of such fees to the sovereign body to which he is required himself to make payment, and a suit against a register upon his official bond, which in the instant case runs to you as Treasurer, is an appropriate mode of collecting

sums so due. *State* v. *Gideon*, 158 Mo. 327; *Sheibley* v. *Dixon County*, 61 Neb. 409; *Boettcher* v. *Lancaster County*, 74 Neb. 148; *Cavender* v. *Cavender*, 10 Fed. 828. See *Clemens Electric Mfg. Co.* v. *Walton*, 168 Mass. 304.

It is not necessary that a public officer be specifically authorized by statute to bring suit upon a bond given to him by another officer, for he has an implied authority, as incident to his office, to bring all suits which the proper and faithful discharge of his official duties require. There may be other remedies open to you, but the suit upon the bond given by the register, which runs to you, would seem to be a simple and direct mode of procedure with which to obtain judicial determination of the questions involved and to seek the collection of funds which should have been paid over to you. By G. L., c. 35, § 45, provision is made for the examination of accounts and vouchers of registers of probate by the Director of Accounts of the Department of Corporations and Taxation, but whatever procedure may be open to such director against a register of probate whose accounts are incorrect, such procedure does not supersede your right to proceed by suit upon the register's bond.

It then becomes necessary to consider, for your guidance, whether or not, upon the facts stated in your letter, such a default can be said to exist upon the part of a register of probate, in the collection of fees required to be made by him, as would justify the institution by you of a suit against him upon his bond. It is to be borne in mind that it is not part of the duty of the Attorney-General to advise registers of probate, and that they are not bound by his opinion. Moreover, ultimate judicial interpretation must give the conclusive answer as to the question of precisely what fees are to be collected by registers of probate under St. 1926, c. 363, § 2, amending G. L., c. 262, § 40, which reads as follows: —

The fees of registers of probate and insolvency, payable in advance by the petitioner or libellant, shall be as follows: —

For the entry of a libel for divorce or for affirming or annulling marriage, five dollars.

For the entry of a petition for the probate of a will, for administration on the estate of a person deceased intestate, of a petition under section thirty-five or thirty-six of chapter two hundred and nine by a husband or wife for authority to convey land as if sole, of a petition for partition, of a petition for change of name, of a petition for leave to carry on the business of the deceased, and for filing a representation of insolvency, and, *except when the petition is certified by the register or assistant register to be incidental to proceedings already pending in the same county, for the entry of a petition for the appointment of a special administrator, conservator, trustee, receiver of the estate of an absentee, or of a guardian* except when the petitioner certifies that the ward's estate does not exceed one hundred dollars, three dollars.

For each certificate issued by the register, fifty cents.

For copies of records or other papers in the charge of said registers at the rate of forty cents a page, except as otherwise provided by law.

You direct my attention in your letter particularly to the clause in the third paragraph providing that "except when the petition is certified by the register or assistant register to be incidental to proceedings already pending in the same county," and have specifically requested my opinion relative to an interpretation thereof. Your questions referring to this statutory exception are as follows: —

First. — Does the exception apply to the entry of a petition for the appointment of a special administrator alone, or does it apply to all the other petitions thereafter mentioned?

Second. — If it does apply to special administrators and all others thereafter, what is meant by the word "incidental" used in the exception?

Third. — If in any of these petitions, a previous petition has been filed upon which an entry fee has been paid and an appointment has been made, but the appointee has failed to qualify and another petition is filed, should there be a fee collected on the second petition?

1. I answer your first question to the effect that the exception referred to applies to each and all of the petitions mentioned after the words "pending in the same county," in the third paragraph of said section 40, as amended.

2. I answer your second question to the effect that the

word "incidental" as used in said third paragraph means arising out of or in connection with the subject matter of another probate petition or proceeding previously commenced in the same county. In other words, when a petition for the appointment of a special administrator or a petition for the appointment of any one of the other officials mentioned thereafter in the third paragraph of section 40 is filed, the duty devolves upon the register to determine whether or not such petition is incidental to some other probate proceeding already begun in the same county, and if he determines that it is so incidental, and certifies that to be the fact, no entry fee is to be paid; if he determines that it is not so incidental, a fee of three dollars is to be paid to him.

The act of certifying is a ministerial act imposed on the register by law; it is not judicial or quasi-judicial in character. It involves no employment of discretion but calls only for an examination of the files and a statement, under a correct interpretation of the law, as to existing conditions disclosed therein.

3. Although the matter is not without some doubt, I am of the opinion that, under the facts stated in your third question, a second petition is so incidental to the proceedings already begun that a fee for the filing thereof ought not to be exacted. Rule I of the Probate Court, to the effect that "each petition shall be considered a separate proceeding," does not affect a determination by the register under the provisions of the statute as to whether one of the designated petitions is incidental to proceedings already pending. I am of the opinion that no right of appeal from the determination of the register relative to certification of a petition as incident to a pending proceeding is vested in the State Treasurer, as such, but that, as I have pointed out, he may have recourse to a suit upon the register's bond, in a proper case, to recover from him the amount of moneys collected or which should have been collected as fees under said section 40 by the register.

Motor Vehicles — Locomotive — Steam Shovel.

A certain machine used as a steam shovel, self propelled and mounted on a railroad car, is neither a locomotive nor a motor vehicle, within the meaning of G. L., c. 146, § 46.

To the Commissioner of Public Safety. 1927 March 23.

You request my opinion as to whether or not, under G. L., c. 146, § 46, a certain machine and boiler may be classified as a locomotive or motor vehicle, and the facts which you give me are as follows: "A machine is under consideration at the present time, being a steam shovel mounted on a standard gauge railroad car and self propelled." In response to a request from this department for further information you add the following facts: "Upon making inquiry as to whether or not this machine can continue for any great distance self propelled, I find that the machine is used solely to move under its own power for a short distance while being used for purposes of excavation. When moved from one location to another, it is drawn away by a locomotive or other transportation." You then ask: "Is this machine to be considered a locomotive or a motor vehicle within the meaning of G. L., c. 146, § 46?"

G. L., c. 146, § 46, provides: —

> No person shall have charge of or operate a steam boiler or engine or its appurtenances, except boilers and engines upon locomotives, motor vehicles, . . . unless he holds a license as hereinafter provided.

R. L., c. 102, § 78, as amended, contained the same provision as the above quotation, except that the words "motor road vehicles" were used instead of "motor vehicles."

In an opinion of a former Attorney-General (IV Op. Atty. Gen. 19) with reference to R. L., c. 102, § 78, it was said: —

> Whether a person operating a boiler or engine is within the exception of the statute depends, by its very wording, upon whether it is upon a locomotive. There is no restriction as to the use of a locomotive in the enactment. The question whether it is a locomotive or not is determined by its design and its potentiality rather than by any use to which it may be temporarily applied.

The term "motor vehicle" is defined by the statute (G. L., c. 90, § 1) as follows —

"Motor vehicles," automobiles, motor cycles and all other vehicles propelled by power other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks.

In view of the facts which you have submitted to me, I am of the opinion that under G. L., c. 146, § 46, the machine you describe is neither a locomotive nor a motor vehicle.

Boston Elevated Railway Company — Trustees — Term of Office.

At the expiration of the ten-year period designated in Spec. St. 1918, c. 159, the Governor may appoint a board of trustees for the Boston Elevated Railway Company composed entirely of new members.

To the Governor. 1927 April 1.

You have asked my opinion "as to whether the terms of the trustees of the Boston Elevated Railway Company, or their successors, appointed by the Governor of the Commonwealth under the provisions of Spec. St. 1918, c. 159, commonly called the Public Control Act, expire at the end of the ten-year period designated in the act, and if he then can appoint an entire new board of trustees."

The pertinent portions of chapter 159, relating to the appointment and terms of office of such trustees, are as follows: —

Section 1. The board of trustees of the Boston Elevated Railway Company is hereby created, to consist of five persons to be appointed by the governor, with the advice and consent of the council. The persons so appointed shall be sworn before entering upon the performance of their duties; shall own no stock or other securities of the Boston Elevated Railway Company or of any company owned, leased or operated by it; shall serve for the term of ten years from the date when they assume the management of the company as hereinafter provided, and until their successors are duly appointed and qualified. . . . In case of any vacancy in said board by reason of death, resignation or otherwise, the governor, by and with the consent of the council, shall fill the vacancy. The board shall designate one of the trustees so appointed to serve as chairman.

Any member of the board may be removed for cause by the governor, with the advice and consent of the council.

. . . . . .

If the public management and operation of the railway system of the Boston Elevated Railway Company shall continue beyond the original period of ten years the governor shall, with the advice and consent of the council, at the expiration of each ten-year period during the continuance of public management and operation, appoint five successor trustees to serve for a period of ten years and until their successors are appointed and qualified, but not exceeding the period of public management and operation. Said trustees shall assume the management and operation of the company's property on the first day of the month next following their appointment and qualification.

The term for which the original trustees were appointed was ten years from the date when they assumed the management of the company.

As regards persons appointed to fill vacancies in the board, there is no provision in the statute relative to such appointments which prevents the application of the statutory rule embodied in R. L., c. 18, § 1, now in G. L., c. 30, § 10, that vacancies in the office of a member of a board shall be filled for the unexpired term. The terms of the last paragraph of section 1 indicate that there was no legislative intent to have vacancies in the board filled in any other manner, for it is expressly provided therein that at the expiration of each ten years of public management of the road the Governor shall appoint five successor trustees, the entire membership of the board being five.

I am of the opinion that at the end of the ten-year period designated in the statute the Governor can appoint a board composed entirely of newly appointed trustees.

Board of Dental Examiners — Registration — Examination.

The Board of Dental Examiners, with relation to registration and examination of applicants, can act only in accordance with statutory provisions and the rules and regulations prescribed for the proper conduct of its duties.

To the Commissioner of Civil Service.
1927
April 8.

You ask: "Whether or not the Board of Dental Examiners has the right to suspend or revoke the license of practicing dentists of this Commonwealth, and if so, for what causes?" This is covered by G. L., c. 112, § 61, as amended by St. 1921, c. 478, § 1, wherein power is given to the Board of Dental Examiners to suspend or revoke licenses for causes which are set out at length therein; that is to say, if "the holder of such certificate, registration, license or authority, is insane, or is guilty of deceit, malpractice, gross misconduct in the practise of his profession, or of any offence against the laws of the commonwealth relating thereto."

You further ask: "Would it be illegal for the secretary of the Board of Dental Examiners to issue interne certificates to candidates who are eligible to take the dental examination without calling a meeting of the full Board?" G. L., c. 112, as amended by St. 1921, c. 365, provides that "an applicant for limited registration" is required to "furnish the board with proof entitling him to be examined for registration," and that he may, "upon payment of five dollars, be registered by the board as a dental interne." It is further provided that "limited registration under this section may be revoked at any time by the board." From the wording of this section (G. L., c. 112, § 45A) it is evident that the Board must act, and its action be, in accordance with the regular practice under the laws of this Commonwealth and the rules and regulations for the proper conduct of its duties, prescribed by G. L., c. 112, § 43. The secretary of the Board of Dental Examiners would have no authority to issue such certificate except as the result of action taken by the Board.

You further ask: "Would it be illegal for the Board of

Dental Examiners to give an unofficial examination to a candidate who is within a short period of the legal age for examination, the Board withholding the certificate of registration until the candidate reaches the legal age?" G. L., c. 112, § 45, states:

> Applications for registration hereunder shall be in writing upon blanks furnished by the board, which shall be signed and sworn to by the applicant, presenting proof of the requirements herein specified. Any such applicant twenty-one years or over and of good moral character who shall furnish the board with satisfactory proof that he has received a diploma from the faculty of a reputable dental college as defined in the following section, shall, upon payment of twenty-five dollars, be entitled to be examined by the board.

There is no exception in said section whereby a person less than twenty-one years of age may be examined.

Since an applicant for registration must be twenty-one years of age before he is entitled to file an application, and since an examination of said applicant, according to the terms of said section, is to be granted upon certain proof set out in said application, it follows that an applicant is not entitled under the law to an examination by said Board prior to arriving at the age when he is entitled to file an application. The Board of Dental Examiners, therefore, would be acting outside the scope of its powers in giving an unofficial examination of a candidate prior to his reaching the age which entitles him to apply for registration.

HOURS OF LABOR — SUNDAY EMPLOYMENT — PAPER MILL.

An employee whose duties do not specifically include work on Sunday other than caring for machinery in a manufacturing establishment may be employed on Sunday in duties designated by G. L., c. 149, § 50, even if this necessitates his working seven days a week.

To the Commissioner of Labor and Industries. 1927 April 27.

You have asked my opinion as to whether an employee in a paper mill may lawfully perform on Sunday the work of caring for machinery in an establishment, provided he works therein on the other six days of the week. The

statutes in question are sections 48 and 50 of G. L., c. 149. Section 47 of said chapter is not applicable to manufacturing or mercantile establishments.

Section 48 of said chapter states: —

> Every employer of labor engaged in carrying on any manufacturing or mercantile establishment in the commonwealth shall allow every person, except those specified in section fifty, employed in such manufacturing or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days. No employer shall operate any such manufacturing or mercantile establishment on Sunday unless he has complied with section fifty-one. Whoever violates this section shall be punished by a fine of fifty dollars.

Section 50 states that section 48 shall not apply to employees whose duties include no work on Sunday other than caring for machinery. (There are other exceptions enumerated in this section which are not material to the issue presented.)

Section 48, allowing twenty-four consecutive hours of rest in every seven consecutive days, by its own terms and by the terms of section 50, does not affect persons whose duties include no work on Sundays other than caring for machinery. It follows, therefore, clearly, in my opinion, that such an employee may work on Sunday at any of the duties set forth in section 50 without violating the law, even though he also works all other days of the week in the establishment. However, an employee who works in the establishment the other six days of the week may not do any work on Sunday, other than that specified in section 50, unless he is granted twenty-four consecutive hours of rest in every seven consecutive days.

Public Health — Inspectors — Slaughtering.

In cities, at least one inspector of animals should be a registered veterinary surgeon, but it is not necessary that one inspector of slaughtering in every city should be such a surgeon.

To the Commissioner of Public Health. 1927 April 27.

You have asked my opinion as to whether the provision contained in G. L., c. 129, § 15, in relation to inspectors of animals, that "in cities at least one such inspector shall be a registered veterinary surgeon," applies to inspectors of slaughtering, provided for by G. L., c. 94, § 128.

G. L., c. 94, § 128, provides that inspectors of slaughtering —

> 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 with 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.

G. L., c. 129, § 15, reads 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.

This latter section deals specifically with inspectors of animals, a type of inspector whose duties are to some extent set forth in said chapter 129, and a different kind of inspector from the inspectors of slaughtering, whose duties are to a certain extent set forth in G. L., c. 94, §§ 118–128. That there is a distinction made in the statutes between the two classes of inspectors is apparent from the wording of said section 128, wherein inspectors of slaughtering are referred to as "said inspectors" and inspectors of animals are referred to specifically by name.

While the inspectors of slaughtering are to be appointed, compensated and removed in the manner provided for inspectors of animals under G. L., c. 129, §§ 15–17, it does not follow that all the provisions of said section 15 are applicable to inspectors of slaughtering. The provision in section 15 that "one such inspector shall be a registered veterinary surgeon" applies specifically to the inspectors of animals mentioned by name in section 15, and the requirement as to one of their number being a registered veterinary surgeon was not intended by the Legislature to be made applicable to inspectors of slaughtering by virtue of the provision for the appointment, compensation and removal of the latter kind of inspectors by reference to section 15.

In brief, then, the provisions of the statutes require that in cities at least one inspector of animals, such as is provided for under said chapter 129, is to be a registered veterinary surgeon, and that it is not necessary that one inspector of slaughtering in every city where an appointment is made shall be a registered veterinary surgeon.

Structures in Tidewater — Acushnet River — Licenses

The provisions of G. L., c. 91, § 21, granting authority to exact compensation for tidewater displacement, are not limited by St. 1806, c. 18, relative to riparian owners on the Acushnet River. The boundary line of the grant given to such owners by St. 1806, c. 18, is at the present time to be taken as the existing low-water mark.

To the Commissioner of Public Works.
1927
May 9.

You have requested my opinion upon several questions of law arising in connection with a certain petition for a license to construct bulkheads and make solid fillings in and over the tidewaters of Acushnet River in the city of New Bedford. You have transmitted to me with your communication various documents and data bearing upon the petitioner's title to riparian land, and relating to various

facts bearing upon the matter, and you have stated further facts in your letter.

The specific questions which you ask in your communication are as follows:

1. Has the city of New Bedford, owing to the extension of North Street, any rights in the land under water. If so, can the Division issue a license for a structure which would cut off the city from its right of approach to the harbor line? (G. L., c. 91, § 17.)

2. If the rights in the land under water, 40 feet wide, in the continuation of North Street, do not belong to the city, do they belong to the owners of the adjoining piers, or do they remain in the Commonwealth?

3. Do the provisions of the statute of 1806 prohibit the Division from making a charge for the displacement of tidewater under G. L., c. 91, § 21?

4. Do the provisions of the statute of 1806 prevent the Governor and Council from fixing the proper compensation for the rights granted by the license in the lands of the Commonwealth under G. L., c. 91, § 22?

You state that the petitioner, claiming to be a riparian proprietor on the tidewaters of the Acushnet River, asks for a license to erect a structure described in your letter, which on the facts as stated is, in my opinion, a pier or wharf and is not to be considered filled land on which structures may be erected.

By virtue of St. 1806, c. 18, riparian owners on the tidewaters of the Acushnet River are authorized to erect wharves extending from their lots "to the channel of said river." St. 1806, c. 18, is to be considered in the nature of a grant of the right to erect wharves to the riparian owners, but this right is confined to areas directly in front of the riparian owner's land, and before such a license can be issued by the Commission it must be apparent that the petitioner for such license is the owner of the fee of the land in question. It appears from the data which you have submitted and from the facts as you have set them forth in your letter that the city of New Bedford, on or about September 8, 1787, laid out a way to the then high-water mark, and by later proceedings extended the same to the present high-water mark over land which is now claimed by the petitioner. It cannot be ascertained with accuracy from such data whether

the city, which was a town in 1787, acquired a fee in the strip so taken as a way, or whether it acquired merely an easement for highway purposes. It is probable that the latter right was all that was acquired by the city, and if so, it would not become a riparian owner within the meaning of St. 1806, c. 18, and the Commission would not be acting in derogation of any rights of the city in granting a license to the owner of the fee of the land over which the way was laid out. If, however, the city acquired a fee in the portion of land taken for the way, it would become a riparian proprietor and the Commission could not, under the provisions of G. L., c. 91, § 17, read in connection with St. 1806, c. 18, issue a license to any individual for the erection of a structure which would be a continuation of the line of the city's taking. It would seem as if the establishment of the petitioner's title as against the city of New Bedford would be a matter to be determined judicially before action was taken upon the petition by the Commission.

You also advise me that a claim is made by the owner of the land adjoining that of the petitioner, who has erected a wharf under license in front of its land, of a prescriptive right to use the waters on the side of its wharf toward the land claimed by the petitioner so freely as to exclude the petitioner from erecting a wharf in front of the land claimed by the petitioner, which is stated to be within a few feet of the existing wharf. I am of the opinion that no such prescriptive right has been acquired by the owner of the land adjoining that claimed by the petitioner which would prevent the licensing by the Commission of a wharf to be erected as specified in the petition.

Assuming that title to the land occupied by the way is not in the city, it appeals from the facts stated in your letter and the data submitted, and from statements made to this Department by counsel for both owners, that the owner of the land adjoining that claimed by the petitioner, over which the said way extends, claims title to so much of said land as is occupied by the way extended, or a portion thereof,

as against the petitioner. It is impossible to ascertain from the facts stated, the data submitted or the statements of counsel which of these two owners, if either, actually has title to the fee in that portion of the land occupied by the way, as extended. As a prerequisite to a license to erect a wharf in front of so much of the land claimed by the petitioner as is disputed with relation to ownership, the petitioner is bound to establish a good title. It would seem that in the existing situation the question as to the ownership of the land in question was one for judicial determination, and that until it has been determined by some competent judicial tribunal that the petitioner is the sole owner thereof no license in relation to a wharf to be erected in front of such land should be issued to it by the Commission.

I think that the foregoing statements constitute a complete answer, so far as one may be given, to your first and second questions.

Your third and fourth questions, in view of the foregoing answer to the first two questions, do not require an answer at the present time as far as they relate to land the title to which is not established as being in the petitioner, but they require an answer in view of the possibility of the issuance of a license by your Commission for a wharf in front of other riparian land of the petitioner adjoining the said way, as to which you state that the petitioner's title to the fee is not in dispute.

In relation to your third question, St. 1806, c. 18, provides as follows:

SECTION 1. That the owners and proprietors of lots of land adjoining Acushnet River, in the town of New Bedford, in the county of Bristol, between Clark's Point, so called, and the head of navigation in said river, their heirs and assigns, shall be, and hereby are authorized and empowered to erect, continue and maintain, wharves parallel with the line of their several lots, as they abut upon said river; said wharves *to extend to the channel of said river*, if the owners of said lots think proper; and each owner of said lot shall have authority to provide docks, or erect wharves, as aforesaid on the aforesaid extended portion of his said lot, in such way

and manner as he may think proper, not exceeding the limits of said channel of said river.

SECTION 2. That if at any time hereafter, it shall be made to appear to the satisfaction of the General Court of the Commonwealth of Massachusetts, that the erection, maintaining, or continuing said wharves or docks, mentioned in the first section of this act, operates any obstruction to the navigation of said river, or to the right of taking shell or other fish in said river, in that case the said General Court shall have a right, notwithstanding this act, to make such provisions respecting the navigation of said river, and the right of taking said fish, as they may think the public interest requires.

While the statute is to be construed as an irrevocable grant to the riparian owners of the right to erect wharves within the lines established by the statute (*Bradford* v. *McQuesten,* 182 Mass. 80; *Hamlin* v. *Pairpoint Mfg. Co.,* 141 Mass. 51), a reservation in the grant is contained in section 2, whereby the grant is made subject to future restrictions which may be imposed by the Legislature "respecting the navigation of said river, . . . as they (the General Court) may think the public interest requires."

The provision of G. L., c. 91, § 21, granting authority to exact compensation for tidewater displacement, is a provision which falls within the meaning of the reservation in the statute of 1806, relative to future restrictions respecting navigation of the river. The reservations embodied in section 2 make inapplicable to the instant case the opinion in *Bradford* v. *McQuesten, supra,* in so far as that opinion held that such compensation could not be exacted from the riparian proprietor whose rights were considered therein, for that owner's rights were established by St. 1851, c. 26, which did not contain any such reservations as does the statute of 1806. I therefore answer your third question in the negative.

In relation to your fourth question, G. L., c. 91, § 22, provides for the payment of compensation to the Commonwealth for the right granted under a license to drive piles or to fill land in tidal waters, the title to which land is in the Commonwealth. The compensation required to be

paid by this statute for the use of tidewater lands is not of a similar character to the compensation required by section 21 for tidewater displacements. It does not bear such relation to the navigation of the river as to bring it within the reservation contained in St. 1806, c. 18, § 2. Compensation for tidewater displacement, in lieu of earlier provisions of law for excavation, is an enactment directly in respect to navigation, whereas compensation for the exercise of a license to drive piles or to fill land is not made directly in respect to navigation, and it cannot be imposed upon licensees driving piles or filling land within the boundaries of the grant made them by St. 1806, c. 18. It becomes necessary, therefore, in this connection to determine what are the boundaries of the grant provided for in St. 1806, c. 18. It is provided in said chapter 18 that the riparian owners may "erect, continue and maintain, wharves parallel with the line of their several lots, as they abut upon said river; said wharves to extend to the channel of said river." It has been held in a number of opinions of the Supreme Judicial Court that a conveyance to or a boundary by the channel line in flats over which the tide rises and falls and through which a tidal stream runs is in effect a boundary by the low-water mark. *Ashby* v. *Eastern R.R. Co.*, 5 Met. 368; *Tappan* v. *Boston Water Power Co.*, 157 Mass. 24. In the latter case the court, after reviewing earlier decisions, says: —

> There is no suggestion in these cases that a tidal channel, from which the tide ebbs and through which a fresh-water stream flows at low tide, will constitute a boundary to flats. . . . And we think it plain that a channel to be a boundary to flats must be one from which the tide does not ebb at low water.

Although an examination of the circumstances which surrounded the enactment of the statute of 1806 tends in some degree to show that in the use of the word "channel" in said statute the Legislature may have intended to signify the tidal channel itself rather than the low-water mark, yet such considerations are not sufficient to require an interpretation of the words as used by the Legislature in this statute

as having other than the meaning attached to such words in similar statutes by the court; and it follows that today the boundary line of the grant given to the riparian owners under St. 1806, c. 18, is low-water mark as it now exists. It will not be proper to fix compensation for use of the Commonwealth's lands inside the present low-water mark, but such compensation may be fixed for the use of such lands beyond low-water mark, and I answer your fourth question in this manner.

BANKING — CO-OPERATIVE BANKS — LOANS — SHAREHOLDERS.

The authority of a co-operative bank in respect to loans is limited by G. L., c. 170, 170, § 12, and in making loans otherwise than in accordance with such limitations the officers of a co-operative bank are performing acts outside the scope of their authority which are not capable of ratification.

To the Commissioner of Banks. 1927 May 9.

You have asked my opinion upon various questions, all of which relate to certain practices of co-operative banks in connection with loans to shareholders.

There are certain general considerations in connection with the law relating to co-operative banks, contained in G. L., c. 170, as amended, which must underlie the answers to your several questions. It is apparent from the language of G. L., c. 170, as amended, and the earlier statutes dealing with co-operative banking, that it was the intent of the Legislature, in providing for this form of banking, that it should not be conducted in the manner in which general commercial banking is carried on nor in the manner in which institutions for savings operate. The statute originally authorizing the formation of corporations to do a co-operative form of banking, St. 1854, c. 454, provided in section 1 that the purpose of the organization should be —

Accumulating a fund to be lent on real estate security, or divided among its members.

Section 4 provided: —

> Every such corporation shall lend its funds on real estate security only . . . and no loan shall be made to any person not a member.

St. 1877, c. 224, and all subsequent statutes have stated the purposes of the corporation to be substantially those now set forth in G. L., c. 170, namely: —

> Accumulating the savings of its members in fixed periodical installments and loaning such accumulations —

and every statute has limited the number of shares in the banking association which any one individual might hold, and has limited the amount which might be loaned upon real estate security, to a given amount for each share held by a member of the corporation or association.

It is apparent from the provisions of the statute that it was the intent of the Legislature, in so limiting the number of shares which a member might hold and in limiting the amount which a member might borrow, to provide a form of banking which would encourage saving by persons of relatively small means, and would extend this privilege and the privilege of obtaining moderate-sized loans widely throughout the community among a class of persons not ordinarily engaging in large financial transactions.

It has been said of co-operative banks by the Supreme Judicial Court: —

> They are not authorized to do a general banking business and their rights and powers are strictly limited for the protection and benefit of their members.

G. L., c. 170, § 12, as amended, now provides as to a co-operative bank as follows: —

> The capital . . . shall be divided into shares of the ultimate value of two hundred dollars each; . . . No person shall hold more than forty unmatured shares, ten matured and ten paid-up shares in any one bank at the same time.

Sections 22 and 26 are as follows: —

SECTION 22. Any person whose application is accepted shall be entitled, upon proper security, to receive a real estate loan of a sum not exceeding two hundred dollars for each unpledged share held by him. . . .

. . . . . .

SECTION 26. For every loan made upon real estate a note shall be given, accompanied by a transfer and pledge of the requisite number of shares standing in the name of the borrower, and secured by a mortgage of real estate situated in the commonwealth, the title to which is in the name of the borrower. . . . No loan upon one parcel of real estate shall exceed eight thousand dollars. . . .

There are other provisions relative to shares owned jointly and by trustees, but their terms in no way modify the general intent of the statute in respect to the matters as to which you have inquired.

It is plain that the authority of the bank and its officers in respect to loans is limited to making them to shareholders, not in excess of $200 for each unpledged share held by a member, upon the security of real estate, the title to which is in the borrower. Such limits upon the authority of the co-operative bank in this respect were intended to carry out the general purpose of the institution, already referred to. It was not the intention of the Legislature, in enacting the statute, to provide a system of banking whereby a single shareholder or a small group of shareholders might borrow all or any very large part of the working capital. Loans made otherwise than in accordance with the limitations imposed by the statute are unauthorized, and in making them the officers of the bank are performing acts outside the scope of their authority which are not capable of ratification by the bank, its directors, or its shareholders. Shareholders dealing with the bank are bound to take notice of the statutory limitations of its authority to make loans. *Davis* v. *Old Colony R.R. Co.*, 131 Mass. 258.

Of the three cases which you advise me that you have before you and which you have submitted to me for consideration upon facts stated, the first two involve situations

in which a shareholder of a co-operative bank, for the purpose of obtaining for his own benefit a loan greater in amount than the bank is authorized to make to one person upon the number of shares actually held by the particular shareholder, which I assume in each instance, from the facts as you state them, to be the maximum number of shares which one individual is entitled to hold, or loans on a single parcel owned by him in excess of $8,000, resorts to a scheme which results in his obtaining such a loan. In the third case a similar result is achieved, but as a result of circumstances arising after the making of a proper loan by the bank to a shareholder and without intent to evade the provisions of the statute.

I. The first case which you have stated and your question of law based thereon are as follows: —

A is the owner of record of several parcels of real estate, each of sufficient value to warrant a co-operative bank loan thereon of $8,000. He obtains in the usual manner a loan of that amount on one parcel, but in order to obtain loans on the other parcels, he deeds them to various admittedly fictitious owners, commonly called "straws." Each of these "straws" applies to the same co-operative bank for a loan secured by the property placed in his name, the applications are accepted and the loans are made, the notes and mortgage deeds being signed by the "straws" and recorded. After the mortgages are recorded each "straw" owner re-transfers his parcel to A, and these deeds in turn are recorded. Thus the books of the bank reflect several apparently separate and distinct loans to as many individuals, but the proceeds of each loan went to A, who in the end is still owner of record of each parcel of real estate involved in the transaction. He makes payment of all monthly dues and interest. The insurance policies held by the bank show that the insurance equities are payable to A.

The question arising from transactions of this nature is, —

If the officers of the co-operative bank have knowledge of the circumstances of the transaction, have they violated or permitted the violation of G. L., c. 170, §§ 12 and/or 26?

The facts set forth in relation to case number I indicate the formation by the shareholder of a scheme to accomplish by indirection what the statute expressly prevents him from doing directly. The bank and its officers are without

authority to make him, as an individual shareholder, such a loan as he desires to obtain. Such a scheme, if successfully carried into effect, might enable a single shareholder to borrow for himself all the working capital of the bank, and it might also enable him to borrow for himself upon a single piece of property a like sum. If, knowing the facts relative to the expedient which he is adopting to obtain such a loan, the officials of the bank connive with him to make a loan of the funds of the bank in the manner indicated, they have violated and permitted the violation of G. L., c. 170, §§ 12 and 26. I answer your question in the affirmative.

II. The second case and the question relating thereto which you set forth in your letter are as follows: —

> This case is similar to case number I, except that after the title to the property is transferred to the "straw" owner it remains in his name and is *not* re-transferred to A. In some cases A holds unrecorded deeds executed by the "straw" owner, in order that he may place them on record, should any attempt be made by the "straw" owner to benefit by having the property in his name. As in case number I, A makes payment of all monthly dues and interest.
>
> The question arising from such transactions is, —
>
> If the title to each of the various parcels involved is allowed to stand in the name of the "straw" to whom the loan ostensibly was made, have the provisions of G. L., c. 170, §§ 12 and/or 26, been violated?

I assume that in this case, as well as under the facts stated in case number I, the officials of the bank have knowledge relative to the intent of the shareholder to obtain loans, by means of such "go-betweens," which he would not otherwise be able to negotiate. It is immaterial in what manner the scheme is carried out. Its purpose is to accomplish a result not permissible under the statutes.

The powers of the bank and its officers are defined by the statute. It was not the intent of the Legislature as expressed in the statutes, that they should have authority to negotiate a loan in any other manner or to any greater extent than is indicated by the terms of the statute. The intentional negotiation by them of a loan in any other manner or to any greater extent than that specified by the

statute is *ultra vires*, being outside the objects for which the corporation was created and beyond the powers expressly conferred to attain such objects. See *Jewett* v. *West Somerville Co-operative Bank*, 173 Mass. 54. Where the officials of a co-operative bank know that a loan in excess of the amount permitted by the statute to a single shareholder, or upon a single piece of property, is in fact being made to one shareholder, or upon the security of one piece of property, their authority is not enlarged by a colorable scheme, devised with their knowledge, by which it is made to appear of record as if the loan were being made to several shareholders or upon several pieces of property. Their acts are no less *ultra vires* in the latter instance than in the former. All persons dealing with co-operative banks, as with savings banks, are bound to take notice of the limitations of the powers of the institution and its officers (see *Gilson* v. *Cambridge Savings Bank*, 180 Mass. 444), and the borrower who has manipulated such a scheme as that outlined in the latter instance stands in *pari delicto* with the corporation. Whether or not an individual has the right in any given instance to attack the validity of the transactions of a co-operative banking corporation as *ultra vires*, the State may make them the basis of a direct proceeding against the corporation. Ample authority is given to the Commissioner of Banks by the statutes to have set in motion appropriate proceedings against a co-operative bank which, through the acts of its officers, has exceeded its authority.

I answer your second question in the affirmative.

Under case number II you also ask the following question: —

> With respect to cases numbers I and II, are the officers who invest the funds of the bank charged with the duty of obtaining such information concerning applicants for loans, which may be available on a reasonable inquiry, as would enable them to prevent the obtaining of loans by such subterfuge or deception?

I answer this question in the affirmative.

III. The facts and questions relative to the third case which you lay before me are as follows: —

A and B, the owners of record of two separate and distinct parcels of real estate, have been granted thereon, properly and at different times, by the same co-operative bank, loans of $8,000 each. At a later date B, by bona fide sale conveys his parcel to A, subject to the co-operative bank mortgage, and assigns to A the value of his unmatured shares pledged under the mortgage. If the bank on its books transfers to A these assigned shares he becomes thereby the holder of eighty unmatured shares, twice the maximum number of shares permitted under the provisions of G. L., c. 170, § 12. The general practice, however, is for A to hold the assignment of B's unmatured shares without requesting that they be transferred to his name on the books of the bank, the assumption being that violation of the provisions of section 12 is thereby avoided.

The question in this instance is, —

(*a*) If the officers of the bank have knowledge of the sale of the mortgaged property and the assignment of the unmatured shares pledged under the mortgage, can they legally permit both loans and shares to stand unchanged in the name of A and B, respectively, when both parcels of real estate stand of record in the name of A and monthly payments of dues and interest are made by him and he holds an assignment of B's interest in the shares?

(*b*) This also raises the question — What is the duty of the officers of the bank upon being notified either through a change in the person to whom insurance equities are payable, or otherwise, of the transfer of property upon which the bank holds a first mortgage?

(*c*) If in any of the transactions outlined above there has been a violation of the statutes relating to co-operative banks but no breach of the conditions of the mortgage, is it thereby within the power of a co-operative bank to demand payment of the loan?

From the facts as you state them, it does not appear that there is involved in the third question any scheme or design on the part of any shareholder to obtain from the bank any loans which it was not specifically authorized by

statute to make. This case presents a different aspect from that of the two foregoing situations. The loan in question has been duly made by the bank's officers, acting within their authority, and the question of a colorable design in relation to negotiations of the bank does not here appear.

Transfer of shares in a co-operative bank is permitted by section 39, but inasmuch as there is a prohibition in section 12 on the holding of more than forty unmatured shares by a single individual, the bank has no legal authority to make a transfer which will bring one of the shareholders into a position where he owns on the books of the company more than the limited number. As the possession of the two parcels of real estate mentioned in case number III has come into the hands of a single shareholder subsequent to the making of a bona fide loan, although the situation created is not one contemplated by the statute, there is no specific provision which calls for action on the part of officers of the bank. I answer your question 3 (*a*) in the affirmative.

I answer your question 3 (*b*) to the effect that there are no duties incumbent upon the officers of a co-operative bank under the circumstances described in your question, provided such information reaches them subsequent to a bona fide loan made within their specific authority under the statute.

I answer your question 3 (*c*) in the negative.

Master Plumber — License — Registration.

A master plumber in a town to which the statues relative to the plumbing business apply is not entitled to a certificate of registration or a license without an examination.

Neither certificates of registration of plumbers nor licenses to those duly registered need be renewed annually, under the provisions of the General Laws.

In towns to which G. L., c. 142, § 3, is applicable, registration or license is a prerequisite to engaging in the plumbing business, and a regular place of business is essential to being a master plumber.

To the Director of Registration.
1927
May 9.

You have requested my opinion as to whether or not a person engaged in the plumbing business in a town to which the plumbing acts hitherto have not been applicable is entitled to a certificate of registration as a master plumber or to a master plumber's license without an examination when his town properly accepts the rules relative to plumbing formulated by the Examiners under G. L., c. 142, §§ 8 and 9.

In my opinion, he is not so entitled but must subject himself to the examination. This is so, even though he was engaged in the plumbing business prior to July 10, 1893. When his town accepts the Examiners' rules, G. L., c. 142, §§ 1 and 3 (among others), becomes binding upon his town, and these sections prohibit him from engaging in the business of a master plumber unless he is lawfully registered or duly licensed by the Examiners. He may not be licensed until he has successfully passed the examination, as provided in said chapter 142. He is not lawfully registered unless he has been registered in accordance with that part of section 1 of said chapter 142 which defines the word "registered." This part of section 1 states that "registered" means a person who has been registered under certain named acts, which provided for the issuing of certificates of registration as master plumbers to persons already registered as such on September 1, 1894. None of these acts contemplated the issuing of certificates of registration to persons who would subsequently come under the operation of the act, but they were designed to exempt from examination those persons who already were engaged in the plumbing

business in towns to which the original act of 1894, when passed, applied.

All of the acts, including the original plumbing act (St. 1894, c. 455), contemplated the issuing of certificates of registration only to such persons who were duly registered on or before September 1, 1894, and there is no provision to be found in the law which allows any other person to engage in the business of a master plumber unless he is duly licensed after an examination.

You have also asked my opinion as to whether or not holders of certificates of registration must renew annually and pay a renewal fee. In my opinion, it is not necessary to renew these certificates annually, as the act of 1894 and acts supplementary thereto provided for the issuance of a certificate to certain plumbers, with no limitation as to its duration.

With reference to licenses, G. L., c. 142, § 6, specifically provides that such licenses shall be issued for one year and may be renewed annually upon the payment of the required fee. In the event that a person became registered properly, it is my opinion that the Legislature did not intend that he should pay any further fee or be required to renew annually. Certain specific acts, such as St. 1910, c. 597, § 2, St. 1909, c. 536, § 3, and St. 1912, c. 518, provided for the re-registration of holders of certificates on or before a certain date, but none of these acts contemplated that such persons should renew the certificates except on the one occasion prescribed by the particular act.

You ask whether or not a person who has never been licensed by the Board may advertise as a plumber or engage in the business of plumbing. G. L., c. 142, § 3 provides: —

> No person shall engage in the business of a master plumber or work as a journeyman unless he is lawfully registered, or has been licensed by the examiners as provided in this chapter.

It follows, therefore, clearly, that no person may engage in the business of a master plumber or work as a journey-

man, as these are defined in section 1 of said chapter 142, unless he is lawfully registered or duly licensed by the Examiners.

It is to be borne in mind, however, that these sections apply only to certain cities and towns, as set forth in section 2 of said chapter 142. In those towns to which this act is not applicable, a person may engage in the business of plumbing and advertise as a plumber without being registered or licensed.

With reference to your question as to whether or not a person may advertise as a plumber, I am of the opinion that he may advertise to the same extent as he may lawfully perform plumbing work.

You further ask my opinion as to whether or not a master plumber must have a regular place of business, and also you ask what constitutes a regular place of business.

In my opinion, a master plumber must have a regular place of business. The definition of "master plumber," as contained in G. L., c. 142, § 1, is as follows: "A plumber having a regular place of business and who, by himself or journeymen plumbers in his employ, performs plumbing work." This definition clearly requires that a person must have a regular place of business in order to be a master plumber.

However, it is to be noted that a person need not have a regular place of business in order to secure a master plumber's license. The license is merely a permit to do legally those things which when done would constitute him a master plumber, and which would be contrary to law if done by an unlicensed person. It is therefore possible for a man legally and properly to hold a master plumber's license and at the same time not be a master plumber. The license does not create the status of master plumber but gives to the licensee the right to do those things which when done cause that status to arise by operation of law.

Insurance — Adjusters of Fire Losses — Solicitation of Business.

An unlicensed adjuster of fire losses may not solicit employment as the representative of an insured in the settlement of a loss, but the statutes do not prohibit him from soliciting business from insurers.

To the Commissioner of Insurance. 1927 May 12.

You have asked me certain questions relative to advertisements and solicitations by persons who are not licensed as adjusters of fire losses, in accordance with G. L., c. 175, § 162.

An adjuster of fire losses is defined by G. L., c. 175, § 162, as follows: —

> Whoever, for compensation, not being an attorney at law . . . or a trustee or agent . . . directly or indirectly solicits from the insured or his representative the settlement of a loss under a fire insurance policy shall be an adjuster of fire losses.

Section 172 requires that such adjusters of fire losses shall be licensed.

Section 175 provides: —

> Whoever, not being duly licensed as an insurance agent or broker or as an adjuster of fire losses, represents or holds himself out to the public as being such an agent, broker or adjuster, or as being engaged in the insurance business, by means of advertisements, cards, circulars, letterheads, signs or other methods, or whoever, being duly licensed as such agent, broker or adjuster, advertises as aforesaid or carries on such business in any other name than that stated in his license, shall be punished by a fine of not less than ten nor more than one hundred dollars.

You advise me of certain types of advertising cards which various unlicensed adjusters of fire losses have caused to be inserted in a certain insurance journal. It is largely a question of fact as to whether any or all of these cards, appearing in connection with other matter on an advertising page of an insurance journal, are of such a character as to constitute a representation to the public by the persons inserting them that such persons, respectively, are adjusters of fire losses. The Attorney-General does not pass upon questions of fact, but I think it would not be unreasonable to say that all of the advertising cards, with the possible exception of the

fifth, read in connection with their place in an insurance journal, were intended as solicitations to insureds who had sustained fire losses to avail themselves of the services of those whose names were set forth on the cards. So regarded, the advertiser causing such cards to be published would plainly be soliciting the business of adjusting fire losses from insureds. In this respect it would be immaterial whether or not such solicitation was successful.

I answer your first question, both as to (*a*) and (*b*), in the affirmative.

As to your second question, it is of the nature of a solicitation that it be intended in some way to be made to or to reach the person from whom something is sought. It may be made otherwise than face to face or by direct communication — a third person may be made the agent of the solicitor's plea. The statute uses the words "directly or indirectly." With this proviso, I answer your second question in the negative.

I answer your third question in the affirmative.

The answer to your fourth question is, I think, fully comprised in what I have already written.

The prohibition of section 175 applies to any person, not licensed as an adjuster of fire losses, who solicits the settlement of a fire loss from an insured; that is, solicits employment by the insured as the latter's representative. It has no application to one who does not desire to act for insureds and holds himself out only as the representative of an insurance company. If, as a matter of fact, any card to which you have called my attention reasonably indicates the status of the advertiser as one who does not desire by his card to gain employment from insureds, as to which I express no opinion, then the advertiser would not be within the prohibition of section 175.

Comptroller — Firemen's Relief — Allowance to Families of Deceased Firemen.

It is the duty of the Comptroller, before certifying for payment a claim under G. L., c. 48, § 83, as amended, to the family of a deceased fireman, to satisfy himself as to the existence of all the conditions specified in said section which are necessary prerequisites to obtaining the relief provided by the statute.

To the Comptroller. 1927 May 12.

You have asked my opinion relative to your authority to act upon a certain claim presented to you under the provisions of G. L., c. 48, § 83, as amended by St. 1923, c. 362, § 54, and you have submitted to me certain documents bearing on the said claim which have been presented to you. The section of the instant statute falls under the heading "Firemen's Relief," and deals with an allowance to families of firemen killed or fatally injured while "in the performance of their duty at a fire or in going thereto or returning therefrom, or while engaged in company drills, when such drills are ordered by the chief, acting chief or board of engineers of the fire department, or required by city ordinance or town by-laws." G. L., c. 48, § 81. Section 83 reads as follows: —

> If a person entitled under either of the two preceding sections to the benefits provided in section eighty-one is killed, or dies within sixty days from injuries received, while in the performance of duties entitling him to such benefits, and his death is certified to the comptroller by the town clerk and the attending physician or medical examiner, the comptroller shall certify for payment to the executor or administrator of such person, out of the appropriation annually made for the purpose, the sum of twenty-five hundred dollars for the use equally of his widow and minor children; or if there are minor children but no widow, to their use; or if there is no minor child, to the use of the widow; and if there is no widow or minor child, to the use of the next of kin if dependent on such deceased person for support. A child of full age dependent upon such person for support shall be regarded as a minor child.

You advise me that a claim for $2,500 has been presented by the administratrix of the estate of a deceased fireman who would have been entitled to relief under section 81.

Your duty under section 83 consists in certifying for payment the sum of $2,500 designated by the statute. Your

authority, however, so to certify depends upon the existence of four sets of facts which the statute sets forth as prerequisites to the right of the administratrix to have such payment made to her. These facts are as follows: —

1. The administratrix' intestate must be a person entitled under section 81 or section 82 to receive benefits.

2. Such person must have deceased within sixty days from receiving injuries which are claimed to be the cause of his death.

3. He must have received such injuries while in the performance of duties entitling him to such benefits as are enumerated in section 81 or section 82.

4. The injuries which such person received while in the performance of his duties must have been the cause of his death.

In relation to each of these sets of facts you must be satisfied that they exist before you can rightly exercise your authority to certify payment. It is not the province of the Attorney-General to pass upon questions of fact. The determination of these issues of fact rests with you. There are, however, certain considerations which I will indicate for your guidance in making your determination.

1. I assume from the statements in your letter that you are satisfied that the deceased was a person entitled to receive benefits under section 81, and consequently a person for whose death an allowance might be paid under section 83.

2. The statute provides that the fact of death shall be proved by the submission to you of a certificate made by the town clerk and the attending physician or medical examiner. You have submitted to me a sworn certificate of death within sixty days of the time when it is claimed by the administratrix that the injury occurred, made by the city clerk of Lynn, and a similar statement as to the fact and time of death made by a person whom I assume to be a physician. It is immaterial that this latter statement is unsworn. It would seem that this certificate and this statement furnish you with evidence of the death and the

time when it took place, in accordance with the mode described for determining these facts by the statute.

3. The physician's statement, which has been filed with you and which you have submitted to me, does not appear of itself to set forth facts from which it can be ascertained with reasonable certainty whether a cold, which it is said the deceased contracted sixty days before his death while in the performance of his duties, was the cause of his death. The facts set forth in such statement fall short of furnishing such definite proof of the causal connection between the immediate injurious results said to have arisen from the performance of duty and the subsequent death as was furnished by the facts submitted in a somewhat similar case in which an opinion was rendered by a former Attorney-General (IV Op. Atty. Gen. 427). In addition to the statements made by the physician, you have before you and have submitted to me an affidavit by the administratrix of the estate which contains certain statements relative to the history of the deceased's injury and illness. These statements, read in connection with those made by the physician, do not necessarily establish such connection between the injury and the death as would make it necessary to determine such fact in favor of the claimant's contention. The word "injury" as used in connection with the deceased's disability is sufficiently broad to include illness or a cold received while in the course of duty, as was determined in IV Op. Atty. Gen. 427.

The statute does not specify the precise mode or manner in which the causal connection between the injury and the death is to be proved. It may be proved in a variety of ways, but it must be so proved that you can make a determination that death was caused by an injury received while the deceased was in the performance of his duties.

4. There is no direct proof in the documents which you have submitted to me and which are before you that the deceased did not leave a widow or minor children. If such be the fact, a dependent next of kin, if any is living, would

be the designated beneficiary under the statute. Among these documents is a statement signed by the administratrix tending to show that the deceased's mother was such a dependent relative.

If a finding upon these various questions of fact which I have outlined is to be made by you upon adequate proof, you are to be satisfied as to the existence of each requisite set of facts before certifying this claim for payment.

Department of Education — School Children — Towns — Transportation.

If a town has not made an appropriation for the free transportation of school children, a denial of a request for such transportation by the school committee, on the ground of lack of funds, is such a declination that the Department of Education may, upon a proper appeal therefrom, require the town to furnish such transportation.

To the Commissioner of Education.
1927
May 16.

You have asked my opinion upon two questions relative to the powers of your Department concerning the transportation of school children by a town in which the children's residences are more than two miles from the high school of the town, which they are entitled to attend, which I assume is maintained under authority of G. L., c. 71, §§ 4 and 5.

G. L., c. 71, § 68, is as follows: —

> Every town shall provide and maintain a sufficient number of schoolhouses, 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 commit-

tee, 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.

You have advised me that in response to a petition by ten residents of a town, some of whom, I assume, are parents of children entitled to attend the high school maintained by the town, the school committee answered the petitioners as follows: —

> Inasmuch as its request for an appropriation for the purpose of transporting pupils to the high school had been refused at town meeting, the committee could not grant the request for transportation of pupils to high school because it had no funds which could be used for this purpose.

I assume that this answer was an official communication from the school committee, as such.

You have also advised me that the inhabitants of the town, in town meeting, refused to make an appropriation for the transportation which was the subject of the school committee's communication; and you have further advised me that four of the residents of the town have appealed from the declination of the school committee to your Department. I assume that at least one of these applicants is a parent or guardian of a school child entitled to attend the town high school.

Your questions are as follows: —

> 1. Has the school committee declined to furnish transportation according to G. L., c. 71, § 68?
>
> 2. In case the Department decides to require the town to furnish transportation for a part or for all of the distance, to what official or board should its communication, making this requirement, be addressed?

Upon the assumptions which I have made from the facts stated in your letter, I answer your first question in the affirmative.

The statute specifically provides that upon appeal to your Department by a parent or guardian of a child for whom the school committee has declined to furnish transportation your

Department may require the town to furnish the same. Any communications from your Department requiring the town to furnish transportation should be addressed to the Inhabitants of the Town of ———, and should be served on the board of selectmen. A penalty for failure to comply with your requirement in this respect is provided as against the town by G. L., c. 71, § 34.

STATE RETIREMENT ASSOCIATION — INCOME TAX ASSESSORS — STATE EMPLOYEES.

Income tax assessors are not exempt from compulsory membership in the Retirement Association, with all the consequences which flow therefrom.

To the State Board of Retirement.
1927
May 25.

You have requested my opinion as to whether income tax assessors, appointed under G. L., c. 14, § 4, are exempt from the provisions of G. L., c. 32, §§ 1–5. It has been the practice of this office to be somewhat reluctant to give opinions in response to general inquiries, for the reason that in so doing, while the answers given may, in general, be correct, some feature or qualification may be overlooked which upon the particular facts of some particular situation might be determinative. I am undertaking to answer your question, however, in such manner as I think will cover most of the situations which are likely to arise under the law as it now exists.

In G. L., c. 32, § 1, the term "employees" was defined as —

> permanent and regular employees in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service.

While this definition stood thus, it was ruled by one of my predecessors that the commissioners composing the Department of Public Works, appointed by the Governor, with the advice and consent of the Council, for short and definite terms of years, were not employees within that definition.

By St. 1922, c. 341, the definition of "employees" was altered to read as follows: —

Persons permanently and regularly employed in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service.

Thereafter, another of my predecessors ruled that the clerk of the Supreme Judicial Court, appointed by the justices of that court for a term of five years, was not an employee within this definition.

In the first of those opinions it was pointed out that the persons concerned were the holders of public office and not in public employment, in a technical or restricted sense, and that by reason of their limited tenure, at least, they were not within the spirit of the retirement act and not within the definition of "employees." In the second of those opinions emphasis was principally laid upon the fact that the clerk was the holder of a public office.

G. L., c. 32, § 2, reads, in part, as follows: —

There shall be a retirement association for the employees of the commonwealth, . . . organized as follows:

(1) All persons who are now members of the state retirement association established on June first, nineteen hundred and twelve, shall be members thereof.

(2) All persons who are members of the teachers' retirement association at the time of entering the service of the commonwealth, and persons who were or are in the employment of a department or institution formerly administered by a city, county or corporation when taken over by the commonwealth shall become members of the association, irrespective of age, but no such person shall remain in the service of the commonwealth after reaching the age of seventy. Except as provided in paragraph (3) all other persons who enter the service of the commonwealth hereafter shall, upon completing ninety days of service, become thereby members of the association, except that such persons over fifty-five shall not be allowed to become members of the association, and no such person shall remain in the service of the commonwealth after reaching the age of seventy.

(3) No officer elected by popular vote shall be a member of the association, nor any employee who is or will be entitled to a non-contributory pension from the commonwealth; but if such employee leaves a position for which such a pension is provided, before becoming entitled thereto, and takes a position to which this section applies, he shall thereupon become a member of the association.

St. 1921, c. 439, § 1, added at the end of the provision last quoted above the following: —

> An official under fifty-five years of age when appointed or reappointed by the governor for a fixed term of years, may, if his sole employment is in the service of the commonwealth, become a member of the association by making written application for membership within one year from the date of his original appointment or subsequent reappointment to the same office. An official who is a member of the association shall not receive credit for any period of service which he may have rendered as an official from June first, nineteen hundred and twelve, to the date of his appointment or reappointment which immediately preceded his membership in the association.

By section 2 of the same act it was further provided as follows: —

> Officials in the service of the commonwealth who are members of the state retirement association when this act takes effect, may, upon written application to the state board of retirement within six months after said date, withdraw their membership and their accounts in the association.

It seems fairly clear that the purpose of St. 1921, c. 439, was to settle the status, with respect to the retirement laws, of the group of superior public officers holding office for specified limited terms of years. That it did not refer to all public officers whatever, but rather to those of superior grade and limited tenure, is, it seems to me, shown by the use of the word "official" and by the fact that the permission of section 1 is extended only to officials "when appointed or reappointed by the governor for a fixed term of years." It recognizes that there might be officers of this grade, not members of the Retirement Association, who would like to become such, and also officials, already members of the association, at least *de facto*, who might desire to withdraw therefrom; and it afforded to the persons in each group a limited opportunity to carry out their desires in this regard. The words "officials in the service of the Commonwealth," in section 2, would thus have reference to officials of the type referred to in section 1, namely, those deriving their

office by appointment of the Governor for a fixed term of years.

That some persons who were technically public officers, and not merely servants or agents, were intended to be brought into the retirement system is shown by the fact that in paragraph 3 of G. L., c. 32, § 2, quoted above, it was thought necessary to provide that "no officer elected by popular vote shall be a member of the association." As the law now stands, therefore, the provisions of the retirement act apply, so far as they can be spoken of in general terms, to public officers whose sole or principal work consists in the performance of their official duties, and whose tenure of office may be deemed "permanent," as that word is used in G. L., c. 32, § 1, as amended. They apply, in addition, to such public officers as hold superior posts by appointment of the Governor for a fixed term of years, and who, under the provisions of St. 1921, c. 439, shall have elected to remain or to become members. They do not apply, however, to officials who, being entitled to exercise the choice afforded by St. 1921, c. 439, have elected to be or remain outside the association; nor to other public officials whose tenure cannot fairly be described as permanent.

Income tax assessors are appointed by the Commissioner of Corporations and Taxation, with the advice and consent of the Governor and Council, for terms of indefinite duration; and they may be removed in the same way. G. L., c. 14, § 4, as amended by St. 1922, c. 330. They have such duties and powers, consistent with G. L., c. 62, as the Commissioner may prescribe. G. L., c. 14, § 8. It is contemplated that they shall have subordinates. G. L., c. 14, § 4, as amended. They are expected to have offices within their several districts, at which offices returns may be filed and taxes paid. See G. L., c. 62, §§ 24, 32 and 39. There is a strong implication that they receive taxes paid to them in an independent capacity, somewhat like that of the collector of local taxes, for which they may be personally accountable to the Commissioner. See G. L., c. 62, § 40.

In my opinion, income tax assessors are public officers as distinguished from employees, in the technical sense. *Brown* v. *Russell*, 166 Mass. 14; *Attorney General* v. *Drohan*, 169 Mass. 534; *Attorney-General* v. *Tillinghast*, 203 Mass. 539; *Rich* v. *Mayor of Malden*, 252 Mass. 213.

They do not, however, fall within the class of officials to whom the right of choice given by St. 1921, c. 439, is extended, for they are not appointed by the Governor but by the Commissioner. Neither is there anything temporary about their tenure of office. They are not appointed for definite terms of years but for terms of indefinite duration which may extend for a lifetime. They are not removable solely at the will of the Commissioner, but only "with the advice and consent of the governor and council." Their time in office may therefore be expected to extend beyond the term of any particular commissioner. They are thus about as nearly permanently and regularly employed as any employee of the Commonwealth who is not under civil service. I am assuming, without further inquiry, that their sole or principal employment is in the service of the Commonwealth.

It follows that these officers are not exempt from compulsory membership in the Retirement Association, with all of the consequences which flow therefrom, and that if upon their appointment they fail to become members of the association by reason of being over the age of fifty-five, they are, nevertheless, subject to the provision that they may not remain in the service of the Commonwealth after reaching the age of seventy.

Department of Educaton — School Committees — Special Classes.

The Department of Education may provide by regulation for an appropriate examination of pupils by school committees with relation to the formation of special classes for those of retarded mental development, and attendance at such classes may be compelled as in other public school classes.

Regulations of the Department relative to the type of child to be required to attend such special classes are binding upon school committees.

To the Commissioner of Education. 1927 May 27.

You have asked my opinion upon three questions relative to the power of school committees of towns, under G. L., c. 71, § 46, as amended, in connection with special classes for the instruction of children of retarded mental development, but not with relation to any particular case or to any set of facts before you for determination. It has been the practice of this office to be somewhat reluctant to give opinions in response to general inquiries upon questions of law or of statutory interpretation, for the reason that in so doing, while the answers given may be correct in their application to the general inquiry, some feature or qualification may not be stated which upon the particular facts of an existing situation might be determinative. Inasmuch, however, as you advise me that my opinion is desired to aid your Department in the preparation of regulations applicable to the enforcement of the law, I answer your questions with a view to affording you an interpretation of such portions of the statute as you inquire about and to assist you in determining the scope of the regulations which you are authorized to establish.

G. L., c. 71, § 46, as amended by St. 1922, c. 231, to which you direct my attenton, reads as follows: —

> The school committee of every town shall annually ascertain, under regulations prescribed by the department and the commissioner of mental diseases, the number of children three years or more retarded in mental development in attendance upon its public schools, or of school age and resident therein. At the beginning of each school year, the committee of every town where there are ten or more such children shall establish special classes for their instruction according to their mental attainments, under regulations prescribed by the department. No child under

the control of the department of public welfare or of the child welfare division of the institutions department of the city of Boston who is three years or more retarded in mental development within the meaning of this section, shall, after complaint made by the school committee to the department of public welfare or said division, be placed in a town which is not required to maintain a special class as provided for in this section.

You have addressed to me the following questions: —

1. Can the school committee require that any child of school age shall be examined in order to ascertain the number of children who are mentally retarded?

2. Can the school committee compel the attendance at the special classes established under this section of children who are found to be three or more years mentally retarded?

3. Must the school committee require all children who are found to be three or more years retarded to attend such classes or may they use their discretion?

1. The character of the examination to which you refer in your first question is, I assume, of a different and somewhat more extended form than the medical examinations of school children provided for by G. L., c. 71, §§ 54–59, as amended, and seeks data not readily to be obtained by the requirements for the registration of minors of school age under G. L., c. 72, as amended. Nevertheless, the examination for which you desire to provide by regulations is, I assume, though different in form and in degree of thoroughness, not different in kind from the examination by a school doctor or from such examination as is necessary to obtain the data for the registration of minors of school age. Its purpose, as it appears from the provisions of the instant statute, is in a general way the same as that of the others heretofore referred to. Like them, it seeks to make available knowledge of the condition of the school child, with a view to providing for his well-being, physically and mentally, in the most appropriate way under the general provisions of our laws for education. A regulation of your Department providing for such an appropriate examination, under G. L., c. 71, § 46, could not necessarily be said to be un-

reasonable or arbitrary, and in ascertaining the number of mentally retarded children of school age a school committee would be bound to follow such a regulation of your Department, and the committee's requirement that a child should be so examined under your regulations would not, in my opinion, be unlawful.

2. As to your second question: The special classes for school children of retarded mental development, established under G. L., c. 71, § 46, as amended, appear from the provisions of that statute to be a regular part of the school system as much as other classes or grades to which children in the schools may be assigned, and I am of the opinion that attendance at these special classes may be compelled in the same manner as is provided for the attendance of school children in other classes of the public schools.

3. As to your third question: The regulations of your Department relative to the establishment, for school children of the retarded mental development specified in the instant statute, of "special classes for their instruction according to their mental attainments," in so far as such regulations cover the field of requirements as to what children shall be required to attend such classes, are binding upon a school committee, and it cannot exercise discretion as to requiring attendance within such field. If there are individual cases which are not covered by your regulation, a school committee may exercise discretion, within the requirements of the statute, in determining the form of instruction suited to the attainments of the mentally retarded children under its care.

Banking — Commissioner of Banks — Trust Company — Assessments.

The Commissioner of Banks may require trust companies to levy assessments upon stockholders whenever and as often as he deems the capital stock to be impaired.

To the Commissioner of Banks.
1927
May 27.

You have requested my opinion upon the following question: —

If the Commissioner of Banks has levied, under the provisions of G. L., c. 172, § 25, as amended by St. 1922, c. 488, § 3, and the stockholders of a trust company have paid, an assessment or assessments aggregating 100% of the capital stock, has he (the Commissioner) authority to levy and enforce the collection of further assessments in the event that the capital subsequently becomes impaired?

It is necessary to consider three sections of the General Laws in answering the above question.

G. L., c. 172, § 24, as amended by St. 1922, c. 488, § 2, is 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, and no stockholder shall be allowed to set off any claim as a depositor in or creditor of either the commercial or savings departments against such liability. Sections forty-six to fifty-four, inclusive, of chapter one hundred and fifty-eight shall apply to and regulate the enforcement of such liability by creditors of the corporation.

G. L., c. 167, § 24, as amended by St. 1922, c. 488, § 1, provides, among other things, that the Commissioner of Banks, after he has properly taken possession of the property and business of a trust company, may, if he deems it necessary to enforce the liability of stockholders described in G. L., c. 172, § 24, file a bill in equity against all persons who were stockholders therein at the time of such taking possession to enforce such individual liability.

G. L., c. 172, § 25, as amended by St. 1922, c. 488, § 3, is as follows:

Any such corporation whose capital stock has, in the opinion of the commissioner, become impaired by losses or otherwise, shall, within three months after receiving notice from the commissioner, pay the deficiency in the capital stock by assessment upon the stockholders pro rata to the shares held by each. If such corporation shall fail to pay such deficiency in its capital stock for three months after receiving such notice, the commissioner may apply to the supreme judicial court for an injunction; and if a stockholder of such corporation neglects or refuses, after three months' notice, to pay the assessment as provided in this section, the board of directors shall cause an amount of his stock sufficient to make good his assessment to be sold by public auction, after thirty days' notice given by posting such notice in the office of the corporation and by publishing it in a newspaper of the city or town where the corporation is located or in a newspaper published nearest thereto; and the balance, if any, shall be returned to such delinquent stockholder. This section shall not take away the right of creditors to enforce the liability of stockholders in such corporations, as provided in the preceding section, or the right of the commissioner to enforce such liability as provided in section twenty-four of chapter one hundred and sixty-seven, nor increase the general liability of such stockholders.

G. L., c. 172, § 24, creates liability on the part of such stockholders 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. This section also, by reference to G. L., c. 158, prescribes the method of enforcing this liability by the creditors. This liability is solely a creature of statute and was unknown to the common law. *Cosmopolitan Trust Co.* v. *Cohen*, 244 Mass. 128. Both the liability on the part of the stockholders and the method of enforcing this liability are created and defined by this section, which confers rights to creditors only.

G. L., c. 167, § 24, as amended, provides that after the Commissioner has taken possession of such a bank, he may (among other powers), if he deems it necessary to enforce the liability of stockholders as described in the first sentence of G. L., c. 172, § 24, file a bill in equity against all persons who were stockholders therein at the time of taking possession. His determination that this liability should be en-

forced is final. *Cunningham* v. *Commissioner of Banks*, 249 Mass. 401, 426.

Clearly, this section does not create a new liability on the part of the stockholders of trust companies but simply provides that the Commissioner, after he has properly taken possession, may also enforce this liability. In so enforcing this liability he is governed by the procedure and regulations set forth in G. L., c. 172, § 24. *Cosmopolitan Trust Co.* v. *Cohen*, 244 Mass. 128. The Commissioner of Banks in enforcing this liability is not exercising a different right from that given to creditors under G. L., c. 172, § 24, but acts for them in a representative capacity. *Commissioner of Banks* v. *Cosmopolitan Trust Co.*, 253 Mass. 205, 226. The stockholders, in my opinion, could not be subjected to liability by the creditors acting under G. L., c. 172, § 24, and by the Commissioner of Banks acting under G. L., c. 167, § 24.

Coming now to G. L., c. 172, § 25, it is there provided that if, in the opinion of the Commissioner, the capital stock of a trust company has become impaired, the Commissioner may call upon the corporation to pay the deficiency by assessment upon the stockholders; and further, that if a stockholder neglects or refuses to pay such assessment, after notice, the board of directors shall sell, at public auction, a sufficient amount of his stock to make good his assessment. It is also provided that this section shall not take away either the right of the creditors to enforce the stockholders' liability under G. L., c. 172, § 24, or the right of the Commissioner to enforce the same under G. L., c. 167, § 24. It is further provided that the general liability of the stockholders shall not be increased by this section.

Apparently this section has not been passed upon by our courts, the only reference thereto being contained in the case of *Commissioner of Banks* v. *Prudential Trust Co.*, 242 Mass. 78, 86, where the court said: —

> The present suit is not grounded on G. L., c. 172, § 25. That relates to a different matter from that here involved.

That case was a proceeding by the Commissioner of Banks under G. L., c. 167, § 24, and the court, in the opinion, stated that the action was not related to proceedings instituted under G. L., c. 172, § 25. The inference is strong that the court meant that the actions under G. L., c. 172, § 24, and G. L., c. 167, § 24, on the one hand, are separate and distinct from action under G. L., c. 172, § 25, and are cumulative rather than alternative measures. *Delano* v. *Butler*, 118 U. S. 634; *Northwestern Trust Co.* v. *Bradbury*, 117 Minn. 83, 91.

Section 25 expressly states that the rights of creditors under G. L., c. 172, § 24, and of the Commissioner under G. L., c. 167, § 24, shall not be taken away by that section. It also adds that the general liability of stockholders shall not be increased by this section.

The precise question asked by you is whether or not the Commissioner, after having caused to be collected an assessment of one hundred per cent from the stockholders, under section 25, could levy and enforce the collection of a further assessment in the event that the capital stock subsequently becomes impaired. I am of the opinion that he may take the steps outlined in section 25 as often as he deems it necessary to do so for the purpose of restoring the impaired capital stock. Does this increase the stockholders' general liability? This section does not create any personal liability upon the stockholders. A stockholder may refuse to pay the assessment, and the only remedy available is a sale of the stock of such stockholder by the board of directors for the purpose of raising the amount assessed to him. No personal action can be had against him by any one under this section, and it therefore seems to be clear that the section does not increase his "general liability," or, indeed, any liability. Further, the "general liability" which may not be increased seems to refer to such liability as is defined and imposed elsewhere than in this section, which, as we have said, creates no liability at all, or at the most a very special liability.

The section, obviously, is of a regulatory and protective

character. Its purpose is not to benefit creditors or any other particular group or class, but rather to protect the general public from the manifest dangers of dealing with a bank which is not in a proper condition to carry on the important business of banking, which vitally affects the interests of those who directly or indirectly deal with it. The Commissioner, in the exercise of his discretion, is the sole judge of the necessity of proceeding under this section, and his duty to act is just as clear and as necessary to the public welfare upon the second or third occasion of impairment of capital as upon the first. It could not have been the legislative intent to limit the exercise of this power of the Commissioner to one occasion, when, obviously, at a subsequent time the identical need for its exercise might arise.

The words of section 25 seem also to indicate that no limitation is to be put upon the number of times that the Commissioner may exercise this power. That statute says:

> Any such corporation whose capital stock has, in the opinion of the commissioner, become impaired . . . shall, . . . pay the deficiency.

These words not only suggest no limitation as to the number of times the Commissioner may exercise this power but seem to imply that the Commissioner shall act whenever and as often as the capital stock has, in his opinion, become impaired.

I therefore answer your question in the affirmative.

Taxation — Stockholders — Voting Trust — Taxable Gain.

A deposit of shares in a voting trust of limited powers does not of itself create a taxable gain under G. L., c. 62, § 5, as amended, nor is such a trust one of the bodies designated in G. L., c. 62, §§ 1 and 5.

To the Commissioner of Corporations and Taxation. 1927 June 1.

You request my opinion as to whether a taxable gain under G. L., c. 62, § 5, par. (*c*), as amended, is realized by stockholders in an association, trust or corporation when such stockholders deposit their shares with the trustees under a voting trust of the type employed in the "Share Trust Agreement" of North Boston Lighting Properties dated March 15, 1927, and in the "Stock Trust Agreement" of the Fitchburg Gas and Electric Light Company dated January 2, 1926. You further ask whether, in my opinion, such a voting trust constitutes a "partnership, association or trust, the beneficial interest in which is represented by transferable shares," within the meaning of G. L., c. 62, §§1 and 5.

G. L., c. 62, § 5, provides, in part: —

> Income of the following classes received by any inhabitant of the commonwealth during the preceding calendar year 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 said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum. Any trustee or other fiduciary may charge any taxes paid under this paragraph against principal in any accounting which he makes as such trustee. If, in any exchange of shares upon the reorganization of one or more corporations or of one or more partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, the new shares received in exchange for the shares surrendered represent the same interest in the same assets, no gain or loss shall be deemed to accrue from the transaction until a sale or further exchange of such new shares is made.

The trusts created by voting agreements such as those which you have submitted to me for examination are for a very limited purpose. Briefly stated, the machinery of the trusts consists of: —

(1) The deposit of shares with trustees, giving the trustees the power to vote the shares deposited during the term of the trust, to transfer the shares for convenience into their own name, and to sell all, but not less than all, of the shares at not less than a stated price.

(2) The issuing by the trustees or depositaries to the depositor stockholders of certificates stating the number of shares deposited; in effect a negotiable receipt (subject to the terms of the agreement) for the shares.

(3) The payment to the stockholder, either directly or through the trustees (in the event that the shares are transferred to the trustees' names on the company books), of the dividends upon the precise shares of stock deposited during the term of the trust, or until all the shares are sold according to the agreement.

(4) If all the shares are not sold before the date named in the agreement, the retransfer of the deposited shares to their original owners.

(5) In the event of a stock dividend during the term of the trust, the receipt by the depositor of the dividend stock, which must be deposited with his shares already subject to the agreement.

(6) The payment to the stockholder by the trustees or the depositaries of the amount received by them from the sale of the deposited stock, in the event of such a sale according to the terms of the voting agreement.

At the most, such an agreement creates a bare trust of specific property with named powers as to that property vesting in trustees for limited purposes. Strictly speaking, for a time the stockholder technically exchanges legal ownership of the shares for an equitable interest in the same shares. Practically speaking, he limits by contract the *jus disponendi* of his property for the common benefit of himself and the other stockholders joining in the agreement by giving to the trustees or depositaries power to act for him in certain particulars. See *Brightman* v. *Bates*, 175 Mass. 105. By the deposit he clearly gains no interest in any new

property. He receives nothing but a receipt for precisely the same shares which he had before. It cannot be said that there is any such accession of wealth to him by the transaction as will constitute a realized gain. The reasoning in *Van Heusen* v. *Commissioner of Corporations and Taxation*, 257 Mass. 488, is applicable, and no taxable gain is recognizable until the deposited shares or the voting trust certificates representing the deposited shares are themselves sold or exchanged for money or other property having a fair market value, at which time a taxable gain, if gain there be, accrues to the depositor stockholder, measured by the tax cost basis of the stock to him.

In my opinion, a voting trust is not a "partnership, association or trust, the beneficial interest in which is represented by transferable shares," within the meaning of G. L., c. 62, §§ 1 and 5. The purposes of the deposit under the voting trust are extremely limited, and the transaction, in substance, is little more than an irrevocable agency for sale, under which, until the sale, the depositor retains nearly all of the incidents of ownership. The Legislature unquestionably intended to include within the category quoted above "Massachusetts trusts" of the usual business type, partnerships and unincorporated associations issuing shares reasonably comparable to shares of corporate stock. The situation under a voting trust for the limited purpose of sale of the specific stock deposited is so different from that under any of the types of association actually engaged in active business which are included within the statutory provision, that it seems highly unlikely that the Legislature intended to place both groups within the same classification.

Teachers' Retirement Association — Teacher of Music — Term of Service in Public Schools.

A period of service in the public schools by a teacher of music for two years and three months, even though such service during such period was given on only one day a week, should be counted as two years and three months in determining whether such teacher has served in the public schools for fifteen years.

To the Commissioner of Education
1927
June 2.

You have asked my opinion as to whether or not service of one day a week in the public schools of the Commonwealth by an instructor of music for a period of two years and three months should be counted as two years and three months of service in determining whether or not this teacher "has served fifteen years or more in the public schools," so as to entitle him to receive a pension under G. L., c. 32, § 10 (5). This paragraph is as follows:

> Any member who served as a regular teacher in the public schools prior to July first, nineteen hundred and fourteen, and who has served fifteen years or more in the public schools, not less than five of which shall immediately precede retirement, on retiring as provided in paragraph (1) or (2) of this section, shall be entitled to receive a retirement allowance as follows: . . .

This man is admittedly a member of the Association; he has served as a regular teacher in the public schools prior to July 1, 1914; he will have served as a teacher in the public schools for more than five consecutive years immediately preceding July 1, 1927, the date upon which he must retire. The only remaining question is whether he will have served fifteen years or more in the public schools so that he may be eligible for the pension provided by G. L., c. 32, § 10 (5).

Of the necessary fifteen years of service he will have had to his credit on July first, next, thirteen years, four and one-half months of regular employment as a teacher, dating from February 15, 1914, to July 1, 1927. He also served as teacher of music in the town of Hamilton for a period of two years and three months beginning in September, 1898, during which time he served one day a week while school was in session. The school committee of Hamilton duly

elected him to this position and he was paid a yearly compensation. The above constitutes the entire service of this man as a teacher in the public schools of the Commonwealth.

I am of the opinion that this service should be included, so that he will have served fifteen years, seven and one-half months on July 1, 1927, and thereby be entitled to the pension set forth in paragraph (5) of section 10. That the time spent in teaching music was not full time does not alter the situation. "Public school" is defined in G. L., c. 32, § 6, as "any day school conducted under the superintendence of a duly elected school committee." I assume that the schools of Hamilton conform to this definition. Nothing is said in paragraph (5) of section 10 as to full time or part time, and as long as the teacher is regularly employed it seems that the service should be counted.

This view is strengthened by the change made by St. 1925, c. 228, which amends the definition of "teacher" contained in G. L., c. 32, § 6, by adding (among other things) that a person to be a teacher within the meaning of the act must be employed on a full time basis. The inference is strong that until this act was passed a person could be a teacher without being employed on a full time basis. Further, this act of 1925 stated that it should not be construed to affect the rights of any person then enrolled as a member of the State Teachers' Retirement Association. Similarly, it seems that the words "who has served fifteen years or more in the public schools" do not import full time service. These words, as contained in paragraph (5) of section 10, have not been amended, and in so far as the question arises as to whether they import full time service it is fair to assume that they would be construed to have the same meaning as that which was given to the word "teacher" prior to the passage of St. 1925, c. 228.

Taxation — Banks — Rate of Taxation.

The rate at which bank taxes are to be levied is to be determined in a manner consistent with U. S. Rev. Sts., § 5219.

To the Commissioner of Corporations and Taxation.
1927
June 13.

You have requested my opinion on certain questions with respect to fixing a rate to be applied in levying bank taxes under G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, reading as follows: —

> Every bank shall pay annually a tax measured by its net income, as defined in section one, at the rate assessed upon other financial corporations; provided, that such rate shall not be higher than the highest of the rates assessed under this chapter upon mercantile, manufacturing and business corporations doing business in the commonwealth. The commissioner shall determine the rate on or before July first of each year after giving a hearing thereon and shall seasonably notify the banks of his determination. Appeal by a bank from the determination of the commissioner may be taken to the board of appeal from decisions of the commissioner of corporations and taxation, in sections five and six called the board of appeal, within ten days after the giving of such notice.

Under this section the rate at which bank taxes are to be levied is the rate assessed upon other financial corporations. There is no classification of corporations as "financial corporations" in the General Laws or amendments thereto, but the wording of section 2, above quoted, is that used in U. S. Rev. Stat., § 5219, 1 (*c*). It is a matter of historical fact that section 2 of G. L., c. 63, as amended, was enacted in the light of U. S. Rev. Stat., § 5219, although enacted prior to the amendment to section 5219 contained in the subsection of that statute numbered 1 (*c*). It is necessary, therefore, for us to adopt a construction of section 2 of G. L., c. 63, which will not conflict with Rev. Stat., § 5219.

The definition of "banks," contained in G. L., c. 63, § 1, as amended, includes banks "existing by authority of the United States" as well as banks organized under the laws of this Commonwealth. It is fundamental that national banks may be taxed under State authority only in so far as Congress consents to such taxation, and only in conformity with the restrictions attached to the consent of Congress.

First National Bank of Hartford v. *Hartford,* 273 U. S. 548; *First National Bank* v. *Anderson,* 269 U. S. 341, 347. The words "at the rate assessed upon other financial corporations," therefore, must be taken to have the same meaning as those words when used in Rev. Stat., § 5219.

Subsection 1 (*c*) of Rev. Stat., § 5219, has not yet been given judicial construction. From the debates in Congress at the time this section was amended by the addition of subsection 1 (*c*) (Act of March 25, 1926, 44 Stat. at L. 223), it is clear that what was desired by the amendment was to provide an additional way by which the States might tax national banks without discriminating against them [Congressional Record, vol. 67, pt. VI, pp. 5760, 5822, 6082–6089, 69th Congress, 1st ses. (1926)], and it is apparent from these debates that no greater discrimination against national banks in the matter of taxation was to be permitted under subsection 1 (*c*) than under any other methods provided by Rev. Stat., § 5219, by which the State might tax national banks.

In construing the provisions of section 5219 enacted prior to the amendment of March 25, 1926, it has always been held that national banks may not be taxed by any method in a way which would discriminate against them and in favor of moneyed capital in the hands of institutions or persons, other than national banks, employed in substantial competition with any of the direct or incidental activities of national banks. *First National Bank of Hartford* v. *Hartford, supra; Minnesota* v. *First National Bank of St. Paul,* 273 U. S. 561; *First National Bank* v. *Anderson, supra; Merchants National Bank* v. *Richmond,* 256 U. S. 635.

The excise tax permitted by subsection 1 (*c*) of Rev. Stat. § 5219, specifically protects national banks only from discrimination by State taxation in favor of "other financial corporations." It does not, as, for instance, does subsection 1 (*b*) of section 5219, protect national banks from discrimination by taxation in favor of moneyed capital in the hands of individual citizens. What is meant by "other financial

corporations" in subsection (*c*) is therefore unquestionably corporations employing moneyed capital in substantial competition with any phase of the business of national banks, including not only State banks and private banks but also corporations engaged substantially in conducting the loan and investment features of banking in making investments by way of loan, discount, or otherwise in notes, bonds, or other securities with a view to sale or repayment and investment. See *First National Bank* v. *Anderson*, *supra*, 348.

It was decided in *Mercantile Bank* v. *New York*, 121 U. S. 138, 161, that savings banks were not engaged in substantial competition with national banks. The decision is broad enough to include insurance companies, co-operative banks and credit unions in the same classification. Although it is an open question whether this decision would now be followed, because of the growth of the activities of national banks, it must be deemed to be law until expressly overruled, and it is the duty of the Commissioner to fix the rate, under G. L., c. 63, § 2, as amended, according to the method hereinafter indicated, excluding from consideration as "other financial corporations" co-operative banks, savings banks and insurance companies.

Rev. Stat., § 5219, requires that the burden upon national banks of any tax assessed must not be greater than the burden upon "other financial corporations" of a similar tax imposed upon them nor greater than the burden of the highest similar tax imposed upon mercantile, manufacturing and business corporations doing business within the Commonwealth. First should be determined the total net income (in the case of corporations doing business outside the Commonwealth that allocable to Massachusetts) of corporations coming within the definition of "other financial corporations." Then should be found the amount of tax, not including interest or penalties, actually paid under chapter 63 by such "other financial corporations," exclusive of any compensation or adjustment for credits or deductions.

In my opinion, the rate of tax under section 2 of G. L., c. 63, is the percentage which the net tax thus determined is of the total net income, as above determined.

The burden of the tax on the corporation is the amount which the corporation actually has to pay out on account of the tax assessed under the chapter, and the rate is the relation of that amount to the basis or measure of the tax, the total net income. A penalty for late payment, or interest because of late payment, is not part of the tax burden but is imposed for some other reason, and should not be taken into account in determining what the rate of tax burden is, despite the provisions of G. L., c. 63, § 49. For the same reason, deductions made in determining the basis of the tax should not be added to the amount of the net tax in determining the rate, for they decrease the burden of the tax (in computing which they are allowed), and it is by that burden that the rate, within the meaning of Rev. Stat., § 5219, is to be measured.

It is also provided both by Rev. Stat., § 5219, and by G. L., c. 63, § 2, as amended, that the rate assessed on banks, namely, that assessed on other financial corporations, shall not be higher than the highest of the rates assessed under chapter 63 upon mercantile, manufacturing and business corporations. The only clear classification drawn by the Legislature among mercantile, manufacturing and business corporations as to the rate of tax under chapter 63 is between domestic and foreign corporations. I do not agree with the proposition that, because of the deduction from net income under section 38A of machinery used in manufacturing, there is a separate classification of manufacturing corporations, or that there is a separate classification because of the provisions of section 32A. These provisions of the statute merely provide for a compensating variation from the general situation under the chapter, which is too slight to indicate any legislative intent to classify certain types of corporations separately. Therefore, grouping together all domestic corporations coming within the group of "business

corporations" as classified by chapter 63, and grouping together all foreign business corporations, the rate for each group should be determined as in the case of "other financial corporations," according to the method outlined above, the total net tax actually paid being taken without any addition to its total amount because of deductions in the basis of the tax, of dividend credits against the tax, or of penalties or interest. If the higher of these two rates thus determined is lower than the rate determined for "other financial corporations" by the method indicated above, that higher business corporation rate should be taken as the rate for the assessment of the bank tax under section 2 of G. L., c. 63; otherwise the rate already determined for "other financial corporations" will prevail.

In your request for an opinion you ask what figures for what years shall be taken in fixing the rates according to the method outlined above. You have informed me that it is impractical to take the tax figures for the year in which the tax is assessed, because of their incompleteness. In my opinion, the figures taken in determining the rate should be the most recent available statistics which are substantially complete, making adjustment wherever possible in these figures for any changes which may have become apparent from more recent data not entirely complete. In most cases, however, I believe that any such adjustment will be impractical, and the general rule to follow would be to take the figures for the most recent year in which the returns are complete.

Constitutional Law — Governor — Pardons — Insane Person.

The power to pardon does not in itself contain authority to release one committed as insane.

To the Governor. 1927 June 21.

You have asked my opinion as to whether Your Excellency may grant a pardon to a man confined in an insane institution. With your request for an opinion you transmit the petition, reports and letters in the specific case of a person who was convicted of murder in the second degree and sentenced to the State Prison in 1911, but was transferred to the Bridgewater State Hospital in 1915 as an insane person, and is still confined there as such.

I assume that your request intended to include the specific case, and my opinion is rendered accordingly.

Mass. Const., pt. 2nd, c. II, § I, art. VIII, provides: —

> The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council: but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.

This is the only warrant in the Constitution enabling the Executive to mitigate or remit sentences imposed by the courts as penalty for crime.

The words of the Constitution contain a grant of authority which is clear in its terms, and which has long been recognized by the courts as an executive prerogative. *Kennedy's Case,* 135 Mass. 48; *Opinion of the Justices,* 210 Mass. 609; *Juggins* v. *Executive Council,* 257 Mass. 386.

It follows, therefore, that, unless in the specific case the original status of the petitioner has been changed by his commitment to the Bridgewater State Hospital and his continued confinement there, Your Excellency may pardon him.

This is not a case in which a defendant has been com-

mitted to an insane hospital because of an acquittal by the jury by reason of insanity, after trial on an indictment for murder or manslaughter. In such instances, whether a defendant be sane or insane, the test of the extent of the power of the Executive, with the advice and consent of the Council, hinges upon the question whether, after investigation by the Department of Mental Diseases, his discharge will cause danger to others. G. L., c. 123, § 101; *Gleason* v. *Inhabitants of West Boylston*, 136 Mass. 489.

The present case presents the duofold aspect of a person under sentence of life imprisonment and, in addition, legally insane.

G. L., c. 123, § 102, provides: —

> The department shall designate two persons, experts in insanity, to examine prisoners in the state prison, the Massachusetts reformatory, the prison camp and hospital or the reformatory for women, alleged to be insane. If any such prisoner appears to be insane, the warden or superintendent shall notify one or both of said experts, who shall, with the physician of such penal institution, examine the prisoner and report the result of their investigation to the superior court of the county where such penal institution is situated or to the appropriate district court mentioned in the following section.

G. L., c. 123, § 103, provides: —

> The superior court upon a report under the preceding section, if it considers the prisoner to be insane and his removal expedient, shall issue a warrant, directed to the warden or superintendent, authorizing him to cause the prisoner, if a male, to be removed to the Bridgewater state hospital, and, if a female, to be removed to one of the state hospitals for the insane, there to be kept until, in the judgment of the superintendent and the trustees of the institution to which the prisoner has been committed, *he should be returned to prison.*

Were the sentence for a term of years, the period of confinement in the State hospital would be credited to the defendant, and if he recovered before his sentence expired he would be returned to the prison from which he was removed, in order that he might serve out the remainder of his sentence. *Le Donne, petitioner*, 173 Mass. 550.

In order to justify a defendant's return to prison and the credit to him of the period of time during which he was receiving treatment in a hospital, it is reasonable to conclude that the original sentence has always been in effect.

Consequently, the Governor, with the advice and consent of the Council, could pardon the defendant. Such a pardon would remove from him the onus of the sentence of life imprisonment imposed after his conviction for murder in the second degree, but would not serve to release him from the Bridgewater State Hospital.

A compliance with G. L., c. 123, §§ 88–94, would accomplish this latter result. These sections in no way relate to the power of the Executive.

Treasurer and Receiver General — Deposit — Insurance — Trust Fund.

A deposit made, under provisions of law, with the Treasurer and Receiver General as an emergency fund by an assessment insurance company constitutes a trust for the benefit of the policyholders of such company, as existing at the time of the deposit, and may not be applied, upon the transformation of the company into an ordinary life insurance company, for the benefit of new policyholders of the company as reorganized.

To the Treasurer and Receiver General. 1927 June 21.

You have asked my opinion as to whether certain securities held by your Department in trust may be withdrawn.

I am advised that the securities in question, amounting to $50,000, or others for which they have been exchanged from time to time, were set apart as an emergency fund by the Boston Mutual Life Association, an assessment insurance company, under the provisions of St. 1890, c. 421, § 14, that under the provisions of St. 1899, c. 229, permitting life associations to transact business as life companies, the Mutual Life Association became the Boston Mutual Life Insurance Company; and that some of the policyholders of the old association did not exchange their old policies for new ones of the life company, and have been for the most part carried by the life company on the plan of renewable

term insurance, under St. 1899, c. 299, § 4, with increasing yearly cost to the insured.

The fund as originally established, under the name of an emergency fund, constituted a trust for the payment of death and disability claims for the benefit of the policyholders of the assessment company, some of whom, I am informed, are still living, and are carried as a separate group by the new life company into which the assessment company was changed. The fund is still charged with the purposes of the trust so established, one of which is the application of a designated excess of the minimum amount required to be held in the trust fund to the reduction of assessments upon the old policyholders. Sums to be so applied to the foregoing or other purposes of the trust, all of which are similar in character, may be drawn by a requisition upon the Treasurer and Receiver General signed by two-thirds of the directors and indorsed by the Commissioner of Insurance, setting forth that such sums are to be used for the purposes of the trust.

St. 1899, c. 229, provided for the transaction of the business of the old assessment life company to be carried on as a general life insurance business under the statute applicable to life insurance companies. The act specifically authorized the company, under the new scheme, "to carry out in good faith its contracts heretofore made with its members," and repealed the provisions of St. 1890, c. 421.

The fund created by the old Boston Mutual Life Association for the benefit of its members paying upon the assessment system is still charged with the trust established in connection therewith under the terms of St. 1890, c. 421, § 14, and the directors of the new company may deal with it only in the manner and for the purposes which the directors of the old association might have dealt with it. Its surplus above the necessary minimum, which is required to be kept while any of the old members are still carried on the renewable term basis, may be drawn from the treasury of the Commonwealth and applied to the purposes mentioned in

St. 1890, c. 421, § 14, but to no others. If, as was stated in a communication to you by the insurance company, which you have submitted to me, "the policies of the association now in force are continued on the plan of renewable term insurance with increasing yearly cost to the insured," some portion of the surplus might well be drawn and applied to lessening such yearly cost.

The specific fund held by you, as to which you inquire, may not at the present time be withdrawn except in the manner and form and to the extent described in St. 1890, c. 421, § 14, which, though now repealed, established the trust, its terms and uses.

Referendum — Appointment of Assistant Registers of Probate for Middlesex County.

A law is either excluded from, or is subject to, the referendum in its entirety.

A law which in any way deals with the powers of courts is not subject to the referendum.

A law is not excluded from the operation of the referendum for the reason that its operation is restricted to a particular town, city or other political subdivision, unless the operation of the entire act is so restricted.

A law conferring upon the judges of probate for Middlesex County the power to appoint a third and a fourth assistant register for said county relates to the powers of courts, and is not subject to the referendum.

To the Comptroller. 1927 June 30.

You have asked my opinion as to whether St. 1927, c. 198, may be the subject of a referendum petition, in order that you may determine the time at which the salary of the fourth assistant register of probate for the County of Middlesex, appointed under the statute, commences.

St. 1927, c. 198, reads as follows: —

An Act to Provide an Additional Assistant Register of Probate for the County of Middlesex.

Section 1. Section twenty-five of chapter two hundred and seventeen of the General Laws, as amended by section three of chapter one hundred and sixty-four of the acts of nineteen hundred and twenty-three, is hereby further amended by inserting after the word "third" in the second line the words: — and a fourth, — and by striking out, in the fourth

line, the word "He" and inserting in place thereof the word: — They, — so as to read as follows: — *Section 25.* The judges of probate for Middlesex county may appoint a third and a fourth assistant register for said county, who shall hold office for three years unless sooner removed by the judges. They shall be subject to the laws relative to assistant registers.

SECTION 2. Section thirty-five of said chapter two hundred and seventeen, as amended by section two of chapter three hundred and eighty of the acts of nineteen hundred and twenty-six, is hereby further amended by striking out the last paragraph and inserting in place thereof the following new paragraph: — Second, third and fourth assistant registers, sixty, fifty-five and fifty per cent, respectively, of the salaries paid their respective registers, — so as to read as follows: — *Section 35.* The salaries of registers and all assistant registers shall be paid by the commonwealth, and, except in Suffolk county, shall be as follows:

Registers, seventy-five per cent of the salaries paid the judges of their respective counties.

Assistant registers, sixty-six and two thirds per cent of the salaries paid their respective registers, except that in a county in which there is more than one judge of probate the salaries of assistant registers shall be seventy-five per cent of the salary of the register.

Second, third and fourth assistant registers, sixty, fifty-five and fifty per cent., respectively, of the salaries paid their respective registers.

Section 2 of this act makes no change in the law existing at the passage of the act except in so far as it provides for the salaries of fourth assistant registers.

The act was approved April 1, 1927. After the expiration of thirty days from that date the judges of probate for Middlesex County appointed a fourth assistant register of probate for that county, who has since performed the duties of his office.

The question presented is whether or not the fourth assistant register so appointed is legally competent to act as an assistant register prior to the expiration of the ninety-day period which must elapse before a law subject to the referendum becomes effective. If the act is subject to the referendum it does not become effective until after the expiration of ninety days from its passage. If, on the other hand, it is not subject to the referendum it becomes effective after the expiration of thirty days from its passage. If subject to the referendum it does not become effective prior

to July 1, 1927, and therefore the appointment may not legally be made until that date. Under the provisions of G. L., c. 215, § 61, which state that "no court shall be held by adjournment or otherwise unless the register, assistant register or a temporary register is present," it would seem that any session of the Probate Court held for Middlesex County prior to July 1, 1927, at which no register or assistant register except the fourth assistant register appointed by the judges under this act was present would not have been a proper session of the court, and that its decrees and orders rendered during such session would be void and of no effect if St. 1927, c. 198, is subject to the referendum. It is necessary, therefore, to determine whether the act is subject to, or excluded from, the referendum.

Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, is as follows: —

> Section 2. *Excluded Matters.* — 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.

The only pertinent clauses of the amendment which might exclude the act from the referendum are, — "no law that relates . . . to the powers, creation or abolition of courts" and "no law . . . the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth."

It may be well to consider first the question as to whether a part of a law may be subject to the referendum and another part not so subject. The word "law" as used in the amendment connotes an act of the Legislature, approved by the Governor, regarded as an entity. The word has no application to a single part or section of such an act

taken by itself. That the word is to be so construed is made clear by an examination of the proceedings of the Constitutional Convention, by which the initiative and referendum provisions were framed. It follows that a particular section of an act may not of itself be the subject of a referendum.

As to the first section of St. 1927, c. 198, it seems that such portion thereof as authorizes the judges to appoint a fourth assistant register clearly deals with "the powers . . . of courts," and such portion, if it stood alone, would be excluded from the referendum. That part of section 1 which prescribes the tenure and powers of the fourth assistant register does not, in my opinion, deal with powers of courts and therefore, if it stood alone, would not be excluded on that ground. I do not think that matters relating to the tenure, powers and compensation of registers of probate may properly be included in the phrase "powers . . . of courts," within the meaning of these words as used in the amendment.

The whole of section 1, if it stood alone, would be excluded from the operation of the referendum for the reason that its operation is restricted to a particular political division of the Commonwealth, namely, Middlesex County.

Section 2, in my opinion, if it stood alone, would be subject to the referendum. It re-enacts the earlier provisions of law as to salaries of registers, assistant registers, and second and third assistant registers and adds only the salary of fourth assistant registers. Its effect is not confined to the fourth assistant register of Middlesex County but is of general application to all fourth assistant registers in the entire Commonwealth with the exception of Suffolk County, for which county there is special legislation on this matter. It is true that there are at present no other fourth assistant registers in the Commonwealth, except in Suffolk, and that therefore the act affects no one at this time but the fourth assistant register provided for therein. On the other hand, the section fixing his salary is general in its

terms, and would apply to such other fourth assistant registers as may in the future be appointed in any county in the Commonwealth, except Suffolk. It is impossible, therefore, to construe section 2 as being "restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth."

We have, therefore, section 1, a part of which, if standing alone, would be excluded from the referendum on one ground and all of which, if standing alone, would be excluded on another ground. We have also section 2, which, if standing alone, clearly would be subject to the referendum. In view of the fact that a law in its entirety is either excluded from, or subject to, the referendum, it becomes necessary to determine whether the excluded portion will exclude the entire act from the referendum or whether the included portion will render the whole act subject to the referendum.

No authoritative decision on this question has been called to my attention, and the amendment must be interpreted on broad and general principles. It states that no law that "relates to powers . . . of courts" shall be the subject of a referendum petition. It is not expressly stated whether the law must "relate" entirely to powers of courts or merely in part. In my opinion, if the law deals with powers of courts then it is such a law as is excluded from the referendum. One purpose of the insertion of "SECTION 2. *Excluded Matters*" in the amendment was to preserve laws with reference to the powers of courts immune from the referendum, and the act in question is clearly concerned with the power of the court to appoint a fourth assistant register. The title of the act, as stated above, tends to indicate that this was the intent of the Legislature.

It cannot well be said that the second possible ground of exemption would of itself exclude the act from the referendum. The amendment states that "no law . . . the operation of which is restricted to a particular town, city or other political division . . . shall be the subject of a referendum

petition." The words "the operation of which is restricted to" seem to imply that the entire scope of the law must be so restricted. "Restricted" differs from the word "relates" in this respect, in that the word "relates" does not necessarily compel an inference that every part of the act must be concerned with the powers of courts, whereas the words "the operation of which is restricted to" imply that the entire act must be so limited.

My opinion, therefore, is that the act is not subject to the referendum, for the reason that it relates to an excluded matter, namely, the powers of courts.

MOTOR VEHICLES — REGISTRATION — PARTNERSHIP.

Upon dissolution of a partnership by the death of one of the partners and the purchase of all outstanding interests by the surviving partner, the latter may not operate a motor vehicle which was the property of the partnership unless he re-registers it in his own name.

To the Commissioner of Public Works. 1927 July 13.

You ask my opinion as to whether one Antonio O. Pajer may continue to operate certain motor busses without re-registering them.

I understand the facts to be that for some indefinite period prior to 1927 Pajer and one Harvey H. Collins were co-partners doing business under the firm name and style of Springfield-New London Coach Company, with places of business in New London, Connecticut, and Springfield, Massachusetts. January 1, 1927, these two men registered three motor busses with the Registrar of Motor Vehicles under the name "Springfield-New London Coach Company by Antonio O. Pajer." Since that date Collins has died and Pajer has bought Collins' interest in the firm from Collins' estate and is continuing the business under the firm name as sole owner.

At the time of the original registration of the vehicles by the partnership it was not improper for the application for registration to be made under the partnership name, signed by one only of the partners, the fact that the owners were a

co-partnership being made plain in accordance with the customary form of application used by the Registry of Motor Vehicles. See VIII Op. Atty. Gen. 118. The partnership no longer exists. Death of a partner dissolves the existence of a co-partnership except under unusual terms in the partnership agreement, which I assume did not exist in the instant case and which would be rendered immaterial, as you advise me that the surviving partner has purchased all rights in the partnership which may have existed in the deceased's representatives. *Marlett* v. *Jackman,* 3 Allen, 287. The fact that the present owner was the member of the former partnership who signed the application for registration by such co-partnership gives no information to the public that he is now the sole owner of the vehicles. Indeed, the application and registration as they now stand furnish an entirely erroneous statement as to the present ownership. One purpose of the statute, G. L., c. 90, was to give persons injured by a motor vehicle redress by enabling them to ascertain easily the name of the owner of such a vehicle. *Fairbanks* v. *Kemp,* 226 Mass. 75; *Bacon* v. *Boston Elevated Ry. Co.,* 256 Mass. 30.

G. L., c. 90, § 2, as amended, in its fourth paragraph provides, in part: —

> Upon the transfer of ownership of any motor vehicle or trailer its registration shall expire, and the person in whose name such motor vehicle or trailer is registered shall forthwith return the certificate of registration to the registrar with a written notice containing the date of the transfer of ownership and the name, place of residence and address of the new owner.

The proviso added to the fourth paragraph of section 2 by St. 1924, c. 427, continuing the registration for a period after the death of an owner, even if it were applicable with relation to the death of a member of a co-partnership, is immaterial in the instant case, for the surviving partner, by purchase of all outstanding interests of the deceased partner, is now the sole owner, and there has been such

transfer of ownership of the vehicles as has caused the registration to expire, and the present owner, Mr. Pajer, may not operate until he has received a new registration.

PARENT AND CHILD — ADOPTION — DUTY TO SUPPORT NATURAL PARENT.

Adoption of a minor abrogates the latter's duty to pay for the support of its natural father under G. L., c. 273, § 20.

To the Commissioner of Mental Diseases.
1927
July 14.

You request my opinion as to whether a daughter is legally liable for the support of her father, duly committed to a State institution and confined there as an insane person, such daughter having been legally adopted by a maternal uncle when she was a young child. In my opinion, a daughter thus adopted as a child is in no way responsible for the support of her actual parent.

G. L., c. 210, § 6, provides: —

> If the court is satisfied of the identity and relations of the persons, and that the petitioner is of sufficient ability to bring up the child and provide suitable support and education for it, and that the child should be adopted, it shall make a decree, by which, except as regards succession to property, all rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between the child and the petitioner and his kindred, and such rights, duties and legal consequences shall, except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred or any previous adopting parent; but such decree shall not place the adopting parent or adopted child in any relation to any person, except each other, different from that before existing as regards marriage, or as regards rape, incest or other sexual crime committed by either or both. The court may also decree such change of name as the petitioner may request. If the person so adopted is of full age, he shall not be freed by such decree from the obligations imposed by section six of chapter one hundred and seventeen and section twenty of chapter two hundred and seventy-three.

This section has always been construed as putting an adopted child, for all legal purposes, with certain specified exceptions mentioned in the section, in the place of an actual

child with respect to the adoptive parent, and as terminating between the child so adopted and his natural parents and kindred all legal consequences, except those specially mentioned. See *Boutlier* v. *Malden*, 226 Mass. 479, 484, and cases therein cited.

The only exception under section 6 which could in any way be construed to impose upon a child thus adopted the obligation to support its natural parent is contained in the last sentence of section 6. This exception, however, applies only "if the person so adopted is of full age," and only in that event is the adopted child not freed by the decree of court allowing the adoption from the obligations of G. L., c. 273, § 20. In the case you state the child adopted was not of full age at the time of the adoption, and therefore, the case not coming within the strict terms of the exception, the child is in no way liable for the support of her natural parents.

It is, of course, clear that the liability imposed by G. L., c. 123, § 96, upon certain relatives of inmates of State institutions, including children of such inmates, is not one of the consequences of the relation of child and parent within any of the exceptions contained in G. L., c. 210, § 6, and hence that liability is abrogated by the decree of adoption.

State Examiners of Plumbers — Revocation of Licenses.

The State Examiners of Plumbers may not revoke or suspend plumbing licenses except as provided in G. L., c. 142, §§ 6 and 7.

G. L., c. 142, § 4, which authorizes the State Examiners of Plumbers to make such rules and regulations as they deem necessary for the proper performance of their duties, does not confer upon them the power to revoke or suspend such licenses.

To the Director of Registration. 1927 July 18.

You have asked my opinion as to whether or not the State Examiners of Plumbers may properly adopt the following rules: —

1. Any master plumber who the Board finds has loaned, transferred or assigned his license to any other party with the intent that that party

to whom such license was loaned could function as a master plumber or work as a journeyman plumber under that license, may have said license suspended for a period of thirty days for the first offense, for a period of three months for a second offense, and in the event of a third offense said license may be revoked permanently.

2. In case the holder of a license or certificate violates any statute, ordinance, by-law, rule or regulation, relative to plumbing, on the request of the inspector of buildings or board of health of the town where such violation is committed, the Board of Examiners of Plumbers may revoke the license of the plumber, in accordance with G. L., c. 142, § 7.

I am of the opinion that the Examiners have not the power to adopt the first of the above rules. The power to suspend or revoke licenses of this character must be expressly or impliedly given to the particular board by statute. *Lowell* v. *Archambault*, 189 Mass. 70. Except for sections 6 and 7 there is nothing in the plumbing statute, G. L., c. 142, which can be construed as giving this power to the Examiners, unless it be found in section 4, which provides as follows: —

The examiners may make such rules as they deem necessary for the proper performance of their duties, which shall take effect when approved by the department of public health.

The balance of this section deals with the duties of the Examiners with reference to the giving of examinations and the issuing of licenses.

I am of the opinion that the power to make rules and regulations given by this section does not include the power to make rules and regulations concerning the revocation or suspension of licenses after they are issued. This view is strengthened by the fact that section 6 of said chapter 142 provides expressly that the Examiners, after notice and hearing, may revoke the license of a licensee violating any regulation relative to plumbing who has previously been convicted of a like offense. This section restricts the right to revoke to violation of "regulations relative to plumbing," which words, in my opinion, connote regulations which have to do with the actual physical work of plumbing and have no relation to the general conduct of plumbers. It is to be noted

that the Board may not revoke a license under this section unless it also appears that the licensee has been previously convicted of a like offense.

Section 7 of said chapter 142 provides as follows: —

> If in the opinion of such inspector of buildings, if any, otherwise of the board of health, of a town, the holder of a license or certificate violates any statute, ordinance, by-law, rule or regulation relative to plumbing, the said inspector or board of health of the town where such violation is committed may request the examiners to forbid such holder, for not more than thirty days, to engage in business in such town as a master plumber or to work as a journeyman. After notice and hearing both parties, the examiners may so forbid such holder and shall give notice of their decision to each of the parties interested.

It may be seen, therefore, that the Legislature has expressly provided for revocation under section 6 in certain cases and for a limited suspension under section 7. The right to revoke or suspend under these sections is closely limited and confined to certain enumerated circumstances. It is also to be noted that in many instances the Legislature has specifically given a general power to revoke to boards and departments similar in character to the State Examiners of Plumbers. A notable example of this may be found in G. L., c. 141, § 4, which section gives to the State Examiners of Electricians the right to revoke certificates for any sufficient cause. The absence of such a general power of revocation in chapter 142 and the fact that the chapter specifically provides in sections 6 and 7 for revocation or temporary suspension in certain limited cases, indicate that it was not the intent of the Legislature to confer the right to adopt such a rule as rule number 1 above. I am therefore of the opinion that the State Examiners of Plumbers under existing law have no power to issue rule number 1.

What has been said concerning the first rule covers the second rule submitted in your request. The Examiners must limit their action under section 7 to the words of the section, and may not adopt a rule except in so far as conforms strictly to said section.

Reformatory for Women — Sentence.

A female convicted of a crime punishable by imprisonment in the State Prison may be held in the Reformatory for Women for a period of five years, irrespective of the existence of a lesser alternative sentence.

To the Board of Parole. 1927 July 18.

You have asked my opinion as to whether a certain woman committed to the Reformatory for Women can be legally held for a five-year indefinite sentence, or if she may be held for two years only.

You have submitted to me a letter written to your Board, which you state "very plainly sets the case out," and which I assume correctly states all facts necessary to a proper consideration of the subject matter. These facts are as follows: —

According to the records of the Roxbury Court a woman was committed to the Reformatory for Women on the 9th day of July, 1926. The record does not indicate any term of service and apparently was imposed under the provisions of G. L., c. 272, § 16. The Roxbury Court entertains jurisdiction in accordance with the provisions of G. L., c. 218, § 26, and, having entertained jurisdiction, its power to impose penalties were circumscribed by the provisions of G. L., c. 218, § 27, to the effect that "they (Roxbury Court) may not impose a sentence to a jail or house of correction for a longer term than two years or to the State Prison for any term."

G. L., c. 279, reads, in part, as follows: —

Section 16. A female, convicted of a crime punishable by imprisonment in a jail or house of correction, may be sentenced to the reformatory for women.

Section 17. The court or trial justice, imposing a sentence to the reformatory for women, shall not prescribe the limit of the sentence unless it is for more than five years.

Section 18. A female sentenced to the reformatory for women for larceny or any felony may be held therein for not more than five years, unless she is sentenced for a longer term, in which case she may be held therein for such longer term; if sentenced to said reformatory for any other offence, she may be held therein for not more than two years.

Section 19. The sentence to imprisonment of a female convicted of a felony shall be executed in the reformatory for women; or the court imposing sentence in such a case may impose the sentence in a jail or

house of correction provided by law in the case of male prisoners if it does not exceed two and one half years.

It is plain from the provisions of section 18 that a female sentenced to the Reformatory for Women for a felony may be held for not more than five years, but if she be so sentenced for a misdemeanor other than larceny, she may not be held for more than two years. Accordingly, it becomes necessary to determine whether the sentence in the instant case was for a misdemeanor or a felony.

A felony is defined by G. L., c. 274, § 1, to be "a crime punishable by death or imprisonment in the state prison."

According to the statement of facts presented to me, this woman was convicted of an offense under G. L., c. 272, § 16, the punishment for which may be by imprisonment in the State Prison. Her offense, then, comes within the class of crimes declared to be felonies by G. L., c. 274, § 1. The fact that the statutes provide that a lesser penalty may be imposed for the offense does not remove it from the class of crimes defined by the Legislature as felonies, because the punishment for the offense may be imprisonment in the State Prison. The fact that jurisdiction of the case was exercised by a district or municipal court judge, who has no authority to commit to State Prison but must fix one of the lesser forms of punishment which are prescribed as an alternative to imprisonment in the State Prison, does not affect the nature of the crime, which falls within the statutory definition of a felony. The judges of the district courts are given by the statute concurrent jurisdiction with the Superior Court over many felonies, with the provision that if they elect to assume such jurisdiction they may not impose the sentence of imprisonment in the State Prison. G. L., c. 218, § 26. Their election to exercise such jurisdiction, rather than merely to hold the defendant for the Grand Jury, does not affect the nature of the defendant's crime and make an offense which is defined by statute as a felony a misdemeanor.

The opinion in *Platt* v. *Commonwealth*, 256 Mass. 539, is

to the effect that a sentence to the Reformatory for Women for a misdemeanor may be for the period of two years, under G. L., c. 279, § 18, even though such period is longer than the punitive term provided for the offense by the statute, and it would seem to be entirely consistent with the proposition that a sentence to the Reformatory for Women for a felony may be for a longer period than that which a district court or other judge may impose as a punitive term.

It follows from the foregoing that this defendant, who has been convicted of a crime which was punishable by imprisonment in the State Prison, although such sentence was not actually imposed, is nevertheless "a female sentenced to the reformatory for women for a felony," and "may be held therein for a period of not more than five years."

Department of Public Health — Tests for Water Supply — Trespass — Damage

Members of the Department of Public Health and its agents may enter upon private land for the purpose of driving wells and making reasonable tests contemplated by the Resolves of 1927, c. 30, without rendering themselves liable for any action of trespass.

If actual damage results, proceedings may lie against the Commonwealth, under G. L., c. 79, § 10.

To the Commissioner of Public Health. 1927 July 19.

You have called my attention to Resolves of 1927, chapter 30, under which your Department is authorized and directed to investigate and determine the best method of supplying with water the municipalities in the valley of the Merrimack River, and especially to make such investigations as your Department may deem necessary, including pumping tests, to determine the practicability of securing an additional water supply in a certain area, described in the resolve, in the town of Chelmsford. You desire my opinion upon the following question: —

Is the Department authorized to enter upon any private land for the purposes of driving wells and making the tests contemplated by the resolve, the doing of which may include some damage to shrubs, trees and

grass, so that the members of the Department and its agents shall not render themselves liable for any action for trespass to any individual landowner upon whose land they may enter?

Such action as you contemplate is clearly authorized by the said resolve, which reads, in part, as follows: —

> Said department (of public health) shall also make such investigations as it may deem necessary, including pumping tests, to determine the practicability of securing an additional water supply for the city of Lowell and the North Chelmsford fire district . . . from the ground in the neighborhood of said (Merrimack) river on the north side adjacent to the present well fields of said city or from the ground in the area within that portion of the town of Chelmsford which lies between the Boston and Maine railroad and the southerly bank of said river northwest of the point where Stony brook joins said river and within approximately one mile of said junction.

It is true that acts which would constitute trespass unless duly authorized by the Legislature will necessarily be committed by your acting under this resolve, according to the common and the statutory law (particularly G. L., c. 266, § 113). It is also true that the resolve does not expressly provide that the members of the Department and its agents shall not be liable for trespass, as has been provided in other somewhat similar statutes of this Commonwealth. G. L., c. 48, § 27 (forest wardens); G. L., c. 33, § 136 (militia).

It is my opinion, however, that such acts on your part are justified by the authority given to the Department by the resolve and that this justification is a good defense to any action, civil or criminal, which may be brought against the members of the Department and its agents, while acting thereunder, on account of trespass. A statute such as this resolve clearly grants powers incidental to the carrying out of its provisions.

In the case of *Winslow* v. *Gifford*, 6 Cush. 327, it was held that there was no trespass where certain commissioners, under authority of a statute, entered upon the lands of the plaintiff and made certain surveys with the view of ascertaining the boundaries of a tract of land devoted to public

purposes, no compensation being provided for such apparent trespass. That case has been approved several times in Massachusetts and has been cited at length and with approval by the United States Supreme Court in *Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U. S. 160, 167.

Other cases show it to be well settled in this Commonwealth that general rights in property have certain limitations, in that entry upon private property may be made under various circumstances by individuals and by public officers for the protection of the public welfare. When a general survey or exploration is made there is not necessarily an exercise of the right of eminent domain, nor permanent appropriation of property to the exclusive use of another. The entry may be made for a purpose determined by the General Court to be for the public welfare, and is subject only to the limitations as expressed in the case of *Winslow* v. *Gifford, supra,* that it "is reasonably necessary and that it is but a temporary one and accompanied with no unnecessary damage."

My answer to your question, therefore, is in the affirmative as long as the acts which would otherwise constitute trespass are a reasonable carrying out of the purpose of the resolve. I am advised, moreover, that your Department has secured releases, under seal, from the landowner upon whose property most of the tests or acts set forth in the resolve are to be made by you. This fact would seem to render the question upon which you seek my opinion an academic one as to the land of such owner.

It should be added, however, that the acts of the Department contemplated by the resolve are likely to go further than such as would be, if unauthorized, mere trespass, and that there may be actual and substantial damage to the lands entered upon by reason of the making of borings and wells. In my opinion, the Commonwealth, but not the members of the Department, would be liable for such damages, under G. L., c. 79, § 10. The resolve is a proper exercise of the sovereign power of the State to provide for and

regulate the water supply of its inhabitants, but private property may not be actually damaged without compensation. While the members of the Department and its agents will not render themselves liable to any individual landowner upon whose land they perform the acts required by the resolve, proceedings by the owner may lie against the Commonwealth by virtue of G. L., c. 79, § 10, for any actual damage that may result.

High Schools — Towns — Payment for Board of Pupils in Lieu of Transportation.

Towns which do not maintain high schools may be required to make payments toward the board of their school children attending high schools in other towns, irrespective of the financial ability of the children or their parents.

To the Commissioner of Education. 1927 July 21.

You have asked my opinion upon the two following questions relative to the application of G. L., c. 71, §§ 6 and 7, as amended. Your questions are as follows: —

1. A boy living in the town of Dana, Massachusetts, which does not maintain a high school, attends the New Salem Academy, a public high school in the adjoining town of New Salem. As he lives more than three miles from this school and there is no public conveyance between his home and the school, it is convenient for him to board at the academy. He pays his board by working at the school.

May the town of Dana, under these circumstances, pay to the parent or guardian of the boy money for board in lieu of transportation, under G. L., c. 71, § 6 and § 7 as amended by St. 1923, c. 363, and be legally reimbursed by the State for the money expended for said board?

2. If a pupil from Dana attends New Salem Academy under conditions similar to those already described, and pays his board at the academy in whole or in part by work done in a grocery store in New Salem, may the town of Dana, under these conditions, pay to the parent or guardian of the boy money for board in lieu of transportation and be legally reimbursed by the State for the money expended for said board?

G. L., c. 71, § 6, as amended by St. 1921, c. 296, § 1, reads as follows: —

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.

G. L., c. 71, § 7, as now amended by said St. 1921, c. 296, § 2, and St. 1923, c. 363, reads as follows: —

If the expenditure per thousand dollars valuation from the proceeds of local taxation for the support of public schools, made by any town of less than five hundred families or householders for the three town fiscal years preceding any school year, averaged more than four and not more than five dollars, the commonwealth shall reimburse the town for one half the amount paid by it during said school year for transportation or board in accordance with the preceding section. If said average was more than five and not more than six dollars, the reimbursement shall be for three fourths of said amount, or if said average was more than six dollars, the reimbursement shall be for the entire sum. Such reimbursement shall not be based on the excess of any amount above forty cents for each day of actual attendance of any pupil. If, however, in order to reach the high school, a pupil must travel three or more miles in some manner other than by steam or electric railroad, or other public conveyance, then the town shall be reimbursed three fourths of the excess, if any, that it expends for such pupil's transportation or board, or both, above forty cents, but not above eighty cents, for each day of actual attendance. Said excess reimbursement shall be paid only to towns in which said average expendi-

ture per thousand dollars valuation was more than five dollars. All expenditures for which reimbursement is claimed shall be subject to approval by the department.

It has always been the policy of the Commonwealth to maintain a system of free education available to the children within its jurisdiction, and this general policy, as is obvious from G. L., c. 71, as amended, now includes free high school education.

When a town which, under provisions of law, might ordinarily be required to maintain a high school does not so maintain one, it is called upon to pay the tuition of such of its children as are certified and approved by the proper authorities as fit subjects for high school education at a high school in another town approved by your Department. Moreover, when it is deemed expedient by your Department that such children, or any of them, should board in the town where they are in fact attending high school, the town of residence is to pay toward such board, in lieu of transportation, to the other town such sum as the school committee may fix. Further provision is made for reimbursement to the town of a portion of the money so expended for transportation or board.

There is nothing in the statute which indicates that a distinction is to be made between school children who are able to and do pay for their board in the high school outside their own town and those who are not able to or do not do so. To have so provided would have been to create a discrimination based upon wealth or earning capacity on the part of children, a discrimination entirely repugnant to the spirit of our laws and to the provisions of the particular chapter under consideration. It is not provided in G. L., c. 71, §§ 6 and 7, that the town must necessarily pay the money which it is required to expend for the benefit of a child in lieu of transportation directly to the child or to its parent. It may, and very properly might, make arrangements to pay the sum which it is called upon to disburse towards the child's board directly to the person to whom

it is due. To the amount of such sum so paid by the town of residence, the mode of determining the amount thereof being established by the statute, the child or its parents will be relieved to the extent that the payments now made by the child, either by money or its equivalent, are released for some other purpose, presumably a purpose connected with the child's welfare. It is not the intent of the statute that towns shall be relieved from the duty to make payments for the benefit of a high school child by reason of the personal labor of the child himself. Provisions are made in the statute for a mode of reimbursing a town in part for the disbursements it may make in this connection.

I answer both of your questions in the affirmative.

DIRECTOR OF FISHERIES AND GAME — DEER — DAMAGE.

The Director of Fisheries and Game has no authority to pass upon claims for damage done by wild deer, approved by local authorities prior to June 28, 1927.

To the Commissioner of Conservation. 1927 July 25.

You have asked my opinion as to whether the Director of Fisheries and Game has jurisdiction to approve or pass upon claims for damage caused by wild deer in the following cases:

1. In cases where the damage was caused prior to June 28, 1927, and where the claim was formally approved by the chairman of the board of selectmen and two disinterested appraisers, as well as by the county commissioners, prior to that date.

2. In cases where the damage was caused prior to June 28, 1927, and where the claim was not approved by the chairman of the board of selectmen and two disinterested appraisers, as well as by the county commissioners, prior to that date.

The date June 28, 1927, is of importance for the reason that St. 1927, c. 194, amending G. L., c. 131, § 67, and amendments thereto, became effective on that date.

G. L., c. 131, § 67, as amended, provided as follows: —

Whosoever suffers loss by the eating, browsing or trampling of his fruit or ornamental trees, vegetables, produce or crops by wild deer or wild moose, if the damage is done in a city may inform the officer of police thereof, who shall be designated to receive such information by the mayor, and if the damage is done in a town may inform the chairman of the selectmen of the town where the damage was done, who shall proceed to the premises and determine whether the damage was inflicted by such deer or moose, and, if so, appraise the amount thereof if it does not exceed twenty dollars. If, in the opinion of the officer or chairman, the amount of said damage exceeds twenty dollars, he shall appoint two disinterested persons, who, with himself, shall appraise, under oath, the amount thereof. The officer or chairman shall return a certificate of the damages found, except in Suffolk county, to the treasurer of the county in which the damage is done, within ten days after such appraisal is made. The treasurer shall thereupon submit the same to the county commissioners, who, within thirty days, shall examine all bills for damages, and if any doubt exists, may summon the appraisers and all parties interested and make such examination as they may think proper. The bills properly approved with the cost of appraisal shall be sent by the county treasurer to the state auditor, and they shall be paid by the commonwealth. In Suffolk county the certificate of damages shall be returned to the treasurer of the town where the damage is done, who shall exercise and perform the rights and duties hereby conferred and imposed upon the county commissioners in other counties. The appraisers shall receive from the commonwealth one dollar each for every such examination made by them, and shall receive twenty cents a mile, one way, for their necessary travel.

St. 1927, c. 194, amends this act by providing that the bills, after approval by the county commissioners, shall be sent to the Director, who shall examine the same and, if found by him to be proper, shall endorse his approval thereon and transmit them to the Comptroller, whereupon they shall be paid by the Commonwealth.

In my opinion, the Director has no authority to pass upon the claims in the first case. While undoubtedly St. 1927, c. 194, is retrospective in its operation and applies to pending cases, I do not think that it applies to a case where all the substantial steps in enforcing the remedy have been completed. In the first case all steps had been completed before

the new law went into effect, except that the approved bill had not been sent to the State Auditor or to his successor, the Comptroller, and had not been paid by the Commonwealth. No appeal from the finding of the county commissioners was provided for by the law, and at the time it was rendered the finding of the county commissioners was final; nothing remained to be done but the purely ministerial act of sending the bills to the State Auditor and the actual paying of the money by the Commonwealth. Neither of these acts involved any discretionary action on the part of any one. The action was not a pending action at the time the new law went into effect, and I therefore am of the opinion that the Director has no power to act in this case.

In the second case the actions were pending at the time the new law went into effect, and under the familiar rule that remedial and procedural laws are retrospective as to pending cases, I am of the opinion that the provisions of St. 1927, c. 194, apply to such cases, so that the Director must approve such bills before they are paid.

Metropolitan District Commission — Beaver Dam Brook — Construction of Statutes.

St. 1927, c. 301, is so repugnant in its terms to St. 1913, c. 814, that it impliedly repeals the latter, and deprives the Metropolitan District Commission of the authority to deal with Beaver Dam Brook given it by St. 1913, c. 814.

To the Metropolitan District Commission.
1927
July 29.

Your Commission has asked my opinion relative to the effect of St. 1927, c. 301, upon the authority given to your Board, or its predecessor in office, by St. 1913, c. 814.

The statute of 1913 authorized the Metropolitan Water and Sewerage Board to widen, straighten and deepen the channel of Beaver Dam Brook in the towns of Ashland, Framingham, Sherborn and Natick. The Board was authorized to take by eminent domain, or otherwise, lands and water rights in relation to such work for the metropoli-

tan water works, the title to the property so taken to vest in the Commonwealth. Damages were to be determined by the Board, and in the absence of an agreement relative to such determination by a jury in the Superior Court. The Board was given authority to assess betterments. The expense incurred in carrying out the provisions of the act was to be paid out of the treasury of the Commonwealth and an issue of bonds therefor was authorized, and a third of the expense was to be repaid to the Commonwealth by the town of Framingham and an issue of bonds for such purpose, to be made by the town, was authorized.

St. 1927, c. 301, provides that the town of Framingham may widen, straighten and deepen the channel of Beaver Dam Brook in the towns of Ashland, Framingham and Natick, with other provisions relative to the brook similar to those contained in section 1 of chapter 814 with the exception of any mention of the town of Sherborn in the statute of 1927. I am advised that the part of the town of Sherborn which is in any way affected by the widening of the brook has, since 1913, been annexed to the town of Framingham.

St. 1927, c. 301, authorizes the town of Framingham to perform the same and some additional work in relation to the channel of Beaver Dam Brook as was given to the Board under the earlier act, and authorizes the town to take by eminent domain or purchase the land and water rights, and provides that damages recovered for such takings shall be paid by the town. The town is also given authority to make betterment assessments, and it is provided in this statute (§ 5) that from and after the completion of the work authorized by this act said Beaver Dam Brook shall be maintained, controlled and kept in good condition by the said town of Framingham.

Undoubtedly, as a matter of law, the repeal of a statute or a part thereof by implication is not favored, but a later statute containing provisions plainly repugnant to those of a former statute has been held to repeal the earlier one

in so far as the two were repugnant to each other. *New London Northern R.R. Co.* v. *Boston & Albany R.R. Co.*, 102 Mass. 386, and cases there cited. In the case of *New London Northern R.R. Co.* v. *Boston & Albany R.R. Co., supra,* powers and duties previously conferred and imposed upon commissioners appointed by the court were by a statute vested in a board of railroad commissioners, and the court held that all provisions of law which authorized commissioners appointed by the court to exercise such powers and perform such duties or the court to appoint such commissioners or to adjudicate upon their report were, in view of the statutory creation of a new commission, impliedly repealed.

The statute of 1927 is repugnant to the statute of 1913. It relates to the same subject matter; it is not affirmative, cumulative or auxiliary, but grants authority to a new board to perform the acts which were formerly authorized to be performed by the Metropolitan Water and Sewerage Board; and it authorizes the new body, the town, which is to go forward with the work, to assess betterments, to make takings and to do all the other necessary acts relative to the completion of precisely the same public improvement which was mentioned in the earlier statute. An attempted exercise of its power under the statute of 1913 by the Metropolitan District Commission, as successor to the Metropolitan Water and Sewerage Board, would bring it into direct collision with the authority vested by the statute of 1927 in the town of Framingham; and while the statute of 1927 does not in terms refer to or directly repeal the statute of 1913, it must, in my opinion, be said to be so repugnant to, and so obviously intended by the Legislature as a substitute for, the other as impliedly to repeal the provisions of St. 1913, c. 814, and I am of the opinion that the authority to proceed with the public work relative to the channel of Beaver Dam Brook now rests with the town of Framingham and is not within the authority of your Commission, under the statutes as they now stand.

ILLEGITIMATE CHILD — LEGITIMATION — ACKNOWLEDGMENT.

Marriage of the parents of an illegitimate child without an acknowledgment of the parentage of the child by the father is not sufficient to make such child legitimate.

To the Governor. 1927 August 29.

You submit to me the inquiry of the Secretary of State of the United States as to whether, under the laws of Massachusetts, the subsequent marriage of the parents of a child born out of wedlock has the effect of legitimating their child.

G. L., c. 190, § 7, provides as follows: —

An illegitimate child whose parents have intermarried and whose father has acknowledged him as his child shall be deemed legitimate.

Acknowledgment by the father is, therefore, requisite in addition to intermarriage to legitimate a child born out of wedlock.

DRAINAGE DISTRICT — ASSESSMENTS — RECORDING.

The provisions of G. L., c. 80, § 2, that no betterments for improvements shall be assessed unless the order therefor is recorded, do not apply to the assessing in a town within a drainage district organized under G. L., c. 252, as amended, of expenses of an improvement determined under said chapter 252.

To the Commissioner of Agriculture. 1927 September 1.

You inform me that the Weweantic River Drainage District, having been organized under the provisions of G. L., c. 252, and never having been reorganized under the provisions of St. 1923, c. 348, § 2, is subject to the provisions of G. L., c. 252, as amended by St. 1922, c. 349, and is not subject to the provisions of St. 1923, c. 348, as amended by St. 1926, c. 393, in which form G. L., c. 252, §§ 1–14B, as so amended now appear.

You inform me that the commissioners of the said district have made an award determining the proportion of the total expense of the improvement of certain low lands in said district to be paid by the town of Carver, and that the sum due from such town has been ascertained in accord-

ance with the provisions of G. L., c. 252, § 13; and that neither the award nor a plan of the area expected to receive advantage from the improvement nor an estimate of the amounts to be assessed upon each parcel of land within such area was recorded, within thirty days from adoption of the award, in the registry of deeds of the district in which the area so improved is situated, as is required under the provisions of G. L., c. 80, §§ 1 and 2, to be done before assessing betterments for an improvement receivable by an area by reason of an order adopted by a board of officers of the Commonwealth stating that betterments are to be assessed for the improvement.

You request my opinion whether the provisions of G. L., c. 80, §§ 1 and 2, relating to assessment of betterments for an improvement consequent to an order of a board of officers of the Commonwealth for such an improvement, stating that betterments are to be assessed, and especially the provision in section 2 that "no betterments shall be assessed for such improvement unless the order . . . (is) recorded," so apply to the assessing by assessors of the town of Carver, under the provisions of G. L., c. 252, § 14, of the divisions of the sum ascertained to be due from the town of Carver under G. L., c. 252, § 13, and especially under the provision therein that "the assessors . . . shall assess the same in the same manner as betterments are assessed under chapter eighty," as to preclude assessing land for divisions of the sum so ascertained, unless the award for such improvement, together with plan and estimate, is first recorded in the registry of deeds of the district within thirty days from its adoption.

G. L., c. 252, § 14, is as follows: —

> The assessors of each such town shall divide the sum ascertained to be due from their town under the preceding section, among the various parcels of land therein which are within the drainage district and are benefited by the improvement in proportion to the special benefit received by each such parcel therefrom and shall assess the same in the same manner as betterments are assessed under chapter eighty. The provi-

sions of said chapter relative to the apportionment, division, reassessment, abatement and collection of assessments for betterments, and to interest, shall apply to assessments made under this section, except that such assessments shall be apportioned in twenty equal annual instalments or in such lesser number as the assessors may determine.

The first sentence sets forth a direction to assessors to perform certain functions, namely, to divide an ascertained sum and to assess the same. The amount which is to be assessed upon each parcel of land is a divisional of an ascertained sum, and the sum which is to be divided is a sum as ascertained in section 13. The functions of division and of assessing relate to a sum definitely described, and ascertained under definite procedure. In so far as the provisions of G. L., c. 80, relate to the function of assessing betterments thereunder, section 14 provides that such provisions shall apply to the function of assessing land for the divisions made by the assessors, pursuant to section 14, of the sum ascertained under section 13.

G. L., c. 80, § 1, as amended by St. 1923, c. 377, §§ 1, 2 and 17, relating to assessing betterments, are as follows: —

Section 1. Whenever a limited and determinable area receives benefit or advantage, other than the general advantage to the community, from a public improvement made by or in accordance with the formal vote or order of a board of officers of the commonwealth or of a county, city, town or district, and such order states that betterments are to be assessed for the improvement, such board shall within six months after the completion of the improvement determine the value of such benefit or advantage to the land within such area and assess upon each parcel thereof a proportionate share of the cost of such improvement, and shall include in such cost all damages awarded therefor under chapter seventy-nine; but no such assessment shall exceed the amount of such adjudged benefit or advantage. The board shall in the order of assessment designate as the owner of each parcel the person who was liable to assessment therefor on the preceding April first under the provisions of chapter fifty-nine.

Section 2. An order under section one which states that betterments are to be assessed for the improvement shall contain a description sufficiently accurate for identification of the area which it is expected will receive benefit or advantage, other than the general advantage to the community, from such improvement, and shall refer to a plan of such area, and shall contain an estimate of the betterments that will be as-

sessed upon each parcel of land within such area; and such order, plan and estimate shall be recorded, within thirty days from the adoption of the order, in the registry of deeds of every county or district in which the benefited area is situated. No betterments shall be assessed for such improvement unless the order, plan and estimate are recorded as herein provided, nor upon any parcel of land not within such area, nor for a greater amount than such estimate.

. . . . . .

SECTION 17. Whenever a formal vote or order for the laying out or construction of a public improvement, or for the taking of land therefor, states that betterments are to be assessed, no betterments shall be assessed except under this chapter, and all proceedings relating to such betterments shall be as herein provided, notwithstanding any special act hitherto enacted.

These provisions are directory to a board, by whose order, stating that betterments are to be assessed, an area receives improvement, as to the function of assessing betterments (§ 1) and as to a function relative to such order (§ 2). Though the exercise of the function relative to such order (§ 2) is therein made requisite to the exercise of the function of assessing in the operation of perfecting an assessment, the manner of the exercise of the latter function is clearly distinguishable, namely, to "assess upon each parcel thereof a proportionate share of the cost of such improvement, and shall include in such cost all damages awarded therefor under chapter seventy-nine; but no such assessment shall exceed the amount of such adjudged benefit or advantage."

Examination of these provisions is sufficient for the conclusion that the provisions of section 14 bear instruction to assessors in the function of assessing only and of an amount as ascertained under G. L., c. 252, only, independent of instructions to other officials or of acts or omissions to act pursuant to such instructions, made requisite elsewhere in the full process of accomplishing any assessment.

G. L., c. 252, particularly provides in detail for procedure as to manner and form of the improvement of low land and swamps by drainage thereof (§§ 1–14); for the financing of

the same, namely, by payment of certain expenses by certain counties (§§ 7, 8 and 11); for the payment thereof to such counties by certain towns (§ 13); and for the collection by such towns of the amounts so repaid (§14). The provisions of section 13 delineate the mode of ascertainment of the amount to be repaid by any town to any county, namely, determination by an award, the procedure as to which (in making, notice to any town, appeal by any town aggrieved, and the finality thereof) is set forth in detail therein, as follows: —

> The commissioners shall, after due notice and a hearing, determine what proportion of the total expense of the improvement, of the cost of maintenance of drains and ditches and of the payment for works or structures taken or otherwise acquired in connection therewith, except, such as is to be paid by the commonwealth, shall be paid by each town where any of the land improved lies, and shall return their award to the board, which shall, upon acceptance thereof, send a copy thereof to each such town. Any such town aggrieved by such award may, by petition joining all the other such towns as party respondents, appeal to the superior court for the county where the greater part of the land improved lies; provided, that such petition is entered not later than the next return day after the expiration of thirty days from its receipt of said copy. Questions of fact shall, upon motion of either party, be tried by jury in such manner as the court orders. The court may affirm, reverse or alter the award, and the decision of the court shall take effect as an original award. The board shall forthwith send to the county commissioners of the county where the greater part of the land lies a copy of the award as finally determined. The sum so ascertained to be due from any such town shall be paid by the treasurer thereof to said county in not exceeding twenty equal annual instalments to be collected in the same manner as taxes.

The provisions of section 14, as herein set forth, delineate the method of collecting, in towns, sums ascertained to be due from the same under the provisions of section 13.

G. L., c. 80, as amended by St. 1923, c. 377, particularly relates to betterments from a public improvement when made by vote or order of a board of public officials and when such order states that betterments are to be assessed for the improvement, and delineates the mode of assessment (§§ 1 and 2), collection (§§ 12 and 14), abatement (§§ 5, 6, 7, 8, 9

and 10), apportionment (§§ 13 and 14 [repealed]), division (§ 15) and reassessment (§ 16) of the same. The provisions of sections 1 and 2 relate particularly to assessments, and require that the same shall be made by the board adopting the order for the improvement and assessment; that the order shall designate owners of land liable to assessment (§ 1), and that no betterments shall be assessed unless the order, plan of area benefited and estimate of betterments to be assessed on each parcel have in fact been recorded in the registry of deeds where the benefited area is situated, within thirty days after the adoption of the order (§ 2).

If G. L., c. 80, §§ 1 and 2, in so far as they relate to incorporation, in the order, of a designation of owner of each parcel liable to assessment, of a description sufficiently accurate for identification of areas benefited, of plans of such area and an estimate of benefits, and the recording of such order, plan and estimate, as prerequisites to assessing betterments, apply to the manner and form of making an award and for the ascertainment of sums due under G. L., c. 252, § 13, as prerequisite to assessing sums ascertained through procedure, of which such award is a part, it is obvious that such provisions of G. L., c. 80, §§ 1 and 2, are in addition to the provision of G. L., c. 252, in delineating further procedure for making an award by district commissioners or by a drainage board, and for ascertainment of sums due, assuming that such award is an order of a board of officers for a public improvement, stating that betterments are to be assessed, to which, when of such character, G. L., c. 80, §§ 1 and 2, are generally applicable, and impose upon said commissioners or drainage board, additional and similar in purport to duties owed solely to towns and to county commissioners, for their information and protection, as recited in G. L., c. 252, § 13, duties to owners of each parcel of land to be assessed within the towns, for whose like information and protection as to betterments, designation of ownership, description of area benefited and record-

ing or order, plan and estimate are ostensibly provided in G. L., c. 80.

G. L., c. 80, § 2, requires that the order shall be recorded within thirty days after the adoption of such order. G. L., c. 252, § 13, provides that after the award is made, the district commissioners shall return the same to the drainage board (now State Reclamation Board, St. 1923, c. 457) for its acceptance; that any town aggrieved by the award, so accepted, may appeal to the court, the decision of which shall take effect as an original award; and that the drainage board shall send to the county commissioners a copy of the award as finally determined. If G. L., c. 80, §§ 1 and 2, in so far as they relate to the recording of an order for improvement and assessment of betterments, within thirty days after its adoption, apply to an award under G. L., c. 252, § 13, they require determination of the date of the adoption of the award, as among the dates of its making, of return to drainage board for acceptance, of acceptance by the board, of receipt of copy by any town from the drainage board, of expiration of period, after receipt, for appeal by a town aggrieved, of decision of court on appeal as an original award, of receipt by county commissioners from the drainage board of copy of award as finally determined, as recited in section 13, in procedure to be had, with respect to such an award, for the ascertainment of the sums to be divided and assessed by the assessors under section 14.

If G. L., c. 80, §§ 1 and 2, in so far as they provide that no betterments shall be assessed for such improvements unless the order, plan and estimate are so recorded, apply, under the provisions of G. L., c. 252, § 14, to the assessing of land in a town for the sum due from such town, then, in the absence of such record within thirty days after adoption of the award, the provision of section 14 that the assessors shall divide the sum due from any town as ascertained under section 13, and shall assess the same, is nullified, and the amount due from any town, though having been determined, ascertained and paid by a county treasurer in strict com-

pliance with the provisions of section 13, cannot be collected because of preclusion for its assessment.

It is evident, therefore, by recitation of but a few involvements, occasioned by construing all the provisions of G. L., c. 80, for perfecting assessment of betterments as an integral part of the procedure for perfecting assessments under G. L., c. 252, that the two chapters are incompatible, except in so far as the provisions of G. L., c. 80, relate to the isolated function of assessing.

Moreover, by recitation in G. L., c. 252, § 14, of the several aspects, relating to betterments, to which the provisions of G. L., c. 80, are expressly made applicable and in which recitation "assessments," as accomplishments had after adherence to the procedure delineated therein, are not enumerated, it becomes more evident that it was the intent of the Legislature to establish the procedure set forth in G. L., c. 252, § 13, as sufficient prerequisite to the operation of assessing by assessors, and that the provisions of G. L., c. 80, are applicable only in so far as they mannerize such operation; and that as to the manner of accomplishing an assessment to pay a town's share of expense of a drainage improvement other than the operation of assessing, the provisions of G. L., c. 252, are substitute for the provisions of G. L., c. 80.

I therefore answer your interrogatory in the negative.

CONSTITUTIONAL LAW — NOTARIES — JUSTICES OF THE PEACE.

Appointments to the offices of notary public and justice of the peace rest in the discretion of the Governor and Council, who may pass upon the qualifications of applicants for such offices.

To the Governor and Council. 1927 September 14.

You request my opinion as to the intent of the framers of the Constitution in regard to the appointment of notaries public and justices of the peace in the Commonwealth.

"Was it originally contemplated," you ask, "that appoint-

ments should be made indiscriminately, as indicated in the petition herein enclosed?" The petition referred to is that of a salesman of bonded whiskey, who petitions for appointment to the office of notary public for the Commonwealth of Massachusetts.

Mass. Const. Amend. IV provides that notaries shall be appointed by the Governor in the same manner as judicial officers are appointed. Mass. Const. Amend. XXXVII provides that the Governor, with the consent of the Council, may remove justices of the peace and notaries public.

In my opinion, there is nothing in the language used by the framers of the Constitution to indicate that appointments to the offices above mentioned should be made *indiscriminately.*

In the original Constitution of the Commonwealth, justices of the peace were to be nominated and appointed by the Governor, by and with the advice and consent of the Council, being *judicial officers* (*Opinion of the Justices*, 107 Mass. 604) within the meaning of Mass. Const., pt. 2nd, c. II, § I, art. IX, which provides: —

> 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.

Notaries public, on the other hand, were to be elected by the Legislature. Mass. Const., pt. 2nd, c. II, § IV, art. I, was 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. . . .

But, as has already been stated, article IV of the amendments brought notaries also within the appointing power of the Governor and Council: —

> Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven

years, unless sooner removed by the governor with the consent of the council, upon the address of both houses of the legislature.

The mere fact that the offices of notaries public and justices of the peace are appointive offices indicates that the Governor and Council are to use their *discretion* in the matter of the nomination and appointment of these officers. This discretion, of course, must not be *arbitrarily* exercised, but the Governor can refuse to appoint for any valid reason.

The Governor and Council, using their discretionary power, might determine, after inquiring into the personal qualifications of applicants or into the reasons for which they seek appointment, that such applicants are not proper persons to receive commissions, or that the reasons which they give for desiring such appointments are not sufficient to justify appointment, or that the public welfare does not require an increase in the number of such officers.

A former Attorney-General, in an opinion to Your Excellency and the Honorable Council (VII Op. Atty. Gen. 580), with which opinion I concur, states: —

> It is my opinion that, except for limitations of the type mentioned in the preceding paragraph, all questions relating to the number of justices of the peace and notaries public which it may be thought desirable to have, or relating to the personal qualifications for appointment to these offices, or relating to the reasons for which such officers once appointed should be removed, are for the determination of the Governor and Council, in the exercise of their sound discretion.

County Commissioners — Trustees of County Tuberculosis Hospital — Compensation.

County commissioners may not award to themselves or to trustees of a tuberculosis hospital salary or compensation for services.

To the Commissioner of Corporations and Taxation.
1927
October 3.

You request my opinion as to whether, under the provisions of G. L., c. 34, § 5, as amended by St. 1927, c. 327, relating to schedules and salaries of county commissioners, and of G. L., c. 111, and amendments thereof, in those sections relating to county tuberculosis hospitals, an item

in certain county accounts for compensation to county commissioners for attendance at meetings of the trustees of the tuberculosis hospital maintained by the county of the said commissioners, and an item for salary voted by the trustees of a county tuberculosis hospital to the county commissioners of the same county for services as trustees, are items which the Director of Accounts, under the provisions of G. L., c. 35, § 44, *et seq.*, and amendments thereof, relating to supervision of county accounts, may certify as correct.

G. L., c. 111, § 78, *et seq.*, and amendments thereof, provide for the erection, care, maintenance and repair of county tuberculosis hospitals. Section 87 provides that the "county commissioners shall be trustees of the hospitals erected."

G. L., c. 34, § 5, is as follows: —

> To establish the salaries of county commissioners, the counties, except Suffolk and Nantucket, are divided into eight classes, based upon population, according to the following schedule, and said salaries, in full for all services performed by said commissioners, except as otherwise provided, shall be as follows: — . . .

A schedule is then set forth, which schedule was amended by St. 1927, c. 327.

It is therefore specifically provided that the salary scheduled to any given class shall be "in full for all services performed by said commissioners, except as otherwise provided," and that performance of service of trusteeship of a county tuberculosis hospital is imposed upon the county commissioners of such county.

As to the first item, compensation for services of county commissioners for attendance as county commissioners at meetings of themselves as trustees, the service of attendance is a service represented by the county commissioners to have been performed in their capacity as county commissioners; and it follows, therefore, that such service is included in those services, for "all" of which, under the provisions of G. L., c. 34, § 5, salary is established in full, unless payment

of compensation for such service shall be elsewhere provided by statute. I do not find such a statute.

As to the second item, salary voted by county commissioners to themselves in their capacity as trustees of a county hospital, for services rendered by them as such trustees while at the same time receiving a salary for their office as county commissioners, by virtue of which they are trustees, the service of trusteeship is a service "performed" by the commissioners pursuant to the provisions of G. L., c. 111, § 87, whether or not performed by them in their capacity as county commissioners in their capacity as such or as trustees, for which, as one of "all services performed by said commissioners," under the provisions of G. L., c. 34, § 5, salary is established in full, unless payment of salary for such service is elsewhere provided. If the service of trusteeship is performed by them as county commissioners, by reason of incumbency in such office, it is a service in their capacity as county commissioners included in those services for all of which the salary, established by G. L., c. 34, § 5, as amended, is in full. If the service of trusteeship is performed by them in their capacity as trustees, apart and distinct from their capacity as county commissioners, enablement of payment by the trustees of salary for such service must be found in some provisions pertaining thereto in statutes relating to such trustees. I do not find any such provision.

It follows, therefore, that there is no authorization for the payment of compensation to county commissioners for attendance of themselves, as county commissioners, at meetings of trustees of county tuberculosis hospitals, nor for salary to them, as county commissioners, as trustees of such hospitals, other than the salary to such county commissioners established for all services performed by county commissioners, nor for payment of a salary to any trustees of county tuberculosis hospitals; and, in my opinion, neither item is proper for certification by the Director of Accounts.

Public Schools — Textbooks — Transportation of Pupils.

Public funds may not be expended to provide free textbooks or free transportation for pupils attending private schools.

To the Commissioner of Education. 1927 November 2.

You have requested my opinion upon the two following questions of law: —

1. Whether the town of Ashburnham, under the "anti-aid" amendment, can furnish textbooks out of public funds to pupils attending a private school.

2. Can the town, from public funds, pay the transportation of pupils to a private school?

You have set forth the facts relative to the situation in Ashburnham, to which you direct my attention, as follows:

The town of Ashburnham is exempted by the Department from maintaining a high school because high school opportunities are made available to the pupils of the town at Cushing Academy in Ashburnham. The tuition of these pupils is paid from a private fund which has been raised by the citizens of the town. The town itself has been supplying these pupils with textbooks. The question of transporting pupils to Cushing Academy has never been raised, but a member of the school committee states that should it occur the transportation would be paid by the town out of public funds.

It is apparent from the foregoing facts and from an inspection of a written contract between the school committee of Ashburnham and the trustees of Cushing Academy, which you have submitted to me, that Cushing Academy is an entirely private school. It is completely under private management. Public officials exercise no control whatsoever over it. No question exists as to its status in this respect, such as was considered with relation to the Punchard School in an opinion rendered to you on August 6, 1924 (VII Op. Atty. Gen. 500). The fact that the availability of Cushing Academy as a place where Ashburnham children of high school age might receive training may have been a large or controlling factor in leading you, in the exercise of your discretion, to exempt the town from main-

taining a high school, under the authority given you by G. L., c. 71, § 4, does not change the status of the academy from that of a private to a public school. The expenditure of public funds for the purchase of school books for pupils who receive their education in institutions other than those public schools embraced in our general public school system is not authorized by the statutes (G. L., c. 71, §§ 48 and 49), and would constitute an expenditure of money for a purpose which cannot be termed public, in the absence of a specific legislative determination to that effect.

The same considerations are applicable to the payment of public funds for the transportation of Ashburnham children to the private school, Cushing Academy, and I am of the opinion that the town cannot expend public moneys to buy textbooks for, or to transport, pupils attending the academy, under the facts as you have set them forth.

Motor Vehicles — Steam Road Roller — Storing of Compressed Air.

A steam road roller capable of being propelled by its own power is a motor vehicle within the provisions of G. L., c. 146, § 34.

To the Commissioner of Public Safety
1927
November 3.

You have requested my opinion as to whether, under G. L., c. 146, § 34, a steam road roller is a motor vehicle.

G. L., c. 146, § 34, provides: —

> No person shall install or use, or cause to be installed or used, any tank or other receptacle, except when attached to locomotives, street or railway cars, vessels or motor vehicles, for the storing of compressed air at any pressure exceeding fifty pounds per square inch, for use in operating pneumatic machinery, unless the owner or user thereof shall hold a certificate of inspection, issued by the division.

G. L., c. 90, § 1, provides: —

> The following words used in this chapter shall have the following meanings, unless a different meaning is clearly apparent from the lan-

guage or context, or unless such construction is inconsistent with the manifest intention of the legislature:

. . . . . .

"Motor vehicles," automobiles, motor cycles and all other vehicles propelled by power other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks, ambulances, fire engines and apparatus, police patrol wagons and other vehicles used by the police department of any city or town or park board solely for the official business of such department or board, road rollers and street sprinklers.

In commenting upon G. L., c. 90, the justices of the Supreme Judicial Court have said, in *Opinion of the Justices*, 250 Mass. 591, 601: —

The dominant aim of the statute is to regulate the use of motor vehicles upon highways. That is a proper field for the exercise of the police power. The enactment of G. L., c. 90, in its main features is an exercise of the police power.

It is evident, therefore, that G. L., c. 90, has a limited application. Further, it is to be noted that section 1 of said chapter begins, "the following words used in this chapter shall have the following meanings," and that consequently the definitions, including that of the term "motor vehicles," have an application limited to the purposes of that chapter.

The first law enacted in this Commonwealth to regulate the operation of automobiles and motor vehicles on ways is found in St. 1902, c. 315. Section 4 of that chapter is as follows: —

The term "motor vehicle" in this act shall include all vehicles propelled by any power other than muscular power, excepting railroad and railway cars and motor vehicles running only upon rails or tracks.

It is to be noted that in that section the definition of the term "motor vehicle" was limited to "this act" and that the Legislature recognized that there existed motor vehicles other than those sought to be regulated by the act of 1902.

This chapter was subsequently repealed in 1903 by St. 1903, c. 473, § 15. In that act automobiles and motor

cycles were the only motor vehicles the use of which was regulated, yet the Legislature evidently considered steam road rollers to be motor vehicles as such. In that chapter the Legislature enacted as follows: —

> The terms "automobile" and "motor cycle" as used in this act shall include all vehicles propelled by power other than muscular power, excepting railroad and railway cars and motor vehicles running only upon rails or tracks, and steam road rollers.

Later on, by St. 1909, c. 534, the prior motor vehicle laws were repealed. In section 1 of that chapter "motor vehicle" is defined, with the exception of two words — "shall include" after the words "motor vehicle" — in the identical language found in the definition of the same words in G. L., c. 90, § 1.

It is evident, therefore, that the term "motor vehicle" as used in G. L., c. 90, § 1, is limited in its application to the sections embodied in that chapter, and that in order to determine whether or not a steam road roller is a motor vehicle under G. L., c. 146, § 34, it is necessary to consider what the term "motor vehicle" means, without regard to the provisions of G. L., c. 90.

The word "motor" is defined by the Century Dictionary as follows: —

> That which imparts motion; a source or originator of mechanical power; a moving power, as water, steam, etc. In *mach.* a prime mover; a contrivance for developing and applying mechanically some natural force, as heat, pressure, weight, the tide, or the wind; a machine which transforms the energy of water, steam, or electricity into mechanical energy; as an electric motor.

The word "vehicle" is defined by the Century Dictionary as follows: —

> Any carriage moving on land, either on wheels or on runners; a conveyance. That which is used as an instrument of conveyance, transmission or communication.

The words "motor vehicle," as found in the Encyclopedia Americana, 1905, are defined as follows: —

Denoting a vehicle moved by inanimate power of any description, generated or stored within it, and intended for the transportation of either goods or persons on common highways. As an adjective the word denotes broadly some relation to mechanically driven vehicles.

Definitions of the terms "motor" and "vehicle" in other dictionaries commonly accepted as standards coincide with the definitions quoted above. Judicial definitions of the term "motor vehicle" in its broader sense are almost entirely lacking.

It is my opinion that a steam road roller, that is, a road roller operated by steam and capable of being propelled by its own power, is a motor vehicle within the terms of G. L., c. 146, § 34.

INSURANCE — FRATERNAL BENEFIT SOCIETY — DISTRIBUTION OF SURPLUS.

A distribution of the surplus of a fraternal benefit society to its members is not an equitable distribution if it is made upon a basis of a *per capita* division or of a percentage of present annual assessments alone.

To the Commissioner of Insurance. 1927 November 3.

You have asked my opinion relative to a proposed distribution of surplus to be made by a fraternal benefit society to its members.

You have advised me that the report of the society which has been adopted by vote of its officers having, I assume, the power of directors, relative to such distribution, is as follows: —

In the valuation of our condition as of December 31, 1926, $1,400,000 was set aside for contingencies and $600,000 for dividend purposes. After setting aside these two sums, our valuation shows a percentage of 105 plus and the executive committee recommends that a dividend be paid of 8⅓ per cent of the annual assessment of each member, to all members in good standing June 30, 1927, who have completed two full years membership on December 31, 1926, with the exception of members on the Table of Regular Rates under 65 years, the dividend to be paid by checks through the collectors of subordinate councils, and on list of members supplied from the office of the supreme secretary.

You have informed me that the $1,400,000 reserve of this society, referred to in the foregoing order, from the statutory surplus of which the proposed distribution is to be paid, has been built up by the payments of beneficiaries upon their assessments made to provide for their prospective benefits under the rules of the organization, with the exception of those members under sixty-five years, specifically referred to in said order. You also have advised me that the amounts which have been paid in by respective beneficiaries differ greatly. Accordingly, the proportionate interests in the reserve funds of the society, including the surplus, which the various members have built up for themselves individually, differ greatly among such members in like manner as their respective payments have differed.

It is obvious that under the plan adopted for distribution one who has been a member for only a short period, whose payments would necessarily have been much less than those of a member of longer standing paying at the same rate, would receive the same amount of repayment from the surplus as would the latter member, although the latter's contribution to such surplus, and his consequent interest therein, would be far the larger.

It is immaterial whether the fund from which the dividend be paid is said to be derived from a reserve, a contingency, a surplus reserve or an emergency fund, as each is built up by the payments of the members, which are not alike for all at any given period. It is immaterial that the sum to be repaid to each member equals the amount of a periodical contribution. The repayment purports to be a payment of a portion of the surplus directly to the members and not a reduction of the periodical contributions of its members. The number or amount of such contributions themselves is not, in fact, lessened or reduced by the vote of the officers, though a member might, if he so chose, use the funds received in the future payment of a contribution. Moreover, the same principle of equitable apportionment is applicable to a distribution by either the method of direct payment or

the reduction of contributions. It is likewise immaterial that the amount of the respective repayments is stated in terms of a percentage of the annual assessment.

G. L., c. 176, § 17, as amended by St. 1926, c. 206, to the terms of which this proposed mode of distribution must conform, reads as follows: —

> Whenever the actual assets of a society exceed its liabilities, including in liabilities the net value of its outstanding contracts computed on the basis specified in the preceding section, by an amount equal to five per cent of said net value, such society may make an equitable distribution of any surplus in excess of said five per cent by a reduction of the periodical contributions of its members, or may pay back to its several members an equitable portion of such surplus in such manner as may be determined by vote of the officers of the society having the powers of directors.

Prior to the passage of St. 1926, c. 206, the only statutory manner of equitable distribution of the specified amount of surplus was by a reduction of the periodical contributions. A second manner, direct payment to beneficiaries, such as this society is following, is now authorized by said chapter 206. The intention of the statute as to either form of distribution is plain. It must be made equitably; that is, without discrimination among the several members, in accordance with the equitable as well as legal rights which such members severally have in the fund which is to be the subject of division. "Equitable distribution" and "equitable portion," as used in the statute, denote, respectively, a distribution made in accordance with the foregoing principles and a portion received by means of such a distribution. The word "equitable" as used in the instant statute does not describe the total sum which is to be distributed in its relation to other moneys of the society.

The reserves and surplus of the society have been built up by the contributions of the members, and as to such surplus and reserve each member has an interest in such part as is represented by the proportion which the member's contributions to such surplus and reserve fairly bear to the total amount thereof. In other words, a member by his

payments is continually building up a part of the reserve of the whole society, which part may fairly be described as the reserve on his particular certificate, and in any fair division of such reserve, or a surplus part of it, the portion thereof which can be allocated to his particular certificate should be returned to him. As such individual portions of the reserve so built up by various members through their own contributions will naturally differ widely in amount with variations in length of membership or rates of payment, any method of dividing up the total reserve or surplus, or any part of either, which ignores these variations in the amount of the particular reserves built up by the individuals and attempts a division *per capita* or by a percentage of present annual assessments is obviously unfair, regardless of the equitable rights of the several members in the whole fund, and cannot be termed either an equitable distribution nor be said to pay to the members equitable portions. An assessment based upon a percentage of the annual assessment of each member, while varying in amount with the size of the respective assessments of the members, does not necessarily reflect in the same proportions the variations which exist in the contributions to the fund to be distributed, which the members have respectively made.

Apart from G. L., c. 176, § 17, as amended, it has been held in this Commonwealth that in a distribution of a reserve fund justice requires that it be carried out by payments to certificate holders in proportion to the amounts paid in to such fund by each respectively. *Fogg* v. *Order of the Golden Lion*, 159 Mass. 9.

Because amounts of payments to beneficiaries are to be equal it does not follow that they will be just or equitable. Indeed, the very fact that they are equal is what may make them inequitable. The scheme under which this society is about to make payments, totally disregarding, as it does, the varying proportions in which the beneficiaries have contributed to the fund which is to be returned in part to those who created it, is plainly inequitable.

I am not unmindful of the difference which exists between the character of the relation of members of a fraternal beneficiary society to the society itself and that of an assured with an insurance company, but I am of the opinion that the specific language of G. L., c. 176, § 17, as amended, clearly indicates an intent on the part of the Legislature to recognize and protect, to the extent of his contributions, an interest of the individual member in the accumulated funds of such a society when a distribution of surplus permitted by the statute is made. The decisions in *Reynolds* v. *Supreme Council, Royal Arcanum,* 192 Mass. 150, and *Royal Arcanum* v. *Green,* 237 U. S. 531, are not inconsistent with the opinions which I have expressed.

Although the statute authorizes the officers of the society who have the powers of directors to determine the manner in which the equitable distribution is to be paid, they are not authorized to make any distribution other than an equitable one. While their determination in regard to the manner of carrying out the distribution (whether by direct payments or by a system of credits, for example) is within their authority, and while their determination in this respect may be binding upon the members of the society, yet they have no authority whatsoever to establish an inequitable scheme for distribution, and their determination, by adoption or otherwise, of the propriety of a given plan of distribution as being equitable is not binding upon the members of the society nor upon the Commissioner of Insurance, and if it be not an equitable plan the courts will grant relief against it. Such relief would probably be granted upon the suit of an aggrieved member of the society without the necessity for the intervention of the Commissioner of Insurance. The Commissioner has ample powers under the statutes to invoke the aid of the courts to prevent the carrying out of a proposed inequitable scheme of distribution if, in his judgment, consideration of the public good requires him so to act in any given case, for the protection of beneficiaries or for other good cause.

The answers to the questions which you have propounded in your letter are, I think, fully indicated in the foregoing considerations and do not require to be set forth seriatim. In order that there may be no possibility of misunderstanding the effect of the opinions which I have expressed herein, I answer your fourth question, in view of the facts before me, categorically in the negative.

INSPECTOR OF ANIMALS — CITY OF LOWELL — APPROVAL OF APPOINTMENT.

The appointment of an inspector of animals for the city of Lowell under St. 1921, c. 383, §§ 20–23, is subject to the approval of the Director of Animal Industry.

To the Commissioner of Conservation. 1927 November 3.

You have requested my opinion relative to an interpretation of the provisions of St. 1921, c. 383, §§ 20 and 22, which you suggest are in conflict with G. L., c. 129, §§ 15 and 16, concerning the appointment of an inspector of animals for the city of Lowell.

I am of the opinion that there is not such repugnancy between the statute of 1921 and G. L., c. 129, §§ 15, 16, 17 and 18, as works an implied repeal of all of such sections or renders them entirely inapplicable to the city of Lowell.

The statute of 1921 is special in its nature and limited to the city of Lowell, but is cumulative or auxiliary to the above provisions of the General Laws as they affect the appointment of inspectors of animals under the said sections, rather than contrary and opposed to them, in the main. St. 1921, c. 383, § 20, provides that in the city of Lowell there shall be certain administrative officers, among whom shall be an inspector of animals, and by section 22 it is provided that the inspector of animals, among others of such officers, shall be nominated by the mayor, subject to confirmation by a majority vote of all the members of the city council, for the term of two years, the first term to begin the first Monday of January, 1922. I am advised in the communication which you forwarded that such nominations to the office of inspec-

tor of animals have been duly made at regular intervals of two years since January 1, 1922, and that the present incumbent of the office of inspector of animals for the city of Lowell was so appointed in January, 1926.

While it is true that the precise mode and manner by which the mayor of Lowell is to nominate an inspector of animals differ in detail from the general provision relative to other cities (G. L., c. 129, § 15), both as to date and as to the length of the term of the office, and confirmation by the city council of such nomination, yet such differences as exist do not appear to be material variations from the procedure outlined in G. L., c. 129, § 15. In any event, the mayor's act with relation to the inspector is treated as a nomination in the newer statute as in the older, and such nomination is spoken of as confirmed by the city council; yet it would seem that even after the council has acted upon the mayor's nomination there has not yet been an appointment, and G. L., c. 129, provides that the appointment is subject to the approval of the Director of Animal Industry. Because the Legislature has changed the mode of nominating the officer it does not follow that the statute shows a legislative intent to remove the final approval from the Commonwealth's own official. St. 1921, c. 383, does not create a new office of inspector of animals. It merely provides for his appointment, with a possible enlargement of his duties, but the inspector is still subject to the orders and directions of the Director of Animal Industry (G. L., c. 129, § 18), and other duties to be presumed under G. L., c. 129, rest upon him. His work appears to be an integral part of an orderly scheme laid out by the Commonwealth, under the control of the Director. It is hardly to be supposed, without the use of explicit words indicating such an intention, that the Legislature intended to make inapplicable to this official the existing requirement of approval by the Director of Animal Industry, under whom his work is largely to be carried on and to whom his duties require him to be responsible as well as to the city. It cannot well be said that the

enactment of the statute of 1921, silent as to repeal of any general laws, was intended by the Legislature to make inapplicable to the inspector of animals in Lowell the provisions of G. L., c. 129, §§ 16, 17, 18, 19 and 24, or the vital provisions of section 15 for the approval of his nomination by the Director, the latter requirement being in no sense inconsistent with the powers of nomination and confirmation thereof given by the statute of 1921 to the mayor and council.

In *Brooks* v. *Fitchburg & Leominster St. Ry. Co.*, 200 Mass. 8, it was stated by Rugg, J.: —

> The principle of interpretation is well established, that statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there be some positive repugnancy between them.

And see, also, III Op. Atty. Gen. 296; 593.

Accordingly, I am of the opinion that the statute of 1921 has not repealed or altered, as far as the city of Lowell is concerned, the provisions of G. L., c. 129, § 15, except in so far as the manner and date of choosing the inspector of animals and the time of reporting the choice is necessarily varied, and that the other provisions of section 15 apply; that the name of the city appointee to the office of inspector of animals should be made known to you by the mayor of Lowell before the first of April in the year in which he is nominated, with the address and occupation of such inspector; that his nomination does not become effective as an appointment until approved by the Director of Animal Industry; and that if more than one inspector is nominated and appointed one must be a registered veterinary surgeon.

Director of Accounts — County Accounts — Expenditures.

Postdating a voucher for the purpose of confirming an account of a county treasurer in its representation as an item of expenditure for a current year renders such account so incorrect that the Director of Accounts may refuse to certify it under G. L., c. 35, § 44, as amended.

A county treasurer's account which contains an item of expenditure in excess of $800, not made in compliance with G. L., c. 34, § 17, as amended, may not properly be certified by the Director of Accounts.

To the Commissioner of Corporations and Taxation.
1927
November 4.

You request my opinion as to whether, under the provisions of G. L., c. 35, § 44, the Director of Accounts may rightly decline to certify, and may rightly notify the Attorney-General of, an account in certain county accounts for allowance of payment, out of appropriations for the current year, of expenditures actually incurred in a preceding year for requirements of said year, though the voucher accompanying such account confirms and sustains on its face the representation of the account, that the indebtedness is one incurred in and for the current year, and corresponds in every detail of its items with detail of the items of the account, and states such details sufficiently.

G. L., c. 35, § 44, as amended by St. 1921, c. 486, § 2, provides, in part, as follows: —

> The director of accounts . . . shall . . . examine the books and accounts of each county treasurer and all original vouchers . . . , and if the same are correct, and if the accounts are accompanied by sufficient vouchers stating in detail the items thereof, and if such vouchers confirm and sustain the same, . . . he shall so certify on the treasurer's cash book. . . . If such accounts are incorrect or not accompanied by sufficient vouchers, the director shall, unless the irregularity is promptly rectified, notify in writing the . . . attorney general.

In my opinion, the word "correct" in the foregoing provisions, descriptive of the character of the books, accounts and vouchers, as to which the Director is authorized to certify, is not restricted to a description of such books, accounts and vouchers as that of being correct in the sense of sufficient itemization in each and of complete accuracy in correspondence of one with another as to such itemization.

Postdating a voucher for the purpose of confirming and sustaining an account in its representation as an item of expenditure incurred in and for the current year, which in fact is an expenditure for the requirements of a preceding year, is contrary to the general purposes of the statutes regulating county finances with respect to their purposed regulation for orderly and accurate allocation of expenditure, and such accounts appearing in books, accounts and vouchers, though correct in the sense that they are in accurate correspondence with and in confirmation and sustainment of one another, are not "correct" in the sense that they are accurate and true accounts of the facts which they purport to represent.

You are advised, therefore, that the Director of Accounts may rightly decline to certify such an account as "correct" unless such irregularity is rectified.

You also request my opinion as to whether, under the provisions of G. L., c. 34, § 17, as amended by St. 1922, c. 383, requiring the advertising of certain contracts by the county commissioners for the purchase of supplies in excess of $800, and under the provisions of G. L., c. 35, § 44, as amended by St. 1921, c. 486, § 2, authorizing the Director of Accounts to certify accounts "if in case of all payments in excess of eight hundred dollars section seventeen of chapter thirty-four has been complied with," an item for the allowance of payment of a bill of $1,160 for printing of booklets entitled "Fees, Forms and Rules," contracted for by a register of probate without having been advertised, is a proper item for certification by the Director of Accounts.

G. L., c. 34, § 17, as amended by St. 1922, c. 383, is, in part, as follows: —

> All contracts exceeding eight hundred dollars in amount made by the (county) commissioners for building, altering, furnishing or repairing public buildings, or for the construction or repair of public works, or for the purchase of supplies, . . . shall be made after notice inviting bids therefor has been posted . . . and has been advertised . . . No contract made in violation of this section shall be valid against the county, and no payment thereunder shall be made.

The booklet is entitled "Fees, Forms and Rules," and pertains to probate court practice. My attention has not been directed to any statutory provision authorizing incurrence by a register of probate of any indebtedness through contract for labor or materials chargeable to a county.

The provisions of G. L., c. 34, relating to the general powers of county commissioners, of G. L., c. 35, relating to county finances, of G. L., c. 215, §§ 30–56, relating to probate courts and to duties of county commissioners with respect to such courts, and of G. L., c. 217, relating to the powers and duties of registers of probate, indicate that indebtedness of a county for and in behalf of the probate court for the county, through contracts, shall be incurred by or on approval of the county commissioners.

Under the provisions of G. L., c. 34, § 17, a county indebtedness in excess of $800, if arising by reason of a contract by the county commissioners for the purchase of supplies, may not be paid unless such contract is advertised. Though all the other types of contract enumerated in the statute, to which its provisions are applicable, relate to public buildings and public works of the county, with respect to construction, alteration, furnishing and repair thereof, in my opinion the word "supplies" is not thereby restricted to a designation of a contract only for supplies for alteration, furnishing and repair of public buildings, but comprehends all supplies which county commissioners are authorized to provide as incidental to the orderly transaction of probate court proceedings, of which a printed publication for information of the public as to rules, fees and forms of such court may be one.

G. L., c. 35, § 44, provides, in part, as follows: —

> The director of accounts . . . shall examine the . . . accounts of each county treasurer, . . . and if in case of all payments in excess of eight hundred dollars section seventeen of chapter thirty-four has been complied with, he shall so certify on the treasurer's cash book.

These provisions are applicable to all payments in excess of $800 appearing on the books of a county treasurer, and

require that as to every payment in excess of $800 the provisions of G. L., c. 34, § 17, must be complied with as a condition precedent to certification thereof by the Director of Accounts.

As the account about which you inquire is for allowance of a payment in excess of $800 and a payment for supplies for a county, furnished under the terms of a contract, and as the register of probate was without authority to make such a contract, apart from any action of the county commissioners thereon, and as the provisions of G. L., c. 34, § 17, were not complied with, in that the contract for such supplies, if interpretable as a contract of the commissioners, was not advertised by the county commissioners, you are advised that said account is not a proper one for certification by the Director of Accounts.

Department of Public Health — Inspection of Milk — Interstate Commerce.

An entry into a railroad car for the purpose of taking samples of milk therein may not be made by an inspector of the Department of Public Health if such car is in the control of a carrier who has operated it for the purpose of an interstate shipment of the milk, even if such car be at or near the consignee's unloading platform.

To the Commissioner of Public Health. 1927 November 10.

You have asked my opinion as to "the rights of the inspectors" of the Department of Public Health "to enter milk cars on railroads in this State and take samples of milk consigned to persons engaged in the milk business in this State."

My answer to your question is that your inspectors may enter milk cars on railroads for the purpose of taking samples of milk only when the milk is not being carried as a subject of interstate commerce.

G. L., c. 94, § 35, authorizes an entry, for the purpose of taking samples, into vehicles used for the conveyance of milk, but in the last sentence of said section it is specifically provided that "this section shall not apply to milk in the

course of interstate commerce." The phrase "in the course of interstate commerce," as used in the instant statute, indicates a period covering at least the time between the consignment of the commodity to a carrier for interstate shipment and its delivery at the point of destination to the consignee. The time when the delivery to the consignee is made is to be determined in any given instance by a consideration of all the facts in relation thereto. As a general proposition, milk is "in the course of interstate commerce," within the meaning of the statute, when it is in a railroad car of the interstate carrier, over which such carrier still properly retains control through its servants, even though the car be at or near the consignee's establishment or his unloading platform. It is possible that there may be such a delivery of the loaded car to the consignee at his private platform, with such a complete abandonment and surrender of the control thereof by the carrier, as will constitute a termination of the course of interstate commerce, but until there has been such an abandonment of control of the car it cannot be said that final delivery to the consignee, which would break the course of interstate commerce with relation to the milk, has taken place until the commodity has at least been unloaded.

Board of Dental Examiners — Practice of Dentistry — Registration — Married Woman.

Only dentists practicing within the Commonwealth are required to pay an annual license.

The power of the Board of Dental Examiners to revoke, cancel or suspend a certificate of registration is limited by G. L., c. 112, § 61, as amended.

A woman dentist who marries must obtain a certificate in her married name.

To the Director of Registration.
1927
November 16.

You have asked my opinion upon the following questions:—

1. Would St. 1927, c. 147, require dentists who are registered in Massachusetts but practicing dentistry in another State to register annually in Massachusetts and pay a fee, in order to maintain their standing as legally authorized practitioners of dentistry in Massachusetts? Should

dentists who are registered in Massachusetts but practicing dentistry in the army or navy and regularly enlisted in the United States service, be required to register annually with and pay a fee to the Massachusetts Board of Dental Examiners in order to maintain their standing as legally authorized practitioners of dentistry of Massachusetts?

2. What action, if any, should the Board of Dental Examiners take with dentists who are convicted of a misdemeanor by the courts and pay the penalty of their crime? Has the Board the power to penalize them further by suspension or revocation of their licenses to practice dentistry?

3. Is it necessary for duly registered women dentists of Massachusetts who marry to have new certificates engrossed in their married name in order legally to practice dentistry in Massachusetts?

1. St. 1927, c. 147, amending G. L., c. 112, § 44, is as follows: —

> Every registered dentist when he begins practice, either by himself or associated with or in the employ of another, shall forthwith notify the board of his office address or addresses, and every registered dentist practicing as aforesaid shall annually, before April first, pay to the board a license fee of two dollars. Every registered dentist shall also promptly notify the board of any change in his office address or addresses and shall furnish such other information as the board may require. The board may suspend the authority of any registered dentist to practice dentistry for failure to comply with any of the foregoing requirements. The board shall publish annually complete lists of the names and office addresses of all dentists registered and practicing in the commonwealth, arranged alphabetically by name and also by the towns where their offices are situated. Every registered dentist shall exhibit his full name in plain readable letters in each office or room where his business is transacted.

This act requires that every registered dentist who is practicing by himself, or who is associated with or in the employ of another, shall annually pay to the Board a license fee of two dollars. I am of the opinion that this provision applies only to such dentists as are practicing within this Commonwealth. The act further provides that the Board shall publish annually a list of all registered dentists who are practicing in the Commonwealth, which provision indicates that it was the intention of the Legislature to limit the application of this section to such dentists. The duty to pay a license fee under this act is predicated upon actual prac-

ticing of dentistry, differing in this respect from certain other license fees which are due and payable regardless of whether the licensee actually is performing the work required to be licensed. I therefore answer the first part of your first question in the negative.

With reference to those registered dentists who are in the United States service practicing dentistry in the army or navy, I advise you that they are not required to pay the annual license fee unless they are engaged in private practice in this Commonwealth apart from their official duties in the army or navy.

2. With reference to your second question, the law in question is found in G. L., c. 112, § 61, as amended by St. 1921, c. 478, which is as follows: —

> Except as otherwise provided by law, each board of registration in the division of registration of the department of civil service and registration, after a hearing, may, by a majority vote of the whole board, suspend, revoke or cancel any certificate, registration, license or authority issued by it, if it appears to the board that the holder of such certificate, registration, license or authority, is insane, or is guilty of deceit, malpractice, gross misconduct in the practise of his profession, or of any offence against the laws of the commonwealth relating thereto. Any person whose certificate, registration, license or authority is suspended or revoked hereunder shall also be liable to such other punishment as may be provided by law. The said boards may make such rules and regulations as they deem proper for the filing of charges and the conduct of hearings.

The above section applies to the Board of Dental Examiners, and clearly sets forth its duties and powers. Assuming that a case arises in which the Board, under the above statute, has the power to revoke, cancel or suspend, the exercise of this power in the particular case is a matter for the judgment and discretion of the Board. The Board may not suspend, revoke or cancel a certificate of registration for the reason that it appears to the Board that the holder thereof is guilty of an offense against the laws of the United States relating to the practice of his profession. It is confined solely to the reasons set forth in the act above

cited. With reference to the particular cases mentioned in your letter, the Board may not act by reason of the violation of the Federal laws, but if it appears to the Board that either of the persons mentioned is guilty of deceit, malpractice or gross misconduct in the practice of his profession, it may suspend, revoke or cancel the certificate.

Under the act the Board clearly has the power to revoke, suspend or cancel if it appears to it that the holder of a certificate is guilty of an offense against the laws of the Commonwealth relating to the practice of his profession, but here also the exercise of this power in any given case lies within the sound discretion of the Board.

It is also to be noted that under the authority of St. 1927, c. 147, the Board may suspend the authority of any registered dentist to practice dentistry for failure to comply with certain provisions of that act.

3. The statutes applicable to your third question are as follows: —

G. L., c. 112, § 44, as amended, states, in part: —

> Every registered dentist shall also promptly notify the board of any change in his office address or addresses and shall furnish such other information as the board may require.

G. L., c. 112, § 45, provides: —

> In proof of this right the certificate or a duplicate shall be kept in his office in plain view of his patients, and, on application, shall be shown to any member or agent of the board.

G. L., c. 112, § 49, provides: —

> No person shall conduct a dental office under any name other than that of the dentist actually owning the practice, or a corporate name containing the name of such dentist.

G. L., c. 112, § 52, provides a penalty for any violation of the provisions of sections 43 to 53, inclusive, of said chapter for which no other penalty is provided.

The statutes above cited indicate clearly that the correct name of the dentist shall be exhibited in each office or room

where his business is transacted, and that he shall keep in his office in plain view his certificate, or a duplicate, and shall show such certificate or duplicate to the Board on application. This necessarily implies that the certificate shall bear the correct legal name of the dentist, and it follows that a married woman who does not have a new certificate bearing her married name is violating section 45, for the reason that she has not a proper certificate in plain view of her patients and which she can show to the proper authorities.

Further, it is to be noted that a married woman violates section 44, as amended, unless she exhibits her correct name in her offices; she also violates section 49 if she conducts a dental office under any name other than her correct name. I therefore answer your third question in the affirmative.

CIVIL SERVICE — AGENT OF SOLDIERS' AND SAILORS' RELIEF OF FALL RIVER — OFFICER.

The agent of soldiers' and sailors' relief of Fall River is not the head of a "principal department" nor an "officer" within the meaning of G. L., c. 31, § 5, as amended.

To the Commissioner of Civil Service. 1927 November 25.

You request my opinion as to whether the agent of soldiers' and sailors' relief of Fall River is the head of a principal department within the meaning of G. L., c. 31, § 5, as amended by St. 1923, c. 130.

The following facts appear as to the position: The duties of the agent are not fixed by charter or ordinance and there is no department of soldiers' and sailors' relief in the list of departments and officers created by the charter and ordinances of the city of Fall River. The affairs of the soldiers' and sailors' relief are administered by a committee of the board of aldermen in that city, to whom the agent reports his activities. The committee in turn reports to the full board of aldermen. The duties of the agent are to

investigate and report upon cases within the field of soldiers' and sailors' relief. The agent deals with no officer of the city government except the chairman of the committee of the board of aldermen referred to above, and has himself no authority to disburse cash relief, which is paid by the city treasurer only on the order of the board of aldermen. He has authority to give orders for fuel, groceries and other necessaries, subject to later ratification by the board of aldermen, which ratification has always been given. The only written instructions given to the agent in the performance of his duties are those contained in pamphlets issued by the Division of State Aid and Pensions. The agent, as a matter of practice, receives no instructions directly from the mayor of the city, either orally or in writing. An assistant to the agent has been appointed, who deals only with the agent, but who, because of the division of work between the agent and assistant, receives no directions or orders from the agent.

In view of the fact that there is no department of soldiers' and sailors' relief provided for in the charter or ordinances of the city of Fall River, it cannot be said that the agent of soldiers' and sailors' relief is the head of a department of the city. *A fortiori* it cannot be said that he is the head of a principal department within the meaning of the provisions of G. L., c. 31, § 5, as amended by St. 1923, c. 130, which reads as follows: —

> No rule made by the board shall apply to the selection or appointment of any of the following:
>
> Judicial officers; officers elected by the people or, except as otherwise expressly provided in this chapter, by a city council; officers whose appointment is subject to confirmation by the executive council, or by the city council of any city; officers whose appointment is subject to the approval of the governor and council; officers elected by either branch of the general court and the appointees of such officers; heads of principal departments of the commonwealth or of a city except as otherwise provided by the preceding section; directors of divisions authorized by law in the departments of the commonwealth; employees of the state treasurer appointed under section five of chapter ten, employees of the commis-

sioner of banks, and of the treasurer and collector of taxes of any city; two employees of the city clerk of any city; public school teachers; secretaries and confidential stenographers of the governor, or of the mayor of any city; clerical employees in the registries of probate of all the counties; police and fire commissioners and chief marshals or chiefs of police and of fire departments, except as provided in section forty-nine; and such others as are by law exempt from the operation of this chapter.

This section of the statute has been construed recently by the Supreme Judicial Court in *Robertson* v. *Commissioner of Civil Service,* Mass. Adv. Sh. (1927), p. 963. The language of that case, at page 965, makes it abundantly certain that only the positions of heads of departments which are clearly designated as principal departments by the charter and possibly by the ordinances of a city can be considered heads of principal departments within the meaning of the statute. The nature of the duties of the agent also strengthens the view that the incumbent of the position cannot be described as the head of a principal department.

I must therefore advise you that the position of agent of soldiers' and sailors' relief is not that of the head of a principal department. I am also of the opinion, upon the authority of the Robertson case above cited, that the incumbent of the position, in view of the nature of the duties of the position, is not an "officer" within the meaning of G. L., c. 31, § 5, as amended.

CHANGE OF NAME — BIRTH RECORDS — TOWN CLERK.

A record of birth may not be amended by a town clerk so as to insert in place of the person's name, as originally recorded, a new name which he has become entitled to use by virtue of a decree of a Probate Court.

To the Secretary. 1927 December 22.

You have asked my opinion as to whether a record of birth, which was correctly recorded some time ago, may be amended or changed so as to insert therein the person's new name, which was properly changed by a decree of the Probate Court. The pertinent provisions of law are as follows: —

G. L., c. 46, § 5, provides: —

> When necessary to supply deficiencies in the birth records, he (the town clerk) may enter therein any written information obtained by him but he shall not change facts already recorded except as provided in section thirteen or except to correct errors in copying from notices, reports or certificates on file in his office.

G. L., c. 46, § 13, as amended by St. 1925, c. 281, § 2, provides: —

> 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. . . . He shall file any affidavit submitted under this section and record it in a separate book kept therefor, with the name and residence of the deponent and the date of the original record, and shall thereupon draw a line through any incorrect statement, or statements, sought to be amended in the original record, without erasing them, shall enter upon the original record the facts required to correct, amend or supplement the same and forthwith, if a copy of the record has been sent to the state secretary, shall forward to the state secretary a certified copy of the corrected, amended or supplemented record upon blanks to be provided by him, and the state secretary shall thereupon correct, amend or supplement the record in his office.

Section 5, quoted above, specifically states that the town clerk shall not change facts already recorded. This statement is modified by providing for two exceptions; one of these is not pertinent to the present case and the other provides for a change only in accordance with section 13. As section 13 is an exception to the general rule, it must be construed strictly.

Section 13 provided only for such amendments or changes as were necessary to render the facts recorded therein correct at the time of the recording, and, in my opinion, did not contemplate that subsequent events, such as a change of name, should be entered into the record by way of correction or amendment. This section was amended by St. 1925, c. 281, § 2, by providing for the amendment of

the record in cases where illegitimate children were subsequently legitimatized so that the record would read as if the person had been born to its parents in lawful wedlock. No provision was made as to amending the record in cases where the name as recorded was subsequently changed. The law governing this question, therefore, stands as it did prior to this amendment, and it is my opinion that the change of name may not be entered upon the record. In this connection I call your attention to VI Op. Atty. Gen. 619.

PROBATE COURTS — PETITIONS FOR ADMINISTRATION DE BONIS NON WITH THE WILL ANNEXED — FEES.

Upon a petition for administration *de bonis non* with the will annexed no entry fee should be required if a fee has already been paid upon an original petition or if an original petition was entered prior to the effective date of St. 1926, c. 363.

To the Treasurer and Receiver General. 1927 December 29.

You have asked my opinion whether a fee is collectible by registers of probate under St. 1926, c. 363, § 2, (1) upon a petition for administration *de bonis non* with the will annexed in a case where a fee has already been paid at the entry of the petition for the probate of the will, and (2) upon a petition for administration *de bonis non* in an estate where the original petition for administration was filed before the said statute was passed, so that this subsequent petition is incidental to a proceeding upon which no fee was required to be paid.

In my opinion, no fee should be charged upon either of these petitions. It is of no consequence that the original petition in an estate was filed before the said statute was passed. The purpose of the statute was to charge a fee upon certain kinds of petitions filed after the effective date of the statute. There is no retroactive provision as to petitions filed before the statute was passed.

The relevant portion of G. L., c. 262, § 40, as amended by St. 1926, c. 363, § 2, is as follows: —

The fees of registers of probate and insolvency, payable in advance by the petitioner or libellant, shall be as follows: —

. . . . . .

For the entry of a petition for the probate of a will, for administration on the estate of a person deceased intestate, . . . and, except when the petition is certified by the register or assistant register to be incidental to proceedings already pending in the same county, for the entry of a petition for the appointment of a special administrator, conservator, trustee, receiver of the estate of an absentee, or of a guardian . . . three dollars.

A petition for administration *de bonis non* with the will annexed is clearly not within the provisions of this statute. It is plain that a petition for administration *de bonis non* with the will annexed is not a petition for the probate of a will, but presupposes a prior and successful petition for probate. It is equally clear that it is not a petition for administration on the estate of a person deceased intestate, but presupposes the existence of a valid will. The first petition regarding which you ask my opinion is therefore not subject to a fee, because it is not within the words of the statute.

The answer to your second inquiry is more difficult. A petition for administration *de bonis non* is clearly within the literal wording of the statute, to wit, "for administration on the estate of a person deceased intestate." It is my opinion, however, that the fee in question was intended to be charged only upon original petitions for probate and original petitions for administration. The intent of the statute, as shown by its exclusion of a petition for administration *de bonis non* with the will annexed, and by its exception when the petition in certain proceedings is certified by the register to be incidental to proceedings already pending in the same county, seems pretty clearly to be to exclude all except original petitions, on an analogy to entry fees in our other courts.

District Attorney for the Northern District — Special Assistants.

A justice of the Superior Court may not appoint a special assistant district attorney for the Northern District if there be an assistant district attorney in office.

To the District Attorney for the Northern District. 1928 January 25.

You request my opinion upon the following question:

Can a justice of the Superior Court, upon the request of the District Attorney for the Northern District, appoint a special assistant district attorney under the provisions of G. L., c. 12, § 18, when there are regular assistants in office?

G. L., c. 12, § 18, reads as follows: —

If there is no assistant district attorney, the court may allow a reasonable sum, payable from the county treasury, for the services of a clerk to aid the district attorney; and in the northern, eastern, middle and southeastern districts, the court may appoint, for the sitting at which the appointment is made, a competent person to act as an assistant to the district attorney and his compensation, not exceeding six hundred dollars in one year, shall be paid from the county treasury.

In the recent case of *Commonwealth* v. *Sacco*, 255 Mass. 369, 444, the court held that there can be no appointment of a special assistant district attorney if there be in office an assistant district attorney who has been duly appointed.

The restriction applies only in the case of appointments in the Northern, Eastern, Middle and Southeastern districts.

I therefore answer your question in the negative.

Board of Retirement — Death of Employee — Widow's Pension.

If the Board of Retirement finds as a fact that work performed by an employee of the Commonwealth was done in the performance of his duties, and that such work contributed to his death, it may award a pension to his widow.

To the Board of Retirement. 1928 February 3.

You have asked my opinion as to two questions in reference to certain facts which are briefly summarized herein: —

An employee of the Metropolitan Sewerage Division, who was suffering from organic valvular disease of the heart,

was engaged in carrying a heavy pipe, with the aid of another man, from one room at the East Boston Pumping Station to the basement thereof. Immediately after reaching the basement he dropped to the floor and shortly thereafter died, the death certificate giving as the cause of his death organic valvular heart disease. Nothing unusual occurred while the employee was engaged in this work, nor was there anything requiring extra exertion on his part.

Your questions are as follows: —

1. Would it be proper and according to the facts in this case to rule that there were no "injuries" according to paragraph (9) or (10) but that death resulted from a pre-existing ordinary disability of heart disease?

2. Has our Board the legal authority to find that the acceleration of a pre-existing disability of heart disease, without any accidental force being present, but nevertheless causing death in the course of employment, is sufficient "injuries" for the compensation to be awarded to the widow under paragraph (10) of section 2?

As the answer to each question deals directly with the answer to the other, both are considered together.

The pertinent law is contained in G. L., c. 32, § 2, par. (10), as amended by St. 1921, c. 487, § 5, and is as follows: —

If any member is found by the board to have died from injuries received while in the discharge of his duty, and leaves a widow, or if no widow any child or children under the age of sixteen, a pension equal to the retirement allowance to which such member would have been entitled under paragraph (9) had he been permanently incapacitated shall be paid to such widow so long as she remains unmarried, or for the benefit of such child or children so long as he or any one of them continues under the age of sixteen. A person receiving a pension under this paragraph shall not receive from the commonwealth any other sum by way of annuity, pension or compensation.

Paragraph (9), referred to herein, does not affect the action of the Board in this case except in so far as the amount of the pension is concerned, and it follows that the provisions of paragraph (9), to the effect that the injuries must be sustained through no fault of the employee, are not applicable in death cases under paragraph (10).

The mere fact that the employee had been suffering from

heart trouble for some time prior to his death does not of itself take his case out of the provisions of the act. Even if he was so suffering, his widow is entitled to the pension if his death was accelerated or hastened by the work done. Under decisions of the Supreme Judicial Court in somewhat similar cases it has been decided that lifting and other physical effort which causes death to a person afflicted with heart trouble may be an "injury" if it in any way is a contributing cause of the death, and even though it would not have caused death except for the defective heart condition. *Brightman's Case,* 220 Mass. 17; *Fisher's Case,* 220 Mass. 581. Nor, in my opinion, is it of importance that the work in which the employee was engaged was not unusual or of the type requiring extra exertion. If the work was done in the performance of his duties and if it contributed to his death, the Board may well find that the employee died from injuries received while in the discharge of his duty. Whether or not the work done by the employee in this case was a contributing cause of death is a fact to be found by the Board, and if the Board finds that it was such a cause, the widow is entitled to the pension. This, in my opinion, is the whole crux of the case, and it is the duty of the Board, upon all the evidence, to ascertain this fact.

Specifically referring to your first question, I repeat that you can find that there were no injuries, within the meaning of the act, only if upon all the evidence the work done did not contribute to the employee's death, and this is a question of fact which must be determined by the Board.

Assuming the facts stated in your second question to be true, I answer it in the affirmative.

Constitutional Law — Municipalities — Shellfish.

Municipalities may be authorized by the Legislature to establish plants for the purifying of shellfish taken therein.

To the House Committee on Bills in the Third Reading. 1928 February 7.

You have asked my opinion as to the constitutionality of House Bill No. 945, which is as follows: —

A city or town may establish and maintain a plant for the purpose of purifying shellfish taken in such city or town. Such plant shall be established and maintained under the direction of the mayor or board of selectmen or a person designated by said mayor or board. Said mayor or board shall also establish fees sufficient to cover the cost of maintaining and operating the plant, which shall be collected for service rendered thereby.

It is true that ordinarily cities and towns may not engage in a private business, even though such business would be of advantage to its inhabitants. The present act, however, to my mind, obviously contemplates a public purpose, as it is closely connected with the important public purpose of protecting the health of the public. It is a well-known fact that shellfish may constitute a serious menace to the health and well-being of a community, and any reasonable measure contemplated to check or eliminate this menace is consistent with the power of the Legislature. I therefore advise you that, in my opinion, the law, if enacted, will be constitutional.

Municipalities — Employees — Vacations.

Action by a city council, under Gen. St. 1915, c. 60, is a prerequisite to the right of a municipal laborer to receive a vacation by virtue of said statute.

A municipal laborer is entitled to a vacation, under the provisions of St. 1914, c. 217, and St. 1927, c. 131, only while he is upon the pay roll.

To the Commissioner of Labor and Industries. 1928 February 8.

You have asked my opinion upon the following questions:

1. In the case of a city or town which accepted St. 1914, c. 217, is a laborer who is otherwise qualified as required by statute, entitled to a vacation if the city council has taken no action under Gen. St. 1915, c. 60?

2. Is a laborer who worked thirty-two weeks in the aggregate during

the preceding calendar year, and who is discharged at some period in the ensuing year before he has received his vacation, entitled to a vacation?

3. Is a laborer who has worked thirty-two weeks in the aggregate in the course of a calendar year, and who is discharged on the last day of that year, entitled to a vacation in the ensuing year?

4. The act provides that the Department of Labor and Industries shall have all the necessary powers to enforce this statute. Since no penalty is provided for violations of the statute and no prosecution can be instituted against the person violating the statute, what other powers has the Department of Labor and Industries to enforce this law?

1. In answer to your first question, I am of the opinion that a laborer who is employed by a city and who is otherwise qualified is not entitled to a vacation under this chapter unless the city council has taken the action described therein. St. 1914, c. 217, provided as follows: —

Section 1. All persons classified as laborers, or doing the work of laborers, and regularly employed by cities or towns for more than one year, shall be granted a vacation of not less than two weeks during each year of their employment, without loss of pay.

Section 2. This act shall be submitted to the voters of each of the cities and towns of the commonwealth at the next annual state election for their acceptance or rejection, and shall take effect in any city or town upon its acceptance by a majority of the voters voting thereon in the affirmative.

This statute was affected by Gen. St. 1915, c. 60, which provided as follows: —

Any city in which a majority of the voters at the last state election voted to accept the provisions of chapter two hundred and seventeen of the acts of the year nineteen hundred and fourteen may by vote of the city council, approved by the mayor, or by vote of the commission in any city under a commission form of government, require the heads of the executive departments to grant a vacation of two weeks without loss of pay to any person regularly employed by such city who is classified as a common laborer, skilled laborer, mechanic or craftsman in the labor service, as classified by the civil service commission, under regulations established by said commission for cities to which the labor rules adopted by the civil service commission are or may become applicable. If such vacations are authorized, they shall be granted by the heads of the executive departments, and shall begin at such times as in the opinion of the

heads of the executive departments will cause the least interference with the performance of the regular work of the city.

There were several other acts, between this latter act and the effective date of the General Laws, affecting this question. The General Laws repealed all of these acts but one, and that one was in substance re-enacted by the General Laws. Several changes, not affecting the answer to your first question, were made subsequently, culminating in St. 1927, c. 131, which provides as follows: —

> In any town which accepted chapter two hundred and seventeen of the acts of nineteen hundred and fourteen, all persons classified as laborers, or doing the work of laborers, regularly employed by such town, shall be granted a vacation of not less than two weeks during each year of their employment, without loss of pay. In any city which accepted said chapter the city council may determine that a vacation of two weeks without loss of pay shall be granted to every person regularly employed by such city as a common laborer, skilled laborer, mechanic or craftsman. If such vacations are authorized, they shall be granted by the heads of the executive departments of the city at such times as in their opinion will cause the least interference with the performance of the regular work of the city. A person shall be deemed to be regularly employed, within the meaning of this section, if he has actually worked for the city or town for thirty-two weeks in the aggregate during the preceding calendar year. The department of labor and industries shall enforce this section, and shall have all necessary powers therefor.

Under this act it follows that in cities the city council must act before a laborer is entitled to any vacation. This has been the law at all times since the effective date of Gen. St. 1915, c. 60. In towns no action by the selectmen or any other body ever has been or is now necessary. A laborer employed by a town is entitled to his vacation, if otherwise qualified, without any action on the part of the selectmen.

2. As to your second question, I am of the opinion that a laborer who worked thirty-two weeks in the aggregate in the preceding calendar year, and who is discharged at some period in the ensuing year before he has received his vacation, is not entitled to a vacation. The word "vacation"

implies a period of rest between periods of employment, and may not properly be used in reference to a period of rest after employment ceases. It contemplates that a person should be employed at the time it commences. The act states that a person shall be deemed to be regularly employed, within the meaning of the section, if he has actually worked for the city or town for thirty-two weeks in the aggregate during the preceding calendar year. This, however, does not mean that a person qualifies for a vacation even though he is not at the time in the employ of the city or town. The definition purports to define the word "regularly" only, leaving the word "employed" to its ordinary common-sense meaning. Any other construction of the act would be unreasonable and not in accord with the intent of the Legislature.

The above is obviously true with reference to a town which has accepted the provisions of St. 1914, c. 217. St. 1927, c. 131, states that in such a town laborers shall be granted a vacation "during each year of their employment." These words tend to indicate that the person must be employed at the time the vacation is to commence. It is further to be noted that in both cities and towns the vacation is to be given "without loss of pay." These words also imply that the person to whom the vacation is given is on the pay roll at the time the vacation commences. If this were not so, the money paid would be in the nature of a bonus or gift rather than pay.

If a man is discharged arbitrarily, for the sole purpose of depriving him of a vacation, it may well be that the above statement of the law would not be applicable, and I express no opinion as to the law covering such a case.

3. What has been said in reference to the second question applies also to your third question.

4. No penalty is provided for violation of St. 1927, c. 131. The duties prescribed by the act fall upon officers of cities and towns, and in most cases these men will conform to the law even though no penalty is prescribed. In my opinion,

a petition for mandamus could be successfully maintained by the person entitled to the vacation, in the event that his rights under this chapter were denied or abridged. Under the principle laid down in *Attorney General* v. *Apportionment Commissioners*, 224 Mass. 598, it is possible that the Attorney-General might institute a petition for mandamus to vindicate the public right, on the theory that rights conferred by this act benefit not only the laborer but also indirectly inure to the benefit of the public at large.

SEWER — MASSACHUSETTS REFORMATORY — APPORTIONMENT OF EXPENSE.

St. 1913, c. 138, as amended, requires the Commonwealth to pay a part of the expense of the Concord sewerage system, with which the Massachusetts Reformatory is authorized to connect its sewers.

To the Commissioner of Correction. 1928 February 10.

You request my opinion on the following questions relative to the expense of construction of the main sewer line from Concord to Concord Junction: —

1. Is the statute of 1895 still in effect?

2. To what extent was it modified by the law of 1906 authorizing an alternative sewerage system at the Massachusetts Reformatory?

3. Was the 1895 law revived by the trivial amendments passed in 1913?

4. To what extent is the Commonwealth obligated under the law, as it now stands, to contribute to the expense of this improvement, the Commonwealth's share of which, it is stated, will be in the vicinity of $50,000?

I assume, although you do not so state in your letter, that the main sewer line in question was constructed by the town of Concord under the authority of St. 1895, c. 151. This act authorized but did not require the town of Concord to construct and maintain a sewerage system, provided the act was accepted by vote of the town within three years. I am advised that it was so accepted.

The act further provided that whenever the said system should be established the sewers of the Massachusetts

Reformatory and other property of the Commonwealth in Concord should be connected with the main sewer line of the town.

The statute in question, not having been definitely limited in time by its terms or expressly repealed by any subsequent act of the Legislature, has been effective and in force since its passage. I accordingly answer your first question in the affirmative.

Resolves of 1906, c. 49, merely authorized the expenditure of a certain sum in order to provide additional means for the disposal of sewage at the Massachusetts Reformatory. It makes no specific reference to St. 1895, c. 151, and is not inconsistent with it. It therefore does not, either specifically or by implication, modify the latter statute, although the results achieved by works established under it may be a factor to be considered in ascertaining the extent of any obligation on the part of the Commonwealth to compensate the town of Concord for the use of the latter's sewage disposal facilities.

St. 1913, c. 138, amending St. 1895, c. 151, § 8, indicates the intent of the Legislature to treat the earlier act as still in force at that time. The slight verbal changes made by the amendment of the earlier statute do not alter its manifest purpose. Under the law the Commonwealth is obligated to pay for the privileges conferred and benefits received such part or percentage of the construction cost and operating expense of the Concord sewerage system established under St. 1913, c. 138, as amended, as may be agreed upon with the said town, and, in the event of failure to reach an agreement, such compensation is to be determined by three commissioners to be appointed by the Supreme Judicial Court.

Motor Vehicles — Registration — Non-Residents.

A person living in another State, who works regularly as an employee in a factory within the Commonwealth for a period of more than thirty days in the year, is not a non-resident, as that term is defined in G. L., c. 90, § 1.

To the Commissioner of Public Works. 1928 February 10.

You have asked my opinion relative to the meaning of a clause of G. L., c. 90, § 1, in the following language: —

Under the provisions of G. L., c. 90, § 1, a "non-resident" is defined as "any resident of any state or country who has no regular place of abode or business in the commonwealth for a period of more than thirty days in the year." Along the border of our State many residents of other States own automobiles properly registered in the States in which they live, which they operate every day or practically every day into the State of Massachusetts to places where they are employed. For instance, many of them come from Rhode Island to their place of employment in the jewelry factories in Attleboro.

In such cases is the factory where the resident of the other State works a place of business within the definition above quoted in G. L., c. 90, § 1?

I am of the opinion that if a person living in another State works regularly as an employee in a factory within the Commonwealth for a period of more than thirty days in the year he is not a "non-resident" within the terms of the definition set forth in said section 1.

Whether or not in any given instance such employment is regular and in excess of the prescribed period is primarily a question of fact, for the determination of your Department or some division or officer thereof.

The word "business" and the phrase "place of business," when used in statutory enactments, may have, respectively, more than one meaning, depending largely upon the context and the purpose and design of the statutes wherein they occur, as the latter throw light upon the legislative intent in employing the words. In its general or broadest sense the word "business" denotes the employment or occupation in which a person is engaged to procure a living, and that irrespective of whether such person be in the service of another or not. *Goddard* v. *Chaffee*, 2 Allen, 395. Such general meaning should be given to the word as used in the

phrase "place of business" unless the context or the design of the statute wherein it occurs indicates that the word is to be interpreted in a more restricted sense, so as to exclude "trade or calling" or "place of employment," as embraced within the use of the word "business" or "place of business," respectively. *Hanley* v. *Eastern S.S. Corpn.*, 221 Mass. 125 (and cases there cited); *Collector of Taxes* v. *New England Trust Co.*, 221 Mass. 384.

One of the purposes or designs of the instant statute, in regard to the registration of motor vehicles and the licensing of operators thereof, appears to be to require such registration and licensing of all vehicles and operators, respectively, as will render their regulation and identification easy of accomplishment by registration and licensing through the officials of this Commonwealth. Certain exceptions to the strict requirements of the general law in this respect are afforded to owners of vehicles registered or persons licensed in other States, obviously upon the theory that such vehicles and such persons will not be upon the roads of the Commonwealth to the same extent as cars owned by residents or operators who are residents. A person who has a regular place of business in the Commonwealth, in the sense that he has a place where he carries on a trade for hire, is not likely to use the roads of Massachusetts less than one who has a place for the transaction of a business which is something other than a trade or calling. The intent or design of G. L., c. 90, furnishes no ground for asserting that the phrase "place of business," in the clause under consideration, was intended by the Legislature to be interpreted in its narrow sense, so as to exclude places wherein a trade, employment or calling was regularly practiced by an individual, thereby permitting such individual to be deemed a "non-resident" and within the exceptions to the general design of the law.

Those persons who are to have the benefit of the exceptions from the general law in this respect are entitled "non-residents," and the meaning of "non-residents," for the

purpose of the statute, is carefully defined. The definition should be construed so as to give effect to the general design of the statute, which is Massachusetts registration and licensing for cars and operators. By the terms of the definition, owners and operators who come regularly into this State are, by reason of their presumably frequent use of our roads, excluded from the class of "non-resident." Presumable frequency of the use of our roads appears to be the test as to those residents of other States who may avail themselves of the privilege of exception from the general law as to local registration and license. The form of business which a person regularly carries on at a place within the Commonwealth would seem to bear no relation to the frequency of his use of our roads. There appears to be no good reason for differentiating in this respect between a class of persons whose regular business, carried on at a definite place in the Commonwealth, is a trade or calling and those whose business, carried on likewise at such a definite place, is of another type. Both classes may, and probably will, use our roads to the same extent in coming to and returning from their work to a place of abode outside Massachusetts. I do not think that the Legislature, in making this definition, intended to place in one class the man who labors at a bench or in a counting room and in another the man who works in his own executive office, and to make exceptions to the general law applicable to one and not to the other.

Department of Public Health — Water Supply — Hearing.

The Department of Public Health has no authority to reopen a hearing held under G. L., c. 40, § 41, after it has given its approval to a proposed taking for water supply thereunder.

To the Commissioner of Public Health. 1928 February 14.

You have asked my opinion as to whether the Department of Public Health has authority to reopen a hearing held under the provisions of G. L., c. 40, § 41, after it has

given its approval, subsequent to such hearing, to the purchase or taking of land by a city for a source of water supply; and whether or not, if it has such authority, it must grant such a rehearing.

In regard to the particular matter before you, as to which your question is propounded, you advise me that the owner of land involved in the proposed taking was notified of the hearing and that a period of three months was given him, upon his request for delay, in which to appear and state his objections, which he did not do; that the hearing was duly held and notice of approval of the purchase or taking formally conveyed to the interested city, which thereafter did in fact take land in accordance with such approval; that subsequent to such taking the said owner filed with you a petition for a rehearing.

I am not aware of any provision of the statutes which specifically authorizes a rehearing of the matters brought before your Department under G. L., c. 40, § 41; and after its approval has been acted upon by a municipality and a taking made in reliance thereon, it has not, in my opinion, authority to rehear such matters.

County Accounts — Deputy Sheriff — Fees.

Fees of a deputy sheriff who is a salaried chief of police may be allowed for services outside the town in which he serves as such chief.

To the Commissioner of Corporations and Taxation. 1928 February 15.

You request my opinion as to whether, under the provisions of G. L., c. 262, § 50, as amended by St. 1922, c. 377, § 1, forbidding extra payments for "official services performed in any criminal case" to "a deputy sheriff, city marshal or other police officer who receives a salary," an item in certain county accounts for allowance of payment of fees to a deputy sheriff, not the recipient of a salary or allowance in payment for services therefor, who is a salaried chief of police of a town, for serving criminal process in and for towns which maintain no regular police department,

for violations of law therein, is proper for approval by the Director of Accounts.

G. L., c. 262, § 50, provides, in part, as follows: —

> No . . . deputy sheriff, . . . 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 testifying as a witness in a criminal case during the time for which he receives such salary or allowance; . . . but his expenses, necessarily and actually incurred, and actually disbursed by him . . . shall . . . be paid . . . in a criminal case tried in a district court . . . by the town where the crime was committed.

The statute first recites *seriatim* the officials, by title, to whom its provisions, purposing prevention of receipt by salaried officers of double compensation for the same working time, and prohibition of their interest in fees, are applicable. Incumbency of office, receipt of salary or allowance and performance of an official service in any criminal case, by any one of the officials recited, are the circumstances by which the provisions operate, in any given case, to preclude extra payment for "official services." Though the "official services" include any and all services in any criminal case incident to the services required of any one of the officers, they relate to those services, performed by any one of the officials recited, which are incident and peculiar to the services required of such official in the capacity for which he receives a salary or a daily or hourly allowance.

In my opinion, the receipt of a salary for official services as a chief of police of a town, by a person who is also a deputy sheriff, does not, under the circumstances you recite, preclude payment of fees to such person for official services as a deputy sheriff in serving criminal process in and for other towns for violations of law therein, and you are therefore advised that the item as to which you inquire is a proper one for approval by the Director of Accounts.

County Treasurer — County Tuberculosis Hospital Treasurer — Salary.

A county treasurer serving as treasurer of a county tuberculosis hospital may receive compensation for the work of both offices, in the absence of a statute making the duties of the latter position part of those of the former.

To the Commissioner of Corporations and Taxation. 1928 February 17.

You request my opinion whether a county treasurer, in the event he serves as treasurer of a county tuberculosis hospital by appointment of the county commissioners, may receive compensation for such service in addition to his salary as county treasurer.

G. L., c. 35, § 4, establishes the basis of salaries payable to treasurers of certain counties "in full for all services performed by them."

The services, obviously, are those required to be performed by an encumbent as part of or incident to duties as a treasurer of a county, as prescribed by statute.

G. L., c. 111, § 81, as amended by St. 1924, c. 500, § 2, provides for the erection of hospitals in counties by county commissioners for hospital care of certain persons in certain municipalities in the counties. Sections 83 and 85 provide for apportionment and collection of amount for erection and maintenance of the same from the municipalities served.

Such municipalities comprise districts as entities separate from the counties. A hospital so erected for such service to municipalities is therefore a county district hospital. The treasurer of such a hospital is therefore not an employee of the county, as such. *Peck's Case*, 250 Mass. 261, 268.

G. L., c. 111, § 87, authorizes appointment by the county commissioners of officers and employees necessary for the proper conduct of said hospitals.

In the absence of any statute requiring treasurership of a county district tuberculosis hospital as part of the duties of a county treasurer, as such, in any particular county, the services of the former are not included in the services of a county treasurer, for the performance of all of which G. L., c. 35, § 4, prescribes a salary in full, and, in

the event that the county commissioners appoint a county treasurer to serve as treasurer of such a hospital, he may, in my opinion, receive compensation therefor in addition to his salary as county treasurer.

INSURANCE — TITLE INSURANCE COMPANY — COMMISSIONER OF INSURANCE.

The Commissioner of Insurance, in reviewing the articles of a proposed title insurance company, may consider with relation thereto the purposes of the corporation in the light of G. L., c. 175, § 47, cl. 11th.

To the Commissioner of Insurance. 1928 February 23.

You have requested my opinion upon several questions relative to the incorporation of a title insurance company, and have set forth the statement of the purposes for which such company is formed, as contained in its articles of organization submitted to you for your approval.

Your questions are as follows: —

1. May the Commissioner in reviewing said articles consider the purposes contained in the second to fifth paragraphs above quoted?

2. May the Commissioner under said section 49 lawfully approve the purposes set forth in the second, third, fourth or fifth paragraphs above quoted?

3. Do the provisions of said section 49 restrict the purposes to be set forth in the articles of a domestic insurance company to those contained in one or more of the several clauses of section 47 of said chapter, and may the Commissioner lawfully refuse to approve articles containing any purposes other than those set forth in said section 47 as aforesaid?

4. May a domestic insurance company formed to transact business under said clause eleventh exercise all of the powers specified in the said second to fifth paragraphs, and if not, what powers of those so specified may it exercise?

1. I answer your first question in the affirmative.

A distinction is to be drawn between the purposes and the powers of a corporation. G. L., c. 175, § 47, cl. 11th, sets forth the only lawful purposes for which a corporation of the character indicated by the instant articles of organization may be organized. A corporation organized for such

purposes has by implication of law certain powers necessary or convenient to enable it to carry out such purposes. Paragraphs two to five of the articles of organization submitted to you do not purport to set forth any other purposes than those to which such a corporation is limited by the stated statutory clause. Such paragraphs merely purport to define the powers which the corporation may exercise in effectuating such purposes. The incorporators may not by the inclusion, in such defined powers, of powers not necessary or convenient to the carrying out of its designated purposes, but calculated, if exercised, to add to such purposes, evade the limitations of clause 11th and create an organization virtually having purposes additional to those allowed by the statute. The Commissioner is therefore bound to examine all the paragraphs of the articles of organization, with a view to determining whether the powers of the corporation, as therein set forth, are in excess of those which may properly be exercised by a company which may be formed only to effectuate the limited purposes designated in said clause 11th.

Moreover, G. L., c. 175, § 49, as amended, provides: —

> The company shall be formed in the manner described in and be subject to section nine of chapter one hundred and fifty-five, and sections six and eight to twelve, inclusive, of chapter one hundred and fifty-six . . .
>
> . . . the articles of organization . . . shall, with the records and by-laws of the company, be submitted to the commissioner (of insurance) instead of to the commissioner of corporations and taxation, and he shall have the powers and perform the duties relative thereto specified in section eleven of said chapter one hundred and fifty-six.

G. L., c. 156, § 6, to which the formation of the corporation is to be subject, provides that the agreement of association shall state, among other matters, —

> (*h*) Any other lawful provisions for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders.

Under this statutory provision the incorporators have a right in their articles of organization to set forth provisions which define the powers of the corporation. This they have done in paragraphs two to five, as set forth in your communication.

The duties and powers with relation to the articles of organization which are vested in the Commissioner of Corporations and Taxation by G. L., c. 156, § 11, and which by virtue of G. L., c. 175, § 49, the Commissioner of Insurance is to exercise with relation to the corporation now under consideration, are as follows: —

> The articles of organization, the agreement of association, and the record of the first meeting of the incorporators, including the by-laws, shall be submitted to the commissioner, who shall examine them and who may require such amendment thereof or such additional information as he deemed necessary. If he finds that the provisions of law relative to the organization of the corporation have been complied with, he shall endorse his approval on the articles. Thereupon, the articles shall, upon payment of the fee provided by section fifty-three, be filed in the office of the state secretary, who shall cause them and the endorsement thereon to be recorded.

Since the incorporators may set forth in their articles of organization such definitions of the powers of the corporation as they may deem best to provide for specifically, it becomes the duty of the Commissioner of Insurance, exercising similar powers to those given to the Commissioner of Corporations and Taxation in other instances, to examine the articles to determine whether such provisions by way of definition are lawful.

2. I answer your second question in the affirmative with relation to the provisions as to the powers of the corporation. No purposes additional to those set forth in the first paragraph of the articles, as quoted in your letter, appear in the following paragraphs of the articles. I do not perceive any powers defined in such latter paragraphs which are either not incidental to or unconnected with the carrying out of the purposes of the corporation, which purposes are set forth

in the articles in the language of clause 11th of section 47 of the statute. The powers set forth are so defined with relation to applicable statutory enactments that it cannot be said that the provisions of law relative to the organization of the corporation have not been complied with.

3. I answer both inquiries contained in your third question, as written, in the affirmative.

Section 49 is to be read in connection with section 47, and as complementary and not in opposition thereto. See VII Op. Atty. Gen. 532, 536.

4. I answer your fourth question to the effect that, with relation to the specific case to which you have directed my attention, all the powers as they are defined in the particular articles of organization laid before me may be exercised by this corporation to which they pertain, when its formation has been duly completed.

Insurance — Mutual Liability Insurance Company — Dividends.

A mutual liability insurance company may agree to pay, and may disburse, to policyholders whose policies have expired a share in the profits, such as may be fairly allocated to them for the time during which their policies were in force.

To the Commissioner of Insurance. 1928 February 27.

You have advised me to the effect that a domestic mutual insurance company doing business under G. L., c. 175, § 47, cl. 6th, as amended, issuing "motor vehicle liability policies" solely, and subject to the provisions of G. L., c. 175, § 80, as amended —

proposes to issue to persons insured by it during the year 1927, a certificate entitled "Participating Dividend Warrant" which reads: —

"(Name of Company.)

No. ——

This is to certify that John Doe, a policyholder or member for the year 1927, and continuously thereafter, of the Insurance Company, will be entitled upon surrender of this certificate (when called for surrender by the Board of Directors of such Company) to such divi-

dend, if any, as may be declared by the Board of Directors but in no event to be in excess of 20% of the insurance premium paid by such policyholder or member in the year 1927 — the same to be payable out of the profits or earnings of such Company declared on business written during such policy year.

This certificate is transferable only at the home office of the Company in such manner and at such times as shall be determined by the Board of Directors."

The purpose of this certificate is to meet competition in that this company has not declared a dividend to persons insured by it during 1927.

You have asked my opinion upon the following questions relative to the foregoing facts: —

1. May a mutual company lawfully issue a certificate in the form above set forth?

2. Do the words "may by vote fix and determine the percentages of dividend . . . to be paid on expiring policies," occurring in said section 80, permit a company to declare and pay dividends on policies which have expired in contradistinction to policies which have not expired, at the time the declaration is made, or more specifically, may a company, *v.g.*, lawfully declare and pay, in 1930, a dividend in respect to a policy which expired on December 31, 1927?

1. I answer your first question in the affirmative. It has been the policy of this Commonwealth, as evidenced by a long line of enactments, to provide for the payment to holders of policies in mutual insurance companies of such share in the profits of those companies as might fairly be allocated to them for the time in which their policies were in force. It is made clear by the language of the statutes that they are not to be deprived of such benefits by the expiration of their policies. Doubtless, in the absence of such enactments, it might have been said that only such persons as continued to hold effective policies in a mutual company could be entitled to participate in its benefits or be liable for any part of its losses. *Zinn* v. *Germantown etc. Ins. Co.*, 132 Wis. 86. Liability to assessment for loss for a designated period after policy lapsing has been placed upon those insured in mutual companies by a series of statutes, now embodied in G. L., c. 175, § 83.

G. L., c. 175, § 80, provides that the directors may fix the percentages of dividends "*from time to time.*" Even if it be assumed that the duty of the directors requires them to make such fixation during each calendar year, the fact that they have not done so in regard to any particular year does not deprive the policyholder of the right which is given by the statute to participate in any dividend which may be declared as of the year in which his policy expired. A declaration of a deferred dividend applicable to a preceding year, deferred perhaps because impossible of ascertainment at an earlier date, or for any other reason, is not specifically forbidden by the statute, and I perceive nothing inherently illegal in it.

The certificate or "warrant" to which you have called my attention does not appear to me to create any liability upon the insurance company which did not previously exist. It seems to be a mere declaration that the company will fulfill its obligation to the holder of a 1927 policy with relation to any portion of a dividend for such year, when and if the same be properly fixed and determined, which might rightly be allocated to him.

I note that the certificate refers to the policyholder of 1927 as one "continuously thereafter" a policyholder or member of the company. It is obvious that if a dividend for 1927 be declared at a later period, all persons whose policies expired in that year would be equally entitled to their proportion of the benefit thereof, irrespective of whether or not they continued to be members of the company, by virtue of the provisions of said section 80. As the so-called warrant does not, as I have said, give rise to new obligations on the part of the company as to policyholders of 1927, the delivery of the warrant, even with this particular clause therein, to continuing members only does not give to the latter any special favor or advantage in the dividends or any other valuable consideration not open to non-continuing policyholders, and for that reason cannot be said to be in violation of G. L., c. 175, §§ 181–185.

2. I assume that the dividend which you refer to in your second question is one which might properly have been declared in 1927 if it had been possible at that time to make the necessary computations, and upon that assumption I answer your second question in the affirmative.

INSURANCE — FRATERNAL BENEFIT SOCIETY — DEATH FUND.

Money applicable only to death fund purposes may not lawfully be diverted to the payment of expenses.

To the Commissioner of Insurance. 1928 February 27.

You have laid before me the following facts: —

A certain fraternal society is licensed to transact business in this Commonwealth under the provisions of G. L., c. 176.

During the year 1926, its board of directors allocated to the expense fund of the society the sum of $100,000 out of the interest and dividends paid to the society on all of the stocks and bonds owned by it. This sum was, therefore, apparently taken from the accretions of the death fund of the society.

The society contends that it has a right to use any portion of the accretions to its death fund in excess of three and one-half per cent, the rate of interest assumption on its reserve, because its by-laws so provide.

You have asked my opinion upon the two following questions as they relate to the foregoing facts: —

1. Did the transfer of the said fund of $100,000 constitute a violation of G. L., c. 176, § 14.

2. May a society lawfully provide in its by-laws that the accretions to its death fund in excess of the interest assumption on its reserve may be used for expenses?

G. L., c. 176, § 14, with relation to a fraternal benefit society, provides: —

Every provision of the by-laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purposes of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses.

The legislative intent as expressed in this section is plain. It is to the effect that none of the accretions which have in fact actually enured to the mortuary or disability funds shall be used for expenses. It is immaterial that the society by its by-laws may have established some other rule as to the accretions. It is immaterial that the society may have provided for using more than a designated percentage of the accretions for expenses. "Net accretions" to the fund, as those words are used in the instant statute, do not mean such sums as the society may itself determine to leave in its death fund from the profits thereof. It is immaterial whether the sums which the society has determined to leave in its death fund are, in the judgment of the society or in fact, sufficient to secure its actuarial solvency or to provide an adequate reserve. The Legislature has determined that all such sums must be left in the death fund. No other measure of the necessary size of the death fund can be substituted for that adopted by the Legislature, namely, the payments of the members plus the actual or net accretions.

If it be of importance to consider the meaning of the words "net accretions" as distinguished from gross accretions, the same is made clear in that part of the opinion of the Supreme Judicial Court in *Catholic Order of Foresters* v. *Commissioner of Insurance,* 256 Mass. 502, wherein certain peculiar expenditures from the gross receipts of the death fund were held to be properly chargeable as against such fund itself, "as in effect a payment of death claims" rather than payable as expenses, within the ordinary use of that word, from the expense fund. In such case the difference between the total of accretions and the authorized payment would clearly be net accretions, within the meaning of the statute.

The words "net accretions" do not mean that portion of the total accretions of the mortuary fund which the society has itself under a by-law permitted to be added to the fund. This society, by means of its by-laws, has attempted by a

colorable division of the money paid by the members for mortuary purposes into different funds to divert to the payment of expenses sums applicable only to death fund uses, in much the same manner as did the plaintiff in the case of *Catholic Order of Foresters* v. *Commissioner of Insurance, supra,* — a practice held there improper by the court.

I answer your first question in the affirmative and your second in the negative.

CONSTITUTIONAL LAW — CONTRACTS BETWEEN CERTAIN EMPLOYERS AND EMPLOYEES.

A proposed statute prohibiting the making of contracts for the purchase of stock, between employers and employees engaged in hand labor or machine operation, would not, if enacted, be constitutional.

To the Senate Committee on Labor and Industries. 1928 February 29.

Your committee has asked my opinion as to the constitutionality of Senate Bill No. 131 and House Bill No. 673, if enacted into law.

The purpose of both the proposed measures appears to be to prohibit the making of certain contracts between employers and employees, and between those who are about to enter into such relationship to each other. By their terms the proposed measures relate only to such employees as engage in hand labor or machine operation.

It is not clear whether section 1 of this act is intended to require all contracts therein included to be in writing, or whether it merely intends to require copies of such contracts as may be in writing to be delivered to employee or prospective employee. This matter should be clarified by amendment. The answer to the first question hereinafter set forth is based upon the assumption that the first section does not compel such contracts to be in writing, but intends to affect only such contracts as may be in writing.

Such provisions of these bills, set forth in their first sections, respectively, as are intended to require the giving

of signed copies of written agreements which have been entered into with relation to terms of employment to the contracting employee, are, in my opinion, constitutional, as a valid exercise of the police power in a field wherein fraudulent practices may not unreasonably be determined by the Legislature to be likely of occurrence, even though the requirements are limited to a particular class of contracting parties.

The provisions of the proposed measures, such as are embodied in the second sections thereof, respectively, declare null and void contracts of employment which in effect require purchase of the capital stock of the employer by the employee. The provisions obviously are intended to apply only to corporations, on the one hand, and are specifically limited by their terms to workers who perform hand labor or operate machines, on the other. The bills as drawn not only impliedly prohibit the requirement of purchase of stock as a prerequisite to the obtaining or retaining of employment, which might conceivably be regarded as such a coercive measure on the part of an employing corporation as to warrant legislative enactment to protect the workman, but go much farther and render void contracts made between those as to whom the relation of employer and employee actually exists, relative to performance of the designated forms of labor, if such contracts contain as a condition or consideration the purchase of stock by the employee.

It is not a matter of common knowledge that the purchase of stock in corporations by their employees is contrary to the public welfare. The practice is not an uncommon one and it is not impossible that it may be of benefit to employees. It is not plain that hand laborers and machine operators form a special group as to which such forms of contract may not be beneficial. To single out this particular class of workmen and to deny to them and their employers the right to make binding contracts of this character does not, on its face, appear to be a reasonable mode of classi-

fication, but, rather, to be an arbitrary one. There is nothing in the phraseology of the bills which tends to show that the subject matter of the enactment bears a relation to any of the forms of public welfare for the protection of which contracts may be the subject of regulation by the police power inherent in the Legislature.

Much the same considerations are applicable to the third sections of the proposed bills. It may well be that some provisions of employment contracts "restricting the liberty of action" of the designated classes of employees are void under our existing laws. It does not necessarily follow, however, that provisions restricting the liberty of former employees in all forms of action are necessarily so oppressive and subversive of the general good of the community as to permit an interference with the right of contract by the Legislature under the guise of the police power. It is not apparent that the conditions of employment with regard to the special class of employers who may desire the benefits of such contracts, namely, those hiring hand laborers or machine operators, is such as to make their classification as a particular group which may not make contracts permitted to others a reasonable rather than an arbitrary one.

The character of the business to which this legislation relates appears to be a private one, not one necessarily charged with a public use. The Legislature, however, even in relation to business not charged with a public use, may to some extent regulate contracts between employer and employee in order to protect the safety, health, morals or, in a limited sense, the general welfare of the public, but unless the public welfare is so adversely affected the Legislature has no authority, under the guise of the police power or otherwise, to prescribe the conditions or regulate the contracts under which labor shall be performed by men of full age. *Opinion of the Justices,* 163 Mass. 589; V Op. Atty. Gen. 484; *Holcombe* v. *Creamer,* 231 Mass. 99; *Opinion of the Justices,* 220 Mass. 627; *Commonwealth* v. *Boston &*

Maine R.R., 222 Mass. 206; *Bogni* v. *Perotti*, 224 Mass. 152, 157; *Commonwealth* v. *Strauss*, 191 Mass. 545, 550–1; and cases cited in the foregoing.

For the foregoing considerations I am constrained to advise you that, in my opinion, the bills to which you have directed my attention would not, if enacted, be constitutional.

MUNICIPALITY — FIRE DEPARTMENT — FIRE CHIEF.

A chief of a fire department of a town, who makes the duties of his office his vocation, is a permanent member of such department, within the meaning of G. L., c. 32, § 85; and the provisions of said section, once accepted by a town, apply after the town has become a city.

To the House Committee on Bills in the Third Reading. 1928. March 1.

You have asked my opinion upon two questions involved in your consideration of Senate Bill No. 237, entitled "An Act relative to the retirement and pensioning of the chief of the fire department of the city of Gardner."

Your questions are these: —

(1) Is the chief of the fire department of a town which has accepted the provisions of G. L., c. 32, § 85, or corresponding provisions of earlier laws, who holds said office under civil service or other form of unlimited tenure or by election or appointment for a stated term, a "permanent member of the fire department," within the meaning of said section 85?

(2) Do the provisions of said section 85, if accepted by a town, continue to apply to permanent members of its fire department after it has become a city?

1. The words "permanent member of the fire department" or "permanent fireman," as used in our statutes for many years, have a somewhat technical meaning. They connote a man whose occupation is that of a fireman attached to some regularly constituted fire-fighting department, in contradistinction to a "call" fireman, who, though a member of such a department, renders his service to it only upon specific calls therefor, and who does not make fire fighting his vocation. As used in legislative enactments in this Commonwealth the word "permanent," as applied to a

fireman, denotes nothing as to his tenure of office, with relation to its being unlimited or limited, or to the manner in which he is chosen for such office. The application of the words "permanent" and "call" to describe two different types of firemen, classified according to the mode in which they render service, is to be seen throughout G. L., c. 48, as amended, and a similar meaning is to be given to the words as used in G. L., c. 32, as amended.

A chief of a fire department appointed under the provisions of G. L., c. 48, § 42, would appear to be intended by the Legislature to be a "permanent fireman," from the very nature of the duties which he is called upon to perform. In any given instance it would appear to be a question of fact as to whether a particular fireman was to be deemed a permanent or a call member of a department, the determination of that fact depending solely upon a consideration of the character of the service which he was obliged to render and in no way upon the manner of his appointment or the term of his office. A chief of a fire department who was not required to perform the duties of such office merely upon specific "call" would be a permanent member of his department and affected by all pension laws pertaining to permanent members, irrespective of the fact that he was subject "to appointment at stated intervals by the municipal authorities," in the language of Senate Bill No. 237. See *Moffatt* v. *Lowell*, 215 Mass. 92.

Accordingly, I answer your first question in the affirmative, assuming that a chief of a fire department, as a matter of fact, makes the duties of his office his vocation. See IV Op. Atty. Gen. 151; V *ibid.* 469.

2. I answer your second question in the affirmative.

The provisions of G. L., c. 32, § 85, relative to pensions for firemen in towns, are identical in purpose and intent with those of G. L., c. 32, § 80, which applies to firemen in cities. Although the establishment by a city of a system of pensions for firemen is dependent upon its acceptance by vote of a city council, nevertheless, the same system, in

effect, has, under the terms of your question, already been accepted by the municipal body, which is now a city. To hold that mere change in the form of government nullifies the effect of the adoption of the system by the town would be to place a strained construction upon two sections of the same chapter which accomplish identical results. Minor details with reference to the carrying out of the system, which necessarily involve changes therein, such as the performance of the duties of the old town officials by the corresponding new city officers, do not render the old system in opposition to the powers, rights and duties of the city as such. The city succeeds the town, and it and its officials are to carry out the obligations of the old body in so far as these are not in opposition to the new city charter. See *Codman* v. *Crocker*, 203 Mass. 146, 149; *Higginson* v. *Turner*, 171 Mass. 586, 591; *Hill* v. *Boston*, 122 Mass. 344, 357. A change in the form of government of a community does not *ipso facto* abrogate pre-existing law applicable thereto. An act of incorporation does not necessarily annul the rights and privileges of a town; it rather confers on the town a new name with additional powers. *Commonwealth* v. *Worcester*, 3 Pick. 462, 474.

Moreover, it is expressly provided by our statutes as follows: —

> Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in the acts relating thereto. Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities. (G. L., c. 40, § 1.)
>
> Except as otherwise provided by law, city councils shall have the powers of towns; boards of aldermen shall have the powers, perform the duties and be subject to the liabilities of selectmen, except with respect to appointments, and the mayor shall have the powers, perform the duties and be subject to the liabilities of selectmen with respect to appointments, but all his appointments shall be subject to confirmation and rejection by the aldermen, and upon the rejection of a person so appointed

the mayor shall within one month thereafter make another appointment. In cities having a single legislative board other than a board of aldermen, such board shall, so far as appropriate and not inconsistent with the express provisions of any general or special law, have the powers, perform the duties and be subject to the liabilities of the board of aldermen. (G. L., c. 39, § 1.)

Department of Conservation — Venue of Prosecution — Game Laws.

A person who, after killing a pheasant, fails to make a report to the Department, as required by its rules and regulations, may be prosecuted in Suffolk County irrespective of the place of such killing.

To the Commissioner of Conservation. 1928 March 1.

You have asked my opinion as to the local jurisdiction in which a person who has failed to make a report to your Department within twenty-four hours after killing a pheasant may be prosecuted. You have not submitted a copy of the rules and regulations which you advise me require such a report, but I assume, for the purposes of this opinion, that they are in proper form and have such effect by law that failure to comply with their terms in the respect indicated authorizes a criminal prosecution and the imposition of a penalty.

The precise point which you raise relative to the venue of such a prosecution has not been passed upon by the Supreme Judicial Court of this Commonwealth, and its ultimate determination is one for judicial decision. I am of the opinion, however, that proper venue for prosecution of the offense which you have described is in the County of Suffolk, irrespective of the situs of the killing or the residence of its perpetrator. Crimes of omission are ordinarily regarded as committed at the place where the required act should have been performed, and the courts at such place have jurisdiction of the offender even if he has not been personally present at any time therein. The general principle has been stated by the Supreme Court of Indiana, in *State* v. *Yocum*, 182 Ind. 481, as follows: —

> Personal presence is not an indispensable element in the locality of crime. A neglect to do an act is punishable in the county where the act should have been done. . . . As a general rule, an offense which involves an act of commission is committed where the act is done, while an offense involving an act of omission is committed where the act should have been done.

This principle has been applied to cases involving neglect to support or abandonment of a wife or children, the offense in such instances being treated as having been committed at the place where the dependents were when failure to support or to maintain existed as a fact, even though the husband or father was not in the same judicial jurisdiction as the dependents. *State* v. *Dvoracek*, 140 Iowa, 266; *Cleveland* v. *State*, 7 Ga. App. 622; *State* v. *Yocum*, *supra; In re Price*, 168 Mich. 527; *People* v. *Quigley*, 134 N. Y. S. 953. It is also significant that the Supreme Judicial Court has *sub silentio* passed upon a similar situation in the case of *Commonwealth* v. *Acker*, 197 Mass. 91.

So a failure by a railroad corporation, having its usual place of business in one county, to construct a station, as required by law, in another county has been held to give jurisdiction to the courts of the latter county, in which the prescribed act should have been performed. *Louisiana etc. Ry. Co.* v. *State*, 85 Ark. 12.

So the venue of an indictment charging embezzlement for failure to account has been held properly laid in the county where the defendant's duty required him to account. *People* v. *Davis*, 269 Ill. 256.

So the prosecution of a corporation for failure to place the word "incorporated" after its name in an advertisement, in violation of a statute, was held properly to be in the county where the corporation had its place of business and not in the county where it published the advertisement in a local newspaper. *Paracamph Co.* v. *Commonwealth*, 33 Ky. Law Rep. 981; *Commonwealth* v. *Nebo Cons. Coal & Coking Co.*, 141 Ky. 493.

Under your regulations, as you have described them in

your letter, the killer of a pheasant was required to make a written report to the office of your Department in the State House at Boston. The failure to make the report at such place where it was due, within a certain time, constitutes such an omission as will give jurisdiction to the courts sitting in Suffolk County for the determination of criminal cases. The offense might be prosecuted by indictment in the Superior Court or by information in the Municipal Court of the City of Boston.

NOTARIES PUBLIC — JUSTICES OF THE PEACE — COMMISSIONS — EXPIRATIONS.

Commissions of notaries public and justices of the peace appointed on February 29, 1928, for the term of seven years, expire on February 28, 1935.

To the Secretary. 1928 March 7.

You inquire whether commissions of notaries public and justices of the peace who were appointed on February 29, 1928, for the term of seven years, would expire on February 28 or March 1, 1935. It is my opinion that such commissions will expire on February 28, 1935.

METROPOLITAN DISTRICT WATER SUPPLY COMMISSION — POWER TO ACQUIRE REAL PROPERTY OWNED BY A TOWN.

The Commission, under St. 1927, c. 321, may acquire by purchase lands owned by a town, but it may not enter into an agreement for purchase of lands owned by a town under a plan for compensation by which the Commonwealth will become the debtor of the town for a period of unlimited duration.

To the Metropolitan District Water Supply Commission. 1928 March 13.

You request my opinion on two questions relating to proposed action by your Commission in pursuance of its duties and powers as expressed in St. 1927, c. 321. Sections 4 and 12 of said act, to which reference is hereby made, are not herein quoted because of their length.

The first question upon which you request my opinion is whether or not the Commission, in behalf of the Com-

monwealth, may acquire certain land and buildings owned by the town of Dana in its corporate capacity.

I assume from your request that the takings contemplated are reasonable and necessary for the successful and proper completion of the project authorized by St. 1927, c. 321. The language of section 4 is clearly broad and inclusive enough to authorize the purchase of lands or of any interest therein owned by the town of Dana in its corporate capacity. That the powers of the Commission extend thus far is also clearly shown by the fact that section 12 gives a specific remedy at law for a taking of such property. In view of the broad authorization of acquisition by purchase, contained in section 4, it cannot be said that the remedy by suit, contained in section 12, is the exclusive method by which compensation for the taking of such lands may be obtained. In my opinion, section 4 of the act authorizes the acquisition by purchase of the lands in question. Your attention is also called to the inclusive provisions of section 7 of said act.

The second question upon which my opinion is required is whether the Commission may enter into an agreement for the purchase of certain buildings in the town of Dana under a contract the terms of which are substantially those set forth in a memorandum accompanying your request. In substance, the memorandum of the contract proposes compensation for the taking of certain specified property of and in the town of Dana by —

(*a*) an agreement of the Commonwealth to take over and assume the payment of certain notes made by the town of Dana;

(*b*) an agreement that the Commonwealth shall permit the town to have the free use of the buildings taken, until the said buildings must actually be removed by the Commission for the execution of the Swift River project; and

(*c*) the establishment by the Commonwealth of a credit balance in the State treasury in favor of the town of Dana, against which the town may draw, in certain specified

amounts, and upon the unpaid amount of which balance the Commonwealth shall pay to the town, semi-annually, interest at the rate of five per cent per annum.

The contract is not described with sufficient accuracy or in such detail in the memorandum attached to your request as to enable me to pass finally upon the validity of its provisions in detail. Upon broad, general principles I am, however, of the opinion that the agreements described in paragraphs (*a*) and (*b*), being in substance the equivalent of the present payment of compensation in money or the grant of privileges in diminution of damages, are valid and within the general authority of the Commission as set forth in St. 1927, c. 321, § 4, and by the express terms of section 7, which gives the Commission the broadest possible powers of settlement. Said section 7 provides as follows: —

> The commission may either before a taking or afterward make such settlements as it may deem for the best interests of the commonwealth with any person or corporation having a valid claim under this act.

Whether or not the provision for a credit balance in favor of the town of Dana, described above in paragraph (*c*), is a proper exercise of the power of purchase under the provisions of St. 1927, c. 321, §§ 4 and 7, is a more difficult question. If the portion of the contract establishing this credit balance provides merely for the postponement of the payment of the principal sum to be paid by way of settlement, I am of the opinion that the provision is proper. The powers of the Commission with respect to purchases of land are at all places in St. 1927, c. 321, of the broadest possible scope, leaving to the Commission free play for the exercise of a sound discretion. I am of the opinion that the broad powers given to the Commission to make settlements include not only the power to settle a taking claim by the spot payment of the principal sum of damages, but also, with the assent of the landowner, to pay the principal sum of damages at a future day or to make the payment of such prin-

cipal sum subject to such reasonable conditions as may be agreed upon by the parties to the settlement.

On the other hand, if the provisions for the establishment of a credit balance in favor of the town of Dana are intended to constitute the Commission or the Treasurer and Receiver General either a trustee for the town or, in substance, a borrower from the town, I am of the opinion that such provisions are not reasonable conditions of a settlement contract under section 7, quoted above. The suggested provision for the payment of interest would indicate that the Commonwealth was planning formally to become the debtor of the town under a contract unlimited in duration. Such a provision, in my opinion, is beyond the powers of the Commission, since it is inconsistent with the general practice of settlement of land taking controversies, in force when the General Court enacted St. 1927, c. 321, in that it does not provide for payment for the taking by a form of compensation which is either a liquidated amount or the substantial equivalent of a liquidated sum of money.

In rendering this opinion, because of the fact that no specific contract is submitted to me in final form for approval, I express only my opinion as to the general powers of the Commission with respect to certain phases of contracts such as that described indefinitely in the memorandum accompanying the request for an opinion.

DEPARTMENT OF MENTAL DISEASES — SUPPORT OF INMATES OF STATE HOSPITALS — STATUTE OF LIMITATIONS.

St. 1926, c. 281, does not operate to remove the bar of the statute of limitations fixed by G. L., c. 260, § 2, with relation to causes of action to recover for the support of inmates of State hospitals which accrued at least six years before the effective date of said St. 1926, c. 281.

To the Commissioner of Mental Diseases. 1928 March 17.

You have asked my opinion as to whether the provisions of St. 1926, c. 281, amending G. L., c. 260, by adding to the latter a clause which permits actions to recover for the support of inmates in State institutions to be brought within

twenty years next after the cause of action accrues, are to be construed as retroactive.

Prior to the enactment of said St. 1926, c. 281, such actions, like other actions of contract, might be commenced only within a period of six years from the time they accrued. G. L., c. 260, §§ 2 and 18.

The construction of a legislative measure as retroactive, so as to remove the bar of a statute of limitations which has heretofore, by its force through the passage of time, vested persons with a legal defense, is not favored by the courts of the Commonwealth. Although there may be forms of remedies, lost by operation of a statute imposing limitations upon the time in which they may be instituted, that the Legislature may revive (*Dunbar* v. *Boston & Providence R.R. Corpn.*, 181 Mass. 383, 386; *Danforth* v. *Groton Water Co.*, 178 Mass. 472), yet in the absence of specific language in a statute, which in effect removes the bar of a statute of limitations, indicating a legislative intent that the measure should have a retroactive effect, such a statute is not to be interpreted so as to permit the bringing of actions upon causes which have already been barred by the passage of time, under the terms of an earlier enactment. *Wright* v. *Oakley*, 5 Met. 400; *Bigelow* v. *Bemis*, 2 Allen, 496; *Kinsman* v. *Cambridge*, 121 Mass. 558; *Garfield* v. *Bemis*, 2 Allen, 445; *Bucher* v. *Fitchburg R.R. Co.*, 131 Mass. 156.

The language of St. 1926, c. 281, does not necessarily import that it is to act retroactively, and I advise you that it does not operate to remove the bar of the statute of limitations as fixed by G. L., c. 206, § 2, with relation to such causes of action as had accrued at least six years before the effective date of said St. 1926, c. 281.

Motor Vehicles — Registration — Applications.

The Registrar of Motor Vehicles may, in the exercise of a reasonable discretion, waive answers to certain questions on applications for registration of motor vehicles.

To the Commissioner of Public Works. 1928 March 29.

You have requested my opinion as to the right of the Registrar of Motor Vehicles to waive answers to certain questions on applications for registration of motor vehicles.

I am of the opinion that the Registrar may, in the exercise of a reasonable discretion, waive answers to any questions which may be contained on a printed form of application, such as you have annexed to your letter, provided that all the information which is specifically required by G. L., c. 90, § 2, to be contained in such an application is in fact set forth therein.

Department of Conservation — Permit — Fishing.

No official has power to authorize the taking of fish by the use of torches.

To the Commissioner of Conservation. 1928 April 2.

You have asked my opinion as to whether or not the Director of the Division of Fisheries and Game, or any other official of the Department of Conservation, has the right to exercise the rights conferred by St. 1913, c. 519, upon the Commissioners of Fisheries and Game. Said chapter 519 provides as follows: —

Section 1. It shall be unlawful for any person to display torches or other light designed or used for the purpose of taking herring in so much of the waters of Boston harbor as lies within the limits of the city of Boston inside of a line drawn from Moon Island to Point Shirley: *provided, however,* that the commissioners on fisheries and game may grant permits for the display of torches or other lights for the purpose aforesaid, but only on the waters aforesaid, with such restrictions as in their judgment will prevent the same from constituting a nuisance; and said commissioners may at any time revoke any such permit.

Section 2 provides a penalty for the violation of section 1. This chapter has never been repealed or amended.

Gen. St. 1919, c. 350, § 43, provided, in part, as follows: —

> The director of the division of fisheries and game shall exercise the functions of the board of commissioners on fisheries and game under chapter ninety-one of the Revised Laws and acts in amendment thereof and in addition thereto.

This section, which stated that the Director of the Division of Fisheries and Game should exercise all the powers of the Commissioners on Fisheries and Game, was expressly repealed by G. L., c. 282. There is no re-enactment of said section 43 to be found in the General Laws or in the laws passed subsequent thereto, nor am I able to find any existing law which confers upon the Director or upon any other person the authority to issue the permits specified in said chapter 519.

It follows that in the present state of the law it is contrary to law to use a torch in the manner and place specified in said chapter 519, and that no person or department has power or authority to issue permits for this purpose.

Constitutional Law — Restrictions — Release.

A proposed statute to remove restrictions on land on Newbury Street, Boston, would be constitutional if it purported to release only rights of the Commonwealth therein.

To the Senate Committee on Ways and Means. 1928 April 10.

You have asked my opinion as to the legality and propriety of legislation relative to removing certain restrictions on land on Newbury Street in Boston, as contained in Senate Bill No. 234. Said bill provides as follows: —

> For the purpose of enabling the city of Boston to widen Newbury street between Arlington street and Massachusetts avenue in said city, the commonwealth hereby releases any lands situated on said street from the operation and effect of any restriction or stipulation imposed by it or for its benefit which would prevent said lands from being used for highway, street and sidewalk purposes.

In 1850 the Back Bay district, which includes that part of Newbury Street described in the bill, was owned by the

Commonwealth. The Commonwealth filled in the land, which consisted of tidal flats, laid out streets and lots, and sold the lots to various purchasers. These sales covered the period between 1857 and 1879. The deeds by which the lots on Newbury Street were conveyed contained, among others, a restriction to the effect that buildings thereon should be set back twenty-two feet from the street, and this is the restriction which the present bill seeks to release.

The sale of the lots in the Back Bay district, including those on Newbury Street, together with the restrictions thereon, was in furtherance of a general scheme for the development of a desirable residential district, and, consequently, each purchaser of a lot acquired the right to compel the observance by all other purchasers of the restrictions common to all the lots. This right, being appurtenant to the land, passed to the heirs and assigns of the original purchasers. It is to be noted that the thirty-year limitation imposed by G. L., c. 184, § 23, upon the duration of such restrictions does not apply in this case, as the statute makes an exception if the restrictions were imposed prior to its passage or if they are imposed in a deed given by the Commonwealth.

It should be clearly stated in the bill that the release of the restriction is subject to the rights, if there be any, of parties other than the Commonwealth. The Commonwealth cannot by its own act release the rights of other property owners in the Back Bay district (*Allen* v. *Mass. Bonding & Ins. Co.*, 248 Mass. 378), and, as stated above, these owners unquestionably have the right to compel the observance of the restrictions. If the character of the neighborhood affected by the restrictions has so changed as to render the restrictions useless and of no avail, then, under the principle laid down in the case of *Jackson* v. *Stevenson*, 156 Mass. 496, the restrictions would cease to operate or to have any legal effect. The determination of this question is for the courts, in appropriate proceedings,

and may not be determined by the Legislature. In the case of *Allen* v. *Mass. Bonding & Ins. Co.*, supra, at page 385, decided in 1924, the court said: —

> When the extent of the area included within the scheme of Back Bay development is considered, plainly the general character of the district has not been changed.

It is further suggested that the bill clearly state that nothing therein contained shall be construed to operate as a release by the Commonwealth for any purpose other than that set forth in the bill.

The result is that the bill would be constitutional if it purports to release only the rights of the Commonwealth, but if it purports to affect rights of other persons it is invalid. As suggested above, the insertion of a clause to the effect that the release is subject to the rights, if there be any, of parties other than the Commonwealth, will render the bill valid.

INSURANCE — GROUP INSURANCE — MASSACHUSETTS AGRICULTURAL COLLEGE.

Neither the Massachusetts Agricultural College nor its board of trustees is the employer of its professional staff, within the meaning of G. L., c. 175, § 133.

To the Commissioner of Insurance.
1928
April 10.

You have asked my opinion upon the following question: Is the Massachusetts Agricultural College or its board of trustees the "employer" of the members of the professional staff of said college, within the purview of G. L., c. 175, § 133?

G. L., c. 175, § 133, as amended by St. 1921, c. 141, defines group life insurance, and reads as follows: —

> Group life insurance is hereby defined to be that form of life insurance covering not less than fifty employees, with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, or by

duration of service in which case no employee shall be excluded if he has been for one year or more in the employ of the person taking out the policy, for amounts of insurance based upon some plan precluding individual selection, and for the benefit of persons other than the employer: provided, that when the premium is to be paid by the employer and employee jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per cent of such employees may be so insured; or not less than forty per cent if each employee belonging to the insured group has been medically examined and found acceptable for ordinary insurance by an individual policy.

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

Section 5 of said chapter 262 provided: —

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 college shall serve in the Department of Education.

G. L., c. 15, § 4, provided that the Commissioner of Education should be the executive and administrative head of said Department, but by an amendment of said section 4 (St. 1926, c. 322) it was further provided that nothing in said chapter 15 shall be construed as affecting the powers and duties of the trustees of the college as set forth in G. L., c. 75.

G. L., c. 75, § 13, provides, in part: —

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

Similar provisions relative to salaries of various employees of the Commonwealth in other departments and institutions are to be found in the General Laws.

In the codification of the General Laws said section 5 of Gen. St. 1918, c. 262, was not embodied in G. L., c. 75, as were some of the sections of the former statute. The salaries of the professional staff of said college are paid in

full by appropriations made by the Legislature annually, except as to some of such staff who, I am advised, receive at least a part of their salaries from the Federal government. The salaries paid by the Commonwealth, though fixed by the trustees, are subject to rules and regulations of the Division of Personnel of the Department of Administration and Finance. St. 1923, c. 362, §§ 45, 48 and 52. Such of the staff as receive part of their pay from Federal sources have been said to be joint employees of the Commonwealth and the Federal government, and those whose salaries are paid solely by the Commonwealth to be employees of the latter. VI Op. Atty. Gen. 105.

In view of the language of Gen. St. 1918, c. 262, § 5, it cannot well be said that the board of trustees of the college or the college occupies the position of employer as regards the professional staff of the college. No special powers have been given by the statutes to the trustees which would tend to indicate, even in the absence of said section 5, that they occupied any relation to persons serving under them which is not the relation held toward persons similarly placed by the heads of other divisions, boards and institutions of the Commonwealth. Such relation is not that of employer and employee. The Commonwealth holds that relation to all persons in its service, irrespective of which of its many divisions, boards or institutions exercises immediate control over them.

The word "employer" as used in G. L., c. 175, § 133, with relation to group insurance has no peculiar significance which would make it possible to construe it as applicable to any department, division, board or institution created by the Commonwealth which is not in fact or law the employer of the persons who work under its immediate supervision.

Accordingly, I answer your question in the negative.

Constitutional Law — Mayors of Cities — Removal.

A proposed statute authorizing the removal of mayors by a judicial determination would not be unconstitutional.

To the House Committee on Bills in the Third Reading. 1928 April 18.

You have asked my opinion as to the constitutionality of House Bill No. 1183, entitled "An Act providing for the removal of mayors of cities by the justices of the Supreme Judicial Court in certain cases," which provides as follows: —

Section four of chapter two hundred and eleven of the General Laws is hereby amended by striking out, in the seventh line, the word "or" and inserting in place thereof a comma and by inserting after the word "attorney" in the same line the words: — or mayor of a city, — so as to read as follows: — *Section 4.* A majority of the justices may, if in their judgment the public good so requires, remove from office a clerk of the courts or of their own court; and if sufficient cause is shown therefor and it appears that the public good so requires, may, upon a bill, petition or other process, upon a summary hearing or otherwise, remove a clerk of the superior court in Suffolk county, or of a district court, a county commissioner, sheriff, register of probate and insolvency, district attorney or mayor of a city.

The cases of *Attorney General* v. *Tufts*, 239 Mass. 458, and *Attorney General* v. *Pelletier*, 240 Mass. 264, were brought under said section 4. It was there held that district attorneys were not "officers of the Commonwealth," within the meaning of Mass. Const., pt. 2nd, c. I, § II, art. VIII.

Mass. Const., pt. 2nd, c. I, § III, art. VI, provides as follows: —

The house of representatives shall be the grand inquest of this commonwealth; and all impeachments made by them shall be heard and tried by the senate.

Chapter I, section II, article VIII, provides: —

The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladministration in their offices.

If a mayor is an officer of the Commonwealth within the meaning of this section he may be removed by impeach-

ment only, and the Legislature may not provide for his removal in any other manner. In *Attorney General* v. *Tufts, supra,* at page 479, the court, quoting from *Opinion of the Justices,* 167 Mass. 599, said: —

> On the one hand, it seems to us that the various officers of cities or towns do not fall within the class of officers of the Commonwealth, in the sense in which these words are used in this provision of the Constitution. . . . It seems to us that the better construction of the constitutional provision is that the county commissioners are not subject to impeachment as officers of the Commonwealth.

There seems to be no reason to doubt that the court would apply any other law to the office of mayor of a city. It follows, in my opinion, that a mayor is not an officer of the Commonwealth, within the meaning of the constitutional provision, and that there is no objection to the bill under the section of the Constitution set forth above.

There is no conflict with article XXX of the Declaration of Rights. The jurisdiction given to the court is purely judicial in character and establishes a procedure constitutionally appropriate for judicial determination.

Other constitutional objections to this law, in so far as district-attorneys are concerned, were considered and disposed of in the decisions in the two cases above cited, and I am of the opinion that the principles of law there laid down are applicable to the office of mayor as well as to the office of district-attorney.

Registrar of Motor Vehicles — Revocation of License — Judicial Recommendation.

A recommendation that the license of an operator of a motor vehicle be not suspended by the Registrar, if communicated to him by a court before actual revocation, though after transmission of a report of a conviction, may be acted upon by the Registrar; but if received by him after the license has been in fact revoked, it is without effect in connection with such revocation.

To the Commissioner of Public Works. 1928 May 4.

You have asked my opinion concerning the correct interpretation of a portion of G. L., c. 90, § 24, as amended, as it relates to the two following questions: —

1. Can a recommendation of the court referred to above be accepted after the receipt of the court record in the case referred to?

2. Can such a recommendation of the court be accepted after the Registrar has revoked the license of the party referred to in the recommendation?

G. L., c. 90, § 24, as amended, defines certain offenses in connection with the operation of motor vehicles, and establishes penalties therefor. It then sets forth the following provision, as to which in your letter you direct my attention: —

> A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and shall, unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license.

It is obvious from the language of the statute that it is mandatory upon the Registrar to revoke the license of a person convicted under the statute immediately upon receipt of the designated report of conviction. It is conceivable that between the time of the Registrar's receipt of such report and his revocation of the license the statutory recommendation might be received by him. There is no specific requirement of the statute that the report and the recommendation shall be transmitted as one document or even simultaneously. In the event of such an unusual occurrence as the receipt of the recommendation after the transmission of the report but before the actual revocation,

the Registrar could not well refuse to accept the recommendation, and might act in accordance therewith.

There is no specific provision of the statutes relative to the duties of the Registrar in relation to the *acceptance* of a recommendation. It is immaterial whether he does or does not physically accept the recommendation. If a recommendation reaches the Registrar after he has performed the duty of immediately revoking a license upon notice of conviction, he has completed the act required of him, the license stands revoked and the subsequently received recommendation is without effect, as the contemplated act has already been accomplished.

The Registrar, however, has power under the same section, in his discretion, in accordance with certain statutory regulations, to issue new licenses to persons who have been convicted, and it may well be that a recommendation of a court or magistrate which purported to be made under the statutory provision referred to in your letter, although received too late to be considered in relation to the revocation of the license, would aid the Registrar in making a decision as to the propriety of issuing a new license.

The foregoing statements of my opinion as to the law answer both your questions fully.

TAXATION — CORPORATIONS — CHANGE IN FEDERAL NET INCOME — INTEREST ON ABATEMENT OF TAX WITH RESPECT TO SUCH CHANGE.

After the effective date of St. 1927, c. 148, a corporation receiving an abatement of an excise assessed under G. L., c. 63, § 32, as amended, is entitled to interest upon the amount of tax refunded, where the refund is based upon a reduction in Federal net income.

To the Commissioner of Corporations and Taxation. 1928 May 5.

You request my opinion as to your duty upon the following facts: Prior to the date upon which St. 1927, c. 148, became effective, a domestic business corporation seasonably reported, in compliance with G. L., c. 63, § 36, a reduction

in its net income for a previous calendar year, as determined by the Federal taxing authorities. Subsequently, after the date upon which St. 1927, c. 148, became effective, you certified to the Treasurer and Receiver General that the corporation had overpaid its excise tax for the year following the calendar year above mentioned by an amount equal to the tax due upon the difference between the amount of net income originally returned by the corporation to the Federal government for the calendar year in question and the amount of net income upon which the Federal government finally assessed a tax for that year. You did not, however, certify to the Treasurer and Receiver General that the corporation was entitled to a repayment of the amount of the tax thus overpaid, *with interest* from the date of payment to the date of repayment of the tax overpaid. If the provisions of St. 1927, c. 148, apply to this repayment, then the corporation is entitled to a repayment of the overpaid tax *with interest* for the period above mentioned.

G. L., c. 63, § 36, prior to the effective date of St. 1927, c. 148, read as follows: —

> If the assessment made by the federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the federal government, any part of such tax is refunded, the corporation, within ten days after the receipt of such notice of said fact, shall make return on oath to the commissioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the federal government upon the latest determination by it of the proper tax, and of the facts giving rise to the difference. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the state treasurer shall, upon certification of the commissioner, repay within thirty days such difference without any further statutory appropriation therefor.

St. 1927, c. 148, reads: —

Chapter sixty-three of the General Laws is hereby amended by striking out section thirty-six and inserting in place thereof the following: — *Section 36.* If the assessment made by the federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the federal government, any part of such tax is refunded, the corporation, within seventy days after the receipt of notice of said fact, shall make return on oath to the commissioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the federal government upon the latest determination by it of the proper tax, and of the facts giving rise to the difference; provided that in case the corporation appeals from a decision of the commissioner of internal revenue or from a decision of the United States board of tax appeals, the return required by this section shall be made within thirty days after notice of the final determination on such appeal. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax with interest at six per cent from October twentieth of the year in which the original return of the corporation was due to be filed. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the state treasurer shall, upon certification of the commissioner, repay within thirty days such difference with interest at the rate of six per cent from the date of the overpayment without any further statutory appropriation therefor. The provisions of this section shall not be construed to authorize the commissioner to make any assessment, the time for making which has by law expired, except assessment, with interest as aforesaid, of such amount of additional tax as is incident to the increase in federal net income, nor to authorize refund in excess of the amount of tax paid with respect to the difference in net income determined by the federal reduction, with interest as aforesaid.

The statute (St. 1927, c. 148) does not clearly indicate whether it was intended to apply to proceedings pending at the time of its effective date or merely to those Federal tax refunds reported to the Commissioner after the date when the amendment became operative. Some indications there are in the statute itself that the amendment was intended to apply to all overpayments certified and all

assessments made (where the Federal net income taxed was increased by the Federal taxing authorities) after the date when the statute became effective. Both from the sentence dealing with additional assessments and from the sentence dealing with refunds of overpayments it must be deduced that the obligation to pay interest, imposed upon the taxpayer and upon the Treasurer and Receiver General, respectively, arises upon the date of assessment or the date of certification of the overpayment by the Commissioner rather than at the earlier date upon which the Federal change is reported to the Commissioner. If this be so, then, unless the imposition of a duty to pay interest changes some substantive right of the taxpayer, the amendment would apply to all cases where the date of assessment or the date of certification followed the effective date of St. 1927, c. 148.

It is familiar law that statutes relating to remedy and procedure apply to pending cases equally with those arising after their enactment. *Hollingsworth & Vose Co.* v. *Recorder of the Land Court,* 262 Mass. 45, and cases cited. See *Bogigian* v. *Commissioner of Corporations and Taxation,* 248 Mass. 545, 548. Where, however, a statute regulates the substantive rights of the parties, a retroactive construction of that statute is avoided by the courts; and the statute will not be held applicable to cases pending. *Paraboschi* v. *Shaw,* 258 Mass. 531, 533, and cases cited, especially *Hanscom* v. *Malden & Melrose Gas Light Co.,* 220 Mass. 1, 3–5, where the authorities are reviewed at length.

The determination of the question involved in this case depends on an analysis of the nature of a provision for the payment of interest in a statute otherwise solely remedial. Does such a provision change the substantive rights of the parties or is it merely remedial in its nature.

In *Tremont & Suffolk Mills* v. *Lowell,* 165 Mass. 265, the statute there construed provided that "in every judgment which shall hereafter be rendered for the amount of an abatement of taxes" under St. 1890, c. 127, "there shall

be included all charges and also interest on the amount of the abatement made from the date of payment of the tax." It was held that the statute, because of its precise language, applied to judgments rendered after the effective date of the statute. The court does not decide whether a provision for interest is purely remedial or whether it affects substantive rights, for the opinion closes with the following words (at pp. 266–267): —

> As the only parties against whom such judgments can be rendered are municipal corporations, no question of vested rights arises, and no contention is made by the respondent that it was not within the power of the Legislature to enact that interest should be allowed in pending cases.

The decision thus plainly is not conclusive of the present discussion, and no case closer to the situation presented for consideration has been found in the Massachusetts reports. Resort, therefore, must be had to general principles. It has been stated that "the general rule at law is that interest is allowed upon the ground of contract either expressed or implied for its payment, or by way of damages where money is detained, or for breach in the performance of a contract where some duty has been violated." (Mr. Justice Braley in *Goldman* v. *Worcester*, 236 Mass. 319, 320, 321.) Interest, if payable by the Treasurer and Receiver General upon the facts now under consideration, is payable because of the statutory provision which imposes an obligation to pay interest "by way of damages where money" due for taxes has been wrongfully detained. There is, of course, no contractual basis to the interest obligation, if any such obligation there be. The obligation, therefore, is in a real sense distinct from the primary tax liability of the taxpayer or the obligation of the State to repay excessive taxes. It is in the nature of compensation for the delay in withholding money the use of which the Commonwealth should have had for a period of years, in the case of an underpayment by the taxpayer; and in the case of an overpayment of taxes, the interest, if allowed, is to compensate the taxpayer

for the wrongful detention of his money by the Commonwealth. The overcollection of the tax is one wrong; the withholding of the money is a separate and distinct wrong. The gravamen of the taxpayer's complaint is the overassessment of the tax, with its subsequent collection; the injury done to him by depriving him of the use of his money is but an incidental consequence of the over-collection. Similarly, interest upon taxes unpaid by the taxpayer is based upon a liability separate from the original liability to pay taxes, and it has been held permissible, under the Federal Constitution, for a State to provide that taxes which have already become delinquent shall bear interest from the time the delinquency began. *League* v. *Texas*, 184 U. S. 156, 161.

The language of that case indicates that interest, although not precisely on the same basis as court costs as an incident to the remedy provided for the collection of overdue taxes, is in its nature remedial rather than a part of the substantive tax obligation itself. This view is alike consistent with the language and general nature of St. 1927, c. 148, and with the result in the decision in *Tremont & Suffolk Mills* v. *Lowell*, *supra*. I am of the opinion, therefore, that the provision in St. 1927, c. 148, for the payment of interest is purely remedial, as are the other provisions of the section, and that the section applies to all abatements and repayments certified to the Treasurer and Receiver General after the date when the section, as amended, became effective.

One further consideration leads me to this conclusion. By St. 1927, c. 148, G. L., c. 63, § 36, as it then stood, was stricken out and a new section inserted in its place. After the effective date of St. 1927, c. 148, the Commissioner was authorized to certify that tax repayments were due only in accordance with the provisions of the section as thus amended, calling for the repayment of excessive taxes, *with interest*. In a similar situation, the Federal courts have held that interest is computed to the date of the authorization of the tax refund, that, even as to pending petitions for

refund, the statute in force at the date of the authorization of the refund controls the allowance of interest, and that only under that statute are the officials of the Government authorized to act. *Blair* v. *Birkenstock*, 271 U. S. 348, 350–1, affirming *S. C.* 6 Fed. (2d) 679 (Ct. of Ap. D. C.).

I advise you, therefore, that you should certify to the Treasurer and Receiver General that interest is due, from the date of overpayment to the date of refund of the overpayment, upon the amount of the refund in the case which you stated to me in asking my opinion.

Inspector of Animals — Appointment — Continuance in Office until Appointment of Successor.

An inspector of animals, appointed under G. L., c. 129, §§ 15 and 16, holds over, after the expiration of his term, until his successor is appointed.

To the Commissioner of Conservation. 1928 May 7.

You have asked my opinion as to whether or not a duly appointed inspector of animals, who was not reappointed in March as required under G. L., c. 129, § 15, holds over until a successor has been appointed. Said section 15 provides 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.

Section 16 of said chapter 129 provides as follows: —

> A town shall, for each refusal or neglect of its officers to comply with the requirements of the preceding section, forfeit not more than five hundred dollars. The director may appoint one or more inspectors for such town, and 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.

Section 15 places an affirmative duty upon mayors and selectmen to nominate inspectors, and provides that the nominee shall not be appointed until approved by the Director of Animal Industry. If an inspector is duly appointed, it is my opinion that, for the purposes of carrying out the duties assigned by law to him, he holds office until his successor is appointed. It could not be the intent of the Legislature that the important duties assigned to this officer should not be carried out if it should happen that no new appointment was made. It is true that section 16 gives to the Director the power to appoint one or more inspectors for such city or town as fails to comply with section 15, but unless and until this is done, it is my opinion that the old officer can legally perform the functions of the office.

It may well be that such officer who holds over is not entitled to compensation, but, for the purposes of performing the duties of his office, his powers are of the same dignity as if he had been duly nominated and appointed.

This question is not free from doubt, but all uncertainty would be removed if the statute provided that the inspector should hold office until a successor was duly appointed.

TAXATION — FOREIGN BANKING ASSOCIATIONS AND CORPORATIONS — CONSTITUTIONAL LAW — FOREIGN BANKS AS FIDUCIARIES.

No provision of the existing statute law of this Commonwealth imposes an excise upon foreign banking corporations or associations doing business within this Commonwealth as fiduciaries, as authorized by St. 1928, c. 128, with respect to the doing of such business.

To the Commissioner of Corporations and Taxation. 1928 May 12.

You request my opinion as to whether you have the power, under the provisions of St. 1928, c. 128, and the provisions of G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, to impose an excise tax upon such foreign banking associations and corporations as obtain a certificate under the provisions of St. 1928, c. 128, with respect to the activities of such

associations and corporations under the authority of such a certificate.

St. 1928, c. 128, § 1, reads, in part, as follows: —

> Chapter one hundred and sixty-seven of the General Laws is hereby amended by inserting after section forty-five the following new section: — *Section 45A*. The board of bank incorporation may, subject to such conditions as the commissioner may prescribe, grant to a banking association or corporation whose principal office is in another state, a certificate authorizing it to act in a fiduciary capacity under the provisions, so far as applicable, of sections fifty-two to fifty-nine, inclusive, of chapter one hundred and seventy-two; . . . Any such banking association or corporation holding a certificate as aforesaid and appointed a fiduciary shall be subject to the provisions of general law with respect to the appointment of agents by foreign fiduciaries and to the same taxes, obligations and penalties, with respect to its activities as such fiduciary and the activities of itself and the property held by it in its fiduciary capacity, as like associations or corporations having their principal office in this commonwealth, and no such certificate shall be issued to any such banking association or corporation until it has filed with the said board of bank incorporation an agreement in writing in which it binds itself to perform said obligations and pay any such taxes and penalties as aforesaid as may be levied or imposed upon it in this commonwealth.

G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, reads as follows: —

> Every bank shall pay annually a tax measured by its net income, as defined in section one, at the rate assessed upon other financial corporations; provided, that such rate shall not be higher than the highest of the rates assessed under this chapter upon mercantile, manufacturing and business corporations doing business in the commonwealth. The commissioner shall determine the rate on or before July first of each year after giving a hearing thereon and shall seasonably notify the banks of his determination. Appeal by a bank from the determination of the commissioner may be taken to the board of appeal from decisions of the commissioner of corporations and taxation, in sections five and six called the board of appeal, within ten days after the giving of such notice.

The provisions of this section refer back to the definitions of "bank" and "net income" as contained in G. L., c. 63, § 1, as amended by St. 1925, c. 343, § 1, which section reads, in part, as follows: —

"Bank," Any bank, banking association or trust company doing business within the commonwealth, whether of issue or not, existing by authority of the United States or of a foreign country, or of any law of the commonwealth not contained in chapters one hundred and sixty-eight to one hundred and seventy-one, inclusive, and chapters one hundred and seventy-three and one hundred and seventy-four.

"Net income," The net income for the taxable year as required to be returned by the bank to the federal government under the federal revenue act applicable for the period, adding thereto any net losses, as defined in said federal revenue act, that have been deducted and all interest and dividends not so required to be returned as net income except dividends on shares of stock of corporations organized under the laws of the commonwealth and dividends in liquidation paid from capital.

It is obvious that G. L., c. 63, § 2, as thus amended, does not afford any authority to tax a "banking association or corporation whose principal office is in another state," apart from the language of St. 1928, c. 128, § 1, subjecting such banking corporation "to the same taxes . . . with respect to . . . the activities of itself . . . as like associations . . . having their principal office in this commonwealth." "Bank" is defined in G. L., c. 63, § 1, as thus amended, in such a way as to exclude trust companies organized under the laws of other States, and the tax in G. L., c. 63, § 2, as thus amended, is limited to a tax on "banks" as thus defined in section 1. Furthermore, even if these corporations holding certificates be held to be included within the provisions of the tax imposed by section 2, the only tax imposed by that section is an excise with respect to the whole "net income" of the bank, as defined in section 1 of the chapter. Clearly, such a tax, measured by net income wherever earned, upon foreign trust companies doing only an incidental portion of their whole business within the Commonwealth would be unconstitutional. See *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76; *cf. Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271.

The Legislature cannot be presumed to have intended to enact an obviously unconstitutional tax statute, and the purposes of the General Court must be gathered in part from

the powers possessed by it. *Eaton, Crane & Pike Co.* v. *Commonwealth,* 237 Mass. 523, 527. No provision of G. L., c. 63, authorizes the Commissioner of Corporations and Taxation to allocate the net income of any bank taxed under section 2 of the chapter in such a way as to determine the proportion of the net income attributable to corporate activities within Massachusetts and to assess a tax only with respect to such allocated net income — an excise which would probably avoid constitutional pitfalls. In the absence of statutory provision for such allocation, you, as Commissioner of Corporations and Taxation, cannot assess a valid excise with respect to the income earned in Massachusetts of foreign trust companies holding a certificate under St. 1928, c. 128. It is well settled that tax laws are to be construed strictly, and that the power to tax must be conferred in unequivocal terms and cannot be extended by implication. *Union St. Ry Co.* v. *New Bedford,* 253 Mass. 314, 317; *Moulton* v. *Commissioner of Corporations and Taxation,* 243 Mass. 129, 130.

The language of St. 1928, c. 128, § 1, in and of itself imposes no tax and merely subjects foreign banks acting under a certificate granted under the chapter to the taxes imposed upon similar banks having their principal office in Massachusetts, with respect to their activities. The state of the law at the time of the passage of St. 1928, c. 128, was such that there was no tax imposed on those banks acting as fiduciaries and having their principal office in Massachusetts which could constitutionally be imposed upon foreign companies acting under a certificate under St. 1928, c. 128, and I can see no warrant in law, as the statutes are now framed, for the imposition of an excise upon such foreign companies.

It may be suggested that the language of St. 1928, c. 128, in no event contemplated the imposition of any excise or tax upon banks operating under certificates granted pursuant to that act with respect to the activities of those banks or measured by the profits made by those banks from

their Massachusetts business. The distinction made in St. 1928, c. 128, § 1, between the "activities as such fiduciary" and the "activities of itself" would indicate a legislative intent to subject these banks not only to the taxes payable by the bank as a fiduciary on behalf of the beneficiaries of their trusts or upon property held by them as trustees, but also to the payment of taxes on their own behalf for such privileges as they might exercise within Massachusetts. It is a general canon of statutory construction not to regard any word found in a statute as superfluous or redundant, but to give each word some meaning. *Kennedy* v. *Commissioner of Corporations and Taxation*, 256 Mass. 426, 429.

NOTARY PUBLIC — APPOINTMENT — AGE.

The appointment of a notary public who is a minor is not necessarily invalid.

To the Governor. 1928 May 14.

Your Excellency has asked whether an appointment previously made, by a former Governor, of a woman twenty years of age as a notary public was valid, and as to whether the official acts of such appointee are themselves valid.

Neither the Constitution nor the statutes of the Commonwealth contain any provisions as to the age which a man or woman must have attained in order to be eligible to appointment as a notary public.

The origin, history and duties of the office of notary public are considered at length in *Opinion of the Justices*, 150 Mass. 586. The duties of such office have not substantially changed in character since the date of such opinion. The office still remains, as pointed out by the justices, not judicial in character. Since said opinion was rendered, by virtue of Mass. Const. Amend. LVII women have been made eligible to appointment as notaries public.

It is a general principle of the common law that minors, though not eligible to offices which are judicial in character, may be eligible to offices which are ministerial, requiring

skill and diligence in their administration rather than experience or the exercise of grave discretion. *Golding's Petition*, 57 N. H. 146; *Moore* v. *Graves*, 3 N. H. 408; *State* v. *Dillon*, 1 Head (Tenn.), 389. The office of notary public is of the latter type. It has been held that a minor may be validly appointed to the office. *United States* v. *Bixby*, 9 Fed. 78.

Accordingly, I advise you that the appointment of the notary public concerning whom you inquire in your letter was not invalid because of her age at the date of appointment, and that her acts done by virtue of such appointment are not invalidated by reason of the fact that she was less than twenty-one years old at the time of her appointment.

MUNICIPAL EMPLOYEE — BLASTING — PERMIT — BOND.

An employee of a municipality, engaged in the work of blasting carried on by such municipality, is not required to have a permit or to furnish a bond.

To the Commissioner of Public Safety. 1928 May 19.

You have asked my opinion as to whether an employee of a city or town can be required to give a bond, under G. L., c. 148, § 24, before receiving a permit under said section to do blasting for the city or town which employs him, and you have set forth certain facts relative to experience in the past in connection with a blasting operation.

G. L., c. 148, § 24, is as follows: —

> Before the issue of a permit to use an explosive in the blasting of rock or any other substance as prescribed by the department, the applicant for the permit shall file with the clerk of the city or town where the blasting is to be done a bond running to the city or town, with sureties approved by the treasurer thereof, for such penal sum, not exceeding ten thousand dollars, as the marshal or the officer granting the permit shall determine to be necessary in order to cover the risk of damage that might ensue from the blasting; provided, that the marshal or the officer granting the permit may determine that a single and blanket bond in a penal sum not exceeding fifteen thousand dollars is sufficient to cover the risk of damage from all blasting operations of the applicant, either under the permit so issued or under future permits to use explosives in blasting

operations. The bond shall be conditioned upon the payment of any loss, damage or injury resulting to persons or property by reason of the use of keeping of said explosive.

It is the apparent intention of the Legislature, as expressed in the language of said section 24, that under rules and regulations made by your department, under G. L., c. 148, § 10, a permit should be required as a prerequisite to blasting. It is obvious, however, that if a municipality is itself, through its own agents, as distinguished from public officers elected or appointed by the city or town to perform statutory duties with relation to the ways, about to perform the work of blasting, the provisions of said section 24 are not applicable to such municipality. The provisions of said section 24 do not apply to a municipality; for a municipality, like an individual, cannot be both the obligor and the obligee of a bond. It follows, then, that from the language of said section 24 it must be held that it was not the intent of the Legislature that the provisions for a permit and a bond as prerequisite to blasting should apply to a municipality performing such act through its own agents.

It has been said by our Supreme Judicial Court that if a municipality "has chosen to take the work of repairing or constructing a street or bridge out of the charge of the officers designated by law, and itself to assume direct control of the work, it may be held liable for the negligence of the servants or agents whom it employs for that purpose." *Haley* v. *Boston*, 191 Mass. 291; and see cases there cited.

It may well have been felt by the Legislature that when liability for blasting might rest upon a municipality, as such, the financial stability of such a body furnished ample security for the payment of damages which might be incurred, without the necessity of a bond with sureties further to ensure payment thereof; and it is not contemplated by said section 24 that a permit shall be issued to, or a bond exacted from, a mere employee of a municipality when blasting is in fact being carried on by the latter.

Municipalities — City Clerk — Appointment and Removal.

A city clerk is not the head of a department, under G. L., c. 43, §§ 60 and 61.
A city clerk under Plan A, G. L., c. 43, may not be removed in the manner set forth in section 18 of said chapter.

To the Committee on Cities. 1928 May 21.

The Committee on Cities has requested my opinion as to whether, under Plan B for the government of cities, set forth in G. L., c. 43, the city clerk is to be regarded as a head of a department subject to appointment and removal by the mayor, subject to confirmation in the first instance by the city council, and in the second by the approval of a majority of the council.

You have not advised me as to any measure before you for your consideration as to which your question is addressed, but I assume that your inquiry is made to me for the purpose of aiding you in the consideration of some legislative matter.

G. L., c. 43, sets forth several plans or forms of charters for city government. Whichever plan may be accepted by a municipality is intended to be complete in itself, but its particular provisions are governed and controlled by certain sections of the chapter which are common to all the plans and operative upon all. *Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574, 577. Section 18 is such a section common to all the plans, and operative as to Plan B.

With relation to the office of city clerk section 18 provides: —

> 3. The council shall, by a majority vote, elect a city clerk to hold office for three years and until his successor is qualified. He shall have such powers and perform such duties as the council may prescribe, in addition to such duties as may be prescribed by law. He shall keep the records of the meetings of the council.
>
> The person holding the office of city clerk at the time when any of the plans set forth in this chapter has been adopted by such city shall continue to hold office for the term for which he was elected and until his successor is qualified.

These provisions as to the election of a city clerk are controlling and are not abrogated by sections 60 and 61, relative to appointments and removal of heads of departments. The office of city clerk was not intended by the Legislature to be comprehended by the term "heads of departments," as those words are used in said sections 60 and 61.

You have also asked my opinion relative to the appointment and removal of city clerks under Plan A, G. L., c. 43, §§ 52 and 54. These sections, like sections 60 and 61, do not change the effect of said section 18, and city clerks are not to be appointed and removed in the manner set forth in sections 52 and 54. That the intention of the Legislature was to provide a specific mode for the appointment of city clerks, applicable in all instances, irrespective of the manner provided for the appointment and removal of other officials under the four charter plans, is further indicated by section 54, which requires that the notice of removal of a head of a department by the mayor shall be filed with the city clerk, and that the official so removed may file an answer to the reasons for his removal, set forth by the mayor, with the city clerk. Such a provision is obviously inconsistent with a legislative intent that the provisions of said section 18, relative to the city clerk, should be nullified by later sections of the same chapter in which it occurs.

CORPORATIONS — SECURITIES — DEFAULT.

Under G. L., c. 174, § 10, neither the seller's commissions nor his overhead expense shall be charged against the purchaser of a corporate security.

To the Commissioner of Banks. 1928 May 21.

You have asked my opinion as to whether the words "amount paid by said corporation on account thereof," as used in G. L., c. 174, § 10, should be construed to include payments by way of commissions to a salesman or should be limited to payments made to a bond or certificate holder.

The material part of G. L., c. 174, § 10, reads as follows: —

Every corporation subject to this chapter shall provide in every bond, certificate or contract issued by it that, after one fourth of the total amount of instalments therein required has been paid and in any event after instalments for two full years have been paid thereon, in case of default in the payment of any subsequent instalment a paid-up bond shall be given to the holder of said bond, certificate or contract of not less than the full amount paid thereon less any amount paid by said corporation on account thereof, said paid-up bond to mature at the same date as the original bond, certificate or contract.

The intention of the Legislature as expressed in this section, read in conjunction with the provisions of the entire chapter, is that the holder of a security, in case of default in his payments thereon, shall receive a paid-up bond equal to the difference in amount between the sum of his payments and the purchase price of the security which he had intended to buy. It was not contemplated that the seller's commissions nor any part of the latter's overhead or other expense should be passed on to the purchaser.

Betterments — Land devoted to a Public Use.

Under St. 1925, c. 330, as amended, betterments relative to the Southern Artery may not be assessed against the United States Housing Corporation.

To the Commissioner of Public Works. 1928 May 22.

You have informed me that the Department of Public Works, under St. 1925, c. 330, as amended by St. 1926, c. 369, assessed betterments in connection with the construction of the Southern Artery, so called, among other parcels, upon three lots standing in the name of the United States Housing Corporation, and have asked me to advise you as to the powers of the Department relative to the assessments upon said three lots. I assume from the wording of your letter that title to said three lots was in the said corporation at the time of the making of the assessment.

By said St. 1925, c. 330, as amended by St. 1926, c. 369, § 2, the Division of Highways of the Department of Public Works was authorized to take by eminent domain, under G. L., c. 79, lands deemed necessary for the purpose of

carrying out the purpose of the statute by the construction of the said Southern Artery, and was required to assess betterments therefor under the provisions of G. L., c. 80; and it was further provided that "no awards and payments shall be made because of any taking of cemetery land or of any other *land devoted to a public use*, except as required by the Constitution, *and no betterments shall be assessed on any such land.*"

Land belonging to the United States Housing Corporation is *land devoted to a public use.* It is immaterial whether such devotion to a public use arises from Federal or State law. The words as employed in the instant statute apply in either event. That land acquired by the United States Housing Corporation is for a public use is manifest from the Act of Congress, 40 Stat. (U. S.) 550, authorizing the acquisition of land for housing in connection with the prosecution of the World War, and from the Act of Congress, 40 Stat. (U. S.) 595, authorizing the creation of a corporation to hold such land, and from the formation of the United States Housing Corporation to carry out such purpose. See *United States* v. *City of New Brunswick*, 1 Fed. (2d) 741, and *Same* v. *Same*, 11 Fed. (2d) 476.

It is not necessary to enter upon a consideration of the nature of such a corporation as an agency of the Federal government, nor the extent of its immunity from taxation upon its property in the form of betterment assessments by a State. See *M'Culloch* v. *Maryland*, 4 Wheat. 316; *Clallam County* v. *United States*, 263 U. S. 341; *Lee* v. *Osceola etc. Improvement District*, 268 U. S. 643; *United States* v. *City of New Brunswick, supra.* The provisions of the instant statute itself do not authorize the imposition of such an assessment as has been made upon the three parcels of land belonging to the United States Housing Corporation.

Constitutional Law — Pardon — Parole.

The Governor may pardon a prisoner and the Board of Parole may issue a permit to be at liberty to a prisoner, but neither will necessarily free him from the form of restraint specified in the second sentence of G. L., c. 111, § 121.

To the Board of Parole. 1928 May 24.

You have transmitted to me the following communication: —

A man was sentenced on March 24, 1922, to serve eighteen to twenty years at the Massachusetts State Prison for manslaughter. On May 10, 1926, he was transferred to the Prison Camp and Hospital, as he was found to be suffering from tuberculosis.

May I have a ruling as to whether or not it would be possible, under G. L., c. 111, § 121, for His Excellency the Governor to grant a pardon or the Board of Parole to release a man on parole when he had served two-thirds of his minimum sentence, if the disease is active.

The Governor, in the exercise of the power vested in him by the Constitution (pt. 2nd, c. II, § I, art. VIII), may pardon the prisoner to whom you refer. If the pardon is unconditional it will operate so as to cause "the expiration of his sentence," within the meaning of G. L., c. 111, § 121, forthwith (see VIII Op. Atty. Gen. 327). Likewise, under the statutory authority of G. L., c. 127, §§ 128–131, as amended, the Board of Parole has authority to act and may grant a special permit to be at liberty to the said prisoner at the time indicated in your communication. When such a permit has been issued, the date of its becoming effective may also be construed as "the expiration of sentence," within the meaning of said section 121. The confinement of the prisoner in the Prison Camp and Hospital, under G. L., c. 127, § 109, does not withdraw him from the jurisdiction of the Board, vested in it by G. L., c. 125, § 7, and specifically made applicable to inmates of the Prison Camp and Hospital by G. L., c. 127, §§ 128 and 129, as would a commitment of a prisoner to a State hospital for the insane (see V Op. Atty. Gen. 141), nor does such confinement prevent the exercise of the power of pardon by the Governor, as does a commitment to a State hospital of one

found not guilty of murder on account of insanity (see V Op. Atty. Gen. 591).

Nevertheless, the granting of a pardon or the issuance of a permit to be at liberty may not operate of itself to free a prisoner, such as you have described, from the form of restraint specified in the second sentence of said G. L., c. 111, § 121. This restraint is not imposed as a punishment, nor because of the existence of any effective sentence of a court, but solely as a means of protecting the general public health. The determination of the necessity for its imposition and the length thereof are placed by the Legislature in the sound discretion of the attending physician of the institution where the prisoner has been confined.

Said section 121, in substantially the form in which it stands today but not including pulmonary tuberculosis, which was added by St. 1920, c. 306, was enacted by St. 1891, c. 420, which antedated the original enactment of G. L., c. 127, § 129, in so far as it relates to paroles for inmates at the Prison Camp and Hospital, by St. 1904, c. 243, and St. 1906, c. 243, and antedates G. L., c. 125, § 39, concerning the Prison Camp and Hospital, in its original form, St. 1898, c. 393. It does not appear that any of the statutes relative to parole contemplate the working of a repeal of the provisions of restraint for persons suffering from diseases set forth in G. L., c. 111, § 121. Since the provisions relative to such restraint, in the second sentence of said section 121, are not operative until after the expiration of sentence, it is obvious that a pardon, which may be said to cause a sentence to expire, does not have the further effect of preventing the enforcement of the restraint made necessary by disease.

The provisions of G. L., c. 111, § 121, have been on our statute books in substantially their present form for over thirty-five years. It does not appear that their constitutionality has been questioned. They purport to be such an interference with the liberty of a certain class of persons as may be justified as a health measure under the general

doctrine of the police power inherent in the sovereign, and in the absence of authoritative judicial decision to the contrary should be regarded as binding by all executive and administrative officials.

Insurance — Group Policies — Fraternal Benefit Association.

Membership in a benefit association is not a condition pertaining to employment, under G. L., c. 175, § 133, as amended, which makes possible the insurance of the members of such an association in a policy of group insurance to the exclusion of fellow employees not members.

To the Commissioner of Insurance.
1928
May 24.

You have stated in a communication to me as follows: —

It has come to my attention that certain policies of group life insurance have been issued to employers in this Commonwealth covering the lives of such of their employees as are members of a mutual or fraternal benefit association composed of their employees and operated for their benefit.

And you have asked my opinion upon the following question relative thereto: —

Is membership in such a mutual or fraternal benefit association "a condition pertaining to the employment," within the meaning of G. L., c. 175, § 133, or may a life insurance company lawfully issue such a policy insuring only such employees as belong to such an association?

I answer your question in the negative. It is plain from the terms of G. L., c. 175, § 133, as amended, that the legislative intent was that all employees of a given employer, or at least all those engaged in the same general type or kind of work for such employer, should constitute a distinct group for the purpose of receiving the benefits of insurance. It is possible that there may be conditions growing out of the employment, such as locality or time of work, which may likewise permit the formation of distinct groups for the purpose of insurance. Nevertheless, membership in a benefit association is not one of "the conditions of employ-

ment," as those words are used in said section 133, even though membership in such association is limited to employees of the employer seeking group life insurance. To create a special group within a larger class, all of whose members work under the same conditions actually pertaining to their employment, merely because the members of such special group belong to an association to which the other individuals of the class are not admitted, would be an unreasonable discrimination against such latter individuals. The fact that membership in such an association is limited to the employees of the one seeking group insurance does not of itself make such membership one of "the conditions pertaining to the employment" in any but such an indirect sense as not to be within the ordinary meaning of the words used in the statute.

Insurance — Life Policies — Incontestability — Date of Issue.

The words "date of issue," as used in G. L., c. 175, §§ 132–134, describe a time which may in part be fixed by agreement of insurer and insured.

To the Commissioner of Insurance. 1928 May 28.

You have called my attention to certain facts and to certain provisions of the statutes relating to insurance policies, in these words: —

G. L., c. 175, §§ 132 and 134, provide that life insurance policies issued in the Commonwealth shall contain certain provisions, including a provision that the policy shall be incontestable after two years from its "date of issue."

A certain life insurance company has filed a form of policy under said section 134 which contains the aforesaid provision, together with a stipulation that the date of issue of the policy is the date of the execution thereof set forth in the teste clause.

You have asked my opinion upon the following questions of law: —

1. What date is meant by the words "date of issue" as used in said sections 132 and 134?

2. May the insured and insurer agree that the date of the execution thereof or any other date is the "date of issue" of a life insurance policy, or may the parties lawfully define in such a policy what is meant by the words "date of issue" as used in said sections 132 and 134?

I am of the opinion that the words "date of issue," as used in G. L., c. 175, §§ 132 and 134, as amended, were not intended by the Legislature to have the meaning of a certain, fixed, invariable point in the series of actions which go to the complete formation of contracts of life insurance, without regard to all the circumstances surrounding the making of any particular contract and excluding the expressed intention of the parties concerning the time of such issue, which intention constitutes one of the surrounding circumstances. The Legislature has determined that the "date of issue" of a policy shall be taken as the time from which the period of two years before the policy becomes incontestable is to be reckoned, but it has not defined the precise meaning of the words "date of issue." The words themselves, as used with relation to a policy of life insurance, are ambiguous. They are susceptible of several meanings. They do describe a point in the negotiation of a policy which exists with relation to each policy written, but which may vary in its position among the several actions included in the negotiations with the circumstances surrounding the making of any particular contract. The expressed intention of the parties as to the point in such series of actions which shall be, as between themselves, the "date of issue" of the policy is an important, if not a determinative, circumstance in fixing what is such date of issue as regards a particular policy. It follows that the parties to the contract may make clear by written expression of agreement, in connection with the policy, what is their intention as to the point among the contractual negotiations which they intend to constitute the "date of issue." Such expressed intention will govern the determination of what was in fact the date of issue of a particular

policy, provided that such intention does not run so wholly counter to the other circumstances surrounding the making of the contract as to indicate that the expression of intention is merely colorable and not an indication of the real intention.

It is clear that there are at least three points in the negotiation of a policy which may be agreed upon as the "date of issue" of the policy by the contracting parties, namely: The time of delivery and acceptance; the time of preparation and signing of the instrument by the officers of the insurance company, irrespective of the date of delivery to the assured; and the date inserted in the policy purporting to be the date of the instrument itself. Which one of these is the date of issue of any particular policy is to be determined by the intent of the parties, as that can be gathered from all the circumstances surrounding the making of the contract, including any actual expression of intention by the insurer and the insured. As to whether there are other meanings which may properly be attached to the words "date of issue," when interpreted in the light of all the surrounding circumstances, I express no opinion in the present absence of authoritative expression of judicial opinion in relation thereto.

The Supreme Judicial Court of this Commonwealth has said with relation to the word "issue," in *Coleman* v. *New England Mutual Life Ins. Co.*, 236 Mass. 552, 554, —

> Ordinarily by the "issue" of an insurance policy is meant its delivery and acceptance whereby it comes into full effect and operation as a binding mutual obligation. . . . Sometimes it is used in the sense of the preparation and signing of the instrument by the officers, as distinguished from its delivery to the insured.

The Supreme Court of the United States, in a case decided since the opinion in *Coleman* v. *New England Mutual Life Ins. Co.*, *supra*, *Mutual Life Ins. Co. of New York* v. *Hurni Packing Co.*, 263 U. S. 167, has held that the words "date of issue," as used in a policy of life insurance, with relation

to incontestability arising two years after the date of issue, may mean the actual date inserted in the written policy, when such date was intended by the parties to have such meaning, whether such date so inserted refers to the actual time of the execution of the instrument, to the time of its actual delivery or to neither. See also: *Russ* v. *Great Southern Life Ins. Co.*, 6 Fed. (2d) 940; *New York Life Ins. Co.* v. *Renault*, 11 Fed. (2d) 281; *Great Southern Life Ins. Co.* v. *Russ*, 14 Fed. (2d) 27; *Northern Life Ins. Co.* v. *Schwartz*, 19 Fed. (2d) 142.

Since a determination must be made of the intent of the parties as to what shall be, in any specific instance, the "date of issue" of a policy, in connection with all the circumstances surrounding the making of the contract, in order to decide what is the "date of issue" of such policy, with a view to establishing when the period of its incontestability begins, I know of no principle of law nor of any statutory provision which forbids or renders contrary to public policy an insertion of an agreement as to what shall be taken to be "the date of issue," showing the intent of the parties with relation thereto, in the policy itself.

CONSTITUTIONAL LAW — FIRE INSURANCE — RATE MAKING.

Rate making for policies of fire insurance may be undertaken by the Legislature.

To the House of Representatives. 1928 June 2.

You have asked my opinion "as to the constitutional right of the Commonwealth to determine or to supervise classifications of the risks and the rates to be made and charged therefor by fire insurance companies transacting business in this Commonwealth," in connection with the consideration of a resolve pending before the General Court, which provides "for a study by a special commission relative to the classification of risks and the rates to be made and charged therefor by fire insurance companies in this Commonwealth."

The constitutionality of rate making and classification as to fire insurance by a State Legislature appears to have been established under the Federal Constitution by the decision of the Supreme Court of the United States. *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389.

The Supreme Judicial Court of Massachusetts has said, in *Opinion of the Justices*, 251 Mass. 569, 610, that the conclusion reached in said decision "is equally sound under the Constitution of the Commonwealth."

Moreover, the Supreme Judicial Court of this Commonwealth has upheld the power of the Legislature to fix rates and classifications in connection with automobile liability insurance. *Opinion of the Justices*, 251 Mass. 569.

The exercise of the power to fix rates and classifications, either by the Legislature itself or by public officials to whom the authority is delegated by the General Court, must be governed by certain fundamental principles which to some degree limit the extent of the power. No rate may be established which is not sufficient to yield a fair net return on the reasonable value of the property used or invested for doing the business. Rates and classifications, when established, are subject to review by the judicial branch of the government, for the purpose of determining whether they are unjust, unreasonable and confiscatory, judged by the standard of a fair net return. Provision for such review by the courts must be embodied in any act of legislation which purports to fix rates and classifications. *Opinion of the Justices, supra.*

Subject to the limitations which I have outlined, the Legislature has the power, under the Constitution of the Commonwealth, to determine classifications of the risks and the rates to be made and charged therefor for fire insurance companies transacting business in this Commonwealth in respect to property within Massachusetts.

OPINIONS

OF

JOSEPH E. WARNER, ATTORNEY-GENERAL

DEPARTMENT OF AGRICULTURE — DIVISION OF ORNITHOLOGY — PUBLICATIONS.

The Department of Agriculture has not the authority to purchase matter for publications under Resolves of 1921, chapter 5, and later resolves. The work necessary for such publications should be prepared by the Division of Ornithology itself.

To the Commissioner of Agriculture. 1928 June 20.

You have asked my opinion "as to whether a contract entered into by and between the Commonwealth of Massachusetts, by its Commissioner of Agriculture, and Mr. Edward H. Forbush, for the purchase of a certain manuscript of facts relative to the birds of the Commonwealth, would be in conflict with the provisions of existing laws of this Commonwealth."

You advise me that Mr. Forbush was formerly Director of the Division of Ornithology, and was retired from the service on April 23, 1928, having then reached the age of seventy years; that he has a manuscript compiled by him over a considerable period of time, which you state to be his own property; and that such manuscript is necessary to supplement the work of the present personnel of said Division in completing the third volume of a report on birds, authorized to be made by the Resolves of 1921, chapter 5, which reads as follows: —

RESOLVE PROVIDING FOR THE PREPARATION AND PUBLICATION OF A REPORT ON THE BIRDS OF MASSACHUSETTS.

Resolved, That the department of agriculture is hereby authorized, subject to such appropriations as may be made, to prepare a report on the birds of the commonwealth, including the facts ascertained by the

director of the division of ornithology regarding the economic value, geographical distribution and life history of such birds.

The printing of said third volume of the report provided for in 1921 has been authorized by the Resolves of 1927, chapter 25, and by the Resolves of 1928, chapter 13, and appropriations for such printing and for distribution have been made.

These resolves undoubtedly give an implied authority to the Department of Agriculture to make contracts necessary for and incidental to the printing and distribution of the volumes of the report.

It does not appear from the terms of the resolve of 1921 that the Legislature intended to give authority for the purchase of manuscript or other literary material from individuals unconnected with the public service, to be embodied in the report. It seems rather to have been the intent of the Legislature, as expressed in the provisions of the resolve of 1921, that the preparation of the report was to be done by persons in the service of the Commonwealth and that the report was to contain an account of data ascertained by the Director of the Division of Ornithology in his official capacity, without extra cost therefor. If, as you say, the manuscript now in the hands of the former Director is his personal property and the Commonwealth is not entitled to the information contained in it, I am of the opinion that there is no authority vested in any one by the existing legislation to purchase or to contract for the purchase of the same. The General Court might by appropriate action extend the powers of the Department of Agriculture so as to permit it to contract for the purchase of manuscript or data from private individuals, but at the present time the Department does not appear to possess such authority.

Taxation — Corporations — Change in Federal Net Income — Interest on Additional Assessment of Excise with Respect to Such Change.

After the effective date of St. 1927, c. 148, an additional assessment of an excise laid in accordance with G. L., c. 63, §§ 32 and 36, as amended, should include an assessment of interest where such assessment is based upon an increase in Federal net income.

To the Commissioner of Corporations and Taxation. 1928 June 22.

You request my opinion with respect to the following situation: A corporation has reported, in accordance with the provisions of G. L., c. 63, § 36, a change made by the Federal government in the amount of its net income as returned to the Federal taxing authorities. This change was made prior to the effective date of St. 1927, c. 148. No assessment with respect to the increased amount of net income was made by you in accordance with the provisions of G. L., c. 63, § 36, prior to the effective date of St. 1927, c. 148. Two questions now arise:

1. In making an assessment with respect to such increased net income after the effective date of St. 1927, c. 148, can interest be included in the assessment upon the additional amount of tax incident to the increase in Federal net income?

2. Assuming that you have already made an assessment without interest since the effective date of St. 1927, c. 148, with respect to the increase in Federal net income, is it now possible for you to make an additional assessment of the interest due upon that amount at the rate of six per cent from October twentieth of the year in which the original return of the net income in question was due to be filed by the corporation?

Reference is made to the reasoning contained in the opinion furnished by this office under date of May 5, 1928, in which you were advised that refunds made pursuant to G. L., c. 63, § 36, carry interest if certified subsequent to the date when St. 1927, c. 148, became effective, although the change was made and notice thereof given prior to that date. The reasoning of that opinion would lead to the conclusion, in answer to the first question raised above, that

in making an assessment with respect to the increase in Federal net income you may include interest, as provided by St. 1927, c. 148. The decision in *League* v. *Texas*, 184 U. S. 156, 161, *et seq.*, shows clearly that there is no objection under the Federal Constitution to such an assessment. I can see no other objection to such an assessment.

I must also advise you that it is your duty to assess interest upon the taxes assessed by you since the effective date of St. 1927, c. 148, with respect to increases in Federal net income reported prior to the effective date of St. 1927, c. 148, where you have neglected to include interest in the original assessment. I can see no objection to making such additional assessment within a reasonable time after the original assessment incident to the increase in Federal net income has been made.

G. L., c. 63, § 36, as amended by St. 1927, c. 148, places no limitation upon the time within which an assessment with respect to an increase in Federal net income must be made, and no limitation exists other than that contained in G. L., c. 63, § 45, as amended by St. 1922, c. 520, § 7. It is not necessary to decide, for the purpose of this opinion, whether that section limits in any degree the assessment provisions of section 36, as amended. I have been unable to discover any statutory prohibition upon the correction of an assessment by the Commissioner within a reasonable time after the assessment is made under the provisions of section 36, and in the absence of such prohibition and in view of the affirmative direction of section 36 to assess the tax due *with interest*, I feel that interest should be assessed.

Schools — Pupils — Free Transportation — State Forest Reservation.

A pupil of the public schools living in a State forest reservation is entitled to free transportation by the town within which he resides.

To the Commissioner of Education. 1928 June 23.

You have asked my opinion upon the question as to whether children of school age, residing within the limits of a town upon land purchased by the Commonwealth and held by it as a State forest reservation, are entitled to the benefits of the provisions of law, embodied in G. L., c. 71, § 68, for free transportation to an appropriate town public school situated more than two miles from their place of residence.

By the terms of G. L., c. 76, § 1, as amended, a child of school age, with certain designated exceptions, is required to attend a public school of the town in which he "resides," and under G. L., c. 71, § 68, his transportation to such school by such town, if the child lives more than two miles from the school where such attendance should be given, may be required of the town by the Department of Education.

Although a child may live upon the land of a State forest reservation, it cannot be said that he does not by reason of that fact reside in the town within the boundaries of which that part of such reservation lies whereon his place of abode is fixed.

There is no specific provision of the statutes which purports to withdraw from persons living on State forest reservations the rights which they otherwise possess in connection with the public school system as residents of the towns within whose bounds they reside. The Legislature has not by direct terms, nor by implication from any statutory enactment, so withdrawn the lands of the State forests from identification with the respective towns wherein they lie as to deprive those living in such forest reservations of the common right of access to the schools in the general public school system of the Commonwealth.

The power now vested in the said Department by G. L.,

c. 71, § 68, renders the opinion of the Supreme Judicial Court in *Davis* v. *Chilmark*, 199 Mass. 112, inapplicable to the situation which you have called to my attention in your letter, and earlier opinions of such court with relation to children residing upon land used by the Federal government are likewise inapplicable (*Newcomb* v. *Rockport*, 183 Mass. 74, and cases there cited); and the opinion of one of my predecessors in office (V Op. Atty. Gen. 435) is not inconsistent with the view which I have expressed.

Accordingly, I am of the opinion that children of school age living upon land within a State forest reservation are entitled to free transportation by a town to a public school more than two miles away in precisely the same degree and to the same extent as are other children of like age and similarly situated living within a town but not upon a State reservation.

SAVINGS BANKS — INVESTMENTS — BANK STOCK.

A savings bank may not invest more than $100,000 of its funds in the purchase of bank stock, irrespective of the par value of such stock.

To the Commissioner of Banks. 1928 June 25.

You have asked my opinion with reference to the interpretation of G. L., c. 168, § 54, cl. 7th, which authorizes investment of the funds of savings banks in the following language: —

> In the stock of a banking association located in the New England states and incorporated under the authority of the United States, or in the stock of a trust company incorporated under the laws of and doing business within this commonwealth, but such corporation shall not hold, both by way of investment and as security for loans, more than twenty per cent of its deposits in the stock of such associations or companies, nor in any one such association or company more than three per cent of its deposits in, nor more than one hundred thousand dollars nor more than one quarter of the capital stock of, such association or company.

The particular inquiry which you make of me in relation to the interpretation of the foregoing statutory provisions is as follows: —

> The question upon which I respectfully request your opinion is whether the $100,000 limitation has reference to the amount of funds which may be used to purchase and invest in bank stock or whether it refers to the par value of the stock so invested in.

In the earliest statute dealing with the investment of the funds of savings institutions in bank stock no specific limitation was placed upon the amount of its funds which a savings institution might so invest, although a designated limit was placed upon the amount of the stock of any one bank which such an institution might acquire, the obvious purpose of the legislation being to prevent a savings institution from acquiring the control of a bank of another. These provisions of limitation originating with St. 1834, c. 190, § 7, have been continuously retained in other acts dealing with the general subject, beginning with R. S., c. 36, § 78, and are now embodied in the last clause of the instant statute, G. L., c. 168, § 54, cl. 7th, by the words "nor more than one quarter of the capital stock of, such association or company."

By St. 1855, c. 294, a limitation was first placed upon the amount of its own funds which a savings institution might invest in the stock of any other corporation. This provision has come down through re-enactment in a series of statutes until it is now set forth in the instant statute in the following words: —

> But such corporation shall not hold, both by way of investment and as security for loans, more than twenty per cent of its deposits in the stock of such associations or companies, nor in any one such association or company more than three per cent of its deposits in, nor more than one hundred thousand dollars.

The attempt to codify in a single sentence both the limitations as to the amount which might be invested in bank stock and the amount of bank stock which might be acquired gives rise to a certain apparent confusion in the reading of said clause 7th. The meaning of the clause, however, is clear when the sources of the two kinds of limitations therein

referred to are set forth, one as in said St. 1834, c. 190, § 7, and the other as in said St. 1855, c. 294, which latter enactment reads as follows: —

Sect. 1. No savings bank in this Commonwealth shall be allowed to invest more than ten per cent. of its deposits, nor, in case such percentage amounts to one hundred thousand dollars, more than one hundred thousand dollars of its deposits, in the capital stock of any one corporation.

Sect. 2. Any savings bank in this Commonwealth that may have invested a larger amount of its deposits than is expressed in the foregoing section, in the capital stock of any one corporation, shall reduce the same to the limits in said section named within twelve months after the passage of this act.

Both the limitations upon the amount of money which might be invested and the amount of stock in any one institution which might be acquired were first combined in a single section in St. 1863, c. 175, § 2, in the following terms: —

No savings bank or institution for savings shall hold both by way of investment and as security for loans, more than one-half of the capital stock of any corporation, nor invest more than ten per cent. of its deposits, and not to exceed one hundred thousand dollars in the capital stock of any corporation.

That the words "stock of any corporation," as used in St. 1855, c. 294, and in St. 1863, c. 175, had been interpreted to include bank stock, although the latter was not designated by name in the earlier acts, is made plain by the provisions of St. 1863, c. 234, entitled "An Act in relation to savings banks and institutions for savings holding bank stock," which read: —

Savings banks and institutions for savings holding stock in banks which may become banking associations, under the provisions of section sixty-one of the act of congress, entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," may continue to hold such stock in such banking associations.

The limitations both as to amount of money which might be invested and the amount of stock in any bank which

might be acquired were codified in a single clause of St. 1876, c. 203, § 9. By the phraseology of chapter 203 the intent of the Legislature with relation to the two forms of limitations and the intent that not over $100,000 of the funds of a savings bank should be invested in the stock of any other bank are made plain, and when read with due consideration of its relation to this statute of 1876 the meaning of the terms of the instant statute, G. L., c. 168, § 54, cl. 7th, becomes clear.

St. 1876, c. 203, § 9, reads, in part, as follows with relation to the deposits of savings banks: —

> All such deposits and the income derived therefrom . . . shall be invested only as follows: —
>
> . . . . . .
>
> *Fourth.* In the stock of any bank incorporated under the authority of this state; or the stock of any banking association located in this state, and incorporated under the authority of the United States; or on the notes of any citizen of this state with a pledge as collateral of any of the aforesaid securities at no more than eighty per cent. of the market value and not exceeding the par value thereof: *provided, however,* that such corporation shall not hold, both by way of investment and as security for loans, more than one-quarter of the capital stock of any one bank or banking association, nor invest more than ten per cent of its deposits, nor more than one hundred thousand dollars, in the capital stock of any such bank or association. Savings banks may deposit on call in such banks or banking associations, and receive interest for the same, sums not to exceed twenty per cent of the amount deposited in said savings banks.

In view of the sequence of legislation which has been outlined, it appears reasonably obvious that the instant statute prohibits the investment of more than $100,000 of the funds of a savings bank in the stock of any one other banking association. It is immaterial whether or not such bank stock at any given time sells above its par value. The test of the legality of the investment in this respect is not the market value or other value of the bank stock purchased but the amount of money which has been expended from the funds of a savings bank for its acquisition. An actual

expenditure of more than $100,000 of the funds of a savings bank may not be made for the purchase of stock of a single bank.

Accordingly, I answer your question to the effect that the $100,000 limitation, which originally was enacted with the apparent intention on the part of the Legislature to secure wide diversity in the investment of savings bank funds, has reference to the amount of funds which may be used to purchase the stock of any bank, and does not refer to the par value of the bank stock the acquisition of which is sought as an investment.

State Forests — Improved Land — Fencing.

The provisions of G. L., c. 49, relative to fences are not applicable to lands of the Commonwealth.

To the Commissioner of Conservation. 1928 June 25.

You have in a recent communication advised me of the following facts: —

There are now under title of the Commonwealth over 100,000 acres of forest land, having many miles of exterior boundaries, the major portions of which are along land privately owned and used by several of the owners for pasturage or other farm activities.

In the administration of the State forest areas the Department activities consist of plantings, thinnings, improvement cuttings and other forms of forestry practice that tend to produce a desirable tree crop on any given area, but no pasturage is permitted.

In connection with these facts you have asked my opinion upon certain questions of law, in the following language: —

The purpose of this letter is to ask if, in your opinion, the areas upon which the above-mentioned activities are carried on each year constitute improved land, within the meaning of G. L., c. 49, § 3; and if so, is the Commonwealth liable to pay one-half of the cost of maintaining boundary fences; and also I should like to know if, where no improvement work of any kind is carried on on State forest areas, the Commonwealth must pay one-half of the cost of maintaining boundary fences against land that is improved by the adjoining owner.

The provisions of G. L., c. 49, §§ 1–20, relative to fences have in their essential terms existed in substantially their present form for many years, most of them from 1785 or earlier. They do not purport to be applicable to lands held by the sovereign, and I am not aware of any judicial decision in which they have been construed as being so applicable. There does not appear to be any statute by which the Commonwealth has specifically made the provisions of said chapter 49 effective as to lands held by it. In the absence of consent upon the part of the Commonwealth to subject lands held by it in its sovereign capacity to the authority of local fence viewers, it cannot be said that such authority can be exercised with respect to its lands.

It does not appear, from an examination of the various statutes relative to the acquisition of forest land by the Commonwealth, that it takes or holds such lands in any other capacity than as the sovereign for purposes appertaining to the general public welfare, although in dealing with such lands it may possibly from time to time act in making a contract with relation thereto outside "the plane of its sovereignty." *Boston Molasses Co.* v. *Commonwealth*, 193 Mass. 387.

Any claim which may exist in relation to neglect to fence, under G. L., c. 49, accrues as a result of prior action and determination by fence viewers, and though such claim may properly be considered as an obligation which is enforced as if it were *ex contractu*, though it arises *ex lege*, so that it would be of the class of claims for which recovery may be had against the Commonwealth under G. L., c. 258 (*Murdock Parlor Grate Co.* v. *Commonwealth*, 152 Mass. 28), nevertheless, since the proceedings of the fence viewers are essential to the creation of the claim and are at least quasi judicial in character, the Commonwealth cannot be made a party or subject to such proceedings in the absence of express consent on its part, and therefore such claims cannot come into being as against it.

Inasmuch as I am of the opinion that the provisions of

G. L., c. 49, relative to fences, are not applicable to lands of the Commonwealth, it becomes unnecessary for me to answer your questions relative to the precise nature of duties and obligations relative to fences as set forth in said chapter.

DEPARTMENT OF PUBLIC HEALTH — SHELLFISH — IMPORTATIONS.

The Department of Public Health is not required by G. L., c. 130, as amended, to take any action relative to shellfish imported from foreign countries.

You have asked my opinion relative to an interpretation of G. L., c. 130, as amended by St. 1928, c. 269, by the following question: —

> Will you kindly inform me what action, if any, this Department must take regarding shellfish imported into Massachusetts from other countries?

To the Commissioner of Public Health. 1928 June 25.

I am of the opinion that section 144A of G. L., c. 130, which was added by St. 1928, c. 269, was not intended by the Legislature to apply to foreign countries, but that the words "grounds outside the Commonwealth," referred to therein, are limited in their application to the territory of States of the Union. The statute refers to "the *state* where such grounds are situated," and the intent of the Legislature that section 144A shall be applicable only as to the jurisdictions comprised within the United States is made apparent by the context, by the tenor of the other sections of G. L., c. 130, relative to shellfish, and by the reference in section 144A to "*interstate commerce*" in shellfish.

It is recognized by judicial opinions that the interpretation of the word "state" in statutes, as meaning only a State of the Union, where the context does not preclude it, is proper. *Houston etc. R.R.* v. *Inmon*, 63 Tex. Civ. App. 556; *Wynne* v. *United States*, 217 U. S. 234; *Eidman* v. *Martinez*, 184 U. S. 578; *People* v. *Black*, 122 Cal. 73;

Employers' Liability Ass. Co. v. *Commissioner of Insurance*, 64 Mich. 614.

I therefore answer your question to the effect that your Department is not required by section 144A to take any action regarding shellfish coming to Massachusetts from foreign countries.

DEPARTMENT OF EDUCATION — COMMISSIONER — CONVEYANCE OF LAND.

The Commissioner of Education has authority, under certain conditions, to convey land to a town.

To the Commissioner of Education. 1928 June 25.

You have requested my opinion as to whether the Department of Education is authorized to transfer a certain parcel of land in its control to the town of Framingham for highway purposes.

The provisions of St. 1927, c. 135, as they amend G. L., c. 30, § 44, by the addition of a new section, are as follows: —

SECTION 44A. A commissioner or head of a state department having control of any land of the commonwealth may, in the name of the commonwealth and subject to the approval of the governor and council, sell and convey to any county, city or town, or transfer to the control of another state department, so much of such land as may be necessary for the laying out or relocation of any highway.

From the terms of this statute it is apparent that the Commissioner of Education rather than the Department has authority to sell and convey land in the control of the Department to a town for the purpose of laying out or relocating any highway. The words "sell and convey" would seem to indicate an intention that a real consideration should pass from the town to the Commonwealth, equivalent to the fair market value of the land transferred; and the conveyance is subject to the approval of the Governor and Council, and such approval would include necessarily an approval of the amount of the consideration.

The form of conveyance by the town should be so drawn

as to set forth that the conveyance is not for highway purposes generally but for the purpose of laying out or relocating a highway, whichever it may be, specifying the highway, and should also contain the amount of the actual consideration.

Having these matters in mind and acting in accordance with these suggestions, I am of the opinion that you have authority, with the approval of the Governor and Council, to sell and convey to the town of Framingham the land in control of the Department of Education concerning which you have inquired.

Witness — Summons in Adjoining State — Forfeiture.

The Commonwealth is entitled to receive the fine or forfeiture laid upon a witness summoned to give testimony in an adjoining State, under G. L., c. 233, §§ 12 and 13, for failure to obey a duly issued process.

To the District Attorney for the Northern District.
1928
July 20.

You have written me as follows: —

A witness is duly summoned by the State of New York in full compliance with G. L., c. 233, §§ 12 and 13. The witness fails to appear, and at the request of the New York authorities proceedings are instituted by me, as District Attorney, in the district court of the witness' residence. The court orders the maximum amount of $300 paid as a forfeiture, under the statute. This money is paid to the clerk of the district court.

The New York authorities request reimbursement out of this forfeiture for the amount paid the witness, and expenses. The general question on which I require an opinion is as to whether the proceedings for forfeiture, although in the name of the Commonwealth of Massachusetts, are undertaken on behalf of the summoning State, so that all or any part of the amount of the forfeiture should be paid over to that State.

You request my opinion upon the following questions relative to the facts which you have set forth as above: —

Should the amount of the forfeiture be paid over by the clerk of the district court to the District Attorney for disposition?

(*a*) If not, what disposition should the district court clerk make of the payment?

(*b*) If so, should the District Attorney pay over all or any part thereof to the representative of the summoning State, and if a part, to what department of the government should the balance be paid?

I am of the opinion that the entire amount of the forfeiture ordered by the court should be paid over, on receipt thereof by the clerk of the district court, to the town in which the witness was when process was served upon him. In this instance the inference from the statements in your communication would indicate that it was the town of his residence.

The original form of the act, now embodied in G. L., c. 233, § 13, is St. 1873, c. 319, and reads: —

> Section 1. If the clerk of any court of record in any state adjoining to this Commonwealth, shall certify that a criminal prosecution is pending in such court, and that a person residing in this Commonwealth is supposed to be a material witness therein, any justice of the peace for the county in which such witness may reside, shall, on receipt of such certificate, issue a summons requiring such witness to appear, and testify at the court in which such cause is pending.
>
> Section 2. If the person on whom such summons is served, and to whom is paid or tendered double the fees allowed by law for travel and attendance of witnesses in the supreme judicial court of this Commonwealth, besides double travelling expenses for the whole distance out and home by the ordinary travelled route, shall neglect without a reasonable excuse, to attend as a witness at the court in such summons mentioned, he shall forfeit a sum not exceeding three hundred dollars for the use of the Commonwealth.

The provision contained therein relative to the forfeiture being "for the use of the Commonwealth" was omitted in the codification of the Public Statutes, but the latter contained a provision relative to fines and forfeitures generally, providing that the same should be paid to the counties.

P. S., c. 217, § 1, provides: —

> All fines and forfeitures recovered in criminal prosecutions or exacted as a punishment for any offence or for the violation or neglect of any duty imposed by statute, and all sums recovered on forfeited recognizance, shall, where no other provision is especially made by law, be paid to the respective counties.

By St. 1890, c. 440, § 5, it was provided that fines and forfeitures paid in any district court, where no other provision is made by law, were to be paid to the city or town

in which the offense was committed. The terms of said St. 1890, c. 440, § 5, are now contained in G. L., c. 280, § 2. G. L., c. 233, §§ 12 and 13, which provide for the instant form of forfeiture, are silent as to whom it shall be paid. It follows, then, that in virtue of said G. L., c. 280, § 2, it should be paid to the town where the offense was committed.

It is obvious that the Commonwealth, which has succeeded to the rights of the Crown to receive fines, and forfeitures equivalent thereto, as is the one under consideration, may by its Legislature provide for payment thereof to one of its subdivisions, and I am of the opinion that, in the absence of statutory provision therefor, such a forfeiture may not be apportioned by the court or paid to any one other than the Commonwealth or such other governmental agency as is specially designated, — in this instance the town where the offense was committed. *Bryant* v. *Rich's Grill*, 216 Mass. 344; *Nelson* v. *Ewell*, 2 Swan (Tenn.), 271.

The offense of refusing to appear and be sworn as a witness when prosecuted under a criminal complaint has been said, with relation to venue, to be committed at the place named in the subpœna where the testimony was to be given. *State* v. *Scott*, 89 N. J. L. 726; *State* v. *Brewster*, 89 N. J. L. 658; *State* v. *Brewster*, 87 N. J. L. 75.

It is manifest, however, that this rule does not apply to the offense which is the subject matter of G. L., c. 233, §§ 12 and 13. The offense there described appears rather to be one against the dignity of the Commonwealth, in disregarding the process issued by a justice of the peace within the Commonwealth directing the one named therein to perform an act outside the Commonwealth. The venue accordingly appears, as by the law of the particular case which you have called to my attention, to be that of the local district wherein the defendant resides. It would follow that the town where the offense was committed would be the town, within said district, in which the defendant resided when process was served upon him, and hence that such town would be entitled to the amount of the forfeiture,

or fine, as the former might with equal propriety have been called in the statute.

There is nothing in G. L., c. 233, §§ 12 and 13, as is evident when read in connection with St. 1873, c. 319, which indicates an intent to divest the Commonwealth of its right to receive the fine or forfeiture in question in favor of a foreign sovereign.

I answer your first question in the negative.

(*a*) I answer this question to the effect that the district court clerk should pay over the amount of the forfeiture to the town in which the defendant had his residence at the time when the witness' summons was served upon him.

(*b*) In view of the foregoing, this question requires no answer.

Metropolitan District Commission — Easements — Acquisition.

The Metropolitan District Commission became vested with an easement formerly acquired by the city of Boston by adverse use in Beacon Street, Brookline.

To the Metropolitan District Commission. 1928 July 25.

You request my opinion as to the right of the Commission to maintain water pipes laid in land owned by one Korkland abutting upon Beacon Street in Brookline. The land in question was formerly part of Beacon Street as then located, and the pipes were originally laid therein by the city of Boston, acting under legislative authority (St. 1880, c. 126). In 1887 the part of the way in question was discontinued by action of the town, under authority of St. 1887, c. 18, and apparently, in 1889 or shortly thereafter, the town gave a deed of this land to Korkland's predecessor in title.

In my opinion, the right of the city of Boston to maintain the pipes in the land in question ceased when the use of that land as a public way was discontinued. It is doubtful whether the Legislature could preserve the water pipe easement after the easement of travel, of which it was an incident, was discontinued; but however that may be, no

legislative intent is here disclosed to attempt such a result. See *Natick Gas Light Co.* v. *Natick,* 175 Mass. 246; *New England Tel. & Tel. Co.* v. *Boston Terminal Co.,* 182 Mass. 397; *Boston Electric Light Co.* v. *Boston Terminal Co.,* 184 Mass. 566.

It would seem, however, that the city had acquired by adverse use a right to maintain the pipes in the Korkland land. The discontinuance was in 1887 and the conveyance by the town, if that is material, was probably no later than 1890.

Assuming that the city of Boston had acquired the easement by adverse use, you suggest a further question as to whether the Metropolitan Water and Sewerage Board succeeded to that right. That Board, by St. 1912, c. 694, was authorized to take "the main water supply pipes belonging to the city of Boston located in the town of Brookline." Although nothing is said as to taking the easement to maintain those pipes, such authority would no doubt be inferred. The taking by the Board from the city was of the pipe line through Beacon Street, as said street is now "or was formerly" laid out, and includes all the "property and rights acquired by the city of Boston by taking or purchase and now owned by it in connection with the said pipes." The word "purchase" includes acquisition of title by prescription. 23 Am. & Eng. Ency. L., 2d ed., p. 463, citing cases; Wharton's Law Lex. 8715.

In my opinion, therefore, the Board became vested with any easement that the city had acquired.

Insurance — Insured — Medical Examination.

A beneficiary under a contract of life insurance is not subject to the provisions of G. L., c. 175, § 123, relative to medical examination, even if by the terms of the policy he may in certain contingencies become one of the insurer's risks.

To the Commissioner of Insurance.
1928
July 26.

You have set forth certain facts and have asked my opinion with relation to the application to them of G. L., c. 175, § 123, as amended, as follows: —

G. L., c. 175, § 123, as amended, provides, with exceptions not material to this request, that no life insurance company shall issue a policy of life insurance without having given the "insured" a prescribed medical examination.

A certain life company doing business in this State proposes to issue a policy of insurance on the life of a minor. The father is named as beneficiary in the policy, the proceeds thereof being payable to him upon the death of the minor. The application for the policy is signed by the father, who is the contracting party with the company.

The policy contains the following provisions: —

"The Company will waive payment of all subsequent premiums on this policy, continuing the insurance in full force and effect, the same as if premiums were being duly paid, if . . . John Doe . . . (father of the minor insured), hereinafter referred to as the Applicant, becomes totally and permanently disabled as hereinafter defined, or in event of the death of the Applicant, provided such disability or death occurs prior to the anniversary of this policy on which the age of the Insured at nearest birthday is twenty-one years and prior to the anniversary of the policy on which the age of the Applicant at nearest birthday is sixty years, subject to the conditions stated herein. Such waiver shall commence with the premium due on the anniversary of this policy following the receipt of due proof of such disability or death."

The foregoing facts raise the following question, upon which I respectfully request your opinion: Is the applicant and beneficiary an "insured" within the meaning of said section 123?

One pertinent portion of G. L., c. 175, § 123, as amended, reads as follows: —

No life company shall, except as herein and in sections one hundred and thirty-three and one hundred and thirty-four provided, issue any policy or policies of life or endowment insurance upon a life within the commonwealth without having within ninety days prior thereto made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner; provided that an inspection by a com-

petent person of a group of employees and their environment may be substituted for such medical examination in case of a policy of group life insurance as defined in section one hundred and thirty-three.

I am of the opinion that the word "insured," as used in G. L., c. 175, § 123, as amended, refers only to the individual to whom a policy is issued insuring his life, and has no reference to the beneficiary of such policy, even though such policy contains contractual provisions, as in the instant matter to which you have called my attention, which may be said to constitute a contract of insurance with the beneficiary, within the meaning of G. L., c. 175, § 2. Such contract of insurance with the beneficiary is subsidiary to the principal contract of life insurance made between the company and the person on whose life the policy is written. Although the word "insured" has had more than one meaning attached to it in the opinions of courts, under various circumstances, I am unaware of any instance in this Commonwealth in which the word, as used in a policy of life insurance, has been interpreted by the Supreme Judicial Court as meaning any one other than the person upon whose life a policy has been written, irrespective of who might be the applicant and beneficiary of such policy. The word as commonly used in connection with life insurance refers to an individual whose life is the principal subject of a policy.

G. L., c. 175, § 123, as amended, in substantially the same form as it stands today with relation to those parts applicable to the question before me, was enacted by St. 1895, c. 366. It contained the same words as occur in the present statute — "prescribed medical examination of the insured." I am advised that in 1895 such a clause, with relation to a beneficiary of a life insurance contract, as appears in the matter which you have called to my attention was unknown in the writing of life policies; that it is uncommon even at the present time; and has never before been presented for the approval of the Commissioner of Insurance in this Commonwealth.

From these considerations it appears that the intention

of the Legislature, as expressed in the wording of the instant statute, was to provide for a medical examination of the individual whose life constituted the main subject matter of the policy, and did not extend to providing for such an examination of any other person, irrespective of any contractual relations which might arise under the policy between the company and such other person.

One reason which may have actuated the Legislature to require prescribed medical examinations of insureds is the advisability of restraining to some extent the writing of extra-hazardous risks by life insurance companies. If the same reason applies to the acceptance of beneficiaries who become risks of a company to an extent less than the face of the policy, the Legislature might by appropriate and unequivocal language provide that such beneficiaries should in like manner be required to submit to a medical examination, but such a requirement cannot be read into the law in the absence of an expression of legislative intent in this regard.

Accordingly I answer your question in the negative.

Department of Correction — Massachusetts Reformatory — Authority to build a Dam.

A dam may be built upon a brook as to which the Commonwealth is a riparian owner, by its officials, subject to the rights of upper riparian owners.

To the Commissioner of Correction.
1928
August 21.

You have requested my opinion upon the following questions: —

1. May the Massachusetts Reformatory build a dam aeross Nashoba Brook, which runs through the property of the Commonwealth, the dam to be so arranged that at all times except during the ice-cutting season the level of the water would remain as at present, and during the ice-cutting season the water level would be raised by flashboards?

2. May the reformatory officials cause the water to be raised so that the meadows of other owners would be flooded to an extent no greater than at times of normal spring high-water level?

The erection of a dam such as you have described, for the purpose of cutting ice, would constitute a reasonable use of the waters of Nashoba Brook by the Commonwealth as a riparian owner. The rights of riparian owners are stated at length in *Taft* v. *Bridgeton Worsted Co.*, 237 Mass. 385, 388–389; *S. C.*, 246 Mass. 444. See also *Collins Mfg. Co.* v. *Wickwire Co.*, 14 Fed. (2d) 871; *Isbell* v. *Greylock Mills*, 231 Mass. 233; *Stratton* v. *Mount Hermon Boys' School*, 216 Mass. 83; *Roach* v. *Sturdy*, 250 Mass. 357.

Briefly summarized, a riparian owner has the right to make a reasonable use of water as it passes through his land, having due regard to the correlative rights of other riparian owners above and below. I call your attention to the requirements of G. L., c. 130, §§ 17–19, with respect to fishways, which should be complied with in the erection of a dam, in so far as applicable.

1. Assuming that the officials in charge of the said reformatory have been duly authorized by the Department of Correction to make use, for the designated purpose, of land of the Commonwealth under their control, I answer your first question in the affirmative upon the facts which you have set forth.

2. An answer to your second question must necessarily depend upon the extent to which lands of upper riparian owners are overflowed by the raising of the dam during ice-cutting seasons. Small and trivial flowage of such lands would be regarded as injuries not meriting compensation, under the doctrine laid down in the cases of *Stratton* v. *Mount Hermon Boys' School*, *supra*, and *Isbell* v. *Greylock Mills*, *supra*. Any flowage, however, which perceptibly prevented an upper riparian owner from having the normal use of any of his property during the season of ice cutting would be an infringement of his property rights, for which he would be entitled to compensation.

Cases decided under the Mill Act, now G. L., c. 253, are not applicable to the situation which you describe.

Insurance — Industrial Life Policy — Surrender Value.

Prior to 1908 it was unlawful to make a contract for a surrender value of an industrial policy to be payable otherwise than in money.

Subsequent to 1908 and prior to the effective date of St. 1928, c. 205, such a contract might have been lawfully made, but it may not be so made since the enactment of said St. 1928, c. 205.

To the Commissioner of Insurance. 1928 September 14.

You have asked my opinion upon the following questions: —

1. Was it lawful for a domestic life insurance company and a person insured under an industrial life policy described in R. L., c. 118, § 76, and issued while said section was in force, to agree, prior to the effective date of St. 1907, c. 576, § 80, that the surrender value of such policy should be applied to the purchase of extended term insurance instead of being paid in cash as set forth in said section 76?

2. Was it lawful for such a life company and the insured under such a policy described in R. L., c. 118, § 76, and issued while said section was in effect, to agree, subsequent to the effective date of St. 1907, c. 576, § 80, and prior to the effective date of St. 1928, c. 205, that the surrender value of such policy be applied as aforesaid instead of being paid in cash as set forth in said section 76?

3. Was it lawful for such a company and the insured under such a policy described in St. 1907, c. 576, § 80, and issued while said section was in effect as to industrial life policies, to agree, prior to the effective date of St. 1928, c. 205, that the surrender value of such policy should be applied as aforesaid instead of being paid in cash as provided in said section 80?

4. Is it lawful for such a company and a person insured under such a policy described in R. L., c. 118, § 76, or in St. 1907, c. 576, § 80, and issued while either of said sections was in effect, to agree, subsequent to the effective date of St. 1928, c. 205, that the surrender value be applied as aforesaid instead of being paid in cash as set forth in said section 76 or 80?

1. I answer your first question in the negative. The last sentence of R. L., c. 118, § 76, reads as follows: —

> Any condition or stipulation in the policy or elsewhere which is contrary to the provisions of this section, and any waiver of such provisions by the insured, shall be void.

This provision rendered it unlawful for the insurer and the insured to enter into such an agreement as you describe in your question.

2. I answer your second question in the negative. In whatever respect St. 1907, c. 576, § 80, may be said to have changed the law with relation to agreements made subsequent to the effective date thereof, concerning the manner of payment of the amount of the surrender value of policies of industrial insurance, yet said statute, in section 79, provided: —

> All policies issued prior to the first day of January in the year nineteen hundred and eight by any domestic life insurance company shall be subject to the provisions of law limiting forfeiture which were applicable and in force at the date of their issue.

It is therefore plain that the same statutory prohibition applied to industrial policies which were issued before 1908 as had applied prior to the said statute of 1907, and the same considerations which impelled me to answer your first question in the negative require a like answer to your second question.

3. I answer your third question in the affirmative. The statute of 1907 specifically repealed R. L., c. 118, § 76 (St. 1907, c. 576, §§ 80 and 122), and substituted for it a new enactment embodied in said section 80, which did not contain a provision similar to that found in the last sentence of R. L., c. 118, § 76, and quoted above. In the absence of such a provision there existed no statutory regulation which forbade the making of an agreement between the insurer and the insured as to the manner in which the fixed amount payable as cash surrender value might be applied for the benefit of the insured.

4. I answer your fourth question in the negative. The provisions of St. 1928, c. 205, as they amend G. L., c. 175, § 22, by the addition of section 22B, now specifically forbid the making of such an agreement as is outlined in your question. Said section 22B reads: —

No company and no officer, agent or employee thereof, and no insurance broker, shall make, issue or deliver any policy of insurance or any annuity or pure endowment contract, or make or procure the making of, solicit or accept any oral or written agreement containing a waiver or a provision for a waiver by an applicant for, or the insured under or holder of, any such policy or contract, of any provision of this chapter except as expressly authorized thereby. Any such agreement, waiver or provision shall be void. Whoever violates this section shall forfeit not less than one hundred nor more than five hundred dollars.

The provision of St. 1907, c. 576, § 80, that the cash surrender value of industrial policies "shall in all cases be payable in cash" is now to be found in G. L., c. 175, § 145, relative to industrial policies issued before December 31, 1911, and the said provisions of St. 1907, c. 576, § 79, as they relate to policies of life insurance issued before 1908 are now embodied in G. L., c. 175, § 143. Both said sections 143 and 145 of G. L., c. 175, are now affected by the prohibitions of section 22B.

STATE FIRE MARSHAL — PERMIT — BLASTING OPERATIONS — CIVIL SUIT.

The State Fire Marshal should proceed to act upon an appeal from an order granting a permit for blasting, even though a suit for damages resulting from blasting is pending against the one to whom such permit has been awarded.

To the State Fire Marshal. 1928 September 19.

You have informed me that an appeal has been filed with you by certain persons claiming to have been aggrieved by the granting of a permit by the fire commissioner of Boston to the Rowe Contracting Company, permitting said company to engage in blasting operations at its quarry in West Roxbury. You also state that a suit for damages is pending in the courts against the Rowe Contracting Company by one of the applicants. You ask whether you should take any action on the appeal while the civil suit is pending.

In my opinion, you should take such action in the premises as you may deem proper, disregarding the pendency of a civil suit. This, of course, is based upon the assumption

that an appeal by a person aggrieved is properly pending before you. Under G. L., c. 148, § 45, no appeal may be taken except by a "person aggrieved."

As a public officer your duty is set forth in the statute, and the pendency or outcome of a civil suit for damages does not in any way conclude the questions which you must decide. It is obvious that for any one of a number of reasons the court might find for the defendant in a civil suit for damages, and at the same time it might clearly be your duty to refuse to issue a permit or, upon appeal, to reverse the finding of the fire commissioner. The function of the court in a civil case is to determine whether or not, upon the evidence then and there presented, the particular plaintiff has sustained an injury for which the law provides relief. Your function is to determine, upon all the facts which come to your knowledge, whether or not, in the best interests of the public safety, a permit should issue.

While it is true that an appeal may not be filed except by a "person aggrieved," nevertheless, assuming such an appeal to have been properly filed, I am of the opinion that your duty is to determine the matter in the light of the safety of the general public and not confine yourself to questions involving simply the appellant himself. Even though certain portions of the evidence presented in the court and of the facts upon which your decision must be based are identical, nevertheless, your field of inquiry is necessarily much broader than that of the court, and it is probable, and consistent, that your decision would properly be based upon facts which in any particular lawsuit would not be competent.

Questions of Public Policy — Submission to Voters — Legislative Resolutions.

A question as to whether representatives in the General Court from a district shall be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit for ratification the repeal of an amendment to the Constitution of the United States may be a question of public policy under G. L., c. 53, § 19, as amended.

To the Secretary. 1928 October 4.

You have informed me that an application, signed by two hundred and twenty-four voters, asking for the submission of the following question to the voters of the Ninth Worcester Representative District, was filed with you on September 4th of the current year: —

> Shall the representatives in the General Court from the 9th Worcester Representative District be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit for ratification the repeal of the Eighteenth Amendment to the Federal Constitution?

You have asked me to determine whether or not the above question is one of public policy. If it is such a question, it must be placed upon the ballot in a form deemed by the Secretary of the Commonwealth and the Attorney-General to be simple, unequivocal and adequate. If it is not a question of public policy, it may not be placed upon the ballot.

The statute under which the application is made is found in G. L., c. 53, § 19, as amended by St. 1925, c. 97, which provides as follows: —

> On an application signed by twelve hundred voters in any senatorial district, or by two hundred voters in any representative district, asking for the submission to the voters of that senatorial or representative district of any question of instructions to the senator or representatives from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this and the two following sections the state secretary

shall place such question on the official ballot to be used in that senatorial or representative district at the next state election.

The precise object sought by the application is the submission to the voters of the district of the question as to whether or not the representatives in that district shall be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit for ratification the repeal of the Eighteenth Amendment to the Federal Constitution. It may be assumed that if such resolutions are not sanctioned or recognized by law the question presented cannot be one of public policy.

It is true that even if the representatives carry out the instructions, and that a joint resolution of both branches of the General Court or a resolution of the House of Representatives is sent to Congress and to the President, requesting them to take steps toward the repeal of the Eighteenth Amendment, yet there is no duty upon the part of the President or of Congress to obey or follow out the request. But the mere fact that there is no binding obligation upon Congress or the President to follow out a resolution of the representatives in the General Court does not necessarily mean that such resolution is not sanctioned or recognized by law. Such a resolution cannot properly be said to be a nullity. It may well have persuasive force, irrespective of its lack of a compelling authority.

It may be assumed that such action on the part of the representatives as is sought by the question is not a "law." If the Legislature, or either branch thereof, voted to follow out the instructions, it would not be subject to the referendum, for the reason that it is not a "law." See *Opinion of the Justices*, 262 Mass. 603.

But the power of the Legislature is not confined to the making of laws. Mass. Const., pt. 2nd, c. I, § I, art. IV, provides that the General Court may from time to time "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." Such a resolution as that sought by the petition under consideration seems clearly to come within this broad and inclusive ground. "Orders . . . directions and instructions" include the right on the part of the Legislature to request Congress to take action on a public matter such as that under consideration. The language used is broad and comprehensive and it cannot be that the framers of the Constitution were in this article using synonymous terms. Further, it has long been the custom of the Legislature, by joint or separate action, to memorialize Congress on matters which it has deemed important. The joint rules and the rules of each branch of the General Court recognize this right and provide in great detail for the method of introducing, voting and signing this type of resolution or memorial. The same rule as to quorum governs action of this type as governs the enactment of a law. The right of a representative body to memorialize and to adopt resolutions is inherent in any parliamentary body, and the fact that this right has been exercised from the earliest days of the Legislature is strong evidence that it possesses that right. The application under consideration here involves instructions to the representatives from a district of the Commonwealth of Massachusetts to do something which they, as such representatives, may legally do.

There is no attempt here to instruct the representatives to perform any act which is a part of the machinery of amending the Federal Constitution. The voters here are not requesting that their representatives petition Congress to call a convention to amend the Federal Constitution, and no question is here involved, therefore, as to whether instruction to vote in such a case would conflict with provisions of the United States Constitution. The result is that the action by the representatives requested by the voters is confined to matters within the sovereignty of the Commonwealth of Massachusetts.

The words "public policy" should be construed broadly. These words, as used in this statute, are not limited or qualified in any way, and therefor it seems to have been the intent of the Legislature that no restricted meaning should be given to them. *Opinion of the Justices,* 262 Mass. 603, 605. The people of each representative or senatorial district are vitally interested and concerned in the question whether an amendment to the Constitution of the United States shall continue in force or be repealed.

An opinion of former Attorney General Benton, given to the Secretary of the Commonwealth on September 9, 1926 (not published), was to the effect that the Secretary might determine that a question of instructions to the representatives of a district to vote for a resolution requesting the President and the Senate of the United States to take steps to bring the United States into full co-operation with the League of Nations was a question of public policy, within the meaning of G. L., c. 53, § 19, as amended by St. 1925, c. 97, and such question was duly placed upon the ballot.

I therefore advise you that, in my opinion, the question presented upon the instant application is one of public policy, and therefore may be placed upon the ballot at the coming election.

DEPARTMENT OF PUBLIC HEALTH — DRAINAGE — HEARING.

Under St. 1888, c. 309, it is not mandatory that the Department of Public Health shall give hearings upon the approval of drainage systems.

To the Commissioner of Public Health. 1928 October 4.

You have asked my opinion as to whether you are required to give a public hearing at the request of the officials of a street railway company relative to your approval of a proposed system of drainage constructed under St. 1888, c. 309.

Section 9 of said statute, to which you have directed my attention, reads, in its pertinent parts, as follows: —

Such system of drainage, before its construction, shall be subject to approval by the state board of health, who may modify and amend the same if desirable, and may give public hearings thereon before approving it, if need be. In case of the violation of any of the provisions of this act, or the creation of a nuisance, appeal may be had to the state board of health, who may order the abatement of any nuisance, if in their judgment there is cause therefor.

It is obvious that the provision for approval of the system of drainage by your Department is for the purpose of protecting the public health in connection with the general scheme of drainage contemplated. It may well be doubted if the approval of a system of drainage by you requires you to consider the mode of carrying on the work involved in the construction of the system otherwise than as it relates to the public health. In any event, the giving of public hearings is not mandatory upon the Department but is left to its discretion.

Department of Public Health — Regulations — Public Places.

The Department of Public Health may not, under G. L., c. 111, § 8, make regulations regarding the use of common drinking cups and towels in parts of buildings which are in fact private places.

To the Commissioner of Public Health. 1928 October 5.

You have submitted to me regulations, made by the Department of Public Health under G. L., c. 111, § 8, which prohibit the use of a common drinking cup and a common towel in various designated public places, vehicles and buildings. You particularly direct my attention to those parts of the regulations which prohibit a common drinking cup "in any part of any factory, market, office building, or store of any kind which is open to the general public," and request my opinion as to whether you have authority to amend the regulation by striking out the words "which is open to the general public" in that phrase of the regulations above quoted.

I am of the opinion that you have not such authority.

G. L., c. 111, § 8, is as follows: —

In order to prevent the spread of communicable diseases, the department may prohibit in hotels and in such public places, vehicles or buildings as it may designate the providing of a common drinking cup or a common towel, and may establish rules and regulations for this purpose. Whoever violates any such rule or regulation shall be punished by a fine of not more than twenty-five dollars.

It is plain that the intent of the Legislature, as disclosed by the words of said section 8, was to prevent the use of a common drinking cup or common towel in places to which the public has a right of access. It was not intended to forbid their use in places which were private. Portions of various buildings mentioned in said phrase of the regulations may be, and in fact often are, private, and the public has no right of access to them. It would not be within the scope of your authority in making regulations under this statute to apply the inhibition against the designated utensils to such private places. Your present regulations, as set forth in your letter, appear to be within the authority delegated to you by the statute, and in the form in which they would stand by the adoption of the proposed amendment would exceed such authority.

Director of Accounts — Towns — Municipal Indebtedness.

The unlawful disbursement of the funds of a town in payment of a liability lawfully incurred is not such a violation of G. L., c. 44, §§ 2–13, that the Director of Accounts may, in his discretion, refuse to certify notes issued in relation to such payment.

To the Commissioner of Corporations and Taxation. 1928 October 6.

You have asked my opinion as to whether the Director of Accounts is authorized to certify notes issued by the town of Westport under date of August 13, 1928.

The warrant for the annual town meeting held on March 13, 1928, contained the following article: —

Article 24. To see if the Town will vote to purchase a five hundred gallon Triple Combination fire truck and proper equipment for same, appropriate money for such purchase and act anything thereon.

The vote of the town meeting thereon was as follows: —

That the Town purchase a five hundred gallon Triple Combination fire truck and necessary and usual equipment for the same, and that the Town raise and appropriate the sum of $9,200 dollars therefor, and that a committee be appointed by the Moderator for the purpose of carrying the provisions of this vote into effect.

G. L., c. 40, § 5, provides: —

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

. . . . . .

(30) For the compensation of all town officers whose election or appointment is authorized or required by law, and for all other necessary charges arising in such town.

The words "all other necessary charges" have been "construed to authorize a town to raise and appropriate money in respect to matters where it has a corporate duty, right or interest to perform, defend or protect." *Leonard* v. *Middleborough*, 198 Mass. 221. Protection from fires always has been treated as a general function of government. *Williams College* v. *Williamstown*, 219 Mass. 46, 48. It was within the corporate powers of the town to raise and appropriate money for the purchase of a fire truck.

The next question to consider is whether or not there has been a sufficient compliance with the provisions of G. L., c. 44.

The article in the warrant under which the town voted to raise and appropriate the money necessary to purchase the fire truck is as follows: —

Article 52. To determine the manner of raising the appropriations to defray the Town's charges for the year ensuing.

The following vote was adopted thereunder: —

Voted: That for the purpose of meeting the appropriation made under Article 24 there be raised in the tax levy of the current year the

sum of $1,700.00 and the Treasurer with the approval of the Selectmen be and hereby is authorized to borrow the sum of $7,500.00, and to issue bonds or notes of the Town therefor, such bonds or 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 5 years from the date of issue of the first bond or note or at such earlier dates as the Treasurer and Selectmen may determine.

No question has been raised by your inquiry of proper service of the warrant, and I shall presume for the purpose of this opinion that proper service was made.

The wording of the article in the warrant under which the foregoing vote was adopted has been held by the courts in numerous cases to be sufficient for a town to appropriate money thereunder.

You do not state in your letter that the authorization of the loan was in violation of G. L., c. 44, § 10, and I shall also presume that the indebtedness of the town of Westport does not exceed three per cent on the average of the assessors' valuation of the taxable property for the three preceding years.

G. L., c. 44, § 7, as amended by St. 1923, c. 338 provides: —

> 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, provided that as to each such purpose, except those described in paragraphs (15), (16) and (17), only such sum may in any year be authorized to be borrowed as exceeds twenty-five cents per one thousand dollars of the valuation of the city or town for the preceding year:
>
> . . . . . .
>
> (11) For the cost of additional departmental equipment, five years.

If the sum of $1,700 to be raised in the tax levy of the current year represents a sum equal to twenty-five cents per one thousand dollars of the valuation of the town for the preceding year, all of the requirements of the statutes with reference to the purchase and mode of payment for the fire truck have been complied with.

You state that an "audit of the accounts of the town has

recently been made, and it was found that an appropriation of $9,200 was voted for the purchase of a fire truck and equipment, $7,500 of which was to be raised by a loan and $1,700 by taxation. It was also found that the truck and equipment had been purchased and that bills had been paid to the amount of $9,196.77, although the treasurer had not issued the loan authorized," and thereby raise the question as to whether or not the wrongful disbursement of public funds by the treasurer of the town in payment of the fire truck, a liability lawfully incurred, renders the whole proceeding in connection with the vote to purchase the said fire truck and the manner prescribed for its payment so defective as to warrant the refusal of the Director of Accounts to certify these notes.

G. L., c. 44, § 20, provides, in part, as follows: —

> The proceeds of any sale of bonds, or notes, except premiums, shall be used only for the purposes specified in the authorization of the loan; provided, that transfers of unexpended amounts may be made to other accounts to be used for similar purposes.

There is nothing before me to show that the town of Westport, by a vote of the town meeting, intends to use the proceeds of the sale of the notes for any purpose other than that specified in the authorization of the loan.

A town is a constituent element of sovereignty, and its affairs, within the authority specified by general law, or the powers incidental to its corporate duties as an existing body politic, are conducted by the qualified inhabitants thereof, who meet, deliberate, act and vote in their natural and personal capacities, in the exercise of their corporate powers.

To say that the act of the treasurer would render the mandates of the town nugatory and void is contrary to sound reason and law. Such a pronouncement would, in many instances, lead to serious disruption of the lawful conduct of the governmental and proprietary functions of a municipality.

The Supreme Judicial Court, in *Spector* v. *Milton*, 250 Mass. 63, 71, said: —

> Misconduct of a public officer in the performance of a public function cannot prevent the proper operation of governmental authority when set in motion through appropriate channels.

I am of the opinion that the unlawful disbursement of the funds of the town of Westport in payment of a liability lawfully incurred is not a violation of the laws relating to municipal indebtedness (G. L., c. 44, §§ 2–13, inclusive), and that the Director of Accounts has no discretionary power to refuse to certify the notes in question.

Commissioner of Public Safety — Order of State Fire Marshal — Appeal.

An appeal from an order of the State Fire Marshal revoking a permit granted by the board of aldermen of a city for a filling station does not lie since the enactment of St. 1928, c. 320.

To the Commissioner of Public Safety. 1928 October 15.

You ask my opinion as to "whether the Commissioner may hold a hearing on the appeal from the State Fire Marshal's order" revoking a permit granted by the board of aldermen of the city of Somerville to "erect and use a filling station in the said city of Somerville."

You state that the permit was granted by the board of aldermen of the city of Somerville on July 12, 1928; that an appeal to the State Fire Marshal was taken on July 31, 1928; and that the order of the State Fire Marshal revoking the permit was dated August 21, 1928.

Before the order of the State Fire Marshal was made, and during the pendency of the appeal to him, St. 1928, c. 320, amending G. L., c. 147, § 5, became effective. Prior to the enactment of this statute a person affected by an order of the State Fire Marshal could appeal to the Commissioner, who, after hearing, could amend, suspend or revoke such order; and, if such person was aggrieved by an order approved by the Commissioner, he could appeal to the Superior

Court. See G. L., c. 147, § 5. An appeal to the Commissioner was therefore a condition precedent to be performed before the Superior Court could review the matter.

St. 1928, c. 320, repealed this provision in G. L., c. 147, § 5, and a person aggrieved by an order of the State Fire Marshal may now appeal directly to the Superior Court.

The statute, as amended, regulates the practice in appeals from orders of the State Fire Marshal, and does not affect the substantive rights of any person aggrieved. "Statutes regulating practice, procedure and evidence . . . and not affecting substantive rights . . . commonly are treated as operating retroactively, and as applying to pending actions or causes of actions." *Hanscom* v. *Malden & Melrose Gas Light Co.*, 220 Mass. 1.

I am of the opinion that St. 1928, c. 320, applies to the instant case, and that the person affected cannot appeal to the Commissioner of Public Safety, and therefore that you cannot hold a hearing.

COMMISSIONER OF PUBLIC SAFETY — LICENSE — REVOCATION.

The Commissioner of Public Safety cannot demand and require the surrender of a license granted under G. L., c. 140, § 183A, after its suspension or revocation.

To the Commissioner of Public Safety. 1928 October 16.

You ask my opinion as to whether it is "within the province of the Commissioner, when he has suspended or revoked his approval (which action automatically suspends or revokes the license)," under the provisions of G. L., c. 140, § 183B (St. 1926, c. 299), "to demand and take up such license."

A license is in the nature of a permission to carry on a business which the Legislature has deemed it wise to surround with restrictions. *Sullivan* v. *Borden*, 163 Mass. 470. A "license," in the sense in which the word is used in your letter, means the written document by which the right or permission is conferred.

When the Commission suspends or revokes his approval of a license granted under the provisions of G. L., c. 140, § 183A, the right to carry on any of the callings therein stated is thereupon suspended or revoked, as the case may be. The mere fact that the document issued at the time of the granting of such license may be in the possession of the licensee after the suspension or revocation does not permit said licensee to continue to carry on the business for which he was licensed. The licensee, if he does carry on the business after suspension or revocation, and even though the certificate has not been surrendered, may be prosecuted under G. L., c. 140, § 183C.

I am of the opinion that the Commissioner cannot demand the surrender of the "license."

DIRECTOR OF REGISTRATION — BOARD OF DENTAL EXAMINERS — LICENSE — REGISTRATION.

One who becomes a registered dentist after April first in any year need not pay a fee for registration in that year.

The certificate of registration issued to a dentist authorizes him to practice until it is revoked or suspended. He is required to pay a fee annually.

To the Director of Registration. 1928 October 22.

You have asked my opinion on the following three questions:—

1. Under the provisions of G. L., c. 112, § 44, as amended by St. 1927, c. 147, does a new practitioner beginning practice in any month subsequent to March 31st in the calendar year comply with the law if he notifies the Board of Dental Examiners of his office address, or must he also pay the two-dollar registration fee?

2. Does the certificate of registration cover from April first of one year to March thirty-first of the following year, or does it cover simply the particular calendar year? Does compliance with this law require any official notice from the Board other than a simple receipt for the registration fee, with the date thereon?

3. What is the meaning and effect of the word "license" as used in said chapter 147?

In answer to your first question, I advise you that a new practitioner who begins practice in any year after March thirty-first need not pay the annual fee of two dollars until the next year. The statute requires that the two-dollar fee shall be paid annually before April first; and if a person is not a registered dentist between January first and April first, he need not pay the fee for that year. Of course, every new practitioner must notify the Board of his office address when he begins practicing.

I shall consider your second and third questions together. The certificate of registration originally issued to a dentist authorizes him to practice until it is revoked or suspended. The duty imposed by St. 1927, c. 147, is to pay to the Board two dollars each year sometime between January first and April first. When a registered dentist complies with this provision he has done all that is necessary. It is not necessary that a new license or certificate be given to him. His authority to practice dentistry exists solely by virtue of his original certificate and not by virtue of anything he obtains in return for the annual two-dollar fee. It is to be noted that if he does not pay the two-dollar fee his authority to practice may be suspended by the Board. Unless and until the Board takes some affirmative action to suspend his authority he still practices legally by virtue of his original certificate. If the statute contemplated that a genuine license should be issued in return for the annual two-dollar payment, there would be no need of "suspending" the authority to practice for failure to comply with the statute; there would be no authority to practice, and suspension would be unnecessary.

Further, G. L., c. 112, § 45, provides that a certificate of registration shall be issued to an applicant who successfully passes the examination required by the Board. This certificate is prima facie evidence of the right of the holder to practice dentistry and must be kept in his office in plain

view of the patients, and on application must be shown to any member or agent of the Board. This section has not been amended or changed in any way. If the Legislature by said chapter 147 contemplated a real license to take the place of, or to supplement, the certificate of registration, it would have amended said section 45 by requiring the new license to be exhibited in the dentist's office instead of, or together with, the certificate of registration. It is to be noticed that the annual report of the Board of Dental Examiners for the year 1926, which is the basis of this legislation, contemplated merely the annual registration of dentists for the purpose of securing more effective supervision of the profession. The report clearly shows that the Examiners did not desire or contemplate that a new or supplemental authority to practice was to be required annually.

The result is that a registered dentist complies with the law if he pays two dollars annually between January first and April first, and it is not necessary that the Board issue to him any new license or certificate. It may be advisable, however, to give such dentist a receipt indicating that for that calendar year he has paid the two dollars between January first and April first.

State Hospitals — Patients — Absentee Voting.

The Department of Mental Diseases may, in its discretion, deliver or forward blank forms of application for absentee ballots on behalf of a patient, exercising in each instance due regard to the condition and welfare of the patient.

To the Commissioner of Mental Diseases. 1928 October 29.

You have asked my opinion with relation to the duties of your Department and its superintendents of State hospitals for the insane in connection with "blanks for absentee voting" sent the patients confined in such hospitals, either by commitment or by voluntary application. I assume that by "blanks for absentee voting" you refer to the blank forms of application for an official absent-voting ballot, as described in G. L., c. 54, §§ 86-89, as amended.

It is not necessary, in order to advise you upon the subject matter of your communication, to enter upon a consideration of the right of a patient in a State hospital to vote. The right of any citizen to have his name upon the list of registered voters in any city or town is a question the determination of which lies in the jurisdiction of such registrars. The due registration of a citizen's name as a voter is a prerequisite to his exercise of a right to vote. The blank form of application for an absentee ballot is to be sent in by the person desiring to vote. G. L., c. 54, § 86, as amended by St. 1925, c. 101, § 1.

G. L., c. 123, § 98, vests in your Department wide discretionary powers relative to letters sent to or from patients. The word "letters," as here used, may well be said to comprehend applications for ballots. The intent of the statute in this regard is to confer authority upon your Department to supervise the correspondence of all patients in institutions over which it has control. See IV Op. Atty. Gen. 219. It would follow that your Department, acting through its superintendents, may well exercise its discretion in delivering or forwarding the blank forms of application, with a view in each instance to the condition and welfare of the patient.

State Employee — Vacation — Pay.

A State employee is not entitled to a "vacation" after his employment has ceased, nor to pay for the period which would be covered by such vacation, in lieu thereof.

To the Commissioner of Mental Diseases. 1928 November 2.

You have requested my opinion as to the application of G. L., c. 149, § 38, to the following facts: —

A carpenter entered the service on August 22, 1927. After working a full year his retirement deductions were taken out of his pay. He objected, and when it was explained to him that the deductions were compulsory he gave his notice verbally to the foreman mechanic under whose direction he was working. This was about September 1st. He then asked that he be given his vacation. This request was denied, as he was on

his notice. He completed working his notice of two weeks and demanded his pay for two weeks' vacation. As it was denied him he refused to take his last week's pay.

G. L., c. 149, § 38, reads as follows: —

All laborers, workmen and mechanics permanently in the employ of the commonwealth or the metropolitan district commission who are within the provisions of section thirty as affected by sections thirty-two and thirty-six shall be entitled to an annual vacation of at least twelve working days with pay.

I assume from the facts as you have set them forth that the workman or mechanic who was hired by your Department as a carpenter was in the permanent employ of the Commonwealth, and that on or about September 1st, some days after he had completed a year of such employment, he duly resigned his position, such resignation to take effect two weeks after the day of its tender, and that such resignation was duly accepted and became effective at the end of the two-week period. He received no vacation.

It is obvious that prior to the date of the employee's resignation he would have been entitled to a vacation of twelve working days, with pay. It cannot be said that after his resignation, which was to take effect in two weeks, he was then permanently in the employ of the Commonwealth, as that word is used in the instant statute. The word "vacation," as used in the instant statute, implies a period of rest between periods of permanent employment, and may not properly be used in reference to a period of rest after permanent employment ceases. It contemplates that a person should be in the permanent employment of the Commonwealth at the time when the vacation commences.

As a matter of fact, the employee never had a vacation, and he is not entitled to receive two weeks' pay in addition to what has already been paid or tendered to him. If this were not so, the pay would be in the nature of a bonus or gratuity rather than pay. (See opinion to the Commissioner of Labor and Industries, dated February 8, 1928, page 38 of this report.)

Commissioner of Public Safety — License to store Oil — Vessel.

A license to store oil is required on behalf of a vessel anchored in that portion of Boston Harbor which is a part of the city of Boston. Such license may be issued by the street commissioners of said city.

To the Commissioner of Public Safety. 1928 November 2.

You have asked my opinion as to whether or not a license is required from the street commissioners of the city of Boston to enable a person to keep, store and sell fuel oil in a quantity not exceeding 200,000 gallons at any one time in an iron hull boat to be permanently anchored in Boston Harbor. I am informed that the boat is to be anchored about one and one-half miles from the Boston shore, outside the shipping channel, and I am further informed by the harbor master of Boston Harbor that he has approved the anchoring of the boat and the location thereof.

G. L., c. 148, § 28, establishes the Metropolitan Fire Prevention District, which includes, among other cities, the city of Boston.

G. L., c. 148, § 30, as amended by St. 1928, c. 274, provides that within the Metropolitan District the Fire Marshal shall have the powers given by section 14 of said chapter 148, as amended, to license persons or premises or to grant permits for the keeping, storage, use, sale, manufacture and transportation of crude petroleum or any of its products. Section 31 of said chapter provides that the Fire Marshal may delegate the granting or issuing of licenses and permits authorized by section 30 to the head of the fire department or to any other designated officer in any city or town in the Metropolitan District. In accordance with the provisions of said section 31, the Marshal has delegated the issuing of licenses in the city of Boston to the street commissioners of that city.

If the Metropolitan Fire Prevention District includes that portion of Boston Harbor in which the boat is to be anchored, I am of the opinion that a license from the street commissioners is necessary in this case. It has been determined

under the provisions of G. L., c. 42, § 1, that that portion of Boston Harbor in which the boat is to be anchored is a part of the city of Boston, and it follows, therefore, in my opinion, that a license from the street commissioners of that city is necessary in this case.

Voting — Public Policy Act — Instructions to Legislators.

A vote upon a question of public policy relating to the repeal of the Eighteenth Amendment to the Constitution of the United States is governed by G. L., c. 53, §§ 19–22, as amended.

If such a question receives a majority of all the ballots cast at the election in which it is voted upon, and a majority of the ballots actually cast in relation to the particular question are in the affirmative, the result is to be construed as an instruction to a member of the Legislature.

To the Governor and Council. 1928 December 1.

From your recent communication to me I gather the following facts: At the State election held in November there was submitted to the voters in a senatorial district of this Commonwealth a question of public policy relating to the repeal of the Eighteenth Amendment to the Constitution of the United States. The vote thereon in that district resulted as follows: Affirmative votes, 18,242; negative votes, 11,320; other ballots cast by voters who did not vote on that particular question, 10,339 — making the total number of ballots cast in that district 39,901. You ask me whether G. L., c. 53, §§ 19–22, inclusive, apply to that particular question, and if so, whether the vote above described constitutes an instruction to the senator from that district.

Mass. Const., pt. 1st, art. XIX, is as follows: —

> The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

G. L., c. 53, § 19, as amended by St. 1925, c. 97, so far as material, is as follows: —

> On an application signed by twelve hundred voters in any senatorial district, . . . asking for the submission to the voters of that senatorial . . . district of any question of instructions to the senator . . . from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this and the two following sections the state secretary shall place such question on the official ballot to be used in that senatorial . . . district at the next state election.

G. L., c. 53, §§ 20 and 21, deal only with the signing and filing of applications by registered voters, and have no bearing on the question asked by you.

G. L., c. 53, § 22, is as follows: —

> No vote under the three preceding sections shall be regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth, unless the question submitted receives a majority of all the votes cast at that election.

The question of public policy relating to the repeal of the Eighteenth Amendment to the United States Constitution, which question is referred to in your letter, was the subject of litigation in our Supreme Judicial Court recently, and that court held, in the case of *Thompson* v. *Secretary of the Commonwealth*, 265 Mass. 16, in substance, that it was a question of instructions under G. L., c. 53, § 19, as amended by St. 1925, c. 97. In answer to the first part of your question, therefore, I am constrained to advise you that G. L., c. 53, §§ 19–22, inclusive, apply.

The next part of your question is, in substance, whether the result of the vote shown above is such as to constitute an instruction to the senator from the district in which the vote was had.

It is necessary under G. L., c. 53, § 22, in order that a

vote shall be regarded as an instruction, that "the question submitted" shall receive a majority of all the votes cast at election. I am of the opinion that by the phrase "a majority of all the votes cast at that election" the Legislature meant to say "a majority of all the ballots cast at that election." If the word "votes" were to be interpreted as meaning simply votes actually cast for or against the particular question, the section would be almost meaningless, because, except in the case of an actual tie vote, there would always be a majority one way or the other on the question submitted. I believe that the Legislature intended that a vote on a question of public policy should not be deemed an instruction to the senator unless at least fifty per cent of the voters who went to the polls in that district cast votes for or against the question. The number of voters who went to the polls in the senatorial district in question, as shown by the total number of ballots cast, was 39,901, and fifty per cent of that figure is 19,951. The total number of votes in that district, both affirmative and negative, which were cast on the question submitted, was 29,562, or more than a majority of all the ballots cast at the election. I am therefore of opinion that the vote in that district is to be "regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth," and inasmuch as the affirmative votes on the question were 18,242 and the negative votes were 11,320, I am of the opinion that the senator from that district was instructed to vote in favor of a resolution seeking the repeal of the Eighteenth Amendment to the Constitution of the United States.

Public Health — Consent of Department — Taking by Local Authorities — Water Supply.

The Department of Public Health is not limited to approving or disapproving a proposed taking as a whole, under G. L., c. 40, § 41, but it does not possess authority to limit such a taking to a specified time.

To the Commissioner of Public Health. 1928 December 3.

You have requested my advice relative to proposed action by your Department under the provisions of G. L., c. 40, § 41.

You state in your letter to me as follows: —

The water commissioners of the town of Weymouth, acting under the provisions of G. L., c. 40, § 41, have requested the approval by this Department of the purchase or taking by right of eminent domain, for the protection of the waters of Weymouth Great Pond, which is the water supply of the town of Weymouth, of certain parcels of land described in a vote taken at the annual town meeting held March 5, 1928.

. . . . . .

The Department, in accordance with the requirements of G. L., c. 40, § 41, gave a hearing upon the proposed taking, at its office, on November 20th, after notice.

It appears that, while the town has given the water commissioners authority to secure all of the lands in question, it is not the intention of the town authorities to acquire all of this land at the present time but to acquire only those lots which are likely soon to be developed for building or upon which buildings or structures exist which are a menace to the water supply or likely to become so. The region about Great Pond contains already a considerable number of dwelling houses, and it seems likely that the population will increase more or less rapidly in the future, the effect of which will inevitably cause deterioration in the quality of the water of Great Pond.

Considering the circumstances, the Department would probably be justified in approving the taking of the lands in question if they were to be taken at the present time. The question arises whether it is reasonable under the circumstances for the Department to approve the taking of these lands after having been advised that the takings may extend over a period of ten years, more or less.

A second question is: Has the Department authority to limit the takings to a specified date or within a specified period of years?

There is a third question, and that is: Whether the owner of a piece of land, the taking of which has been approved by this Department but not carried out by the town, can recover damages for injury to the land for the purposes of sale, provided damage can be proven?

G. L., c. 40, § 41, is as follows: —

> Towns and water supply and fire districts duly established by law may, with the consent and approval of the department of public health, given after due notice and a hearing, take by eminent domain under chapter seventy-nine, or acquired by purchase or otherwise, and hold, lands, buildings, rights of way and easements within the watershed of any pond, stream, reservoir, well or other water used by them as a source of water supply, which said department may deem necessary to protect and preserve the purity of the water supply. All lands taken, purchased or otherwise acquired under this section shall be under the control of the board of water commissioners of the town or district acquiring the same, who shall manage and improve them in such manner as they shall deem for the best interest of the town or district. All damages to be paid by a town or district by reason of any act done under authority hereof may be paid out of the proceeds of the sale of any bonds authorized by law to be issued by such town or district for water supply purposes or from any surplus income of the water works available therefor. A town may also make a contract to contribute to the cost of building, by any other town situated in the watershed of its water supply, a sewer or system of sewers to aid in protecting such water supply from pollution.

The matter of giving consent and approval to the proposed taking is one which rests solely in the exercise of sound discretion by your Department. It may give or withhold its consent and approval upon a consideration of any facts which are before it. It may give its approval to the taking of any part of the realty which is proposed to be taken, and may, if it deems proper, withhold such approval from the taking of any part which it deems not necessary for the protection or preservation of the water supply. The Department is not limited to approving or disapproving of the proposed taking as a whole. It lies within the authority of the Department to withhold its approval from the proposed taking if it is satisfied that the same is to be made at a subsequent period and it is not satisfied that a taking, at a later period than the present time, can be determined by it now to be necessary for the protection and preservation of the water supply as indicated in the statute.

I am of the opinion that the Department does not possess

authority under the statute "to limit the takings to a specified date or within a specified period of years."

In view of the opinions which I have already expressed, an answer to your third question is not required.

CONSTITUTION — TREASURER AND RECEIVER GENERAL — VACANCY IN OFFICE.

When a Treasurer and Receiver General who has been elected Lieutenant-Governor takes the oath qualifying him for the latter office, he automatically vacates the former office.

To the Treasurer and Receiver General. 1928 December 5.

You ask my opinion as to whether you cease to be Treasurer and Receiver General on taking the oath of office as Lieutenant-Governor on Wednesday, January 2, 1929.

So much of Mass. Const. Amend. LXIV, § 1, as is material is as follows: —

> The governor, lieutenant-governor, councillors, secretary, treasurer and receiver-general, attorney-general, auditor, senators and representatives, shall be elected biennially. The governor, lieutenant-governor and councillors shall hold their respective offices from the first Wednesday in January succeeding their election to and including the first Wednesday in January in the third year following their election and until their successors are chosen and qualified. . . . . The terms of the secretary, treasurer and receiver-general, attorney-general and auditor, shall begin with the third Wednesday in January succeeding their election, and shall extend to the third Wednesday in January in the third year following their election and until their successors are chosen and qualified.

Mass. Const., pt. 2nd, c. VI, art. II, in so far as material to the question asked by you, is as follows: —

> No governor, lieutenant-governor, or judge of the supreme judicial court, shall hold any other office or place, under the authority of this commonwealth, except such as by this constitution they are admitted to hold, . . .

The third Wednesday in January, 1929, which marks the end of your term of office as Treasurer and Receiver General, falls on January 16th. The first Wednesday in January,

1929, which will mark the first day of your term of office as Lieutenant-Governor, falls on January 2nd.

I find nothing in the Constitution of Massachusetts, or in the amendments thereto, which permits the Lieutenant-Governor to hold the office of Treasurer and Receiver General, and I am therefore of the opinion that under Mass. Const., pt. 2nd, c. VI, art. II, you will, on taking the oath of office as Lieutenant-Governor on January 2, 1929, automatically cease to be Treasurer and Receiver General.

I am confirmed in this opinion by the reasoning adopted by one of my predecessors in an opinion rendered on February 19, 1917, to the Joint Committee on Constitutional Amendments (V Op. Atty. Gen. 20, 22–23), to the effect that the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court could not, while occupying their respective offices, also sit as delegates in the Constitutional Convention, because the position of delegate to said convention was a place under the authority of the Commonwealth.

Metropolitan District Water Supply Commission — Taxes — Payments.

Under St. 1926, c. 375, the Commonwealth should pay to a town wherein lands have been purchased for the purpose of protecting the purity of the Ware River an amount equal to that which the town would receive for taxes upon the average of the assessed value of the lands, exclusive of structures, for the three years last preceding the purchase, reduced by prior abatements.

To the Metropolitan Water Supply District. 1928 December 6.

You have informed me that the Metropolitan District Water Supply Commission has acquired by purchase certain lands, together with the structures thereon, in the town of Rutland for the purpose of protecting the purity of the waters of the Ware River, to be diverted for a water supply under the provisions of St. 1926, c. 375. You have asked my opinion as to whether, under the provisions of G. L., c. 59, § 6, the Metropolitan District Water Supply Commission should pay to the town of Rutland an amount equal to that

which the town would receive upon the average of the assessed values of such land, including buildings or other structures thereon.

G. L., c. 59, § 6, provides as follows: —

> Property held by a city, town or district, including the metropolitan water district, in another city or town for the purpose of a water supply, the protection of its sources, or of sewage disposal, if yielding no rent, shall not be liable to taxation therein; but the city, town or district so holding it shall, annually in September, pay to the city or town where it lies an amount equal to that which such city or town would receive for taxes upon the average of the assessed values of the land, which shall not include buildings or other structures except in the case of land taken for the purpose of protecting the sources of an existing water supply, for the three years last preceding the acquisition thereof, the valuation for each year being reduced by all abatements thereon. Any part of such land or buildings from which any revenue in the nature of rent is received shall be subject to taxation.
>
> If such land is part of a larger tract which has been assessed as a whole, its assessed valuation in any year shall be taken to be that proportional part of the valuation of the whole tract which the value of the land so acquired, exclusive of buildings, bore in that year to the value of the entire estate.

The above section expressly applies to property held by the Metropolitan Water District. G. L., c. 4, § 7, par. 36, provides that "water district" shall include "water supply district." It follows that section 6 applies to property held by the Metropolitan Water Supply District.

It is provided that property held by a district in another city or town for the purpose of a water supply or for the protection of its sources shall not be liable to taxation if it yields no rent. I am informed that the property in question yields no rent. The property is held for the purpose of a water supply and to protect the sources thereof, it having been acquired in connection with the Ware River project for the purpose of furnishing an adequate water supply for the metropolitan district. It follows, therefore, that the property is not liable to taxation in the city or town where it lies.

Said section 6 further provides that if no taxes are payable

on the property the district shall pay to the city or town where it lies a certain amount defined by said section, based upon the average of the assessed values of the land, which shall not include buildings or structures except in the case of land taken for the purpose or protecting the sources of an existing water supply. As to the land itself, clearly this method of payment applies in the present case. Buildings and other structures are not to be included in the assessed value of the land, unless the land is taken for the purpose of protecting an existing water supply. There is at present no existing water supply at this place, and it follows, therefore, that buildings and structures in this area are not to be included in the assessed value which forms the basis for the payment to the city or town in lieu of taxes.

The result is that the Commission should pay to the town of Rutland an amount equal to that which the town would receive for taxes upon the average of the assessed values of the land, not including buildings or other structures thereon, for the three years last preceding the acquisition thereof, the valuation for each year being reduced by all abatements thereon.

REGISTRATION — CERTIFIED PUBLIC ACCOUNTANT — CHANGE OF BUSINESS NAME.

The addition of the words "& Co." to that of a duly certified public accountant, where the accountant has not in fact created a partnership or a corporation, does not violate the provisions of G. L., c. 112, § 87E, relative to registration.

To the Director of Registration. 1928 December 6.

You have asked my opinion as to whether an individual named John Jones, duly certified as a certified public accountant under the laws of Massachusetts, may do business under the name of "John Jones & Co., Certified Public Accountants."

G. L., c. 112, § 87E, provides as follows: —

No person, not registered under the provisions of section eighty-seven C or corresponding provisions of earlier laws, shall designate himself or

hold himself out as a certified public accountant. No partnership unless all of its members are registered under said provisions, and no corporation, shall use the words "certified public accountant" in describing the partnership or corporation or the business thereof; . . .

As long as there is no corporation or partnership, there can be no objection to John Jones doing business under the above name. The use of the words "& Co." does not constitute John Jones, who is the sole owner, a partnership. These words do not necessarily imply that a partnership exists, as it is perfectly proper for an individual to use the words "& Co." after his name. See *Crompton* v. *Williams*, 216 Mass. 184. There is no violation of the provisions of section 87E disclosed, although it may well be that the individual should file with the city or town clerk the business certificate required by G. L., c. 110, § 5.

DIVISION OF METROPOLITAN PLANNING — JURISDICTION.

The jurisdiction of the Division of Metropolitan Planning under St. 1923, c. 399, as amended, extends to any town added by the Legislature to the north or south metropolitan district.

To the Metropolitan Planning Board.
1928
December 7.

You have asked my opinion as to whether St. 1928, c. 384, adds the towns of Norwood, Stoughton and Walpole to the district to be covered by your Division with respect to the investigations and recommendations provided for in St. 1923, c. 399, as amended by St. 1924, c. 354.

At the time of the passage of St. 1923, c. 399, it was, obviously, the intent of the Legislature to make the jurisdiction of the Division of Metropolitan Planning, with respect to transportation service and facilities, co-extensive with the jurisdiction exercised by the Metropolitan District Commission over the north and south metropolitan sewer districts and the metropolitan parks district.

I am of the opinion that the jurisdiction of your Division extends automatically to any town which is added by the Legislature to either the north or south metropolitan sewer district, and that, consequently, the towns of Norwood,

Stoughton and Walpole are now a part of the district to be covered by your investigations and recommendations under the statutes above mentioned.

Department of Conservation — Governor — Killing Deer.

Neither the Governor nor the Commissioner of Conservation has the power to restrict or prohibit the killing of deer during the open season; except that the Governor may so act when it shall appear to him that by reason of extreme drouth there is danger of forest fires.

To the Commissioner of Conservation. 1928 December 10.

You have asked my opinion as to whether or not the Governor of the Commonwealth, the Commissioner of Conservation or any other official has the right to restrict or prohibit the shooting of deer within the open season prescribed by G. L., c. 131, § 63, as amended by St. 1928, c. 215, other than on reservations held by and under the control of the Commonwealth.

Said section 63 provides as follows: —

Any person duly authorized to hunt in the commonwealth may, between sunrise of the first Monday of December and sunset of the second following Saturday, hunt, pursue, take or kill by the use of a shotgun, a wild deer, subject to the following restrictions and provisions: No person shall, except as provided in the preceding section, kill or have in possession more than one deer. No deer shall be hunted, taken or killed on land posted in accordance with section seventy-nine, or on land under control of the metropolitan district commission, or in violation of any city ordinance or town by-law, or in any state reservation subject to section sixty-eight except as provided therein. No person shall make, set or use any trap, saltlick or other device for the purpose of ensnaring, enticing, taking, injuring or killing a deer. Whoever wounds or kills a deer shall make a written report, signed by him, and send it within twenty-four hours of such wounding or killing, to the director, stating the facts relative to the wounding or killing. Violations of this section shall be punished by a fine of not more than one hundred dollars.

Assuming that a person qualifies, he is entitled to a sporting license which permits him to take and kill deer within the open season as described in said section 63.

Section 63 provides that no deer shall be hunted, taken or killed on land posted in accordance with section 79, or on land under control of the Metropolitan District Commission, or in violation of any city ordinance or town by-law, or in any State reservation subject to section 68, except as provided therein. Every person properly holding a sporting license has the right, under the section, to hunt and kill deer on all other lands, provided it is not in violation of any city ordinance or town by-law. The Commissioner has no power to modify or to limit the right to hunt on such other lands.

G. L., c. 131, § 29, as amended by St. 1925, c. 249, provides that the Governor, with the advice and consent of the Council, may suspend the continuance of any or all open seasons established by this chapter whenever it shall appear to him that by reason of extreme drouth there is danger of forest fires resulting from hunting, trapping, fishing or other cause. It will be seen that the power of the Governor under this section is limited to cases in which it appears to him that such danger exists, and it is, of course, for him to decide whether in any given instance there is such danger.

A city or town may by ordinance or by-law prohibit the taking and killing of deer during this season, but if this is not done a person holding a license as above stated may exercise the rights conferred by section 63. If it is deemed advisable to confer upon the Governor or the Commissioner the power to suspend the open season on deer, such power should be given by the Legislature.

I therefore advise you that the Commissioner has no power to prohibit the taking and killing of deer during the open season established by the Legislature. I further advise you that the Governor has no power to suspend the continuance of said open season except as indicated above. The open season may be suspended by no other body except a city council or board of selectmen in any given city or town.

Constitution — Treasurer and Receiver General — Vacancy in Office.

When a Treasurer and Receiver General who has been elected Lieutenant-Governor takes the oath qualifying him for the latter office, he automatically vacates the former office.

Two suitable persons are to be appointed in such a contingency to take custody of valuables in the treasury.

To the Governor. 1928 December 11.

You desire my opinion with respect to certain questions which may arise incident to the ending of Mr. Youngman's term as Treasurer and Receiver General on the beginning of his term as Lieutenant-Governor.

Under Mass. Const. Amend. LXIV it is provided that "the governor, lieutenant-governor and councillors shall hold their respective offices from the first Wednesday in January succeeding their election to and including the first Wednesday in January in the third year following their election and until their successors are chosen and qualified."

I am advised by the Secretary of the Commonwealth that the practice is for the new Governor and Lieutenant-Governor to take their respective oaths of office on the Thursday next following the first Wednesday in January, which this year will be January 3rd. Under the same amendment the term of the Treasurer and Receiver General and the term of certain other State officers "shall begin with the third Wednesday in January succeeding their election and shall extend to the third Wednesday in January in the third year following their election and until their successors are chosen and qualified." Mr. Youngman's term as Treasurer and Receiver General would normally end, therefore, on the third Wednesday of January, 1929, which will be January 16th; but Mr. Youngman has been elected to the office of Lieutenant-Governor, and in the normal course of events would take the oath of office as Lieutenant-Governor on Thursday, January 3rd, thus creating a vacancy in the office of Treasurer and Receiver General.

Mass. Const. Amend. XVII provides, in part, that, "in

case the office . . . of treasurer and receiver-general . . . shall become vacant, from any cause, during an annual or special session of the general court, such vacancy shall in like manner be filled by choice from the people at large." The words "in like manner" refer to an election by joint ballot of the senators and representatives in one room.

Mass. Const. Amend. LXIV further provides 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 incoming Legislature, therefore, comes in on Wednesday, January 2nd, and on that day the Senate and House organize, and the annual session referred to in Mass. Const. Amend. XVII thereupon begins on that day. Therefore, at the time Mr. Youngman, on Thursday, January 3rd, takes the oath of office as Lieutenant-Governor, and thereafter automatically ceases to be Treasurer and Receiver General, the filling of that vacancy in the office of Treasurer and Receiver General is one that must, under Amendment XVII, above quoted, be filled by an election by the two houses of the Legislature on a joint ballot.

G. L., c. 10, § 12, provides as follows: —

> Upon a vacancy in the office of state treasurer, the state secretary, with two suitable persons appointed by warrant of the governor, shall, after notice to the former treasurer, . . . and to his sureties or one of them, or to such of them as are within the commonwealth, seal up and secure, in their presence if they attend, all money, papers and other things supposed to be the property of the commonwealth . . .

And the same chapter contains further provisions as to what the Secretary of the Commonwealth and the two suitable persons shall thereafter do by way of making an inventory of money and securities and other things and for the exchanging of receipts with the new Treasurer and Receiver General.

My conclusions are that Mr. Youngman, by taking the oath of office as Lieutenant-Governor on January 3rd, will

thereby automatically vacate the office of Treasurer and Receiver General; that the Legislature will then be in session, and, under the Constitution, will have the power of filling the office of Treasurer and Receiver General by an election, and that, pending such election, it will be the duty of the Secretary of the Commonwealth and two suitable persons to be appointed by Your Excellency to take custody, after certain formalities, of all the money, papers and other things supposed to be the property of the Commonwealth in the office of the Treasurer and Receiver General, and to retain them until a new Treasurer and Receiver General shall have been qualified. Your Excellency should be prepared, therefore, to appoint under your warrant two suitable persons to act seasonably with the Secretary of the Commonwealth.

Insurance — Stock Company — Dividends.

Policyholders may participate in dividends of stock companies of insurance other than life insurance.

To the Commissioner of Insurance. 1929 January 2.

My opinion is requested upon the following question: —

Is it lawful for a stock insurance company, other than a life company, to pay or allow dividends to policyholders under policies issued in this commonwealth, or is the payment or allowance thereof prohibited by G. L., c. 175, §§ 182 and 184?

I assume from the facts stated in your letter that the privilege or right to participate in dividends declared by the stock insurance company to whom you refer is set forth in the policy itself.

That general participation by policyholders in dividends of stock companies is not a violation of the prohibitions against rebates and considerations, contained in sections of the statutes regulating insurance (now embodied in G. L., c. 175, §§ 182–184, as amended), was held in an opinion of one of my predecessors in office (IV Op. Atty. Gen. 503), with which I concur. The amendments made in the various statutes regulating the insurance business since such opinion

was written do not evidence any legislative intent to make such participation unlawful. The particular reference to participation in the savings, earnings or surplus of mutual insurance companies without specification in the policy, inserted in the statutes since the writing of said opinion. (G. L., c. 175, § 184, as amended), does not, in my opinion, affect the legality of participation in the dividends of a stock company specified in the policy when such participation is not in its nature a "special advantage" with regard to any particular policyholder or holders, as the words "special advantage" are construed in said opinion of one of my predecessors in office.

Police Commissioner for the City of Boston — Traffic Signs — Expense.

Expenses of erection and maintenance of traffic signs in Boston fall upon the police department.

To the Police Commissioner of Boston.
1929
January 3.

You have asked me to advise you upon the following: —

The exact question in issue is whether in Boston the Police Commissioner or the Board of Street Commissioners or the Department of Public Works of the Commonwealth has the authority and duty to place signs, markings, etc., after they have been authorized by ordinance or by-law and approved by the Department of Public Works.

Traffic signs and markings made necessary by ordinance regulation or by law of the city of Boston or its officials, and approved by the Department of Public Works of the Commonwealth, are not required by law to be placed or paid for by said Department. St. 1928, c. 357, authorizes the said Department to erect and maintain such signs and markings on certain highways, and if these be in fact erected and maintained by said Department the expense thereof should be borne by it, but the expense of such signs and markings upon such highways, or upon other highways, erected or maintained thereon by any city or town with the

approval of the said Department, is not required to be borne by the said Department.

As to the allocation of the expense of the erection and maintenance of signs and traffic markings to be erected by the city of Boston, with the approval of the said Department, as between the Police Commissioner and the Street Commissioners of Boston, I am of the opinion that such expense should be paid as expenses of the police department, and that the Police Commissioner has the authority and duty of placing such signs and markings as are necessary to enforce the regulations, ordinances and by-laws which have been made and approved with relation to street traffic. St. 1908, c. 447.

I am not unaware of the limitations to the extent to which opinions and advice should be given to the Police Commissioner for the city of Boston by the Attorney-General (see VII Op. Atty. Gen. 735), but I consider that your question so far involves a consideration of the duties of the Commissioner under the statutes governing his office as to require an expression of my opinion thereon.

Department of Labor and Industries — Common Drinking Cups and Towels — Rules.

The Department of Labor and Industries may make rules and regulations relative to common drinking cups and towels in certain places, under G. L., c. 149, § 113, but not under § 6.

To the Commissioner of Labor and Industries. 1929 January 5.

You have asked my opinion as to whether the Department of Labor and Industries has the legal power, under G. L., c. 149, § 6, to make rules and regulations prohibiting the use of a common drinking cup and a common towel in factories, workshops and mercantile establishments. Said section 6 provides as follows: —

It shall investigate from time to time employments and places of employment, and determine what suitable safety devices or other reasonable means or requirements for the prevention of accidents shall be

adopted or followed in any or all such employments or places of employment; and also shall determine what suitable devices or other reasonable means or requirements for the prevention of industrial or occupational diseases shall be adopted or followed in any or all such employments or places of employment; and shall make reasonable rules, regulations and orders applicable to either employers or employees or both for the prevention of accidents and the prevention of industrial or occupational diseases.

Section 1 of said chapter 149 contains the following definition: —

"Industrial disease" or "occupational disease," any ailment or disease caused by the nature or circumstances of the employment.

Industrial or occupational diseases, as defined above, are those arising from the peculiar nature of the employment, and do not include diseases that are communicable to other persons by reason of the use of a common drinking cup or common towel. Diseases communicated to others by the use of such cup or towel are not incidental or peculiar to the employment but are of a nature that may be communicated by such use without reference to the nature or circumstances of the employment. It follows that, under section 6, the Department has no power to make the rules and regulations under consideration.

However, I am of the opinion that the Department, under the authority of G. L., c. 149, § 113, may make reasonable rules and regulations prohibiting the use of the common drinking cup or common towel in any factory, workshop, manufacturing, mechanical or mercantile establishment. Said section 113 provides as follows: —

Every factory, workshop, manufacturing, mechanical and mercantile establishment shall be well lighted, well ventilated and kept clean and free from unsanitary conditions, according to reasonable rules and regulations adopted by the department with reference thereto.

In order to keep such places clean and free from unsanitary conditions, it is clearly reasonable to prohibit the common drinking cup and common towel, both of which are universally recognized to be unsanitary and dangerous to

public health. The Department will be acting well within the scope of this section if it makes the rules and regulations under consideration.

Section 106 of said chapter 149 provides as follows: —

All industrial establishments shall provide fresh and pure drinking water to which their employees shall have access during working hours. Any person owning, in whole or in part, managing, controlling or superintending any industrial establishment in which this section is violated shall, on the complaint of the local board of health, the selectmen of a town or an inspector, be punished by a fine of one hundred dollars.

This section, contained in the chapter dealing with Labor and Industries, indicates that the question of supplying fresh and pure drinking water to employees in any industrial establishment is clearly one for the attention of the Department of Labor and Industries, and adds weight to the conclusion that the Department may make the rules and regulations above referred to.

DEPARTMENT OF PUBLIC SAFETY — FORFEITED AUTOMOBILES — SALES.

The Department of Public Safety may sell automobiles forfeited and forwarded to it under an order of court.

To the Commissioner of Public Safety. 1929 January 9.

You have asked me to advise you on the following matter: —

Inquiry has been made regarding the status of cases concerning two automobiles forfeited to the Commonwealth but with suits brought against the State to recover. One concerns a Ford coupé forfeited July 6, 1927; the other concerns a Ford coupé forfeited on October 28, 1927.

We have these cars in our possession and desire to dispose of them, our facilities for storage being very limited and the cars not improved by not being used.

I am unable to find any provision of law permitting actions against the Commonwealth to recover, after forfeiture by "authority of the court or trial justice," implements of sale or furniture used or kept and provided to be used in the illegal keeping or sale of intoxicating liquor.

"Under our system of jurisprudence the Commonwealth cannot be impleaded in its own courts except with its consent." *Glickman* v. *Commonwealth*, 244 Mass. 148.

Suits brought to recover automobiles forfeited would be futile gestures on the part of the petitioners.

In the case of *E. J. Fitzwilliam Co., Inc.*, v. *Commonwealth*, 258 Mass. 103, 107, the court said: —

> Proceedings for the forfeiture of an automobile, because of its connection with the illegal sale or keeping for sale of intoxicating liquor under statutes already cited, are proceedings *in rem*. The principle of the statute is that the container of the intoxicating liquor or the implements of sale used or kept to be used in connection with the illegal sale or keeping for sale of such liquor, themselves constitute a subject liable to offend against the public welfare notwithstanding the innocence of the owner. The things themselves are primarily treated as the offender. The intent of the person in actual control may in some circumstances be enough to determine the guilt of the articles against which the complaint for forfeiture is pending.

G. L., c. 138, § 71, provides that implements of sale and furniture seized and forfeited shall be disposed of in the manner prescribed in G. L., c. 138, § 69, for the disposition of intoxicating liquor. Said section 69, as amended by St. 1923, c. 329, provides, in part, that if, "in the judgment of the commissioner it is for the best interests of the commonwealth to sell the same, he shall cause the same to be sold."

I am of the opinion that you may sell automobiles forfeited and forwarded to the Department of Public Safety by an order of court, if you deem a sale to be for the best interests of the Commonwealth.

Board of Retirement — State Employees — Age.

A member of the State Retirement Association, sixty years of age, who has been in the service of the Commonwealth over fifteen years immediately preceding request for retirement, and whose retirement is requested by the head of his department, has an absolute right to retire, and must retire at seventy. Between those ages the Board of Retirement has the right to exercise its discretion relative to such retirement.

To the State Board of Retirement. 1929 January 9.

I have been requested by the former Treasurer and Receiver General, while Chairman of the State Board of Retirement, to advise you in relation to your powers and duties under G. L., c. 32, § 2 (4), as amended, upon the following matter in connection with an employee of a State department: —

> The Board of Retirement wishes your opinion as to whether it is the meaning and intent of the law that this Board is obliged to retire a State employee when demand is made by the head of the department for his retirement, as it is in this case, and when it is insisted upon by the head of the department despite the objection of the employee, as it is in this case.

That portion of the said section applicable to your inquiry reads as follows: —

> Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board upon recommendation of the head of the department in which he is employed, or, in case of members appointed by the governor, upon recommendation of the governor and council, and any member who reaches the age of seventy must so retire.

The jurisdiction of your Board under said subsection to deal with the retirement of a member employed in a department exists (1) when the member has reached the age of sixty and has been in the continuous service of the Commonwealth for a period of fifteen years immediately preceding an application for retirement, and (2) when a recommendation for the member's retirement is presented to you by one who is in fact the head of a department in which such member is employed. See IV Op. Atty Gen. 105. Such a member, after attaining the age of sixty, has an absolute

right to retire, if he desires to do so, without the necessity for any action on the part of your Board, and must retire at seventy.

Between the ages of sixty and seventy such a member may be retired by your Board when it has jurisdiction over the matter by reason of the existence of the facts already referred to, irrespective of the desire of the member. A decision relative thereto rests with your Board, and I am of the opinion that your Board is not obliged to retire such a member merely because a recommendation for retirement is transmitted to it by the proper official, but that the instant statute gives to the Board authority to act in its sound discretion upon such recommendation.

INSURANCE — SMALL LOANS LAW — INSTALLMENT NOTES.

Plans for the payment of insurance upon notes payable by the purchasers do not relate to loans under G. L., c. 140, §§ 96–114.

To the Commissioner of Banks. 1929 January 17.

You have requested my opinion in the following communication: —

The opinion of your Department is respectfully requested as to whether two plans for financing automobile and fire insurance premiums, where the amounts are $300 or under, come under the scope of G. L., c. 140, §§ 96–114, inclusive.

The plan marked "A" has to do with the financing of automobile liability insurance premiums, and the plan marked "B" has to do with fire insurance premiums.

The plans referred to in your letter as "A" and "B" appear to be, respectively, (*a*) a promissory note, payable in the installments indicated on its face, to secure payment of premium upon a policy or policies of automobile insurance issued through the office of the payee by insurance companies for which the payee is an agent, with authority to the payee to cancel the policy or policies in the name of the maker if default is made in any of the specified payments

in the note; and (*b*) a similar note to secure payment of premium upon a policy or policies of fire insurance.

I am of the opinion that the plans to which you refer, as evidenced by the face of the notes which you have submitted, do not relate to "loans," within the meaning of G. L., c. 140, §§ 96–114, but are in the nature of agreements for the extension of credit for policies of insurance actually purchased by the maker of the notes, and as such are not within the purview of said G. L., c. 140, §§ 96–114.

Acceptance of Statute by a Town — Vote of Inhabitants.

Acceptance of an act by vote of the inhabitants of a town is made by a vote at a town meeting.

To the Secretary. 1929 January 19.

You have asked my opinion in the following communication: —

St. 1928, c. 406, entitled "An Act to permit certain sports and games on the Lord's Day," by section 2 amends G. L., c. 136, § 21, and provides as follows: —

"In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council and in any town which accepts said sections by vote of its inhabitants, it shall be lawful to take part in or witness any athletic outdoor sport or game on the Lord's day between the hours of two and six in the afternoon as hereinafter provided."

Your opinion is respectfully requested as to whether the phrase "by vote of its inhabitants" means the vote of a town on an official ballot or in open town meeting.

In a town which has a representative form of town government does it mean that the representatives will represent the inhabitants so far as to permit them to vote on the question, or should the question appear on the official ballot to be voted on by the inhabitants?

G. L., c. 4, § 4, reads as follows: —

Wherever it is provided that a statute shall take effect upon its acceptance by a city or town, such acceptance shall, except as otherwise provided in such statute, be, in a city, by vote of the city council or, in a town, by vote of the inhabitants thereof at a town meeting.

The phrase used in St. 1928, c. 406, as to its acceptance in any town "by vote of its inhabitants" does not indicate an intention that the vote shall be taken in a manner other than that set forth in G. L., c. 4, § 4, which provides for a "vote of the inhabitants . . . at a town meeting."

G. L., c. 54, § 104, is not applicable to a vote upon the acceptance of statutory provisions, for reasons set forth in *Moloney* v. *Selectmen of Milford*, 253 Mass. 400, 403–404.

The adoption of a representative form of town government does not, in my opinion, so alter the relations of the inhabitants of a town to its town meeting as to make necessary a construction of the words "by vote of its inhabitants," as used in the instant statute, as expressing a legislative intent that the requisite vote should be by official ballot at the polls and not by the town meeting.

TRUST COMPANY — TRUST FUNDS — COMMERCIAL FUNDS — MINGLING.

An investment of a group of trust funds by the trust department of a trust company in a mortgage loan or group of loans, in which the funds of the commercial department of the trust company are also invested, is improper.

To the Commissioner of Banks. 1929 January 21.

You have requested my opinion as to the propriety of the investment of certain trust funds by trust companies authorized to act in a fiduciary capacity. You state the following facts: —

A trust company suggests that it proposes to have all real estate mortgages owned by the company transferred to the trust department to form a pool of mortgages. Thereupon participation certificates in such pool or fund would be issued to the various trust estates in which the trust company, by its trust department, was acting in a fiduciary capacity. Any excess interests in the pool not absorbed by the trust department for its trust estates would be held by the commercial department of the bank. The result of such an arrangement would be a constant participation

by the commercial department of the trust company in the fund or pool through the ownership by the commercial department of trust participation certificates.

You state that under the proposed scheme this form of investment would be used not only for small amounts of trust estates which could not otherwise be advantageously invested, but would also be made the primary form of investment for the funds of all trust estates held by the bank. The propriety of such investment of trust funds by trust companies and national banks doing business as fiduciaries within Massachusetts must be considered in two aspects: —

1. How far does the statute law applicable to trust companies and to national banks acting as fiduciaries, respectively, permit or prohibit such investment?

2. How far may any fiduciary acting under appointment by a court of equity or subject to the control of a court of equity make such an investment properly under the principles of equity applicable to the administration of trust estates?

A. Statute Law Relating to Trust Companies.

G. L., c. 172, §§ 49, 52–54 and 59, read as follows: —

Section 49. Every such corporation acting under any provision of the following section or section fifty-two shall have a trust department in which all business authorized by said sections shall be kept separate and distinct from its general business.

. . . . . .

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.

Section 53. Every such corporation may invest the funds or assets

which it may receive and hold under the preceding section in the same way, to the same extent, and under the same restrictions as an individual holding a similar position may invest such funds or assets.

SECTION 54. Money, property or securities received, invested or loaned under the provisions of sections fifty to fifty-two, inclusive, shall be a special deposit in such corporation, and the accounts thereof, shall be kept separate. Such funds and the investment or loans thereof shall be specially appropriated to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to such corporation, or be liable for the debts or obligations thereof.

. . . . . .

SECTION 59. A person creating a trust may direct whether money or property deposited under it shall be held and invested separately or invested in the general trust fund of the corporation; and such corporation acting as trustee shall be governed by directions contained in the will or instrument under which it acts.

In my opinion, sections 53 and 54, above quoted, effectually prohibit such an investment as that suggested in your request for an opinion, and I respectfully advise you that such an investment of trust funds by the trust department of a Massachusetts trust company in a mortgage loan or group of such loans, in which the funds of the commercial department of the bank are also invested, would be manifestly improper. The situation which you suggest, when analyzed, amounts to little more than this: A trust company desires to pool the real estate mortgage loans made by it and to issue against such loans participation certificates to the trust accounts held by it, in the proportion in which funds of such trusts are used in making such loans. At the same time the commercial department will receive participation certificates in the pool mortgage loans in proportion to its interest in those loans. The participation certificate device is really, in substance, not different from a bookkeeping arrangement by which the bank indicates upon its own records the proportion in which its trust accounts and its commercial department have made a loan to strangers in the name of the bank upon the security of real estate mortgages. In my opinion, such an investment

of trust funds was intended to be prohibited by the sections to which I have referred, and this conclusion is to some extent reenforced by the language of the Supreme Judicial Court in the cases in which it has construed the sections quoted. *Commonwealth-Atlantic National Bank, petitioner,* 249 Mass. 440, 447–448, approved *Atlantic National Bank, petitioner,* 261 Mass. 217, 219; *Worcester County National Bank, petitioner,* 263 Mass. 444; *cf. Campbell* v. *Commissioner of Banks,* 241 Mass. 262, 265.

B. The Situation with Respect to National Banks acting as Fiduciaries in Massachusetts in accordance with a License granted by the Federal Reserve Board under the Provisions of Code of Laws of the U. S., Title 12, §248 (k).

(Act of Dec. 23, 1923, chap. 6, § 11, 38 Stat. et al. 264, as amended by Act of Sept. 26, 1918, chap. 177, § 2, 40 Stat. et al. 968.)

In view of the length of the statute above referred to it is not here quoted, but therein it is provided, in part, as follows: —

> National banks exercising any or all of the powers enumerated in this subsection (*k*) shall segregate all assets held in any fiduciary capacity from the general assets of the bank . . .
>
> Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.

The section generally gives to national banks holding the permit authorized by the section the power to act as trustee, or in other fiduciary capacities, in competition with state banks and trust companies, where such power is granted to state banks. There is no indication in the section that a national bank performing the duties of a fiduciary, under appointment of a state court or subject to the provisions of state law as to the administration of trusts, is not in every respect as fully subject to the control

of the court or to the provisions of the state law in the administration of such trusts as a trust company or an individual acting in a similar fiduciary capacity. This question was expressly left undecided by the Supreme Judicial Court in the case of *Commonwealth-Atlantic National Bank, petitioner,* 249 Mass. 440, 447. The reasoning of *Worcester County National Bank, petitioner,* 263 Mass. 444, and the cases therein cited, however, is clearly to the effect that a national bank acting as a fiduciary appointed by a state court is, with respect to the administration of the estate and trust committed to it, subject to the control of the court in the same way that an individual or state trust company would be if carrying out the same trust. It therefore becomes pertinent to discover whether the general principles of equity governing the administration of trust estates would permit such an investment by a trustee administering a trust or other fiduciary obligation subject to the control of a court of this Commonwealth.

C. The General Principles of Equity Applicable to Such Investments

It is well settled that it is the duty of trustees holding distinct trust funds to segregate them. They cannot ordinarily be invested together and the net income prorated to the beneficiaries. *Lannin* v. *Buckley,* 256 Mass. 78, 82. The situation now under consideration even more strongly calls for the application of the rule requiring the complete separation of trust funds from funds owned by the trustee individually, because of the fundamental principle that a trustee, apart from his proper compensation as such trustee, should not in any respect have any pecuniary interest in the administration of his trust. See, for example, *Bullivant* v. *First National Bank of Boston,* 246 Mass. 324, 334. *Witherington* v. *Nickerson,* 256 Mass. 351, 357.

The arrangement concerning which you have requested this opinion clearly involves the mingling of trust assets

and commercial assets of the trust company in such a way as to create a very decided intermingling of personal interest with that of the bank as fiduciary. In the absence of clear authorization in the trust instrument under which the fiduciary is acting, such a mingling of interest would not, in my opinion, be proper for a trustee, whether an individual or a corporation acting by appointment from a Massachusetts court or subject to the general control of a Massachusetts court of equity.

Nothing in this opinion should be construed as advising that it is improper for a trust department of a trust company to permit two or more of the trust estates held by it to participate in the whole of a single loan secured by mortgage, by use of the participation certificate device. That question has not been considered and no opinion is hereby expressed thereon.

BANKING — DEPOSITS IN TWO NAMES — JOINT ACCOUNTS.

A joint account in which the word "and" joins the names of the depositors falls within the provisions of G. L., c. 167, § 14.

An account in a savings bank doing life insurance business, payable to the insured and after his death to a beneficiary, is not a joint account.

To the Commissioner of Banks. 1929 January 22.

You have requested my advice upon certain questions relative to deposits made in the names of two persons.

The applicable statute, G. L., c. 167, § 14, reads as follows: —

When a deposit is made in any bank, in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or interest or dividend thereon, if not then attached at law or in equity in a suit against either of said persons, may be paid to either of said persons, whether the other be living or not, and such payment shall discharge the bank making such payment from its obligation, if any, to such other person or to his legal representatives for or on account of such deposit.

You state that deposits such as are referred to in the statute are sometimes made in the following form: —

"John Doe *or* Mary Doe
Payable to either or the survivor."

And at other times are written as follows: —

"John Doe *and* Mary Doe
Payable to either or the survivor."

Your first question, which relates to such forms, is: —

Can the joint account in which the word "and" joins the name of the depositors be construed as a joint account within the meaning of G. L., c. 167, § 14?

I answer this question in the affirmative.

Inasmuch as in each instance which you cite the words "payable to either or the survivor" appear, it is immaterial whether the word "or" be used with the two names or the word "and." In each instance the form used sufficiently expresses an intention to make a deposit of the kind which falls within the meaning of the statute, and to which all the terms of the statute are applicable. Were the phrase "payable to either or the survivor" not employed in the second form, the two forms which you have set forth would not have a precisely synonymous meaning.

You have set forth a form said to be used in designating deposits in savings banks which act as agents for savings bank life insurance. This form reads: —

"John Doe or Mary Doe
Payable to the insured during his
or her life.
Payable to the survivor in the event
of death."

Your question with relation to this form is: —

Can this account be construed as a joint account within the meaning of section 14, since it is not payable to either except on the death of one?

I answer your question in the negative, inasmuch as the deposit is payable to the insured depositor alone during his life.

Your third question with relation to the form of deposit last mentioned is: —

Can the bank, upon the death of the insured, pay this account to other than his or her estate?

A deposit made in the said form is not such a deposit as is governed by said G. L., c. 167, § 14, and the provisions thereof have no application to it. The question, as between the bank and its depositors with relation to a construction of the precise character of the ownership of the deposit, created by the said form, would seem to be one primarily for judicial determination. In the absence of such a determination I do not express an opinion upon this question, which is not one which relates directly to the discharge of your functions as Commissioner.

Your fourth question is: —

Can the bank loan to one of the parties of a so-called joint account (John Doe or Mary Doe, payable to either or the survivor) without the consent of the other?

G. L., c. 168, as pointed out in your letter, provides in some of its sections that a savings bank may loan money to a depositor upon the pass book as collateral security.

In *Marble* v. *Treasurer and Receiver General*, 245 Mass. 504, the court stated that a deposit such as you describe in your fourth question is not strictly a joint tenancy nor is it an estate by the entirety, where the depositors are husband and wife, because of the express terms of the deposit that either one of the depositors may withdraw any part or the whole of the fund on his single receipt or order, and thereby terminate the tenancy without the consent of the other. This right violates the essential character of a true joint tenancy. The estate created by such a deposit is at most analogous to a joint tenancy but is not a joint tenancy in the accurate meaning of those words.

There exists a contract between the bank and the depositors that the bank will pay the whole or any part of the deposit as agreed upon.

Whether an implied contract by the bank to loan to one of the depositors also exists, under the peculiar circumstances surrounding such a deposit, has not been considered by our Supreme Judicial Court. If there were a true joint tenancy in the deposit, no one of the owners might cumber the same by pledging it. Such a pledging would amount to a severance of the joint tenancy, and it would therefore be improper for a savings bank to make such a loan. Whether or not such a deposit is so analogous to a joint tenancy that a pledge by one of the depositors would be improper as against the other, has not been passed upon by the court. These questions are primarily for judicial determination, and relate particularly to the relations between a savings bank and its depositors, under the terms of a contractual arrangement between them. In the absence of judicial determination of the points which I have noted, I do not express an opinion upon your fourth question, which, like the third, is not one relating directly to the discharge of your functions as Commissioner.

Taxation — Life Insurance Policy — Change of Beneficiary.

The proceeds of a life insurance policy in which the insured reserves the right to change the beneficiary, and which is payable after the death of the insured to a beneficiary named in the policy, are not subject to an inheritance tax.

Nor are the proceeds of such a policy subject to tax if the insured has not reserved the right to change the beneficiary.

To the Commissioner of Corporations and Taxation. 1929 January 22.

You have requested my opinion on the following questions: —

Are the proceeds of a life insurance policy in which the insured has reserved the right to change the beneficiary, which policy is payable after the death of the insured to a beneficiary named in the policy, subject to inheritance tax in Massachusetts under the laws now in effect?

Are the proceeds of a life insurance policy subject to tax if the insured has not reserved the right to change the beneficiary?

Our Massachusetts succession tax statute does not mention life insurance policies specifically. The only words of the statute which might be said to include life insurance policies taken out by the insured upon his life and payable to other beneficiaries than his own estate are the words in G. L., c. 65, § 1, as amended, — "property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession of enjoyment after his death (the death of the donor)." The Massachusetts Supreme Judicial Court has held that these words of the succession tax statute, properly construed, do not include life insurance policies, and that the proceeds of life insurance policies are not subject to an inheritance tax in Massachusetts. *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306.

It is my opinion that the recent United States Supreme Court decision in *Chase National Bank* v. *United States*, 278 U. S. 327, may be distinguished from the decision in *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306.

In the Chase National Bank case the United States Supreme Court was considering the Federal estate tax law, which specifically provides that the gross estate of the decedent, for taxation purposes, shall include life insurance policies taken out by the decedent upon his own life and made payable to other beneficiaries than his own estate. The United States Supreme Court was thus considering a tax upon the right to transfer, and held that the reserved power in the insured to change the beneficiary gave the insured a power of control which might properly be made the subject of a transfer tax. By inference it would seem that even in the United States Supreme Court, in a case where the Federal estate tax is involved, the proceeds of a life insurance policy would not be subject to a transfer tax if the insured has not reserved the right to change the beneficiary. The language of the decision strongly suggests that a life insurance policy payable to a beneficiary other than the estate of the insured may properly be considered a gift to take effect in possession or enjoyment after the

death of the insured, and to hold that a life insurance policy is a gift from the insured to the beneficiary.

The Tyler case was decided in 1917. It is a case which turns upon the construction of a State statute. The Massachusetts court is not bound by the opinion of the United States Supreme Court as to the construction of a State statute. A State court construction of a State statute is final. In this case the court said that a life insurance policy made payable by the insured to a beneficiary other than his estate "does not by fair intendment come within the descriptive words of the statute as 'property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession or enjoyment after the death of the grantor.' "

It seems clear, therefore, that the cases can be distinguished by reason of the construction of the statutes involved; and until the Massachusetts succession tax statute specifically includes life insurance policies of this nature within its terms, it is my opinion that a succession tax upon such insurance policies will not be sustained by our Massachusetts court.

The answer to the first question must therefore be in the negative, and, *a fortiori*, the answer to the second question must also be in the negative.

Constitutional Law — Stock of Trust Company held by Other Banking Organizations.

A proposed law penalizing a trust company, by liquidation, for the holding of more than a certain per cent of its stock by certain organizations, would, if enacted, be unconstitutional as drawn.

To the Senate Committee on Banks and Banking. 1929 February 13.

Your committee has asked my opinion relative to the constitutionality, if enacted into law, of House Bill No. 613, which reads as follows: —

Chapter one hundred and sixty-seven of the General Laws is hereby amended by inserting after section twenty-two the following new section:—

SECTION 22A. Whenever it shall appear to the commissioner of banks that more than ten per cent of the capital stock of any trust company is held, owned, or controlled, directly or indirectly, by any other trust company or by any banking association organized under the laws of the United States of America, or by any corporation, association, or trust directly or indirectly owned, controlled, or affiliated with such other trust company or banking association, the commissioner of banks shall notify the holder of such capital stock to divest itself thereof within thirty days from the date of such notice, and in the event of failure so to do, the commissioner of banks shall take possession forthwith of the property and business of such trust company more than ten per cent of the capital stock of which is so held, owned, or controlled, and retain possession of such trust company and liquidate its affairs in the manner herein provided.

The proposed act in effect penalizes a trust company, by the drastic measure of enforced liquidation, not for any unlawful or improper action of such company but solely because of the failure of some other body (not under the control of the trust company) to comply with an order of the Commissioner of Banks. Such a provision, on its face, is so arbitrary and unfair as to give rise to grave doubts as to its validity, if enacted, under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Whether the main objects of the proposed act could be accomplished by legislation which would constitute a valid exercise of the police power by the General Court, and more particularly of the reserved right to amend and repeal the charters of domestic corporations, I do not need to advise. The act, as printed above, is so indefinite, uncertain and vague in the standards of conduct which it lays down, either for the guidance of individuals investing in the stock of a trust company or for the direction of the activities of the Commissioner of Banks, that it would certainly be, for that reason alone, in contravention of the due process clause of the Fourteenth Amendment to the Federal Constitution. What constitutes control "directly or indirectly," within the meaning of the act, is in no way definitely set forth. A corporate purchaser of stock of a

Massachusetts trust company, if this bill were enacted, would have no basis for determining whether its purchase (if it involved more than ten per cent of the stock of the trust company) would cause the eventual dissolution of the trust company, thereby endangering the purchase as an investment. The only criterion by which the validity of the purchase could be gauged would be a guess as to the way in which the Commissioner of Banks would regard the corporation's relations with all or any of its banking connections. Because of the absence of any standard which an ordinary man could by his general knowledge apply with reasonable certainty to his proposed conduct, the proposed bill is, in my opinion, unconstitutional. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, and cases there cited; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457; *cf. Nash* v. *United States*, 229 U. S. 373, 376. Despite grave doubts upon other grounds as to the validity of the whole method provided by the proposed bill for carrying out its purpose, I limit my opinion to the single ground of unconstitutional indefiniteness.

Motor Vehicles — Compulsory Motor Vehicle Insurance — Express Business.

Motor vehicles owned by express companies are excepted from the application of the compulsory insurance act.

To the Commissioner of Public Works. 1929 February 16.

You request my opinion as to whether motor vehicles owned by a corporation engaged in the express business, and, so far as the statutes provide, under the supervision of the Department of Public Utilities, are outside of the application of the compulsory insurance act.

That act provides (G. L., c. 90, § 1A): —

> No motor vehicle or trailer, except one owned by a person, firm or corporation for the operation of which security is required to be furnished under section forty-six of chapter one hundred and fifty-nine, or one owned by any other corporation subject to the supervision and control

of the department of public utilities or by a street railway company under public control, or by the commonwealth or any political subdivision thereof, shall be registered under sections two to five, inclusive, unless the application therefor is accompanied by a certificate as defined in section thirty-four A.

The question is whether the fact that the jurisdiction of the Department of Public Utilities over express companies appears to be somewhat limited takes the case out of the words of the statute above quoted.

The provisions conferring jurisdiction upon the Department of Public Utilities are contained in G. L., c. 159, § 12, which reads as follows: —

The department shall, so far as may be necessary for the purpose of carrying out the provisions of law relative thereto, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies furnishing or rendering any such service or services, in sections ten to forty-four, inclusive, collectively called common carriers and severally called a common carrier:

(*a*) The transportation or carriage of persons or property, or both, between points within the commonwealth by railroads, street railways, in this chapter called railways, electric railroads, trackless trolleys and steamships, including express service and car service carried on upon or rendered in connection with such railroads, railways, electric railroads, trackless trolleys or steamships.

(*b*) The carriage of passengers for hire upon motor vehicles as provided in sections forty-five to forty-nine, inclusive, of this chapter and section forty-four of chapter one hundred and sixty-one, but only to the extent provided in said sections.

(*c*) The operation of all conveniences, appliances, facilities or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or provided, whether the service be common carriage or merely in facilitation of common carriage.

(*d*) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith.

G. L., c. 159, § 33, provides: —

> Every person doing an express business upon either a railroad or railway in the commonwealth shall annually transmit to the department a return on oath of his doings setting forth copies of all contracts made during the year with other persons doing a transportation or express business upon any railroad or railway in the commonwealth, and shall give complete information in reply to the questions presented in the form for such return which shall be prescribed by the department. A person neglecting to make such return or, if defective or erroneous, to amend it within fifteen days after a request so to do shall forfeit twenty-five dollars for each day during which such neglect continues.

Even if it were assumed that the Department, under chapter 159, has no supervision and control over express service except so far as it is rendered upon railroads or steamships, it would be difficult to say that the words of section 1A of chapter 90 are inapplicable, for those words apply to the corporation and not to the service. But, in fact, it seems that the supervision and control of the Department over express companies is not so confined [see G. L., c. 159, §§ 12 (*c*) and 33], and, in practice, the Department requires companies rendering returns under section 33 to give such information as cost and repairs of motor trucks.

In my opinion, the motor vehicles in question are excepted from the application of the insurance act by the express terms of section 1A.

Constitutional Law — Savings Bank Life Insurance — Statutory Limitations.

The Legislature may, without violating constitutional provisions, limit the amount of the hazard which savings banks as an entire group may venture upon lives of insureds.

To the Senate Committee on Insurance. 1929 February 21.

The Committee on Insurance has asked my opinion upon the following matter relating to savings bank life insurance: —

> Would the limitations, as proposed in document known as Senate 132, if enacted into law, violate any constitutional right of the citizens

of this Commonwealth, and how, if at all, would your opinion differ if the life insurance limitation were changed from five thousand dollars to ten thousand dollars, the amount available at the present time?

The proposed bill, Senate No. 132, is entitled "An Act relative to the amount of insurance which savings and insurance banks may pay upon the death of the insured," and reads as follows: —

SECTION 1. Section ten of chapter one hundred and seventy-eight of the General Laws is hereby amended by adding at the end thereof the following: — Provided, that the maximum amount of insurance which may be issued to any one person by five or more such banks shall not exceed in the aggregate five thousand dollars, exclusive of dividends or profits, and the maximum yearly payments to any one person under annuity contracts issued by five or more such banks shall not exceed four hundred dollars.

SECTION 2. This act shall take effect upon its passage.

The writing of policies of insurance and annuity contracts is a business so clothed with public interest that it may be regulated by the Legislature for the public welfare, under its general police power, in a wide variety of ways. Almost all such reasonable regulations interfere with perfect freedom of the exercise of the right to make contracts, both as to the individual insured and the insurer, but as a proper exercise of the police power such interference does not violate the constitutional guarantees of State constitutions or of the Federal Constitution. Such regulations, to be constitutional, must not be arbitrary or unreasonable.

The doing of an insurance business by savings banks was first authorized by the Legislature in 1907, and the manner and mode of conducting such business by these banks is regulated and limited in a wide variety of ways by enactments now embodied in G. L., c. 178, as amended. The system laid down by the Legislature heretofore for the conduct of the business by these banks differs in many particulars from that under which insurance companies are permitted to carry on business under the provisions of G. L., c. 175, as amended.

Among other regulations provided in G. L., c. 178, as amended, for the conduct of the business by savings banks, section 10 of said chapter now provides the following: —

> No savings and insurance bank shall write any policy binding it to pay more than one thousand dollars, exclusive of dividends or profits, upon the death of any one person, except for such amount, if any, as it may be bound to pay upon the death of such person under an employees' group policy, nor any annuity contract binding it to pay in any one year more than two hundred dollars, exclusive of dividends or profits.

The existing law thus limits the amount which any savings bank may hazard upon a single risk, either by way of a policy of insurance or a contract of annuity. The proposed bill limits the amount of the hazard which the savings banks engaged in this business, as an entire group, may venture upon a single risk. If such limitation be necessary to protect the interests of those seeking this particular form of insurance, as well as the insurers, as a provision making for the solvency of the insurers and the safety of the funds to which the insureds are to look for payment upon their contracts, it could not well be said that a legislative measure establishing such a limitation was unreasonable or arbitrary. The determination of the amount of such limitation best adapted to secure such solvency, if fixed by the sound judgment of the Legislature at either of the figures mentioned in your communication, could not, in view of the exercise of the judgment of the Legislature, be said to be arbitrary or unreasonable.

Whether such limitations as are created by the proposed bill are reasonable for accomplishing the purpose which I have above referred to is for the determination of the General Court. If it so determines, I cannot say that such a bill, if enacted into law, would be unconstitutional.

Retirement System — Penal Institutions Officer — Duration of Service.

The Commissioner of Correction may retire and place on the pension roll a penal institutions officer entitled to such retirement under G. L., c. 32, § 46.

To the Commissioner of Correction. 1929 February 23.

You have sent me the following communication: —

I respectfully refer you to an opinion rendered by a former Attorney General, dated May 12, 1919, relative to the retirement status of a man employed at the Massachusetts Reformatory. This man will attain the age of seventy on January 27, 1929, and has been advised by the Board of Retirement that he must leave the service of the Commonwealth on that date.

In the light of the opinion above referred to will you be kind enough to advise me whether this man is entitled to be retired under the prison officers' retirement law, G. L., c. 32, § 46, or is ineligible to any retirement allowance, as assumed by the Board of Retirement.

You have also submitted to me certain correspondence, from which I assume the facts to be that the person referred to in your letter was first employed at one of the State penal institutions from June 1, 1890, until January 5, 1907; that he then resigned and was absent from the service until re-employed in such an institution on May 10, 1915, and that when so re-employed in 1915 he was over fifty-five years of age.

There can be no question but that the person referred to has been, since attaining the age of sixty-five, eligible to retirement from the service and to have his name placed upon a pension roll, with the approval of the Governor and Council, under the provisions of G. L., c. 32, §§ 46–48, as amended, which relate peculiarly to prison employees. It is specifically provided in section 47 that in computing the twenty years of service for the Commonwealth, which render a prison employee eligible to the pension mentioned in section 46, all the time which he has served in the penal institutions of the State shall be counted, irrespective of whether such service was continuous or not. An opinion of one of my predecessors in office, rendered to you May 12, 1919 (not published), relative to a similar case, makes this

plain; but such opinion did not hold that because an employee or officer of a penal institution was eligible for retirement under the particular provisions now embodied in G. L., c. 32, §§ 46–48 (formerly St. 1908, c. 601, as amended), he was also entitled, in addition to such pension, to receive a retiring allowance, or that he was eligible to be a member of the State Retirement Association if over fifty-five years of age at the time of his last re-entry into the service of the Commonwealth. Moreover, it has been held in an opinion of a former Attorney General (V Op. Atty. Gen. 456) that where an employee has ceased by voluntary retirement to hold a position in the service of the State and subsequently re-enters it, his term of service, for the purposes of obtaining the benefits of the retirement system, begins with the date of his re-employment, and that, as the continuity of his service has been broken by his resignation, the term of his prior employment is to be disregarded by the Board of Retirement.

The first plan for a comprehensive retirement system for the employees of the Commonwealth was enacted by St. 1911, c. 532, and after a series of amendments it was consolidated in G. L., c. 32, with other provisions relative to pension systems for certain classes of employees, enacted by other statutes, among which were the provisions for employees in penal institutions, contained in St. 1908, c. 601, as amended. Employees such as those in penal institutions, as the law now stands, are, when eligible to the benefits of the State retirement law, given the advantage of an option between retiring under the general provisions of the retirement law or under those applicable to their particular class. V Op. Atty. Gen. 634. Their eligibility to the advantages of the general retirement system is governed by the provisions applicable directly thereto, and particular provisions of those sections of the statutes which relate to eligibility to special pension funds do not control or govern their eligibility to the benefits of the general retirement system.

The person to whom you refer in your letter re-entered the service of the Commonwealth in its penal institutions in 1915. He was then over fifty-five years of age. Having attained such age he was not then eligible to membership in the State Retirement Association or entitled to the benefits of the retirement system in that respect. St. 1911, c. 532, § 3 (2), as amended, now G. L., c. 32, § 2 (2) and (3). He was, however, as I have pointed out, eligible to the benefits of the pension provided for penal institution employees by St. 1911, c. 608, now G. L., c. 32, §§ 46–48.

He was also subject to the provisions of St. 1911, c. 532, § 3, as amended, now G. L., c. 32, § 2 (2), to the effect that "no such person (employee) shall remain in the service of the Commonwealth after reaching the age of seventy."

This provision of chapter 32 applies, as part of the comprehensive scheme for the regulation of the retirement of persons in the service of the Commonwealth, to all such persons alike, irrespective of whether or not they are entitled to the advantage of a pension.

The provisions of G. L., c. 32, are intended to, and do, forbid a person employed by the Commonwealth from remaining in the service after reaching the age of seventy (see opinion rendered the Commissioner of Public Works March 19, 1921, not published), with the exception of those persons mentioned in G. L., c. 32, § 2 (3), namely an "officer elected by popular vote" or "any employee who is or will be entitled to a non-contributory pension from the commonwealth." Admittedly, the person in question does not fall within the exception extended to elective officers nor does he fall within the second exception. It cannot be said that under the provisions of G. L., c. 32, §§ 46–48, "he is or will be entitled to a non-contributory pension." The pension provided for by section 46 is non-contributory, but it cannot presently be said that he "either is or will be entitled" thereto within the meaning of said chapter 32, section 2 (3). It is optional with the Commissioner of Correction to retire him from service and place him upon

a pension roll, and the act of the Commissioner in this respect is subject to the approval of the Governor and Council (see V Op. Atty. Gen. 634).

MOTOR VEHICLES AND TRAILERS — LENGTH — PERMITS.

No commercial motor vehicle with an extreme over-all length of twenty-eight feet may be operated upon a State highway without a special permit.

Groups of vehicles having altogether an over-all length of twenty-eight feet do not require a special permit.

To the Commissioner of Public Works.
1929
February 23.

You have directed my attention to G. L., c. 90, § 19, which, as finally amended by St. 1927, c. 72, reads as follows: —

No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a state highway or a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load.

You have asked my opinion as to its interpretation in connection with the issuing of the special permits.

Gen. St. 1919, c. 252, §§ 2 and 3, which was the original act dealing with the subject matter of said section 19, was as follows: —

SECTION 2. The Massachusetts highway commission, as to state highways, and the county commissioners, as to county highways, may likewise grant permits under this act.

SECTION 3. Any person violating any provision of this act, or of the terms of any permit granted hereunder, shall be punished by a fine of not more than one hundred dollars for each offence.

The provisions of said Gen. St. 1919, c. 252, were originally embraced in G. L., c. 90, § 19, in substantially the same terms, in the following words: —

No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way,

except that such a vehicle exceeding twenty-eight feet may be operated when a special permit so to operate is secured from the superintendent of streets, selectmen, or local authorities, having charge of the repair and maintenance of highways in the several cities and towns, or in the case of state highways, from the commissioner of public works, and in the case of other highways, from the county commissioners having jurisdiction thereof; provided, that the combined length of such a vehicle and trailer or trailers, or of two or more such vehicles fastened together in series, with or without trailers, may exceed twenty-eight feet, but in no event shall such combined length exceed sixty-five feet. All of the aforesaid dimensions shall be inclusive of the load.

The words of the proviso as contained in said section 19 were omitted when it was amended by St. 1925, c. 180, § 1, which read as follows: —

Section 1. Chapter ninety of the General Laws is hereby amended by striking out section nineteen and inserting in place thereof the following: — *Section 19.* No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches, shall be operated on any way. No commercial motor vehicle, motor truck or trailer, the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load.

Nor have the words of the proviso been restored by subsequent legislation.

It follows, then, from the wording of G. L., c. 90, § 19, as it now stands amended, that any commercial motor vehicle, motor truck or trailer, the extreme over-all length of which exceeds twenty-eight feet, may not be operated, without a special permit from you as Commissioner of Public Works, upon a State highway or a way determined to be a through route, and the necessity for such a permit is not removed by the fact that such a vehicle is fastened together with others, irrespective of what the combined length of all the vehicles may be. Nor does a single vehicle, of the types mentioned in the statute, which is not itself over twenty-eight feet in length require a special permit

for operation even if it be fastened together with other vehicles, all of which together have a length of over twenty-eight feet. Nor does a group of vehicles fastened together, none of the units of which exceeds twenty-eight feet in length, require a special permit.

FIRE MARSHAL — LICENSES AND PERMITS — CITY COUNCIL.

Licenses and permits under G. L., c. 148, § 31, as amended, and licenses under G. L., c. 148, § 14, as amended, may be issued by a head of the fire department and a city council, jointly, if they have been designated for that purpose by the Fire Marshal.

To the Commissioner of Public Safety. 1929 February 25.

You have asked my opinion relative to delegation of authority by the Fire Marshal to issue licenses and permits under G. L., c. 148, § 31, as amended, and to issue licenses under G. L., c. 148, § 14, as amended. Your question reads as follows: —

> The question upon which your opinion is desired is: Can a designation be made by the Marshal including the city council and the head of the fire department to grant such licenses, so that one document only will be required?

Section 14 provides for the issuance of permits by the Marshal "or by some *official* designated by him for that purpose." Section 31 provides for delegation by the Marshal to "the head of the fire department or *to* any other designated *officer*" in a city or town in the metropolitan district.

The terms "official" and "officer," as used in these two sections, are, in my opinion, to be construed as including the plural. See G. L., c. 4, § 6, cl. 4th. In *Foss* v. *Wexler*, 242 Mass. 277, the delegation was to the mayor and the board of street commissioners, and no question was raised on this point.

Nor do I think that the use of the word "or" in section 31 excludes the possibility of delegation to a head of the fire

department and some other official jointly. The word "or" may be given a conjunctive as well as disjunctive meaning, and should be so construed here, for certainly it was not intended that, although a delegation might be made to any two other officials jointly, the head of the fire department could be designated only in the event that he should act alone. Nor could it have been intended that the power to make a joint delegation, including the head of the fire department, should be different under section 31 from what it is under section 14.

I am not certain what is meant by the last part of your question, viz.: "so that one document only will be required." If by "document" you refer to notice of the designation, I would say that written notice of the designation must be given to the head of the fire department and also to the city council. If you refer to the license or permit issued by the officials designated, there not only may be, but should be, only one document issued by the head of the fire department and the city council jointly.

Food — Fish — Cold Storage — Advertising.

The provisions of G. L., c. 94, § 78, as to advertisements, do not require that cold storage fish shall be designated as such, but they do forbid representation of the commodity as fresh fish.

The word "fish," as used in St. 1928, c. 40, § 1, includes all forms of fish and shellfish and crustacea.

To the Commissioner of Conservation. 1929 February 25.

You have asked my opinion as to whether or nor, in advertising or other forms of publicity, cold storage fish must be so designated as to distinguish it from fresh fish.

G. L., c. 94, § 78, is as follows: —

> No person shall sell, offer or expose for sale fish which have been held in cold storage, without notice to purchasers that such fish have been so held, nor without the conspicuous display of a sign marked "Cold Storage Fish"; nor shall any person represent or advertise or sell cold storage fish as fresh fish.

G. L., c. 94, § 74, as amended by St. 1922, c. 17, § 1, provides, in part, as follows: —

> All fresh food fish before being offered for sale or placed in cold storage shall be graded as follows: —
>
> . . . . . .
>
> No person shall represent, sell, offer for sale or advertise fresh or frozen fish of any grade under any but the truthful and correct name and grade or corresponding term for such fish.

The words "advertising or other forms of publicity," as used in your question, may be somewhat ambiguous, and you may mean to include in these words some specific case in which it would be possible to construe the form of publicity as an offer; in which case, of course, notice that the fish offered has been held in cold storage is required by the statute. An advertisement, however, in the sense in which that word is commonly used, will usually be construed by the courts, not as an offer, but as an invitation for offers. See Williston on Contracts, § 27. And, in any event, it is clear that the word "advertise," as used in the two sections of the statute above quoted, is used as distinct from "offer." Assuming, then, as I must, that your question refers only to advertisements or forms of publicity which are not in law offers, I answer your question in the negative.

The requirement of section 78 as to advertisements is merely that cold storage fish shall not be represented as fresh fish. An advertisement of fish, without more, is not a representation that it is fresh fish, as distinguished from cold storage fish. Nor is there anything in section 74 which leads to a different result. The words "name" and "grade" have no reference, as the preceding part of section 74 clearly shows, to any distinction between fresh and cold storage fish.

You also ask my opinion as to whether or not the word "fish", as used in St. 1928, c. 40, § 1, includes all forms of fish, such as fresh, frozen, cold storage, salted, pickled or otherwise preserved, and all shellfish and crustacea. Said section, amending G. L., c. 94, § 82, makes it criminal to sell for food purposes fish which is unwholesome or unfit for

food. I think that shellfish and crustacea were intended to be, and well may be, included under the term "fish" as used in this statute. Provisions relating to these types are contained in G. L., c. 130, entitled "Fisheries."

See also *Weston* v. *Sampson*, 8 Cush. 347. Nor do I think that this statute makes any distinction as between fresh fish and fish that is salted, pickled or preserved. The purpose of the statute, namely, to guard against the sale of impure food, applies to all equally. Accordingly, I answer your second question in the affirmative.

TRUST COMPANY — INCREASE OF CAPITAL STOCK — STOCKHOLDER.

Stockholders of trust companies may, under G. L., c. 172, § 18, as amended, and G. L., c. 156, §§ 41 and 44, authorize an increase of capital stock under such terms and in such manner as the directors or officers may determine.

To the Commissioner of Banks. 1929 March 22.

You have asked my opinion as to whether stockholders of a trust company have power under the terms of G. L., c. 172, § 18, as amended, to authorize its board of directors or officers to dispose of an increase of capital stock under such terms and in such manner as the board or officers may determine.

G. L., c. 172, § 18, as amended by St. 1926, c. 239, as it relates to the increase of capital stock by trust companies, reads as follows: —

> Any such corporation may, subject to the approval of the commissioner, increase its capital stock in the manner provided by sections forty-one and forty-four of chapter one hundred and fifty-six.

G. L., c. 156, §§ 41 and 44, read as follows: —

> SECTION 41. Every corporation may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize an increase or a reduction of its capital stock and determine the terms and manner of the disposition of such increased stock, or authorize such terms and manner of disposition to be

determined in whole or in part by the board of directors or officers of the corporation, may authorize a change of the location of its principal office or place of business in this commonwealth or a change of the par value of the shares of its capital stock, or may authorize proceedings for its dissolution under section fifty of chapter one hundred and fifty-five. Such increased stock may in whole or in part be disposed of without being offered to the stockholders. Any corporation having authorized shares with par value may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, including in any event a majority of the outstanding stock of each class affected, change such shares or any class thereof into an equal or greater number of shares without par value, or provide for the exchange thereof pro rata for an equal or greater number of shares without par value; provided, that the preferences, voting powers, restrictions and qualifications of the outstanding shares so changed or exchanged shall not be otherwise impaired or diminished without the consent of the holders thereof.

. . . . . .

Section 44. If an increase in the total number of the capital stock of any corporation shall have been authorized by vote of its stockholders in accordance with section forty-one, the articles of amendment shall also set forth — (*a*) the total amount of capital stock already authorized; (*b*) the amount of stock already issued for cash payable by instalments and the amount paid thereon; and the amount of full paid stock already issued for cash, property, services or expenses; (*c*) the amount of additional stock authorized; (*d*) the amount of such stock to be issued for cash, property, services or expenses, respectively; (*e*) a description of said property and a statement of the nature of said services or expenses, in the manner required by section ten.

The statute which first provided for increase of capital stock of trust companies, St. 1905, c. 189, was couched in the following language: —

A trust company may, subject to the approval of the board of commissioners of savings banks, increase its capital stock to the maximum amount allowed by section five of chapter one hundred and sixteen of the Revised Laws, in the manner provided for the increase of capital stock of business corporations under the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, and of acts in amendment thereof, relative to the increase of capital stock; *provided, however,* that no such stock shall be issued by any trust company until the par value thereof shall be fully paid in in cash.

Provision is made in the General Laws for a mode of disposition of increased capital stock with reference to corporations not subject to G. L., c. 156, when no other provision is made by law with relation thereto. This is contained in G. L., c. 155, § 20, and reads as follows: —

> If a corporation, not subject to chapter one hundred and fifty-six, increases its capital stock and no other provision therefor is made by law, its directors shall forthwith give written notice thereof to each stockholder who was such at the date of the vote to increase, stating the amount of the increase, the number of shares or fractions of shares of the new stock which such stockholder is entitled to take, and the time, not less than thirty days after the date of such vote, within which such new stock shall be taken; and, within said time, each stockholder may take at par his proportion of such new shares, according to the number of his shares at the date of such vote to increase. If, at the expiration of said time, any shares remain untaken, the directors shall sell them by public auction for the benefit of the corporation at not less than the par value thereof.

I am of the opinion that it was the intent of the Legislature, in providing by G. L., c. 172, § 18, as amended, that a trust company might increase its capital stock "in the manner provided by" G. L., c. 156, §§ 41 and 44, to make applicable to such company the provisions of said sections 41 and 44, not only as they refer directly to the method of increasing stock but as they refer to the manner of distributing or disposing of the same. The terms and manner of disposition are such an integral part of an increase of stock that a reference to increase of capital stock in the "manner provided" in sections 41 and 44 would seem, in the ordinary use of words, to include both, as set out in the designated sections. It follows that the terms of G. L., c. 155, § 20, are not applicable to increase of stock by a trust company, for which provision is made by law under said G. L., c. 156, §§ 41 and 44, incorporated by reference in G. L., c. 172, § 18, as amended.

Division of Animal Industry — Rules — Poultry — Animals.

G. L., c. 129, § 2, does not give authority to the Division of Animal Industry to make rules as to giving certificates as to the condition of poultry or animals.

To the Commissioner of Conservation.
1929
March 27.

You ask my opinion as to the validity of certain proposed rules of the Division of Animal Industry, one set relating to a disease of poultry known as salmonella pullorum, and the other to a disease of cattle known as Bang bacillus.

The proposed rules provide, in substance, that if an owner elects to submit his flock or herd to certain blood tests in a laboratory approved by the Director, and if such tests show freedom from the disease in question, and if the owner further observes certain requirements as to care and maintenance, the Division will issue to him a certificate that his flock or herd is free of the disease in question.

The power of the Division to make rules is set forth in G. L., c. 129, § 2, as follows: —

> The director may make and enforce reasonable orders, rules and regulations relative to the following: the sanitary condition of neat cattle, other ruminants and swine and of places where such animals are kept; the prevention, suppression and extirpation of contagious diseases of domestic animals; the inspection, examination, quarantine, care and treatment or destruction of domestic animals affected with or which have been exposed to contagious disease, the burial or other disposal of their carcasses and the cleansing and disinfection of places where contagion exists or has existed. No rules or regulations shall take effect until approved by the governor and council.

Nothing therein confers power to issue certificates, and such power cannot, in my opinion, be implied. The Legislature has specifically provided in section 20 that inspectors shall issue certificates in certain cases, but section 20 gives no authority for the procedure proposed. Moreover, it would appear that under the proposed rules the Division would have no first-hand knowledge of the fact which it undertook to certify. The blood tests are not made by the Division, nor is any provision made for the Division to

ascertain the existence of the other facts which are supposed to exist in order to make a certificate proper.

As to the proposed set of rules relating to poultry, there is, in my opinion, an additional reason why they are invalid. The words "domestic animals," as used in G. L., c. 129, § 2, do not, I think, include poultry. The Division of Animal Industry succeeded to the powers of the Department of Animal Industry (Gen. St. 1919, c. 350, § 40), which succeeded to the powers of the Board of Cattle Commissioners and the Cattle Bureau (St. 1912, c. 608). The Cattle Bureau was given the powers of the Board of Cattle Commissioners (St. 1902, c. 116). The power of the Board of Cattle Commissioners to make rules is expressed in P. S., c. 90, § 13, as follows: —

> When such commissioners make and publish any regulations concerning the extirpation, cure, or treatment of animals infected with or which have been exposed to any contagious disease, such regulations shall supersede those made by mayors and aldermen and selectmen; and mayors and aldermen and selectmen shall carry out and enforce all orders and directions of the commissioners to them directed.

The authority here given to the Cattle Commissioners is over the same subject matter referred to in section 1 of said chapter 90, in the following words: "The mayor and aldermen of cities and the selectmen of towns, in case of the existence in this commonwealth of the disease called pleuro-pneumonia among cattle, or farcy or glanders among horses, or any other contagious or infectious disease among domestic animals, shall cause" the animals to be segregated, etc. It would seem that the term "domestic animals," as here used, was not intended to include poultry. This view is confirmed by the words of section 7, which provide that "they may cause every animal infected with any such disease, or which has been exposed thereto, to be forthwith branded upon the rump with the letter P." There is nothing in subsequent statutes tending to show that the term "domestic animals" was intended to be given a new meaning which might confer on the Cattle Commissioners

the power or duty of passing rules affecting poultry. This is further confirmed, moreover, by the failure to include any poultry disease in the list of contagious diseases enumerated in R. L., c. 90, § 28 (St. 1911, c. 6).

Furthermore, it is to be noted that in a number of instances the Legislature has used the term "birds or poultry" in addition to "animals," so indicating that the word "animals" is not sufficiently inclusive. Thus in G. L., c. 180, § 2, "for encouraging the raising of choice breeds of domestic animals and poultry"; in G. L., c. 131, § 2, "preservation of birds and animals"; in G. L., c. 130, § 2, "the laws relating to fish, birds, mammals and game." I do not mean to intimate that there may not be statutes in which the word "animals" may be construed as including birds or poultry; but, in my opinion, it is not so to be construed in G. L., c. 129, § 2.

Public Safety — Compressed Air Tank — Operation of Pneumatic Machinery.

A compressed air tank used merely for starting in initial motion one piston of a Diesel engine is comprehended within the meaning of G. L., c. 146, § 34, relative to tanks for the storing of compressed air.

To the Commissioner of Public Safety.
1929
March 28.

You have asked my opinion on the following matter: —

Whether a compressed air tank setting in initial motion one piston of a Diesel engine may be considered as operating pneumatic machinery as specified in the law.

You have advised me of the following facts in connection therewith: —

The method of using the compressed air contained in the tank is as follows:

For the purpose of starting the engine in the first instance, the compressed air contained in the tank is applied to a cylinder of the engine, compressing the air therein to a temperature of approximately 500 degrees Fahrenheit. A portion of oil at this instant is injected into the cylinder, the heat igniting the oil and causing combustion and explosion.

The expansion of this cylinder compresses the next in a similar manner, and so on. The tank is used for the sole purpose of starting the engine. This method has been used for more than twenty-five years, but not to any considerable extent until about 1914, since which time these engines and tanks have been gradually coming into considerable use in place of steam engines.

The pertinent provisions of the statutes are as follows, G. L., c. 146, § 34: —

> No person shall install or use, or cause to be installed or used, any tank or other receptacle, except when attached to locomotives, street or railway cars, vessels or motor vehicles, for the storing of compressed air at any pressure exceeding fifty pounds per square inch, for use in operating pneumatic machinery, unless the owner or user thereof shall hold a certificate of inspection issued by the division, certifying that the said tank or other receptacle has duly been inspected within two years, or unless the owner or user shall hold a policy of insurance upon the said tank or other receptacle issued by an insurance company authorized to insure air tanks within the commonwealth, together with a certificate of inspection from an insurance inspector who holds a certificate of competency described in section sixty-two.

The Attorney-General does not pass upon questions of fact, but if, as would appear from the statements in your letter, the motive power of the Diesel engine is not compressed air, the mere fact that compressed air from tanks is used in the initial process of starting the engine would, in my opinion, not be sufficient so that it could be said that a tank employed solely for the purpose of furnishing compressed air for such starting purposes was a tank for the storing of compressed air "for use in operating pneumatic machinery," within the meaning of the statute. The mere starting of machinery whose motive power thereafter is not pneumatic cannot fairly be said to be comprehended by the employment of the words "*use in operating pneumatic machinery.*" The words "operating" and "starting," as the former is used in the statute, are not synonymous. The intent of the Legislature, as expressed in the words of the statute, appears to be to provide for the adequate safeguarding of tanks storing compressed air which were to be used for something more than brief periods.

Constitutional Law — Water Supply — Cities.

The Legislature may constitutionally redistribute the burdens assumed under an agreement between different cities relative to a water supply.

To the House Committee on Water Supply. 1929 April 11.

You request my opinion as to whether House Bill No. 932, entitled "An Act relative to water supply for the cities of Salem and Beverly," would, if enacted, be constitutional.

St. 1913, c. 700, § 3, provides that the payment of certain expenses incurred in connection with a joint water supply for Salem and Beverly should be apportioned two-thirds and one-third. The proposed bill amends this section by changing the apportionment to three-fourths for Salem and one-fourth for Beverly.

The argument that this proposed change is unconstitutional is based upon the contention, made in behalf of the city of Salem, that by action taken by the two cities under earlier statutes, which permitted Beverly to acquire a one-third interest in the water supply of Wenham Lake, a contract was created between the two cities which binds Beverly to bear one-third of the burden of providing and maintaining a joint water supply, and that the change proposed in the present bill impairs the obligation of that contract.

By St. 1864, c. 268, Salem was authorized to take, and did take, for the purpose of a water supply, Wenham Pond, in Wenham and Beverly, and certain lands and water rights in connection therewith. By section 15 of said act towns upon the line of works, including Beverly, were entitled to a reasonable use of the water upon paying an equitable compensation therefor. See also St. 1869, c. 380; St. 1877, c. 144.

By St. 1885, c. 294, Beverly was authorized to supply itself with water, and for that purpose to draw directly from Wenham Pond so much of the waters thereof and of the waters which flow into and from the same "as it may require." By section 10 it was provided that upon the establishment of independent works by Beverly, the town should pay to Salem one-third of the expense theretofore

sustained by Salem in connection with securing and preserving the water supply in Wenham Pond and also one-third of the expenses thereafter incurred by Salem at Beverly's request in securing and preserving the purity of the waters of said pond; and upon the payment by Beverly of one-third of the expense theretofore incurred, Salem should record a declaration of trust in or concerning "said lands, water rights and easements," declaring that "one undivided third part of the same is held in trust" for Beverly, and that Beverly is entitled "to the beneficial enjoyment of said one undivided third part thereof." Beverly paid the one-third, and Salem in 1888 recorded the declaration of trust, as provided for by the statute (Essex Deeds, book 1217, page 128).

By section 11 of said act of 1885, it was further provided that the town of Beverly may draw from said pond "such water as it may require," without compensation to the city of Salem; but that if for any reason the supply in said pond were "insufficient to supply the needs of said city and its inhabitants and of said town and its inhabitants," thereafter, "so long as the supply remains insufficient as aforesaid, said town shall take from said pond only so much water as shall bear the same proportion to the water taken by said city from said pond as the number of inhabitants of said town bears to the number of the inhabitants of said city."

By St. 1893, c. 364, Salem was authorized, for the purpose of providing an additional water supply for Salem and Beverly, to take certain additional waters and to convey them into Wenham Lake; and by section 10 it was provided that upon payment by Beverly of one-third of the expense, Salem should record a declaration of trust, declaring that one undivided third thereof was held in trust for Beverly and that Beverly is entitled to the beneficial enjoyment of the same. It is my understanding that such taking was made, that Beverly made the payment and that Salem filed the declaration of trust.

St. 1913, c. 700, created the Salem and Beverly Water Supply Board. By section 4 said board was authorized, for the purpose of providing for the supply for Salem and Beverly, to acquire waters from the Ipswich River, and to construct works and acquire other rights in connection therewith; and section 5 provided that such property and rights should vest in Salem and Beverly "as tenants in common in the proportion named in section three hereof" — *i.e.*, in the proportion of two-thirds and one-third. Payment of expenses so incurred by the board was to be made from a fund, established by section 16, which was created from the proceeds of the issuance of bonds and notes by Salem and by Beverly as requested by the board, "provided, that at no time shall said city (Beverly) be requested to issue said bonds or notes to an amount greater or less than one-half the amount so requested in the case of the city of Salem" (§ 14).

As to expenses incurred by the board in maintenance, care and operation, it is provided by section 19 that these shall be paid by the respective cities from current revenues derived from water rates or taxation, in the proportion named in section 3 — *i.e.*, two-thirds and one-third, for a term of five years; but that every five years thereafter the board shall determine the proportion, subject to right of appeal to the Superior Court.

Section 3 of said act of 1913, which the present bill aims to amend by changing the proportion from two-thirds and one-third to three-fourths and one-fourth, reads as follows:—

> All expenses, liabilities and damages incurred by said board in carrying out the purposes of this act shall be paid, except as hereinafter provided, by said cities in the proportion of one third by the city of Beverly and two thirds by the city of Salem, and payment shall be made in the manner provided in section seventeen from the fund established by section sixteen hereof.

The proposed amendment effects no change in the proportion of ownership in any property heretofore acquired, nor does it involve any readjustment of payments already

made. Neither does it affect in any way the existing liability of the two cities for care and maintenance, either of property now owned in common or hereafter to be acquired, for that is determined by section 19 of the act. The sole effect, therefore, of the proposed change would be to impose a different allocation of the expense in the event that the board shall hereafter acquire additional property or construct additional works, as, for instance, a new reservoir at Putnamville, to which you refer.

If the Legislature decides that, as to this, justice requires a different apportionment of expense from that which has previously been applied in connection with the joint water supply of the two cities, I can see no constitutional objection to the enactment of a law to that effect. The fact that in the case of this proposed reservoir at Putnamville the water will presumably be drawn from there into Wenham Lake, does not, in my opinion, alter the case, especially since the right of the respective cities to draw water from Wenham Lake is not fixed by any apportionment, except in the unusual event of a shortage. (St. 1885, c. 294, § 11.) Under ordinary circumstances the right of the city of Beverly is to draw such water "as it may require" (St. 1885, c. 294, §§ 2 and 11), and the right of the city of Salem is no doubt the same.

Moreover, the Legislature has very broad powers in making readjustments of the rights and property of municipal corporations. In *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, 521, the court said: —

> Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another public corporation.

As the court in this case and in many others points out, the question is very different from that involved where the rights of individuals or quasi-public corporations are concerned.

In *Scituate* v. *Weymouth*, 108 Mass. 126, 131, the court said:

> It was an exercise of the authority of the legislature to distribute public burdens and duties. It is clear that, under the same constitutional power, it had the right to change the law and redistribute these public burdens, if from a change of circumstances or other reason it deemed it just and proper so to do.

See also *Cambridge* v. *Lexington*, 17 Pick. 222; *Attorney General* v. *Cambridge*, 16 Gray, 247; *Turners Falls Fire District* v. *Millers Falls Water Supply District*, 189 Mass. 265; *City of Boston, petitioner*, 221 Mass. 468; *Opinion of the Justices*, 234 Mass. 612, 616; *Selectmen of Brookline, petitioners*, 236 Mass. 260.

Indeed, the Legislature, by the act of 1913 here under consideration, has by section 19 apparently made provision for changing the distribution of the burden of care and maintenance from two-thirds and one-third to such proportion as the board should, after a five-year term, decide to be proper; and the constitutionality of that provision seems not to have been questioned.

I would suggest, however, that House Bill No. 932 seems inadequate to effect the change intended, for the reason that payments are to be made from the fund, and section 14 of said act of 1913 would still provide that Beverly's contribution to the fund should be one-half that of Salem. If, therefore, the Legislature desires to change the allocation, section 14 and perhaps other sections of the act should be amended, in addition to section 3.

You also ask whether the city of Salem now has the legal right to take an unlimited quantity of water from Wenham Lake, which would prevent the city of Beverly from taking one-third of the water of said lake for water supply purposes. The answer to this question depends upon whether Beverly requires one-third of the water. As already stated, either city has the right to take as much as it requires, except in the event of a shortage, when the right is limited as provided in St. 1885, c. 294, § 11.

Constitutional Law — Charitable Trust Funds — Cy Pres.

An act is an unconstitutional invasion by the Legislature of the judicial function if it attempts to alter a trust agreement relative to the application of funds for a charitable purpose.

To the House Committee on Towns. 1929 April 11.

You have asked my opinion as to whether House Bill No. 737 would, if enacted into law, be constitutional. The act authorizes the Trustees of the School Fund in the Town of Hopkinton, a corporation organized under the provisions of an act approved June 17, 1820, to transfer and convey all its property to the town of Hopkinton, which, acting through its school committee, shall receive and apply said funds upon the same trusts as those upon which said trust funds and property are now held. The act further provides that the corporation shall thereupon be dissolved.

The act of 1820 creates the present trustees as a corporation for the purpose of holding and applying certain funds for school purposes. Those funds were apparently originally provided by certain public spirited inhabitants interested in the schools of the town, and the act of 1820 created a method of administering the fund, which method I assume to have been in conformity with the donors' wishes. The persons interested in the present act were not able definitely to trace the original source and history of this fund, and a somewhat limited investigation by this office has not aided materially. The question is therefore treated as if there was, prior to 1820, a gift for charitable uses to be administered for the purposes and in the manner described by the act of 1820.

If the act is unconstitutional, it is because of one or more of the following reasons: —

1. It impairs the obligation of the contract between the State and the corporation.

2. It impairs the obligation of the contract between the corporation and the donor or donors of the fund.

3. It is an attempted exercise of the judicial power by the Legislature.

1. The Legislature may not alter or repeal the charter of a corporation issued prior to 1831 without its consent. The present act, however, is dependent upon the assent of the corporation, and therefore cannot be said to be objectionable on the first ground.

2. It has repeatedly been held that a gift to a charitable corporation constitutes a contract between the corporation and the donor, and that any act impairing this agreement violates the Constitution of the United States. It is very probable that this act, dissolving the corporation by whom the trust is administered and causing the funds to be turned over to the town, may be contrary to the wishes and intent of the donor. It is not unlikely that the donor intended and desired that the management of the fund should be left in the hands of private persons rather than public officers, who might be influenced by political and personal motives. Assuming that the act of 1820 expresses the intent of the donor or donors of this fund, I am of the opinion that the constitutionality of this act would be open to grave doubt upon this ground.

3. Any material change in the objects of a charity or the agents by whom it is to be administered must be made by the courts, and then only if the original purposes are impossible or impracticable; further, the court must also find a dominant or general charitable intent on the part of the donor which is consistent with the contemplated changes. This action on the part of the court is generally referred to as the application of the *cy-pres* doctrine, and is exclusively a judicial function. *Cary Library* v. *Bliss*, 151 Mass. 364; *Opinion of the Justices*, 237 Mass. 613, 617.

The Legislature has a somewhat vaguely defined power over charitable trusts held by municipalities, and may authorize the conversion of real estate into personalty in certain cases, but beyond this, action in any given case which alters the original gift must be had by the judicial

department. The court, in the case of *Ware* v. *Fitchburg*, 200 Mass. 61, decided that the Legislature had power to determine by statute who should be the agent of the city to administer a charitable fund left to it; the case does not hold that the Legislature may change the trustee or terminate a charitable corporation, and no case has come to my attention where this was properly done by the Legislature.

It follows that the act, in so far as it attempts to alter the trust agreement, is an unconstitutional invasion by the Legislature of an exclusively judicial function.

PUBLIC HEALTH — LOCAL BOARD OF HEALTH — INSPECTOR — APPOINTMENT.

A city manager, in lieu of a mayor, has the duty to nominate an inspector of slaughtering to the Department of Public Health, but the approval of such nomination by the Department alone constitutes the appointment of the person so nominated.

To the Commissioner of Public Health. 1929 April 18.

You have asked my opinion upon the following question:—

Will you kindly inform me whether or not the city charter of Fall River removes from the board of health of Fall River the right to make a nomination to this Department of a person for the position of slaughtering inspector, and, after such nominee has been approved, the right to make the appointment?

You have advised me in connection with your inquiry that you have received the following communication from the city manager of Fall River: —

The local board of health has recommended the appointment of Edward F. Carey, V.S., as inspector of slaughtering for the city of Fall River.

I do hereby notify you that under the present city charter it is mandatory for all appointments to be made by the city manager. Therefore I have on this date appointed Edward F. Carey, V.S., to said position.

The government of the city of Fall River is now carried on under Plan D, as set forth in G. L., c. 43, §§ 79–92. Under this plan it is provided that there shall be a "city manager" (§ 89), and he is given the authority, among

other things, to "appoint and remove all heads of departments, superintendents and other employees of the city" (§ 90).

G. L., c. 43, §§ 79–92, providing for a special plan of city government, were not intended by the Legislature to override other existing provisions of the General Laws relative to appointments.

G. L., c. 129, § 15, provides 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.

As has been said with relation to animal inspectors generally, in an opinion given to the Commissioner of Conservation by my immediate predecessor in office (See VIII Op. Atty. Gen. 444): —

> Section 15 places an affirmative duty upon mayors and selectmen to nominate inspectors, and provides that the nominee shall not be appointed until approved by the Director of Animal Industry.

Approval of nominations of such inspectors as are termed inspectors of slaughtering rests with the Department of Public Health instead of with the said Director, by virtue of the terms of G. L., c. 94, § 128, which are 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.

"First named inspectors," in said section, as appears by reference to the earlier sections of the same statute, are what are commonly termed inspectors of slaughtering, and as

to them the Department of Public Health exercises a power of approving their nominations similar to that given to the Director with relation to other inspectors.

G. L., c. 94, § 126, refers to "an inspector appointed by the local board of health" as one who performs duties with relation to slaughtering. This may give rise to some confusion, which appears to result from the codification of the General Laws in 1921. Prior to such codification R. L., c. 90, § 12, had provided that "the mayor and aldermen in cities" should nominate inspectors of slaughtering. As the local boards of health were given authority to perform the duties of aldermen, they exercised a part, at least, in the power to appoint such inspectors. As the laws stand since the enactment of the General Laws, the power to nominate such inspectors is vested by said G. L., c. 129, § 15, in the mayors of cities.

Although the power of appointing the employees of cities under Plan D (G. L., c. 43, §§ 90, 91) has been taken from the mayor and vested in the city manager, there is not such repugnancy between G. L., c. 43, §§ 90 and 91, and G. L., c. 129, § 15, as works an implied repeal of the latter section or renders it inapplicable to the cities operating under said plan.

Although it is true that the mode of appointing inspectors has been transferred by said Plan D from the mayor to the manager, yet this difference does not involve a material variation from the procedure outlined in G. L., c. 129, § 15. The duty now rests upon a city manager, in lieu of a mayor, to make a nomination of an inspector of slaughtering to the Department of Public Health. Even though the naming of a person for such a position be called an appointment by the city manager, it is in effect only a nomination and is to be treated as such, and is subject to the approval of the Department. When the Department's approval has been given to the appointment of the person named, then, and not before then, the appointment may be validly made by the city manager. See VIII Op. Atty. Gen. 444.

Civil Service — Labor Service — Rules.

The Commissioner of Civil Service is bound to provide rules for the registration and certification of laborers in Springfield, and these rules do not need to be approved by the municipality.

To the Commissioner of Civil Service. 1929 April 18.

You have asked my opinion upon the three following questions: —

(*a*) Is the application of the rules governing the labor service, as established by the Commission, with the approval of the Governor and Council, mandatory for the city of Springfield?

(*b*) If not, is action required by the Civil Service Commission in framing a new rule to be submitted to the Governor and Council?

(*c*) Is such action in any way subject to consideration or approval by the authorities of the city of Springfield?

G. L., c. 31, § 3, provides: —

The board 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 . . . and, except as otherwise provided in section forty-seven, the selection of persons to be employed as laborers or otherwise in the service of the commonwealth and said cities and towns. Such rules shall be of general or limited application, shall be consistent with law . . .

Said section 47 referred to in section 3 is as follows: —

This chapter shall continue in force in all the cities of the commonwealth and in all towns of more than twelve thousand inhabitants which have accepted corresponding provisions of earlier laws, and shall be in force in all such towns which hereafter accept it by vote at a town meeting. The provisions of this chapter and the rules established under it relative to employment of laborers designated as the "labor service" shall not be in force in any city of less than one hundred thousand inhabitants, which has not heretofore accepted the corresponding provisions of earlier laws, until said provisions are accepted by the city council.

The provision in section 47 above quoted, that rules relative to employment of laborers shall not be in force in any city of less than 100,000 inhabitants is not intended to grant perpetual exemption from the rule making power, under said section 3, to any city which had such a population at the time of the enactment either of the General Laws

or of the original statute containing a similar provision in 1896 (St. 1896, c. 449, amending St. 1884, c. 320). All cities in the Commonwealth have been at all times since the passage of said St. 1896, c. 449, subject to the general terms now embodied in said section 3, and when any one of them reaches a population of 100,000 the provisions and rules established under said section 3, relative to employment of laborers, become applicable to such a city. See St. 1884, c. 320, § 2.

Civil Service Rule 32, section 3, provides as follows: —

> The Commissioner shall provide for the registration and certification of laborers in the service of the Metropolitan District Commission and the city of Boston, and in other cities to which the labor rules are or may become applicable. The Commissioner may appoint persons to be registration clerks in such other cities.

Inasmuch as the city of Springfield now has a population in excess of 100,000, said Rule 32, section 3, is now applicable thereto, and from the terms of said Rule 32, section 3, it appears that it is mandatory upon the Commissioner to provide for the registration and certification of laborers in said city.

I therefore answer your question (*a*) in the affirmative.

This answer precludes the necessity of making a specific reply to your question (*b*).

The approval and acceptance of any particular laws is not made by the statutes a prerequisite to the establishment of rules relative to the employment of laborers in cities of over 100,000 inhabitants. I therefore answer your question (*c*) in the negative.

Governor and Council — State House — Radio Equipment.

The Governor and Council have the authority to approve the erection of a part of a radio equipment used by the Department of Public Safety upon the roof of the State House.

To the Governor and Council. 1929 April 29.

You have requested to be advised as to the authority of the Governor and Council to grant their approval to the erection of a steel tower to support an antenna, which is a part of the radio equipment used in the police work of the Department of Public Safety, upon the roof of the rear of the State House, such erection having been asked for by the Commissioner of said Department.

I am of the opinion that such an erection may properly be made if it meets with the approval of the Governor and Council.

G. L., c. 8, § 6, as amended by St. 1923, c. 362, § 10, provides, with relation to the authority of the Superintendent of Buildings, as follows: —

> He shall direct the making of all repairs and improvements in the state house and on the state house grounds. All executive and administrative departments and officers shall make requisition upon him for any repairs or improvements necessary in the state house or in other buildings or parts thereof owned by or leased to the commonwealth and occupied by said departments or officers. Such repairs or improvements shall be made only upon such requisition signed by the head of the department or office. This section shall not apply to state institutions or officers thereof.

G. L., c. 8, § 9, is, in part, as follows: —

> The superintendent shall, under the supervision of the governor and council, have charge of the care and operation of the state house and its appurtenances.

The erection of the steel tower may be said to fall within the terms of section 6 as an improvement in the State House, and I assume from the communication which you sent me that a requisition for the same, signed by the Department of Public Safety, has been made upon the Superintendent.

Inasmuch as the intent of the Legislature in enacting said section 9 was, obviously, to provide that the Governor and Council should have direct charge of the State House and its appurtenances, their approval should be given to the making of this contemplated improvement under the direction of the Superintendent of Buildings.

MOTOR VEHICLES — "RIGHT TO OPERATE" — REVOCATION.

The right to operate a motor vehicle without ever having received a license, allowed by G. L., c. 90, § 10, as amended, may be revoked by the Registrar of Motor Vehicles, and any unlicensed operation thereafter may be punished.

To the Commissioner of Public Works. 1929 May 8.

You have asked my opinion as to the interpretation of certain portions of the statutes concerning the operation of motor vehicles in the following communication: —

I am requested by the Registrar of Motor Vehicles to secure an opinion as to the exact meaning or effect of the suspension of the *right* of any person to operate motor vehicles in the Commonwealth of Massachusetts, under G. L., c. 90, § 22, and whether that person may be prosecuted under section 23 of said chapter.

The pertinent portions of the statutes are quoted below.

G. L., c. 90, § 10, as amended by St. 1923, c. 464, § 4, provides: —

No person shall operate a motor vehicle upon any way unless licensed under this chapter, except as is otherwise herein provided; but *this section shall not prevent the operation of motor vehicles by unlicensed persons if riding with or accompanied by a licensed operator*, excepting only persons who have been licensed and whose licenses are not in force because of revocation or suspension, persons whose right to operate has been suspended by the registrar, and persons less than sixteen years of age; but such licensed operator shall be liable for the violation of any provision of this chapter, or of any regulation made in accordance herewith, committed by such unlicensed operator; provided, that the examiners of operators, in the employ of the registrar, when engaged in their official duty, shall not be liable for the acts of any person who is being examined. During the period within which a motor vehicle of a non-resident may be operated on the ways of the commonwealth in accordance with section three, such vehicle may be operated by its owner or by his chauffeur or

employee without a license from the registrar if the operator is duly licensed under the laws of the state in which he resides, or has complied fully with the laws of the state of his residence respecting the licensing of operators of motor vehicles; but if any such non-resident or his chauffeur or employee be convicted by any court or trial justice of violating any provision of the laws of the commonwealth relating to motor vehicles or to the operation thereof, whether or not he appeals, he shall be thereafter subject to and required to comply with all the provisions of this chapter relating to the registration of motor vehicles owned by residents of the commonwealth and the licensing of the operators thereof. A record of the trial shall be sent forthwith by the court or trial justice to the registrar. This section shall apply to the operation of all vehicles propelled by power other than muscular power, except railroad and railway cars, road rollers, and motor vehicles running only upon rails or tracks.

G. L., c. 90, § 22, as amended by St. 1923, c. 464, § 6, provides: —

The registrar may suspend or revoke any certificate of registration or any license issued under this chapter, after due hearing, for any cause which he may deem sufficient, and he may suspend the license of any operator or the certificate of registration of any motor cycle in his discretion and without a hearing, and may order the license or registration certificate to be delivered to him, whenever he has reason to believe that the holder thereof is an improper or incompetent person to operate motor vehicles, or is operating improperly or so as to endanger the public; and neither the certificate of registration nor the license shall be reissued unless, upon examination or investigation, or after a hearing, the registrar determines that the operator should again be permitted to operate. *The registrar, under the same conditions and for the same causes, may also suspend the right of any person to operate motor vehicles in the commonwealth under section ten* until he shall have received a license from the registrar.

G. L., c. 90, § 23, as finally amended by St. 1927, c. 267, § 2, provides: —

Any person convicted of operating a motor vehicle after his license to operate has been suspended or revoked or *after notice of the suspension of his right to operate a motor vehicle without a license has been issued* by the registrar and received by such person or by his agent or employer *and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate*, and any person convicted of operating or causing or permitting any other person to operate a motor vehicle after the certificate of registration for such vehicle has been suspended

or revoked and prior to the restoration of such registration or to the issuance of a new certificate of registration for such vehicle, shall, except as provided by section twenty-eight of chapter two hundred and sixty-six, *be punished* for a first offence by a fine of not less than fifty nor more than one hundred dollars or by imprisonment for not more than ten days, or both, and for any subsequent offence by imprisonment for not less than ten days nor more than one year, and any person who attaches or permits to be attached to a motor vehicle a number plate assigned by the registrar to another vehicle, or who obscures or permits to be obscured the figures on any number plate attached to any motor vehicle, or who fails to display on a motor vehicle the number plate and the register number duly issued therefor, with intent to conceal the identity of such motor vehicle, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than ten days, or both.

The proper construction of the statutes with relation to the subject matter of your inquiry will ultimately be one for judicial determination, but for your guidance and that of the Registrar of Motor Vehicles I state that my opinion is that "the *right* of any person to operate motor vehicles in the Commonwealth under section ten until he shall have received a license from the registrar," mentioned in the last sentence of G. L., c. 90, § 22, refers to the right to operate accorded by G. L., c. 90, § 10, to (1) unlicensed persons riding with or accompanied by a licensed operator who are not within the classes of persons specifically excepted from the enjoyment of such right by said section, and (2) non-residents, unlicensed in this Commonwealth, under certain circumstances set forth in said section. Any of such persons who operates a motor vehicle after his right to operate, as defined above, is suspended by the action of the Registrar, under said section 22, may be prosecuted under the provisions of said section 23.

In other words, the right to operate, referred to in the last sentence of said section 22, is the right to operate without ever having received a license, and when such right is lost by the action of the Registrar further unlicensed operation of any sort, whether the specific kind enjoyed under the particular "right" or not, pending restoration of such right,

subjects the person to the penalties appropriate for such offence set forth in said section 23. A similar interpretation is to be applied to the words "after his right to operate without a license has been suspended," as used in G. L., c. 266, § 28, as amended by St. 1926, c. 267, § 1, reading as follows: —

Whoever steals an automobile or motor cycle, or receives or buys an automobile or motor cycle knowing the same to have been stolen, or conceals any automobile or motor cycle thief knowing him to be such, or conceals any automobile or motor cycle knowing the same to have been stolen, or takes an automobile or motor cycle without the authority of the owner and steals from it any of its parts or accessories, or without the authority of the owner *operates an automobile or motor cycle after his right to operate without a license has been suspended* or after his license to operate has been suspended or revoked and prior to the restoration of such right or license to operate or to the issuance to him of a new license to operate, shall be punished by imprisonment in the state prison for not more than ten years or imprisonment in jail or house of correction for not more than two and one half years.

Commissioner of Correction — Officer — Pension.

With relation to certain employees of the Department of Correction only "officers" may be retired on a pension, and a preliminary determination as to whether an applicant for a pension is an officer must be made by the Commissioner.

To the Commissioner of Correction. 1929 May 17.

You ask my opinion on the following question: —

A man, employed at the Reformatory for Women since January, 1894, under various titles but doing practically the same kind of work, largely disciplinary cases with the inmates, has asked for a ruling as to whether or not he is eligible for retirement under the prison officers' retirement act, G. L., c. 32, § 46. He contends that while he has not been listed as an officer of the institution he has in fact been the only disciplinary officer there since his appointment, and therefore should be eligible for retirement as an officer.

G. L., c. 32, § 46, as amended by St. 1921, c. 403, and St. 1926, c. 343, § 7, provides: —

The commissioner of correction may, with the approval of the governor and council, retire from active service and place upon a pension

roll any officer of the state prison, the Massachusetts reformatory, the prison camp and hospital, the state farm, the reformatory for women or any jail or house of correction, or any person employed to instruct the prisoners in any prison or reformatory, as provided in section fifty-two of chapter one hundred and twenty-seven, or any other employee of the state prison, the Massachusetts reformatory or the prison camp and hospital, who has attained the age of sixty-five and who has been employed in prison service in the commonwealth, with a good record, for not less than twenty years; or who, without fault of his own, has become permanently disabled by injuries sustained in the performance of his duty; or who has performed faithful prison service for not less than thirty years; . . . and provided, that no such officer, instructor or employee shall be retired unless he began employment as such in one of the above named institutions, or as an officer or instructor in one of those named in the following section, on or before June seventh, nineteen hundred and eleven. The word "officer," as used in this and the two following sections, shall extend to and include prison officer, correction officer and matron.

It is clear that the only employees of the Reformatory for Women eligible for a pension under the foregoing statute are officers, which term includes "prison officer, correction officer and matron," and instructors.

In an opinion of a former Attorney-General, dated February 24, 1914 (not published), in which he had occasion to consider St. 1908, c. 601, as amended by St. 1911, c. 673 (the original statute providing for the retirement and pensioning of officers and instructors and other employees in penal institutions of the Commonwealth), he defined the word "officer," as used therein, to mean "those persons who are employed to, and who as a regular part of their duties do, have charge either of all or a definite number of persons committed to prison, jail or reformatory by legal process."

St. 1921, c. 403, enlarged the scope of the law relative to retiring and pensioning all prison officers by defining the word "officer" to include "prison officer, watchman and matron." The term "watchman" was stricken out by St. 1926, c. 343, § 7, and the words "correction officer" were substituted. The additions and elisions made by these

statutes do not, in my opinion, alter the definition quoted above.

In a later opinion of a former Attorney-General (V Op. Atty. Gen. 227) it was said, in speaking of said definition: —

> This seems to me to be an appropriate definition of the term, and, in my opinion, it should be employed in determining who are officers in the prison service, within the meaning of the statute under consideration. . . .
>
> If an employee is appointed and carried on the pay roll as an officer, that fact may, *prima facie*, entitle him to the benefits of this statute, though it is not conclusive. Calling a clerk an officer, of course, cannot make him such. Nor does the fact that an employee may occasionally, as an incidental part of his work, have some supervision over a few of the prisoners who are assigned to work in his department make him an officer. It must be a regular and substantial part of his duty to have charge and control of prisoners in order to bring him within the definition of prison officers to which I have referred. Thus, the engineers, assistant engineers and stewards or cooks cannot, in my opinion, be regarded as officers merely because prisoners are from time to time assigned to work in their departments under their direction. Again, persons appointed as, and in the main performing the duties of, clerks are not officers unless in addition they perform substantial duties of the character indicated in this definition of prison officers.

It would seem, therefore, that this resolves itself into a question of fact in each individual case, and whether or not a person is an officer must be determined by the Commissioner of Correction before such person can be pensioned.

Marriage and Divorce — Records — Corrections.

City or town clerks' records of marriages may not be expunged but may be corrected.

The validity of a marriage is not determined by the records of a city or town clerk.

Decrees of nullity as to marriages are not required to be filed with city or town clerks.

To the Secretary. 1929 May 23.

You have requested my opinion upon the following questions: —

1. Can the record of a marriage which is subsequently annulled by decree of court, or voided without a decree of divorce or other legal proc-

ess as provided in G. L., c. 207, § 8, be expunged from the record books of a city or town clerk or registrar?

2. If such record cannot be expunged and such marriage stands as a matter of record, must either party to such marriage, in making written notice of intention of another marriage, state that such subsequent marriage is his or her second marriage?

3. Must a copy of the decree, if any, be filed with the notice of intention of marriage?

1. There do not appear to be any provisions of the statutes which provide for the expunging of records of a marriage kept by city or town clerks. Correction of such records may be accomplished, however, in the manner described in G. L., c. 46, § 13, as amended by St. 1925, c. 281, § 2, which reads 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. If a person shall have acquired the status of a legitimate child by the intermarriage of his parents and the acknowledgment of his father, as provided in section seven of chapter one hundred and ninety, the record of his birth may be amended or supplemented hereunder so as to read, in all respects, as if such person has been reported for record as born to such parents in lawful wedlock. For such purpose, the town clerk shall, if satisfied as to the identity of the persons and the facts, receive an affidavit executed by the parents or by either if the other is dead, setting forth the material facts. Unless the marriage is recorded in the records in the custody of such clerk, such affidavit shall be accompanied by a certified copy of the record thereof. He shall file any affidavit submitted under this section and record it in a separate book kept therefor, with the name and residence of the deponent and the date of the original record, and shall thereupon draw a line through any incorrect statement, or statements, sought to be amended in the original record, without erasing them, shall enter upon the original record the facts required to correct, amend or supplement the same and forthwith, if a copy of the record has been sent to the state secretary, shall forward to the state secretary a certified copy of the corrected, amended or supplemented record upon blanks to be provided by him, and the state secretary shall thereupon correct, amend or supplement the record in his office. Reference to the record of the

affidavit shall be made by the clerk on the margin of the original record. If the clerk furnishes a copy of such record, he shall certify to the facts contained therein as corrected, amended or supplemented, and shall state that the certificate is issued under this section, a copy of which shall be printed on every such certificate. Such affidavit, or a certified copy of the record of any other town or of a written statement made at the time by any person since deceased required by law to furnish evidence thereof, may, in the discretion of the clerk, be made the basis for the record of a birth, marriage or death not previously recorded, and such copy of record may also be made the basis for completing the record of a birth, marriage or death not containing all the required facts.

Under the foregoing provisions the city or town clerk is not required to initiate action for the correction of marriage records, nor are there any special requirements relative to such corrections in relation to marriages which have been recorded but which are void.

With relation to the facts which are required to be recorded by said clerks to make up such marriage records, it is provided by G. L., c. 46, § 1, 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 marriages, date of record, date of marriage, place of marriage, name, residence and official station of the person by whom solemnized, names and places of birth of the parties married, residence of each, age and color of each, the number of the marriage (as first or second) and if previously married, whether widowed or divorced, the occupation of each and the names of their parents, and the maiden names of the mothers. If the woman is a widow or divorced, her maiden name shall also be given.

If a marriage which has been recorded under the terms of said chapter 46, section 1, is a void marriage, an affidavit containing facts showing that it is void, accompanied by a certified copy of a decree of nullity entered by a court of competent jurisdiction under the provisions of G. L., c. 207, § 14, if any such there be, although not required, might well be 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," and the clerk would be required to receive it. Such affidavit would then be filed by the clerk in the manner described in said G. L., c. 46, § 13, as amended. The clerk would then make such corrections, amendments, references and supplements on and in the original records as said section 13 requires.

If this be done the void character of the marriage will appear of record, and confusion with relation thereto in the future will be obviated. A city or town clerk, however, as I have said, has no authority to "expunge" the record of a marriage.

2. I answer your second question in the negative. The validity or invalidity of a marriage is not determined by the records of a city or town clerk relating to such a marriage. If a ceremony has not resulted in a valid marriage, a subsequent marriage of either of the parties to such ceremony is a first marriage as to him or her, irrespective of what appears upon the records of a city or town clerk concerning the facts connected with the first ceremony. See in this connection VII Op. Atty. Gen. 728.

3. I answer your third question in the negative. The filing of a copy of a decree of nullity, either in connection with a correction of a record of a marriage subsequently shown to have been void, or with a notice of intention of marriage subsequent thereto, would tend to make records in the offices of city and town clerks more accurate, but such filing is not required by the terms of any statute.

Milk — Misbranding — Prosecution.

Misbranding of milk by the use of the word "Guernsey" on a container when the milk is not from Guernsey cattle and is inferior to the product known as Guernsey, may be prosecuted.

To the Commissioner of Public Health.
1929
May 23.

You have asked my opinion as to whether misbranding of milk by the use upon the container of the word "Guernsey" in connection with milk, when the milk is inferior to the product known as Guernsey milk and not in fact obtained from Guernsey cattle, may be prosecuted under the provisions of G. L., c. 94, § 187. I am of the opinion that it may be so prosecuted.

The general definition of food, in section 1 of said chapter 94, is broad enough to cover milk. The specific sections of chapter 94, which deal with improperly labeling milk, such as sections 18 and 19, relate to misleading names applied to grades and qualities of milk different in character from those comprehended in the definition of "misbranded," as used in said section 187.

As originally enacted, that portion of G. L., c. 94, entitled "Adulteration and misbranding of food and drugs," contained in section 185 an exclusion from the operation of the ten following sections of various commodities, including milk and cream.

By St. 1921, c. 486, § 26, section 185 was repealed, and there is now no specific statutory limitation of the words "article of food" or "food" as used generally in section 187. Of course, the ultimate decision of your question is one for judicial determination in relation to any particular prosecution which may be started.

LABORERS — CONTRACTS — PUBLIC WORKS — PAYMENTS.

Contractors engaged in the construction or repair of any water or electric light works, pipes or lines may not contract with their workmen to pay less often than once a week.

To the Commissioner of Labor and Industries. 1929 May 24.

You have asked my opinion as to whether it is legal for a contractor who is doing work for the Commonwealth to pay less often than weekly such of his employees as may request in writing to be paid in a different manner.

The law pertinent to the question is contained in G. L., c. 149, § 148, as most recently amended by St. 1925, c. 165.

There is no restriction in this respect upon contractors doing work for the Commonwealth as such. The section, however, does apply to contractors engaged in certain enumerated types of work, among which is "the construction or repair of any . . . water or electric light works, pipes or lines." The company to which your letter refers is apparently engaged in the construction of the works in connection with the taking of the Swift and Ware rivers, and therefore would come under the prohibition contained in the statute.

In my opinion, a company engaged in any of the types of work enumerated in the statute must pay its employees weekly, and may not avoid this duty by contract with the employee or otherwise. That part of the section which permits payment to be made in a different manner, if the employee in writing so requests, applies only to cases involving employment by the Commonwealth or a county, city or town, and cannot be construed to apply to employees of private companies, whether they are or are not doing work for the Commonwealth. It follows, therefore, that your question should be answered in the negative.

Department of Public Health — Investigation — Barbers.

Under a resolve of the Legislature the Department of Public Health has authority to investigate barbering wherever practiced.

To the Commissioner of Public Health. 1929 June 10.

You have asked my opinion relative to the duties of your Department under Resolves of 1929, chapter 43, in the following language: —

Chapter 43 of the Resolves of 1929, recently passed, directs this Department to investigate the matter of barbering in the Commonwealth. In defining what constitutes "barbering," singeing, dyeing and various manipulations of and applications to the face are mentioned. Such procedures are practiced in so-called beauty parlors. I should like to know whether, in your opinion, this definition of "barbering" extends the scope of our investigation to this latter type of establishment.

Resolves of 1929, chapter 43, reads as follows: —

Resolved, That the department of public health is hereby authorized and directed to investigate the need, as a health measure, for establishing a board of registration of barbers or otherwise regulating the practice of barbering. For the purposes of the investigation, a barber shall be construed to be any person who, for hire, shaves or trims the beard, cuts the hair, gives facial or scalp massage or facial or scalp treatment with oils, creams or other preparations, or singes or shampoos the hair or applies any hair tonics or dyes to the hair of any person and who is not a registered physician or a registered embalmer; and the performance of any such service shall be construed as practising barbering. In connection with its investigation the department shall consider the subject matter of house document numbered one hundred and eighty-one of the current year, and shall make such examination of the sanitary condition of barbering establishments and the practices of barbers as it deems necessary. Said department shall report to the general court its findings and its recommendations, if any, together with drafts of such legislation as may be necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives not later than the first Wednesday of December in the current year. Said department may expend for the aforesaid purpose such sum, not exceeding three thousand dollars, as may hereafter be appropriated by the general court.

By the terms of this resolve your investigation is to be directed to a determination of the need, as a health measure,

for establishing a board of registration of barbers, or otherwise regulating the practice of barbering, and you are also directed to consider the subject matter of House Document No. 181, dealing with the same subject, and in connection therewith to make such examination of the sanitary condition of barbering establishments and the practices of barbers as your Department may deem necessary. A definition of "barber," for the purpose of the investigation, is set forth in the resolve. There is no definition of "barber shop" or of "beauty parlor" contained in the resolve.

You have authority, and it is your duty under this resolve, to investigate the practice of barbering, as defined in the resolve, in whatever place such barbering may be practiced. In so far as it may be carried on in beauty parlors, the practice of barbering there is properly subject to your investigation; and it is possible that the relation of the general type of business conducted in the beauty parlor to barbering, as this affects the sanitary condition of the latter, may require your investigation.

You have no authority under this resolve to investigate beauty parlors as such, but whenever the practice of barbering, as defined in the resolve, is carried on therein that practice and the surroundings which affect it may well be considered by you.

CORPORATIONS — FEE — CERTIFICATE OF CHANGE IN STOCK.

The fee under G. L., c. 156, § 54, as amended, is to be figured at one cent per share for additional shares without par value.

To the Secretary. 1929 June 11.

You request my opinion as to the fee to be charged for filing a certain certificate relating to a change in authorized stock of a certain corporation.

The certificate, or articles of amendment, in question provides for the issuance of 6,000 shares of common stock without par value, in addition to 6,000 shares without par value originally authorized and now outstanding, and also

provides for the retirement of 3,000 shares of preferred stock, which you state to have a par value of $100.

G. L., c. 156, § 54, as amended by St. 1928, c. 360, § 2, reads as follows: —

> The fees for filing and recording the following certificates shall be as follows:
>
> For filing and recording a certificate providing for an increase of capital stock with par value, one twentieth of one per cent of the amount by which the capital is increased; but not in any case less than twenty-five dollars.
>
> For filing and recording a certificate providing for a change of shares with par value to shares without par value, whether or not the capital is changed thereby, one cent for each share without par value resulting from such change, less an amount equal to one twentieth of one per cent of the total par value of the shares so changed; but not in any case less than twenty-five dollars.
>
> For filing and recording a certificate providing for an increase in the number of shares without par value, whether or not the capital is changed thereby, one cent for each additional share; but not in any case less than twenty-five dollars.

You state that the attorney for the corporation contends that the net result of the transaction in question is a reduction of capitalization, and that therefore the fee should be $10.00, as provided in section 55 for certificates other than those covered by section 54.

But in determining whether an increase of capitalization is effected, shares without par value are to be treated as having a par value of $100 (see V Op. Atty. Gen. 570), and therefore the present transaction results in a net increase rather than in a reduction.

Furthermore, under the amendment of 1928, above quoted, the fee in the case of additional shares without par value does not appear to be dependent upon a net increase in capitalization being effected. In the case of shares without par value the law as it previously existed (see *Commonwealth* v. *United States Worsted Co.*, 220 Mass. 183; G. L., c. 156, § 54) has been changed by the amendment of 1928. The reduced fee of one per cent per share is expressly made independent of the question "whether or not the capital

is changed thereby." It is clear that the transaction in question, involving, as it does, the issuance of additional shares without par value, comes within the provisions of section 54, as amended.

It might be questioned whether the certificate comes under the provisions of paragraph 3 or of paragraph 4 of section 54, as amended. You assume in your letter that it comes under the fourth paragraph, if under either, and I think that that assumption is correct. Paragraph 3 refers to "a change of shares with par value to shares without par value"; and it cannot be said of the present transaction that any outstanding stock of par value is being changed to stock without par value. The new stock is to be issued for cash; it is not to be exchanged for the preferred, which is retired.

The present certificate provides for an increase in the number of shares "without par value," and therefore comes within paragraph 4. It may seem that the corporation should receive a deduction on account of the preferred stock retired, and that the fee should be figured only upon net increase of capitalization, as would have been done under section 54 before the amendment. That would make the fee $30.00. Or perhaps it may be thought that a deduction should be given at the rate of five cents per share upon the stock retired, as is provided in paragraph 3. That would make the deduction $150, and therefore make the fee the minimum of $25.00. But, in my opinion, under the words of paragraph 4 the fact that the preferred stock is being retired can have no bearing upon the amount of the fee, which is to be figured upon the increase in the number of shares without par value. If the Legislature had intended the fee under paragraph 4 to be based upon the amount by which the capital is increased, it would have said so, as it did in connection with paragraph 2; or if it had intended to give a deduction because of a retirement of other stock, it would have said so, as it did in connection with paragraph 3.

In my opinion, therefore, the fee in the present case must be figured at one cent per share for the additional 6,000 shares without par value, that is, $60.00.

AGRICULTURE — RETAILER OF SEEDS — NAME.

The name of the retailer of agricultural seeds must appear on every package of seeds, however put up.

To the Commissioner of Agriculture. 1929 June 12.

You ask my opinion on certain questions relative to G. L., c. 94, as amended by St. 1927, c. 274, in the following language: —

G. L., c. 94, §§ 261A, 261B, 261C and 261E, require that the name and address of the vendor be shown on containers of agricultural seeds or mixtures of agricultural seeds. The question arises as to who the vendor of the agricultural seeds is when there has been a sale of such seeds in the Commonwealth. Many of the seeds that are sold have the name and address of the wholesaler on the package, and a large amount of seeds that are sold have the name and address of the wholesaler on the tag fastened to the large container from which the seeds are sold in smaller packages.

It is the contention of many of those who have been requested to appear with reference to reported violations of our seed law that the name and address of the wholesaler satisfies the law as to the requirement for the name and address of the vendor of such seeds or mixtures. Your opinion is therefore requested as to who is the vendor in the sale of agricultural seeds or mixtures thereof in the State of Massachusetts.

Sections 261A, 261B and 261C indicate that agricultural seeds or mixtures of agricultural seeds shall have affixed thereto in a conspicuous place on the exterior of the container of such seeds or mixtures a plainly written or printed tag or label with a statement in the English language of certain required information. The question has arisen as to the interpretation of the word "container." . . .

This Department is interested in the interpretation of the word "container." . . . The question of importance, therefore, is whether or not the word "container" refers to the package that is handed over the counter to the vendee in a sale of agricultural seeds or mixtures thereof.

G. L., c. 94, as amended by St. 1927, c. 274, § 2, provides:—

SECTION 261A. Every lot of agricultural seeds of ten pounds or more, except as otherwise provided in sections two hundred and sixty-one B to

two hundred and sixty-one L, inclusive, shall have affixed thereto, in a conspicuous place, on the exterior of the container of such agricultural seeds, a plainly written or printed tag or label in the English language, stating:

. . . . . .

(f) Name and address of the vendor of such agricultural seed.

Sections 261B, 261C and 261E, added to G. L., c. 94, by St. 1927, c. 274, § 2, contain similar provisions with reference to the information to be written or printed on the tag or label to be affixed to the container.

Section 261L, added to said chapter 94 by the 1927 statute, provides: —

Whoever sells, offers or exposes for sale, any lot of agricultural seeds, or mixtures of agricultural seeds, without complying with the requirements of sections two hundred and sixty-one A to two hundred and sixty-one K, inclusive, or falsely marks or labels such agricultural seeds or mixtures thereof or vegetable seeds, or impedes, obstructs or hinders the commissioner of agriculture or any of his duly authorized agents in the discharge of the authority or duties conferred or imposed by any provision of said sections, shall be punished by a fine of not more than five hundred dollars.

G. L., c. 4, § 6, provides: —

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

. . . . . .

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

I am of the opinion that the words "container" and "vendor," as used in the statute above quoted, are to be given their ordinary meaning. The word "container" means a package of any description capable of holding the various seeds described in the statute. Said package may be in the form of a box made of wood, tin, cardboard, fibre, etc., or it may consist of a paper bag ordinarily used in

retail stores. The word "vendor," as used in said statute, must be construed to mean a person, firm or corporation which actually sells within the Commonwealth the seeds described in the statute.

The statute applies equally to producer, wholesaler or distributor and retailer of agricultural seeds if he engages in business in this Commonwealth. The tag or label required to be affixed to the container must have written or printed thereon all of the information required by this statute. This applies to the retailer who sells the seeds within the Commonwealth, notwithstanding the fact that the seeds which he sells may have been put up in packages by the producer, wholesaler or distributor doing business within or without the Commonwealth, and that tags or labels bearing the name and address of such wholesaler, producer or distributor are plainly printed in the English language and affixed to said containers. In other words, the name of the retailer must appear on every package of seeds whether the seeds are contained in packages put up by the producer, wholesaler or distributor or put up in a "paper bag package." This contention is clearly supported by the last paragraph of St. 1927, c. 274, § 2 (G. L., c. 94, § 261L).

ELECTION COMMISSION OF LOWELL — APPOINTMENT OF CLERK — CIVIL SERVICE.

An appointment of a clerk by the election commission of Lowell is not under the Civil Service Rules.

To the Commissioner of Civil Service 1929 June 24.

You request my opinion as to whether the appointment of a clerk by the election commission of the city of Lowell is within the civil service.

The appointment is made under St. 1920, c. 154, § 4, which provides that the election commission "may employ such persons as they may deem necessary in the performance of their duties: *provided, however,* that among the persons

so employed after the passage of this act, the two dominant political parties shall at all times be equally represented."

In my opinion, the provision which makes party affiliation a qualification leads to the conclusion that the appointment was not intended to be within the civil service. G. L., c. 31, § 10, provides:

> No question in any examination shall relate to political or religious opinions or affiliations, and no appointment to a position or selection for employment shall be affected by them.

The Civil Service Commission, therefore, has no official means of knowing which, if any, of the persons whose names appear upon its list are eligible for the appointment. Moreover, even if it did know, it could not make a selection for certification, for it is required to certify names in the order of standing upon the eligible list. G. L., c. 31, §§ 15 and 23; Civil Service Rule 16. The civil service laws and rules do not fit the case in question.

This conclusion is confirmed by the fact that the appointment of assistant registrars by the election commission of Boston, under St. 1913, c. 835, § 80, which provided, similarly to the statute now in question, that the two leading political parties should be equally represented in appointments, was recognized as not within the civil service; and also by the fact that when the Legislature, by St. 1920, c. 305, placed such appointments by the Boston commission within the civil service it was thought necessary at the same time to alter the civil service law to fit the situation, which was done by providing in section 2 of the 1920 statute that an applicant must file with the Civil Service Commission a certificate of party enrollment.

Medical Examiner — Absence — Associate.

Absence of a medical examiner sufficient to authorize an associate examiner to perform his duties is not restricted to absence from the Commonwealth of the former official.

To the District Attorney for the Western District. 1929. June 25.

It was held by one of my predecessors in office, in an opinion given to the medical examiner in the Third Bristol District, dated April 11, 1917 (not published), that actual absence of a medical examiner from his district was not required in order to authorize associate medical examiners to act. It was pointed out that "the administration of the law in relation to medical examiners ordinarily requires prompt action, and therefore the determination of when the associate medical examiner should act in place of the medical examiner must depend upon the facts arising in each case."

G. L., c. 38, § 2, reads: —

> Associate examiners in the other counties (exclusive of Suffolk) shall, in the absence of the medical examiners or in case of their inability to act, perform in their respective districts all the duties of medical examiners.

Apparently my predecessor, in construing the Revised Laws, where similar language was used, felt, as I do, that there might be situations, other than the actual absence of the medical examiner from the district, in which the associate was authorized to perform the former's duties. I think that section 16 of said chapter 38, with relation to the duties of the associate examiners, should be construed, in the light of section 2, with the meaning which I have indicated.

Supervisor of Public Records — Custody — Rules.

The Supervisor of Public Records has authority to approve specifications of a safe for the preservation of records, and may make rules relative thereto.

To the Secretary. 1929 June 27.

You have asked my opinion as to whether or not the Supervisor of Public Records is authorized to establish or approve specifications of fireproof safes or vaults to be used

for the safe-keeping of public records, and also to promulgate rules and regulations for the manufacture, construction and use of such fireproof safes or vaults.

G. L., c. 66, § 1, provides as follows: —

> The supervisor of public records . . . shall take necessary measures to put the records of the commonwealth, counties, cities or towns in the custody and condition required by law and to secure their preservation. . . .

Section 11 of said chapter 66 provides as follows: —

> Officers in charge of a state department, county commissioners, city councils and selectmen shall, at the expense of the commonwealth, county, city or town, respectively, provide and maintain fireproof rooms, safes or vaults for the safe-keeping of the public records of their department, county, city or town, other than the records in the custody of teachers of the public schools, and shall furnish such rooms with fittings of non-combustible materials only.

While this last section imposes a duty upon the various officers to keep public records in fireproof safes or vaults, I am of the opinion that under section 1 the Supervisor of Public Records has authority to determine what is a proper fireproof safe or vault, and that such safe or vault must correspond with specifications which he may approve. Section 1 gives him the power to secure the preservation of such records and to see to it that they are kept in the custody and condition required by law. This duty imposed by this section cannot be successfully carried out unless the Supervisor has the power to decide and determine the specifications of such a safe or vault. If, in his opinion, a safe or a vault is not fireproof or otherwise proper, it is my opinion that it may not be used for the keeping of public records. I do not believe that the Supervisor may approve specifications of manufacturers or can in any way determine questions arising out of the manufacture of these safes or vaults, as his only concern is their use as a container for public records.

Under section 1 he also has the power to promulgate

reasonable rules and regulations concerning the use and construction of such safes or vaults, as this obviously is one of the "necessary measures" to secure the preservation of the records.

SENTENCE — STATE FARM — INDETERMINATE SENTENCE.

A prisoner committed to the State Farm may be held in custody for two years under an indeterminate sentence.

To the Commissioner of Correction. 1929 June 28.

You have addressed the following communication to me, setting forth certain facts relative to a person committed to the State Farm: —

A person was committed to the State Farm May 8, 1929, from the District Court in Malden, for the offence of "refusing to work while an inmate of a city home," under G. L., c. 117, § 22, which specifically states that the sentence shall be for one year.

G. L., c. 279, § 36, states: "In imposing a sentence of imprisonment at the state farm, the court or trial justice shall not fix or limit the duration thereof."

Said section 36 also states: "Whoever is sentenced to the state farm for drunkenness may be there held in custody for not more than one year, and if so sentenced for any other offence may be there held in custody for not more than two years."

In view of the above two apparent inconsistencies in the law, and in view of the ruling of the Supreme Court in *Platt* v. *Commonwealth*, 256 Mass. 539, I write to ask you for an opinion as to whether this man's maximum sentence should be one year or two years for the above offence.

I assume, for the purposes of this opinion, although you do not definitely so state, that the sentence of the judge in the District Court was a sentence for an indefinite period to the State Farm, and that the judge did not himself in the sentence attempt to fix a definite period for such confinement. I gather from your communication that the sentence was imposed under the provisions of G. L., c. 117, § 22, which reads as follows: —

Whoever refuses or neglects to perform any labor required of him under the two preceding sections, or who, while performing such labor, wilfully

damages any property of the town requiring the same, shall be punished, in Suffolk county by imprisonment in the house of correction for not more than one year, and in other counties, in the house of correction or at the state farm for a like term.

The original enactment, which is now embodied in said section 22, is St. 1895, c. 445, § 3, which reads as follows: —

Whoever refuses or neglects to perform any labor required of him as aforesaid, or while performing such labor wilfully damages any property of the city or town requiring the performance of such labor, shall on conviction thereof by any court or magistrate having jurisdiction of the offence be punished by imprisonment not exceeding one year in the house of correction or at the state farm, or, in the county of Suffolk, in the house of correction or house of industry.

This statute of 1895 was incorporated in the Revised Laws as section 24 of chapter 81, as follows: —

Whoever refuses or neglects to perform any labor required of him under the provisions of the two preceding sections, or while performing such labor wilfully damages any property of the city or town requiring the same, shall be punished, in the county of Suffolk, by imprisonment in the house of correction for not more than one year, and in other counties, in the house of correction for a like term, or at the state farm.

Subsequent to the enactment of said statute of 1895, St. 1898, c. 443, was enacted, which, in section 1, reads as follows: —

When a convict is sentenced to the state farm the court or trial justice imposing the sentence shall not fix or limit the duration thereof. Whoever is so sentenced for drunkenness may be held in the custody of said state farm for a term not exceeding one year, and whoever is so sentenced for any other offence may be held in such custody for a term not exceeding two years.

Section 4 of said chapter 443 provides as follows: —

All acts and parts of acts inconsistent with this act are hereby repealed.

Said St. 1898, c. 443, § 1, is now embodied in G. L., c. 279, § 36, which is as follows: —

In imposing a sentence of imprisonment at the state farm, the court

or trial justice shall not fix or limit the duration thereof. Whoever is sentenced to the state farm for drunkenness may be there held in custody for not more than one year, and if so sentenced for any other offence may be there held in custody for not more than two years.

At the time of the imposition of the sentence to which you refer in your communication, under the terms of said G. L., c. 279, § 36, the judge could not impose any sentence to the State Farm except an indeterminate one, under which a person convicted of a crime other than drunkenness might be held in custody for a term not exceeding two years. The judge might have adopted the alternative course of a sentence to the house of correction for one year, but if he elected to sentence to the State Farm the sentence was governed by the provisions of said G. L., c. 279, § 36, the original terms of which were enacted in 1898, and which in that year superseded the terms of St. 1895, c. 445, § 3, which contained the original of the provisions of said section 22.

It is provided in G. L., c. 281, § 2, that: —

The provisions of the General Laws, so far as they are the same as those of existing statutes, shall be construed as a continuation thereof and not as new enactments.

The provisions of R. L., c. 81, § 24, and of G. L., c. 117, § 22, above referred to, indicate that they were clearly intended as a continuation of the original enactment of the statute of 1895, and the effect of the statute of 1895 had long since been altered by the enactment of said St. 1898, c. 443, already referred to, wherein the provisions for indefinite sentence to the State Farm were incorporated and all earlier acts repugnant thereto were repealed. The present provisions of the General Laws (c. 117, § 22) continue the effect of the provisions of the statute of 1895 as they existed subsequent to the passage of St. 1898, c. 443, and are to be read with a consideration of the language used in both of such statutes.

It was said by the Supreme Judicial Court in *Moulton* v. *Commonwealth*, 215 Mass. 525, 527: —

If, however, an earlier statute is repugnant to the subsequent act the presumption is, that the latter statute is intended as the final expression of the legislative will, and the former statute is necessarily repealed by implication.

Moreover, it is a general principle of statutory interpretation that a body of laws enacted at one time, as were the General Laws, is to be construed so as to constitute, so far as practicable, an harmonious entity. *Brooks* v. *Fitchburg & Leominster St. Ry. Co.*, 200 Mass. 8. And the Supreme Judicial Court, in *Platt* v. *Commonwealth*, 256 Mass. 539, 543, has said: —

> The history of legislation shows that the General Court in comparatively recent years has established the indeterminate sentence to exist alongside the definite sentence as to many offences. The underlying design of the indeterminate sentence is to subject the offender to reformative influences, to rescue for useful citizenship one started on a criminal career and thus enable him to assume right relations with society. It is manifest that the bringing back to upright conduct of one embarked upon evil courses cannot commonly be easily or quickly accomplished. Time is required for the operation of physical, industrial, mental and moral training and education essential to the work of reclamation of human beings.
>
> There have been superimposed by the Legislature, upon its statutes requiring sentences for specifically defined terms of incarceration upon a finding or verdict of guilty as to misdemeanors like the present, the newer statutes relative to the indeterminate sentence. These several provisions are not contradictory and incompatible, but constitute a consistent frame of law. It has been left to the court to determine on the evidence in each case whether the purely punitive sentence for a specified period, or the indefinite sentence with a reformative purpose even though invoking longer restraint, is better for the common welfare.

If, as I have said, the trial judge in pronouncing sentence had desired to avail himself of that portion of the law which permitted a definite sentence of one year, he might have done it by a sentence to the house of correction. If he elected to adopt the use of the indefinite sentence, as he apparently did, he could not set the term thereof (G. L., c. 279, § 36), and by the provisions of said G. L., c. 279, § 36,

which control the limits of the indeterminate sentence, the prisoner committed thereunder may be held in custody for not more than two years.

Marriage Records — Certificate — Death Records — Diseases.

The date of a certificate of the filing of intention of marriage should be the date of its issue.

Diseases which are the cause of a death should be entered upon the death records of municipal clerks and the Secretary of the Commonwealth.

To the Secretary. 1929 June 28.

You have asked my opinion upon certain questions of law relative to various sets of facts which you have set forth, in a letter to me.

Your first question is as follows: —

G. L., c. 207, § 28, provides that "on or after the fifth day from the filing of notice of intention of marriage . . . the clerk or registrar shall deliver to the parties a certificate," and that "if such certificate is not used it shall be returned to the office issuing it within six months after it is issued."

Some clerks mail the certificate on the fifth day after the intention has been filed, dating the certificate on that date. Other clerks do not date the certificate until it is called for, in some cases several months (possibly years) after the date of filing the notice of intention.

What is to be considered the date a certificate is issued?

G. L., c. 207, § 28, reads as follows: —

On or after the fifth day from the filing of notice of intention of marriage, except as otherwise provided, the clerk or registrar shall deliver to the parties a certificate signed by him, specifying the date when notice was filed with him and all facts relative to the marriage which are required by law to be ascertained and recorded, except those relative to the person by whom the marriage is to be solemnized. Such certificate shall be delivered to the minister or magistrate before whom the marriage is to be contracted, before he proceeds to solemnize the same. If such certificate is not used, it shall be returned to the office issuing it within six months after it is issued.

I am of the opinion that the date on which a certificate is issued is the date of its delivery to the parties referred to in

the said section. The date written upon the certificate by the clerk may well be considered prima facie evidence of the date of such delivery, but it would appear to be the proper course for the clerk or registrar to follow to date the certificate upon the day of delivery.

Your second question is as follows: —

> If a city or town clerk or the Secretary of the Commonwealth has received facts relative to a death, giving gonorrhoea or syphilis as the disease or cause of death, is he prohibited from entering such facts in the record of death and from subsequently issuing a certificate containing said facts?

G. L., c. 46, § 1, relative to facts to be recorded by city and town clerks, in its pertinent parts reads 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 deaths, date of record, date of death, name of deceased, sex, color, condition (whether single, widowed, married or divorced), supposed age, residence, occupation, place of death, place of birth, names and places of birth of the parents, maiden name of the mother, disease or cause of death, defined so that it can be classified under the international classification of causes of death. . . .

The provisions of G. L., c. 111, § 119, are as follows: —

> Hospital, dispensary, laboratory and morbidity reports and records pertaining to gonorrhoea or syphilis shall not be public records, and the contents thereof shall not be divulged by any person having charge of or access to the same, except upon proper judicial order or to a person whose official duties, in the opinion of the commissioner, entitle him to receive information contained therein. Violations of this section shall for the first offence be punished by a fine of not more than fifty dollars, and for a subsequent offence by a fine of not more than one hundred dollars.

These provisions do not relate to the public records relative to deaths which are required to be kept by city and town clerks, under G. L., c. 46, or by the Secretary of the Commonwealth, and their prohibitions have no application to such records.

I therefore answer your second question in the negative.

Massachusetts Agricultural College — Trustees — Expenditures — Committee.

No person not a member of the board of trustees of the Massachusetts Agricultural College may be appointed to serve on a committee of that body to deal with expenditures.

To the Massachusetts Agricultural College. 1929 June 29.

You ask my opinion on the question of whether or not G. L., c. 75, § 5, "gives the trustees of the Massachusetts Agricultural College the right to appoint a committee to authorize expenditures consisting of others than members of this Board."

G. L., c. 75, § 5, provides: —

> 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.

Prior to May 31, 1918, the Massachusetts Agricultural College was a public charitable corporation organized for educational purposes by virtue of St. 1863, c. 220, and amendments thereof. By said statute the Legislature reserved certain rights, among which was the right to alter, limit, annul or restrain the powers vested in said corporation. See III Op. Atty. Gen. 308; 460.

By Gen. St. 1918, c. 262, the Legislature exercised the right reserved in said St. 1863, c. 220, and dissolved the corporation, and the Commonwealth took over said college, thenceforth to be maintained as a State institution under the name of "Massachusetts Agricultural College." Gen. St. 1918, c. 262, also prescribed the powers and duties of the trustees, and in section 4 provided: —

> All expenditures for the maintenance of the institution shall be authorized by a majority of the trustees, or by a majority of a duly appointed committee of the trustees. . . . The expenditure of special appropriations shall be under the direction and control of the trustees, and shall be accounted for in the same manner as appropriations for maintenance.

In the rearrangement and consolidation of the General Laws the present language of the statute was adopted, but the elisions made by the commissioners in charge of said rearrangement do not affect the original intent of the Legislature.

I am of the opinion that the words "or by their duly appointed committee" are to be construed to mean "or by a majority of a duly appointed committee of the trustees," and that the trustees of the Massachusetts Agricultural College have not "the right to appoint a committee to authorize expenditures consisting of others than members" of the board of trustees.

AUDITOR — CIVIL SERVICE — VETERAN.

A veteran appointed to the Auditor's office under St. 1920, c. 428, and St. 1921, c. 380, when not, as a matter of fact, employed under the civil service law, may be removed without a hearing.

To the Auditor. 1929 July 1.

You request my opinion as to whether a veteran appointed and employed in your Department under St. 1920, c. 428, and St. 1921, c. 380, is entitled to a hearing in the event of your discontinuing his employment.

In my opinion, he is not. Said chapter 380 provides for the continued employment of the employee in question "notwithstanding any civil service rules to the contrary." Moreover, it is my understanding that the employee in question was not originally appointed and never has been employed under the civil service law. This being so, he cannot avail himself of G. L., c. 31, § 26, which provides that no veteran shall be removed except after hearing, for that statute has been construed as applying only to veterans appointed under the civil service law. *Ayers* v. *Hatch*, 175 Mass. 489; *Bates* v. *Selectmen of Westfield*, 222 Mass. 296; VII Op. Atty. Gen. 90.

Joint Special Committee — Clerk of a Senate Committee — Wages or Salary.

The clerk of the Senate Committee on Rules and assistant to the President of the Senate may not, while drawing his salary for such position, receive compensation for work as secretary of a joint special committee.

To the Council Committee on Finance. 1929 July 2.

You have asked my opinion upon the following question: —

Eugene W. Mason was employed as clerk of the Senate Committee on Rules and assistant to the President of the Senate for the year 1929, at an annual salary of $3,000. The joint special committee created by order of the Legislature to investigate civil service laws, rules, etc., under date of June 25, 1929, have advised His Excellency the Governor and the Honorable Council that they desire to employ Eugene W. Mason for special legislative work as secretary of their committee, at a compensation not to exceed $1,000, payable at the rate of $150 a month, dating from July 1, 1929.

The Committee desires to know whether the Council may legally approve the proposed payments to Eugene W. Mason for the special legislative work above described.

I am advised that Mr. Mason's duties as clerk of the Senate Committee on Rules and assistant to the President of the Senate do not cease with the prorogation of the annual session of the Legislature, but that he is still discharging the same and will be required to continue to do so, especially in relation to those pertaining to his work as assistant to the President of the Senate, throughout the current year, although they are not sufficient in amount fully to occupy his time during regular working hours, at least between July 1st and December 1st; and that Mr. Mason's salary is an annual salary, paid to him monthly throughout the year, and not in full at the close of the regular annual session of the General Court. Mr. Mason's situation in these respects does not resemble that of a member of the General Court, and the considerations relative to the latter in regard to a salary paid for services in another official capacity rendered after prorogation, as set forth in VI Op. Atty. Gen. 220, are not applicable to him.

Both sums which Mr. Mason would receive for his various forms of work, if the compensation as secretary of the joint special committee, referred to in your communication, were allowed him, would be payable out of the treasury of the Commonwealth.

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.

There is undoubtedly sometimes a distinction between a salary and compensation, as when the latter word is used as a synonym for wages. This difference has been pointed out and defined in an opinion of one of my predecessors in office (V Op. Atty. Gen. 700), in which I concur, and from which I quote as follows: —

> It is not necessary to quote authorities in defining what is meant by the word "salary" other than to point out that it is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called "piece work" basis, and are more frequently subject to deductions for loss of time.

Under this definition the payment which Mr. Mason would receive as secretary of the said joint special committee, as described in your communication, would be a salary. It would not be compensation on a per diem basis paid for the limited time in which he was engaged on the special work of said committee. There can be no doubt but that the sum of $3,000 which Mr. Mason receives as clerk of the Senate Committee on Rules and assistant to the President of the Senate is a salary.

The facts as you have set them forth in your communication and as you have advised me regarding them do not appear to bring this matter within the principles relative to overtime work, as set forth in V Op. Atty. Gen. 697 and 699. See also II Op. Atty. Gen. 309.

Accordingly, I am constrained to advise you that the proposed payment to Mr. Mason for work for the said joint special committee, in the form in which it is now presented, should not, as a matter of law, be approved by your Committee.

Teachers' Retirement Law — Assessments — Failure to deduct Assessments seasonably.

Teachers must pay back assessments and interest thereon before being granted a retiring allowance.

To the Commissioner of Education.
1929
July 2.

You have asked my opinion as to four questions, which are listed below: —

1. If the assessments required by section 9 (2) of the retirement law (G. L., c. 32) are not deducted from the salary of a teacher who is subject to the law, is it necessary that the omitted assessments be paid by the teacher if the teacher is in the service of the public schools of Massachusetts, serving either in the city or town where the deductions were not made or in some other city or town?

2. If it is necessary that a teacher pay assessments in error omitted, is it also necessary that the teacher pay the interest which would have been credited on the omitted assessments, so that the teacher will have to his credit in the retirement fund the same amount which he would have had if the assessments had been paid in the regular manner as provided by section 12 (5); or, if the payment of interest is not required, is the payment of interest permissible?

3. If it is necessary that a teacher pay assessments in error omitted, either with or without the interest on said assessments, can the teacher be granted a retiring allowance before the amount due the retirement fund has been paid in full?

4. Is the following rule adopted by the Retirement Board at a meeting held September 29, 1925, in accordance with the provisions of the retirement law:

"If a school committee shall neglect to deduct from the salary of a teacher the assessments required by law, the amount due the annuity fund shall be paid in one sum by the teacher, or in equal monthly installments over a period of not exceeding five years, provided that the monthly installments shall not be less than the regular monthly assessment and

they shall be deducted from the salary of the member by the employing school committee as directed by the Retirement Board.

1. In my opinion, a teacher who is subject to the law must pay into the retirement fund all payments required by law which have not been deducted by the proper authorities. G. L., c. 32, § 7, defines who are members of the Teachers' Retirement Association, and makes membership in certain cases mandatory. Your question assumes that the teacher under consideration is subject to the law, and the teacher must therefore become a member of this Association. Section 9 of said chapter 32 requires that each member shall pay into the annuity fund certain assessments, which are to be deducted from his salary. Section 12 (5) of said chapter 32 provides that the school committee of each town shall, as directed by the Board, deduct from the amount of the salary due each teacher employed in the public schools of such town such amounts as are due as contributions to the annuity fund, as prescribed in section 9.

I am informed that in certain cases deductions have not been made and that several teachers who, under the law, are required to be members of the Association have not paid, either by deduction or otherwise, any sums into the annuity fund. In view of the fact that both membership and payments are mandatory under the statute, I am of the opinion that it is necessary that such teachers pay into the fund an amount equal to that which they would have paid had the deductions been properly made.

2. I am of the opinion that such a teacher must pay the interest which would have been credited on the unpaid assessments, so that he will have to his credit in the fund the same amount which he would have had if he had regularly paid the assessments as provided by law. It is to be noted that section 7 (3) of said chapter 32, as amended by St. 1927, c. 173, provides that in certain cases a teacher may become a member of the Association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined on

September 30, 1914. This section is dealing with the case of a teacher who, as far as unpaid assessments are concerned, is in exactly the same position as the teacher about whom you inquire in your second question; and if the law requires that a teacher described in said section 7 (3) must pay regular interest, it would seem to follow logically that a teacher of the type about whom you inquire should also pay that interest. Further, it is only equitable that a teacher who has during the past years had the use of the money should pay a fair rate of interest upon it, so that he will be in approximately the same position as the teacher who has complied with the law and from whose salary installments have been deducted.

3. In my opinion, a teacher may not be granted a retiring allowance before the amount due the retirement fund has been paid in full. The law contemplates that only teachers who have complied with the law relative to the payment of the installments shall receive the retiring allowance. Section 7 (3) of said chapter 32, as amended, provides that certain teachers who are not compelled to become members of the Association may become such members if they so wish. With reference to the payment by such teachers of back installments, the paragraph provides that the teacher shall become a member of the Association when the total amount due on account of back assessments and interest has been accumulated in the annuity fund. Such a person is not enrolled as a member until the entire amount of back assessments is paid. Logically, the situation would seem to be similar in the case of a teacher who is compelled to become a member of the Association with reference to the right to receive the benefits thereof. There is no statute covering the exact point at issue, and the law most nearly applicable is that above cited. The whole theory and purpose of the law, as indicated throughout, is to confer its benefits upon teachers only when they have completely complied with its provisions, and if a teacher has not paid the full amount due at a given time it does not seem consistent with the

purpose of the law that he should be permitted to receive its benefits. The mere fact that a school board or committee has failed to deduct from a teacher's salary the amounts due from time to time, as required by law, does not in any way alter the situation. The amounts are due regardless of whether or not the school board performs the mechanical details of deducting them.

4. In my opinion, the rule adopted on September 29, 1925, is within the power of the Board. Section 8 (2) of said chapter 32 provides that "the board may make by-laws and regulations consistent with law." In my opinion, it is well within the scope of the power of the Board to enact the rule referred to, although as to its desirability I, of course, make no comment.

INSURANCE — FRATERNAL ORGANIZATIONS — CERTIFICATES.

A final certificate may not be granted to a fraternal organization, under G. L., c. 176, which has already made contracts for the payment of death or disability benefits or has made such contracts or payments for death before the provisions of G. L., c. 176, § 8, have been complied with.

To the Commissioner of Insurance. 1929 July 3.

You have sent me a letter which, in part, is as follows: —

G. L., c. 176, §§ 6–9, inclusive, regulate the formation and authorization of domestic fraternal benefit societies. Section 8 provides, in part, that no such society shall incur any liability except for advance payments made by applicants for membership, nor pay or allow any death or disability benefits until it has performed certain acts, and that upon the presentation of satisfactory evidence that the society has complied with all the provisions of said chapter, the Commissioner shall issue to the society a certificate to that effect.

A certain society in the process of formation has received a preliminary certificate under said section 8 but has not received the final certificate required under said section. It has complied with all the requirements of section 8 but it or its incorporators have in fact made contracts for the payment of death or disability benefits or have paid such benefits contrary to the foregoing prohibition of said section. It now applies for a final certificate.

You request my opinion upon the two following questions relative to the matters which you have set forth: —

1. Is the Commissioner precluded as a matter of law from granting a final certificate to a society, under said section 8, which has fulfilled all the requirements of said section 8 but which has admittedly made contracts for the payment of, or has paid, death or disability benefits contrary to said section, on the ground that the society has not complied with all the provisions of said chapter 176?

2. If you answer the preceding question in the negative, is the society as a matter of right entitled, on the facts set forth in the preceding question, to receive a final certificate in such circumstances, or is the issue thereof discretionary with the Commissioner?

I answer your first question in the affirmative.

G. L., c. 176, § 8, provides, with relation to an unincorporated fraternal benefit society, the incorporators of which have held their first meeting, that —

The commissioner shall then furnish the incorporators of any such society, if on the lodge plan, with a preliminary license, authorizing it to solicit members for the purpose of completing its organization. It shall collect from each applicant the amount of not more than one periodical benefit assessment or payment, in accordance with its tables of rates as provided by its constitution and by-laws, and shall issue to every such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advance payments, nor issue any benefit certificate, nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death or disability benefit certificates, as the case may be, have been secured from at least five hundred persons, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of the society; nor until there shall be established ten subordinate lodges or branches, in which said five hundred applicants have been initiated; nor until there has been submitted to the commissioner, on oath of the president and secretary or corresponding officers of such society, a list of the said applicants, giving their names, addresses, date of examination, date of approval, date of initiation, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, and rate of regular payments or assessments, which for societies offering death benefits shall not be lower for death benefits than those required by the National Fraternal Congress Table of

Mortality as adopted by the National Fraternal Congress August twenty-third, eighteen hundred and ninety-nine, or any higher standard at the option of the society, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the commissioner, by the sworn statement of the treasurer or corresponding officer of such society, that at least five hundred applicants for death benefits have each paid in cash one regular payment or assessment as herein provided, and the payments in the aggregate shall amount to at least twenty-five hundred dollars, all of which shall be credited to the mortuary or disability fund on account of the applicants, and no part of which may be used for expenses. Such advance payments shall, during the period of organization, be held in trust for the applicants, and if the organization is not completed within one year as hereinafter provided, shall be returned to them. The commissioner may make such examination and require such further information as he deems advisable; and upon presentation of satisfactory evidence that the society has complied with all the provisions of this chapter, he shall issue to the society a certificate to that effect.

In addition to the information contained in your letter, you have advised me that the incorporators of the society as to which your inquiries are particularly addressed have both made promises to pay death and disability benefits and have paid such benefits before actual bona fide applications for certificates had been secured from at least five hundred persons, and have actually in fact paid death benefits before the medical examinations required by the said statute had been made and certificates thereof filed.

If the explicit provisions of said section 8 have been violated in the ways above described, it cannot be said that the society has complied with all the provisions of chapter 176, and, accordingly, satisfactory evidence of compliance with the provisions of said chapter, upon which the issuance of the certificate mentioned in said section 8 is predicated, cannot be before the Commissioner so as to require him to issue such certificate.

Moreover, payment of benefits before receipt of the Commissioner's certificate, which can from the nature of the case be made only from "advance payments," as those words are used in said section 8, has prevented the society from a

compliance with that provision of section 8 which requires that advance payments "shall, during the period of organization, be held in trust for the applicants," to be returned if the organization is not completed.

My answer to your first inquiry precludes the necessity of answering your second question.

PUBLIC WELFARE — MINOR CHILDREN — SETTLEMENTS.

After a divorce, when the children of a marriage have a settlement within the Commonwealth, derived from their mother, they will not lose it if the father has no settlement in the Commonwealth.

To the Commissioner of Public Welfare. 1929 July 11.

You have asked my opinion in a communication which reads as follows: —

I respectfully request your opinion whether or not three minor children, who now live in Athol, have a legal settlement within the Commonwealth. The father of the children was granted a decree of divorce which becomes absolute on July 21, 1929, and the court awarded the custody of the three children to him. He was born in Wisconsin May 8, 1894, and has never resided in any town in Massachusetts long enough to gain a legal settlement. The mother of the three children was born in Erving, Massachusetts, February 4, 1902, and she admittedly has a legal settlement in that town.

I assume that your question relates to the settlement as of the time, July 21st, when the decree of divorce becomes absolute. G. L., c. 116, § 1, cl. Third, reads: —

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.

The provision in the above-quoted section in regard to divorce was added by St. 1911, c. 669. Under R. L., c. 80, § 1, cl. Second, which contained only what is now the first part of the section of the General Laws above quoted,

the children in the case in question would clearly, because of the divorce, not lose their settlement in the town of Erving. In my opinion, the terms used in the provision added by the act of 1911 cannot properly be construed as changing the result. The word "settlement" must mean settlement within this Commonwealth; and since in the case in question the father, to whom custody is given, has no settlement within the Commonwealth, the provision has, by its terms, no application. The provision does not purport in terms to change the law in a case where the parent to whom custody is given does not have a settlement, and, in my opinion, no such meaning can be read into it.

PHYSICIAN — CERTIFICATE OF REGISTRATION — TOWN.

A physician must present his certificate of registration to the city or town clerk of each city or town in which he establishes an office.

To the Director of Registration. 1929. July 16.

You request my opinion as to whether it is necessary, under G. L., c. 112, § 8, for a physician to record his certificate of registration with the city or town clerk "each time he establishes a new business address."

Said section 8 provides, in part: —

> No person shall enter upon, or continue in, the practice of medicine within the commonwealth until he has presented to the clerk of the town where he has, or intends to have, an office or his usual place of business, his certificate of registration as a physician in the commonwealth.

I assume that your question refers to a case where a physician, who has recorded his certificate in one town, moves to or opens an office in another town. There seems to be nothing in the statute to require a new record where the physician takes a new business address within the same town.

The statute, in my opinion, requires the certificate to be recorded in each town in which the physician establishes an office.

Insurance — Life Policies — Incontestability — Forms.

A clause eliminating hazards of aviation from the coverage of a life policy may not be disapproved upon that ground alone.

To the Commissioner of Insurance. 1929 August 8.

You have asked my opinion, in the first portion of a written communication, upon several questions relative to the interpretation and application of the incontestability provision concerning policies of life insurance embodied in G. L., c. 175, § 132, cl. 2. You have directed my attention particularly to certain forms of riders or endorsements intended to be attached to life policies, as to which your approval has been requested and which are before you for consideration.

The first two questions which you have propounded in relation to this portion of your communication are not limited in their scope to the forms of riders as to which you are now required to act, but are general in their nature and deal with possible and hypothetical states of fact which may or may not be called to your attention in the future and which are not necessarily governed by precisely the same principles of law as are applicable to the specific problems which arise upon the matters now actually before you for determination. I therefore do not at the present time deem it incumbent upon me to answer your questions numbered I, 1 and 2.

I.

You advise me in your communication as follows: —

I. Certain life insurance companies have filed with me, and have requested me to approve, under said section 132 and section 192 of said chapter 175, certain forms of riders or endorsements which they propose to attach to forms of life or endowment policies to be issued in this Commonwealth, said policy forms having been duly approved by the Commissioner under said section 132 and containing the provision required by clause 2 of said section 132.

These forms of riders or endorsements read as follows: —

"(1) Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this

contract; but, if the Insured shall die as a result, directly or indirectly, of such service, travel or flight, the Company will pay to the beneficiary the reserve on this contract.

(2) Death or disability resulting directly or indirectly from being in, on or about or operating or handling any vehicle or mechanical device for aerial navigation or in falling therefrom or therewith is a loss not assumed under any of the terms of this Policy; but in the event of such death the Company will pay to the beneficiary the amount of the reserve on this Policy.

(3) In the event of the death of the Insured within a period of ten years from the date of issue of this policy resulting directly or indirectly from travel, service or flight in any species of aircraft, the Company's liability under this contract shall be limited to the reserve guaranteed by the policy."

With relation to the foregoing you have asked me the following questions: —

3. May the Commissioner, under G. L., c. 175, §§ 132 and 192, as amended, lawfully approve any form of policy of life or endowment insurance, except an industrial policy, containing in substance the provisions required by clause 2 of said section 132 and the provisions of the forms of riders or endorsements set forth in I, *supra*, and numbered (1) and (2), or the form of the said riders or endorsements for attachment to the aforesaid forms of policies?

4. May the Commissioner, as aforesaid, lawfully approve any such form of policy containing in substance the provisions required by said clause 2 and the provisions of the form of rider or endorsement set forth in I, *supra*, and numbered (3), or the form of the said rider or endorsement for attachment to the aforesaid forms of policies?

I am also advised that one of your predecessors in office has at some time in the past approved riders similar to one of the three forms described in your letter, so that there would not appear to be an established departmental interpretation of the incontestable clause of G. L., c. 175, § 132, cl. 2, adverse to the approval of such riders.

G. L., c. 175, § 132, cl. 2, as amended, reads as follows: —

A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue except for non-payment of premiums or violation of the conditions of the policy relating to military or naval service in time of war and

except, if the company so elects, for the purpose of contesting claims for total and permanent disability benefits or additional benefits specifically granted in case of death by accident.

G. L., c. 175, § 192, as amended, in its pertinent parts is as follows: —

All provisions of law relative to the filing of policy forms with, and the approval of such forms by, the commissioner shall also apply to all forms of riders, endorsements and applications designed to be attached to such policy forms and when so attached to constitute a part of the contract.

The incontestability of the policy as provided for in said section 132, clause 2, precludes a defense that the contract made between the parties is not valid and binding. It does not preclude a defense that the subject matter of a claim is outside the scope of the contract as written. It does not enlarge the coverage of the contract, neither does it of itself determine the risk or hazard which the parties to the contract elect to include therein.

The policy with its rider or endorsement constitutes the contract of insurance made between the parties, and where the risk of aviation hazards is limited in, or eliminated from, such contract the fact that the contract as made is incontestable in no way tends to make illegal the terms of the agreement as written by the mutual consent of the parties in the policy and endorsement.

It cannot fairly be said that because the statute sets forth certain exceptions to incontestability of a policy no contract may be made which by the mutual agreement of insured and insurer lessens the extent of the coverage by removing those connected with aviation from the scope of coverage.

The riders or endorsements with relation to aviation, set forth above as (1), (2) and (3), do not appear to be contrary to any provisions of law, and I answer your questions I, 3 and 4, in the affirmative.

II.

You have advised me in your communication as follows: —

II. Certain life insurance companies are issuing in this Commonwealth a form of industrial life policy which contains a provision that the policy—

"shall be incontestable after it has been in force during the lifetime of the Insured, for a period of two years from the date of issue, except for nonpayment of premiums, fraud or misstatement of age";

and further provisions which read as follows: —

"If, (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the "Space for Endorsements" on page 4 in a waiver signed by the Secretary; or if (3) any Policy on the life of the Insured hereunder has been previously issued by this Company and is in force at the date hereof, unless the number of such prior Policy has been endorsed by the Company in the "Space for Endorsements" on page 4 hereof (it being expressly agreed that the Company shall not, in the absense of such endorsement, be assumed or held to know or to have known of the existence of such prior Policy, and that the issuance of this Policy shall not be deemed a waiver of such last mentioned condition), then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud, in which case all premiums will be forfeited to the Company."

In relation thereto you have asked me this question: —

5. May the Commissioner, under said section 132, as amended, lawfully approve a form of industrial life policy containing the provision for incontestability and the other provisions set forth in II, *supra*, or should such a form of policy be disapproved, as a matter of law, on the ground that any condition, a violation of which, existing prior to the expiration of the period of time specified in said provision for incontestability and continuing or occurring, thereafter, relieves the company from liability, is repugnant to the provision for incontestability?

G. L. c. 175, § 132, does not require the insertion of a clause as to incontestability in a policy of industrial insurance.

An incontestable clause is a part of the industrial life policy under consideration, but various provisions are introduced into the contract by which the insurer may avoid liability. In each instance the exceptions to the incontestability of the contract, introduced into the policy, relate to facts, circumstances or events prior to, and in some instances leading up to, the making of the contract. Such exceptions would be plainly repugnant to a statutory requirement that such policies should contain an incontestable clause such as is required for the life policies, which have previously been considered. In this instance, however, the incontestable clause, modified by the exceptions, constitutes, when read in connection with each other, a term of the policy fixed by agreement of the insured and insurer which is not contrary to any provision of law governing the form of industrial policies.

I therefore answer your fifth question in the affirmative.

STATE HOSPITAL — GARDNER STATE COLONY — SUPERINTENDENT — INMATES.

A superintendent of a State hospital or colony has authority to allow patients to leave the grounds, under proper supervision, for short periods, under conditions beneficial to their health.

To the Commissioner of Mental Diseases. 1929 September 7.

You have asked my opinion relative to the authority and liability of the superintendent of the Gardner State Colony in a communication as follows: —

Your opinion is respectfully requested on certain questions raised by Dr. Charles E. Thompson, Superintendent of the Gardner State Colony.

He states that a short while ago after sending a number of patients to attend a circus at Fitchburg he became concerned as to possible legal liability should injuries occur to them. Inasmuch as this procedure is one that might arise in any institution, the Department feels that the

subject is of sufficient importance to ask for an opinion on certain specific questions.

(1) Has the superintendent authority legally to allow a group of patients to leave the confines of an institution temporarily for recreation, entertainment or similar purpose?

(2) What liability, if any, attends a superintendent or other official in authority sending a patient or group of patients temporarily away from the confines of an institution for recreation, entertainment or similar purpose should injury occur to them, or should such patients injure persons or property?

(3) Is the State liable legally in such a case?

1. I answer your first question in the affirmative. The Gardner State Colony is an institution under the control of your Department, listed under G. L., c. 123, as a State hospital to which insane persons may be committed. The authority to act, in the exercise of a wise discretion, for the benefit of such insane persons, vested in the Department and in its superintendents of State hospitals, is necessarily very broad. I cannot say, as a matter of law, that such a superintendent is not acting within his implied authority in allowing a group of patients, whose condition is such that they may reasonably be expected to receive benefit therefrom, to leave the confines of a State hospital for a short period of recreation or entertainment, when properly supervised and guarded. Of course, in any given instance the facts connected with each individual patient's well-being and safety must be considered by a superintendent.

2. Your second question asks for a somewhat general statement of law without reference to any specific facts. Speaking broadly, an official in charge of patients of a State hospital may be liable individually for acts of negligence on his part which are the direct cause of injury to such patients or to the person or property of others. In taking action in relation to the care of his patients such official is bound to exercise such reasonable care as may properly be expected of a person occupying such a position of responsibility, having regard especially to the mental characteristics of those under his care.

3. The Commonwealth cannot be sued in its own courts for injuries or damages sustained by persons through the negligence of officials such as you describe in your letter. Claims with relation to such injuries or damages might, under certain circumstances, which it is not necessary for me to attempt to describe in detail, require the disbursement of money by the Commonwealth.

Citizenship — Registration of Voters.

The burden of proving citizenship is upon a person applying for registration as a voter.

The registrars of voters are to determine the question of citizenship upon such proof.

To the Secretary. 1929 September 23.

You ask my opinion on the following question: —

Have registrars of voters or election commissioners authority to register as a voter in this Commonwealth a person whose only right to citizenship is derived through naturalization of husband or father, upon presentation of certificate of naturalization of such husband or father, or must such person present a certificate obtained after application of said section 33 (45 Stat. at L., pt. I, p. 1512)?

You state in your communication that —

In the case of a wife, or a child who was a minor at the time of naturalization of his parent, and who is otherwise qualified to register, it is the present practice, I believe, of registrars of voters and election commissioners to require the production for inspection of the papers of the husband or parent. Such papers in late years bear the names of wife and minor children; and that the new form to be used for certificate of naturalization does not contain any blank for statement of wife or minor children, and election officials are apprehensive and in disagreement concerning proof of citizenship to be required.

The laws of the United States conferring citizenship upon minor children of naturalized parents are found in the United States Code, Title 8, chapter 1, sections 7 and 8, as follows: —

Section 7. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of

any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. (R. S. § 2172.)

SECTION 8. A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent, where such naturalization or resumption takes place during the minority of such child. The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States. (Mar. 2, 1907, c. 2534, § 5, 34 Stat. 1229.)

In passing upon these statutes the Circuit Court of Appeals, Second Circuit, in *United States ex rel. Patton* v. *Tod*, 297 Fed. 385, said: —

We have a simple system under which each statute confers rights in two different situations. Under R. S. U. S. § 2172 (U. S. C., Title 8, c. 1, § 7, above quoted), a foreign-born minor child dwelling in the United States at the time of the naturalization of the parent automatically becomes an American citizen. Under section 5 of the Act of March 2, 1907 (U. S. C., Title 8, c. 1, § 8, above quoted), a foreign-born child, not in the United States when the parent is naturalized, becomes a citizen only from such time as, while still a minor, it begins to reside permamently in the United States.

A person claiming to be a citizen by virtue of the naturalization of his parent can establish that fact, it seems to me, by producing substantial proof of his minority at the time of naturalization of the parent and that he was either dwelling in this country at that time or that he began to reside permanently in the United States during his minority.

The law relative to citizenship of a wife of a naturalized person, prior to Act of Congress approved September 22, 1922, provided (Rev. Stat. 1874, § 1994): —

Any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized, shall be deemed a citizen.

A similar act has been construed in *Kelly* v. *Owen*, 7 Wall. 496, 498, to confer —

> The privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms "married," or "who shall be married," do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after marriage, she becomes, by that fact, a citizen also.

Rev. Stat. 1874, § 1994, was repealed by Act of Congress approved September 22, 1922. The repealing statute expressly provides that citizenship acquired thereunder "shall not terminate." See U. S. C., Title 8, c. 9, § 368.

G. L., c. 51, § 44, provides, in part: —

> The registrars shall examine on oath an applicant for registration relative to his qualifications as a voter.

This statute places the burden of proving citizenship upon the person applying for registration. It does not prescribe the manner in which the proof shall be established. The sufficiency of such proof is to be determined by the registrars in each individual case.

The prevailing practice of the registrars, in cases where applicants for registration claim citizenship by virtue of the naturalization of a parent or husband, of requiring the production by the applicant of the naturalization certificate of the parent or husband, is one way in which the question of citizenship of the applicant may be determined.

Another way in which the question may be determined is by the production by the applicant of a "certificate of citizenship" issued by the Commissioner of Naturalization under section 9 of the Act of March 2, 1929 (45 Stat. at L., pt. I, p. 1512), which section provides as follows: —

> Any individual over twenty-one years of age who claims to have derived United States citizenship through the naturalization of a parent,

or a husband, may, upon the payment of a fee of $10, make application to the Commissioner of Naturalization, accompanied by two photographs of the applicant, for a certificate of citizenship. Upon obtaining a certificate from the Secretary of Labor showing the date, place, and manner of arrival in the United States, upon proof to the satisfaction of the commissioner that the applicant is a citizen and that the alleged citizenship was derived as claimed, and upon taking and subscribing to, before a designated representative of the Bureau of Naturalization within the United States, the oath of allegiance required by the naturalization laws of a petitioner for citizenship, such individual shall be furnished a certificate of citizenship by the commissioner, but only if such individual is at the time within the United States. In all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States, the certificate of citizenship issued under this section shall have the same effect as a certificate of citizenship issued by a court having naturalization jurisdiction.

An examination of the legislative history of the Act of March 2, 1929 (45 Stat. at L., pt. I, p. 1512), leads me to believe that Congress did not intend that all persons claiming citizenship through the naturalization of a parent or husband should be required to secure a "certificate of citizenship" to entitle them to the privileges of native born or naturalized Americans. I believe that until and unless the Legislature of the Commonwealth, by legislative act, requires the production of a "certificate of citizenship" issued under said Act of March 2, 1929, to establish citizenship for the purposes of registration as voters, the registrars of voters or election commissioners cannot require an applicant for registration to procure such a "certificate of citizenship" if the citizenship of such applicant can be proved in any other manner. I am therefore of the opinion that registrars of voters or election commissioners have authority to register as a voter in this Commonwealth a person whose only right to citizenship is derived from naturalization of husband or parent, upon presentation of a certificate of the naturalization of such husband or parent, if they are satisfied that citizenship was derived in that manner; and if, in their

judgment, the proof offered is not sufficient, they may require a "certificate of citizenship," but they cannot arbitrarily require the production of such certificate in all cases.

FIRE MARSHAL — RULES — ENFORCEMENT.

It is the duty of both the State Fire Marshal and the local authorities to prosecute violations of regulations made under G. L., c. 148.

To the Commissioner of Public Safety. 1929 October 3.

You state that certain persons in the city of Lynn are violating the regulations of the State Fire Marshal relative to the use of inflammable fluids and compounds in the manufacture of shoes, that the Marshal has delegated to the head of the fire department of said city "the carrying out of any lawful rule, order or regulation established by the Fire Marshal," that the city officials have taken the position that it is not their duty but the duty of the Fire Marshal to enforce the regulations, and that accordingly they are not prosecuting said violations. You request my opinion as to "whether it is the duty of the State Fire Marshal to execute and enforce" these regulations, "or whether it is incumbent upon the Lynn authorities to execute and enforce these regulations under the authority vested in them by the aforesaid delegation of power."

The regulations in question are made under authority of G. L., c. 148, § 30, which authorizes the Marshal, among other things, to inspect or regulate the keeping or use of inflammable fluids and compounds. Section 31 of said chapter 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.

Acting under said section 31 the Marshal has delegated to the head of the fire department of the city of Lynn —

The right to issue any permit authorized by G. L., c. 148, §§ 30–51, inclusive, the carrying out of any lawful rule, order or regulation established by the Fire Marshal, and the right to make any inspection required under said sections.

Section 51 of said chapter 148 imposes the penalty of a fine for violation of rules made under section 30.

The regulations in question "have the force and effect of law." *Guinan* v. *Famous Players-Lasky Corporation.* Mass. Adv. Sh. (1929) 1297, 1305.

In my opinion, it is the duty of *both* the State Fire Marshal and the local authorities to see to it that these violations of law are prosecuted. If it appears to the Marshal that the local authorities are failing to prosecute violations of law, it is his duty as a public official to cause such violations to be prosecuted. The fact that the Marshal has delegated the carrying out of these regulations to local authorities does not deprive him of the power or free him from the duty of acting in cases where it becomes known to him that the local authorities are failing to act.

Fire Marshal — Municipalities — Ordinances — Fire Prevention.

Cities and towns have no power to make ordinances regulating storage and use of explosives and inflammable fluids within the Metropolitan Fire Prevention District, but may regulate by ordinances for fire prevention in connection with the construction of buildings.

To the Special Commission on Fire Prevention. 1929 October 8.

You request my opinion upon the following questions: —

1. Have municipalities within the Metropolitan Fire Prevention District authority to adopt ordinances, in addition to the rules of the State Fire Marshal and the Department of Public Safety, relating to fires and to fire prevention?

2. Have municipalities outside the Metropolitan Fire Prevention District authority to adopt ordinances, in addition to the rules of the State Fire Marshal and the Department of Public Safety, relating to fires and to fire prevention?

Under G. L., c. 143, § 3, every city, except Boston, and every town accepting the statute is authorized, "for the prevention of fire," among other things, to regulate by ordinance or by-law "the inspection, materials, construction, alteration, repair, height, area, location and use of buildings and other structures."

By G. L., c. 148, § 39, the Fire Marshal is given certain limited powers to make rules within the metropolitan district "relating to fires, fire protection and fire hazard." By section 42 the Fire Marshal may require reports from heads of fire departments of violations "of ordinances, by-laws, rules or orders made by the various cities and towns, or by the Marshal, relating to fires, fire hazard and fire protection." The statute first cited, giving to cities and towns power to regulate as therein stated, is in full force and effect. It has not been abrogated by any delegation of authority to regulate given to the State Fire Marshal or to the Department of Public Safety, either within or without the metropolitan district. See *Storer* v. *Downey*, 215 Mass. 273; *Kilgour* v. *Gratto*, 224 Mass. 78.

As to any ordinances or by-laws relating to the storage or use of explosives or inflammable compounds, assuming that such ordinances or by-laws cannot be brought within the scope of G. L., c. 143, § 3, above referred to, a different question is presented. Under the Revised Laws cities and towns, in addition to the power given them to regulate, for the prevention of fire, the inspection, materials, construction, alteration and use of buildings and other structures (R. L., c. 104, § 1, now G. L., c. 143, § 3), were authorized to adopt ordinances, by-laws and regulations relative to the storage and sale of camphine or any similar explosive or inflammable fluid (R. L., c. 102, § 94), and also to make certain orders relative to storage of gunpowder and use of certain explosives (R. L., c. 102, §§ 89 and 91).

But by St. 1904, c. 370, § 1, it was provided that —

> The powers conferred on city councils of cities and selectmen of towns by chapter one hundred and two of the Revised Laws, to regulate the

keeping, storage, use, manufacture or sale of gunpowder, dynamite or other explosives and inflammable fluids, shall hereafter be exercised by the fire marshal's department of the district police.

By section 5 it was provided that —

So much of chapter one hundred and two of the Revised Laws as is inconsistent herewith is hereby repealed.

By St. 1914, c. 795, which created the office of Fire Prevention Commissioner for the Metropolitan District, it was provided in section 3 that —

All existing powers, in whatever officers, councils, bodies, boards or persons, other than the general court and the judicial courts of the commonwealth, they may be vested, to license persons or premises, or to grant permits for or to inspect or regulate or restrain 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, firecrackers, or any other explosives, and the use of engines and furnaces described in section seventy-three of chapter one hundred and two of the Revised Laws, are hereby transferred to and vested in the commissioner.

The power of the Department of Public Safety, as now constituted, to make rules, applicable outside of the metropolitan district, governing the storage or use of explosives or inflammable fluids or compounds is found in G. L., c. 148, § 10, which reads as follows: —

The department may make rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, and may prescribe the materials and construction of buildings to be used for any of the said purposes, except that cities and towns may by ordinances or by-laws prohibit the sale or use of fireworks or firecrackers within the city or town, or may limit the time within which firecrackers and torpedoes may be used.

The power of the Marshal to make rules governing the storage or use of explosives or inflammable fluids and com-

pounds within the metropolitan district is found in G. L., c. 148, § 30, in the following words: —

> 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, firecrackers, 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.

In my opinion, the terms of these statutes must be construed as divesting cities and towns of any power which they previously had to regulate the storage and use of explosives or inflammable fluids as such. Such powers to make rules and regulations became vested in the Fire Marshal's department of the District Police, or afterwards, within the metropolitan district, in the Fire Prevention Commissioner; and to these powers the Department of Public Safety (or the State Fire Marshal) has succeeded. Gen. St. 1919, c. 350, § 99.

As before stated, however, cities and towns may still, under G. L., c. 143, § 3, by ordinances or by-laws regulate, for the prevention of fire, the construction and use of buildings and other structures. (It will also be noted that under G. L., c. 148, § 30, the power of the Fire Marshal to *license* within the metropolitan district is subject to the approval of the local authorities.)

Motor Vehicles — Length — Ways.

Motor vehicles and trailers when used for transportation of poles, and various single units having an over-all length, inclusive of load, of not more than 60 feet, may operate on any public way.

To the Commissioner of Public Works. 1929 October 14.

You have asked my opinion concerning the interpretation of G. L., c. 90, § 19, as amended, with relation to two questions which you have set forth as follows: —

(1) If the Department should decide to designate localities or ways, as provided in this act, will it be possible to limit any such way to a 33-foot vehicle, or will the act of designation automatically carry with it authority for the use of such ways by vehicles which, when loaded with poles, have an over-all length of 60 feet?

(2) If no designation is made by the Department under the provisions of this act, can motor vehicles loaded with poles, having an over-all length of 60 feet, be legally operated on any way without the "special permit" mentioned in the tenth line of this act?

G. L., c. 90, § 19, as amended by St. 1929, c. 313, reads: —

No motor vehicle or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which is more than twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way or, in case of a state highway or a way determined by the department of public works to be a through route, from said department; provided, that such width may be exceeded by the lateral projection of pneumatic tires beyond the rims of the wheels for such distance on either side of the vehicle or trailer as will not increase its outside width above one hundred and two inches; and provided, further, that the extreme over-all length of such a vehicle or trailer when used in localities or on ways designated by the said department may exceed twenty-eight feet but not thirty-three feet, and that, when used for the transportation of poles or single units of lumber or metal, such length may exceed twenty-eight feet but not sixty feet, except as authorized by a special permit granted as aforesaid. The aforesaid dimensions of width and length shall be inclusive of the load.

Before the enactment of the amending act, St. 1929, c. 313, G. L., c. 90, § 19, as then amended by St. 1927, c. 72, was as follows: —

No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all

length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a state highway or a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load.

Accordingly, the law as it stood before the passage of St. 1929, c. 313, prohibited the operation on any way of a commercial motor vehicle or trailer having an over-all length, inclusive of its load, of more than 28 feet, without a special permit.

The amendment of section 19 by St. 1929, c. 313, in its first clause establishes precisely the same general prohibition as to over-all length of all motor vehicles and trailers as had been set forth for commercial motor vehicles and trailers immediately prior thereto, and then sets up certain exceptions to the general prohibition of an over-all length, inclusive of load, in excess of 28 feet, and these exceptions are: First, as to such vehicles when used in localities or on ways designated by the Department of Public Works, in which instance the maximum length may be 33 feet; and second, as to such vehicles "when used for the transportation of poles or single units of lumber or metal," in which latter instance the maximum length may be 60 feet.

I am of the opinion that the second exception noted above, in favor of such vehicles as are used for the designated transportation purposes, is not limited to such vehicles so used when run upon designated ways or in designated localities, but applies to them wherever used upon the ways throughout the Commonwealth. I am constrained to think that such was the intent of the Legislature as expressed by the words of St. 1929, c. 313, by reason of the fact that the word "that" immediately follows the word "and," in the twenty-second line of said chapter, indicating, in connection with the context, a separation of the provisions which immediately follow it from those employed just before in relation to designated ways and localities. I am confirmed

in this view by the further fact that the provisions of the exceptions concerning motor vehicles on "designated" ways state that their length "may exceed twenty-eight feet but not thirty-three feet," and that the language with relation to motor vehicles engaged in the designated transportation is that their length "may exceed twenty-eight feet but not sixty feet." If the exception with relation to the last-named class of vehicles had been intended by the Legislature to be limited by the provisions connected with use on designated ways, the wording used would not have been as above quoted but would naturally have been, — "may exceed thirty-three feet but not sixty feet."

In accordance with the foregoing considerations I answer your first question to the effect that, irrespective of a designation of localities or ways by your Department, motor vehicles and trailers, "when used for the transportation of poles and single units of lumber or metal," having an over-all length, inclusive of load, of not more than 60 feet, may operate in any locality and upon any public way, designated or undesignated; and that you have no authority to limit the use of any public way whatsoever to 33-foot vehicles to the exclusion of those not over 60 feet, used in said transportation.

I answer your second question in the affirmative.

CIVIL SERVICE — CHIEF OF POLICE OF LEOMINSTER.

The chief of police of Leominster is within the civil service law and rules.

To the Commissioner of Civil Service. 1929 October 23.

You have asked me the two following questions: —

1. Did the passage of Gen. St. 1918, c. 291, § 22, legalize the act of the town of Leominster in accepting St. 1911, c. 468, and place the chief of police of that town within the civil service classification?

2. If the answer to question number one is in the affirmative, does the fact that Leominster became a city on January 3, 1916, prior to the passage of the 1918 amendment, affect the situation?

You advise me that on March 3, 1915, the town of Leominster voted to accept the provisions of R. L., c. 19, § 37, and "at the same time," but I assume somewhat thereafter, the town voted to accept the provisions of St. 1911, c. 468, which in effect classified the chief of police of the town under the civil service.

An opinion of one of my predecessors in office, to which you refer in your communication and with which I agree, was given the Civil Service Commission under date of March 21, 1917 (not published), and was to the effect that the town of Leominster did not by its votes of March 3, 1915, so accept St. 1911, c. 468, as to place its chief of police within the classified service.

The reason for the result arrived at by the opinion was that the town, by its first vote of March 3, 1915, accepted only the provisions of R. L., c. 19, § 37, and not the whole of said chapter 19, and that since by the terms of St. 1911, c. 468, as it then read, the acceptance by a town of St. 1911, c. 468, was not effective unless it had previously accepted all the provisions of R. L., c. 19, the action of the town did not in the then existing state of the law constitute a valid acceptance of St. 1911, c. 468.

After the said opinion was rendered, the Legislature enacted in 1918 an amendment to said St. 1911, c. 468, namely, Gen. St. 1918, c. 291, § 22, which reads as follows: —

> Section one of chapter four hundred and sixty-eight of the acts of nineteen hundred and eleven is hereby amended by inserting after the word "of" in the ninth line the words — section thirty-seven of, — and by inserting at the end thereof the words — as applied to the police force thereof, — so as to read as follows: — *Section 1.* The provisions of chapter nineteen of the Revised Laws, entitled "Of the Civil Service," and all acts in amendment thereof and in addition thereto, and the civil service rules made thereunder, and all acts now or hereafter in force relating to the appointment and removal of police officers, shall apply to the superintendent, chief of police or city marshal in all cities except Boston, and in all towns that have accepted, or may hereafter accept, the provisions of section thirty-seven of said chapter nineteen as applied to the police force thereof.

This statute made applicable to cities and towns which had accepted said section 37 only, all acts then or thereafter in force relative to chiefs of police upon acceptance of the statute of 1911. The town had previously voted to accept St. 1911, c. 468, but its vote was ineffectual as an acceptance only because said statute as it then stood required the acceptance of the whole of R. L., c. 19, as a prerequisite to the acceptance of St. 1911, c. 468. The town had in fact prior to its vote on the acceptance of the statute of 1911, voted to accept said section 37 of R. L., c. 19. The effect of the amendment of the statute of 1911 by Gen. St. 1918, c. 291, § 22, was to make effective the vote of the town accepting said statute of 1911, by reason of its acceptance of said section 37. In my opinion, the intent of the Legislature in amending St. 1911, c. 468, was to give to the amended section a retroactive effect to the extent above set forth.

You advise me that Leominster became a city January 3, 1916, that is, prior to the passage of Gen. St. 1918, c. 291, § 22. The fact that it was so incorporated prior to the enactment of Gen. St. 1918, c. 291, § 22, is immaterial. The city of Leominster is the same municipal corporation as the inhabitants of the town of Leominster were. By being incorporated as a city the identity of the municipal corporation is not lost. (*Higginson* v. *Turner*, 171 Mass. 586, 591), and the acceptance of R. L., c. 19, § 37, and of St. 1911, c. 468, by the town in 1915 is an acceptance of said chapters by the city of Leominster, within the meaning thereof, in view of the effect of Gen. St. 1918, c. 291, already noted.

I answer your first question to the effect that the passage of Gen. St. 1918, c. 291, § 22, had the effect of making R. L., c. 19, and all acts in amendment thereof and in addition thereto, and the civil service rules made thereunder, and all acts in force at the effective date of said chapter 291 and thereafter enacted, relating to the appointment and removal of police officers, applicable to the chief of police of Leominster.

I answer your second question in the negative.

Incompatibility of Offices.

The positions of register of probate of Hampden County and special justice of the District Court at Holyoke may both be held by one person.

To the Governor. 1929 November 4.

You have requested my opinion upon the following question of law: —

On October 30, 1929, the name of Russell L. Davenport, Esquire, of Holyoke, was submitted for the position of register of probate for the County of Hampden. For your information Mr. Davenport at the present time is special justice of the District Court at Holyoke. If the Executive Council confirms the nomination of Mr. Davenport for the position of register of probate on November 6th, will it be constitutional for him to hold the two offices mentioned at the same time?

Mass. Const., pt. 2nd, c. VI, art. II, and Mass. Const. Amend. VIII set forth certain offices not more than one of which may be held by a single individual, and certain other offices not more than two of which may be held by a single individual. Certain other offices are described which may not be held by members of the General Court.

The positions of register of probate for Hampden County and special justice of the District Court at Holyoke are not so designated in the Constitution but that they may be held by one individual. There appears to be no provision of statutory law making it illegal for one person to hold both of these offices, and I consequently advise you that it will be constitutional for the person whom you name in your letter to retain his office as said special justice while holding also the position of said register of probate.

Director — Two Positions — Text Books.

A person may not hold the position of principal of the Massachusetts School of Art and State Director of Art Education if he has a direct or indirect pecuniary interest in the books or school supplies used in public schools.

To the Commissioner of Education. 1929 November 15.

You have asked my opinion as to the application of G. L., c. 15, § 5, as it affects the services of a person employed as principal of the Massachusetts School of Art and State

Director of Art Education, in so far as such person may have a pecuniary interest in books or supplies used in the public schools.

G. L., c. 15, § 5, in its pertinent parts, reads as follows: —

> Except in the case of the teachers' retirement board, the division of public libraries, the division of the blind and institutions under the department, the commissioner may appoint such agents, clerks and other assistants as the work of the department may require, may assign them to divisions, transfer and remove them and fix their compensation, but none of such employees shall have any direct or indirect pecuniary interest in the publication or sale of any text or school book, or article of school supply used in the public schools of the commonwealth.

You have advised me that a single person is employed by your Department under one title or description but with two distinct lines of work, with dissimilar duties: namely, first, as principal of the State school of art, which you tell me corresponds in general scope of administration to that of a State normal school, and, second, as Director of Art Education; and I am informed that the duties of this latter position are not unlike the functions usually discharged by the agents appointed under the provisions of said section 5, except that they are confined to promotion of a single branch of education only, — that of art. In your letter to me you have described the duties which such person performs as Director of Art Education as follows: —

> He visits the various towns and cities of the Commonwealth for the purpose of conferring with art supervisors and school officials on their art programs in the public schools; addresses groups of people on art subjects; confers with art supervisors and school officials; and conducts regional conferences of art supervisors.

If the duties of the person who bears the title of principal of the Massachusetts School of Art and State Director of Art Education were confined to the administration of the School of Art, the prohibition of said section 5 would not be applicable to such a person, for the reasons set forth in an opinion of one of my predecessors in office rendered to you August 5, 1924 (VII Op. Atty. Gen. 495), inasmuch as

it appears plain that in the capacity of such a principal alone he would not be an agent of the Department appointed under the authority of said section 5, but rather would be appointed by virtue of G. L., c. 73, § 1, as amended by St. 1926, c. 6. But the duties of the person who bears the said title embrace also duties such as visiting cities and towns and doing other acts particularly prescribed for agents of the Board under earlier statutes, now embodied in said section 5 (P. S., c. 41, § 9; R. L., c. 39, § 9).

It would seem that in his capacity as State Director of Art Education he is acting as an agent of the Department, within the meaning of said section 5, and, though called a director, his appointment would appear to be that of an agent, made by virtue of the provisions of said section 5, especially as no specific statutory authority exists relative to the directorship of art education, and no division of art education which would require a director as its head appears, from what you have advised me, to be in existence.

Since, then, the position in question is, in part at least, that of an agent appointed under G. L., c. 15, § 5, the incumbent is subject to the terms of said section relative to pecuniary interest in books and supplies.

Consequently, I am constrained to advise you that a person may not lawfully hold the position called principal of the Massachusetts School of Art and State Director of Art Education if he has "any direct or indirect pecuniary interest in the publication or sale of any text or school book or article of school supply used in the public schools of the Commonwealth." If, as a matter of fact, the two employments constitute one position, such a pecuniary interest would debar a person from holding the same.

State Board of Retirement — Members — Probation.

The Board has authority to make a by-law that an employee shall not be a member during a probationary period of employment nor until ninety days thereafter, and an employee has not the right to apply for retirement during such periods.

Service of members is to be computed alone from the beginning of non-probationary employment by the Commonwealth.

To the Board of Retirement. 1929 November 16.

You have asked my opinion upon the following questions relating to the authority of the Board of Retirement: —

(1) Has the Board exceeded its authority in establishing a by-law that an employee shall not become a member during a period of probationary employment?

(2) Is it correct for the Board not to enroll a person until ninety days after he has completed a period of probationary employment?

(3) Is it correct after the enrollment of an employee to include the probationary plus additional ninety days of service when computing his total period of continuous service for retirement benefits under the law?

(4) Has an employee any rights under G. L., c. 32, § 2 (9), to apply to the Board for retirement during a probationary period of employment and the additional ninety days specified by the law?

G. L., c. 32, § 2, provides that —

> There shall be a retirement association for the employees of the commonwealth.

Section 1, as amended by St. 1922, c. 341, § 1, defines "employees," as the word is used in said chapter 32, as —

> Persons permanently and regularly employed in the direct service of the commonwealth . . . whose sole or principal employment is in such service.

G. L., c. 31, § 3, provides that the Civil Service Commissioners may make rules and regulations which shall regulate "the selection of persons to fill appointive positions, in the government of the Commonwealth," and that such regulations shall include — "(*e*) A period of probation before an appointment or employment is made permanent." You advise me that the Civil Service Commissioners have duly made a regulation providing a probationary period of six months in the classified service before an appointment

or employment is made permanent. It is plain that a person while employed during a probationary period, whether his employment is under civil service or not, is not, from the very nature of such employment, a "permanent" employee of the Commonwealth; and that he was not, if under civil service, intended by the Legislature to be considered as one follows from the language of G. L., c. 31, § 3 (*e*), above quoted.

The provision of G. L., c. 32, § 2 (2), that "persons who enter the service of the commonwealth hereafter shall, upon completing ninety days of service, become thereby members of the association," would seem to apply only to persons who enter the service of the Commonwealth as permanent employees, for such alone are eligible to membership in the association. It would therefore follow that a period of ninety days from the expiration of a probationary period of employment should elapse before an employee could be said to be a member of the association and entitled to the benefits thereof.

Accordingly, I answer your first and second questions in the affirmative, and your fourth in the negative.

The answer to your third question involves a consideration of other factors in addition to those affecting the answers to your other queries.

G. L., c. 32, § 2 (4), as amended by St. 1925, c. 12, provides that —

> Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire.

Paragraphs (5) and (8) contain similar references to "continuous" service with relation to periods entitling a member to retire.

I am informed that it has been the practice of your Board to include the time of a probationary employment and the ninety days of employment before a person gains membership in the association as parts of the period of continuous

service mentioned in said paragraphs (4), (5) and (8). I am of the opinion that your departmental practice in this respect is correct. It appears from the definition of "continuous service" set forth in said section 1, above quoted, and from the absence of any provisions in said chapter 32 indicating an intention on the part of the Legislature to make the "continuous service" essential to retirement coincident with continuous membership in the association, that continuous service is to be computed from the beginning of employment of a member by the Commonwealth and not from the beginning of his membership in the association.

SECRETARY OF THE COMMONWEALTH — INITIATIVE PETITION — TRANSMISSION TO GENERAL COURT.

The Secretary of the Commonwealth must transmit a certified initiative petition, having the required number of signatures, to the General Court upon and not before its assembling.

To the Secretary. 1929 November 26.

You have asked my opinion as to your duty with relation to the transmission to the General Court of an initiative petition, duly signed by the required number of qualified voters, which has been filed with you. Your request reads as follows: —

> Will you kindly give me your opinion whether such petition must be transmitted to the Clerk of the House of Representatives upon the exact date of assembling of the General Court or whether it may be transmitted prior to that date?

The meaning of the applicable provision of the Constitution seems clear upon this matter. Mass. Const. Amend. XLVIII, The Initiative, *II. Initiative Petitions*, § 4, is as follows: —

> *Transmission to the General Court.* — If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall, upon the assembling of the general court, transmit it to the clerk of the house of representatives,

and the proposed measure shall then be deemed to be introduced and pending.

This section of the Constitution places upon you the duty to transmit to the Clerk of the House of Representattivs such an initiative petition at a fixed time, namely, "upon the assembling of the General Court." The time of such transmission is not left to your discretion, and I am of the opinion that you are not authorized to transmit the petition before the time designated in section 4.

Commissioner of Correction — Life Prisoner — Removal to State Prison Colony.

The Commissioner of Correction may, in his reasonable discretion, remove a life prisoner from the State Prison to the State Prison Colony.

To the Commissioner of Correction. 1929 November 30.

In a recent communication to me you state: —

St. 1927, c. 289, § 1, states that "the commissioner may remove to the state prison colony *any* prisoner held in the state prison," etc.

G. L., c. 265, § 2, provides that "whoever is guilty of murder in the second degree shall be punished by imprisonment *in the state prison for life.*"

Before this Department orders the transfer of any life prisoners from the State Prison to the State Prison Colony I desire to ask your opinion as to the legality of the same.

G. L., c. 265, § 2, provides: —

Whoever is guilty of murder in the first degree shall suffer the punishment of death, and whoever is guilty of murder in the second degree shall be punished by imprisonment in the state prison for life.

G. L., c. 125, § 41B (St. 1927, c. 289, § 1), provides: —

The commissioner may remove to the state prison colony any prisoner held in the state prison who, in his judgment, may properly be so removed and may at any time return such prisoner to the state prison. Prisoners so removed shall be subject to the terms of their original sentence and the provisions of law governing parole from the state prison.

The provisions of G. L., c. 265, § 2, standing alone, are mandatory, and the judge of the court in which a prisoner has been convicted of murder in the second degree must impose upon such person the sentence of imprisonment for life in the State Prison, and a sentence, so imposed, with certain exceptions, is required to be executed in the State Prison.

St. 1927, c. 289, § 1, in my opinion, constitutes an exception to the mandatory provisions of G. L., c. 265, § 2. The words "any prisoner," as used in St. 1927, c. 289, § 1, are sufficiently broad to include prisoners serving life sentences. If the Legislature had intended to limit the removal of prisoners from the State Prison to the State Prison Colony to only those prisoners sentenced to that institution for a term of years, it would have used appropriate language to express that intent, as it did in the passage of St. 1898, c. 393, §§ 5 and 7, now G. L., c. 125, § 39, where it specifically provided that "such male prisoners, except those serving sentences for life in the state prison, . . . may be removed from the state prison" to "the prison camp . . . at West Rutland."

The words "may properly be so removed" are to be construed to mean that any prisoner in the State Prison, except such prisoners confined therein in the manner and for the purposes provided by G. L., c. 279, § 44, may be removed to the State Prison Colony if, in the judgment of the Commissioner, such prisoner, by his disposition and previous conduct, has shown that he will be amenable to the discipline at said State Prison Colony and will benefit by his removal thereto.

I am of opinion that the Commissioner of Correction may remove a prisoner serving a life sentence in the State Prison to the State Prison Colony, provided that he is of the opinion that such prisoner may "properly be so removed."

Small Loans — Licenses — Mode of doing Business.

It is a question of fact for the determination of the Commissioner of Banks whether a corporation, however organized or operating, engages in the business of making small loans, as described in the applicable statute. If it does so engage in such business, it must be licensed.

To the Commissioner of Banks.
1929
December 16.

You have asked my opinion as to whether the business of making loans in the amount of three hundred dollars or less, as carried on in the following manner, requires a license under G. L., c. 140, § 96. You have described the manner in which the business is done as follows: —

A corporation contemplates the issue of ten thousand shares of preferred stock, par value $10.00, and ten thousand shares of common stock, no par value, to be offered for public sale at $20.00 per unit of two preferred shares and one common share. The plan has secured the tentative approval of the Department of Public Utilities, Sale of Securities Division. The purpose of the corporation is to lend money at the maximum legal rate of interest for the specialized purpose of purchasing fuel for home consumption: Repayment is to be made in weekly installments. The mechanics of the loan will be in the form of an order of the corporation upon the person selling the fuel, to whom payment will be made directly.

I am of the opinion that the mode in which a corporation is organized, or the particular purpose for which its loans of three hundred dollars or less are to be used, or the fact that the money which is borrowed is by agreement with the borrower paid to a third person for the former's benefit, as described by you in your letter, is immaterial to a determination of whether or not such corporation is required to be licensed under said section 96. Irrespective of the foregoing facts relative to the mode and manner in which a corporation carries on its operations, if, as a matter of fact, it directly or indirectly engages "in the business of making loans of three hundred dollars or less, and if the amount to be paid on any such loan for interest and expenses exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned," as set forth in said section 96, it is required to be licensed.

If you determine, as a matter of fact, that a corporation

engages in the business described in section 96, as above quoted, it is your duty to see that such a corporation is licensed, or that the proper authorities are requested to institute a prosecution against it under the provisions of said section 96.

CIVIL SERVICE — SUPERINTENDENT OF CONSTRUCTION IN THE DEPARTMENT OF SCHOOL BUILDINGS IN BOSTON — DEPUTY SUPERINTENDENTS.

The position of superintendent of construction in the department of schoolbuildings in Boston is not within the provisions of the civil service laws.

The positions of deputy superintendents in said department are within the provisions of the civil service laws.

To the Commissioner of Civil Service. 1929 December 18.

You have requested my opinion upon the following matter now before you for consideration:—

I respectfully request your official opinion as to whether or not the position of superintendent of construction, created by St. 1929, c. 351, § 2, is under civil service.

The statute to which you refer, St. 1929, c. 351, in its pertinent parts reads as follows: —

The department of school buildings of the city of Boston is hereby established and shall be under the charge of a superintendent of construction who shall be elected by the board of commissioners and shall serve at the pleasure of said board. His salary shall be established by said board of commissioners, with the approval of the school committee, but shall not exceed twelve thousand dollars per annum. He shall make a written report to the mayor, to the school committee and to the board of commissioners annually or oftener as the mayor, or the school committee or the board of commissioners may require and in such manner and detail as may be required.

You have called my attention to the fact that in section 1 of said statute, with relation to the member of the board of commissioners of school buildings who is to be appointed by the mayor, it is specifically stated that he shall be so appointed "without approval by the civil service commissioners." It does not seem to me that the existence in the

statute of this provision, with relation to the appointment of a commissioner who is to serve for a term of years fixed by the act, is significant as to the legislative intent in relation to the provisions of section 2 as to the position of the superintendent of construction, who is to be elected by the board of commissioners and "shall serve at the pleasure of said board." As no power of removal of the said commissioner before the expiration of his statutory term was vested by the statute in any one, the same considerations would not necessarily apply to such commissioner with regard to civil service as might apply to a superintendent whose removal by the appointing body was particularly authorized.

It has been held by several of my predecessors in office that, where power to remove a State employee or official is specifically vested in an appointing body, such official is not within the provisions of the civil service law and the regulations made thereunder.

In considering the provisions of the act creating the South Essex Sewerage Board, concerning employees, St. 1925, c. 339, § 3, which reads, in part, as follows: —

> Said board shall from time to time appoint or employ such engineers, experts, agents, officers, clerks and other employees as it may deem necessary, shall determine their duties and compensation, which shall be paid by the district, and may remove them at pleasure. —

a former Attorney-General said (VII Op. Atty. Gen. 719, 720): —

> The fact that the statute gives to the board the power to remove the various employees named therein at its pleasure indicates that it was not the intention of the Legislature that the board or its employees should be subject to the requirements of the laws relative to civil service.

In considering the status of certain matrons at the house of detention in the city of Boston, as affected by the civil service law, the applicable statute being St. 1887, c. 234, § 3, wherein it was provided, among other things, that such matrons "shall be appointed to hold office until removal, and . . . may be removed at any time by said board by

written order stating the cause of removal," another of my predecessors in office said (VI Op. Atty. Gen. 152, 155): —

> 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.

Again, in an opinion relative to the position of an assistant register of probate, appointed under St. 1921, c. 42, the then Attorney-General said (VI Op. Atty. Gen. 334, 335): —

> 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.

And again, in the same opinion (VI Op. Atty. Gen. 334), with relation to the position of clerk in the Probate Court for Suffolk County, as to which the provisions of the applicable statute, G. L., c. 217, § 28, were 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. —

it was said (p. 336): —

> 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.

The words of the instant statute, that the said superintendent of construction "shall serve at the pleasure of the board," indicate an intention on the part of the Legislature to vest in the appointing power authority to remove an incumbent of the instant office in the same way as is indicated by the provisions of the statutes passed upon by my predecessors in office, with whose conclusion I agree.

I am not unmindful of the language used in the opinion of the Supreme Judicial Court in *Robertson* v. *Coughlin*, 196 Mass. 539. In that opinion the court was considering a situation which had actually been created by a particular mode of exercising the power of removal at pleasure, adopted by a certain board. The court does not say in its opinion that another mode of exercising the power of removal at pleasure might not have been adopted by the board having the power of appointment and removal, and it cannot be assumed that the commissioners appointed by the instant statute will use their power in the precise mode which was adopted by the board in *Robertson* v. *Coughlin*, *supra*. It cannot be said in advance of action by the board of commissioners of school buildings that the words "shall serve at the pleasure of the board" do not vest such power of removal in that body as to place the position of superintendent of construction outside the action of the civil service laws or regulations.

As to the positions of deputy superintendents, provided for in St. 1929, c. 351, § 4, there do not appear to be any provisions of the instant statute which render the civil service law and the rules made thereunder inapplicable to them.

Metropolitan Transit District — Powers of Trustees to borrow Money.

The trustees of the Metropolitan Transit District are authorized to borrow money temporarily, and to issue notes for the same, for the purpose of providing funds for the payment of certain expenses when no other funds are available for the purpose.

To the Trustees of the Metropolitan Transit Commission.
1929
December 30.

You request my opinion as to whether you are authorized, under St. 1929, c. 383, temporarily to borrow money, and issue notes of the district therefor, in order to provide funds for certain current expenses, such as office rental, stenographic service, etc., there being no funds available to meet such expenses.

By section 1 of the act the district is given the power "of contracting and doing other necessary acts relative to its property and affairs." Section 2 provides that "the affairs of the district shall be managed by a board of five trustees"; and that "the trustees may from time to time appoint and at pleasure remove a clerk, treasurer and such agents and employees for the district as they may deem necessary, and may determine their duties and their compensation, which shall be paid by the district; shall cause at all times accurate accounts to be kept of all expenditures of the funds of the district; and shall make an annual report, containing an abstract of such accounts, to the general court and to the metropolitan transit council. . . . Except as herein otherwise provided, they shall have full authority to represent the district, to have the care of its property and the management of its business and affairs, . . ."

It may be assumed that the expenses to which you have reference are deemed by the trustees to be necessary for the proper management of the affairs of the district.

There being no funds now available for these expenses, the trustees have, in my opinion, power to issue temporary notes of the district for the purpose of providing such funds. Section 10 of the act contains the following paragraph: —

> The trustees, in behalf of the district, may temporarily borrow money and issue notes of the district therefor in anticipation of the issue of

bonds, or of receipts from taxation, or of income to be received, or to provide for the payment of any obligations when due, for which funds are not available. No purchaser of such bonds or lender upon such notes shall be bound to see to the application of the money paid or loaned.

The expenses to which you refer, when incurred, will become obligations for the payment of which no funds will, unless now borrowed, be available. In my opinion, the words of section 10, above quoted, are to be construed as authorizing the issuance of temporary notes for the purpose of providing such funds.

The money with which to pay the notes may, in my opinion, be obtained by the trustees through the means set forth in section 12 of the act, which provides that on or before June 15th of each year the trustees shall certify to the State Treasurer the estimated amount required for the current expenses of the district, "and shall also certify the amount required to meet any lawful obligations of the district for which payment is not otherwise provided, . . ."; that the State Treasurer shall apportion such amounts among the cities and towns of the district, collect such amounts in the same manner as other State taxes assessed upon said cities and towns, and pay over the amounts so collected to the district.

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