Commonwealth of Massachusetts

ATTORNEY-GENERAL'S REPORT

1919

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The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY-GENERAL

FOR THE

YEAR ENDING JANUARY 21, 1920

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1920

The Commonwealth of Massachusetts

Department of the Attorney-General,
Boston, Jan. 21, 1920.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the department for the year ending this day.

Very respectfully,

HENRY A. WYMAN,
Attorney-General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY-GENERAL.

State House.

Attorney-General.

HENRY C. ATTWILL.[1]
HENRY A. WYMAN.

Assistants.

WM. HAROLD HITCHCOCK.
ARTHUR E. SEAGRAVE.
JOHN W. CORCORAN.
CHARLES W. MULCAHY.[2]
MAX L. LEVENSON.[3]
JAY R. BENTON.
LELAND POWERS.
EDWIN H. ABBOT, JR.
ALBERT HURWITZ.

Chief Clerk.

LOUIS H. FREESE.

[1] Resigned Aug. 13, 1919. [2] Resigned Nov. 15, 1919. [3] Resigned Nov. 1, 1919.

STATEMENT OF APPROPRIATION AND EXPENDITURES.

Appropriation for 1919,	$50,000 00
Appropriation, additional,	10,000 00
Expenditures.	
For law library,	$542 22
For salaries of assistants,	18,761 92
For clerks,	6,426 66
For office stenographers,	4,914 00
For telephone operator,	673 74
For legal and special services and expenses,	6,929 92
For office expenses,	3,693 39
For court expenses,	10,223 36
Total expenditures,	$52,165 21

The Commonwealth of Massachusetts

Department of the Attorney-General,
Boston, Jan. 21, 1920.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 8 of chapter 7 of the Revised Laws, as amended, I herewith submit my report for the year ending this day.

The cases requiring the attention of this department during the year, to the number of 10,872, are tabulated below: —

Corporate franchise tax cases,	1,029
Extradition and interstate rendition,	194
Grade crossings, petitions for abolition of,	65
Indictments for murder,	49
Inventories and appraisals,	15
Land Court petitions,	77
Land-damage cases arising from the taking of land by the Charles River Basin Commission,	6
Land-damage cases arising from the taking of land by the Massachusetts Highway Commission,	37
Land-damage cases arising from the taking of land by the Directors of the Port of Boston,	3
Land-damage cases arising from the taking of land by the Metropolitan Water and Sewerage Board,	11
Land-damage cases arising from the taking of land by the Metropolitan Park Commission,	23
Land-damage cases arising from the taking of land by the Commission on Waterways and Public Lands,	8
Land-damage cases arising from the taking of land by the State House Building Commission,	2
Miscellaneous cases arising from the work of the above-named commissions,	39
Miscellaneous cases,	868
Petitions for instructions under inheritance tax laws,	31
Public charitable trusts,	102
Settlement cases for support of persons in State Hospitals,	44
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth,	8,269

Capital Cases.

Indictments for murder pending at the date of the last annual report have been disposed of as follows: —

August Alves, *alias*, indicted in Hampden County, September, 1918, for the murder of Jose Rodriguez, at Ludlow, on July 7, 1918. He was arraigned Sept, 20, 1918, and pleaded not guilty. Silvio Martinelli, Esq., appeared as counsel for the defendant. On Dec. 19, 1918, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than five nor less than two and one-half years. The case was in charge of District Attorney Joseph B. Ely.

Isaiah E. Booth, indicted in Suffolk County, December, 1918, for the murder of Fred Pullum, on Nov. 9. 1918. He was arraigned March 19, 1919, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than five nor less than two and one-half years. William H. Lewis, Esq., appeared as counsel for the defendant. The case was in charge of District Attorney Joseph C. Pelletier.

Willard E. Ellis, indicted in Hampden County, September, 1918, for the murder of Henry M. Green, at Wilbraham, on June 27, 1918. He was arraigned Sept. 20, 1918, and pleaded not guilty. James E. Dunleavy, Esq., and William J. Granfield, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Joseph B. Ely.

Domenico Fioranti, indicted in Suffolk County, September, 1918, for the murder of Marie Tamburino, at Bos-

ton, on May 9, 1918. The defendant was arraigned Dec. 9, 1918, and pleaded not guilty. Louis Cohen, Esq., and John W. Connolly, Esq., appeared as counsel for the defendant. In May, 1919, the defendant was tried by a jury before Callahan, J. The result was a verdict of not guilty. The case was in charge of District Attorney Joseph C. Pelletier.

Lincoln M. Grant, indicted in Berkshire County, July, 1917, for the murder of Miles Hewitt, at Pittsfield, on Feb. 26, 1917, and Margaret Hewitt, indicted for being accessory before the fact to the murder of Miles Hewitt. The defendants were arraigned July 26, 1917, and each pleaded not guilty. Robert M. Stevens, Esq., appeared as counsel for the defendant Lincoln M. Grant, and Patrick J. Moore, Esq., appeared as counsel for the defendant Margaret Hewitt. In April, 1919, the defendant Lincoln M. Grant was tried by a jury before Morton, J. The result was a verdict of guilty of murder in the second degree. The defendant Lincoln M. Grant was thereupon sentenced to State Prison for life. On July 28, 1919, the defendant Margaret Hewitt was released on her own recognizance. The cases were in charge of District Attorney Joseph B. Ely.

James Houston, indicted in Suffolk County, August, 1918, for the murder of John Jackson, on July 10, 1918. He was arraigned Aug. 23, 1918, and pleaded not guilty. John Burke, Esq., appeared as counsel for the defendant. On March 20, 1919, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than ten nor less than eight years. The case was in charge of District Attorney Joseph C. Pelletier.

Vincenzo Issarella, indicted in Essex County, May 2, 1918, for the murder of Vito Rocco, at Haverhill, on Feb. 10, 1918. He was arraigned May 28, 1918, and pleaded not guilty. William J. McDonald, Esq., appeared as counsel for the defendant. On Feb. 14, 1919, the defendant retracted

his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to State Prison for a term of not more than fifteen nor less than thirteen years. The case was in charge of District Attorney Henry G. Wells.

Giovanni Percoco, indicted in Middlesex County, March, 1916, for the murder of Samuel Wolkon, at Somerville, on April 29, 1916. The defendant has been apprehended in Italy and is to be tried in that country. The case was in charge of District Attorney Nathan D. Tufts.

Charles Rollins and George L. Rollins, *alias*, indicted in Suffolk County, March, 1917, for the murder of Edward T. Foley, at Boston, on Feb. 17, 1917. They were arraigned April 20, 1917, and pleaded not guilty. Thomas L. Walsh, Esq., appeared as counsel for the defendant Charles Rollins. In December, 1919, the defendant Charles Rollins was tried by a jury before John F. Brown, J. The result was a verdict of guilty of murder in the second degree. The defendant was thereupon sentenced to State Prison for life. The defendant George L. Rollins was not tried on this indictment, having been found guilty of murder in the first degree on an indictment for the murder of Ordway R. Hall. The case was in charge of District Attorney Joseph C. Pelletier.

Salem Seif, *alias*, indicted in Hampden County, September, 1918, for the murder of Mohammed Shahane Barber, at Springfield, on May 26, 1918. He was arraigned Sept. 20, 1918, and pleaded not guilty. James E. Dunleavy, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than fifteen nor less than ten years. The case was in charge of District Attorney Joseph B. Ely.

Elizabeth M. Skeels, *alias*, indicted in Essex County, September, 1918, for the murder of Florence W. Gay, at Andover, on Dec. 10, 1917. She was arraigned Nov. 1, 1918,

and pleaded not guilty. Daniel J. Daley, Esq., appeared as counsel for the defendant. In June, 1919, the defendant was tried by a jury before Thayer, J. The result was a verdict of not guilty. The case was in charge of Hon. Henry C. Attwill, Attorney-General, and District Attorney Henry G. Wells.

Alexander Thompson, indicted in Plymouth County, June, 1918, for the murder of Charles H. Wood, at Bridgewater, on Feb. 25, 1918. John P. Vahey, Esq., appeared as counsel for the defendant. On June 27, 1918, the defendant was committed to the Taunton State Hospital for observation. On Feb. 11, 1919, a verdict of not guilty by reason of insanity was ordered by Thayer, J. The defendant was thereupon committed to the Bridgewater State Hospital for life. The case was in charge of District Attorney Frederick G. Katzmann.

Michele Totolo, indicted in Middlesex County, Jan. 1, 1918, for the murder of Palma Ditino, at Acton, on Jan. 3, 1918. The defendant has been apprehended in Italy and is to be tried in that country. The case was in charge of District Attorney Nathan A. Tufts.

Indictments for murder found since the date of the last annual report have been disposed of as follows: —

Harry Baker and Eleanor Baker, *alias*, indicted in Worcester County, August, 1919, for the murder of Dwight P. Chapman, at Westborough, on June 9, 1919. They were arraigned Sept. 2, 1919, and pleaded not guilty. George S. Taft, Esq., and Daniel W. Lincoln, Esq., appeared as counsel for the defendants. In December, 1919, the defendants were tried by a jury before Sisk, J. On Dec. 16, 1919, during the trial, the defendant Harry Baker retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant Harry Baker was sentenced to State Prison for life. On Dec. 16, 1919, a verdict of not guilty was ordered by the court in the case of the defendant Eleanor Baker. The cases were in charge of District Attorney Edward T. Esty.

Herman L. Barney, *alias*, and John F. Dillon, *alias*, indicted in Suffolk County, March, 1919, for the murder of Charles E. Deininger, on Feb. 13, 1919, and John Dillon, *alias*, as accessory before the fact, and Joseph F. Hurley, as accessory both before and after the fact, of the murder of Charles E. Deininger. The defendants were arraigned April 21, 1919, and each pleaded not guilty. E. Juggins, Esq., and Thomas F. Murphy, Esq., appeared as counsel for the defendant Herman L. Barney, Hon. Edward P. Barry appeared for the defendant John Dillon, and John F. McDonald, Esq., appeared for the defendant Joseph F. Hurley. In June, 1919, the defendants Herman L. Barney and John F. Dillon were tried by a jury before Callahan, J. The result was a verdict of guilty of manslaughter in the case of the defendant Herman L. Barney, and a verdict of not guilty in the case of the defendant John F. Dillon. The defendant Herman L. Barney was thereupon sentenced to State Prison for a term of not more than twenty nor less than fifteen years. On June 28, 1919, an entry of *nolle prosequi* was made on the indictment against Joseph F. Hurley. The cases were in charge of District Attorney Joseph C. Pelletier.

Pietro Bruzzese, indicted in Plymouth County, February, 1919, for the murder of Salvatore Aprile, at Hingham, on Jan. 8, 1919. He was arraigned Feb. 13, 1919, and pleaded not guilty. J. E. Crowley, Esq., appeared as counsel for the defendant. On June 18, 1919, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to the Plymouth County House of Correction for a term of eighteen months. The case was in charge of District Attorney Frederick G. Katzmann.

Ellie W. Corkins, indicted in Franklin County, July, 1919, for the murder of Robert Lawless, at Greenfield, on June 4, 1919. He was arraigned July 15, 1919, and pleaded not guilty. William A. Davenport, Esq., and Charles Fairhurst, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by

the Commonwealth, and the defendant was sentenced to State Prison for life. The case was in charge of District Attorney John H. Schoonmaker.

Peter DiZazzo, indicted in Essex County, May, 1918, for the murder of Tony Volenti, at Lawrence, on Feb. 9, 1918, He was arraigned May 29, 1918, and pleaded not guilty. Hon. W. Scott Peters and Raphael A. A. Comparone, Esq., appeared as counsel for the defendant. On May 1, 1919, an entry of *nolle prosequi* was made against this indictment. The case was in charge of District Attorney Henry G. Wells.

Marie O. Fisher, indicted in Suffolk County, May, 1919, for the murder of Eugene L. Fisher, on April 21, 1919. She was arraigned June 2, 1919, and pleaded not guilty. John P. Feeney, Esq., appeared as counsel for the defendant. Later the defendant retracted her former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to one year in jail. The case was in charge of District Attorney Joseph C. Pelletier.

Giuseppe Graceffa, indicted in Middlesex County, June, 1919, for the murder of Giuseppe Cipolla, at Maynard, on June 15, 1919. He was arraigned Sept. 11, 1919, and pleaded not guilty. On Nov. 24, 1919, the indictment was placed on file. The case was in charge of District Attorney Joseph C. Pelletier.

Alexander Krolle and Stella Archook, indicted in Suffolk County, April, 1919, for the murder of Peter Archook, on Feb. 10, 1919. They were arraigned April 21, 1919, and pleaded not guilty. Maurice Caro, Esq., appeared as counsel for the defendant Alexander Krolle, and John Daley, Esq., appeared for the defendant Stella Archook. While awaiting trial the defendant Alexander Krolle committed suicide, and on July 9, 1919, an entry of *nolle prosequi* was made on the indictment against the defendant Stella Archook. The cases were in charge of District Attorney Joseph C. Pelletier.

Gertrude LaCourt, indicted in Suffolk County, April, 1919, for the murder of Louis LaCourt, on March 22, 1919. She was arraigned April 21, 1919, and pleaded not guilty. George H. Shields, Esq., appeared as counsel for the defendant. On May 20, 1919, the defendant retracted her former plea, and pleaded guilty to manslaughter. The defendant has been released on her own recognizance. The case was in charge of District Attorney Joseph C. Pelletier.

James F. Lyden, indicted in Middlesex County, June, 1919, for the murder of Annie Wilson, at Cambridge, on May 2, 1919. He was arraigned June 12, 1919, and pleaded not guilty. Edward A. Counihan, Jr., Esq., appeared as counsel for the defendant. On June 24, 1919, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than eighteen nor less than fifteen years. The case was in charge of District Attorney Nathan A. Tufts.

Elmer V. Maki, indicted in Middlesex County, June, 1919, for the murder of Martin H. Gallagher, at Lowell, on June 15, 1919. He was arraigned Sept. 17, 1919, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than twelve nor less than nine years. Edward J. Tierney, Esq., appeared as counsel for the defendant. The case was in charge of District Attorney Nathan A. Tufts.

William R. McLane, *alias*, indicted in Bristol County, June, 1919, for the murder of Leroy E. Thomas. He was arraigned June 17, 1919, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was sentenced to the house of correction for eighteen months. H. E. Woodward, Esq., appeared as counsel for the defendant. The case was in charge of District Attorney Joseph T. Kenney.

Dominick Parisi and Rosario Papia, indicted in Middlesex County, March, 1919, for the murder of Luigi Graceffa, at Waltham, on Jan. 19, 1919. They were arraigned April 16, 1919, and pleaded not guilty. Maurice Flynn, Esq., appeared as counsel for the defendant Dominick Parisi, and James E. Henchey, Esq., for the defendant Rosario Papia. On Sept. 11, 1919, the indictments were placed on file. The cases were in charge of District Attorney Nathan A. Tufts.

Raffelle Rizzo, indicted in Suffolk County, March, 1919, for the murder of Savatore Campagno, on Jan. 8, 1919, and Pasquale Losanno, indicted as accessory after the fact to the murder of Savatore Campagno; and Pasquale Losanno, indicted in Suffolk County, March, 1919, for the murder of Savatore Campagno, on Jan. 8, 1919, and Raffelle Rizzo, indicted as accessory before the fact to the murder of Savatore Campagno. The defendants were arraigned April 21, 1919, and each pleaded not guilty. Thomas F. Murphy, Esq., appeared as counsel for the defendant Raffelle Rizzo, and William M. Marshall, Esq., and Felix Forte, Esq., appeared as counsel for the defendant Pasquale Losanno. In September, 1919, the defendants were tried by a jury before McLaughlin, J. The result was a verdict of not guilty in the case of each defendant. The cases were in charge of District Attorney Joseph C. Pelletier.

Michael Sadnoway, *alias*, indicted in Suffolk County, April, 1919, for the murder of Adel Sadnoway, on March 7, 1919. He was arraigned April 21, 1919, and pleaded not guilty. Amos R. Little, Esq., appeared as counsel for the defendant. On June 24, 1919, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Joseph C. Pelletier.

George Shields, indicted in Middlesex County, January, 1919, for the murder of Rose Trainor, at Lowell, on Jan. 20,

1919. He was arraigned March 11, 1919, and pleaded not guilty. Edward J. Tierney, Esq., appeared as counsel for the defendant. On March 24, 1919, the defendant retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Nathan A. Tufts.

Manuel Teixeira, indicted in Bristol County, June, 1919, for the murder of Julio Fernandes. He was arraigned June 17, 1919, and pleaded not guilty. C. N. Serpa, Esq., appeared as counsel for the defendant. Later the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to the house of correction for one year. The case was in charge of District Attorney Joseph T. Kenney.

Frank B. Wohlgemuth, indicted in Suffolk County, April, 1919, for the murder of Mary Wohlgemuth, on March 30, 1919. He was arraigned April 21, 1919, and pleaded not guilty. E. M. Dangel, Esq., and Daniel J. Daley, Esq., appeared as counsel for the defendant. In October, 1919, the defendant was tried by a jury before Fessenden, J. The result was a verdict of not guilty. The case was in charge of District Attorney Joseph C. Pelletier.

Herbert Wright, indicted in Suffolk County, May, 1919, for the murder of James R. Europe, on May 9, 1919. He was arraigned May 14, 1919, and pleaded not guilty. J. W. Ramsey, Esq., appeared as counsel for the defendant. On June 9, 1919, the defendant retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to State Prison for a term of not more than fifteen nor less than ten years. The case was in charge of District Attorney Joseph C. Pelletier.

The following indictments for murder are now pending: —

John Arzenti, indicted in Plymouth County, October, 1919, for the murder of Frank Gentile, at Brockton, on July 17, 1919. He was arraigned Oct. 16, 1919, and pleaded not guilty. W. J. Callahan, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Frederick G. Katzmann.

Joseph E. Bamforth, *alias*, indicted in Essex County, May, 1919, for the murder of Minnie Bamforth and Martha E. Graham, at Haverhill, on Jan. 19, 1919. He was arraigned May 16, 1919, and pleaded not guilty. Essex S. Abbott, Esq., appeared as counsel for the defendant. On Oct. 24, 1919, the defendant was committed to the Danvers State Hospital for observation. The case is in charge of District Attorney S. Howard Donnell.

Wojciech Birusz, *alias*, indicted in Essex County, January, 1919, for the murder of Mary B. Lavoie, at Salem, on Dec. 12, 1918. He was arraigned Jan. 20, 1919, and pleaded not guilty. William H. McSweeney, Esq., appeared as counsel for the defendant. On March 5, 1919, the defendant was committed to the Danvers State Hospital for observation. The case is in charge of District Attorney S. Howard Donnell.

Nunzio Colella, indicted in Suffolk County, July, 1919, for the murder of Antonio DeAngelis, on June 8, 1919. He was arraigned July 16, 1919, and pleaded not guilty. Thomas J. Grady, Esq., appeared as counsel for the defendant. Later an entry of *nolle prosequi* was made against said indictment except so much thereof as charged manslaughter. No further action has been taken in this case. The case is in charge of District Attorney Joseph C. Pelletier.

Joseph Cordia, *alias*, and Francisco Feci, *alias*, indicted in Middlesex County, November, 1918, for the murder of

Louis Fred Soulia, at Billerica, on Oct. 31, 1918. The defendants were arraigned Nov. 19, 1918, and pleaded not guilty. Daniel J. Donahue, Esq., and Melvin G. Rogers, Esq., appeared as counsel for Joseph Cordia, and Meyer J. Sawyer, Esq., and John H. Mack, Esq., for Francisco Feci. In March, 1919, the defendants were tried by a jury before Dubuque, J. The result was a verdict of not guilty in the case of the defendant Joseph Cordia, and a verdict of guilty of murder in the first degree in the case of the defendant Francisco Feci. The motion of the defendant Francisco Feci for a new trial was overruled. At the trial of the case the defendant Francisco Feci alleged certain exceptions, which are now pending before the Supreme Judicial Court. The case is in charge of District Attorney Nathan A. Tufts.

Joseph DeLaurentis, indicted in Suffolk County, December, 1919, for the murder of William L. Duchaine, on Nov. 11, 1919. He was arraigned Dec. 10, 1919, and pleaded not guilty. Richard M. Walsh, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Joseph C. Pelletier.

Angelo DiCassio, *alias*, indicted in Hampden County, December, 1919, for the murder of Volpini Fillippo, at Springfield, on Nov. 30, 1919. He was arraigned Dec. 30, 1919, and pleaded not guilty. Silvio Martinelli, Esq., and Thomas F. Moriarty, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

Imbrian Hassan and Suleman Hassan, indicted in Essex County, January, 1919, for the murder of Ali Hassan, at Salem, on Oct. 28, 1918. The defendants were arraigned Feb. 6, 1919, and pleaded not guilty. Edward J. Carney, Esq., and Charles A. Green, Esq., appeared as counsel for the defendant Imbrian Hassan, and William H. Fay, Esq., and Thomas R. Vahey, Esq., appeared as counsel for the defendant Suleman Hassan. On July 3, 1919, an entry of *nolle prosequi* was made on so much of the indictment against

Suleman Hassan as charged murder in the first degree; and on Oct. 2, 1919, an entry of *nolle prosequi* was made on so much of the indictment against Imbrian Hassan as charged murder in the first degree. In October, 1919, the defendants were tried by a jury before Callahan, J. The result was a verdict of guilty of manslaughter in the case of the defendant Imbrian Hassan, and a verdict of not guilty in the case of the defendant Suleman Hassan. The defendant Imbrian Hassan was thereupon sentenced to State Prison for a term of not more than seven nor less than five years. At the trial of the case the defendant Imbrian Hassan alleged certain exceptions which are now pending before the Supreme Judicial Court. The case is in charge of District Attorney S. Howard Donnell.

Antonio Ingemi, indicted in Essex County, May, 1919, for the murder of Salvatore Salvo, at Salem, on March 21, 1919. He was arraigned May 16, 1919, and pleaded not guilty. Edward J. Carney, Esq., and Charles A. Green, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney S. Howard Donnell.

Frank Walter Potter, indicted in Hampden County, May, 1919, for the murder of George A. Bills, at Palmer, on Feb. 24, 1919. He was arraigned May 16, 1919, and pleaded not guilty. Richard P. Stapleton, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

George L. Rollins, *alias*, indicted in Suffolk County, March, 1917, for the murder of Ordway R. Hall, at Boston, on Feb. 21, 1917. He was arraigned April 20, 1917, and pleaded not guilty. Herbert L. Baker, Esq., appeared as counsel for the defendant. On June 3, 1918, the defendant was tried by a jury before Keating, J. The result was a verdict of guilty of murder in the first degree. Exceptions were filed which are now pending. The case is in charge of District Attorney Joseph C. Pelletier.

Henry Seipel, indicted in Plymouth County, October, 1919, for the murder of Alfred W. Raymond, at Brockton, on July 1, 1919. A. F. Barker, Esq., appeared as counsel for the defendant. On Oct. 21, 1919, the defendant was committed to the State Farm for observation. The case is in charge of District Attorney Frederick G. Katzmann.

Antonio J. Szczepanek, indicted in Essex County, January, 1918, for the murder of Annie Spiewok and Wladyslaw Bill, at Newburyport, on Dec. 10, 1917. He was arraigned Nov. 2, 1918, and pleaded not guilty. Timothy S. Herlihy, Esq., appeared as counsel for the defendant. In December, 1918, the defendant was tried by a jury before Thayer, J. The result was a verdict of guilty of murder in the first degree. At the trial of the case the defendant alleged exceptions, which were allowed by the Supreme Judicial Court Nov. 22, 1919. On March 25, 1919, the defendant was committed to the Danvers State Hospital for observation. The case is in charge of District Attorney S. Howard Donnell.

Antonio Teregno, and Maria Cammerota, indicted in Hampden County, March, 1918, for the murder of Raffaele Cammerota, at Westfield, on Jan. 30, 1918. The defendants were arraigned March 22, 1918, and pleaded not guilty. Frank M. Zottoli, Esq., and Silvio Martinelli, Esq., appeared as counsel for Antonio Teregno, and Frank P. Fralli, Esq., for Maria Cammerota. In September, 1918, the defendants were tried by a jury before Nelson P. Brown, J. The result was a verdict of guilty of murder in the first degree in the case of Antonio Teregno, and a verdict of guilty of manslaughter in the case of Maria Cammerota. The defendant Maria Cammerota was thereupon sentenced to the Reformatory for Women for a term of fifteen years. In the case of the defendant Teregno exceptions were taken at the trial of the case, which exceptions were overruled. The defendant Antonio Teregno was thereupon sentenced to death by electrocution during the week beginning April 4, 1920. The case is in charge of District Attorney Charles H. Wright.

Domenick Vass and Manuel Smith, indicted in Suffolk County, June, 1919, for the murder of Francis Marshall, on April 25, 1919. The defendants were arraigned June 11, 1919, and each pleaded not guilty. William H. Lewis, Esq., appeared as counsel for the defendant Domenick Vass, and J. W. Schenck, Esq., appeared for the defendant Manuel Smith. No further action has been taken in these cases. The cases are in charge of District Attorney Joseph C. Pelletier.

Victor Verier, indicted in Essex County, January, 1919, for the murder of Elizabeth Verier, at Lawrence, on Dec. 14, 1918. On Oct. 24, 1919, the defendant was adjudged insane and was committed to the Bridgewater State Hospital until further order of the court. The case was in charge of District Attorney Henry G. Wells.

Jennie G. Zimmerman, indicted in Hampden County, September, 1919, for the murder of Henry Zimmerman, at Springfield, on Aug. 7, 1919. She was arraigned Sept. 15, 1919, and pleaded not guilty. William G. McKechnie, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

Grade Crossings.

The following is the report of the work done in connection with the elimination of grade crossings during the year 1919: —

Five hearings and conferences before special commissions have been attended.

No construction work has been in progress and no statements of expenditures have been submitted during the year.

Violations of the Law relating to Corrupt Practices in Elections.

My attention has been directed to the recent returns of primary and election expenses by candidates and committees, and I find many apparent violations of law relative thereto.

From information I have received I am of the opinion that not only candidates and committees but also other persons have expended money in behalf of candidates or political parties under a misapprehension of the law. Furthermore, there has existed some confusion as to the law in official circles. This warrants the department in exercising considerable discretion in determining its action thereon now under consideration.

I have already given an opinion on several phases of the law to the Secretary of the Commonwealth, and have suggested that that opinion be printed and mailed hereafter to every political committee and candidate. If this is followed, I apprehend that no one need unwittingly violate the law in the future.

I believe it possible to amend the law slightly to make its meaning clearer by changing the phraseology of section 354 of chapter 835 of the Acts of 1913, showing that this section does not authorize advertisements which other sections prohibit, and I recommend that the Legislature give this matter consideration.

Service of Civil Process upon Corporations.

My predecessor in office, in his report for the year ending Jan. 15, 1919, recommended an amendment to Revised Laws, chapter 167, section 36, providing the manner in which process shall be served upon corporations.

The law now permits service upon the president or treasurer only when found to be in charge of the business of the corporation. The natural officer upon whom to serve, and usually the most accessible one, is the treasurer; but deputy sheriffs are often unable to certify that he is in charge of the business.

I renew the recommendation that this section be amended by inserting the words "the president and treasurer" in the list of officers upon whom service may in any event be made.

The Attorney-General is called upon to prosecute a large number of corporations yearly for failure to file returns required by statute. As the law now stands service upon an officer of a corporation is required to be made by a deputy

sheriff of the county in which said officer resides or has his usual place of business. It has become in some cases almost impossible to secure the service of process upon said officers, and the work of the department is greatly interfered with.

I recommend that the State police officers be empowered by law to serve such processes issued by the court upon informations filed by the Attorney-General.

This service by deputy sheriffs involves a large expense annually, a small portion of which is paid by the corporation upon whom service is made. If the State police officers are permitted to perform this service, it will result in a substantial saving to the Commonwealth.

Workmen's Compensation Act as applied to the Commonwealth.

I renew the recommendation concerning the Workmen's Compensation Act as applied to the Commonwealth, as contained in the last annual report of the Department.

Reporter of Decisions.

The office of the reporter of decisions is one of the most important in the administration of our judicial procedure, and requires, and should command, all the time and services of one profoundly versed in the law. The salary of this office has not been changed in thirty years, and I recommend that it now be increased.

Creation of Offices of Official Conveyancer and of Cashier.

Under the statutes the duties of the Department of the Attorney-General have been very generally increased, and each year some additional duty or duties are imposed, as, for instance, the temporary duties under the Resolves of 1919, chapters 13, 47, 59 and 69, and the proceedings for the disbarment of attorneys, under General Statutes, 1919, chapter 260.

There is also some of the legal business of the Commonwealth which is performed by specially appointed assistants, in particular, the examination of titles of lands purchased

or taken by eminent domain. This I find is a very considerable item of expense, and the practice apparently does not result in furnishing the Department with records of the abstractors, that they may serve as data for use when, as often happens, adjacent lands are acquired. I therefore suggest the creation of the office of official abstractor and conveyancer, to be appointed by the Attorney-General, whose duties shall be prescribed by him, and to include the work above mentioned and other similar duties.

The collections of the Department for the year amounted to $876,660.35. I suggest the creation of the office of cashier for the Department, who shall be required to give adequate bond, unless, under the report of the special commission, all bonds of State officials are abolished.

Salary of the Attorney-General and Assistants.

When I took over the administration of this department I found it exceptionally well equipped in all of its personnel, but in many instances very much underpaid. There have been some adjustments of salaries, but I strongly recommend that the salaries of all of the assistant attorneys-general be increased. The salary of the Attorney-General, concededly the office second only in importance to that of the Executive, has remained at the present figure for eight years. The salaries of the heads of various commissions, of some district attorneys and of the judges of the Supreme and Superior Courts are in excess of his salary. I recommend that the salary of the Attorney-General be fixed at $9,000 a year.

Department of the Attorney-General.

The number of official opinions rendered by the Department during the year, up to Jan. 1, 1920, was 189. The number of cases tried in the Probate Court was 3, and 5 cases were tried in the Land Court. The number of cases tried before the Municipal Court for the City of Boston was 8. The number of cases tried in the Superior Court was 29. Thirty-six hearings before a single justice of the Supreme Judicial Court have been attended, and there have been 10 cases argued before the Supreme Judicial Court. There

have been 4 cases argued before the United States Supreme Court, 5 cases before the United States District Court for the District of Massachusetts, 2 cases before the United States Circuit Court of Appeals, and 1 case before the New York Supreme Court (Appellate Division). One case was tried before the New York Surrogate's Court.

There have been numerous changes in the personnel of the Department during the year. On Aug. 13, 1919, Hon. Henry C. Attwill, Attorney-General, resigned, and was on the same day appointed a member of the Public Service Commission. On Sept. 1, 1919, Leland Powers, Esq., was appointed an assistant attorney-general; on Nov. 1, 1919, Max L. Levenson, Esq., resigned from the office of assistant attorney-general to enter private practice, and on Nov. 15, 1919, Charles W. Mulcahy, Esq., who has ably served the Commonwealth for five years, also resigned from the office of assistant attorney-general to enter private practice. Edwin H. Abbot, Jr., Esq., and Albert Hurwitz, Esq., were appointed assistant attorneys-general on Nov. 21, 1919. Wm. Harold Hitchcock, Esq., after five years of faithful and especially efficient service as an assistant attorney-general, retired at the close of the present year to enter private practice.

All of the assistants and employees of the Department have earned and are entitled to an expression of appreciation for the ability and fidelity with which they have severally served the Commonwealth.

Annexed to this report are such of the opinions rendered during the current year as it is thought may be of interest to the public.

Respectfully submitted,

HENRY A. WYMAN,
Attorney-General.

OPINIONS.

Boards of Health — Disease Dangerous to Health — Notice.

Gen. St. 1918, c. 130, relieving cities and towns failing to give notice to the Commonwealth from the expense of caring for persons having a disease dangerous to health, who reside or have no settlement in such city or town, is not retroactive.

JAN. 10, 1919.

Mr. ROBERT W. KELSO, *Executive Director, State Board of Charity.*

DEAR SIR: — I acknowledge receipt of your communication requesting my opinion as to whether Gen. St. 1918, c. 130, which amends section 52 of chapter 75 of the Revised Laws, is retroactive.

Sections 52, 53 and 57 of chapter 75 of the Revised Laws read as follows: —

SECTION 52. If the board of health of a city or town has had notice of a case of smallpox, diphtheria, scarlet fever or of any other disease dangerous to the public health therein, it shall within twenty-four hours thereafter give notice thereof to the state board of health stating the name and the location of the patient so afflicted, and the secretary thereof shall forthwith transmit a copy of such notice to the state board of charity.

SECTION 53. If such board refuses or neglects to give such notice, the city or town shall forfeit its claim upon the commonwealth for the payment of expenses as provided in section fifty-seven.

. . . . . .

SECTION 57. Reasonable expenses incurred by the board of health in making the provision required by law for a person infected with the smallpox or other disease dangerous to the public health shall be paid by such person, his parents or master, if able; otherwise by the town in which he has a legal settlement. If he has no settlement, they shall be paid by the commonwealth and the bills therefor shall be approved by the state board of charity.

R. L., c. 75, § 52, has been amended by St. 1907, c. 480, § 1, and by Gen. St. 1916, c. 55, but these amendments do not affect the question in issue.

Gen. St. 1918, c. 130, amending said section 52, reads as follows: —

Section 1. The board of health of every city and town, or in towns not having such a board, the board of selectmen acting as a board of health, shall appoint some person, who may or may not be a member of the board, whose duty it shall be to give notice to the state department of health of diseases dangerous to the public health as provided by section fifty-two of chapter seventy-five of the Revised Laws, as amended by section one of chapter four hundred and eighty of the acts of nineteen hundred and seven and by chapter fifty-five of the General Acts of nineteen hundred and sixteen, and in case of the absence or disability of such appointee the board shall appoint another person to perform said duty during such absence or disability. Such appointments and the acceptance thereof by the persons so appointed shall be placed upon the records of the board. Any person who accepts such an appointment and who wilfully refuses or wilfully neglects or through gross negligence fails to make and send the notices required by said section fifty-two, as amended as aforesaid, in accordance with its terms, shall be punished by a fine of not exceeding fifty dollars.

Section 2. A claim of a city or town against the commonwealth for reasonable expenses incurred by the board of health of such city or town, or by the board of selectmen acting as such, in making the provision required by law for persons infected with a disease dangerous to the public health shall not be defeated by reason of the failure on the part of its board of health, or by the board of selectmen acting as such, to give notice of such disease to the state department of health in accordance with the provisions of said section fifty-two as amended as aforesaid, if such claim is otherwise a valid claim against the commonwealth.

The general rule is, that all statutes are prospective in their operation, unless an intention that they shall be retroactive appears by necessary implication from their words, context or objects when considered in the light of the subject-matter, the pre-existing state of the law and the effect upon existing rights, remedies and obligations. All legislation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. *Garfield* v. *Bemis*, 2 Allen, 435; *Bucher* v. *Fitchburg Railroad*, 131 Mass. 156; *Kelley* v. *Boston & Maine Railroad*, 135 Mass. 448; *Whitman* v. *Hapgood*, 10 Mass. 437; *King* v. *Tirrell*, 2 Gray, 331; *Gerry* v. *Stoneham*, 1 Allen, 319; *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139; *Commonwealth* v. *Sudbury*, 106 Mass. 268.

That certain statutes retrospective in their operation may be passed when of a remedial character and not affecting substantive rights regulating practice, procedure and evidence is not controverted, but the general rule that is applied to all statutes is that they are to have a prospective operation only unless it is otherwise distinctly expressed in them or clearly implied from the necessity of thus giving effect to their provisions.

The general rule that statutes are prospective only in their effect has been applied to statutes respecting suits on bonds for breach of liberty in prison yards, *Call* v. *Hagger*, 8 Mass. 423; evidence of an advancement, *Whitman* v. *Hapgood*, 10 Mass. 437; limitations of actions against executors and administrators, *King* v. *Tirrell*, 2 Gray, 331, *Page* v. *Melvin*, 10 Gray, 208; consummation of illegal railroad location, *Commonwealth* v. *Old Colony & Fall River Railroad*, 14 Gray, 93; extension of equity jurisdiction, *Buck* v. *Dowley*, 16 Gray, 555; remedies against estates of deceased persons, *Garfield* v. *Bemis*, 2 Allen, 445; recovery of illegal assessments, *Gerry* v. *Stoneham*, 1 Allen, 319; abolishing usury as a defence, *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139, *Whitten* v. *Hayden*, 7 Allen, 407; complaints for support of bastard children, *Wheelright* v. *Greer*, 10 Allen, 389; validation as a corporation seal of a mere impression upon paper, *Bates* v. *Boston & New York Central Railroad*, 10 Allen, 256; sales of intoxicating liquor, *Hotchkiss* v. *Finan*, 105 Mass. 86; settlements and supports of paupers, *Somerset* v. *Dighton*, 12 Mass. 383, *Commonwealth* v. *Sudbury*, 106 Mass. 268, *Cambridge* v. *Boston*, 130 Mass. 357, *Abington* v. *Duxbury*, 105 Mass. 287, *Worcester* v. *Barre*, 138 Mass. 101; suits against married women as if they were single and exonerating husbands from liability for judgment in such suits, *Hill* v. *Duncan*, 110 Mass. 238, *Towle* v. *Towle*, 114 Mass. 167, *McCarty* v. *DeBest*, 120 Mass. 89; special judgment where the defendant has given bond to dissolve attachment, and becomes bankrupt, *Fickett* v. *Durham*, 119 Mass. 159, *Barnstable Savings Bank* v. *Higgins*, 124 Mass. 115, *Mosher* v. *Murphy*, 121 Mass. 276; removal of defence in personal injury suits of travelling on the Lord's day, *Bucher* v. *Fitchburg Railroad*, 131 Mass. 156, *Read* v. *Boston & Albany Railroad*, 140 Mass. 199; the admission of dying declarations upon indictments for procuring miscarriage, *Commonwealth* v. *Homer*, 153 Mass. 343; restricting the number of places licensed for the sale of intoxicating liquors, *Commonwealth* v.

Hayes, 149 Mass. 32; the creation of an action of tort for death caused by negligence, *Kelley* v. *Boston & Maine Railroad*, 135 Mass. 448, *Holland* v. *Lynn & Boston Railroad*, 144 Mass. 425, *Gunn* v. *Cambridge Railroad*, 144 Mass. 430; bonds to be given to probate courts, *Conant* v. *Newton*, 126 Mass. 105; statements to be filed for mechanic's liens, *Pierce* v. *Cabot*, 159 Mass. 202; revocation of will by marriage, *Swan* v. *Sayles*, 165 Mass. 177, *Ingersoll* v. *Hopkins*, 170 Mass. 401; divorces, *Burt* v. *Burt*, 168 Mass. 204, 207; damages accruing from fire set by locomotive, *Wild* v. *Boston & Maine Railroad*, 171 Mass. 245; violation of building ordinances, *Commonwealth* v. *Roberts*, 166 Mass. 281; restrictions of time within which suit may be brought for assessment against policy holders of a mutual insurance company, *Sanford* v. *Hampden Paint & Chemical Co.*, 179 Mass. 10; approval by public boards, *Haverhill* v. *Marlborough*, 187 Mass. 150; and deduction for good behavior in State Prison sentences, *Murphy* v. *Commonwealth*, 172 Mass. 264, 267.

The statutes considered in all these foregoing cases have been held to apply only to causes arising subsequent to their taking effect.

The same rule prevails generally elsewhere. *Reynolds* v. *McArthur*, 2 Pet. 417, 434; *Murray* v. *Gibson*, 15 How. 421; *Chew Heong* v. *United States*, 112 U. S. 536, 559; *Cook* v. *United States*, 138 U. S. 157, 181; *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 96; *Union Pacific Railroad* v. *Laramie*, 231 U. S. 190, 199; *Cameron* v. *United States*, 231 U. S. 710, 720; *Dash* v. *Van Kleeck*, 7 Johns. 477, 502; *Lombard, Appellant*, 88 Maine, 587; *Gardner* v. *Lucas*, 3 App. Cas. 582, 597; *The Queen* v. *Ipswich Union*, 2 Q. B. D. 269; *Moon* v. *Durden*, 2 Exch. 22; *Knight* v. *Lee*, 1 Q. B. 41.

Until Gen. St. 1918, c. 130, went into effect the notice required by R. L. 75, § 52, was a condition precedent to the right of the city or town to maintain an action against the Commonwealth for the payment of expenses, as provided in section 57. There are several decisions of our Supreme Court on questions of law similar to the question at hand. In *Shallow* v. *City of Salem*, 136 Mass. 136, the plaintiff brought suit for personal injuries caused by a defect in a highway. The notice given by him under St. 1877, c. 234, was held by the court to be insufficient. St. 1882, c. 36, enacted subsequently to the plaintiff's injury and to the giving of the notice by him, provided that " no notice shall be deemed to be in-

valid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury: *provided*, that it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby."

The plaintiff contended that, inasmuch as there was no intention to mislead, and as the defendant was not actually misled by the insufficiency of the notice, St. 1882, c. 36, was to be construed as acting retrospectively, and thus as validating the notice. The court in its opinion went on to say: —

> Even if it be remedial in its character, and intended to affect procedure only, full force is given to it when it is applied to cases in which the time for notice had not expired, and the notice had not been given, although the injury might have occurred before its passage. To treat it as applicable to those cases where the time for notice had expired, and where no sufficient notice had been given, is to give it a retroactive character in no respect demanded by its language, . . . The language of the St. of 1882 applies to notices given after the act shall take effect.

In *Dalton* v. *Salem*, 139 Mass. 91, which was a suit for personal injuries caused by a defect in a highway, the principle of law decided in *Shallow* v. *Salem* was followed. The court said: —

> Under the statutes in force at the time the plaintiff received her injury, it was necessary for her, as a condition precedent to her right to maintain this action, to give to the defendant a notice in writing of the time, place, and cause of her injury. The St. of 1882, c. 36, does not apply to this case.

In *Pierce* v. *Cabot*, 159 Mass. 202, the action was a petition for enforcement of a mechanic's lien. The notice in this case, being a condition precedent, was a statement of account, filed in the registry of deeds, under the section of the Public Statutes. The statement was insufficient. The statement was filed in September, 1891. The petitioners claimed that the defect was cured by St. 1892, c. 191, which law went into effect on April 22, 1892. The court followed the decision of *Shallow* v. *Salem*, and held that the statute could not be held to be applicable to statements filed before it went into effect.

In *McNamara* v. *Boston & Maine Railroad*, 216 Mass. 506, the plaintiff brought an action to recover damages for injuries received by him upon a platform of a railroad station. No sufficient notice of the cause of the plaintiff's injuries was

given to satisfy the requirements of St. 1908, c. 305, and the time for giving notice had expired before the enactment of St. 1912, c. 221. The court said: —

St. 1912, c. 221, having been enacted after the time expired for giving notice in this case, has no bearing. Statutes commonly are to be construed as prospective only in their operation.

Gen. St. 1918, c. 130, is not to be distinguished as to its effect upon pending or past matters from those under consideration in the numerous cases cited above. There is nothing to show that the Legislature intended that this statute should be taken out of the operation of the general rule. In my opinion, there was no intention, either express or implied, that this statute should be retroactive.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Minimum Wage Commission — Powers — Minimum Wage Board.

The Minimum Wage Commission has no power to qualify or to limit the application of any determination made by a wage board.

JAN. 15, 1919.

Minimum Wage Commission.

GENTLEMEN: — You have requested my opinion upon the following question: —

A wage board in a certain occupation, in its report, states that the sum required to supply the necessary cost of living and to maintain in health a female employee is not less than, say, $11, and, after showing that while the usual day's work is six hours it does vary from three hours in some establishments to eight or nine in others, it determines the minimum hourly wage suitable for the said employee of ordinary ability to be, say, 30 cents. This hourly rate in case of a six-hour day would not produce more than $11, but in case of an eight or nine hour day the weekly wages would exceed $11. If the Commission otherwise approves the determination of the wage board, can it issue a decree fixing an hourly rate, with a provision that "the total payment for a week's work need not exceed $11, with a *pro rata* deduction for time lost?"

Section 5 of the act establishing your Commission, and providing for the determination of the minimum wages for women and minors, provides, in part, that "each wage board . . . shall endeavor to determine the minimum wage, whether by time rate or piece rate. . . . When a majority of the members of a wage board shall agree upon minimum wage determinations, they shall report such determinations to the commission, together with the reasons therefor and the facts relating thereto."

Section 6 of the act provides, in part, that "upon receipt of a report from a wage board, the commission shall review the same, and may approve any or all of the determinations recommended, or may disapprove any or all of them, or may recommit the subject to the same or to a new wage board. . . ."

I understand that the question has arisen as the result of a recommendation of the office and other building cleaners' wage board made to your Commission on July 18, 1918. The following determinations were reported by that wage board to you: —

1. The minimum wage to be paid to any female employed as an office or other building cleaner shall be as follows: —

(*a*) Between the hours of 7 P.M. and 8 A.M., 30 cents an hour.

(*b*) Between the hours of 8 A.M. and 7 P.M., 26 cents an hour.

I am of the opinion that the powers given you under section 6 of the statute referred to limit you to approving or disapproving all of the determinations of the wage board or to approving certain of the determinations and disapproving others which are separable from one another. You have no power, in my opinion, to qualify or limit the application of any determination made by the board. If the determination without such qualifications and limitations is unsatisfactory to your Commission, it is your duty to disapprove the same, or to recommit the subject to the said wage board or to a new wage board.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Unregistered Pharmacist — Right to do Business.

An unregistered person lawfully actively engaged in the business of pharmacy as a copartner or stockholder prior to the passage of St. 1913, c. 720, may thereafter actively engage in the drug business if associated with a registered pharmacist.

JAN. 20, 1919.

Board of Registration in Pharmacy.

GENTLEMEN: — You have made an inquiry relative to the right of an unregistered pharmacist who was a copartner or a stockholder in a drug business at the time of the passage of St. 1913, c. 720, actively to engage in the drug business, but in another partnership or corporation.

Section 1 of said chapter 720 provides: —

> No unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business shall hereafter be actively engaged in the drug business.

Section 2 provides an exception to the above, as follows: —

> The provision of . . . section one of this act; that no unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business shall hereafter be actively engaged in the drug business, shall not apply to those engaged in said business at the time of the passage of this act.

It becomes important to determine what is meant by the words "shall not apply to those engaged in said business." Do they refer to the drug business generally, or to a particular business conducted by a particular partnership or corporation? Does this language exempt from the operation of the law all persons who at the date of passage were then unregistered stockholders or partners, or does it merely exempt such persons so long as they continue to be connected with a specific corporation or partnership? The language is not at all clear.

If a narrow interpretation is given to the exception, then a surviving unregistered partner cannot continue to engage in the drug business upon the death of one of his partners, notwithstanding the business is to be continued at the same place and by the remaining partners. St. 1913, c. 720, contains a penalty for its violation, and consequently is to be construed strictly in favor of the unregistered copartner or stockholder excepted from its provisions.

The provisions relating to an unregistered copartner first appeared in St. 1908, c. 525, § 2, where it was provided as follows: —

No unregistered co-partner shall hereafter be actively engaged in the business of pharmacy; but this provision shall not apply to those engaged in the business at the time of the enactment hereof.

In my judgment, the exception contained in this provision permitted a copartner then engaged in the business of pharmacy to continue in the business he was then in, or to engage thereafter as a copartner with others in the business of pharmacy.

By the passage of St. 1913, c. 720, the provision affecting an unregistered copartner was enlarged to include unregistered stockholders in a corporation doing a retail drug business. I do not think it is to be presumed that the statute of 1913 intended to do anything more than to include unregistered stockholders in the exception.

Accordingly, it is my opinion that an unregistered person who was lawfully actively engaged in the business of pharmacy prior to May 28, 1913, as a partner with a registered pharmacist, or a stockholder who was lawfully actively engaged in the business of pharmacy, may actively engage in the drug business as an unregistered copartner or unregistered stockholder in a corporation engaged in a retail drug business.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

School Permits — Minors — Domestic Service.

Under the provisions of R. L., c. 44, § 1, a girl between the ages of fourteen and sixteen must first receive a permit from the superintendent of schools in order legally to leave school and engage in domestic duties in her own home.

JAN. 27, 1919.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have requested my opinion upon the following question: —

Whether, under the provisions of R. L., c. 44, § 1, a girl between the ages of fourteen and sixteen must receive either a permit or a certificate from the superintendent of schools in order that she may legally leave school and engage in domestic duties in her own home.

R. L., c. 44, § 1, as amended by St. 1905, c. 320, St. 1906, c. 383, St. 1913, c. 779, § 1, and Gen. St. 1915, c. 81, § 1,

so far as it affects your question, provides that "every child under sixteen years of age who has not received an employment certificate as provided in this act and is not engaged in some regular employment or business for at least six hours per day or has not the written permission of the superintendent of schools of the city or town in which he resides to engage in profitable employment at home, shall attend a public day school in said city or town or some other day school approved by the school committee, during the entire time the public schools are in session." The section then provides that the above provisions are subject to exceptions as enumerated. In brief, the statute requires the attendance at school of every child under sixteen years of age unless the child falls within specific excepted classes.

A girl, under the facts stated in your question, does not come within any of the statutory exceptions, and, accordingly, I am of the opinion that it is necessary for her to obtain written permission of the superintendent of schools to leave school and engage in domestic duties in her own home. The giving of the written permission by the superintendent is the proper method in a case like this, as the giving of an employment certificate, in my opinion, covers cases where a child is permitted to work in a factory, workshop, manufacturing, mechanical or mercantile establishment. St. 1909, c. 514, § 17, provides that the "exercise of manual labor in a private house or private room by the family dwelling therein or by any of them or if a majority of the persons therein employed are members of such family, shall not of itself constitute such house or room a workshop."

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Appropriation by Legislature — Private Institutions.

An appropriation by the Legislature in furtherance of a pre-existing agreement to provide moneys for a term of years to certain private institutions of learning is valid, under article XLVI of the Amendments to the Constitution.

FEB. 7, 1919.

BENJAMIN LORING YOUNG, Esq., *Chairman, House Committee on Ways and Means.*

DEAR SIR: — I acknowledge your communication in which you request my opinion upon the following question of law: —

Are the items recommended for appropriation in favor of the Massachusetts Institute of Technology and the Worcester Polytechnic Institute, included in the Governor's Budget recommendations (House No. 185), items Nos. 473 and 474, valid and legal under article XLVI of the Amendments to the Constitution of the Commonwealth?

I assume these items are included in the budget to carry out the provisions of chapter 78 of the Resolves of the year 1911, and chapter 87 of the Resolves of the year 1912. The first is a resolve in favor of the Massachusetts Institute of Technology, and the second is in favor of the Worcester Polytechnic Institute. These resolves are similar in character.

The resolve in favor of the Massachusetts Institute of Technology provides for the payment annually, for the term of ten years beginning with the first day of January, 1912, of the sum of $100,000, to be expended under the direction of the corporation of said institute, for the general purposes of the institute; provided, however, that the last five annual payments are conditioned upon the presentation of satisfactory evidence to the Governor and Council that the institute has received by bequest or gift from other sources the sum of $1,000,000 in addition to all funds held by it on the day of the approval of the resolve.

The resolve in favor of the Worcester Polytechnic Institute provides for the annual payment to said institute, for the term of ten years beginning with the first day of September, 1912, of the sum of $50,000, to be expended under the direction of the corporation of said institute, for the general purposes of the institute; provided, however, that the last five payments are conditioned upon the presentation of satisfactory evidence to the Governor and Council that the institute has received by bequest or gift from other sources property amounting in value to $350,000 in addition to the property held by it on the day of the approval of the resolve.

The resolve in favor of the Massachusetts Institute of Technology further provides that, in consideration of the payments and during the continuance thereof, the institute shall maintain eighty free scholarships, to be granted by the Board of Education to residents or minor children of residents of Massachusetts; while the resolve in favor of the Worcester Polytechnic Institute provides that, in consideration of the payment to it and of the grant made by chapter 57 of the Resolves of the year 1869, the Worcester Polytechnic Institute

shall maintain forty free scholarships, to be awarded to pupils of the public schools of Massachusetts.

The Massachusetts Institute of Technology was chartered by the Legislature in 1861 for the purpose of instituting and maintaining a society of arts, a museum of arts and a school of industrial science, and aiding generally the advancement, development and practical application of science in connection with arts, agriculture, manufactures and commerce.

The Worcester Polytechnic Institute was chartered in 1865 under the name of the Worcester County Free Institute of Industrial Science, for the purpose of establishing and maintaining in the city of Worcester an institution to aid in the advancement, development and practical application of science in connection with arts, agriculture, manufactures, mercantile business and such other kindred branches of practical education as said corporation shall determine.

The appropriation of money for the advancement of the purposes for which these institutions were chartered is undoubtedly an appropriation of money for a public purpose, and thus there is no constitutional objection to the appropriation of money in aid of these institutions, apart from article XVIII of the Amendments to the Constitution.

Article XVIII of the Amendments to the Constitution contains an exception from its prohibitions that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into. I assume that the legal obligations referred to in the exception are such obligations as would constitute a contract the impairment of which is prohibited by the Federal Constitution.

Your question therefore resolves itself to this: Has the Commonwealth, by chapter 78 of the Resolves of the year 1911 and chapter 87 of the Resolves of the year 1912, entered into contracts the impairment of which is prohibited by the terms of the Federal Constitution?

It was stated in the opinion in the case of *Cary Library* v. *Bliss*, 151 Mass. 364, that it was settled by the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, that the word "contract," as used in the Constitution of the United States, "is to be interpreted broadly and liberally, so as to include all obligations which should be enforced and held sacred growing

out of agreements, express or implied, for which there is a valuable consideration."

I am of the opinion that the Legislature of the year 1911 intended by the passage of chapter 78 of the resolves of that year to hold out an inducement to the Massachusetts Institute of Technology to obtain, by solicitation or otherwise, $1,000,000 to enable it to better carry on the purposes for which the institute was created, and to induce members of the public to give to the institute $1,000,000; and the inducement was that in the event the institute obtained, by gift or otherwise, $1,000,000, on its part the Commonwealth would appropriate to the institute $1,000,000 in annual payments of $100,000 each. If the Legislature intended to hold out an inducement of this character, it seems to me that it intended the inducement to be one of substance; that is, one legally binding the Commonwealth on its part to carry out its assurance given to the institute, if the institute on its part accepted the proposition contained in the resolve, and carried out the conditions imposed in the resolve. Nor do I think the fact that the action of the General Court was by resolve rather than by an act is important. A long-established usage seems to justify resolves of this character, and I am of the opinion that they have in the present instance the same binding effect upon the Commonwealth as if the action of the General Court had been taken by acts. Furthermore, this method seems to be recognized by article XI of section I of chapter II of part the second of the Constitution.

If, therefore, the Massachusetts Institute of Technology has produced satisfactory evidence that it has obtained $1,000,000 by bequest or gift from other sources, and has maintained the scholarships required, I am of the opinion that the institute has accepted the offer of the Commonwealth and has met its obligations incurred by such acceptance; and thus chapter 78 of the Resolves of the year 1911 constitutes a contract binding upon the Commonwealth. What I have said in relation to the resolve in favor of the Massachusetts Institute of Technology applies to the resolve in favor of the Worcester Polytechnic Institute.

Accordingly, your question is to be answered in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Street Railways — Cancellation of Rates — Redemption of Outstanding Tickets.

Unused reduced-rate tickets, after the schedule of rates under which they were issued has been canceled, are to be redeemed at the pro rata value of the unused portion.

Feb. 7, 1919.

Public Service Commission.

Gentlemen: — I acknowledge your request for my opinion as to the rights of persons who hold partially used reduced-rate tickets issued by street railways and steam railroads, concerning the use of such tickets after the schedule of rates under which they were issued has been canceled and new rates providing for a higher fare have become effective.

St. 1913, c. 784, § 20, requires every common carrier to file with your Board schedules of fares to be charged by it for service rendered or furnished within the Commonwealth. After such schedules have become effective every carrier is forbidden to charge any different rates from those stated in the schedules. This section authorizes a change to be made in any schedule of rates on file by a thirty days' notice to your Board by the carrier. By section 21 you are empowered to investigate the propriety of any such proposed changes, to suspend the taking effect of the same and to substitute new rates therefor if, in your judgment, the proposed rates are unreasonable. When, however, any change in a schedule of fares has become effective, either by the action of the carrier without interference by you or as a result of an order made by you after an investigation, it is plain that such new rates become the only rates which may legally be charged by the carrier. It is forbidden by section 20 to charge fares upon any other basis.

Accordingly, in my opinion, when a schedule of rates providing for reduced-rate tickets to be sold in books or in lots of a specific number has been canceled in the manner provided in St. 1913, c. 784, and a new schedule substituted therefor, eliminating such tickets or increasing the amount to be charged for them, a carrier is not only not required thereafter to accept the old tickets, but is actually forbidden by law to do so. Assuming that these tickets constitute a contract between the person purchasing them and the company issuing them, they are contracts subject to cancellation by a change of rates made effective in accordance with the provisions of

law. To hold otherwise would be in effect to discriminate in favor of persons who had been farsighted enough to buy up quantities of such tickets when there was a prospect of an increase in rates. Any such discrimination is directly forbidden by section 20.

I understand that the schedule under which the ticket was issued which gave rise to your inquiry provided that partially used tickets would be redeemed by the company at the difference between the cost of the complete ticket and the full cash fare for the rides represented by the used portions. In my judgment, this provision applies only to tickets presented for redemption by purchasers while the rate is in force. It does not apply to cases where the rate under which the ticket was issued has been canceled by act of the carrier or of your Board. In such cases, in my opinion, the carrier is required to redeem outstanding tickets at the pro rata value of the unused portion. I understand that the company involved in the case under consideration is entirely ready to redeem upon this basis.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Payments by Commonwealth — Private Institutions — "Anti-Aid" Amendment.

The payment of moneys to the New England Asylum for the Blind, later changed to the Perkins Institution and Massachusetts School for the Blind, under the provisions of St. 1829, c. 113, and under subsequent legislation, does not constitute a contractual obligation on the part of the Commonwealth, and as the management of the institution is not under the exclusive control of the Commonwealth, further payments to it by the Commonwealth are prohibited under the provisions of the "anti-aid" amendment.

FEB. 7, 1919.

DR. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — I acknowledge your letter in which you ask the following: —

Whether article XLVI of the Amendments to the Constitution prohibits payments by the Commonwealth of an annual grant to the Perkins Institution and Massachusetts School for the Blind, in accordance with the provisions of Res. 1864, c. 56, as amended.

The first provision made by the Legislature calling for the payment of funds to the New England Asylum for the Blind

appears in St. 1829, c. 113, which was the act of incorporation. By section 7 of said chapter it was provided that the State should pay to said corporation, for the maintenance and education of each blind person sent to the said asylum under the authority of the Legislature, the same compensation as by the by-laws of said corporation might be demanded and was actually received for the maintenance and education of such other blind persons as were at that time residing in said asylum.

By Res. 1830, c. 81, the Legislature allowed the unexpended balance of the appropriation for the deaf and dumb to be paid to the New England Asylum for the Blind for the current year, and from time to time thereafter upon the Governor's warrant, unless other disposition thereof was made by the General Court.

Res. 1833, c. 28, provided that $6,000 was to be paid annually to this institution during the pleasure of the Legislature.

Res. 1847, c. 49, allowed the payment of $9,000 at the pleasure of the Legislature, on condition that the asylum should receive forty State beneficiaries, if so many should be recommended. All previous grants were repealed.

By Res. 1855, c. 62, the annual appropriation was increased from $9,000 to $12,000 a year, the same to continue at the pleasure of the Legislature.

Res. 1861, c. 51, provided that an additional appropriation of $3,000 be made on condition that the trustees admit all such persons as the Governor might designate, and educate them gratuitously. Res. 1862, c. 84, and Res. 1863, c. 65, repeated the preceding grant.

By Res. 1864, c. 56, the Legislature provided that the annual appropriation in favor of the Perkins Institution and Massachusetts Asylum for the Blind should be increased from $12,000 a year to $16,000 a year, commencing from the first day of April, 1864, and continuing until otherwise ordered by the Legislature.

Res. 1868, c. 12, provided that $9,000 should be allowed in addition to the regular appropriation of $16,000 to this institution.

By Res. 1869, c. 19, it appears that an appropriation of $5,000 was made, the same to be paid annually in addition to the sums authorized by Res. 1864, c. 56, and Res. 1868, c. 12,

making an annual appropriation that year and thereafter of $30,000, subject to the conditions of Res. 1864, c. 56. This was to supersede the appropriation of $16,000 made by St. 1869, c. 27. The last payment by the State of $30,000 to this institution was made under the authority of Spec. St. 1918, c. 110. After considering this and other legislation dealing with the payment of State funds to this school, it appears that all appropriations since 1869 have been made under the authority provided by Res. 1869, c. 19.

On examining the legislation pertaining to this institution it is apparent that at the present time there is no existing contract between the Commonwealth of Massachusetts and the Perkins Institution and Massachusetts School for the Blind which calls for the payment of money annually to the school in question. In my judgment, all past appropriations by the Legislature must be considered as gratuities which have been paid subject to the pleasure of the Legislature rather than as the fulfilment of any contractual obligation on the part of the Commonwealth.

St. 1829, c. 113, § 4, provided that the New England Asylum for the Blind should be under the direction and management of twelve trustees, who were to be chosen annually and to remain in office until others were chosen and qualified in their stead. Four of the trustees were to be chosen by the board of visitors, and the remaining eight by the corporation itself.

By St. 1864, c. 96, the Governor was granted the power formerly vested in the board of visitors to appoint four trustees to hold office for one year, or until their successors were appointed. Such portion of St. 1829, c. 113, as authorized the appointment of trustees by a board of visitors was repealed.

Res. 1869, c. 71, provided that the sum of $80,000 should be appropriated for the purpose of erecting suitable buildings for the use of the Perkins Institution and Massachusetts Asylum for the Blind, provided that no portion of said sum should be paid until the said trustees conveyed to the Commonwealth by a good and sufficient deed, free from all incumbrances, the land on which the buildings to be erected should stand, and so much adjacent thereto as the Governor and Council should require. It appears that later the institution desired to dispose of the property which was conveyed to the Commonwealth in compliance with the provisions of Res. 1869, c. 71, and accord-

ingly a resolve was passed which authorized and directed the Treasurer and Receiver General of the Commonwealth to convey to the Perkins Institution and Massachusetts School for the Blind the land which was conveyed to the Commonwealth in compliance with the provisions of said chapter 71. See Res. 1909, c. 90.

It is to be noted that on Oct. 3, 1877, the name of the institution was changed to the Perkins Institution and Massachusetts School for the Blind.

Section 2 of article XLVI of the Amendments to the Constitution provides, in part, as follows: —

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

The present governing board of the Perkins Institution and Massachusetts School for the Blind consists of twelve trustees, eight of whom are chosen by the corporation and four of whom are appointed by the Governor. It is obvious that since the majority of the trustees of this institution are chosen by the corporation, it cannot be said that the management of the school is under the exclusive control of public officers or agents authorized by the Commonwealth of Massachusetts. I am informed by the secretary of this institution that the legal title to all real estate owned by it at the present time is held in the name of the trustees, which precludes any contention that the institution is publicly owned.

Accordingly, I am of the opinion that as the school is constituted at the present time it is prohibited from receiving further payments by the Commonwealth of Massachusetts.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Chain Drug Stores — Central Prescription Department.

A drug corporation operating a chain of stores may establish a central prescription department in one of them, provided each store is conducted in accordance with law.

Feb. 11, 1919.

Board of Registration in Pharmacy.

Gentlemen: — I have your letter concerning the proposal of a certain drug corporation operating a number of stores in Boston to have a central prescription department at one of its present stores, to which prescriptions taken in at each of its other stores in Boston should be sent for compounding and returned by messenger for delivery at the stores where they were taken in. You ask: —

Would such method affect the permit already granted by the Board to each of these stores whereby each store carries on its own prescription department in the usual way; also, under this arrangement would the Board be justified in refusing to issue a permit under this arrangement?

St. 1913, c. 705, as amended, provides in substance as follows: —

Section 1. The term "drug business" as used in this act shall mean the sale, or the keeping or exposing for sale of drugs, medicines, . . . and the said term shall also mean the compounding and dispensing of physicians' prescriptions.

Section 2. No store shall be kept open for the transaction of the retail drug business unless it is registered with and a permit therefor has been issued by the board of registration in pharmacy as herein provided.

Section 3. The board of registration in pharmacy shall, upon application, issue a permit to keep open a store for the transaction of the retail drug business to such persons, firms and corporations as the board may deem qualified to conduct such a store. . . .

Section 4. No such permit shall be issued for a corporation to keep open a store for the transaction of the retail drug business, unless it shall appear to the satisfaction of the said board that the management of the drug business in such store is in the hands of a registered pharmacist.

Section 5. The said board may suspend or revoke a permit issued hereunder for any violation of the law pertaining to the drug business . . . ; but before suspending or revoking any such permit the said board shall give a hearing to the person, firm or corporation holding

the permit, after due notice to such person, firm or corporation of the charges against him or it and of the time and place of the hearing. . . .

. . . . . .

Section 7. Whoever violates any provision of this act shall be punished by a fine of not less than five nor more than one hundred dollars; or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

Upon examination of the above statute, as well as other acts pertaining to the drug business, I find nothing therein contained which prohibits the sending of prescriptions by one drug store to another which is operated by the same company, where both stores are being conducted in accordance with the requirements of the statute, and the management of each of said stores is in the hands of a registered pharmacist. The compounding of prescriptions is but one incident of the retail drug business. Each store, however, in view of the fact that it is selling drugs and dispensing physicians' prescriptions, must strictly comply with the provisions of the aforesaid act and of all acts pertaining to the drug business. Such a method, in my opinion, will not affect a permit already granted by the Board; nor do I think the Board will be justified in refusing to issue permits to the several stores of said corporation solely because of this arrangement.

Very truly yours,

Henry C. Attwill, *Attorney-General.*

Constitutional Law — Public Operation of Street Railways.

A law providing for the public operation of a street railway, allowing compensation to its stockholders upon the acceptance by them of terms, is constitutional.

Feb. 12, 1919.

Hon. Edwin T. McKnight, *President of the Senate.*

Dear Sir: — I beg to acknowledge the receipt from the Honorable Senate of the following order: —

Ordered, That the Senate request the opinion of the Attorney-General as to the constitutionality of chapter one hundred and fifty-nine of the Special Acts of the year nineteen hundred and eighteen, entitled "An Act to provide for the public operation of the Boston Elevated Railway Company."

Your question is not directed to any particular feature of said act. Obviously, it is impossible for me to foresee every

question that might be raised or that the Honorable Senate may have in mind. I have confined my attention to those questions which I conceive might be raised, and which to me seem to merit consideration.

Said act provides for the appointment by the Governor, with the advice and consent of the Council, of public trustees to assume the control and operation of the Boston Elevated Railway for the period specified in the act. The Governor may remove said trustees, with the advice and consent of the Council. The act provides in section 2 that the trustees "shall take and have possession" of the Boston Elevated Railway Company and the property owned, leased or operated by it, "in behalf of the Commonwealth, during the period of public operation" provided for in the act.

In effect the act provides for the taking over by the Commonwealth of the possession and control of the Boston Elevated Railway system, with its leased lines, for a period of ten years, and for a longer period unless the Commonwealth elects to discontinue its operation of the road. This is done upon the assent of a majority of the stockholders of the Boston Elevated Railway Company and a majority of the stockholders of the West End Street Railway Company, and in consideration of the payment by the Commonwealth, during the period of public operation, of a fixed amount upon the capital stock of the Boston Elevated Railway Company out of the receipts of the road after the payment of interest charges and expenses of operation; and, in the event of the receipts being insufficient, then the Commonwealth is to pay out of its own treasury the amount necessary to meet any deficit, such deficit to be apportioned as provided by the act upon the communities specially benefited by the operation of the system. Thus in effect it is the same as if the Commonwealth had taken a direct lease of the system, agreeing to assume the interest charges and operating expenses and to pay the corporation a rental; the corporation, on the other hand, agreeing to issue from time to time notes or certificates of indebtedness to renew indebtedness already existing and properly chargeable to capital account.

The provision of section 2 of the act, that in the management and operation of the company and its properties the trustees and their agents and employees shall be deemed to be acting as the agents of the company, obviously was inserted in order that persons suffering damages by reason of

the operation of the railway could continue to bring suits therefor as heretofore, thus obviating provisions which would otherwise have been necessary to enable them to bring their actions directly against the Commonwealth.

I do not think there can be any question at this day that a street railway is a public utility, and that the appropriation of public funds for its construction, maintenance and operation is for a public purpose. In the present state of civilization and economic conditions the operation of means of transportation is of vital concern to all the people. Contemplation of the results of the discontinuance of the operation of the Boston Elevated Railway and its leased lines graphically answers any suggestion that the welfare of the general public is not involved in its continued operation. Furthermore, a long line of decisions of the Supreme Judicial Court of this State seems to recognize that the construction, maintenance and operation of means of transportation are public purposes.

Thus it was held, as far back as 1842, in the case of *Worcester* v. *Western Railroad Corporation*, 4 Met. 564, that properties devoted to railroad purposes were public works, and as such were exempt from taxation unless it was specifically provided in the terms of the act authorizing their construction and maintenance that they should be taxed. It was there said, by Chief Justice Shaw: —

> It is true, that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public. The company have not the general power of disposal, incident to the absolute right of property; they are obliged to use it in a particular manner, and for the accomplishment of a well defined public object; they are required to render frequent accounts of their management of this property to the agents of the public.

It is because railroads and railways are engaged in a public purpose which the public might otherwise undertake itself that the State may delegate to them its power of eminent domain.

Furthermore, it is not novel for the Commonwealth to own a railroad. Thus, on Sept. 4, 1862, the Commonwealth took possession of the Troy & Greenfield Railroad, about the same time acquired title to the Southern Vermont Railroad by virtue of the provisions of St. 1862, c. 156, and

completed the Hoosac Tunnel and the Troy & Greenfield Railroad at a total expense of about $17,000,000, and opened them for use about June 30, 1876.

In many instances the Legislature has granted aid to railroad corporations from its own treasury, *Kingman, petitioner*, 153 Mass. 566. It in many instances has authorized cities and towns to furnish aid to railroads by subscribing for stock is such railroads, and in other ways. *Prince* v. *Crocker*, 166 Mass. 347, 361.

I think it is equally plain that the Commonwealth can operate either a railroad or street railway. Granted that the State may construct and own a railroad or railway, it seems to follow, because of its character, that the State has the power to make it useful by providing for its operation. That the State can authorize a city to operate a street railway transportation system seems to have been assumed in *Brown* v. *Turner*, 176 Mass. 9, 14. See also the *Minnesota Rate Cases*, 230 U. S. 352, 416; *Attorney-General* v. *Boston*, 123 Mass. 460.

Convinced, as I am, that there is no constitutional objection to the Commonwealth acquiring and operating a railroad or street railway, it follows, in my judgment, that the Commonwealth may lease a railroad or street railway or take over the control of the same, with the consent of its owners, and pay compensation to the owners while it holds it by lease or the exercise of such control. The determination of the amount and terms of compensation to be paid and the details of the control and operation are matters for the Legislature alone to determine. The provision for the payment of dividends on the stock of the Boston Elevated Railway Company, in my judgment, is a provision for the payment of compensation in the nature of a rental. The stock is taken as a convenient measure of the rent. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 763. This is the ordinary and usual method of measuring rentals where a transportation company is leased.

Therefore, in my opinion, the provisions of said act, so far as they relate to the taking of possession by the Commonwealth of the property of the Boston Elevated Railway Company and the control of the same, and the payment of compensation for such use and control, upon the acceptance of the terms thereof by the corporations involved, are constitutional.

This leaves but two other questions which, in my judgment, merit consideration: First, do the provisions of the act in any way impair the rights of any stockholders in either the Boston Elevated Railway Company or the West End Street Railway Company; and second, is the method adopted to meet any deficit occurring in the operation of the railway, and the assessment of such deficit upon the municipalities in which the Boston Elevated Railway system operates, constitutional?

As to the first remaining question I think that the act is free from objection. In my judgment, there is no question but that the Legislature can authorize a street railway company, upon the affirmative vote of a majority of its stockholders, to lease its property and authorize its operation by others. The charters of all corporations are subject to amendment, alteration or repeal by the General Court. It is true that this power is limited by the provisions of our own and the Federal Constitution, that no person shall be deprived of his property without due process of law. So long, however, as the amendment or alteration is not open to this objection, such amendment or alteration is within the power of the General Court to enact. The statute in question is not open to this objection, as it makes adequate provision to protect and safeguard the interests of non-assenting stockholders by providing for a fair return upon their capital invested and the return of the property of the corporation at the end of the period of control in good operating condition. I do not think it could be successfully contended that a regulation of rates and fares by the Commonwealth of the Boston Elevated Railway System, which allowed a return upon the capital invested of from 5 to 6 per cent per annum, after due allowance for operating expenses, taxes, rentals, interest on indebtedness and allowances for depreciation of property and for obsolescence and losses in respect to property, deprived the stockholders of property without due process of law. The act in question allows a return upon the capital invested of at least 5 to 6 per cent per annum. The non-assenting stockholders are, therefore, under the operation of the act, in no worse situation than they would be under the general regulation of rates by the Public Service Commission, or a like body.

Furthermore, it is to be borne in mind that at the time of the acceptance of the act the Boston Elevated Railway

Company was restricted by its charter from establishing and taking a toll of fare which should exceed 5 cents for a single continuous passage in the same general direction.

So far as the stockholders of the West End Street Railway Company are concerned, it is to be observed that the Commonwealth takes possession of the property of the West End Street Railway Company subject to the terms of its lease to the Boston Elevated Railway Company.

The extensions and additions that the trustees are authorized to make are such as the railway itself could undertake, if, indeed, such extensions and additions could not be required by the Legislature; and consequently a majority of its stockholders can authorize such extensions and additions by the public trustees.

As to the method adopted to meet any deficit occurring in the operation of the railway and the assessment of the same upon the municipalities in which the Boston Elevated Railway System operates, this is defined in sections 11 and 14 of the act. Section 11 provides for notice by the trustees to the Treasurer and Receiver-General of any deficit existing as of the last day of June or the last day of December in any year, and it is therein provided that the Commonwealth shall thereupon pay over to the company the amount of such deficit. It further provides that in order to meet any payment required of the Commonwealth the Treasurer and Receiver-General may borrow, in anticipation of assessments to be levied upon the cities and towns, such sums as may be necessary to make such payments. It is also provided that, in the event of a surplus in the reserve fund provided for in the act as of the last day of any June or December, the trustees shall apply the surplus, so far as necessary, to reimburse the Commonwealth for any amounts which it may have paid to the company under the provisions of said section. The amount of reimbursement thereon is to be distributed among the cities and towns contributing payments to meet the deficit.

By section 14 it is provided that such deficit shall be assessed upon the cities and towns in which the company operates, by an addition to the State tax next thereafter assessed in the proportion therein set forth.

I do not think there can be any question as to the constitutionality of section 11, which simply provides means for the Commonwealth meeting an obligation which it has undertaken.

Any objection which may be raised in relation to section 14, in my judgment, is answered by the case of *Kingman, petitioner,* 153 Mass. 566. In that case it was said, in relation to the construction and support of a public utility, that —

> The Legislature may properly determine that the whole or a part of the cost shall be borne by the Commonwealth, or it may impose it wholly upon counties, or wholly upon towns, or a part upon each. And in doing so it is not necessarily limited by county or town lines. . . . Absolute equality in the distribution of burdens of course is not to be hoped for. But with a view to the nearest approach to it that is possible, the Constitution wisely vests a large and general power in the Legislature. And if at any time it is found, either from a change of circumstances or otherwise, that the burden presses too hardly upon a particular town or county, the Legislature may change it. Nor does the fact that the money has been advanced in the first instance from the treasury of the Commonwealth prevent the Legislature from providing for a reimbursement from counties, cities, or towns.

It is to be observed that if there is any constitutional difficulty in the method adopted of apportioning the burden of the cost of the operation of the railway system, it undoubtedly is separable from the rest of the act.

A further suggestion may be made that, in view of the fact that the charter of the Boston Elevated Railway Company contained a condition that in the operation of its road it should not charge more than 5 cents for a single continuous passage in the same general direction, at least until the year 1922, the effect of the legislation is to grant a gratuity to the stockholders. This, in my judgment, cannot successfully be contended, because, so far as I am aware, there is no way in which to compel a public service corporation to continue to operate its road when it is unable to pay its operating expenses. Confronted with such a situation, there is no doubt that the General Court may make a new arrangement with the corporation for the continued operation of its road. *Friend* v. *Gilbert,* 108 Mass. 408; *Abbott* v. *Doane,* 163 Mass. 433.

Accordingly, I advise you that, in my opinion, said chapter 159 of the Special Acts of the year 1918 is constitutional.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Bakers — Hours of Employment.

A law regulating the hours of employment of bakery workers which has no reasonable relation to the public health, safety or morals is unconstitutional.

Feb. 12, 1919.

Leland Powers, Esq., *Chairman, Committee on Bills in the Third Reading.*

Dear Sir: — I am in receipt of your letter in which you request my opinion upon the constitutionality of House Bill No. 114, entitled "An Act to regulate the hours of employment of bakery workers."

The first two sections of the act are as follows: —

Section 1. Except in cases of emergency as hereinafter provided, it shall be unlawful to make or bake bread, rolls, buns, biscuits, cake, pastry and crackers and all other bakery goods in any bakeshop, bakery, hotel, restaurant or club, between the hours of eight o'clock in the evening and four o'clock in the morning.

Section 2. In cases of emergency where serious suffering, loss, damage, or public inconvenience are threatened, the police commissioner of the city of Boston, or any member of the police department thereof having the rank not lower than captain and designated by said commissioner, or the chief of police of any other city or of any town upon such terms and conditions as he shall impose may issue a permit allowing the work prohibited in the preceding section to be done in the prohibited hours, but such permit shall be valid only during the twelve hours after the time it is issued.

In the case of *Lochner* v. *New York*, 198 U. S. 45, it was held that a statute of New York limiting the hours of employment in bakeries to not more than ten hours a day was unconstitutional, as "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best or which they may agree upon with the other parties to such contracts." This decision was expressly recognized by our Supreme Judicial Court in the case of *Commonwealth* v. *Boston & Maine R.R.*, 222 Mass. 206, as binding upon the Legislature and courts of this Commonwealth.

It seems clear from these decisions that House Bill No. 114 would be unconstitutional if enacted into law, unless the fact that the prohibition contained in this bill applies only to night work, and baking at night makes it distinguishable from these cases. If employment in the night time in a

bakery, or baking at night, has any reasonable relation to the public health, safety or morals, acts of this character might be sustained as valid police regulations. The question of whether the prohibition contained in this bill is appropriate to safeguard the public health or the health of individuals who are following the trade of a baker is largely a question of fact, in the first instance at least, to be determined by the Legislature itself. No evidence, however, has come to my attention which tends to show that this bill can be distinguished from the acts found to be unconstitutional in the cases cited, and, accordingly, I am constrained to advise that, in my opinion, House Bill No. 114 would be unconstitutional if enacted into law.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Doctor — Use of Title — Degree.

The mere use of the prefix "Dr." or "Doctor" by a person not in possession of a degree from an institution having the power to grant degrees is not a violation of R. L. c. 208, § 75.

FEB. 20, 1919.

Board of Registration in Medicine.

GENTLEMEN: — I acknowledge the receipt of your letter requesting my opinion upon the following question: —

Can the use of the prefix "Dr." or "Doctor" by a person not in possession of a degree conferred by a legally chartered college or other educational institution having power to grant degrees, be regarded as a violation of section 75 of chapter 208 of the Revised Laws?

The word "doctor" comes from the Latin word *doctor,* meaning teacher, and this was derived from the Latin verb *docere,* meaning to teach. Consequently, the earliest English use of this word was synonymous with teacher. It later became the subject of degrees conferred by universities and colleges on men of great learning, such as doctors of divinity.

Lexicographers define the word "doctor" to mean, in addition to physician, the following: —

(1) A teacher; instructor; one who gives instruction in some branch of knowledge or inculcates an opinion of principles. (2) One who by reason of his skill in any branch of knowledge is competent to teach it or whose attainments entitle him to express an authoritative opinion; an eminently learned man. (New English Dictionary.)

A teacher; an instructor; a learned man; one skilled in a learned profession. (Century Dictionary.)

A person of great learning and qualified to instruct; literally, a teacher. (Standard Dictionary.)

According to the Encyclopedia Britannica the word comes from the Latin for teacher, and "though the word is commonly used as synonymous with physician, it was not until the fourteenth century that the doctor's degree began to be conferred in medicine."

R. L., c. 208, § 75 (originally St. 1893, c. 355, § 1), is as follows: —

Whoever, in a book, pamphlet, circular, advertisement or advertising sign, or by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to have been an officer or teacher, or to be a graduate or to hold any degree of a college or other educational institution of this commonwealth or elsewhere, which is authorized to grant degrees, or of a public school of this commonwealth, and whoever, without the authority of a special act of the general court granting the power to give degrees, offers or grants degrees as a school, college, or as a private individual, alone or associated with others, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.

During the next year St. 1894, c. 458, providing for the registration of physicians and surgeons, was passed. Sections 10 and 11 of said chapter 458 were as follows: —

Section 10. Whoever not being registered as aforesaid shall advertise or hold himself out to the public as a physician or surgeon in this Commonwealth, by appending to his name the letters "M.D.," or using the title of doctor, meaning thereby a doctor of medicine, shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offence, or by imprisonment in jail for three months, or both.

Section 11. This act shall not apply to commissioned officers of the United States army, navy or marine hospital service, or to a physician or surgeon who is called from another state to treat a particular case, and who does not otherwise practise in this state, or to prohibit gratuitous services; nor to clairvoyants, or to persons practising hypnotism, magnetic healing, mind cure, massage methods, christian science, cosmopathic or any other method of healing: *provided*, such persons do not violate any of the provisions of section ten of this act.

Thus, apparently, it was contemplated that persons other than persons holding the degree of doctor granted by a college authorized to confer such degree might use the prefix "doctor," provided they did not represent themselves as doctors of medicine. Applicants for registration as physicians were not required to have a degree of doctor of medicine or its equivalent from a legally chartered medical school having power to confer degrees, until the passage of Gen. St. 1915, c. 293. If it is intended by R. L., c. 208, § 75, that only a person who has a doctor's degree from a college authorized to confer such degree can use the title "doctor," obviously all persons registered as physicians and surgeons prior to the passage of Gen. St. 1915, c. 293, who have not received a degree of doctor from a college authorized to grant such a degree are not entitled to use the title "doctor." Certainly such a construction is not to be placed upon R. L., c. 208, § 75.

Accordingly, I am of the opinion that merely the use of the prefix "Dr." or "Doctor" by a person not in possession of a degree from a college or other educational institution having the power to grant degrees is not a violation of R. L., c. 208, § 75.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Public Buildings — Mercantile Purposes.

A law providing for the erection of buildings by cities and towns to be used for both public and mercantile purposes is unconstitutional.

MARCH 3, 1919.

Hon. JOHN HALLIWELL, *Chairman, Joint Committee on Municipal Finance.*

DEAR SIR: — You have requested my opinion as to whether House Bill No. 30, if enacted, will be constitutional and valid. This bill provides: —

SECTION 1. Cities and towns may issue bonds, the proceeds of which shall be used to purchase land and build and erect thereon buildings to be used for public assemblage and for the use and occupation of men who were in the service of the country in the German war and the Spanish-American war, including the use for social, educational and recreation purposes.

SECTION 2. Such buildings shall be under the immediate control of

trustees or directors, the appointment and number of which and the duties of the same to be prescribed by an ordinance or by-laws.

Section 3. The city or town availing itself of the provisions of this act may erect and maintain in said buildings stores on the ground floor and devote the basement of said building or a proportional part thereof to mercantile or business purposes, and the trustees or directors may charge a reasonable rent for the occupation of the same.

Section 4. All income derived in any manner from the use or occupation of said building shall be used for the purposes of maintaining said buildings, and in the maintenance account there shall be a reasonable amount set apart for up-keep and depreciation, and the balance, if any, shall be paid each year into the city treasury and be applied to the payment of maturing bonds. Any deficiency required in order to meet the maintenance and depreciation charges shall be borne by the city or town by annual appropriation.

Section 5. This act shall take effect upon its passage.

The principal question raised by your inquiry is whether or not the provision that a city or town "may erect and maintain in said buildings stores on the ground floor and devote the basement of said building or a proportional part thereof to mercantile or business purposes, and the trustees or directors may charge a reasonable rent for the occupation of the same" is constitutional.

Money raised by taxation can be expended only for public purposes. The Legislature has no power to authorize the expenditure of money raised by bonds which ultimately must be paid, in part at least, through taxation, for other than public uses. In its last analysis any other principle is a taking of private property for a private use, which is contrary to the fundamental conceptions of our form of government.

It has been decided that once a municipality has erected buildings, built in good faith and used for municipal purposes, it has the right to allow such buildings, or parts thereof, to be used incidentally for other purposes, either gratuitously or for a compensation. *French* v. *Quincy*, 3 Allen, 9; *Worden* v. *New Bedford*, 131 Mass. 23.

It is equally well settled that a municipality cannot enter into private business by erecting and maintaining a public building for gain. *Wheelock* v. *Lowell*, 196 Mass. 220; *Spaulding* v. *Lowell*, 23 Pick. 71, 80; *Opinion of the Justices*, 182 Mass. 605.

The buildings contemplated under the proposed act are to be erected in part for mercantile purposes to aid in meeting

the expense of the erection and maintenance of that part used for public purposes. This is not a case where a building is erected to be used in its entirety for public purposes and incidentally is to be let for private purposes when not required for the public purposes for which it is erected. In my opinion, the situation is the same as if on one lot two buildings were to be erected, one to be devoted to public purposes, the other to private purposes, the income derived from the one devoted to private purposes to be applied to meet in part the maintenance and cost of the building devoted to public purposes.

In effect the proposition is to devote public funds in mercantile pursuits to enable the community better to sustain its public burdens, which, in my judgment, cannot be done.

Accordingly, I advise you that, in my opinion, the bill in its present form would be unconstitutional if enacted.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Alien — Eligibility to Public Office.

A law providing that an alien who claimed exemption from military service during the World War shall never be eligible to hold public office is unconstitutional.

MARCH 3, 1919.

Hon. THOMAS WESTON, Jr., *Chairman, Committee on Constitutional Amendments.*

DEAR SIR: — In reply to your inquiry as to whether the article of amendment contained in House Resolve No. 466 would be unconstitutional as conflicting with the provisions of the Federal Constitution, I submit the following.

The proposed article of amendment is as follows: —

No person who pleaded his alien status as an exemption from military service during the war against Germany shall ever be eligible to hold and enjoy any office of honor, trust or profit under the government of the commonwealth, or any county, city or town thereof.

There is no doubt that a State may prescribe qualifications for the holding of office under its government.

Mass. Const., c. I, § I, art. IV.
Opinion of the Justices, 115 Mass. 602.

Section 10 of article I of the Constitution of the United States provides, in part, as follows: —

> No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. . . .

The question involved is whether the proposed amendment can be justified as establishing a qualification for office, or is in effect a punishment for an act already done.

It was said by Mr. Justice Field, in *Cummings* v. *The State of Missouri*, 4 Wall. 277, 321, that —

> The theory upon which our political institutions rest is that all men have certain inalienable rights — that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

A provision for a qualification must have some reasonable relation to that purpose. Under the form of creating a qualification a State cannot evade the inhibition contained in the Federal Constitution.

It seems to me obvious that the claiming of an exemption from military service by an alien has no such reasonable connection with his fitness for office, when he shall become a citizen, as to take such a provision out of the inhibition prescribed by the Federal Constitution.

I am of the opinion, in view of the decision in *Cummings* v. *The State of Missouri*, already referred to, and the cases of *Ex parte Garland*, 4 Wall. 333, and *Pierce* v. *Carskaden*, 16 Wall. 234, that such an amendment to the Constitution must be viewed as inflicting a punishment upon such aliens who may hereafter become citizens of the United States for an act already done which was lawful when done. In *Cummings* v. *The State of Missouri* it was pointed out that "under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights."

The principle decided in *Cummings* v. *The State of Missouri* and *Ex parte Garland*, *supra*, has been recognized by the

Supreme Court of the United States as late as 1912. See *Johannesen* v. *United States*, 225 U. S. 227, at 242.

Accordingly, I beg to advise you that in my opinion the proposed article of amendment, if adopted, would be in violation of the Constitution of the United States.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Commissioner of Animal Industry — Orders and Regulations — Acts of Congress.

Orders, regulations and requirements of the Commissioner of Animal Industry for permission to ship anti-hog cholera serum into this Commonwealth, in accordance with the provisions of R. L., c. 90, and St. 1912, c. 608, and amendments thereof, where Congress has prescribed and authorized rules and regulations in respect to interstate trade in such serums, cease to have any force and effect.

MARCH 6, 1919.

Dr. LESTER H. HOWARD, *Commissioner of Animal Industry.*

DEAR SIR: — You have requested my opinion on the question of whether or not the orders and regulations relative to the distribution, sale and use of anti-hog cholera virus or serum and the regulations for serum companies, promulgated by you in accordance with the provisions of R. L., c. 90, and St. 1912, c. 608, and acts in amendment thereof and addition thereto, are in conflict with the acts of Congress or with the authority of Congress to regulate interstate commerce.

Under the provisions of our statutes, you have the power to make orders and regulations relative to the prevention, suppression and extirpation of contagious diseases among domestic animals, and those orders and regulations have to be approved by the Governor and Council.

Under the provisions of the statutes cited, you made the following order on Oct. 28, 1914: —

To all persons whom it may concern.

Whereas, the disease known as hog cholera, which is a contagious disease and is so recognized under the laws of this Commonwealth, prevails extensively among swine in this Commonwealth, and whereas it has become necessary to adopt measures for the prevention of the spread of said contagious disease;

Now, therefore, acting under and by virtue of the authority vested in me by the provisions of chapter 90 of the Revised Laws, and chapter

608 of the Acts of 1912, and all acts and amendments thereof and in addition thereto, and all other authority me hereto enabling, I do hereby make the following order and regulation: —

No person, firm or corporation shall distribute, sell or use in the Commonwealth of Massachusetts virulent blood from hog-cholera-infected hogs, or "virus," or anti-hog cholera serum, unless written permission has been obtained from the Commissioner of Animal Industry for such distribution, sale or use, which written permission will be granted persons deemed proper by the Commissioner of Animal Industry.

This order shall take effect upon its approval.

This order shall be published by sending a copy to each inspector of animals in the Commonwealth, and by distribution to known breeders of swine, to commercial houses known to be dealing in the aforesaid commodity, and to veterinarians registered under the laws of the Commonwealth.

On Sept. 15, 1915, you made the following order: —

To all persons whom it may concern.

Whereas, the Department of Animal Industry is now actively engaged in the control and eradication of hog cholera, which is a contagious disease, and is so recognized under the laws of this Commonwealth;

And whereas, successful control of this disease has been accomplished only in those States which have regulated and restricted the sale, distribution, possession and administration of various commercial products known as anti-hog cholera serum, and virulent blood or virus, which products, while designed to prevent or cure hog cholera, in the hands of untrained men tend to create and cause an epidemic of this disease;

Now, therefore, acting under and by virtue of the authority vested in me by the provisions of chapter 90 of the Revised Laws, and chapter 608 of the Acts of 1912, and all acts and amendments thereof and in addition thereto, and all other authority me hereto enabling, I do hereby make the following order and regulation: —

No person, firm or corporation shall, directly or indirectly, administer or procure, or cause to be administered, or have in possession with intent to have administered, directly or indirectly, within the Commonwealth of Massachusetts, anti-hog cholera serum, virulent blood or virus, or any other preparation of a similar composition under whatever name, and administered in a similar way for the prevention and cure of hog cholera, unless written permission has been obtained from the Commissioner of Animal Industry for such administration or possession.

This order shall take effect upon its approval.

This order shall be published by sending a copy to each inspector of animals in the Commonwealth, and by distribution to known breeders of swine, to commercial houses known to be dealing in the aforesaid products, and to veterinarians registered under the laws of the Commonwealth.

You have also made the following regulations for the issuing of a permit to ship anti-hog cholera serum or hog cholera virus to be used within the Commonwealth: —

Section 1. A permit shall be obtained from the Commissioner of Animal Industry for each individual shipment of either anti-hog cholera serum or hog cholera virus to be used within the State of Massachusetts, which permit shall be inoperative until the provisions mentioned in section 3 hereof have been complied with.

Section 2. All anti-hog cholera serum and hog cholera virus to be used in Massachusetts, permit for the shipment of which has been granted, shall be shipped in care of the Department of Animal Industry to such place as the Commissioner shall designate.

Section 3. Every person, firm or corporation which receives a permit to ship anti-hog cholera serum or hog cholera virus to be used in Massachusetts shall build, equip and maintain a building suitable for the purpose of testing these products, the plans and location for this building to be approved by the Commissioner of Animal Industry before the buildings are constructed.

Section 4. The entire expense of testing anti-hog cholera serum and hog cholera virus, and for storing the same before and after testing, shall be borne by the company submitting the same for test.

Section 5. Every lot of anti-hog cholera serum shall be tested by a veterinarian registered in Massachusetts who shall be approved by the Commissioner of Animal Industry, and in a manner prescribed by said Commissioner.

Section 6. If any anti-hog cholera serum fails to pass the prescribed test, the entire lot within the State of Massachusetts bearing the same serial number shall be sealed and returned to the company holding the permit, or shipped to any other address outside of the State of Massachusetts furnished by said company; shipment in either case to be at the expense of said company.

Section 7. Anti-hog cholera serum and hog cholera virus, after passing tests approved by the Commissioner of Animal Industry, shall be held under conditions prescribed by him, and cannot leave the custody of the Department except for immediate use by its authorized agents.

Section 8. If it becomes necessary, while virus is being tested, to use the same in order to prevent it reaching the date of expiration, and it is later found that this virus has not passed the required test, all such product anywhere in the State which bears the same serial number

shall be condemned and destroyed. All animals upon which a portion of said virus has been used shall receive whatever treatment the Commissioner of Animal Industry deems necessary, the same to be done at the expense of the company producing said virus.

Section 9. Copies of records of the physiological, bacteriological and microscopical tests to which anti-hog cholera serum and hog cholera virus have been subjected shall be furnished the Commissioner of Animal Industry with each shipment of these products, or as often as in his opinion may be necessary.

Section 10. Any person, firm or corporation applying for a permit under above regulations must satisfy the Commissioner of Animal Industry that their products shipped to Massachusetts are not produced in a plant located within one-half mile of a public stockyard or within any district under quarantine by order of the Bureau of Animal Industry of the United States Department of Agriculture.

Section 11. Each company which applies for a permit to ship anti-hog cholera serum or hog cholera virus to the Department of Animal Industry agrees to observe all present and future orders which the Commissioner may consider to be necessary for the proper control of hog cholera in Massachusetts.

The shipment of such serum from state to state is a branch of interstate commerce, and any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the shipment of such a serum from one state to another is taken under direct national supervision, and a system devised by which contaminated and dangerous serum may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Hennington* v. *Georgia*, 163 U. S. 299, 317; *N. Y., N. H. & H. R.R. Co.* v. *New York*, 165 U. S. 628, 631; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200. The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject is thereby left under the police power of the States.

It has been held that where Congress has not by any statute covered the whole subject of transportation of certain articles, a wide field is left for the exercise by the States of

their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases. *Reid* v. *Colorado*, 187 U. S. 137; *Rasmussen* v. *Idaho, supra; Adams* v. *Lytle*, 154 Fed. 876; *Kansas City Ry. Co.* v. *State*, 90 Ark. 343. But the difficulty in this case, in my opinion, is that Congress has prescribed and authorized rules and regulations in respect to interstate trade in such serums which are paramount throughout the Union.

Chapter 145 of the act of Congress of March 4, 1913, provides, in part: —

> That from and after July first, nineteen hundred and thirteen, it shall be unlawful for any person, firm, or corporation to prepare, sell, barter, or exchange . . . , or to ship or deliver for shipment from one State . . . to any other State . . . any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in the treatment of domestic animals, and no person, firm, or corporation shall prepare, sell, barter, exchange, or ship as aforesaid any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals, unless and until the said virus, serum, toxin, or analogous product shall have been prepared, under and in compliance with regulations prescribed by the Secretary of Agriculture, at an establishment holding an unsuspended and unrevoked license issued by the Secretary of Agriculture as hereinafter authorized. . . . That the Secretary of Agriculture be, and hereby is, authorized to make and promulgate from time to time such rules and regulations as may be necessary to prevent the preparation, sale, barter, exchange, or shipment as aforesaid of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals, and to issue, suspend, and revoke licenses for the maintenance of establishments for the preparation of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, intended for sale, barter, exchange or shipment as aforesaid. . . . All licenses issued under authority of this Act to establishments where such viruses, serums, toxins, or analogous products are prepared for sale, barter, exchange, or shipment as aforesaid, shall be issued on condition that the licensee shall permit the inspection of such establishments and of such products and their preparation; and the Secretary of Agriculture may suspend or revoke any permit or license issued under authority of this Act, after opportunity for hearing has been granted the licensee or importer, when the Secretary of Agriculture is satisfied that such license or permit is being used to facilitate or effect the preparation, sale, barter, exchange or shipment as aforesaid, . . . of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals.

The act then goes on to provide that any officer of the Department of Agriculture may inspect any establishment licensed under this act at any hour during the daytime or night time, and that any person, firm or corporation violating any of the provisions of the act shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment.

In my judgment, the provisions of this act of Congress and the regulations of the Department of Agriculture made thereunder cover the whole subject of the preparation, sale and shipment of the hog cholera serum in question. The entire subject has been taken under direct national supervision, and under the act and regulations worthless, contaminating, dangerous or harmful serums may be excluded from interstate commerce. This being the case, local and State regulations in respect of the matter cease to have any force, and the rules and regulations made in accordance with the act of Congress alone control.

Accordingly, I am of the opinion that the orders and regulations and the requirements for permission to ship hog cholera serum into this Commonwealth made by you are in conflict with the act of Congress of March 4, 1913, and with the authority of Congress to regulate interstate commerce.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Co-operative Banks — Matured Shares — Dues Capital.

Matured shares of a co-operative bank held by it under the provisions of St. 1914, c. 646, § 6, are to be treated as "dues capital."

MARCH 17, 1919.

Hon. AUGUSTUS L. THORNDIKE, *Bank Commissioner.*

DEAR SIR: — You have requested my opinion as to whether any portion of matured shares continued in a co-operative bank, under the provisions of St. 1914, c. 643, § 6, is to be treated as "dues capital." "Dues capital" is referred to in St. 1912, c. 623, §§ 35 and 36, having to do with the guaranty fund and the surplus account.

By St. 1913, c. 264, a co-operative bank may "invest a sum not exceeding its surplus account in the purchase of a suitable site and the erection or preparation of a suitable building for the convenient transaction of its business, but in no case exceeding two per cent of its dues capital."

A co-operative bank holding a number of matured shares desires to purchase a bank building, and the question arises as to whether any part of the matured shares is to be considered as "dues capital."

Under the provisions of law relating to co-operative banks, capital has always been considered as consisting of (1) dues capital, — that part of the funds of the bank that has been paid in by members thereof as dues; and (2) profits capital, — that part consisting of interest which the bank has received from loans made by it from the savings of its members and from other minor sources of income.

I see no reason why matured shares, which, by the provisions of St. 1914, c. 643, § 6, may be continued under certain conditions, should be considered as a new form of capital. I assume it is possible at any time to ascertain that portion of the matured shares which is made up of dues capital and that portion which is made up of profits capital.

Obviously, the capital applicable to the matured share is the same the moment after the share matures as the moment before, and thus it continues to be made up of part dues capital and part profits capital, and I think must continue to be treated as such unless the Legislature has expressed an intention that it should be treated otherwise.

It has been suggested that if any portion of the capital applicable to matured shares can be treated as dues capital the nature of co-operative banks is seriously changed, because of the provisions of law providing for the reservation of an amount of the profits as a guaranty fund until it amounts to 5 per cent of the dues and profits capital. There is much force in this suggestion. However, I am of the opinion that it cannot be assumed that the Legislature, in passing the provision authorizing continued matured shares, did not give this subject consideration. I find nothing in the act which indicates an intention upon the part of the Legislature that the capital applicable to matured shares should be treated otherwise than the other capital of the bank.

Accordingly, I am of the opinion that your inquiry is to be answered in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Property of the Commonwealth — Sidewalk Assessment.

The Commonwealth is not liable for a sidewalk assessment levied by a town for a sidewalk constructed in front of an armory owned by the Commonwealth in that town.

March 26, 1919.

Mr. George Howland Cox, *Secretary, Armory Commissioners.*

Dear Sir: — I acknowledge your letter in which you ask my opinion on the following matter: —

I have a bill from the town of Stoneham, dated Dec. 28, 1914, for a sidewalk assessment, State armory, Main Street, $160.79. Will you kindly advise me if the Commonwealth is liable for such an assessment.

St. 1909, c. 490, pt. I, § 5, cl. 2, expressly provides that "the property of the commonwealth, except real estate of which the commonwealth is in possession under a mortgage for condition broken," shall be exempt from taxation. The words "the property of the commonwealth" mean the same as "all the property of the commonwealth," as decided in the case of *Corcoran* v. *Boston*, 185 Mass. 325.

The property of the Commonwealth is exempt from taxation because, as the sovereign power, it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished, discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions. As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication.

Inhabitants of Worcester County v. *Mayor and Aldermen of Worcester*, 116 Mass. 193, 194.

Accordingly, I am of the opinion that the Commonwealth is not liable for this assessment.

Very truly yours,

Henry C. Attwill, *Attorney-General.*

Commonwealth — Cities and Towns — Troy Weight.

Under the provisions of R. L., c. 62, §§ 11 and 12, as amended, the Commonwealth is not obliged to furnish standard troy weights and measures to cities and towns.

March 27, 1919.

Mr. Thure Hanson, *Commissioner of Standards.*

Dear Sir: — You have requested my opinion as to "whether or not it is incumbent upon this State to furnish cities and towns with standard troy weights, or shall the town or city, upon designation by this office, furnish these weights at their own expense?"

The original act in this connection was St. 1890, c. 426, which is as follows: —

Section 1. The standard weights, measures and balances which shall be kept by the counties, cities and towns of the Commonwealth, except as hereinafter provided, shall be the following: . . .

Section 2. In addition to the standards mentioned above, each shire town, and each city not a shire town, shall keep the metre and kilogram, and also such standard troy-weights as the treasurer and receiver-general may designate. . . .

Section 3. Any county, city or town which has not received from the Commonwealth a complete set of the standard weights, measures and balances, as provided in section one, shall at once make application to the treasurer and receiver-general for the weights, measures and balances which such county, city or town has not received, and the same shall be furnished to such county, city or town at the expense of the Commonwealth.

. . . . . .

It will be noted that by section 3, above quoted, it was the intent of the statute that the Commonwealth should furnish to each county, city or town a set of the standard weights, measures and balances as provided in section 1, and that no provision is made for the furnishing by the Commonwealth of standard troy weights, mentioned in section 2.

R. L., c. 62, § 11 (since amended by St. 1907, c. 534, § 3, and by St. 1909, c. 310), provided as follows: —

The treasurer shall provide each county, city and town with a complete set of the standard weights, measures and balances named in the following section.

R. L., c. 62, § 12 (since amended by St. 1909, c. 310), provided: —

Counties, cities and towns shall keep the following standard weights, measures and balances: . . . and each city and each shire town shall keep the meter and kilogram and such standard troy weights as the treasurer and receiver general may designate. . . .

The commissioners, when revising the laws and statutes for the purpose of incorporating them in the Revised Laws, were given authority to omit enactments which were redundant. By virtue of this authority St. 1890, c. 426, § 2, was omitted as redundant, and the following was added to section 12 in place thereof: —

Each city and each shire town shall keep the meter and kilogram and such standard troy weights as the treasurer and receiver general may designate.

It is apparent, therefore, that it was not intended that the meaning and purposes of St. 1890, c. 426, should be changed. It being clear that under sections 1, 2 and 3 of said chapter 426 it was not incumbent upon the Commonwealth to furnish each city and town standard troy weights, it is my opinion that R. L., c. 62, §§ 11 and 12, as amended, do not make it incumbent upon the Commonwealth to furnish each city and town standard troy weights and measures.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Insurance — Inducement not specified in Policy — Loans and Insurance.

A provision by an insurance company that the issuance of a policy should be dependent upon the policyholder making a loan, or the making of a loan dependent upon the borrower taking out a policy, is a violation of the provisions of St. 1907, c. 576, § 69.

APRIL 30, 1919.

Hon. FRANK H. HARDISON, *Insurance Commissioner.*

DEAR SIR: — I have considered your inquiry as to whether the method of the conduct of business by the Morris Plan Insurance Society, if conducted in this Commonwealth as set forth in a brief submitted by its counsel, would constitute a violation of that part of section 69 of chapter 576 of the Acts of 1907 which reads as follows: —

. . . or give, sell or purchase or offer to give, sell or purchase as inducement to insurance or in connection therewith, any stocks, bonds

or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

The words "or in connection therewith" are, I think, to be construed as meaning something in addition to inducement. It is not to be assumed that the Legislature makes use of idle words. It is my view that the words mean that as a part of the transaction of insuring there shall be no sale, gift or purchase of anything other than that set forth in the policy. I do not think that the section prohibits an insurance agent selling stocks, bonds or securities or other like things at the same time he writes insurance, but the sale must not be connected in any way with the insurance; that is, they must be independent transactions.

It is claimed by the Morris Plan Insurance Society that the provisions of the statute are not violated by requiring one who desires a loan to take out an insurance policy, nor by agreement made by a borrower to give his insurance exclusively to the lender, and that it has been so held in other jurisdictions. I do not concur in this view, and I am of the opinion that such transactions would be held in this Commonwealth to be in violation of said section.

Your question therefore resolves itself to this: Does the lending of money and the taking of a note therefor, with indorsers, co-makers or sureties, involve a gift, sale or purchase of anything of value, within the terms of the statute; and if so, is the gift, sale or purchase in connection with insurance?

The notes taken by the Morris Plan Insurance Society at the time the loans are made are more than mere evidences of the debt created by the loan, and I think the transactions constitute purchases of the notes. This being so, if the loans are made in connection with insurance there is a violation of the provisions of the statute. Furthermore, it may well be contended that the society gives a privilege of securing a loan. Whether there is a violation of the statute is largely a question of fact. If the insurance is in any way made dependent upon the policyholder making a loan, or if the loan is made dependent upon the borrower taking out a policy of insurance, then, in my opinion, the transaction is in violation of the statute; otherwise, not.

As to the suggestion made by the company that the terms

of the statute will be complied with if the company indorses on each policy where a loan is made that such loan has been made, I do not concur in the suggestion. The statute provides that that which is given, sold or purchased of value shall be specified in the policy. It seems to me it contemplates that it shall be incorporated as one of the provisions of the policy, and applicable to each holder thereof in the class.

Furthermore, I am of the opinion that there is a limit upon that which may be offered, sold or purchased in connection with the insurance transaction. I do not feel that our laws contemplate that in connection with the insurance business companies can carry on businesses foreign to insurance. St. 1907, c. 576, § 26, specifically provides that domestic companies shall not engage in any other business than the business for which the insurance company is incorporated.

Moreover, grave practical difficulties will arise if the provisions of the section are held to authorize insurance companies to specify and undertake obligations which are foreign to insurance. The Commissioner passes upon the premiums, and it is difficult to see how he can pass intelligently upon the premium required if insurance companies are authorized to undertake any and all kinds of obligations, the cost of which it is impracticable to determine.

Accordingly, I am of the opinion that the provisions of the statute will not be satisfied by such an indorsement.

The form of policy submitted to me seems to indicate that the manner in which the business is being transacted in other states by the Morris Plan Insurance Society is done in connection with the lending of money. The last condition on the second page of the policy is as follows: —

Payment of Premiums. — If the insured be indebted to the first beneficiary named in said schedule the insured agrees not to allow this policy to lapse for the non-payment of premiums.

Obviously, this is a condition required by the insurance company, not for its own benefit but for the benefit of the loan company, which under the arrangement is named as the first beneficiary. If you should determine as a matter of fact that the lending of the money by the Morris Plan Insurance Society and the doing of the insurance business by the Morris Plan Insurance Society are to be conducted as separate and distinct

businesses, although undertaken, for the most part, by an agent representing both, it is obvious that the last condition named on the second page should be eliminated from the policy.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Supervisor of Plans — Regulations — Fireproof Construction.

Under St. 1913, c. 655, § 15, the supervisor of plans may require fireproof construction in the lower portions of apartment buildings of extreme height, so long as the requirement is made in good faith, is not discriminatory, and applies to all buildings of the same class thereafter to be constructed.

MAY 2, 1919.

Mr. JOHN H. PLUNKETT, *Chief, Massachusetts District Police.*

DEAR SIR: — I acknowledge your communication in which you request my opinion as to whether the provision in St. 1913, c. 655, § 15, that the supervisor of plans may require "that proper fire stops shall be provided in the floors, walls, partitions and stairways of such building," is sufficiently elastic to be so construed that the supervisor of plans may require fireproof construction in the lower portions of certain apartment buildings of extreme height, where he feels that extra precaution should be taken for the safety of the occupants thereof.

It may be that this provision, standing alone, would not justify requiring fireproof construction in the lower portion of an apartment building of extreme height, but I think that, taken in connection with the sentence following, the supervisor of plans would be justified in making such a requirement. The sentence following is as follows: —

He may make such further requirements as may be necessary to prevent the spread of fire, or its communication from any steam boiler or heating apparatus therein.

Said section 15 was originally enacted in 1888 as section 1 of chapter 316 of the Acts of 1888, and as first enacted read, in part, as follows: —

Such inspector may require that proper fire stops shall be provided in the floors, walls and partitions of such buildings and may make such

further requirements as may be necessary or proper to prevent the spread of fire therein or its communication from any steam boiler or heating apparatus.

The only changes made since that time in this provision are the elimination of the words "or proper," the elimination of the word "therein" after the word "fire" and the substitution of a comma therefor, and the addition of the word "therein" after the word "apparatus." The meaning of the provision has not been changed.

It is to be borne in mind that section 15 is a provision to require buildings to be so constructed as to insure the safety of the occupants thereof in the event of fire, and the provision in the section that the inspector may make such further requirements as may be necessary to prevent the spread of fire therein, in my opinion, gives to the inspector authority to require such provisions as he may deem reasonably necessary to prevent the spread of fire in the building. This necessarily involves the power to require walls, floors and partitions to be of such construction and such material as the inspector may deem necessary to prevent the spread of fire in the building.

Accordingly, I am of the opinion that the inspector has the power to require such fireproof construction in the lower portions of apartment buildings of extreme height as may be necessary, in his judgment, to prevent the spread of fire in the buildings, so long as the requirements are made in good faith and are not discriminatory, and apply to all buildings of the same class and character thereafter to be constructed. The inspector's judgment in the first instance as to what is necessary is controlling, and I doubt if the requirements can be considered unreasonable so long as they require no more than have been established by the Legislature as reasonable provisions in relation to buildings in the city of Boston of a like character to those enumerated in section 15.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Governor — Return of Bill to Legislature — Resubmission.

Under the provisions of article LVI of the Amendments to the Constitution a bill returned to the General Court by the Governor with recommendations of amendment cannot be resubmitted to him without re-enactment by both branches of the General Court.

May 12, 1919.

Hon. Edwin T. McKnight, *President of the Senate and Chairman of the Committee on Rules.*

Sir: — I acknowledge your communication in which you request my opinion upon the following questions: —

When, in accordance with the provisions of article LVI of the Amendments to the Constitution, a bill is returned by the Governor with a recommendation that amendments specified by him be made therein, and the branch to which the bill has been returned fails to amend it, what procedure must follow in that branch, or in both branches, in order that the said bill may again be laid before the Governor for his approbation?

If the branch to which the bill is so returned fails to amend it, can that branch thereupon proceed to re-enact the bill, and return it to the Governor, without first giving the co-ordinate branch opportunity to consider the bill with reference to any amendment to which it may be subject, under the provisions of the said article LVI?

Article LVI of the Amendments to the Constitution reads as follows: —

The governor, within five days after any bill or resolve shall have been laid before him, shall have the right to return it to the branch of the general court in which it originated with a recommendation that any amendment or amendments specified by him be made therein. Such bill or resolve shall thereupon be before the general court and subject to amendment and re-enactment. If such bill or resolve is re-enacted in any form it shall again be laid before the governor for his action, but he shall have no right to return the same a second time with a recommendation to amend.

When a bill or resolve is returned under the provisions of this article to the branch of the General Court in which it originated, it is before the General Court and subject to amendment and re-enactment. If it is re-enacted in any form it shall again be laid before the Governor for his action.

I am of the opinion that the General Court is not restricted

to the amendments proposed by the Governor in amending a bill returned. The suggestions of the Governor may entail further amendments, or other amendments may better secure the purposes his suggested amendments are designed to accomplish. That this was contemplated by the framers of the amendment seems plain from the third sentence of the amendment, which provides that if the "bill or resolve is re-enacted in *any* form it shall again be laid before the governor for his action." Furthermore, this provision of the article, in my judgment, requires re-enactment by both branches of the General Court of a bill returned. It is to be observed that there is no provision for again laying the bill before the Governor without re-enactment. It may be that one branch may be of the view that a bill as to which the Governor suggests an amendment should not be re-enacted without amendment. Mass. Const., pt. 2d, c. I, § I, art. I, provides that each branch shall have a negative on the other. Thus, it would seem to follow that a bill returned may be amended in such manner as the General Court may determine, or may be rejected; but before it can again be laid before the Governor for his action it must be re-enacted by the General Court, that is, by both branches thereof.

Accordingly, I am of the opinion that the answer to your first question is that the bill must be re-enacted by both branches of the General Court in order that it may again be laid before the Governor. The order in which it may be re-enacted by the Senate and House is a matter to be determined by the General Court.

Your second question is to be answered in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

State Board of Labor and Industries — Employment of Nurses — Factories and Shops.

Under Gen. St. 1918, c. 110, the State Board of Labor and Industries has no authority to require persons, firms and corporations operating a factory or shop, in which machinery is used, to furnish a nurse or other person in attendance on its employees.

MAY 24, 1919.

State Board of Labor and Industries.

GENTLEMEN: — I acknowledge your communication of recent date, in which you request my opinion as to whether

the provisions of Gen. St. 1918, c. 110, authorize your Board to make the following requirement contained in Bulletin No. 14 issued by your Board, viz.: —

> Such room shall be placed under the charge of a qualified nurse or other person trained in and competent to administer first aid, who shall be employed on the premises and on call when necessary to administer first aid only, unless further advised by a physician, and who shall keep a record of all cases of accident and sickness treated at the first-aid room, such records to be open to the inspection of the state board of labor and industries or its representatives.

Said chapter 110 is an amendment of St. 1909, c. 514, § 104, as amended by St. 1914, c. 557, and by Gen. St. 1915, c. 216. The section as originally enacted is contained in St. 1907, c. 164, entitled "An Act to provide for the keeping of medical and surgical appliances in factories." As originally enacted it required every person, firm or corporation operating a factory or shop in which machinery was used for manufacturing purposes, and certain other purposes, at all times to keep and maintain, free of expense to the employees, such a medical and surgical chest as should be required by the local board of health of any city or town where such machinery was used. By St. 1914, c. 557, certain changes in the statute were made, one of which was the requiring of a medical or surgical chest, or both, as might be required by the State Board of Labor and Industries. This act was entitled "An Act relative to the providing of medical and surgical chests in factories and machine shops." By Gen. St. 1915, c. 216, the act was further amended by providing as follows: —

> Every such person, firm or corporation, employing one hundred or more persons, shall, if so required by the state board of labor and industries, provide accommodations, satisfactory to said board, for the treatment of persons injured or taken ill upon the premises.

The title of the act was as follows: "An Act to require manufacturing establishments to provide rooms and equipment for the treatment of injured or sick employees."

By Gen. St. 1918, c. 110, the act was further amended by providing that the persons, firms and corporations governed by the act should also provide "suitable and sanitary facilities for heating or warming food to be consumed by those employees of the factory or shop who so desire," the act being entitled "An Act to require certain manufacturing and mechanical estab-

lishments to provide for their employees facilities for heating or warming food."

The specific question raised by your inquiry is this: Can the persons, firms and corporations coming within the provisions of the act be compelled, if required by the State Board of Labor and Industries, to provide a qualified nurse or other person trained in and competent to administer first aid in charge of the so-called first-aid room, who shall be employed on the premises and on call when necessary to administer first aid, and who shall keep a record of all cases of accident and sickness treated at the first-aid room?

This depends upon the interpretation to be given the words "accommodations for the treatment of persons," as used in the act.

It is to be borne in mind that the statute is a criminal statute, and therefore is to be construed strictly against the Commonwealth, and unless it is reasonably clear that the term "accommodations" includes a nurse or other person who performs the duties of a nurse, such a requirement cannot be made by your Board.

It is to be noted that the accommodations which your Board may require are accommodations for the treatment of persons injured or taken ill upon the premises. You are not specifically authorized to require the treatment of persons injured or taken ill on the premises, or the furnishing of such treatment. Requirements by implication are not favored in criminal law.

Such light as can be obtained from the title of Gen. St. 1915, c. 216, seems to negative the idea that your Board can require anything other than physical accommodations. That chapter is entitled "An Act to require manufacturing establishments to provide rooms and equipment for the treatment of injured or sick employees." While the word "equipment" may at times be used to include human beings, ordinarily it is used to signify supplies and apparatus for a special service.

Accordingly, I am constrained to advise you that it is my opinion that persons, firms and corporations cannot be required, under the provisions of Gen. St. 1918, c. 110, to furnish a nurse or other person in attendance as required by said bulletin.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Gas Companies — Net Maximum Rates — Gross Rates.

A gas company may, after the lawful establishment of a net maximum rate, establish a reasonable gross rate, in excess of such net rate, to be paid by all customers who do not, prior to a specified date, pay the net rate.

May 26, 1919.

Hon. Edwin T. McKnight, *President of the Senate.*

Dear Sir: — I have the honor to acknowledge the receipt of a copy of the following order passed by the Honorable Senate: —

Ordered, That the Senate request the opinion of the Attorney-General as to whether a gas company, as defined in section 1 of chapter 742 of the Acts of 1914, may lawfully, after the establishment by the Board of Gas and Electric Light Commissioners or otherwise of a net maximum rate to be charged by such company, establish a gross rate, in excess of said net rate, which shall be paid by all customers who do not, prior to a specified date, pay the net rate.

I assume that the question presented by the order arises from a practice, which I am informed by the chairman of the Board of Gas and Electric Light Commissioners has prevailed for many years, of fixing in the orders of said Board, issued under the provisions of St. 1914, c. 742, § 162, a net price that may be charged by the company affected by the order. It is provided by said section 162 that upon the complaint in writing of the mayor of a city or the selectmen of a town, or of twenty customers, either as to the quality or price of the gas or electricity sold and delivered, the Board, after a hearing, may order any reduction in the price of gas or electricity or an improvement in the quality thereof; and it is further provided that the maximum price fixed by such order shall not thereafter be increased by the company except as provided in the following section. The following section (§ 163) provides for a revision of orders relative to the price and quality of gas or electricity made by the Board, upon application by the company.

Apart from these two sections, and except in so far as by reason of the nature of the business the rates must be reasonable, there are no provisions of general law that restrict a gas or electric light company as to the charges it may make for the service it furnishes, or as to the regulations it may adopt to

insure prompt payment in accordance with the terms upon which it sells gas or electricity. Thus, a gas or electric light company as to which no order has been made may increase the price of gas or electricity without regard to said sections.

As I understand it, therefore, the question presented is this: Where a gas company has been charging a net price to those paying their bills promptly when due, and a larger price to those failing to pay when due, and the Board orders a reduction in or a revision of the net price, does the action of the Board in fixing a net price prohibit the charging thereafter of a gross price to the users of gas who do not pay the charges when due?

Assuming that the Board is authorized to make such an order, which I deem it unnecessary to determine, as otherwise it would seem no order binding upon the company is made, I am of the opinion that in such a case the company may charge a gross rate. A long-continued practice, acquiesced in by the public, is not lightly to be disturbed. But for the last sentence of section 162 there would be no doubt, as the only order made by the Board is in relation to the net price, leaving the company free to charge, as before, a gross price in excess of the net price to those not paying their bills promptly. The last sentence of the section provides that "the maximum price fixed by such order shall not thereafter be increased by said company except as provided in the following section." This provision originally appeared as a part of St. 1888, c. 350. The other provisions of that act are now contained in said section 163. The purpose of the provision seems to have been to insure that a price once fixed by an order of the Board should not thereafter be increased except as provided in said chapter 350. It is a reasonable view to take that it was not intended by this provision to interfere with the conduct of the business of a company other than as ordered by the Board. It is to be noted that apparently the provision has no application to an order made under the provisions of said section 163. The intent was to prohibit a company from increasing the price fixed by an order of the Board. When, by order, the Board deals solely with a net price, it contemplates that a gross price in excess will be charged, and impliedly authorizes such a charge. Obviously, the gross rate must be reasonable, and the difference between the gross and net rates must have relation to the expense to which the company is put by

the failure of the users of gas to pay the net rate when due. Assuming, therefore, that the gross rate charged is a reasonable rate, the question of the Honorable Senate is to be answered in the affirmative.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Street Railway — Public Trustees — Limitation of Stock Issue.

Under Spec. St. 1918, c. 188, § 4, the public trustees of the Eastern Massachusetts Street Railway Company are not restricted to the issuance of stocks, bonds and other evidences of indebtedness to the total amount mentioned therein as "the entire capitalization" plus or minus the adjustments to be made.

MAY 29, 1919.

His Excellency CALVIN COOLIDGE, *Governor of the Commonwealth.*

SIR: — I acknowledge your communication in which you request my opinion as to what the amount of the capital of the Eastern Massachusetts Street Railway Company properly should be under the provisions of Sp. St. 1918, c. 188. Since receiving your communication I have ascertained from the trustees that what they really desire is my opinion as to whether the new company may, under the provisions of section 4 of the act, issue stock, bonds and other evidences of indebtedness to a total amount in excess of $40,282,340 plus or minus such amount as shall be added thereto or deducted therefrom in accordance with the determination of the Public Service Commission, as provided in said section.

Said chapter 188 provides for the purchase of the property and franchises of the Bay State Street Railway Company by a new company to be organized as provided in the act. Section 1 of the act provides that "the new company, upon the acquisition of the railways, property and franchises of the company may, subject to the provisions of this act, exercise all the powers and privileges of a street railway company organized under general laws, so far as the same are applicable, . . . and shall be subject to all the duties, restrictions and liabilities imposed upon street railway companies, except as otherwise provided." Special provisions are made for the incorporation of the new company. I think it obvious that in the organization of the company the general laws apply only to a limited extent; that is, in so far as they are not inconsistent with the specific provisions of said act.

The trustees appointed under the provisions of the act are to co-operate with the holders of the shares and securities of the Bay State Street Railway Company, and with the receiver operating the properties of said company, in arranging for the transfer of the railways, property and franchises of the Bay State Company to the new company.

It is provided in section 4 that the new company, for the purpose of paying for the railways, property and franchises of the company, may issue stock, bonds and other evidences of indebtedness in such amounts and proportions, with such par values and preferences, as may be approved by the directors and by the trustees.

Thus, it would seem that in the issuing of stock, bonds and other evidences of indebtedness for the purpose of paying for the property and franchises of the old company the provisions of general law have little if any application, and the determination of the amounts and proportions of such stock, bonds and evidences of indebtedness are matters left entirely to the discretion of the directors and the trustees, subject only to the limitations thereafter prescribed. It is thereafter provided that —

> The entire capitalization of the new company, including stock, bonds and other evidences of indebtedness which may be issued to pay for, or which shall remain outstanding in respect of, the railways and property owned, leased or operated by the company which were included in the computation of investment value contained in the decision of the public service commission, dated the thirty-first day of August, nineteen hundred and sixteen, shall not represent a capital bearing an annual interest and dividend charge (common dividends being computed at the rate of six per cent per annum) which will exceed six per cent upon the sum of forty million two hundred eighty-two thousand three hundred and forty dollars, etc.

As I interpret the section, the words "the entire capitalization" refer to the entire initial capitalization required to purchase the railways, property and franchises of the old company, and in the creation of this capitalization the company is not restricted to the issuance of stock, bonds and other evidences of indebtedness to a total amount of $40,282,340 plus or minus the adjustments to be made. I think it plain from the language of the section that such a limitation was not intended.

Light is thrown upon the provisions of section 4 by a con-

sideration of the other provisions of the act. The act provides for what is known as a service at cost plan of operation, which in substance provides that the rates of fare shall not be in excess of those required to meet operating expenses and fixed charges and to pay 6 per cent per annum upon the common stock. I assume that it was intended by the Legislature to give the directors and the trustees latitude in effecting the organization of the new company and the acquisition of the property of the old, restricting, however, the creation of an initial capital to such an extent that the public will not be required to pay by way of fares more than 6 per cent upon the investment value of the property acquired, as determined by the Public Service Commission, as provided in said section, and relying upon the requirement of the approval of the trustees appointed under the provisions of the act, within the limitation prescribed, to safeguard the public interests. In this connection it is to be borne in mind that at the time of the passage of the act the Bay State Street Railway Company was in the hands of a receiver, that it was in default in the payment of interest on its bonds and the property was subject to foreclosure under the mortgage securing the bonds, and that public service corporations were experiencing great difficulty in raising capital for their needs. That it was generally recognized that public service corporations were experiencing difficulty in raising capital is indicated by Sp. St. 1918, c. 159, wherein the Boston Elevated Railway Company was authorized to issue preferred stock entitled to dividends at 7 per cent per annum, and by Sp. St. 1917, c. 366, which authorized the New York, New Haven & Hartford Railroad Company to issue preferred stock entitled to dividends at 7 per cent per annum.

Accordingly, I beg to advise you that I am of the opinion that so long as the initial capitalization created for the purpose of paying for the railways, property and franchises of the old company is not of such an amount and character as to subject the new company to the payment of interest and dividend charges (dividends on common stock computed at 6 per cent per annum on the par value thereof) to an amount in excess of 6 per cent of the investment value of the property as found under the provisions of said section, and is approved by the directors and by the trustees, it is authorized by the act.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — Class Legislation — Delivery Vehicles.

A law regulating the dimensions of motor vehicles, with their loads, operated upon the public highways, exempting vehicles owned by manufacturers or dealers in boxes or barrels, is unreasonable class legislation, denies equal protection of the laws, and is, therefore, unconstitutional.

June 2, 1919.

Hon. Edwin T. McKnight, *President of the Senate.*

Dear Sir: — I acknowledge the receipt of an order from the Honorable Senate in the following form: —

Ordered, That the Senate request the opinion of the Attorney-General on the question whether exempting from the provisions of Senate Bill No. 547, entitled "An Act to regulate the dimensions of commercial vehicles and motor trucks and their trailers," so far as they restrict the height of motor vehicles and their loads, delivery vehicles owned by manufacturers and dealers in boxes or barrels, would render the bill unconstitutional.

Section 1 of the proposed bill is as follows: —

No commercial vehicle, motor truck, or motor-drawn vehicle shall be operated on any way in this commonwealth, as defined in section one of chapter five hundred and thirty-four of the acts of nineteen hundred and nine, and amendments thereof, the outside width of which is more than ninety-six inches, the height of which exceeds thirteen feet, or the extreme over-all length of which exceeds twenty-eight feet; except that such vehicle may be operated exceeding thirteen feet in height when a special permit so to operate is secured from the superintendent of streets, selectmen or local road authorities having charge of the repair and maintenance of highways in the several cities and towns: *provided, however,* that where more than one vehicle or trailer is operated the length of such vehicles may exceed twenty-eight feet, but in no event shall all such vehicles or trailers so drawn or operated exceed eighty feet in length, over all. All of the aforesaid dimensions shall be inclusive of the load.

Section 2 provides for the granting of permits also by the Massachusetts Highway Commission and by the county commissioners, and section 3 establishes a penalty for violation of the act.

I am informed that an amendment has been proposed by which, if it is adopted, an additional section will be added to the bill as follows: —

In so far as it restricts the height of motor vehicles and their loads, this act shall not apply to delivery vehicles owned by manufacturers or dealers in boxes or barrels.

The order of the Senate appears to relate merely to the question whether this amendment will render the bill unconstitutional if enacted with the proposed amendment incorporated therein.

An exemption of special classes of persons from the burden of general police regulations always requires a clear explanation. It is fundamental that there can be no unreasonable or arbitrary distinctions in the application of such a statute. Either it must apply equally to all, or any classification which it attempts must be based upon some reasonable ground connected with the nature and purpose of the regulation or the general public interest. That a regulation may cause special inconvenience to persons in certain kinds of business is not alone a reasonable ground for exempting them. Such exemptions and distinctions must be based upon public interest, not upon private inconvenience.

The purpose of the proposed bill appears to be merely to regulate and limit in the interest of public safety and convenience the dimensions of motor vehicles, with their loads, which are operated upon the public highways. The bill appears to have no relation to the weight of the vehicle or its load. Presumably manufacturers or dealers in boxes or barrels often have occasion in transporting empty boxes and barrels to carry loads of unusual height over the public highways, but so do manufacturers and dealers in other bulky articles of light weight. This bill, if enacted, will prove as inconvenient to all such manufacturers and dealers as to those especially exempted by the proposed amendment. Furthermore, this amendment completely exempts motor vehicles owned by the manufacturers and dealers specified, whether used in transporting boxes or barrels or any other articles or material. Then, others than manufacturers and dealers in boxes or barrels have occasion to transport them on motor vehicles. A motor truck and its load exceeding thirteen feet in height is precisely as great a danger or inconvenience to the public, whether operated by a person of the exempted class or by any other person.

No sound distinction for the classification proposed by this amendment in any way related to the purpose of this bill or the general public interest has been suggested to me, and none

occurs to me. I must advise you that the bill would, in my judgment, be unconstitutional if enacted with the proposed amendment incorporated therein, on the ground that in that form it would be unreasonable class legislation, and that it would deny to persons operating motor vehicles within the Commonwealth the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Towns — Joint Employment of Superintendent of Schools — Termination of Agreement.

Where two towns continue to employ jointly a superintendent of schools after they are no longer required by law so to do, either town can terminate such arrangement whenever it sees fit.

JUNE 3, 1919.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You ask my opinion as to whether the town of Wareham has the right to terminate the arrangement whereby the towns of Wareham and Marion jointly employ a superintendent of schools. In 1900 these towns formed a union under the provisions of St. 1898, c. 466, and they have, until April, 1919, employed jointly a superintendent of schools. The school committee of Wareham has since notified the school committee of Marion that the arrangement would no longer be continued. In 1910 the valuation of both these towns had exceeded $3,500,000, and under the then existing law the towns were no longer required to continue the union. They did, however, continue to employ a superintendent as before, through the agency of the joint school committee, although not in the manner provided in R. L., c. 42, § 42, which was by a committee consisting of the chairman and secretary of the two committees.

This arrangement was in effect when St. 1911, cc. 384 and 399, were enacted. Chapter 384 provided that in towns operating under the act relative to the forming of unions for the purpose of electing a superintendent of schools, said superintendent should be elected for a three-year term. Chapter 399 provided that such unions could not be dissolved except by a vote of a majority of the towns constituting the union, and with the consent of the Board of Education. The towns in

question did not choose the superintendent for three years, but continued to elect one from year to year. In other words, these towns, prior to the passage of the statutes of 1911, had outgrown the necessity for continuing the union established in 1900, but were by common consent employing a superintendent through the instrumentalities previously created.

Your question, therefore, really is whether St. 1911, c. 399, prohibits a dissolution of the original union unless there is a majority vote of the towns and the consent of the Board of Education is given. It is my opinion that the original union had been dissolved by operation of law before 1911, and that the continuation of a similar arrangement was a matter of convenience and not of legal necessity. Had St. 1911, c. 399, been enacted previous to the time when the towns reached a valuation of $3,500,000, and when they were operating under the original statute, said chapter would have changed the situation entirely. Under the facts above stated, however, it is my opinion that the towns were no longer subject to the control of the then existing law, and that the statutes of 1911 did not revive the original union or curtail the rights of the towns if either saw fit to discontinue the convenient arrangement of choosing a joint superintendent.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Constitutional Law — General Court — Delegation of Powers.

The Legislature cannot delegate to cities and towns the powers granted to it by Art LX of the amendments to the Constitution, limiting the use or construction of buildings to specified districts.

JUNE 25, 1919.

Hon. EDWIN T. MCKNIGHT, *President of the Senate.*

DEAR SIR: — I acknowledge the receipt of an order from the Honorable Senate in the following form: —

Ordered, That the Senate request the opinion of the Attorney-General on the question whether article LX of the Amendments to the Constitution empowers the General Court to authorize cities and towns to limit buildings according to their use and construction to specified districts thereof, and more especially whether House Bill No. 635 would be constitutional if enacted into law.

Article LX of the Amendments to the Constitution provides as follows: —

The general court shall have power to limit buildings according to their use or construction to specified districts of cities and towns.

House Bill No. 635 is entitled "An act to authorize cities and towns to limit buildings according to their use or construction." Its essential provision is as follows: —

Section 1. A city or town may by ordinances or by-laws not inconsistent with law and applicable throughout the whole or any defined part of its territory limit buildings according to their use or construction except such as are owned or occupied by the United States or by the commonwealth and may prescribe penalties not exceeding one hundred dollars for each violation of such ordinances or by-laws.

The phraseology of this section seems somewhat incomplete, in that it does not clearly state the nature of the limitation which is to be imposed upon "buildings according to their use or construction." I assume that the purpose of the bill is merely to authorize cities and towns "to limit buildings *according* to their use or construction" to specified districts thereof.

The bill of itself imposes no limitation whatever upon the use or construction of buildings in any specified district of any city or town. It in no way establishes any general principle to be applied in imposing limitations of this character. It is merely a complete delegation to each of the cities and towns within the Commonwealth of the entire power granted to the General Court by article LX of the Amendments. Thus, the sole question presented by the order is whether such a delegation of legislative power is authorized by the Constitution of the Commonwealth.

The principles of law applicable to the determination of such a question were clearly stated by the Supreme Judicial Court in *Brodbine* v. *Revere,* 182 Mass. 598, 600: —

It is well established in this Commonwealth and elsewhere that the Legislature cannot delegate the general power to make laws conferred upon it by a constitution like that of Massachusetts. *Opinion of the Justices,* 160 Mass. 589; *Larcum* v. *Olin,* 160 Mass. 102; *Stone* v. *Charlestown,* 114 Mass. 214; *State* v. *Hayes,* 61 N. H. 264; *Barto* v. *Himrod,* 4 Seld. 483; *Gloversville* v. *Howell,* 70 N. Y. 287; *Locke's Appeal,* 72 Penn. St. 491; *State* v. *Morris County,* 7 Vroom, 72; *Harbor Commissioners* v. *Excelsior Redwood Co.,* 88 Cal. 491; *People* v. *Hurlbut,* 24 Mich. 44. This doctrine is held by the courts almost universally.

There is a well-known exception to it, resting upon conditions exist-

ing from ancient times in most of the older States of the Union, which the constitutions of the States generally recognize, namely, the existence of town or other local governmental organizations which have always been accustomed to exercise self-government in regard to local police regulations and other matters affecting peculiarly the interests of their own inhabitants. On this account the determination of matters of this kind has been held to be a proper exercise of local self-government which the Legislature may commit to a city or town. *Commonwealth* v. *Bennett*, 108 Mass. 27; *Stone* v. *Charlestown*, 114 Mass. 214; *Opinion of the Justices*, 160 Mass. 586, 589; *People* v. *Albertson*, 55 N. Y. 50; *Gloversville* v. *Howell*, 70 N. Y. 287; *State* v. *Morris County*, 7 Vroom, 72.

In my judgment, the proposed bill does not deal merely with local police regulations or other matters affecting peculiarly the interests of the inhabitants of the various cities and towns of the Commonwealth. It rather purports to delegate the whole power and duty to determine what restrictions shall be placed upon the use and construction of buildings in specified districts without establishing any general policy whatever as to the purposes of such regulation or the standards to be applied in connection therewith. The legislation authorized by this amendment was obviously intended to be something more than police regulations in the interests of the public health, safety or morals. The amendment was entirely unnecessary to authorize such regulations. The determination of the question as to how far legislative power under this amendment can or should be exercised presents grave questions both of constitutional power, in view of the provisions of the Federal Constitution, and of legislative policy. Are certain kinds of business to be restricted to specified districts? Are manufacturing and mercantile buildings, and, perhaps, even apartment houses, to be excluded entirely from specified districts? Is the character or construction of buildings, even of those devoted merely to residential purposes, to be regulated as to their height, size, location with reference to public highways or to other buildings or as to their artistic or architectural qualities? All these matters, so far as they are permissible matters of legislation under this amendment, are left by the proposed bill entirely to the determination of cities and towns. Such general considerations of policy in a new field of legislation cannot, in my judgment, be said to be mere matters of local self-government.

Of course, the acceptance or rejection of a general scheme

of regulation may often be left to individual municipalities. This is merely leaving to the local community the determination of the question whether the conditions there existing make it desirable to put in force therein a definite regulation. Then, too, the fitting of the administrative details of such a regulation into the particular conditions of a given community may be left to local authorities or to general administrative boards. Doubtless much could be left to local determination in this manner in definite legislation enacted under this amendment, but this subject need not now be discussed, since nothing of that sort is attempted by the bill under consideration.

Accordingly, I must advise you that, in my judgment, the General Court cannot completely delegate to cities and towns the powers granted to it by article LX of the Amendments to the Constitution and that House Bill No. 635 would be unconstitutional if enacted into law.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Police Power — Applicability to State Institutions — Hours of Labor.

Gen. St. 1919, c. 113, reducing the hours of labor of women and children, does not apply to the industrial department of the Reformatory for Women.

JUNE 28, 1919.

Mr. EDWARD C. R. BAGLEY, *Director, Bureau of Prisons.*

DEAR SIR: — You request my opinion as to whether Gen. St. 1919, c. 113, amending the law with reference to the hours of employment for women and children, and reducing the period of such employment to forty-eight hours a week, applies to the industrial department of the Reformatory for Women.

The act in question applies only to women and children "employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company."

Assuming that the matrons employed in the industrial department of this institution can be said to be "employed in laboring," within the meaning of the statute, I have grave doubts as to whether such an industrial department can be

said to be a factory, workshop or manufacturing establishment within the meaning of this statute, or otherwise to come within its terms. Such a department is carrying on a part of the work of a penal or reformatory institution. Its primary purpose is not the employment of persons in the manufacture of goods.

It is, however, a well-established principle that a police regulation of the general character of the statute under consideration is not to be construed as applying to activities conducted by the State unless it clearly appears from its terms that it was intended to be so applicable. I find no indication whatever in this statute that the General Court intended it to apply to any State institutions of any sort, least of all to State penal institutions.

Accordingly, I feel required to construe this statute as not applicable to women employed at the Reformatory for Women.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Nurses' Corps — State Benefits — World War.

Under Gen. St. 1918, c. 92, members of the nurses' corps who saw active service in the World War are entitled to the benefits provided for by Gen. St. 1917, cc. 211 and 332.

JUNE 28, 1919.

Hon. CHARLES L. BURRILL, *Treasurer and Receiver-General.*

DEAR SIR: — You have asked my opinion as to whether members of the nurses' corps, organized in connection with the medical department of the army of the United States, who saw active service in the war with the German Empire, are entitled to the benefits of Gen. St. 1917, cc. 211 and 332, as interpreted and extended by Gen. St. 1918, c. 92.

The language of the two chapters first mentioned plainly cannot refer to women, and therefore the rights of these nurses must depend upon the statute of 1918. Section 1 of that statute provides that the two earlier statutes "shall be construed to apply to all persons, male or female, voluntarily enlisted in the military or naval service of the United States since the beginning of the present war with the German Empire as defined by said chapter three hundred and thirty-two, or drafted into the military forces under the provisions of the federal selective service act, whether a part of the quota of this commonwealth or not, provided that such persons, at the

time of their entry into said service, were residents of this commonwealth."

The terms of the Federal statutes and the practice of the War Department thereunder seem to make it clear that these nurses are not "enlisted" in the military service, in the ordinary technical sense of that term. They are appointed to their positions by the Secretary of War, and do not go through the formalities of an enlistment as do the enlisted men in the military service.

It is apparent, however, that, by the use of the word "female" in connection with persons in the military service, the General Court intended to extend the rights under these statutes to some persons who heretofore did not come within their terms. So far as I can perceive, there are no women in the military service, or to whom these words could possibly apply, except members of the nurses' corps. I am inclined to think, therefore, that the General Court intended by the use of these words to extend Gen. St. 1917, cc. 211 and 332 so as to include the members of the nurses' corps while in active service. I accordingly advise you that, in my opinion, the members of this corps while in such active service, if they otherwise come within the terms of these statutes, are entitled to their benefits.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Highway Commission — Purchase of Land — Construction of Highway.

The Massachusetts Highway Commission may purchase and take land in addition to that portion of the highway wrought for travel, when it is essential in order to insure the safety of persons traveling thereon.

JULY 10, 1919.

Massachusetts Highway Commission.

GENTLEMEN: — You have requested my opinion upon the following question: —

Chapter 213 of the Acts of 1916 directs the Massachusetts Highway Commission to construct and maintain a certain highway in the town of Hingham, and provides that the Commission is "authorized to purchase or take such land and buildings as may be deemed necessary in the laying out and construction of said highway."

At one point where this highway intersects an existing highway a

very dangerous condition exists, due to the obstruction of the view by two buildings on land of the Beale estate, and it seems to the Commission quite necessary that the land on which these buildings are located should be purchased or taken in order to get rid of the present buildings and insure that no buildings shall hereafter be erected on said land.

The Commission desires to know if in your opinion it can purchase this land, which is outside of the portion that is necessary for travel.

It is my view that your Commission is not restricted in the purchase and taking of land which is necessary for travel. Very often it is necessary to take land outside of the portion that is constructed, for the purpose of grading and draining, in order to make that portion of the road which is to be wrought for travel safe and convenient for travel. The width of the road at its intersection with other roads, within reasonable limits to insure the safety of travelers, is a matter properly within the discretion of the Commission. If, therefore, a situation is presented wherein your Commission deems it necessary to purchase land in addition to that which is to be wrought for travel, in order to insure the safety of persons traveling on that portion of the highway that is wrought for travel, I am of the opinion that it can be purchased. Obviously, it must appear that the additional land is reasonably necessary for the convenience and safety of the use of the traveled portion of the road, in order to justify such action by your Commission. This, in the first instance, is largely a question of fact for the determination of your Commission. Such being the fact, I am of the opinion that you are authorized to purchase such land.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Public Service Commission — Motor Vehicles — Rules and Regulations — Cities and Towns.

Under the provisions of Gen. St. 1918, c. 226, the Public Service Commission, upon an appeal, is limited in its power relative to the operation of motor vehicles either to approving or disapproving the orders, rules and regulations adopted by local cities and towns.

JULY 14, 1919.

Hon. FREDERICK J. MACLEOD, *Chairman, Public Service Commission.*

DEAR SIR: — You request my opinion "as to whether Gen. St. 1918, c. 226, which provides for an appeal to the Public

Service Commission from the orders, rules and regulations prescribed by the local authorities relative to the operation of jitneys, so called, limits the authority of the Commission to the approval or disapproval of the orders, rules and regulations from which an appeal is taken, or whether it empowers the Commission, in case it disapproves such orders, rules and regulations, to prescribe by order the just and reasonable rules and regulations thereafter to be in force, and, specifically, as to whether and in what respect, if any, the Commission exceeded its lawful authority in issuing its order of April 3, 1919 (P. S. C. 2151), relative to regulations governing the operation of jitneys in the cities of Lawrence, Haverhill, Malden, Lynn, Salem and Brockton, and the towns of Swampscott and Nahant."

Your question involves an interpretation of section 2 of the act. Said section provides, in part, as follows: —

> Every person, firm or corporation, including street railway companies, operating any such motor vehicle upon any public street or way for the carriage of passengers for hire in such a manner as to afford a means of transportation similar to that afforded by a street railway, by indiscriminately receiving and discharging passengers along the route on which the vehicle is operated or may be running, is hereby declared to be a common carrier, and shall in respect to the operation of such vehicle be subject to such orders, rules and regulations as have been or may from time to time be prescribed or adopted by the licensing authorities of any city or town which has accepted the provisions of chapter two hundred and ninety-three of the General Acts of nineteen hundred and sixteen.

So far the section is little more than a re-enactment of the provisions of Gen. St. 1916, c. 293, as under that act cities and towns could make orders, rules and regulations, and the operation of motor vehicles was subject thereto. The section then provides that —

> Any petitioner, or any street railway company aggrieved by such orders, rules or regulations, may appeal to the public service commission whose decision, after notice to said licensing authorities and a hearing thereon if requested by such authorities, shall be final. Such appeal may be taken within thirty days from the time such orders, rules or regulations become effective or in case the same have already become effective, within thirty days after the passage of this act.

I assume that the petitioner referred to in this provision refers to some person who is operating a motor vehicle or de-

sires to operate a motor vehicle. It is difficult to see how any other petitioner would be aggrieved by any orders, rules or regulations made under the provisions of Gen. St. 1916, c. 293, and I doubt the intention of the Legislature to give any member of the public who is affected by the rules and regulations only to the extent that all members of the public are affected a right to appeal to the Public Service Commission. This, it seems to me, throws light upon the meaning of the section. Neither a petitioner nor a street railway company can be said to be aggrieved unless the rules and regulations adopted appear to be unreasonable and to unduly restrict their power to operate motor vehicles. This being so, it would seem to follow that the cause of their grievance is eliminated by the action of the Public Service Commission in disapproving the rules, or so much thereof as appears to the Public Service Commission to be unreasonable. Certainly, up to the time of the passage of this act it could not be said that street railway companies were aggrieved by the adoption of rules regulating the operation of motor vehicles. They had no peculiar rights under the law to be protected against competition, and there is nothing in the present statute to indicate that the Legislature intended to adopt another policy, unless it is derived by implication from the provisions of section 3. On the other hand, there is no provision for an appeal by a street railway company because of the failure of a municipality which has accepted the provisions of Gen. St. 1916, c. 293, to adopt rules and regulations. The purpose of the appeal, it seems to me, is to correct the alleged grievance. It is a grievance that is the foundation for the action of the Public Service Commission. The grievance is not corrected by allowing the rule or regulation appealed from to stand and adding additional rules and regulations to it.

The section provides that persons operating motor vehicles shall be subject to such orders, rules and regulations as may from time to time be adopted by the licensing authorities of the city or town. This is inconsistent with the view that the Public Service Commission has the power to originate and make rules and regulations upon appeal, in addition to those already adopted by the city or town, and finally to dispose of the whole matter.

Nor do I think that the declaration in the section, that the persons operating such motor vehicles are common carriers, adds much to the section, as, obviously, persons operating such vehicles are common carriers. I do not think it can

soundly be contended, merely from this declaration, that the Public Service Commission was given jurisdiction of such vehicles under the provisions of St. 1913, c. 784. That chapter relates to common carriers of persons or property by railroads, street railways, electric railroads and steamships. It is true that clause *b* of section 2 provides that the Commission shall have general supervision and regulation of the operation of all conveniences, appliances, facilities or equipment utilized in connection with or appertaining to the transportation or carriage of persons or property by railroads, street railways, electric railroads and steamships, by whomsoever owned or by whomsoever provided, whether the service be common carriage or merely in facilitation of common carriage.

But for the provisions of section 2 of said chapter 226 it may be that it could be contended with some force that street railway companies using motor vehicles for the purpose of facilitation of common carriage by street railways were subject to the regulations of the Public Service Commission, under the provisions of said chapter 784, as to the operation of such motor vehicles. Doubtless in some respects street railways in the operation of motor vehicles are subject to the control of the Public Service Commission. However, it is going to great length to say that the operation of a motor bus in no way connected with the street railway company is a convenience, appliance, facility or equipment utilized in connection with or appertaining to the transportation or carriage of persons or property by street railways or in facilitation of such transportation or carriage.

Section 3 of said chapter 226 provides: —

> In cities or towns that have not accepted the provisions of said chapter two hundred and ninety-three wherein a street railway exists, and wherein a line of motor vehicles has been established under the provisions of section one of this act, the public service commission shall have original jurisdiction over persons, firms or corporations mentioned in section two, and may prescribe rules and regulations until the city or town accepts the provisions of said chapter two hundred and ninety-three, whereupon original jurisdiction shall vest in the city or town, subject to appeal to the public service commission as provided in section two.

I take it that this section gives to the Public Service Commission the power to establish rules and regulations in relation to automobiles, motor vehicles and the operation of motor

vehicles in cities and towns that have not accepted the provisions of said chapter 293, wherein a street railway exists, or wherein a line of motor vehicles has been established under the provisions of section 1 of the act. Some argument might possibly be advanced under this section that by implication the power is given to the Public Service Commission, on appeal, under the provisions of section 2, to prescribe rules and regulations in addition to those adopted by the local community. The use of the words "original jurisdiction," it may be said, indicates that on appeal it has the same power that it has when exercising original jurisdiction under the provisions of section 3, and that it has the right to pass rules and regulations in any community where a street railway exists, whether a line of motor vehicles has been established or not, or whether the street railway is operating a line of motor vehicles in the community; and consequently, it follows that the Legislature was of the opinion that a street railway might be aggrieved by the operation of a line of motor buses in a community where it operated a street railway, although it did not operate a line itself. On the other hand, under section 3 the Public Service Commission has no jurisdiction whatever over motor vehicles operated by others than street railway companies in a community where no street railway exists, as the application of section 3 is limited to towns wherein a street railway exists and towns wherein a line of motor vehicles has been established under the provisions of section 1, which relates entirely to street railway companies. Thus the original jurisdiction of the Public Service Commission is limited in its extent, and does not embrace all communities which have not accepted the provisions of said chapter 293. Furthermore, it is given original jurisdiction over the persons, firms and corporations mentioned in section 2. The section does not use the words "original jurisdiction" in connection with its power to prescribe rules and regulations.

However, in my judgment, whatever force the provisions of section 3 may have in supporting the view that the Commission, on appeal, may add to the regulations adopted by the city or town is controlled by the provisions of section 2 and the conclusions to be drawn from its provisions.

The provision in section 2, that all orders, rules or regulations made, established or prescribed hereunder shall be enforced in the manner provided in St. 1913, c. 784, § 28, is of no assistance in determining the question involved. If the pro-

vision is restricted to such rules and regulations as are affirmed, on appeal, by the Public Service Commission, then it leaves those as to which no appeal is taken to be enforced as provided in Gen. St. 1916, c. 293. If it applies to all rules and regulations referred to in the section, then it necessarily relates to rules and regulations which may never come before the Public Service Commission for action.

Accordingly, I am of the opinion that it was not the intention to interfere with the power of the local communities accepting the provisions of said chapter 293 to regulate in such manner as they may determine the operation of motor vehicles coming within the provisions of the act, provided such regulations are not found to be unreasonable by the Public Service Commission upon appeal; and that your Commission is limited to either approving or disapproving the orders, rules and regulations adopted by such communities.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Board of Registration in Pharmacy — Certificate of Fitness — War Prohibition.

The Board of Registration in Pharmacy may, after the war prohibition act becomes effective, continue to grant certificates of fitness authorizing the sale of intoxicating liquors on prescriptions of registered physicians.

JULY 14, 1919.

Mr. JOHN J. TOBIN, *Secretary, Board of Registration in Pharmacy.*

DEAR SIR: — My opinion is requested upon the following question: —

Has the Board the right to issue a certificate of fitness (St. 1913, c. 413) to druggists in cities and towns which voted to grant the first five classes of licenses, which licenses were rendered ineffective on July 1 by war prohibition?

St. 1913, c. 413, provides: —

In any city or town in which licenses for the sale of intoxicating liquors of the first five classes are not granted, registered pharmacists to whom a certificate of fitness has been issued as provided for by section two of this act, may sell pure alcohol for medicinal, mechanical or chemical purposes without a physician's prescription, such sales to be recorded in the manner provided for in section twenty-six of chapter

one hundred of the Revised Laws, and may sell intoxicating liquors upon the prescription of a registered physician practising in such city or town, provided that the prescription is dated, contains the name of the person prescribed for, and is signed by the physician.

I am of the opinion that your Board may continue to grant such certificates of fitness, and that such certificates will authorize the sale of intoxicating liquors upon the prescription of a registered physician to the extent authorized by said chapter 413, provided such sale does not violate the provisions of the Federal statutes.

Very truly yours,
HENRY C. ATTWILL, *Attorney-General.*

Unlawful Combination — Fixing of Wages by Minimum Price Scale.

Agreements between employer and employee to establish minimum prices as a means of fixing wages are unlawful.

JULY 16, 1919.

Hon. EDWIN T. MCKNIGHT, *President of the Senate.*

DEAR SIR: — I am in receipt of a copy of an order adopted by the Honorable Senate, as follows: —

Ordered, That the Senate request the opinion of the Attorney-General on the following question of law: —

Would it be contrary to the laws of the United States or of this Commonwealth for a combination of fishermen to enter into an agreement with dealers purchasing their product fixing minimum prices for such product as a method of fixing the wages of such fishermen?

The order does not state to whom the product upon which the price is to be fixed belongs, but apparently it is assumed to belong to the fishermen. Upon this assumption it is not possible for me to give an opinion, for the reason that the answer would depend upon facts which are not stated; for example, whether the purpose of the combination of fishermen and dealers is to advance the price of fish, or whether the combination would be of such size as to give substantial price-making power.

I apprehend, however, that the purpose of the Honorable Senate in passing the order was to obtain an opinion which would be applicable to the situation in the fish industry in

this Commonwealth, and therefore submit the following answer.

It is my understanding that the fishermen employed on vessels landing fish at Boston and other points in this Commonwealth are in general paid an amount equal to a certain proportionate part of the proceeds of the cargo, the proportion varying from 7–1000 in the case of a fisherman on a steam trawler to a much larger percentage in the case of fishermen employed on sailing vessels, the variation being due principally to the fact that the trawler fishermen receive a definite salary in addition to their share in the proceeds.

As a general rule, the fish caught does not belong to the fishermen. While the pay received by the fisherman depends, at least in part, upon the value of the cargo, he cannot be considered the owner of such cargo, but still remains an employee. *Baxter* v. *Rodman*, 3 Pick. 435; *Cambra* v. *Santos*, 233 Mass. 131.

In this situation it is difficult to see how the fishermen may, by arrangement with dealers to whom the fish may be sold, fix a minumum price thereon, when, as above pointed out, the fish is not owned by them.

It is too well recognized to require the citation of authorities that employees have a right, both under the laws of this Commonwealth and of the United States, to combine and contract with their employer as to what wages they shall receive.

This right on the part of the employees, however, does not include the right to dictate to their employer as to the manner and terms upon which the product of the employees' labor shall be sold, and a combination to effect this, in my judgment, would be an unlawful combination. While it is true that combinations of workmen by collectively bargaining as to the wages they shall receive necessarily affect the price of the product of their labor, this is an incident necessarily flowing from the exercise of this right. When, however, a combination of workmen, under the guise of collective bargaining as to wages, attempts to fix the price at which the product of their labor shall be sold by their employer, they exceed their lawful rights, and the combination becomes unlawful. And I think it is equally plain that it is unlawful for such a combination to enter into agreements with the purchasers of the product, by which it is agreed that the product shall be bought only on certain terms.

I do not mean to intimate that I am of the opinion that an agreement may not legally be effected between the fishermen and their employer, by which the wages to be paid are fixed upon the basis that the fish caught is of a certain minimum value.

Assuming, therefore, that the facts are as I understand them, your question is to be answered in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Recess Committee — Appropriation for Services.

The Legislature may lawfully appropriate money to pay members of a recess committee appointed to consider the work being done by a commission to revise the laws of the Commonwealth.

JULY 19, 1919.

His Excellency CALVIN COOLIDGE, *Governor of the Commonwealth.*

SIR: — I beg to acknowledge your communication in which you request my opinion as to whether or not you can sign an appropriation bill providing money for the payment of the members of a proposed recess committee to consider the work being done by the commission to revise the laws of the Commonwealth.

I assume that the appropriation arises by reason of the passage of chapter 11 of the Resolves of the present year, which extends to Oct. 15, 1919, the time within which the Commissioners for Consolidating and Arranging the General Laws of the Commonwealth, under authority of chapter 43 of the Resolves of 1916, are required to make their final report to the General Court.

The resolve provides that the commissioners shall complete the said consolidation and arrangement and present their final report in print on or before Oct. 15, 1919, and file the same with the clerk of the Senate.

Article LXV of the Amendments to the Constitution provides as follows: —

> No person elected to the general court shall during the term for which he was elected be appointed to any office created or the emoluments whereof are increased during such term, nor receive additional salary or compensation for service upon any recess committee or commission except a committee appointed to examine a general revision of the statutes of the commonwealth when submitted to the general court for adoption.

The sole question involved, therefore, is what is meant by the words "when submitted to the General Court for adoption," as used in said amendment.

I am of the opinion that a reasonable construction should be given to these words, and that, accordingly, they are to be construed as including a report made to the clerk of the Senate by direction of the General Court, under an order which extends the time of the filing of the report of the commissioners with the General Court, and provides for the filing of said report with the clerk of the Senate.

Considering the filing with the clerk of the Senate under the provisions of the order as a submission to the General Court, it is clear that the amendment does not prohibit the payment of members of a committee appointed to examine the revision of the statutes, after the report is so submitted, for services performed after it is submitted.

In any event, in so far as the appropriation is concerned I am of the opinion that you may properly approve it, as it is made simply in anticipation of the receipt of the report by the General Court, and no question will arise until it is proposed to expend money under authority of the appropriation. If the report then is before the General Court the expenditure will be lawful.

Accordingly, I answer your question in the affirmative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Commission on Waterways and Public Lands — Great Pond — Islands — Title.

Any pond of more than 10 acres is a great pond unless there was a grant of such pond prior to the enactment of the Colonial Ordinances. Title in it and to the islands therein is in the Commonwealth.

The Commission on Waterways and Public Land has authority to convey or lease islands in a great pond.

JULY 21, 1919.

Commission on Waterways and Public Lands.

GENTLEMEN: — You request my opinion as to whether or not Swan Pond, in the town of Dennis, is a great pond belonging to the Commonwealth, and whether or not your Commission has authority, under St. 1904, c. 379, or any other provision of law, to sell and convey or lease two islands located in the northerly part of the pond.

Your question really divides itself into three parts: first, whether or not Swan Pond is a great pond belonging to the Commonwealth; second, whether or not the islands located in the pond belong to the Commonwealth; and third, whether or not your Commission has authority to sell and convey or lease the islands in the pond.

In the memorandum submitted by you in your letter you state that —

> Swan Pond is a body of water situated in the town of Dennis and has an area of about 157 acres. There are two islands in the northerly part of the pond, and there are no buildings on either island.

Unless there was a grant of Swan Pond prior to the enactment of the Colonial Ordinances of 1641–47, the title is in the Commonwealth.

The Colonial Ordinances contain the following provision: —

> Providing that no town shall appropriate to any particular person any great pond containing more than ten acres.

It is clear, therefore, that any pond of more than 10 acres is a great pond, and is owned by the State. *Attorney-General* v. *Herrick*, 190 Mass. 307; *II Op. Atty.-Gen.*, 307; *Auburn* v. *Union Water Power Co.*, 9 Me. 376.

So far as I am aware, there was no grant of Swan Pond before the Colonial Ordinances were enacted. Accordingly, I am of the opinion that Swan Pond is a great pond, the title to which is in the Commonwealth.

The second question is whether the islands in Swan Pond are owned by the Commonwealth. The only case in Massachusetts dealing with the subject is *Attorney-General* v. *Herrick*, 190 Mass. 307, 313, in which the court states that —

> Ordinarily a grant of a pond as a piece of real estate would include the entire area within its borders. . . .
>
> While there are grounds for an argument that the ordinance of 1641–47 had reference only to the waters of the great ponds and the land under them, there is much force in the suggestion that the expressions "great pond, containing more than ten acres of land," and "great ponds lying in common, though within the bounds of some town," refer to great ponds as physical features of the country, including any islands within them.

It is my opinion that the islands in Swan Pond are the property of the Commonwealth.

As to the third part of your question, as to the right of your Commission to sell or lease the islands in Swan Pond, St. 1904, c. 379, § 1, provides as follows: —

> The board of harbor and land commissioners may, under the authority and subject to the approval of the governor and council, sell and convey or lease any of the islands owned by the Commonwealth in the great ponds.

By St. 1916, c. 288, the Board of Harbor and Land Commissioners was abolished, and all the powers, duties and obligations conferred and imposed by law on said Board were transferred to, and were to be exercised by, the Commission on Waterways and Public Lands. Accordingly, I am of the opinion that your Commission is authorized to convey or lease said islands, as provided in St. 1904, c. 379, § 1.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Paupers — Loss of Settlement — Domicile.

Absence of paupers from cities or towns in which they have a residence, in order to constitute a loss of settlement, must be for five consecutive years and of such a character as to constitute a change of domicile.

JULY 22, 1919.

Mr. ROBERT W. KELSO, *Executive Director, State Board of Charity.*

DEAR SIR: — You have requested my opinion upon the question arising out of the following facts: —

A certain woman was born in Ireland May 1, 1878. Her parents never came to the United States. She married in Brighton, on April 8, 1908. Her husband came to the United States about 1897, and resided in Boston until he removed to Revere, Dec. 27, 1913, where he continued to reside until his death Aug. 17, 1917. He never gained a settlement. At the date of his death his wife had a legal settlement in Boston, gained through her own residence.

After the death of the husband, the wife went to her sister's home in Boston, where she remained until June 29, 1918, and then returned to Revere. When she went to her sister's home she had no fixed idea or purpose of living there, but decided to remain there until she became reconciled to her husband's death. She was also in poor health, and

decided she would make her home with her sister until she felt able to return to her home in Revere and care for her home and children. Meantime, she had an offer to rent her home to advantage for the winter, which she accepted. She returned to Revere as soon as her home was vacated.

The question upon which you have asked my opinion is whether the woman, on Dec. 27, 1918, had been absent from Boston five consecutive years, within the meaning of St. 1911, c. 669, § 4, as amended.

This statutory provision, so far as applicable to this case, reads as follows: —

> A person who, after the passage of this act, is absent for five consecutive years from the city or town in which he had a settlement shall thereby lose his settlement.

I assume from your facts that the woman had gained her settlement in Boston prior to Dec. 27, 1913.

Absence, within the meaning of the statute relating to the laws of settlement of paupers, in my opinion, must be of such a character and with such intent as to constitute a change of domicil. From the facts as given by you, it is manifest that this woman intended to regard Revere, and made it, her home from the date she went there to live with her husband, and that her domiciliary residence from Dec. 27, 1913, has been in Revere.

The woman referred to has therefore, in my judgment, lost, within the meaning of St. 1911, c. 669, § 4, as amended, the settlement which she had in Boston.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Initiative and Referendum — Acts of the Legislature — When in Effect.

Gen. St. 1919, c. 112, increasing the compensation and mileage to be paid to traverse and grand jurors, is not a law the operation of which is restricted to a particular political division, district or locality of the Commonwealth, and cannot, therefore, take effect earlier than ninety days after it becomes a law by approval of the Governor

JULY 28, 1919.

MR. FRANK L. DEAN, *Controller of County Accounts.*

DEAR SIR: — You have requested my opinion as to when chapter 112 of the General Acts of 1919, increasing and es-

tablishing the rate of compensation and mileage to be paid traverse and grand jurors, becomes effective. This act applies to all jurors in attendance upon any court within the Commonwealth.

The initiative and referendum amendment to the Constitution, in the first article under the heading "The Referendum," contains the following provision: —

I. When Statutes shall take Effect.

No law passed by the General Court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

The statute under consideration is not declared to be an emergency measure, and therefore it cannot take effect earlier than ninety days after it has become a law, unless it is a statute which may not be the subject of a referendum petition.

Article III of this division of the amendment under consideration is, in part, as follows: —

III. Referendum Petitions.

Section 1. *Contents.* — A referendum petition may ask for a referendum to the people upon any law enacted by the General Court which is not herein expressly excluded.

Section 2. *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 item of excluded matters within which it has been suggested this statute may come is that of laws "the operation of which is restricted to a particular town, city or other political subdivision or to particular districts or localities of the commonwealth." The suggestion is made that as the General Court might have dealt with the matter of jurors' compensation by statutes applicable only in one or more counties and not throughout the Commonwealth, and thus by a series of statutes covering the several counties of the Commonwealth in succession, this statute must be regarded as the equivalent of

such a series of statutes, and as coming within the matters excluded from the referendum by the clause under consideration.

By precisely the same reasoning, any statute dealing with a subject of legislation which it is within the power of the General Court to make applicable to less than the entire Commonwealth could be similarly regarded as the equivalent of several statutes applicable to districts or divisions of the Commonwealth. The real question, therefore, is whether the referendum is by the terms of the amendment limited to matters which are of such a character that they cannot constitutionally be restricted in their application to "a particular town, city or other political subdivision or to particular districts or localities of the commonwealth." The same language as that above quoted is used in defining the matters excluded from the operation of the initiative (The Initiative, art. II, § 2). So this suggestion also raises the question whether only those matters may be made the subject of the popular initiative as are required by the Constitution to be made applicable throughout the Commonwealth.

The history of the adoption of the initiative and referendum amendment is too recent to require stating. It was the result of a popular desire of considerable strength to provide the people with a more effective means of controlling the exercise of legislative power. Its opening article, defining the scope of the amendment, is as follows: —

I. Definition.

Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the General Court, to the people for their ratification or rejection.

Both expressly and by implication it is indicated throughout the amendment that both the initiative and the referendum shall be applicable to all exercises of legislative power except those dealing with matters excluded from their operation. The various exclusions are based upon different grounds of policy. That under consideration seems plainly to be founded on a desire not to burden the people of the whole Commonwealth

with the duty of passing upon matters of only local or limited application in which they are not as a whole interested; but unless a matter is excluded on other grounds, it is the obvious purpose of the amendment to enable the people directly to consider, enact, approve or reject all matters of legislation which affect the people of the Commonwealth as a whole. Thus there are many matters which are ordinarily dealt with by general legislation applicable throughout the Commonwealth which conceivably might in a proper case be restricted to particular localities or districts. It cannot be said that all such matters are excluded from the initiative and referendum merely because the General Court might have dealt with them locally. It must be said that if it chooses to treat a matter as one of general application, and to deal with it as such by a general statute applicable to all the people of the Commonwealth who come within its scope, it is not excluded from the initiative and referendum. Such a statute is in fact made applicable to the entire Commonwealth, and therefore cannot be said to be a law "the operation of which is restricted to a particular town, city or other political subdivision or to particular districts or localities of the commonwealth." To construe the amendment otherwise would be to overlook its real character of a far-reaching reservation of power to the people, and thereby to thwart by a narrow construction the will of the people as expressed therein.

Accordingly, in my opinion, the statute to which you refer does not deal with a matter expressly excluded from the operation of the referendum by the provisions of the Constitution, and therefore, in my judgment, it cannot take effect earlier than ninety days after it became a law by approval by the Governor on April 18, 1919.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Highway Commission — Operators of Motor Vehicles — Revocation and Renewal of Licenses.

Under Gen. St. 1916, c. 290, the Massachusetts Highway Commission may, within one year of the time of conviction of an operator of a motor vehicle for violation of a law which provides for the surrender and revocation of a license, issue a new license where, on appeal, the district attorney has made an entry of *nol. pros.*, but may not do so where, on appeal, a plea of *nolo contendere* is accepted by the court and the case is placed on file.

July 28, 1919.

William D. Sohier, Esq., *Chairman, Massachusetts Highway Commission.*

Dear Sir: — You have requested my opinion as to the following: —

Assuming that the holder of an operator's license has been convicted in the lower court of operating a motor vehicle while under the influence of intoxicating liquor, and that such conviction has been followed by the surrender and revocation of the license, has this Commission the power, after an investigation or upon hearing, to issue a new license to such operator under the following circumstances, viz.: —

(*a*) Within one year from such conviction in the lower court, in the event that in the Superior Court the entry of *nol. pros.* is made by the district attorney.

(*b*) Within one year from such conviction in the lower court, in the event that in the Superior Court the plea of *nolo contendere* is accepted and the case placed on file.

Gen. St. 1916, c. 290, provides: —

Whoever upon any way operates an automobile or motor cycle, recklessly, or while under the influence of intoxicating liquor, or so that the lives or safety of the public might be endangered, or upon a bet, wager or race, or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of sections sixteen and seventeen of this act, or whoever without stopping and making known his name, residence, and the number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any other vehicle or property, or whoever uses a motor vehicle without authority, shall be punished [as therein provided].

The statute further provides: —

A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the commission which 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. . . . The commission in its discretion may issue a new license to any person acquitted in the appellate court, or after an investigation or upon hearing may issue a new license to a person convicted in any court: *provided*, that no new license shall be issued by the commission to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction, and to any person convicted of violating any other provision of this section until sixty days after the date of final conviction if for a first offence, or one year after the date of any subsequent conviction.

It follows that upon a conviction in the lower court of operating a motor vehicle while under the influence of intoxicating liquor the license then held by the person so operating a motor vehicle is to be forthwith revoked, unless the court or magistrate recommends otherwise; and that no appeal from the judgment in the lower court shall operate to stay the revocation of the license. The person so convicted cannot again receive a new license unless he is acquitted in the appellate court, or until one year has expired after the date of final conviction.

The questions which you raise, therefore, are dependent upon whether what is done in the Superior Court amounts to an acquittal or a conviction.

The words of the statute are to be given a reasonable construction. I am of the opinion that the word "acquittal," as used in the statute, includes more than an acquittal by a jury. I do not think it could have been intended by the Legislature that where a complaint in the Superior Court is quashed by the court, or an entry of *nolle prosequi* is made by the district attorney, and no new complaint is brought, the person charged is to be forever barred from receiving a new license. This result will follow if the word "acquittal" is to be construed in its strict sense.

In the case of *Lizotte* v. *Dloska*, 200 Mass. 327, it was said by Chief Justice Rugg, at page 329, that "the entry of a *nolle prosequi* is final so far as the particular case is concerned." While it is true that in some jurisdictions a *nolle prosequi* may be removed upon order of the court, and that that question has not been determined in this Commonwealth, yet it has always been considered, so far as other proceedings were con-

cerned, that the entry of a *nolle prosequi* was to be considered as a final determination of the case. As was said by the chief justice in *Lizotte* v. *Dloska*: —

> The district attorney had the absolute power to enter a *nolle prosequi* upon his official responsibility, without the approval or intervention of the court. He alone is answerable for the exercise of his discretion in this respect. It is presumed that he will act under such a heavy sense of obligation for enforcement of the law and sensitive consciousness of important public duty that no wrongful act will be committed.

It was said in *Commonwealth* v. *Lockwood*, 109 Mass. 323, that —

> The ordinary legal meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt.

And this meaning of the word "conviction" was followed in the case of *Munkley* v. *Hoyt*, 179 Mass. 108.

I am of the opinion that the meaning of the word "conviction," as used in the statute, is the ordinary legal meaning, and that the expression "final conviction," as used in the statute, refers to that stage of the case where nothing is left to be done other than the imposition of the judgment or sentence.

In the case of *White* v. *Creamer*, 175 Mass. 567, it was said that a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered, although such record could not be used in another judicial proceeding to show that the defendant was guilty. It is my opinion, therefore, that where a plea of *nolo contendere* is accepted, and the case is then placed on file, your Commission is authorized, after the expiration of one year from such plea, to issue a new license to the person entering the plea, but not before.

Accordingly, I am of the opinion that your first question is to be answered in the affirmative, and your second question in the negative.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Inmate of Public Institution — Acquiring a Settlement.

Under the provisions of St. 1911, c. 669, the time spent by a pauper as an inmate in any public institution at public expense, irrespective of the source from which the public funds come, is to be counted in computing the time for acquiring a settlement unless he tenders reimbursement within two years of the time of receiving such relief.

July 29, 1919.

Mr. Robert W. Kelso, *Executive Director, State Board of Charity.*

Dear Sir: — You have requested my opinion as to whether aid rendered to a poor person in a city or town hospital, which is supported in whole or in part by an appropriation other than that granted the overseers of the poor or board of health, prevents the gaining or acquiring of a settlement if such aid is not paid for by the overseers of the poor, by the board of health or by the State Board of Charity.

I assume by the use of the words "poor person" you have reference to a pauper.

St. 1911, c. 669, § 4, reads, in part, as follows: —

. . . But the time during which a person shall have been an inmate of any public hospital, public sanatorium, almshouse, jail, prison, or other public institution, within the commonwealth, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or for losing a settlement, except as provided in section two.

This provision of law applies to an inmate of any of the public institutions referred to, irrespective of the source from which the public funds come.

St. 1911, c. 669, § 2, referred to, reads as follows: —

No person shall acquire a settlement, or be in process of acquiring a settlement, while receiving relief as a pauper, unless, within two years after the time of receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth, or to the city or town furnishing the same.

Accordingly, I am of the opinion that under the provisions of section 4, above referred to, irrespective of the source of the aid rendered to a pauper in a city or town hospital, the time spent there is not to be counted in computing the time for gaining or acquiring a settlement, except as provided in section

2, by which, if he shall tender reimbursement of the cost to the city or town furnishing the same, he shall be in the process of acquiring a settlement.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Town Treasurer — Women — Eligibility to hold Office.

Under the provisions of St. 1913, c. 835, § 400, a woman is ineligible to election to the office of town treasurer.

JULY 30, 1919.

Mr. CHARLES F. GETTEMY, *Director, Bureau of Statistics.*

DEAR SIR: — You have requested my opinion as to whether a woman may fill the position of town treasurer.

St. 1913, c. 835, § 400, provides: —

Every town at its annual meeting shall in every year, except as is otherwise provided in the following sections, choose from the inhabitants thereof the following named town officers, who, except as otherwise provided in the following sections, shall serve during the year: . . .

Among the officers so to be chosen, as specified in the section, is a town treasurer. It is also provided, at the end of the section, that —

Women shall be eligible as overseers of the poor and school committee.

This provision grew out of the provision of St. 1874, c. 389, § 1, that "no person shall be deemed to be ineligible to serve upon a school committee by reason of sex;" and from the provision of St. 1886, c. 150, that "no person shall be ineligible for the office of overseer of the poor by reason of sex."

The language used in said section 400 is substantially the same as that contained in R. L., c. 11, § 334. The expression that the town shall choose from the inhabitants thereof the various town officers enumerated appears in R. S., c. 15, § 33; Gen. Sts., c. 18, § 31; and P. S., c. 27, § 78.

The word "inhabitant," as used in these various statutes, in my opinion, does not include women unless specific provision is made therefor by the Legislature. This view is confirmed by the action of the Legislature in 1874 and in 1886, wherein women were made eligible to serve as members of a school

committee and as overseers of the poor. It is also confirmed by the views expressed by the justices of the Supreme Judicial Court in an opinion rendered to the House of Representatives Feb. 6, 1811 (7 Mass. 523). See also *Opinions of the Justices*, 122 Mass. 594; 115 Mass. 602; 165 Mass. 599.

Accordingly, I am of the opinion that a woman is ineligible to be elected town treasurer, under the provisions of St. 1913, c. 835, § 400.

Very truly yours,

HENRY C. ATTWILL, *Attorney-General.*

Co-operative Banks — Right to borrow Money.

A co-operative bank has no right to borrow money from national banks or trust companies for any purpose other than to meet an unusual demand by its depositors for withdrawals.

AUG. 2, 1919.

Hon. AUGUSTUS L. THORNDIKE, *Bank Commissioner.*

DEAR SIR: — You have requested my opinion as to whether a co-operative bank may borrow money from a national bank or trust company in order to meet the demands of its borrowers.

Sections 1 and 19 of chapter 623 of the Acts of 1912 provide only for loaning accumulations of a co-operative bank, and do not provide for loaning borrowed money. The only provision of our statutes giving power to a co-operative bank to borrow is found in section 4 of chapter 643 of the Acts of 1914, which reads in part as follows: —

> . . . On any occasion when there is an unusual demand by depositors for withdrawal from the funds of any co-operative bank . . . such co-operative bank by a vote of at least three-fifths of its directors and with the consent of the bank commissioner, may borrow from any national bank, savings bank, co-operative bank or trust company. . . .

I am of the opinion that the Legislature, by passing this statute, intended that co-operative banks in this Commonwealth should be allowed to borrow only for the purpose set forth, namely, to meet an unusual demand by its depositors for withdrawals, and that by implication a co-operative bank has no right to borrow money for any other purpose.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Life Insurance Companies — Loans to Policyholders — Home Purchase Plan.

A life insurance company may constitute the taking out of a policy of insurance a condition precedent to the making of a loan, provided such condition is stated in the policy and made available to all policy holders of the same class.

Aug. 5, 1919.

Hon. Frank H. Hardison, *Insurance Commissioner.*

Dear Sir: — You have requested my opinion as to whether a plan, called the Home Purchase Plan, proposed by the Equitable Life Assurance Society, will be in violation of the provisions of St. 1907, c. 576, § 69. You state, in brief, that it is an arrangement whereby the Equitable Life Assurance Society will make a loan to a person desiring to build a home, a condition of the loan being that the borrower shall take out a policy of life insurance in the company. The premium on the policy, interest on the loan and a certain agreed amount to be paid periodically on the principal of the mortgage are paid in monthly instalments, so graduated that at the end of ten years the property is free from encumbrance and the life insurance policy is reassigned to the borrower.

The part of said section 69 involved is as follows: —

> . . . nor shall any such company or agent pay or allow, or offer to pay or allow as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement not specified in the policy contract of insurance; or give, sell or purchase or offer to give, sell or purchase as inducement to insurance or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

In an opinion given to you April 30, 1919, in relation to the method of the conduct of business by the Morris Plan Insurance Society, I expressed doubt as to whether the provisions of said section 69 authorized an insurance company to make any inducement it saw fit so long as the inducement was set out in the policy, and stated that if the section were held to authorize insurance companies to specify and undertake obligations foreign to insurance, grave practical difficulties would arise in carrying out the provisions of the insurance law.

But the investment of the money paid to insurance companies by policyholders is not foreign to insurance; in fact, it is a part of the business of the companies. In effect, it is simply preferring the policyholders in the investment of the companies' funds. Thus the privilege of obtaining a loan from a company upon a mortgage of residential property, the privilege and the terms thereof being stated in the policy as a part of the contract of insurance, and made available to all policyholders in the same class, does not, it seems to me, contravene the provisions of said section 69.

Accordingly, I beg to advise you that if the privilege of obtaining the loan is stated as one of the privileges enuring to the benefit of the assured under the policy, I am of the opinion that it will not be in violation of the provisions of said section 69.

Yours very truly,
HENRY C. ATTWILL, *Attorney-General.*

State and Federal Military Service — Computation of Time — Service Medal.

The time of service of one who was lawfully drafted into the service of the United States while a member of the organized militia of the Commonwealth is to be computed in measuring the time of honorable service required for a State Long Service Medal.

AUG. 5, 1919.

Col. JESSE F. STEVENS, *Adjutant General.*

DEAR SIR: — You ask me the following questions in relation to section 191 of chapter 327 of the General Acts of 1917: —

1. Can the words "honorable service," as contained in said section, be construed to mean any service other than service in the Massachusetts Volunteer Militia or the Massachusetts National Guard?

2. Can Federal service subsequent to the 5th of August, 1917, be allowed in computing the time required for a State Long Service Medal, under the provisions of said section?

Section 191 is as follows: —

To each officer or enlisted man who completes nine years of honorable service, continuous or otherwise, there shall be issued a medal, and, for each additional five years of like service, a clasp to be affixed thereto. Active, retired or honorably discharged officers and enlisted men who have served in the military or naval service of the United States in

time of war and have been honorably discharged therefrom, shall receive an additional clasp indicative of such service, to be affixed to the medal herein provided for.

I understand the questions arise in relation to the application of a private of Co. B, 9th Regiment Infantry, for a State Long Service Medal. You state in your letter that he was drafted into the service of the United States under a proclamation of the President, published July 12, 1917, in accordance with the act of Congress of May 18, 1917. The question arises because of the following provision in the proclamation: —

Par. III. All persons hereby drafted shall on and from the 5 August 1917, stand discharged from the militia, . . .

I am of the opinion that the service of the private under the draft is to be computed as a part of the service required under the provisions of section 191. The section provides that "to each officer or enlisted man who completes nine years of honorable service, continuous or otherwise, there shall be issued a medal." It further provides that "active, retired or honorably discharged officers and enlisted men who have served in the military or naval service of the United States in time of war and have been honorably discharged therefrom, shall receive an additional clasp indicative of such service, to be affixed to the medal herein provided for."

It is my view that the statute contemplates that all service which is directly connected with his enlistment in the organized militia of the Commonwealth is to be computed, and if, as a part of the obligation he entered into when he enlisted, he is called upon to act in the service of the United States government, it is to be deemed a part of his service within the provisions of the section.

I question the authority of the President to discharge any private who is enlisted in the organized militia of a State from service which he is under obligation to perform for the State, except for the time that the President of the United States deems it necessary to draft his services for Federal purposes. However, for the reasons stated above, I think it unnecessary to determine this question.

Accordingly, your questions are to be answered in the affirmative.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

City of Boston — Police Commissioner — Duties — City Council.

The Boston city council has no power to impose duties upon the Police Commissioner of its city other than those which incidentally arise from his responsibility to enforce the law.

Aug. 12, 1919.

Hon. Edwin U. Curtis, *Police Commissioner for the City of Boston.*

Dear Sir: — You have requested my opinion as to whether, assuming that the city council of Boston has the power to regulate by ordinance the operation of motor vehicles used for the carriage of passengers for hire in the city of Boston, it may properly delegate to you or impose upon you the duty of licensing the operators of such vehicles and of inspecting such vehicles.

While there is some doubt as to whether the Attorney-General is required to advise you in relation to your duties, I have heretofore taken the position that, in relation to State offices of a similar nature to yours, I would advise so far as such advice related to the construction of the statutes creating and governing such offices, and, accordingly, to that extent I answer your inquiry.

The office of police commissioner for the city of Boston was created by St. 1906, c. 291. That statute provides that he is to be appointed by the Governor, with the advice and consent of the Council. Section 10 of said chapter provides that, except as otherwise provided therein, all the powers and duties that were conferred or imposed by law upon the board of police of the city of Boston at the time of the passage of that act are conferred and imposed upon said police commissioner. The powers and duties that were conferred and imposed by law upon the board of police of the city of Boston at the time of the passage of said chapter 291 are defined in St. 1885, c. 323, § 2, as follows: —

> The board of police shall have authority to appoint and establish and organize the police of said city of Boston, and make all needful rules and regulations for its efficiency. All the powers now vested in the board of police commissioners in said city of Boston, by the statutes of the Commonwealth or by the ordinances, by-laws, rules and regulations of said city, except as otherwise hereby provided, are hereby conferred upon and vested in said board of police.

By St. 1878, c. 244, § 2, it was provided that all the powers vested by the statutes of the Commonwealth in the board of

aldermen of the city of Boston in relation to the administration of police and the appointment of watchmen and policemen in said city should be vested in the board of police commissioners.

Thus, it becomes the duty of the police commissioner to have charge of and direct the activities of the police of the city of Boston in the maintenance of order and in the enforcement of law, and to perform such other duties as are imposed upon him by the statute by which the office was created. By the provisions of that statute the salary of the police commissioner is established, and, subject to the approval of the Governor and Council, he is to be provided with rooms, suitably furnished, and convenient and suitable for the performance of his duties, the expense of which is to be borne by the city of Boston. He is also authorized to employ such clerks, stenographers and other employees as he may deem necessary for the proper performance of the duties of his office, and to appoint, establish and organize the police of said city, and to make all needful rules and regulations for its efficiency, subject only to the provision that he shall not appoint a greater number of police than the number authorized at the time of the passage of the act, nor change the compensation of such police except with the approval of the mayor: *provided, however,* that he is authorized, without such approval, to fix the salary of the police superintendent, which shall not exceed five thousand dollars per annum. There is no intimation in said statute that the police commissioner is to be in any way subject to the direction or control of the city council or the mayor in the performance of his duties.

I think it plain from the provisions of the statute creating the office and defining the duties of the Police Commissioner that he is a State official, responsible only to the Governor and to the Legislature, and that only by statute can additional duties be imposed or conferred upon him. Furthermore, it is my opinion that he is not warranted in assuming any duties other than those imposed upon him by statute.

Accordingly, I am of the opinion that it is beyond the power of the city council of Boston to impose any duties upon you other than those which incidentally arise from the responsibility that you are under to enforce the law, which necessarily includes the enforcement of valid ordinances to which penalties are attached.

Yours very truly,

HENRY C. ATTWILL, *Attorney-General.*

Bureau of Statistics — Certification of Town Notes — Repairs.

Cities and towns are prohibited by law from issuing notes in payment for work in a schoolhouse unless it is for an addition to the building which increases its floor space.

SEPT. 3, 1919.

Mr. GEORGE A. BACON, *Director, Bureau of Statistics.*

DEAR SIR: — You have requested an opinion as to your authority to certify notes of the town of Provincetown under the following article and vote: —

To act upon the report of the committee appointed at the last annual town meeting to consider the matter of heating and ventilating the Governor Bradford Schoolhouse.

It was voted that the report of the committee recommending an appropriation of $6,000 be accepted.

It was voted that $2,000 of this money be paid in 1920, $2,000 in 1921 and $2,000 in 1922.

The report of the committee referred to in said vote shows that no work was contemplated except to make changes in sanitary conditions, heating and ventilation. The report does not refer to any addition to the building, although it is contended that additional floor space would be secured by reason of the changes in equipment.

The laws on municipal indebtedness are found in St. 1913, c. 719. Clause 4 of section 5 of said chapter 719, which applies to the case at hand, reads as follows: —

Cities and towns may incur debt, within the limit of indebtedness prescribed in this act, for the following purposes, and payable within the periods hereinafter specified: —

. . . . . .

(4) For the construction of additions to schoolhouses or buildings to be used for any municipal purpose, including the cost of original equipment and furnishings, where such additions increase the floor space of said buildings to which such additions are made, twenty years.

It would appear that neither an addition to a municipal building nor an increase in floor space in such building, alone, comes within the provisions of the statute, but that there must be an addition as well as an increased floor space in order to come within the provisions of the law. This statute was obviously enacted in an attempt to prevent increasing town

debts for incidental or ordinary expenses, such as alterations and repairs, it evidently being deemed to be sound business policy to pay for such expenses out of the tax levy. This might possibly be accomplished by other language which would permit changes in equipment of an expensive or unusual nature, but in case language in the statute of a more general character were used, the purpose of the law might more easily be defeated. The Legislature having specifically expressed that additions are essential in order to entitle a town to the provisions of the "borrowing statute," it is my opinion that you may not properly certify the notes in question.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

City of Boston — Mayor — Police Commissioner — Police.

St. 1885, c. 323, § 6, is still in force and applicable to the Police Commissioner for the city of Boston. In case of action by the mayor under its provisions, the internal administration and personnel of the police force remain solely under the direction and control of the Commissioner.

The mayor of Boston has no authority to direct the reinstatement of any police officer removed by the Commissioner.

Under the provisions of Gen. St. 1919, c. 150, a war veteran is eligible to appointment to the police force of the city of Boston if he is a resident of this Commonwealth.

SEPT. 11, 1919.

Hon. EDWIN U. CURTIS, *Police Commissioner for the City of Boston.*

DEAR SIR: — I have your letter requesting my opinion upon certain questions of law, and in reply thereto I beg to submit the following opinion.

In answer to your first inquiry, namely, whether the provisions of St. 1885, c. 323, § 6, are in force and applicable to the Police Commissioner, I am of the opinion that they are still in force and applicable to the Police Commissioner.

Your second question is whether the powers of the mayor and the duties of the Police Commissioner, as provided by St. 1885, c. 323, § 6, empower the mayor to control, direct or provide for the internal administration of the police force or its personnel under established regulations. In reply to this question I beg to advise you that in my opinion the internal administration of the police force of the city of Boston and its personnel remain under the control and direction of the Police

Commissioner alone, in case of action by the mayor under authority of this statute.

In reply to your further specific question as to whether the mayor may direct the reinstatement of officers removed from the police force by the Commissioner, in accordance with existing rules and regulations of the police department, I am of opinion that the mayor is without power to direct such reinstatement.

You ask my opinion as to whether, under the provisions of Gen. St. 1919, c. 150, a veteran, to be eligible for appointment to the police force of the city of Boston, must be a resident of that city, or whether he may be so appointed if a resident of the Commonwealth. I am of opinion that it is not necessary, in order for a veteran to be eligible for such appointment, that he be a resident of said city, but that it is sufficient if he is a resident of this Commonwealth.

In my opinion, your last request presents a question of fact which, in the first instance, at least, is to be determined by you.

Very truly yours,
HENRY A. WYMAN, *Attorney-General.*

Constitutional Law — Right to withdraw Petition for Referendum.

A completed petition for a referendum on Gen. St. 1919, c. 116, after it has been filed with the Secretary of the Commonwealth cannot be withdrawn by one of its signers.

SEPT. 16, 1919.

HON. ALBERT P. LANGTRY, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion upon the question of whether a petition asking for a referendum on Gen. St. 1919, c. 116, and requesting that the operation of such law be suspended, may now be withdrawn by one of the signers of such petition.

It appears from your communication and a copy of a letter which you enclosed therewith that this petition has been completed by filing at your office the signatures of not less than 15,000 qualified voters within the time prescribed by the Constitution. The filing of these signatures had the effect of suspending the operation of this law, and made it the duty of the Secretary of the Commonwealth to submit the law to the people at the next State election. There is no provision in our

Constitution which provides for the withdrawal of a referendum petition after it has been completed, except where the law on which a referendum is asked has been repealed. The law under consideration, while it was modified in some respects by chapter 326 of the General Acts of the present year, has not been repealed.

Accordingly, I beg to advise that the answer to your question must be in the negative.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Fish and Game Laws — Conviction for Violation — Surrender of Certificate.

Under Gen. St. 1819, c. 296, § 12, the imposition of a fine on a plea of *nolo contendere* constitutes a conviction.

The filing of a case, with or without costs, upon a plea of *nolo contendere*, or upon a plea of guilty, or while an appeal from a conviction in a lower court is pending, does not constitute a conviction within the meaning of said statute.

SEPT. 22, 1919.

Mr. WILLIAM C. ADAMS, *Chairman, Commissioners on Fisheries and Game.*

DEAR SIR: — You request my opinion as to the interpretation of Gen. St. 1919, c. 296, § 12.

This section reads, in part, as follows: —

> The certificate of any person who shall be convicted of a violation of any of the fish and game laws or of any provision of this act shall be void, and his certificate shall immediately be surrendered to the officer who secures such conviction, and the officer shall forthwith forward the same to the commissioners, who shall cancel it and notify the clerk in whose city or town the certificate was recorded, of its cancellation; and no person shall be entitled to receive a certificate during the period of one year after the date of such conviction. A certificate issued to any person within one year after such a conviction shall be void, and shall be surrendered on demand of any officer authorized to enforce the fish and game laws.

The specific questions upon which you request my opinion are whether the following sets of facts amount to convictions, within the meaning of the law above quoted. The situations stated by you are as follows: —

1. Where the defendant pleads *nolo contendere* and the case is placed on file.

2. Where the defendant pleads *nolo contendere* and the court imposes a fine.

3. Where the defendant (in the Superior Court) pleads *nolo contendere* and upon payment of costs the case is placed on file.

4. Where the defendant pleads guilty and the case is placed on file.

5. Where the defendant pleads not guilty and is found guilty in the lower court and fined, and the defendant appeals to the Superior Court so that he will be allowed to retain his license pending the disposition of the case in the Superior Court.

In *Commonwealth* v. *Kiley,* 150 Mass. 325, it was held that the word "conviction," in St. 1887, c. 392, providing that "the conviction by a court" of competent jurisdiction of a licensee for violating any of the provisions of the laws relating to intoxicating liquors "shall of itself make the license of such person void," implied a final judgment of the court, and that the filing of a case by the court after a verdict of guilty did not amount to such a conviction.

A contrary conclusion was arrived at by our Supreme Judicial Court in the case of *Munkley* v. *Hoyt,* 179 Mass. 108, where the term "conviction," in a somewhat different statute, was held to include a situation where the defendant pleaded guilty and his case was placed on file.

I am of opinion that, so far as your questions involve a determination of whether the placing of a case on file after a plea or a verdict amounts to a conviction, within the meaning of the instant statute, they are to be governed by the decision in *Commonwealth* v. *Kiley, supra,* and, accordingly, I beg to advise that the facts stated in your first, third and fourth questions do not amount to a conviction, within the meaning of the statute.

In regard to the second question, namely, where a fine is imposed after a plea of *nolo contendere,* I am of opinion that this amounts to a conviction, within the meaning of this statute. While it is well recognized that a plea of *nolo contendere* cannot be used in any other proceedings as an admission of guilt (*Olszewski* v. *Goldberg,* 223 Mass. 27), it amounts, when accepted by the court, to a plea of guilty for the purposes of the particular case. *Commonwealth* v. *Ingersoll,* 145 Mass. 381. In *White* v. *Creamer,* 175 Mass. 567, the court, in considering the effect of this plea, said: "We do not doubt that a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered."

It follows from the foregoing authorities that if it were necessary to institute further proceedings to secure the forfeiture of the defendant's license under our statute, a sentence imposed after a plea of *nolo contendere* could not be used as a basis for such proceedings. This is the conclusion arrived at by my predecessor in office, Hon. Henry C. Attwill, in an opinion rendered by him to the Board of Registration in Medicine under date of Dec. 9, 1915, in which he ruled that the imposition of a fine upon the defendant after acceptance by the court of a plea of *nolo contendere* did not warrant that Board in revoking any certificate held by him or in cancelling his registration as a physician, under R. L., c. 76, § 3, which provides that the Board, "after hearing, may by unanimous vote revoke any certificate issued by it and cancel the registration of any physician who has been convicted of a felony or of any crime in the practice of his profession." Under the statute with which we are concerned, however, no further proceedings are required in order to effect a forfeiture of the defendant's certificate. Such forfeiture automatically takes effect upon the conviction of the holder, and is in fact an additional punishment imposed upon conviction in the particular case.

Accordingly, I am of opinion that, as above stated, the facts set forth in our second question constitute a conviction, within the meaning of the statute in question.

Your fifth question is whether a conviction is had, within the meaning of this statute, where the defendant, pleading not guilty but being found guilty in the lower court and fined, appealed to the Superior Court. This question is, in my judgment, disposed of by an opinion rendered to the State Board of Health under date of Feb. 25, 1914, by former Attorney-General Thomas J. Boynton, to the effect that the term "conviction" in a similar statute implied a final judgment, and did not apply while an appeal was pending from a lower court. IV Op. Atty.-Gen. 157. It results from this that in the situation set forth in your fifth inquiry the defendant cannot be considered as having been convicted while his appeal is still pending.

To recapitulate, the answers to your questions are as follows: No. 1, no; No. 2, yes; No. 3, no; No. 4, no; and No. 5, no.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Secretary of the Commonwealth — Petition for Referendum — Public Opinion — Printing on Ballot.

Under the provisions of St. 1913, c. 819, the Secretary of the Commonwealth must, on a petition properly signed and filed with him, place on the official ballot, for submission to the voters of a senatorial or representative district, instructions to the senators and representatives of such districts to vote for certain legislation, if in the opinion of the Secretary it is a question of public policy.

SEPT. 27, 1919.

Mr. HERBERT H. BOYNTON, *Deputy, Acting Secretary of the Commonwealth.*

DEAR SIR: — I have your letter in which you state that there have been filed in the office of the Secretary of the Commonwealth, under the provisions of St. 1913, c. 819, petitions for the submission of the following question in certain senatorial and representative districts, namely: —

Shall the senator and representatives from this district be instructed to vote for legislation to regulate and license the manufacture and sale of beverages containing not over four per cent of alcohol by weight and to define same to be non-intoxicating?

You request my opinion as to whether this question should be placed upon the official ballot in said districts at the next State election.

St. 1913, c. 819, § 1, 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 secretary of the commonwealth shall determine if such question is one of public policy, and if he shall so determine shall draft it in such simple, unequivocal and adequate form as he shall deem best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this act the secretary shall place such question on the official ballot to be used in that senatorial or representative district at the next state election.

I beg to advise that, in my opinion, there is nothing contained in the question which is proposed to be submitted which, as a matter of law, would prevent the Secretary of the Commonwealth from determining the question to be one of public policy. Whether the proposed question is, as a matter of fact, one of public policy is for the Secretary of the Com-

monwealth alone to determine. If the Secretary should determine that it is a question of public policy, it of course follows that the question should be placed on the official ballots, as provided in said act.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

War Bonus — Draftee — Discharge for Physical Disqualification or Bad Conduct.

The provisions of Gen. St. 1919, c. 283, granting a war bonus to men honorably discharged from the service of the United States in the World War, do not apply to drafted men who were passed by the draft board, sent to army camps and there discharged because physically disqualified, or to men discharged on account of bad conduct or similar ground.

OCT. 9, 1919.

Hon. CHARLES L. BURRILL, *Treasurer and Receiver-General.*

DEAR SIR: — You have asked my opinion with reference to several questions which have arisen as to the application of Gen. St. 1919, c. 283, entitled "An Act to provide suitable recognition for those residents of Massachusetts who served in the army and navy of the United States during the war with Germany." The purpose of this statute is plainly set forth in its first section, and the remainder of the act must in each instance be construed in the light of this purpose. That section is as follows: —

> In order to promote the spirit of patriotism and loyalty, in testimony of the gratitude of the commonwealth, and in recognition of the services of certain residents of Massachusetts in the army and navy of the United States during the war with Germany, to the full extent of the demands made upon them and of their opportunity, the payments hereinafter specified are hereby authorized.

Your first question is whether men who were summoned in the draft, passed by the draft boards, sent to one of the army camps and there found physically disqualified, and given a discharge from the draft, are entitled to the benefits of this act. I understand that in each instance these men received no discharge from the army, but merely a discharge from the obligations of the selective service law. Apparently, they never became sufficiently members of the army to be discharged therefrom.

That portion of section 2 of the statute which specifies the persons who are to receive the benefit of the act is as follows: —

Upon application, as hereinafter provided, there shall be allowed and paid out of the treasury of the commonwealth, to each commissioned officer, enlisted man, field clerk and army or navy nurse duly recognized as such by the war or navy department, who was mustered into the federal service and reported for active duty subsequently to February third, nineteen hundred and seventeen and prior to November eleventh, nineteen hundred and eighteen, and to each commissioned officer, warrant officer, nurse and enlisted man, who enlisted or was enrolled in, or was mustered into the federal service and who has been called and reported for active duty in the United States Navy, United States Naval Reserve Forces, United States Marine Corps, United States Coast Guard, or the National Navy Volunteers, subsequently to said February third, and prior to said November eleventh, and to every man who served during the war in the regular army, navy or marine corps, or to the dependents or heirs at law of the persons above enumerated, as provided in section three, the sum of one hundred dollars: . . .

In my judgment, construing the language just quoted in the light of the purpose of the act as specified in section 1, it cannot be said that the class of men to which you refer was enlisted in or had been enrolled in or had been mustered into the Federal service, within the meaning of this statute. These men were never in the army of the United States to a sufficient extent to be discharged from it. In my opinion, it cannot be said that they performed "services . . . in the army . . . of the United States" of the character intended by this statute to be recognized. Accordingly, I must advise you that men of the class to which you refer are not entitled to the benefits of the statute.

You also request my opinion as to whether men who actually entered the Federal service during the period specified in the statute, but who subsequently received discharges not declared by their terms to be either honorable or dishonorable, but specified to be given on account of bad conduct or some similar ground, are entitled to the benefits of this act.

Section 5 of the statute provides in part as follows: —

No person shall be eligible for any benefit accruing under this act who (1) shall have received a dishonorable discharge from the service of the United States, . . .

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 discharged for causes other than dishonorable. 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.

Yours very truly,

HENRY A. WYMAN, *Attorney-General.*

"Anti-Aid" Amendment — Americanization Classes — Bureau of Immigration.

By virtue of the "anti-aid" amendment, article XLVI, the provisions of Gen. St. 1919, c. 295, would not apply to educational classes for adult immigrants organized in factories, taught by private instructors and supervised by a supervisor employed and paid for by a city or town.

The State Board of Education, under the power granted it by Gen. St. 1919, c. 295, may train and employ teachers for naturalization classes conducted by the Bureau of Immigration.

OCT. 11, 1919.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have requested my opinion relative to certain questions which have been raised in connection with Gen. St. 1919, c. 295, which provides for the promotion of Americanization through education of adult persons unable to use the English language.

Your first question is based upon the following circumstances: The school authorities in a city vote to accept the provisions of chapter 295. In this city there are several classes for adult immigrants, which have been organized in

factories and which are taught by factory foremen or superintendents. These instructors are not in the employ of the school committee. The school committee and the factory employers both wish, however, to have these classes conducted according to public school requirements. To bring this to pass, the school committee plans to engage a supervisor who will visit these classes periodically and exercise general professional authority over them. Your first question is "whether or not such classes are to be considered under the control of public school authorities to the extent that this department will be enabled to recommend reimbursement for the salary of this supervisor."

My answer to this question is in the negative because of the so-called "anti-aid" amendment to our Constitution, being article XLVI, which provides, in part, that no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the Commonwealth for the purpose of maintaining or aiding any school or any educational undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the Commonwealth. The provisions of chapter 295 do not, therefore, apply to classes organized in factories, as set forth by you, nor to supervisors over such classes.

Your second question is raised on the following facts: The Bureau of Immigration engages in the recruiting of naturalization classes. The Bureau requests your Board, under the power bestowed upon it by chapter 295, to supply teachers for these classes. You ask my opinion as to whether or not the phrase "to provide teachers and supervisors in Americanization work" is to be interpreted as meaning that under the provisions of this act the Board may train teachers and employ them for the above purpose.

In my opinion, by the provisions of section 1 of chapter 295 it was intended by the Legislature that the Board of Education, acting through the Department of University Extension, should be empowered to promote Americanization, in the first place by co-operation with cities and towns, and secondly by co-operation with other proper agencies of the Commonwealth, as is indicated by the general provision at the end of section 1, which empowers you "to provide teachers and supervisors in Americanization work."

Accordingly, I am of the opinion that your Board may train teachers and employ them, under the provisions of said chapter 295, for the naturalization classes of the Bureau of Immigration.

Very truly yours,
HENRY A. WYMAN, *Attorney-General.*

Constitutional Law — Public Operation of Street Railway — Service at Cost — Zones.

Spec. St. 1918, c. 159, providing for the fixing of such rates by the public trustees operating the Boston Elevated Railway Company as will reasonably insure a sufficient income to meet the cost of service, constitutes a contract binding upon the Commonwealth; any departure therefrom would be unconstitutional unless assented to by the stockholders.

Rates fixed on the "cost of service" principle may be determined on a zone basis.

By the term "cost of service" as used in connection with Spec. St. 1918, c. 159, is meant the cost to the Boston Elevated Railway Company, exclusive of its expense to other agencies.

The General Court may authorize the taking of the Boston Elevated Railway Company in the exercise of the right of eminent domain.

OCT. 29, 1919.

Street Railway Commission.

GENTLEMEN: — Replying to the oral questions submitted to me for an opinion by you, which, as noted at the time, are as set out below, I beg to advise you as follows.

1. The first question is whether any departure from the service at cost principle prescribed by Spec. St. 1918, c. 159, would need to be assented to by the Boston Elevated Railway Company.

Section 18 of that act provides as follows: —

> None of the provisions of this act shall be construed to constitute a contract binding upon the commonwealth other than the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or operated by the Boston Elevated Railway Company shall be managed and operated by the said trustees, and the provisions of section thirteen, which provisions shall constitute a contract binding upon the commonwealth.

Section 6 of that act provides, in part, as follows: —

The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, . . .

It seems to me that the provision last above quoted, as to the manner in which the rates of fare are to be fixed, is a term and condition under which the property is to be managed and operated by the trustees, within the meaning of said section 18, and therefore constitutes a contract binding upon the Commonwealth, as provided in said section. It would seem to follow from this that any departure from the service at cost principle as prescribed by this act would be impairing the obligation of this contract, contrary to the provisions of the Constitution of the United States. It is my opinion, therefore, that this cannot legally be done without the assent of the stockholders of the Boston Elevated Railway Company.

The justices of our Supreme Judicial Court, in an opinion given to the Senate under date of April 2, 1919 (231 Mass. 603), held that Senate Bill No. 54, which provided a maximum fare of 5 cents on the lines of the Boston Elevated Railway Company, was constitutional; but it is to be noted that section 6 of that bill provided that it should not take effect until it was accepted by a majority of the stockholders of the Boston Elevated Railway Company.

2. As to the second query, I beg to advise that I can see no reason why the system of the Boston Elevated Railway Company cannot be divided into zones for the purpose of determining rates of fare, and different rates of fare applied to the various zones: *provided, however*, that such rates insure sufficient income to meet the cost of service, within the meaning of section 6 of said chapter 159.

3. If the Boston Elevated Railway Company is legally freed from its obligation to pay rental for the use of its subways, the rental of which it is so relieved should not be included in determining the cost of the service, and the fact that an amount equal to this rental is assessed upon the metropolitan district would not change this conclusion. It seems to me that the cost of service means the cost to the Boston Elevated Railway Company, and in determining this cost the expense which it involves to other agencies should not be included.

Replying to the question submitted in your letter of October 24, namely, "as to whether the State can take the property of the Boston Elevated Railway Company by condemnation to

effect public ownership of the railway," I have to advise you as follows.

Under the Constitution and the decisions of our court there can be no question but that, if "the public exigencies" require the property of the Boston Elevated Railway Company to "be appropriated to public uses," it is within the constitutional power of the General Court to authorize such taking by eminent domain, making provision at the same time for the payment of reasonable compensation to the owners of said property.

Very truly yours,
HENRY A. WYMAN, *Attorney-General.*

Hunting License — Conviction — Forfeiture.

Under Gen. St. 1919, c. 296, a hunting license is automatically forfeited upon the conviction of the holder thereof, regardless of whether or not the officer procuring the conviction has obtained a surrender of the license, as required by law.

OCT. 29, 1919.

Mr. WALTER C. ADAMS, *Chairman, Commissioners on Fisheries and Game.*

DEAR SIR: — I have your letter in which you state that upon a plea of *nolo contendere* a defendant was fined $10 upon a complaint for killing a mourning dove, and that at the time of conviction he was not required to surrender his hunting license, as provided in Gen. St. 1919, c. 296. You request my opinion as to whether "this disposition of the case bars us from proceeding against him for the surrender of his license," and "if it does not, will you kindly indicate to us what action should be taken by this Board."

I beg to advise you that, in accordance with the opinion rendered to you September 22, upon such conviction no further proceedings are required in order to effect a forfeiture of the defendant's certificate. Such forfeiture automatically takes effect upon the conviction of the holder, and is in fact an additional punishment imposed upon conviction in the particular case.

The statute expressly states that "the certificate of any person . . . shall be void, and his certificate shall immediately be surrendered to the officer who secures such conviction, and the officer shall forthwith forward the same to the commissioners, who shall cancel it and notify the clerk in whose city or town the certificate was recorded, of its cancellation."

It would appear that the officer securing this particular conviction failed to carry out the duties imposed upon him by the statute. There would appear to be, however, no reason why the officer should not now require the defendant to surrender his certificate and forward it to you in accordance with the terms of the statute. I doubt not that upon the proper demand, if a person so convicted fails to comply forthwith, proper proceedings may be instituted to compel the delivery of the certificate. Furthermore, there would appear to be no objection to your notifying the city or town granting the certificate that the same is void, and order its cancellation. The failure of the officer to fulfill the duties imposed upon him by the statute cannot change the force and effect of the statute in making the certificate void, and under the circumstances set out in your letter the person holding such certificate is without any authority of law to act under it.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Constitutional Law — Capital Stock of Street Railway Company — Eminent Domain.

The Legislature may authorize the taking of shares of the capital stock of a street railway company in the exercise of the right of eminent domain.

OCT. 31, 1919.

Street Railway Commission.

GENTLEMEN: — You have requested my opinion upon the following question: —

If public exigencies require, can the stock of the Boston Elevated Railway Company be taken by condemnation proceedings?

I assume your inquiry to involve the question whether it is within the constitutional right of the Legislature to provide for the taking by condemnation proceedings of the capital stock of said railway company.

I do not find any constitutional provision, Federal or State, which in anywise restricts the exercise of the right of eminent domain as affecting the question at issue.

In an early case in Massachusetts, in an opinion by Chief Justice Shaw, the right of eminent domain is referred to as follows: —

It is fully conceded that the right of eminent domain, the right of the sovereign, exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must judge, is a right incident to every government, and is often essential to its safety. And property is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments. Even the term "taking," which has sometimes been relied upon as implying something tangible or corporeal, is not used in the Massachusetts Declaration of Rights; but the provision is this: "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Declaration of Rights, art. 10. Here again the term "appropriate" is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated.

Boston & Lowell R.R. Co. v. *Salem & Lowell R.R. Co.*, 2 Gray, 1, 35.

In a New Jersey case decided in 1873 it was said by the court: —

In the exercise of the right of eminent domain, the Legislature may authorize shares in corporations, and corporate franchises, to be taken for public uses upon just compensation. The title to this species of property is no more secure against invasion, when the public uses require it, than is the ownership of real estate. Under this paramount right in the public, subject to which all private property is held, the franchises of one corporation have been, and may be, taken and bestowed upon another.

Black v. *Delaware & Raritan Canal Co.*, 9 N. J. Eq., 455, 468.

It has been held that "even contracts and legislative grants, which are beyond the reach of ordinary legislation, are not exempt." *New York, Housatonic & Northern R.R. Co.* v. *Boston, Hartford & Erie R.R. Co.*, 36 Conn. 196, 198.

In the case of *New York, New Haven & Hartford R.R. Co.* v. *Offield*, 77 Conn. 417, in which the right to take two shares of stock of a railroad corporation was involved, and in which it was contended that one railroad corporation could not take the stock of another railroad corporation, it was said: —

The record shows the credit of the New Haven and Derby Railroad Company to be such that if it could provide the means for the projected improvement of its property at all, it must be by contracting loans at

a higher rate of interest than would be paid by the plaintiff for similar assistance. This being so, the public interest would be better served by having the plaintiff do the work. That it is a necessary work in order to make the railroad of the greatest service to the public is admitted by the demurrer. It will therefore promote the use for which the line was originally constructed. Whatever in the nature of a property interest stands in the way of such promotion the State can put aside. Any kind of property can be taken for public use on making just compensation. The whole franchise of a corporation may be so taken. . . . Its whole property may be likewise taken. . . . Shares of stock represent an undivided interest in such franchises and property, and for the same reason can be taken, if to take them seems to the State necessary in furtherance of public uses.

This case was taken to the Supreme Court of the United States, and affirmed by a decision reported in 203 U. S. 372. See also *Contributors of the Pennsylvania Hospital* v. *City of Philadelphia et al.*, 245 U. S. 20; *City of Cincinnati* v. *Louisville & Nashville R.R. Co.*, 223 U. S. 390.

The right of the State to authorize the appropriation of every description of property, including every contract, whether between the State and an individual or between individuals only, for a public use, is one of its inherent powers, provided there be due process of law. The capital stock of the Boston Elevated Railway Company clearly falls within the sweep of this sovereign authority of the Commonwealth, and I therefore answer your question in the affirmative.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Constitutional Law — Secretary of the Commonwealth — Liquor License — Printing on Ballot.

Under the provisions of St. 1913, c. 835, § 419, the Secretary of the Commonwealth is bound to place on the ballots sent to towns the question, "Shall licenses be granted for the sale of intoxicating liquors in this town?" as nothing therein contained is in violation of the prohibition amendment or the national prohibition act.

Nov. 7, 1919.

Hon. ALBERT P. LANGTRY, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion upon the question of whether it is your duty to place upon the ballots which are sent to the town clerk of each town not using official ballots the question, "Shall licenses be granted for the

sale of intoxicating liquors in this town?" in view of the so-called prohibition amendment to the Constitution of the United States and the acts of Congress passed for the enforcement of said amendment.

It is fundamental in our system of jurisprudence that the Constitution of the United States, and the laws made in pursuance thereof, is the supreme law of the land. It follows from this that if the law of this Commonwealth commanded the doing of that which is forbidden by the Constitution and laws of the United States the State law would be nugatory and of no effect. But so long as the performance of the duty imposed by the law of the State is not contrary to or prohibited by the Federal Constitution and the laws made thereunder, it is incumbent upon the person upon whom such duty is imposed to obey the law of the State. Changes in the paramount law of the land may create need for changing the law of the State. Indeed, it may create an imperative necessity, as a practical matter, that the law of the State be repealed or altered in such a manner as to work consistently and in harmony with the mandates of Federal authority. In all cases, however, where the law of the State is not in direct conflict with Federal law, the question of the wisdom, expediency or practical necessity of altering the laws of the State to conform more nearly with the provisions of Federal law is a matter for the legislative branch of the Commonwealth alone to determine, and officers of the State charged with the execution of its laws are bound to carry out the provisions thereof until they are repealed or changed by the General Court.

Upon applying these general principles to the instant question, the answer to your question seems plain, for by St. 1913, c. 835, § 419, a positive duty is imposed upon you in relation to placing upon the ballots hereinbefore referred to the question of granting licenses for the sale of intoxicating liquors. That statute is as follows: —

> The secretary of the commonwealth shall at least seven days before the annual meeting send to the town clerk of each town not using official ballots, ballots upon the question of granting licenses for the sale of intoxicating liquors therein, which shall contain the words: "Shall licenses be granted for the sale of intoxicating liquors in this town?" "Yes" or "No," and no other words. Ballots of each kind shall be provided in number equal at least to the number of registered voters in such town. They shall be distributed to the voters at the polling place under the direction of the town clerk.

The material parts of the recent amendment to the Constitution of the United States, commonly known as the "prohibition amendment," are as follows: —

Sect. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sect. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Pursuant to this amendment an act of Congress has lately been passed, under the title of The National Prohibition Act. Part II of this act, which is to take effect from and after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, prohibits the manufacture, sale and transportation of intoxicating liquor, and defines the term "intoxicating liquor" to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors containing one-half of 1 per cent or more of alcohol, by volume, which are fit for beverage purposes.

It is clear that if this act remains in force on and after the date upon which licenses might be granted in cities and towns of this Commonwealth, the placing of this question upon the ballot and the voting thereon at the city or town elections will have little, if any, practical effect. It is equally clear, on the other hand, that nowhere in the constitutional amendment or the acts of Congress passed thereunder is there any prohibition or restriction which prevents the question in issue being placed upon the ballots, as required by section 419, above quoted. That section is not in violation of the Federal Constitution or Federal laws. It is not either expressly or by necessary implication repealed or annulled, but remains in force and effect as the law of this Commonwealth until repealed or amended by our General Court. The question is not the value, or lack thereof, or the practical effect resulting from your act, but the legal duty imposed upon you by the statute.

Accordingly, I beg to advise you that for the foregoing reasons I am of opinion that it is your duty to place upon the ballots sent to the town clerk of each town not using official

ballots the question, "Shall licenses be granted for the sale of intoxicating liquors in this town?" as provided by St. 1913, c. 835, § 419.

Very truly yours,
HENRY A. WYMAN, *Attorney-General.*

Mechanic's Lien — Laborers — Weekly Wages.

A lien filed in due season by a laborer for work performed either prior to the recording of a mortgage or in connection with the erection, alteration, repair or removal of a building or structure, which erection, alteration, repair or removal was begun prior to the recording of the mortgage, takes precedence over the mortgage.

Where the erection, alteration, repair or removal of a building or structure is commenced after the recording of the mortgage, the only remedy of a workman who has done work in connection with such erection, alteration, repair or removal is against the contractor, either civilly for wages owed or criminally for failure to pay weekly.

Nov. 28, 1919.

Mr. EDWIN MULREADY, *Commissioner of Labor.*

DEAR SIR: — You have asked my opinion as to whether Gen. St. 1918, c. 265, affects the weekly payment law, as provided in St. 1909, c. 514, § 112, as amended; and also whether there is any legal procedure by which a workman may obtain certain wages he has earned, on a particular set of facts stated in your letter.

Section 112, aforesaid, was last amended by Gen. St. 1918, c. 87, and under the statute as amended the contractor is liable criminally for failure to pay wages weekly. Gen. St. 1918, c. 265, does not affect this liability in any way. Section 1 of chapter 265 enlarges the lien of material men who do work after the date of the original contract. Section 2 provides for dissolution of the lien by notice from the person who holds the lien. Section 3 also relates to dissolution of liens, and section 4 to the rights of an attaching creditor, but there is nothing therein which restricts the rights of a laborer as created by prior laws.

The law relative to liens for labor and materials is contained in Gen. St. 1915, c. 292, and numerous amendments thereto, particularly Gen. St. 1916, c. 306. Section 6 of the 1915 act, as amended, reads as follows: —

No lien, except under the provisions of section one, shall avail as against a mortgage actually existing and duly registered or recorded prior to the filing or recording in the registry of deeds of the notice required by the provisions of this act, and no lien under section one shall avail as against such a mortgage unless the work or labor performed is in the erection, alteration, repair or removal of a building or structure, which erection, alteration, repair or removal was actually begun prior to the recording of the mortgage.

Section 1 therein referred to provides for the labor lien.

The effect, then, of section 6 is as follows: Where a workman does work before a mortgage is recorded he has a lien for the work if he files his claim in due season, and this lien has precedence over the mortgage. He also has a similar lien if the erection, alteration, repair or removal of a building or structure on which he was working was begun prior to the recording of the mortgage, even though he does not do his individual work until after the recording of the mortgage. If, however, he does not start his work until after the mortgage is recorded, and the mortgage was recorded before the erection, alteration, repair or removal of the building or structure was begun, the mortgage has precedence over his lien.

Assuming, then, that the laborers referred to in your letter filed their claims in due season and started their work either before the mortgage was recorded or did work on the alteration, repair or removal of a building or structure which was begun prior to the recording of the mortgage, they have a lien on the land ahead of the mortgage. If, however, the mortgage was recorded before the job of erection, alteration, repair or removal of the building was begun, and they did no work prior to the recording of the mortgage, then they are shut out from their lien, as a practical matter, because the mortgage takes precedence over their lien, and their only remedy is against the contractor, which remedy can be pursued civilly for wages owed, and criminally for failure to pay weekly.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Public Service Commission — Limitation of Grade Crossings — Public and Private Railroads.

St. 1890, c. 382, and St. 1892, c. 228, as amended, authorizing the Public Service Commission to limit crossings at grade for a specified time, apply to private crossings on all railroads.

Nov. 29, 1919.

Public Service Commission.

GENTLEMEN: — You have asked my opinion as to whether the position taken by the attorneys for the Fore River Railroad Corporation and the Fore River Shipbuilding Corporation, in regard to their right to maintain private freight tracks across highways, at grade, in Quincy and Braintree, is correct.

In the first place, it is my opinion that Spec. St. 1918, c. 138, authorizing the Fore River Shipbuilding Corporation to sell and convey its private property to any domestic railroad corporation, does not lessen in any way the obligations of the Fore River Railroad Corporation, which took over the property in question, and that all laws now or hereafter in force which controlled the shipbuilding corporation in its management of the railroad are equally applicable to the railroad corporation, except as such laws may be modified by section 3, relating to the expense of abolishing the grade crossing.

There are two statutes relating specifically to the question at hand. The first is St. 1890, c. 382, as finally amended by St. 1912, c. 375, and the other is St. 1892, c. 228, as last amended by St. 1906, c. 463, § 22. A first reading of the 1890 statute would indicate that it was intended to apply to private railroads, and apparently the Legislature, when making its amendment in 1912, took this view; but an investigation of the report of the Railroad Commissioners for 1889, particularly at pages 30 and 33, indicates very strongly that the 1890 statute was passed for the purpose of safeguarding private crossings on all railroads rather than public crossings on private railroads, and that the words "for private use" modify, not the word "railroad" but the word "crossing."

The necessity for an act giving the commissioners supervision over public grade crossings, general in its character, is referred to in the report of the Railroad Commissioners of 1889, at page 33, and by draft of legislation in regard to grade crossings, at page 137, and again in their report of 1891, at page 95. The act of 1892, apparently passed for the reasons set forth in the reports cited, enumerated specifically the

various types of public crossings that might exist, including the one in question. There is nothing in any statute that I can find which indicates that the word "railroad," as used in the 1892 statute, does not include a private railroad.

It is my opinion, therefore, that the Fore River Railroad Corporation is subject to the 1892 statute, as amended, under which the Board has the power to limit a public crossing at grade for a specified length of time. It seems unnecessary to decide whether the same result might be reached under St. 1890, c. 382, as amended by St. 1912, c. 375.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Referendum — Existing Law — Effect of Ratification on Subsequent Amendment.

A petition for referendum on an existing law, subsequently amended, suspends operation both of the law and the amendment thereto, pending action thereon by the voters; and its approval by them carries with it the approval of the amendment.

Nov. 29, 1919.

Hon. AUGUSTUS L. THORNDIKE, *Bank Commissioner.*

DEAR SIR: — I acknowledge the receipt of your letter in which you ask the following question: —

As the question has been raised whether savings banks and trust companies having savings departments may pay dividends or interest monthly or semi-annually, I respectfully ask your opinion whether chapter 116 of the General Acts of 1919, which was suspended by a petition for a referendum, and which I understand was afterwards ratified by the referendum vote, is the rule, or whether chapter 326 of the General Acts of 1919, which is an amendment of said chapter 116, is the rule?

The effect of the petition for the referendum on chapter 116 of the General Acts of 1919 was to suspend the operation of the law pending the action of the voters thereon. They having acted, and, as I understand, approved the law, it takes effect thirty days after such approval.

This law had not in the meantime been repealed. Gen. St. 1919, c. 326, amended it. Suspending the operation of the original act suspended the operation of the amendment. The approval of the original act carried with it the approval of the amendment.

The legislative control of the enactment or amendment of laws is not affected by the referendum provisions of the Constitution; the operation of a given law is alone affected by the referendum. It may or may not become effective, as the voters act. When they do act, the status of the law is fixed, unless and until the Legislature, as it may, again acts with reference to the same subject-matter.

Gen. St. 1919, c. 116, as amended by Gen. St. 1919, c. 326, will be in force Dec. 4, 1919.

Very truly yours,

HENRY A. WYMAN, *Attorney-General.*

Joint School Committee — Election of Superintendent — Length of Term.

Under R. L., c. 42, § 44, as amended by St. 1911, c. 384, § 1, a superintendent of schools elected by a joint school committee of a school union must be employed for a three-year term, regardless of when the employment begins.

DEC. 3, 1919.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have requested an opinion on the following propositions: —

Can a joint school committee, acting in December of this year, elect a superintendent of schools for a three-year term to begin July 1, 1920?

Can said committee elect a superintendent of schools to serve temporarily; that is, from Jan. 1, 1920, to July 1, 1920?

The law relating to this subject is incorporated in R. L., c. 42, § 44, as amended by St. 1911, c. 384, § 1, and is as follows: —

The joint committee shall annually, in April, meet at a day and place agreed upon by the chairman of the committees of the several towns comprising the union, and shall organize by the choice of a chairman and secretary. They shall employ a superintendent of schools, determine the relative amount of service to be performed by him in each town, fix his salary, apportion the amount thereof to be paid by the several towns and certify it to each town treasurer. Such superintendent of schools shall be employed for a term of three years, and his salary shall not be reduced during such term.

This law relates to the selection of a superintendent of schools by joint school committees of school unions, and is not specific on the points about which you inquire.

It is my opinion that a superintendent must be employed for a three-year term, regardless of when the employment begins.

Yours very truly,

HENRY A. WYMAN, *Attorney-General.*

Minors — Hazardous Employment — Manual Training in Educational Institution.

Under St. 1913, c. 831, § 27, the Board of Education or the school committee of a city or town must, on an application of the Co-operative School of Engineering of Northeastern College for approval of the manual training or industrial education in that school, give its approval or disapproval.

DEC. 5, 1919.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have requested my opinion upon the following set of facts: The Co-operative School of Engineering of Northeastern College conducts courses in which pupils are alternately in school and in employment. Minors are thus sometimes engaged in hazardous employments forbidden except as specially provided for in St. 1913, c. 831. You have directed my attention to section 27 of chapter 831 of the Acts of 1913, which provides, in part, that "nothing in this act shall be construed . . . to prevent minors of any age from receiving manual training or industrial education in or in connection with any school in the commonwealth which has duly been approved by the school committee or by the board of education." You have asked the three following questions: —

1. Are pupils in the co-operative courses of the Co-operative School of Engineering of Northeastern College receiving manual training or industrial education in or in connection with a school, as contemplated by said section 27?

2. Is said Co-operative School of Engineering the type of school contemplated by section 27, and therefore one which either school committees or the Board of Education could approve as such, thereby waiving the provisions of the child labor law?

3. Is approval of such a school as the said co-operative school, for the purposes of said section 27, a responsibility imposed by the statutes upon the Board of Education?

Your three questions are all to be answered in the affirmative. In my opinion, the provisions of section 27 require that when an educational institution makes application to a school committee or to the Board of Education for approval of its manual training or industrial education in that institution, it is incumbent upon the school committee or the Board of Education, as the case may be, to give its approval or disapproval.

Yours very truly,

HENRY A. WYMAN, *Attorney-General.*

Cities and Towns — Sale of Intoxicating Liquors — Payment of Part License Fee to Commonwealth.

Under the provisions of R. L., c. 100, § 2, malt liquors, cider and light wines containing more than 1 per cent. alcohol by volume at 60° F. are intoxicating liquors, and under section 45 of said chapter the treasurer of a town issuing a license for the sale of such liquors is obliged to pay one-fourth of all of the moneys received for said licenses to the Treasurer and Receiver-General of the Commonwealth.

DEC. 9, 1919.

HON. CHARLES L. BURRILL, *Treasurer and Receiver-General.*

DEAR SIR: — You have requested my opinion on a question as to the application of R. L., c. 100, § 45, under which cities and towns have paid into the treasury of the Commonwealth one-fourth of the amount received for licenses for the sale of intoxicating liquors. You state that the town treasurer of Maynard has paid one-fourth of a certain license under protest, and has forwarded to you a copy of a license issued by the board of selectmen of that town, the town claiming that it is not a license for the sale of intoxicating liquors within the language of section 45.

The license issued reads as follows: —

This is to certify that the board of selectmen of the town of Maynard, Mass., have granted a license to , doing business at , to sell or expose or keep for sale malt liquors, cider and light wines (containing not more than 15 per cent of alcohol) to be drunk on the premises.

You desire to know whether treasurers of cities and towns are now obliged to pay to the Treasurer and Receiver-General one-fourth of the amount of money received for licenses for the sale of intoxicating liquors.

Section 45 of chapter 100 of the Revised Laws is as follows: —

The treasurer of a city or town shall, within thirty days after the receipt of money for licenses for the sale of intoxicating liquors, make a return of the amount thereof to the treasurer and receiver general and at the same time shall pay to him one-fourth of the amount so received, and for neglect thereof he shall pay interest at the rate of six per cent per annum on the amount of such receipts from the time they become due until they are paid.

Section 2 of said chapter provides: —

Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter.

In view of the fact that these provisions of law still stand upon our statute books, treasurers of cities and towns are obliged, under section 45, to pay to you one-fourth of all money received for licenses for the sale of intoxicating liquors.

Yours very truly,

HENRY A. WYMAN, *Attorney-General.*

Private Detective — Definition of Term.

By the words "private detective," as used in Gen. St. 1919, c. 171, is meant any person who generally engages in or solicits the business of seeking out and discovering evidence for use in civil or criminal proceedings.

DEC. 9, 1919.

Mr. JOHN H. PLUNKETT, *Chief of Inspections, Department of Public Safety.*

DEAR SIR: — You have asked me for a definition of the words "private detective" as used in Gen. St. 1919, c. 271, which forbids any person, firm or corporation "to engage in the business of, or solicit business as, a private detective, or the business commonly transacted by a private detective," without first obtaining a license as provided in said act.

The popular conception of a detective is a person whose occupation it is to seek out and discover, more or less secretly, evidence concerning the character or conduct of third persons. The popular conception of a private detective is a person engaged unofficially in this occupation. The act apparently uses the words "private detective" in their popular sense. The

language of the act, however, lays stress on engaging in or soliciting such business. I am of opinion that a mere sporadic seeking of such evidence or information should not be held to be within its terms. This view is strengthened by the considerable license fee required (§ 5, $100), and further by the fact that a person who desires to obtain a license must have had three years' experience as an investigator (§ 2). Gen. St. 1919, c. 271, repeals and replaces R. L., c. 108, §§ 35 and 36. Section 35 authorizes certain municipal officials to license a private citizen "to act as a private detective for the detection, prevention and punishment of crime." In view of the broader language used in Gen. St. 1919, c. 271, the definition of detective can no longer be restricted to the collection of information "for the detection, prevention or punishment of crime." It extends to civil proceedings.

For a practical rule of thumb, but by no means as an exhaustive and conclusive definition, I suggest that any person who *generally engages in or solicits the business* of seeking out and discovering *evidence* for use in civil or criminal proceedings will usually be found to be within the act. I do not feel, however, that a cast-iron rule can be laid down.

Yours very truly,

HENRY A. WYMAN, *Attorney-General.*

Fire Insurance Companies — Right to do more than One Class of Business — Reinsurance.

Under St. 1907, c. 576, § 34, a foreign insurance company, admitted to this Commonwealth since the date mentioned therein, is not permitted to carry on more than one class or combination of classes of business mentioned therein.

A purely mutual fire insurance company may not qualify to issue policies by a contract of reinsurance by it of the business of another existing company. Before such a company may issue policies it must have subscriptions for at least four hundred separate risks of direct insurance upon property located within the Commonwealth, and amounting to not less than $1,000,000.

DEC. 23, 1919.

Hon. CLARENCE W. HOBBS, *Insurance Commissioner.*

DEAR SIR: — You request my opinion upon certain questions which have arisen in the administration of the statutes relating to insurance companies.

You call attention to the classes of business established by St. 1907, c. 576, § 32, with its amendments, and to the various

combinations of those classes permitted in the case of foreign insurance companies by section 34. You state that, —

An application has been filed by a company to transact business specified in clauses 5, 6, 8 and 11 of section 32. This combination is not set forth in section 34, and the questions are: —

(1) Are the combinations set forth in section 34 the only combinations of classes of business which a foreign company may be admitted to transact?

(2) Is the specific combination which the company in question desires to be admitted to transact permissible under the law?

Section 34 contains the following provision: —

No domestic insurance company shall transact any business other than that specified in its charter or agreement of association and no foreign insurance company admitted to this commonwealth prior to May thirty-first, eighteen hundred and eighty-seven, shall transact any other kind of business than it had been authorized to transact prior to that date, and no foreign insurance company admitted since said date shall transact more than one class or kind of business herein, except that a domestic company and, if its charter permits, and not herwise, any admitted foreign company may transact.

There then follow numerous specifications of combinations of classes of business permitted to such companies, with a statement of the authorized capital to be required in certain instances.

The provision of this section that "no foreign insurance company admitted since said date shall transact more than one class or kind of business herein, except that . . . if its charter permits, and not otherwise, any admitted foreign company may transact" the specified combinations of classes of business, plainly limits the permissible combinations to those thus specified. The combination to which you refer is not authorized by this section, and therefore a foreign company may not be admitted to transact such business in this Commonwealth.

You further inquire if, in determining whether a purely mutual fire insurance company has complied with the conditions established by St. 1907, c. 576, § 42, so as to permit it to issue policies, consideration can be given to the reinsurance by it of the business of another existing company. This section provides in part as follows: —

No policy shall be issued by a purely mutual fire insurance company organized subsequent to the twenty-third day of April in the year eighteen hundred and ninety-four, nor by a mutual fire insurance company with a guaranty capital of less than one hundred thousand dollars, until not less than one million dollars of insurance, in not less than four hundred separate risks upon property located in this commonwealth, has been subscribed for and entered on its books. No policy shall be issued under the provisions of this section until a list of the subscribers for insurance, with such other information as the insurance commissioner may require, shall have been filed at the insurance department, nor until the president and secretary of the company shall have certified under 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 of a license to the company by the insurance commissioner to issue policies. If such officers shall take a false oath relative to such certificate they shall be guilty of perjury.

A contract of reinsurance is not a contract of insurance upon property. See II Op. Attys.-Gen. 157. It is rather a contract to insure, in whole or in part, the contractual risk assumed by the ceding company. It is merely an agreement to indemnify that company against loss upon its contracts. Thus it cannot be said that a contract for the reinsurance of the business of another company consisting of various separate risks of direct insurance assumed by it is a contract covering "separate risks upon property." Nor is an arrangement with another company for the reinsurance of its business in any proper sense of the term a "subscription for insurance" within the meaning of this section. In my opinion, this statute contemplates that the subscriptions for insurance which must be obtained before a mutual company may issue policies shall be subscriptions for four hundred separate risks of direct insurance upon property located within the Commonwealth. Thus, in my judgment, a company may not qualify to issue policies by a contract of reinsurance of the character stated by you.

Yours very truly,

HENRY A. WYMAN, *Attorney-General.*

Taxation — Exemption — Merchant Marine — Arrest for Non-payment of Taxes — Administrator, Executor, Trustee in Bankruptcy.

Gen. St. 1919, c. 9, exempting inhabitants of this Commonwealth who have served in the military and naval forces of the United States in the World War from the payment of poll taxes, does not apply to members of the merchant marine.

A trustee in bankruptcy is an officer in the bankruptcy court. He cannot be arrested for the non-payment of a tax due from the estate.

Neither an executor nor an administrator can be arrested for non-payment of a tax assessed in the estate or to him as said executor or said administrator, except as provided for in St. 1909, c. 490, pt. II, § 34.

Dec. 24, 1919.

Hon. William D. T. Trefry, *Commissioner of Corporations and Taxation.*

Dear Sir: — You have asked my opinion upon certain questions with reference to which you have been requested to advise local assessors and collectors of taxes.

Your first question is as follows: —

Under Gen. St. 1919, c. 9, do those who served in the merchant marine and coast guard come within its provisions as to exemption from payment of poll taxes; and also, if any poll taxes have been paid by those who are entitled to an exemption, must a refund be made, and from what money may it be repaid?

The statute to which you refer exempts from the payment of poll taxes assessed for 1917 and a certain period thereafter "inhabitants of this commonwealth who were engaged in the military or naval service of the United States in the present war before the passage of this act, and those who hereafter engage in said service during said war."

The question is, therefore, whether persons who served in the merchant marine and coast guard were in the military or naval service of the United States.

It is plain that those who served in the merchant marine were not in such service. They were not connected with the military or naval forces of the United States, but were engaged in purely merchant marine service under the United States Shipping Board. They have not been regarded as in the military or naval service for the purposes of Gen. St. 1919, c. 283, granting the so-called $100 bonus or gratuity. They therefore do not come within the provisions of this act. At the beginning of the war the coast guard was in the service of the Treasury

Department, but during the war it was taken over by the Navy Department, and therefore its members must be regarded as in the naval service of the United States. They have been so considered in the administration of the bonus or gratuity statute above referred to. In my opinion, they come within the exemption from poll taxes established by the statute under discussion. If poll taxes have been assessed upon, and paid by, any persons entitled to exemption under this statute, their remedy seems to be the ordinary one granted by the statutes for the abatement of taxes. They must apply to the local assessors, and their applications must be dealt with in the same manner and subject to the same conditions as all other applications for abatement.

Your second question is as follows: —

Can an administrator, executor or assignee or trustee in bankruptcy be arrested for a tax assessed directly to them in their capacity as such administrator, etc.?

A trustee in bankruptcy is an officer of the courts of the United States. In my opinion, it is not within the power of a collector of taxes to arrest him for non-payment of taxes nor in any other way to interfere with his performance of the duties entrusted to him by the court. The rights of the tax collector must be enforced by appropriate proceedings in the bankruptcy court. *In re Tyler*, 149 U. S. 164.

So far as your question relates to the right to arrest executors and administrators, it depends solely upon the interpretation of our statutes. The right to arrest is, of course, an extraordinary remedy, and is not regarded as granted unless the grant clearly appears by the terms of the statute. An executor or administrator acts purely in a representative capacity, and, in the eyes of the law, is an entirely different person from himself individually. He is not *personally* liable for taxes assessed upon the estate or to him as executor or administrator, except under the conditions prescribed in St. 1909, c. 490, pt. II, § 34, but if those conditions are satisfied he "is personally liable therefor as for his own tax." The question is not free from doubt, but I am of opinion that this provision for personal liability would be construed by the court to bring an executor or administrator in a proper case within the scope of section 27 of the same act, provided, of course, the conditions of section 27 are also clearly satisfied. It seems

INDEX TO OPINIONS.

GRADE CROSSINGS.

The following petitions for the abolition of grade crossings are pending: —

Berkshire County.

North Adams, Mayor and Aldermen of, petitioners. Petition for abolition of State Street and Furnace Street crossings. Edmund K. Turner, David F. Slade and William G. McKechnie appointed commissioners. Commissioners' report filed. Pending.

Pittsfield, Mayor and Aldermen of, petitioners. Petition for abolition of Merrill crossing in Pittsfield. Thomas W. Kennefick, Frederick L. Green and Edmund K. Turner appointed commissioners. Pending.

Stockbridge. Berkshire Railroad, petitioner. Petition for abolition of Glendale station crossing. Pending.

West Stockbridge, Selectmen of, petitioners. Petition for abolition of grade crossing at Albany Street. James D. Colt, Charles W. Bosworth and James L. Tighe appointed commissioners. Pending.

Bristol County.

Taunton, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Danforth and other streets in Taunton. Thomas M. Babson, George F. Swain and Edwin U. Curtis appointed commissioners. Charles H. Beckwith appointed commissioner in place of Thomas M. Babson, deceased. Commissioners' report filed. James A. Stiles appointed auditor. Pending.

Essex County.

Gloucester. Directors of Boston & Maine Railroad, petitioners. Petition for abolition of grade crossing between Washington Street and tracks of Boston & Maine Railroad. Pending.

Haverhill, Mayor and Aldermen of, petitioners. Petition for abolition of Washington Street and other crossings in Haverhill. George W. Wiggin, William B. French and Edmund K. Turner appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. E. A. McLaughlin appointed auditor in place of Fred E. Jones, deceased. Auditor's seventeenth report filed. Disposed of.

Lawrence, Mayor and Aldermen of, petitioners. Petition for abolition of crossing at Merrimac and other streets in Lawrence. Robert O. Harris, Edmund K. Turner and Henry V. Cunningham appointed commissioners. Pending.

Lawrence, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossing at Parker Street. James D. Colt, Henry V. Cunningham and Henry C. Mulligan appointed commissioners. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of Summer Street and other crossings on Saugus branch of Boston & Maine Railroad and Market Street and other crossings on main line. George W. Wiggin, Edgar R. Champlin and Edmund K. Turner appointed commissioners. Commissioners' report filed. Edward A. McLaughlin appointed auditor. Auditor's eighth report filed. Pending.

Lynn, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Pleasant and Shepard streets, Gas Wharf Road and Commercial Street, on the Boston, Revere Beach & Lynn Railroad. Pending.

Salem. Directors of Boston & Maine Railroad, petitioners. Petition for the abolition of grade crossings at Bridge, Washington, Mill, North, Flint and Grove streets in Salem. Patrick H. Cooney, George F. Swain and William A. Dana appointed commissioners. Pending.

Salem, Mayor and Aldermen of, petitioners. Petition for abolition of Lafayette Street crossing in Salem. Pending.

Franklin County.

Erving, Selectmen of, petitioners. Petition for abolition of grade crossing on the road leading from Millers Falls to Northfield. Samuel D. Conant, Arthur H. Beers and Charles C. Dyer appointed commissioners. Commissioners' report filed. Pending.

Greenfield, Selectmen of, petitioners. Petition for abolition of grade crossing at Silver Street. Stephen S. Taft, Henry P. Field and Thomas J. O'Connor appointed commissioners. Commissioners' report filed and recommitted. Stephen S. Taft, Jr., appointed commissioner in place of Stephen S. Taft resigned. Commissioners' second report filed. Pending.

Hampden County.

Palmer, Selectmen of, petitioners. Petition for abolition of Burley's crossing in Palmer. Pending.

Hampshire County.

Amherst, Selectmen of, petitioners. Petition for abolition of grade crossings at Whitney, High and Main streets. Railroad Commissioners appointed commissioners. Pending.

Middlesex County.

Acton, Selectmen of, petitioners. Petition for abolition of Great Road crossing in Acton. Benj. W. Wells, George D. Burrage and William B. Sullivan appointed commissioners. Commissioners' report filed. Fred Joy appointed auditor. Pending.

Arlington, Selectmen of, petitioners. Petition for abolition of grade crossings at Mill and Water streets. Pending.

Belmont, Selectmen of, petitioners. Petition for abolition of crossings at Waverley station. Thomas W. Proctor, Patrick H. Cooney and Desmond FitzGerald appointed commissioners. Pending.

Chelmsford, Selectmen of, petitioners. Petition for abolition of grade crossing at Middlesex Street. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Marble Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Concord Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Waverly Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Bishop Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Hollis and Waushakum streets crossings. Pending.

Framingham, Selectmen of, petitioners. Petition for the abolition of Claflin Street crossing. Pending.

Framingham, Selectmen of, petitioners. Petition for abolition of grade crossings at Willis Crossing. Pending.

Lowell, Mayor and Aldermen of, petitioners. Petition for abolition of grade crossings at Middlesex and Fletcher streets and Western Avenue. George F. Swain, Patrick H. Cooney and Nelson P. Brown appointed commissioners. Commissioners' report filed. Pending.

Marlborough, Mayor and Aldermen of, petitioners. Petition for abolition of Hudson Street crossing in Marlborough. Walter Adams, Charles A. Allen and Alpheus Sanford appointed commissioners. Commissioners' report filed. Pending.

Newton, Mayor and Aldermen of, petitioners. Petition for the abolition of Concord Street and Pine Grove Avenue crossings in Newton. George W. Wiggin, T. C. Mendenhall and Edmund K. Turner appointed commissioners. Pending.

Somerville, Mayor and Aldermen of, petitioners. Petition for abolition of Park Street, Dane Street, and Medford Street crossings in Somerville. George W. Wiggin, George F. Swain and James D. Colt appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor in place of Patrick H. Cooney deceased. Auditor's thirteenth report filed. Pending.

Somerville, Mayor and Aldermen of, petitioners. Petition for abolition of Somerville Avenue crossing in Somerville. George W. Wiggin, George F. Swain and James D. Colt appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor in place of Patrick H. Cooney deceased. Auditor's tenth report filed. Disposed of.

Wakefield, Selectmen of, petitioners. Petition for abolition of Hanson Street crossing in Wakefield. Pending.

Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of South Street crossing in Waltham. Geo. F. Swain, —— —— and Geo. A. Sanderson appointed commissioners. Pending.

Waltham, Mayor and Aldermen of, petitioners. Petition for abolition of Moody Street, Main Street, Elm Street, River Street, Pine Street, Newton Street and Calvary Street crossings in Waltham. Arthur Lord, Patrick H. Cooney and George F. Swain appointed commissioners. Pending.

Watertown, Selectmen of, petitioners. Petition for abolition of grade crossings at Cottage, Arlington, School, Irving and other streets in Watertown. Pending.

Wayland, Selectmen of, petitioners. Petition for abolition of grade crossing at State Road. George F. Swain, Harvey N. Shepard and Arthur W. DeGoosh appointed commissioners. Pending.

Weston, Selectmen of, petitioners. Petition for abolition of grade crossings at Central Avenue, Conant Road, Church and Viles streets. P. H. Cooney, Louis A. Frothingham and Andrew M. Lovis appointed commissioners. Pending.

Winchester, Selectmen of, petitioners. Petition for the abolition of crossing at Winchester station square. George W. Wiggin, George F. Swain and Arthur Lord appointed commissioners. Commissioners' report filed and recommitted. Pending.

Norfolk County.

Braintree, Selectmen of, petitioners. Petition for the abolition of the Pearl Street crossing at South Braintree. Patrick H. Cooney, Frank N. Nay and George F. Swain appointed commissioners. Pending.

Braintree. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of grade crossing at School, Elm, River and Union streets in Braintree. John L. Bates, Winfield S. Slocum and Arthur H. Wellman appointed commissioners. Commissioners' report filed. Pending.

Dedham, Selectmen of, petitioners. Petition for the abolition of Eastern Avenue and Dwight Street crossings in Dedham. Alpheus Sanford, Charles Mills and J. Henry Reed appointed commissioners. Commissioners' report filed. Fred E. Jones appointed auditor. Pending.

Dover, Selectmen of, petitioners. Petition for abolition of grade crossing at Springdale Avenue and Dedham and Haven streets. Public Service Commission appointed commissioners. Pending.

Needham, Selectmen of, petitioners. Petition for abolition of Charles River Street crossing in Needham. Pending.

Quincy. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Saville and Water streets crossings in Quincy. John L. Bates, Winfield S. Slocum and Arthur H. Wellman ap-

pointed commissioners. Commissioners' report filed and recommitted. Joseph B. Lyons appointed commissioner in place of Winfield S. Slocum, deceased. Commissioners' second report filed. Pending.

Westwood. Directors of New York, New Haven & Hartford Railroad Company, petitioners. Petition for abolition of Green Lodge Street crossing in Westwood. Samuel L. Powers, Stephen S. Taft and Wm. Jackson appointed commissioners. Commissioners' report filed. Recommitted. Pending.

Plymouth County.

Rockland, Selectmen of, petitioners. Petition for abolition of grade crossings at Union and other streets in Rockland. Pending.

Suffolk County.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of Dudley Street crossing in Dorchester. Thomas Post, Fred Joy and Edmund K. Turner appointed commissioners. Commissioners' report filed. James D. Colt appointed auditor. Auditor's tenth report filed. Disposed of.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of Freeport, Adams, Park, Mill and Walnut streets and Dorchester Avenue crossings. James R. Dunbar, Samuel L. Powers and Thomas W. Proctor appointed commissioners. Commissioners' report filed. Arthur H. Wellman appointed auditor. Auditor's twenty-second report filed. Disposed of.

Boston, Mayor and Aldermen of, petitioners. Petition for abolition of crossings at Saratoga, Maverick and Marginal streets in East Boston. Railroad Commissioners appointed commissioners. Commissioners' report filed. Robert O. Harris appointed auditor. Auditor's second report filed. Disposed of.

Boston. New York, New Haven & Hartford Railroad Company, petitioner. Petition for abolition of grade crossing at West First Street. William B. Thompson, Philip Nichols and H. Heustis Newton appointed commissioners. Commissioners' report filed. Pending.

Revere, Selectmen of, petitioners. Petition for abolition of Winthrop Avenue crossing in Revere of the Boston, Revere Beach & Lynn Railroad. Pending.

Worcester County.

Auburn. Boston & Albany Railroad Company, petitioner. Petition for abolition of Cemetery Road, a private way. The Public Service Commission appointed commissioners. Pending.

Clinton, Selectmen of, petitioners. Petition for abolition of Sterling, Water, Main, High and Woodlawn streets crossings. George W. Wiggin, William E. McClintock and James A. Stiles appointed commissioners. Commissioners' report filed. David F. Slade appointed auditor. Frederic B. Greenhalge appointed auditor in place of David F. Slade deceased. Auditor's thirteenth report filed. Pending.

Harvard. Boston & Maine Railroad, petitioner. Petition for abolition of a grade crossing near Harvard station. Pending.

Hubbardston, Selectmen of, petitioners. Petition for abolition of Depot Road crossing in Hubbardston. Pending.

Leominster, Selectmen of, petitioners. Petition for abolition of Water, Summer, Mechanic and Main streets crossings. George W. Wiggin, George F. Swain and Charles D. Barnes appointed commissioners. Commissioners' report filed. Recommitted. Pending.

Southborough, Selectmen of, petitioners. Petition for abolition of crossing on road from Southborough to Framingham. A. W. DeGoosh, Louis A. Frothingham and Eugene C. Hultman appointed commissioners. Commissioners' report filed and recommitted. Pending.

Southborough, Selectmen of, petitioners. Petition for abolition of Main Street crossing at Fayville in Southborough. Pending.

Southbridge, Selectmen of, petitioners. Petition for abolition of grade crossings at Foster, Central and Hook streets. George F. Swain, P. H. Cooney and William F. Garcelon appointed commissioners. Commissioners' report filed. Pending.

Webster, Selectmen of, petitioners. Petition for abolition of grade crossing at Main Street. Pending.

West Boylston. Boston & Maine Railroad Company, petitioners. Petition for abolition of Prescott Street crossing. Pending.

Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of crossings at Exchange, Central and Thomas and other streets. Arthur Lord, George F. Swain and Fred Joy appointed commissioners. Pending.

Worcester, Mayor and Aldermen of, petitioners. Petition for abolition of Grafton Street crossing and eight other crossings, including alterations of Union Station. James R. Dunbar, James H. Flint and George F. Swain appointed commissioners. Commissioners' report filed. James A. Stiles appointed auditor. Auditor's seventy-third report filed. Pending.

RULES OF PRACTICE

In Interstate Rendition.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.