Commonwealth of Massachusetts

ATTORNEY-GENERAL'S REPORT

1922

Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JANUARY 17, 1923

BOSTON
WRIGHT & POTTER PRINTING CO., STATE PRINTERS
32 DERNE STREET

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, Jan. 17, 1923.

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,

J. WESTON ALLEN,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL.

State House.

Attorney General.

J. WESTON ALLEN.

Assistants.

EDWIN H. ABBOT, JR.
ALEXANDER LINCOLN.
JAY R. BENTON.
ALBERT HURWITZ.
LEWIS GOLDBERG.
CHARLES R. CABOT.
A. CHESLEY YORK.
JAMES H. DEVLIN.[1]

Chief Clerk.

LOUIS H. FREESE.

[1] Appointed June 1, 1922.

STATEMENT OF APPROPRIATION AND EXPENDITURES.

Appropriation for 1922	$102,950 92
Appropriation for 1921, unexpended balance brought forward to pay 1921 bills	4,401 93
	$107,352 85

Expenditures.

For salary of Attorney-General	$8,000 00
For law library	1,228 55
For salaries of assistants	30,750 01
For clerks	7,870 00
For office stenographers	7,075 00
For telephone operator	921 00
For legal and special services and expenses	23,314 97
For office expenses and travel	8,452 07
For court expenses	3,307 83
Total expenditures	$90,919 43

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, Jan. 17, 1923.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, 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 12,451, are tabulated below: —

Corporate franchise tax cases	5,156
Extradition and interstate rendition	273
Grade crossings, petitions for abolition of	60
Indictments for murder	56
Inventories and appraisals	3
Land Court petitions	218
Land-damage cases arising from the taking of land by the Department of Public Works	48
Land-damage cases arising from the taking of land by the Metropolitan District Commission	25
Land-damage cases arising from the taking of land by the State House Building Commission	2
Land-damage cases arising from the taking of land by the Armory Commissioners	1
Land-damage cases arising from the taking of land by the Department of Mental Diseases	4
Land-damage cases arising from the taking of land by the Pilgrim Tercentenary Commission	6
Miscellaneous cases arising from the work of the above-named commissions	11
Miscellaneous cases	655
Petitions for instructions under inheritance tax laws	47
Public charitable trusts	168
Settlement cases for support of persons in State hospitals	57
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	5,661

Capital Cases.

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

Louis Arone, indicted in Middlesex County, June, 1921, for the murder of Dominic Falcone, at Watertown, on May 11, 1921. He was arraigned March 9, 1922, 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. James H. Vahey, Esq., appeared as counsel for the defendant. The case was in charge of District Attorney Endicott P. Saltonstall.

Julius B. Arthur, indicted in Norfolk County, September, 1921, for the murder of John Bodey, at Quincy, on June 18, 1921. The defendant was arraigned April 20, 1922, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant was thereupon sentenced to the house of correction for fourteen months. J. J. McAnarney, Esq., and John D. Smith, Esq., appeared as counsel for the defendant. The case was in charge of District Attorney Frederick G. Katzmann.

Caleb Loring Cunningham, indicted in Norfolk County, April, 1921, for the murder of John Johnson, at Quincy, on Jan. 5, 1921. He was arraigned Dec. 30, 1921, and pleaded not guilty. Sherman L. Whipple, Esq., J. J. McAnarney, Esq., and J. W. McAnarney, Esq., appeared as counsel for the defendant. In March, 1922, the defendant was tried by a jury before Sanderson, J. The result was a verdict of not guilty. The case was in charge of District Attorney Frederick G. Katzmann.

Albert J. Duhaine and George E. Belanger, indicted in Hampden County, December, 1921, for the murder of Wallace L. Weber, at Springfield, on Sept. 17, 1921. They were arraigned Jan. 5, 1922, and pleaded not guilty. William J. Granfield, Esq., and John M. Noonan, Esq., appeared as counsel for the defendant Albert J. Duhaine, and

Harry M. Ehrlich, Esq., and Thomas F. Moriarty, Esq., appeared as counsel for the defendant George E. Belanger. On May 10, 1922, the defendant Albert J. Duhaine retracted his former plea, and pleaded guilty to murder in the second degree. This plea was accepted by the Commonwealth, and the defendant Albert J. Duhaine was thereupon sentenced to State Prison for life. In November, 1922, the defendant George E. Belanger was tried by a jury before Thayer, J. The result was a verdict of guilty of murder in the second degree. The defendant George E. Belanger was thereupon sentenced to State Prison for life. The cases were in charge of District Attorney Charles H. Wright.

John Frongillo, indicted in Middlesex County, December, 1921, for the murder of Rocco De Luca, at Framingham, on Dec. 4, 1921. He was arraigned Dec. 20, 1921, and pleaded not guilty. John F. McDonald, Esq., appeared as counsel for the defendant. On March 24, 1922, 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 twenty years nor less than eighteen years. The case was in charge of District Attorney Endicott P. Saltonstall.

Philip J. McDermott, indicted in Essex County, September, 1921, for the murder of Monica Morrill, at Lynn, on Sept. 9, 1921. He was arraigned June 29, 1922, and pleaded not guilty. J. Frank Williams, 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 S. Howard Donnell.

Luigi Pecano, indicted in Hampden County, December, 1921, for the murder of Carlo Muia, at Springfield, on Oct.

21, 1921. He was arraigned Jan. 5, 1922, and pleaded not guilty. John T. Moriarty, Esq., and Milton L. Davis, Esq., appeared as counsel for the defendant. On Feb. 13, 1922, 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 years nor less than three and one-half years. The case was in charge of District Attorney Charles H. Wright.

Giovanni Percoco, indicted in Middlesex County, March Term, 1916, for the murder of Samuel Wolkon, at Somerville, on April 29, 1916. The defendant was apprehended in Italy, and tried there by the Corte di Assisi at Velletri, in July, 1922. He was convicted, and was sentenced to prison for a term of twenty years, seven months and twenty-seven days.

Vito Salvo, indicted in Middlesex County, January, 1922, for the murder of Giovanni Parinello, at Natick, on Dec. 29, 1921. He was arraigned Jan. 6, 1922, and pleaded not guilty. Francis B. Burns, 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 Endicott P. Saltonstall.

Rocco Scicchitani, indicted in Middlesex County, November, 1920, for the murder of Thomas J. Riley, at Cambridge, on Nov. 21, 1920. He was arraigned Nov. 30, 1920, and pleaded not guilty. Joseph T. Zottoli, Esq., appeared as counsel for the defendant. In January, 1921, the defendant was tried by a jury before Cox, J. The result was a verdict of guilty of murder in the first degree. The defendant's motion for a new trial was denied, and his exceptions overruled. The defendant was thereupon sentenced to be electrocuted during the week beginning June 12, 1922. June

10, 1922, a respite was granted until July 10, 1922, which was later extended to Sept. 16, 1922. On Aug. 30, 1922, the sentence was commuted to imprisonment in the State Prison for life. The case was in charge of District Attorney Endicott P. Saltonstall.

Margherita Tarquinio, indicted in Middlesex County, November, 1921, for the murder of Pasquale Renno, at Cambridge, on Nov. 2, 1921. She was arraigned Nov. 22, 1921, and pleaded not guilty. Richard M. Walsh, Esq., and Felix Forte, Esq., appeared as counsel for the defendant. On Feb. 27, 1922, 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 the house of correction for one year. The case was in charge of District Attorney Endicott P. Saltonstall.

Michele Totolo, indicted in Middlesex County, January, 1918, for the murder of Palma Ditino, at Acton, on Jan. 3, 1918. The defendant was apprehended in Italy, and tried there by the Corte di Assisi at Lucera, in June, 1921. He was convicted, and sentenced to prison for a term of twelve years and six months.

Clarence H. Williams, indicted in Berkshire County, July, 1921, for the murder of Louis C. Decker, at Stockbridge, on June 6, 1921. He was arraigned July 18, 1921, and pleaded not guilty. Robert M. Stevens, Esq., appeared as counsel for the defendant. On Nov. 4, 1921, an entry of *nolle prosequi* was made as to so much of said indictment as charged murder in the first degree, and the defendant was tried by a jury before Wait, J., on so much of said indictment as charged murder in the second degree. The result was a verdict of guilty of manslaughter, and the defendant was thereupon sentenced to State Prison for a term of not more than twelve years nor less than eight years. The case was in charge of District Attorney Charles H. Wright.

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

Herman Alheit, *alias*, and James W. Wickham, indicted in Plymouth County, February, 1922, for the murder of Edward C. Cardinal, at Kingston, on Dec. 8, 1921. They were arraigned March 2, 1922, and pleaded not guilty. John P. Feeney, Esq., J. P. Vahey, Esq., and J. J. McAnarny, Esq., appeared as counsel for the defendants. June 12, 1922, the defendant Herman Alheit retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant Herman Alheit was thereupon sentenced to State Prison for a term of not more than seven years nor less than four and one-half years. In June, 1922, the defendant, James W. Wickham was tried by a jury before Nelson P. Brown, J. The result was a verdict of not guilty. The cases were in charge of District Attorney Frederick G. Katzmann.

Giovanni Barbogallo, *alias*, and Domenic Misite, *alias*, indicted in Middlesex County, June, 1922, for the murder of Salvatore Carlino, at Arlington, on June 25, 1922. The defendants were arraigned Sept. 21, 1922, and pleaded not guilty. Moses P. Libby, Esq., appeared as counsel for the defendant Giovanni Barbogallo, and John F. McDonald, Esq., appeared as counsel for the defendant Domenic Misite. Later the defendants retracted their former pleas, and pleaded guilty to manslaughter. These pleas were accepted by the Commonwealth, and the defendant Giovanni Barbogallo was thereupon sentenced to State Prison for a term of not more than five years nor less than three years, and the defendant Domenic Misite was sentenced to the house of correction for one year. These cases were in charge of District Attorney Endicott P. Saltonstall.

Albert W. Bartlett, *alias*, indicted in Suffolk County, October, 1922, for the murder of Frank E. Small, on Sept. 29, 1922. He was arraigned Oct. 4, 1922, and pleaded not guilty. James E. O'Connell, Esq., and Daniel F. O'Connell, Esq., appeared as counsel for the defendant. In December,

1922, the defendant was tried by a jury before Sisk, J. During the trial 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 Thomas C. O'Brien.

John Bedrosian, indicted in Middlesex County, September, 1922, for the murder of Hagop Sarkisian, at Dracut, on Aug. 16, 1922. He was arraigned Nov. 13, 1922, and pleaded not guilty. E. J. Tierney, Esq., and M. G. Rogers, Esq., appeared as counsel for the defendant. In November, 1922, the defendant was tried by a jury before Nelson P. Brown, J. The result was a verdict of guilty of murder in the second degree, and the defendant was thereupon sentenced to State Prison for life. The case was in charge of District Attorney Endicott P. Saltonstall.

Joseph Bova, indicted in Middlesex County, April, 1922, for the murder of Antonio De Napoli, at Cambridge, on March 26, 1922. He was arraigned April 20, 1922, and pleaded not guilty. John F. McDonald, 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 years nor less than twelve years. The case was in charge of District Attorney Endicott P. Saltonstall.

Mary G. Brady, indicted in Middlesex County, October, 1922, for the murder of Frederick W. Brady, at Lowell, on Sept. 29, 1922. She was arraigned Oct. 9, 1922, and pleaded not guilty. Edward J. Tierney, Esq., appeared as counsel for the defendant. In December, 1922, the defendant was tried by a jury before Hammond, J. The result was a verdict of not guilty by reason of insanity. The defendant was thereupon committed to the Danvers State Hospital. The case was in charge of District Attorney Endicott P. Saltonstall.

George Hosten, indicted in Middlesex County, June, 1922, for the murder of Albert Bembray, at Cambridge, on May 22, 1922. He was arraigned June 30, 1922, and pleaded not guilty. John W. Schenck, 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 twenty years nor less than eighteen years. The case was in charge of District Attorney Endicott P. Saltonstall.

Carrie N. Hubbard, indicted in Suffolk County, May, 1922, for the murder of William B. Hubbard, on May 2, 1922. She was arraigned May 9, 1922, and pleaded not guilty. J. P. Feeney, Esq., and Willard P. Lombard, Esq., appeared as counsel for the defendant. On Sept. 15, 1922, 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 the Reformatory for Women for a term of five years and one month. The case was in charge of District Attorney Thomas C. O'Brien.

Fong Jow, *alias*, and Ang Lock, indicted in Suffolk County, May, 1922, for the murder of Ung Shi Ging, on April 18, 1922. They were arraigned May 9, 1922, and pleaded not guilty. Ralph H. Willard, Esq., and William H. Taylor, Esq., appeared as counsel for the defendant Fong Jow, and Guy A. Ham, Esq., and J. F. Myron, Esq., appeared as counsel for the defendant Ang Lock. In November, 1922, the defendants were tried by a jury before Dubuque, J. During the trial the defendant Fong Jow 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 years nor less than fourteen years. The court directed that a verdict of not guilty be entered as to the defendant Ang Lock. The cases were in charge of District Attorney Thomas C. O'Brien.

Alfred Myrie, indicted in Suffolk County, May, 1922, for the murder of May Myrie, on March 30, 1922. He was arraigned May 16, 1922, and pleaded not guilty. John W. Schenck, Esq., and Jordan P. Williams, 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 Thomas C. O'Brien.

Eugene Pires, indicted in Plymouth County, October, 1922, for the murder of Joseph Pina, at Wareham, on Sept. 15, 1922. He was arraigned Oct. 24, 1922, 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. John P. Leahy, Esq., James F. Bento, Esq., and J. F. Kiernan, Esq., appeared as counsel for the defendant. The case was in charge of District Attorney Frederick G. Katzmann.

John J. Pullen, indicted in Middlesex County, February, 1922, for the murder of Thomas F. Kiley, at Somerville, on Jan. 6, 1922. He was arraigned Feb. 17, 1922, and pleaded not guilty. Albert E. Hughes, 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 twenty years nor less than eighteen years. The case was in charge of District Attorney Endicott P. Saltonstall.

Joseph Rizzo, indicted in Middlesex County, September, 1922, for the murder of Angelo Bennici, at Waltham, on May 29, 1922. He was arraigned Sept. 15, 1922, and pleaded not guilty. William J. Bannan, Esq., and Thomas E. Bannan, Esq., appeared as counsel for the defendant. In November, 1922, the defendant was tried by a jury before Nelson P. Brown, J. The result was a verdict of not guilty by order of the court. The case was in charge of District Attorney Endicott P. Saltonstall.

John Williams, *alias*, and Julius Evans, indicted in Suffolk County, May, 1922, for the murder of Edward F. Conley, on July 12, 1921. On April 6, 1922, the defendant John Williams was committed to the Bridgewater State Hospital. The defendant Julius Evans was arraigned May 18, 1922, and pleaded not guilty. George E. Morris, Esq., appeared as counsel for the defendant John Williams, and John W. Schenck, Esq., appeared as counsel for the defendant Julius Evans. On June 19, 1922, the defendant Julius Evans retracted his former plea, and pleaded guilty to manslaughter. This plea was accepted by the Commonwealth, and the defendant Julius Evans was thereupon sentenced to State Prison for a term of not more than ten years nor less than five years. The cases were in charge of District Attorney Thomas C. O'Brien.

The following indictments for murder are now pending: —

Ignatzio Carluccio and Theresa Marangi, indicted in Suffolk County, December, 1922, for the murder of Leo Marangi, on Nov. 24, 1922. The defendants were arraigned Dec. 13, 1922, and pleaded not guilty. William R. Scharton, Esq., appeared as counsel for the defendants. The defendant Theresa Marangi was released in $25,000 bail. No further action has been taken in these cases. The cases are in charge of District Attorney Thomas C. O'Brien.

Vito Caruso, indicted in Essex County, September, 1922, for the murder of Marie Caruso, at Lawrence, on July 2, 1922. He was arraigned Dec. 26, 1922, and pleaded not guilty. Michael A. Sullivan, Esq., appeared as counsel for the defendant. In December, 1922, the defendant was tried by a jury before Quinn, J. The result was a verdict of guilty of murder in the second degree. Sentence was deferred, pending the filing of a motion for a new trial. The case is in charge of District Attorney William G. Clark.

Paul Dascalakis, *alias*, indicted in Suffolk County, May, 1920, for the murder of Alice Arseneault, on Dec. 26, 1919.

He was arraigned Sept. 26, 1921, and pleaded not guilty. John W. Schenck, Esq., William C. Matthews, Esq., and Jordan P. Williams, Esq., appeared as counsel for the defendant. In June, 1922, the defendant was tried by a jury before Keating, J. The result was a verdict of guilty of murder in the first degree. The defendant's exceptions taken at the trial of the case are pending. The case is in charge of District Attorney Thomas C. O'Brien.

John De Gregorio, indicted in Suffolk County, July, 1921, for the murder of Joseph Lopresti, on June 14, 1921. He was arraigned July 14, 1921, and pleaded not guilty. On Sept. 14, 1921, an entry of *nolle prosequi* was made on so much of said indictment as charged more than manslaughter, and the defendant was released in $3,000 bail. No further action has been taken in this case. The case is in charge of District Attorney Thomas C. O'Brien.

Peter Dempsky, indicted in Bristol County, November, 1922, for the murder of Mary Dempsky and Jennie Gerowaki. On Nov. 24, 1922, the defendant was committed to the Bridgewater State Hospital. John B. Tracy, Esq., appeared as counsel for the defendant. The case is in charge of District Attorney Stanley P. Hall.

Anthony M. Gaeta, *alias*, indicted in Suffolk County, June, 1922, for the murder of Joseph Veto, on May 21, 1922. The defendant has not yet been arraigned. No further action has been taken in this case. The case is in charge of District Attorney Thomas C. O'Brien.

John Gancarz, indicted in Essex County, September, 1922, for the murder of Boleslew Golubowsky, at Lawrence, on June 5, 1922. He was arraigned Dec. 11, 1922, and pleaded not guilty. John P. S. Mahoney, Esq., appeared as counsel for the defendant. The defendant has been committed to the Bridgewater State Hospital for observation. The case is in charge of District Attorney William G. Clark.

J. Thomas Gettigan, indicted in Suffolk County, February, 1922, for the murder of Lizzie M. Cook. He was arraigned Feb. 15, 1922, and pleaded not guilty. Roscoe Walsworth, Esq., appeared as counsel for the defendant. In May, 1922, the defendant was tried by a jury before Dubuque, J., which resulted in a disagreement by the jury. In October, 1922, the defendant was again tried by a jury before Dubuque, J. The result was a verdict of guilty of manslaughter. The defendant was thereupon sentenced to State Prison for a term of not more than fifteen years nor less than twelve years. The defendant's exceptions taken at the trial of the case are pending. The case is in charge of District Attorney Thomas C. O'Brien.

Albert L. Harvey, indicted in Norfolk County, December, 1922, for the murder of Ida G. Anderer, at Quincy, on Nov. 24, 1922. The defendant has not yet been arraigned. J. J. McAnarney, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Harold P. Williams.

John Kalapotharakos, *alias*, indicted in Middlesex County, December, 1922, for the murder of Kiriaki Kalapotharakos, at Lowell, on May 10, 1921. He was arraigned Dec. 22, 1922, and pleaded not guilty. No further action has been taken in this case. The case is in charge of District Attorney Arthur K. Reading.

Elizabeth M. Kezer, indicted in Suffolk County, December, 1921, for the murder of Eldon L. Kezer, on Nov. 30, 1921. The defendant has been committed to the Boston State Hospital. The case is in charge of District Attorney Thomas C. O'Brien.

Frank Lesnewski, indicted in Hampden County, September, 1921, for the murder of Elliot Bobbaski, at Springfield, on July 31, 1921. He was arraigned Sept. 26, 1921, and pleaded not guilty. Thomas A. McDonnell, Esq., and Joseph F. Carmody, Esq., appeared as counsel for the defendant.

The defendant has been committed to the Bridgewater State Hospital for observation. The case is in charge of District Attorney Charles H. Wright.

Joseph Lombardi and Elizabeth Montrossi, indicted in Essex County, January, 1922, for the murder of Dominic Tirone, at Newburyport, on Oct. 24, 1921. They were arraigned June 29, 1922, and pleaded not guilty. William E. Sisk, Esq., appeared as counsel for the defendant Joseph Lombardi, and Robert E. Burke, Esq., appeared as counsel for the defendant Elizabeth Montrossi. In October, 1922, the defendants were tried by a jury before Lummus, J. The result was a verdict of guilty of murder in the second degree in the case of the defendant Joseph Lombardi, and a verdict of not guilty in the case of the defendant Elizabeth Montrossi. The defendant Joseph Lombardi was thereupon sentenced to State Prison for life. The defendant's motion for a new trial was denied, and his exceptions taken at the trial are now pending. The case is in charge of District Attorney William G. Clark.

Constanti Marrotti, indicted in Essex County, January, 1916, for the murder of Gallo Alici, at Lawrence, on Sept. 19, 1915. He was arraigned Sept. 19, 1922, and pleaded not guilty. Wilfred B. Keenan, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney William G. Clark.

Stefano Militello and Antonio Bianco, indicted in Suffolk County, November, 1922, for the murder of Giuseppe Simboli, on Sept. 30, 1922. They were arraigned Nov. 20, 1922, and pleaded not guilty. William S. Kinney, Esq., appeared as counsel for the defendant Stefano Militello, and John W. Connelly, Esq., appeared as counsel for the defendant Antonio Bianco. No further action has been taken in these cases. The cases are in charge of District Attorney Thomas C. O'Brien.

Joseph Morello, indicted in Suffolk County, October, 1922, for the murder of Salvatore Procopio, on Sept. 24, 1922. The defendant has not yet been arraigned. Thomas J. Grady, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Thomas C. O'Brien.

William Morgan, indicted in Norfolk County, December, 1922, for the murder of Henry V. Reynolds, at Brookline, on Sept. 21, 1922. The defendant has not yet been arraigned. No further action has been taken in this case. The case is in charge of District Attorney Harold P. Williams.

Jesse Murphy, *alias*, indicted in Suffolk County, June, 1922, for the murder of Edward T. Foley, on Feb. 17, 1917, and of Ordway R. Hall, on Feb. 21, 1917. He was arraigned Aug. 18, 1922, and pleaded not guilty. William T. McCarthy, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Thomas C. O'Brien.

Giuseppe Parisi, indicted in Hampden County, December, 1921, for the murder of Carlo Siniscalchi, at Springfield, on Dec. 20, 1921. He was arraigned Jan. 5, 1922, and pleaded not guilty. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

Anthony Pass, indicted in Hampden County, September, 1922, for the murder of Stanislaw Grotkowski, at Chicopee, on Aug. 1, 1922. He was arraigned Sept. 22, 1922, and pleaded not guilty. Joseph F. Carmody, Esq., appeared as counsel for the defendant. The defendant has been committed to the Northampton State Hospital. The case is in charge of District Attorney Charles H. Wright.

Dominic Procopio, *alias*, indicted in Middlesex County, December, 1922, for the murder of Bruno Montegna, at Cambridge, on Oct. 29, 1922, and Giacento Sanzi, indicted

as accessory before and after the fact to the murder of Bruno Montegna. They were arraigned Dec. 11, 1922, and pleaded not guilty. Joseph T. Zottoli, Esq., appeared as counsel for the defendant Dominic Procopio. No further action has been taken in these cases. The cases are in charge of District Attorney Arthur K. Reading.

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., and Thomas L. Walsh, Esq., appeared as counsel for the defendant. In June, 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 Thomas C. O'Brien.

Nicola Sacco and Bartolomes Vanzetti, indicted in Norfolk County, September, 1920, for the murder of Alexander Barardelli and Frederick A. Parmenter, at Braintree, on April 15, 1920. The defendants were arraigned Sept. 28, 1920, and pleaded not guilty. Fred H. Moore, Esq., and William J. Callahan, Esq., appeared as counsel for the defendant Sacco. J. J. McAnarney, Esq., and T. F. McAnarney, Esq., appeared as counsel for the defendant Vanzetti. In May, June and July, 1921, the defendants were tried by a jury before Thayer, J. The result was a verdict of guilty of murder in the first degree against each defendant. The defendants' motions for a new trial were denied Dec. 24, 1921. Supplementary motions for a new trial are now pending. The cases are in charge of District Attorney Harold P. Williams.

Eugene Sciebelli, indicted in Hampden County, May, 1922, for the murder of Antonio Bonavito, at Springfield, on Dec. 13, 1920. He was arraigned May 18, 1922, and pleaded not guilty. No further action has been taken in this case. The case is in charge of District Attorney Charles H. Wright.

Joseph Simboli, Luigi DiPadova and Guiseppe Anzardo, indicted in Suffolk County, April, 1922, for the murder of Michael Scarpone, on Jan. 20, 1922, and Francesco Toscano, Salvatore Tornamei, *alias*, Domenic Bontorno, *alias*, and Antonio Mascatti, indicted in June, 1922, as accessory before the fact to the murder of Michael Scarpone. The defendants Joseph Simboli, Luigi DiPadova and Guiseppe Anzardo were arraigned April 10, 1922, and pleaded not guilty. The defendants Francesco Toscano, Salvatore Tornamei, Domenic Bontorno and Antonio Mascatti were arraigned June 23, 1922, and pleaded not guilty. F. Forti, Esq., appeared as counsel for the defendant Joseph Simboli, William T. McCarthy, Esq., appeared as counsel for the defendant Luigi DiPadova, J. Vecchione, Esq., appeared as counsel for the defendant Guiseppe Anzardo, P. C. Borre, Esq., appeared as counsel for the defendant Francesco Toscano, J. T. Zottoli, Esq., appeared as counsel for the defendant Salvatore Tornamei, H. E. Lawler, Esq., appeared as counsel for the defendant Domenic Bontorno, and Thomas J. Grady, Esq., appeared as counsel for the defendant Antonio Mascatti. In July, 1922, the defendants were tried by a jury before Dubuque, J. The result was a verdict of guilty of murder in the second degree in the case of Guiseppe Anzardo, a verdict of guilty of being accessory before the fact to the murder of Michael Scarpone in the case of Antonio Mascatti, and a verdict of not guilty against the defendants Joseph Simboli, Francesco Toscano, Salvatore Tornamei and Domenic Bontorno. The defendant Luigi DiPadova was declared insane during the trial, and was committed to the Bridgewater State Hospital. The defendant Guiseppe Anzardo was thereupon sentenced to State prison for life. The defendant Antonio Mascatti has not yet been sentenced, pending a decision upon his motion for a new trial. The cases are in charge of District Attorney Thomas C. O'Brien.

Anthony Stamatopailos, indicted in Essex County, September, 1922, for the murder of Charles Dantos, at Haverhill, on Aug. 8, 1922. He was arraigned Dec. 11, 1922, and pleaded not guilty. Frederic H. Magison, Esq., appeared as

counsel for the defendant. In December, 1922, the defendant was tried by a jury before Quinn, J. The result was a verdict of guilty of murder in the second degree. The defendant's motion for a new trial is now pending. The case is in charge of District Attorney William G. Clark.

Ramon Velez, indicted in Suffolk County, May, 1922, for the murder of Pablo Bfarie, on May 15, 1922. On Aug. 30, 1922, the defendant was committed to the Bridgewater State Hospital for observation. Edgar P. Benjamin, Esq., and Curtis J. Wright, Esq., appeared as counsel for the defendant. The case is in charge of District Attorney Thomas C. O'Brien.

Biagio Vessella, indicted in Suffolk County, July, 1922, for the murder of Frederico Spiriti, on June 21, 1922. The defendant has not yet been arraigned. James H. Vahey, Esq., and Robert J. Crowley, Esq., appeared as counsel for the defendant. No further action has been taken in this case. The case is in charge of District Attorney Thomas C. O'Brien.

Giovanni Vilardi, indicted in Suffolk County, January, 1922, for the murder of John Arzenti, on Jan. 5, 1922. The defendant has been committed to the Bridgewater State Hospital. The case is in charge of District Attorney Thomas C. O'Brien.

Need for Reform in the Criminal Law.

The attention of the General Court was directed in my last annual report to the serious problem which is presented in the administration of the criminal law, and it was then pointed out that the machinery which had been provided for the prosecution of crime and which was sufficient under the conditions existing at the time it was devised is no longer adequate for the protection of the public. The legislation enacted during the last session has not availed to relieve the congestion of the criminal dockets in the Commonwealth, and particularly in the more populous counties.

The legislation which was enacted last year has for the most part affected the civil business of the Superior Court, and was ably discussed by Chief Justice Hall of the Superior Court before the Worcester County Bar Association on June 15 of last year. On that occasion he pointed out that the enlarged authority given to the Supreme Judicial Court to transfer cases over which it had original jurisdiction to the Superior Court for partial or final disposition, in so far as it serves its intended purpose of relieving the burden upon the Supreme Court, which I pointed out in my last report was excessive, must, to the same extent, increase the burden upon the Superior Court.

The statute extending the concurrent original jurisdiction in divorce to the probate courts in some degree relieves the pressure upon the Superior Court, but how much relief will be afforded is not yet determined. In any event it will not relieve the situation.

A more important step in reducing the work of the Superior Court was the creation of appellate divisions for civil business of the district courts, but it is not expected that all of these changes will result in more than a small net decrease of the civil business of the court.

The need of prompt administration of criminal justice is emphasized by Chief Justice Hall, who points out that it is obvious that one of the most potent remedies is to be found in prompt action, with a resulting final disposition of indictments and appeals. In this connection he says: —

> The criminal side of the superior court is congested and must remain so until a sufficient number of judges are assigned from its present quota, or new justices created, to bring this department back to normal.

Abolition of Double Trials for Minor Offences.

The remedy for the congestion in the work of the court is not to be found in constant increases in the number of permanent judges. Already this court, with thirty judges, is one of the largest in the country, and the present congested criminal docket is due in large measure to appeals from the lower courts, which are a direct result of the inability to try these cases in the Superior Court.

Chief Justice Bolster has made an exhaustive study of the subject of criminal appeals in this Commonwealth, and the results were presented before the Massachusetts branch of the American Institute of Criminal Law and Criminology in April of last year. He points out that those who commit felonies are permitted but one trial, whereas those who are guilty of small offences are allowed two trials at the expense of the Commonwealth. In this connection he says: —

> On economic grounds, it seems indefensible, unless one is prepared to urge some reason why a small case, such as simple assault, should engage the successive attention of two courts, but a murder or robbery of but one. Yet the cases in the district court which are inevitably headed for an appeal include the bulk of those which consume the great time and effort of the district courts. They are usually represented by counsel, and the plea is generally "not guilty," that being the more advantageous basis for a trade after appeal. This involves continuances "to prepare for trial" (often a euphemism for collection of a retainer), further attendance of witnesses at public expense, further inroads upon the outside duties of the police, and, finally, the time of the trial, unless, after continuances of varying number, the defendant, when brought to bay, adopts the growing habit of "admitting a finding." The cost of maintenance of the seventy-odd district courts of the state runs into the millions, and at least half of that represents expenditure for time spent in utterly inconsequential effort.
>
> The objections on grounds of policy to the present system are even graver. The district courts, after all is said and done, are our first line of defence against crime. But they instill no fear in the mind of the deliberate criminal. For him, such a court is only one additional hurdle, which the prosecution must clear or stumble upon, to his advantage. If he loses, the words "I appeal" give him a new start. When, then, should he fear justice in that quarter, and what respect can he, his friends, or the public have for such an impotent tribunal?

I concur in his opinion that defendants in the municipal court for the city of Boston and in the district courts should be required to elect whether they will stand trial in those courts, waiving trial by jury, or whether their cases shall be sent to the Superior Court for jury trial without trial in the lower court. The suggested change would require provision for the correction of errors of law in trials in the lower courts, and a possible further provision, as pointed out by Chief Justice Bolster, for the equalization of sen-

tences, but the machinery would appear to be available in the appellate division of the municipal court of the city of Boston and in the newly created appellate divisions of the district courts of the Commonwealth.

The abolition of double trials for small offences will be an important step in expediting final judgment in these cases and would relieve the Commonwealth of a substantial financial burden.

Waiver of Jury Trial in the Superior Court in Criminal Cases.

A further forward step along similar lines may be accomplished by providing that defendants in criminal cases in the Superior Court may waive the right of trial by jury. Nothing in the Federal Constitution requires the States to accord a jury trial in criminal cases, provided the accused is otherwise assured due process of law. *Maxwell* v. *Dow*, 176 U. S. 606. Moreover, the right to a jury trial, if granted, may be waived. For over one hundred and forty years Maryland has provided that one accused of crime may elect to be tried by the court rather than by a jury. Last year Connecticut followed the example of Maryland. I am advised by judges in Connecticut that the plan is working excellently. In Maryland, since 1852, the system has included even capital cases. It is described at length by the Hon. Carroll T. Bond, judge of the Supreme Court of Baltimore, in 6 Mass. Law Quarterly, pp. 89–96. In the course of his description he says: —

> We can hardly conceive of a (criminal) docket entirely of jury trials. The thought of such a thing would dismay us. It would slow down our work greatly, and we should have to multiply courts to dispatch business.

I recommend serious consideration of a system which has worked successfully in Maryland for over one hundred and forty years, which has materially aided in the swift and efficient dispatch of criminal business, and which has recently been adopted by Connecticut and is there giving satisfaction.

More Prompt Disposition of Criminal Cases in the Superior Court.

In lieu of further increasing the number of permanent justices in the Superior Court, two methods of providing for additional jury trials in criminal cases have been suggested: one, appropriate legislation to authorize the extension of the jury system to the municipal and district courts; and the other, a statute which would authorize the drafting of municipal and district court judges for service in the Superior Court for the trial of appealed cases and the minor offences originating by indictment in the Superior Court.

I am of the opinion that the extension of the jury system to the district and municipal courts is not feasible because many of the district judges are not sufficiently experienced for the trial of jury cases, and the necessary accommodations and officers for the conduct of jury trials are not provided.

I believe that a permissive statute enabling the chief justice of the Superior Court to call to his aid municipal and district court justices, including associate and special justices, for the trial of jury cases would provide the necessary means of relieving the congestion of the criminal docket without increasing the already large number of permanent judges. There are judges in the lower courts of ability and broad experience in the criminal law who are fully equipped to render temporary service when called upon in the Superior Court. It would afford the chief justice of the Superior Court the opportunity to summon only the necessary number of judges to relieve the burden upon the Superior Court from time to time and thereby provide an elastic system which would automatically expand and contract according to the needs of the situation. The experience gained by occasional service in the Superior Court would also be of great value in the more efficient handling of the criminal business of the lower courts. The Judicature Commission, in its second and final report to the Legislature in 1921, recommended this method of relief, and I renew my recommendation of last

year that enabling legislation to permit the calling of the justices of our lower courts for service in the Superior Court be enacted.

Changes in the Criminal Law recommended at the Instance of the District Attorneys.

With a view to securing greater co-operation among the district attorneys in the eight districts of the Commonwealth, and a resultant increased efficiency in the administration of the criminal law, I invited the district attorneys to a conference in April of last year. It was the general opinion that the conference was of great assistance to the district attorneys, and at their suggestion conferences have been since held on two occasions, with a view to securing an exchange of opinions with regard to needed changes in the criminal law. Numerous suggestions have been made, and at the final conference recently held they unanimously voted to authorize me, upon their behalf, to recommend in my report to the Legislature certain needed changes in the criminal statutes. Except as elsewhere discussed in this report, the recommendations are as follows: —

a. Assaults resulting in Serious or Permanent Physical Injury. — I recommend that a law be enacted providing that whoever assaults another with a dangerous weapon, substance, chemical or through physical force, and by such assault disfigures, cripples or inflicts serious or permanent physical injury upon another person, and whoever is privy to such intent or is present and aids in the commission of such crime, shall be punished by imprisonment in the State Prison for not more than twenty years or by a fine of not more than $1,000 and imprisonment in jail or a house of correction for not more than two and one-half years.

b. Concealment of Automobiles with Intent to defraud Insurer. — A statute should be enacted making it an offence to steal, remove or conceal, with intent to defraud the insurer, automobiles which are at the time insured against theft. The penalty imposed by such statute should be consistent with the provisions of G. L., c. 266, § 10, relating to burning goods with intent to defraud the insurer; of sec-

tion 28 of the same chapter, relating to theft of automobiles; and of section 82 of that chapter, relating to the concealment of mortgaged personal property.

c. Conspiracy to commit a Felony. — I recommend that legislation be passed providing that a conspiracy to commit a felony shall be punished in the same manner and to the same extent as an attempt to commit a felony.

d. Venue of Crimes. — (1) The prosecuting officer is at times uncertain from the state of the evidence then in his possession as to whether a crime was committed in one county or another. As a result, prosecution is instituted in one county and during the trial it develops that the crime was actually committed in another county, and the defendant is discharged because of wrong venue. This necessitates a submission of the facts to another district attorney and a new prosecution, and involves a needless expenditure of money. This duplication of effort and expense will be largely avoided if the law relative to venue of crimes be so amended as to permit, whenever the prosecuting authorities are uncertain in which of several counties a crime has been committed, a prosecution in any one of those counties, upon petition to the court by the Attorney-General or a district attorney representing that he is in doubt as to the proper venue of the crime.

(2) Persons are at times conveyed from one place to some unknown place and there assaulted or raped. The true venue of the crime is therefore unknown, and it is difficult, if not impossible, properly to prosecute for offences committed under such circumstances. I suggest such changes in legislation as will permit prosecution for such crimes in the place from which such person or persons were taken.

e. Report of the Department of Mental Diseases as Evidence in Criminal Cases. — St. 1921, c. 415, provides that whenever a person is indicted for a capital offence, or whenever a person, who is known to have been indicted for any other offence more than once or to have been previously convicted of a felony, is indicted or bound over for trial in the Superior Court, the Department of Mental Diseases shall cause such person to be examined as to his mental condition, and that

its report shall be admissible as evidence. The district attorneys are of the opinion that this statute should be amended by striking out the provision that the report of the Department of Mental Diseases shall be admissible as evidence of the mental condition of the accused, and I so recommend.

f. Defence of Insanity. Pleadings. — Existing legislation should be so amended that the defence of insanity of a defendant cannot be raised except by leave of court, unless a special plea of insanity is filed with the clerk of the court at least three days prior to the coming in of the court at the sitting at which the defendant is to be tried. I further recommend that the statutes be amended so as to provide that all dilatory pleadings, motions to quash, and requests for bills of particulars shall be filed at least three days prior to the coming in of the court at the sitting at which the respective cases are to be tried.

g. Precedence of Certain Prosecutions. — G. L., c. 212, § 24, provides that certain cases shall have precedence in the order of trial next after the cases of persons who are actually confined in prison and awaiting trial. The district attorneys are thereby prevented for extended periods from trying any cases except those given precedence by the statute, and certain classes of offences are barred from trial. Not infrequently, important cases, which, for special reasons should be tried, are postponed for long intervals. I recommend that the section be so amended as to provide that the court shall have discretion to modify the order of trial if in his opinion there is sufficient ground for so doing.

Limitation upon Practice in Criminal Cases by Special Justices.

At the instance of the district attorneys, I renew my recommendation made in my annual report for the year 1920 that special justices of municipal and district courts be prohibited from practicing in their own courts in criminal cases either as prosecuting officers or as defendants' attorneys. Under the provisions of G. L., c. 218, § 17, it is provided that a special justice shall not be retained or employed in

any case in which he acts or has acted as justice, but a practice has grown up on the part of special justices in certain districts in the western and southern parts of the State of engaging extensively in the trial of criminal cases. There is a grave impropriety in such a practice, for when a special justice conducts a criminal case before the justice of his own court there is occasion for distrust, lest by virtue of his office, he may have undue influence upon the court.

Proposal to Amend General Laws, Chapter 111, Section 31.

I renew my recommendation for amendment of G. L., c. 111, § 31, which provides as follows: —

> Boards of health may make reasonable health regulations which shall be published once in a newspaper if one is published in the town, otherwise in a newspaper published in the county. All regulations made hereunder which provide a penalty for violation thereof shall, before taking effect, be approved by the attorney-general. Such publication shall be notice to all persons.

This provision confers upon local boards of health a general power to make regulations. If such regulations provide a penalty for violation thereof, they are subject to the approval of the Attorney-General.

In my opinion, G. L., c. 111, §§ 122 and 127, confer ample power to make regulations. As those sections provide a penalty of not more than $100 for violation of the regulations made thereunder, such regulations do not require the approval of the Attorney-General.

I recommend that the additional and, in my opinion, superfluous power to make regulations, conferred by section 31, be eliminated by amending section 31 so as to read as follows: —

> Regulations made by boards of health shall be published once in a newspaper if one is published in the town, otherwise in a newspaper published in the county. Such publication shall be notice to all persons.

A Permanent Judicial Council.

I renew my recommendation for the establishment of an unpaid judicial council, charged with the duty of studying

the working of our judicial system and of suggesting needed changes and improvements from time to time. The value of such a body is apparent. Needed changes and reforms ought not to be left to individual initiative, which is often uncertain and sometimes biased in its operation. Unprejudiced expert advice might eliminate defects before the consequences become serious. Furthermore a permanent commission will be able to study the progress of judicial administration in other States and countries, which the committees of the Legislature changing from year to year cannot do, and the commission will be in a position to lay out and recommend a progressive and orderly program for the growth of the judicial administration in this Commonwealth. The establishment of such a council was recommended last year by the Judicature Commission (House, No. 1205, p. 135). An appropriate act accompanied the recommendation.

Liquor Legislation.

Massachusetts and Maryland are the only two States which have not passed prohibition enforcement laws bringing the State and Federal statutes governing the manufacture, sale and transportation of intoxicating liquors into substantial conformity.

Additional legislation is imperatively needed to meet the grave situation in this Commonwealth, which is fostering disrespect for law and encouraging those who are spreading the propaganda of nullification. At the present time the Federal prohibition enforcement agents (about thirty in number during the past year) are too few to afford reasonable enforcement, and the State and local police and officials (to the number of about four thousand) are without authority to require obedience to the law of the land.

The rejection upon referendum of the law passed by the General Court at the last session has had the effect of leading many to believe that the prohibition laws may now be violated with impunity. Such a belief, if permitted to continue, will inevitably lead to practical nullification, and this Commonwealth, which has always stood for the supremacy of the law and against nullification, will invite the boot-

legger from other jurisdictions to come here to ply his trade without molestation.

Whatever the significance of the vote against the act passed last year, we have a right to assume that a majority of the people believe in the enforcement of law and will approve any law which they think it necessary to secure reasonable enforcement.

The late police commissioner, the Hon. Edwin U. Curtis, fearless and uncompromising champion of law and order, in his last annual report, urged the need of conformity between the State and Federal prohibition laws in justice to the police in the performance of their duties. He was not advocating prohibition, or approving or disapproving the provisions of the Volstead Act, but, speaking solely for more efficient enforcement, he said: —

> The liquor situation in Boston to-day, as regards the work of the police in relation thereto, is substantially different from what it was prior to the passage of the Eighteenth Amendment and the Volstead Act. There is not on our statute books to-day an act the same in all respects as the Volstead Act, and for that reason the handling of the liquor situation is and must be unsatisfactory. It is a fact that the amendment to the Constitution is now in existence, but there is no adequate enforcement act upon our statute books in this State, with the result that the State officers of the law come in for a great deal of well-meant but unjust criticism.

To the same effect, but in even more emphatic terms, His Excellency the Governor, in his address to the General Court last year, after referring to the difficulty of preventing traffic in intoxicating liquors, reported by officers especially charged with the duty of law enforcement, declared that "considerations of impelling force require that the laws of Massachusetts be made to conform to the laws of the United States in this respect." Those considerations obtain with even greater force to-day than when the message of the Governor was delivered.

I urge upon your consideration the good sense of making the legal definition of intoxicating liquor uniform in the State and Nation, in order that there may be greater opportunity for co-operation in securing reasonable enforce-

ment. I believe that the defeat of the legislation enacted last year was largely due to the fact that it included provisions for search and seizure, not understood by the voters, and regarded by them as an unwarranted interference with their personal liberty and the privacy of their homes. I am of the opinion that no special legislation authorizing search and seizure by prohibition enforcement agents is desirable.

In the present state of public opinion I believe that the enforcement of the prohibition law will receive the largest measure of approval when directed primarily not against those caught taking a drink, but against those who engage in the business of manufacturing, selling or transporting liquor illegally, and who are chiefly responsible for present conditions. Similarly, the drinking of liquors at public banquets and in public places will be most effectively checked if legislation is directed to holding to strict accountability those innkeepers who violate their innkeepers' licenses by encouraging or permitting the illegal use of intoxicating liquors in their hotels or restaurants.

At the recent conference of district attorneys and district attorneys-elect, at which all the districts of the State were represented, it was the opinion of the conference that, as officers who are not directly concerned with legislation but solely charged with the enforcement of existing law, they should not at that time undertake to make concrete recommendations for legislation to regulate further the existing illegal traffic in liquor in advance of the opening of the General Court and the remedial legislation which would be proposed for the consideration of the Governor and the legislators. It was, however, the unanimous opinion of all who attended the conference that additional legislation was needed, and that the attention of the Legislature should be called to the fact that in the new codification of the statutes of the Commonwealth the statute relating to the transportation of intoxicating liquor had been omitted. As a result of this apparently unintentional omission, the district attorneys, in a number of instances, have found themselves unable effectively to prosecute illegal liquor cases, and I accordingly recommend, on their unanimous request,

that the Legislature consider the passage of a law forbidding transportation of, or having in possession with intent to transport, liquor which is intoxicating, under the law of the Commonwealth. A majority of the public are not aware that at the present time there is no law upon our statute books forbidding the manufacture of intoxicating liquors. At the instance of the conference, I further recommend that a law be passed prohibiting the manufacture of intoxicating liquor with intent to sell.

Defects in the Administration of the Jury System.

The most important subject which is presented for your consideration in this report is the need of reform in the jury system. Although the corruption which was practiced in the administration of the district attorney's office in Suffolk County and in the administration of the closed trust companies has been disclosed, some of those who are responsible have been able to escape punishment through their ability to prevent indictments by the grand jury.

The corruption disclosed by the removal proceedings was not confined to maladministration within the district attorney's office. It also involved corrupt control of grand juries. There is reason to believe that the same corruption was practiced in some instances upon petit juries. Unless threats of prosecution could be made good, whether there was evidence upon which indictments could properly be found or not, the blackmailing operations disclosed by the removal proceedings could not have been successfully carried through. It is significant that the court removed District Attorney Tufts in part for misconduct before a grand jury, and that in the so-called Jack Mann case, presented in connection with the Pelletier removal proceedings, the action of the assistant district attorney before the grand jury was severely condemned. These instances indicate that the forces which found profit in corrupt control of district attorneys gave attention to the control of juries also. The methods which they employed disclose defects in the system by which grand and petit juries are selected, of which these sinister forces still continue to avail themselves.

The secrecy of grand jury proceedings offers to these sinister forces an opportunity to use the grand jury as a barrier against punishment.

Both in Middlesex and in Suffolk, the district attorneys since removed and the forces behind them did not propose, if they could help it, that the prosecuting powers of the Attorney General should be revived and exercised. It is significant that after Special Assistant Attorney General Hurlburt appeared before a grand jury in Middlesex County in connection with prosecutions for thefts of automobiles, the plea in abatement filed by the defendant in that case was supported by a brief, filed as *amicus curiae*, by Joseph C. Pelletier, then district attorney for the Suffolk District. Although the prosecuting powers of the Attorney General were fully confirmed by the decision of the Supreme Judicial Court in *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, decided in May, 1921, every effort was made, both before and after that decision, to prevent the exercise of those powers by the Attorney General. The significant feature of the facts hereafter set forth is that those who were able to invoke the forces of organized corruption were able to prevent indictment, while, in cases substantially similar, those who did not possess this influence were indicted by the same grand juries.

In order that the General Court may have full knowledge of the need of a reform in the jury system, I deem it my duty to lay before it the facts disclosed by recent investigations.

In September, 1920, Joseph C. Allen, Commissioner of Banks, reported to me certain violations of the banking laws, as disclosed by an investigation of the affairs of the Hanover Trust Company. After investigation, I became satisfied that certain officers of this company were guilty of criminal offences. I thereupon caused to be presented the evidence against these officers to the regular Suffolk grand jury. The grand jury usually hears only the government's case. Contrary to the almost universal practice, two of the officers of that trust company were on their request permitted to appear and make statements to the grand jury. As soon

as the evidence was closed, the prosecuting officers, contrary to the usual practice, were ordered out of the grand jury room during the deliberations of the jury. That grand jury returned "no bills" against these bank officials, although the evidence presented was, in my opinion, not only amply sufficient to sustain an indictment but also a conviction.

In February, 1922, the Commissioner of Banks, having previously reported to me violations of the banking laws in connection with the affairs of several other closed trust companies, I determined, after full investigation, that these cases should be presented to the grand jury. I first presented evidence against the president of the Cosmopolitan Trust Company. While the case was being presented, he requested the grand jury to hear him, agreeing to waive immunity. The grand jury refused this request. At the conclusion of the evidence the grand jury voted indictments.

As I was satisfied that improper influences had been brought to bear upon the former grand jury, and that the jurors had not based their vote upon the evidence presented against the officers of the Hanover Trust Company, I presented those cases to this grand jury. The evidence was as strong as in the case of the Cosmopolitan Trust Company, where the grand jury had just voted indictments. A change in the attitude of the grand jurors was immediately apparent when the Hanover case was taken up. A request by two of the officials of this company to come before the grand jury was granted, although the same request had been refused in the case of the Cosmopolitan Trust Company. It was apparent that certain grand jurors were receiving instructions from persons outside the grand jury room. They asked the witnesses questions upon matters not disclosed by the evidence, the apparent purpose of which was to discredit the government witnesses and to shield the officials under investigation. This time, when the evidence was concluded, the grand jury excluded the prosecuting officers and voted "no bills." It was later reported to me that the president of the Cosmopolitan Trust Company had been approached and advised that, upon payment by him of a certain sum of money, the grand jury would vote to hear him

and would refuse to indict him, but that he ignored the suggestion. In view of the action taken in the Hanover Trust Company case, I decided not to present any more cases to this grand jury.

In September, 1922, the chief justice of the Superior Court, at my request, caused to be summoned a special grand jury in Suffolk County. To this grand jury I first presented evidence in connection with the so-called H. V. Greene cases, which had been under investigation in my department for a considerable length of time. H. V. Greene requested the grand jury to hear him, waiving immunity. The grand jury denied his request, and he and a number of other persons were indicted. I then presented evidence against the officers of the Prudential Trust Company. The president requested the grand jury to hear him, waiving immunity. This request the grand jury denied, and indictments were returned against him and the former treasurer of that company.

I then presented the Hanover Trust Company case to this grand jury. There was an immediate change in the attitude of the jurors. As on the previous occasion, questions were asked by the grand jurors in respect to matters not before them, apparently designed, as before, to discredit witnesses and to shield the persons under investigation. Although the grand jury had refused to hear the defendants in the two previous cases, it now reversed its action and gave a hearing to the treasurer of the Hanover Trust Company. At the conclusion of the evidence, the prosecuting officers were permitted to remain in the grand jury room, but the vote, contrary to the usual practice, was by secret ballot. Some indictments were voted, but when the jury reconvened the next morning, these indictments were reconsidered before they could be signed and returned.

As a result of their action and because of further information which I had received, I discharged the jury from further service.

While the Hanover Trust Company cases were being presented, certain of the members of this grand jury, on their own initiative, came to me and informed me that it was

useless to introduce further evidence, that from what was being said and done, both inside and outside the grand jury room, it was apparent to them that no indictments would be returned against the officials of the Hanover Trust Company, no matter what evidence the government might present. On this occasion they informed me that they had observed the foreman and several other jurors meet, as if by appointment, at a place outside the Court House, the officer of the Hanover Trust Company who was under investigation and had just testified before them. They watched them and saw them walk away together.

I also learned that anonymous communications, tending to discredit the prosecution, were sent by mail to each of the grand jurors. In addition to these anonymous letters three of the persons whose conduct was under investigation addressed signed communications to the grand jury, upon which they were adjudged in contempt by the court and fined. The court found that their acts tended to obstruct and degrade the administration of justice.

At my request a second special grand jury was convened on Dec. 26, 1922. To this grand jury I presented evidence in seven cases which were before the Supreme Judicial Court in the Pelletier removal proceedings. In all these cases evidence was presented as fully as when they were presented to the court. In six of these cases the court had found the district attorney guilty of conspiracy to extort by threat to accuse of crime, and in some of them of actual extortion by that means. In the seventh case, where the finding of the court was "not proved," additional evidence not available at the removal trial was presented to the grand jury. In addition to this, in the so-called Berman case, there was presented to the grand jury so much of the confession of William J. Corcoran as related to his participation in that case. Corcoran had been found by the court in the removal proceedings to have been a co-conspirator in the Berman case. In order that the Legislature may know the information which was contained in the Corcoran confession, in so far as it related to his participation in the Berman case, this portion of the confession is annexed to this report and

marked Appendix A. When a vote was about to be taken in the Berman case, the prosecuting officers were ordered from the room by the grand jury, and were afterwards recalled and a vote taken. No indictments were voted, even against Corcoran, whose confession was before them.

Following the evidence in the Berman case, which was the first presented, the evidence in the other six cases was presented to the jury upon the question of a general conspiracy to extort. When the evidence in these cases had been completed, the prosecuting officers were again ordered out of the grand jury room. A vote was taken on the question of a general conspiracy to extort, and no bill was voted.

From the time the grand jury convened it became increasingly apparent, from what occurred both inside and outside the jury room, that a majority of the members would not consider the evidence upon its merits. As soon as the grand jury had elected a foreman it came to my attention that, previous to convening, solicitation had been made over the telephone to secure the election of Martin J. McGuire as foreman. He was elected.

Shortly after the convening of the grand jury I was advised that a son-in-law of Daniel H. Coakley had asked a certain person if he knew any members of the new special grand jury, saying that, if he did, there was a big bunch of money available. This statement is supported by an affidavit in my possession.

I am advised that on the first day of the sitting, before any evidence was introduced, one of the grand jurors stated to a fellow grand juror that the defendants had only held up rich men; good luck to them.

Later I was informed that a certain person who is a close business associate of Daniel H. Coakley, and who has a reputation at the Court House of being a jury fixer, had met one of the grand jurors by appointment at a club house in a neighboring city, just prior to the convening of the jury, and conferred with him there.

During the sitting of the grand jury, questions were asked of witnesses by certain jurors which indicated that these

jurors were being instructed outside the jury room by persons interested in preventing indictments.

Subsequently, I was informed that two jurors had stated to friends that they would not indict Coakley and Pelletier no matter what the evidence might be.

It is significant, bearing in mind the solicitation that had been made before the jury convened for the election of McGuire as foreman, that all of the jurors who voted for McGuire as foreman failed to vote for an indictment.

Immediately after the vote on the question of a general conspiracy was taken, one of the jurors arose and stated that he was satisfied that a majority of the jurors were determined to vote "no bills" regardless of the evidence, and that it was useless to proceed further. Not one of the jurors who voted a "no bill" took exception to or resented his statements or ventured to make reply.

Before any vote had been taken upon the question of general conspiracy, several of the jurors informed me that they were satisfied that, because of what occurred within and without the jury room, it would be useless to proceed further and that they were prepared so to inform the court, as they were convinced that no indictments would be returned no matter what further evidence might be presented. In view of this information, which confirmed my own opinion that the grand jury were not considering the evidence upon its merits, I did not present any further cases after the evidence in these seven cases was concluded. I was prepared to present further cases which had been presented in the Supreme Judicial Court, and upon which the court found Pelletier guilty, and other cases which were not known to me at the time of that hearing, in three of which the sum extorted, according to the evidence, was $400,000.

After certain jurors had appeared in court and stated that from what had occurred in the jury room, both from the actions of the grand jurors and what had been said, they were of the opinion that the purpose for which the grand jury had been called would not be served by continuing in further session and had requested that the jury be discharged, before any vote had been reported and without any request

having been made upon me that the vote should be reported, I discharged the grand jury.

The series of events above described cannot be explained by chance or by incompetence, or both. They show incompetence but they show much more. They demonstrate incompetence molded by corrupt forces to achieve corrupt ends. The completeness of control which those corrupt forces have secured should need no further demonstration, but in order that the Legislature may learn from the lips of a co-conspirator what methods were used and how complete that corrupt control over grand jurors had become in the hands of Coakley and Pelletier, I am attaching to this report (Appendix B) that portion of Corcoran's confession in which he discloses the plan of Coakley to prevent the trial of Pelletier by securing the indictment of judges of the Supreme Judicial Court.

The evils in the administration of the jury system are not confined to grand juries.

It is difficult to conceive a stronger case for conviction than that presented against Charles Ponzi, in which a verdict of acquittal was returned. The foreman of that jury has written me that he will be glad to co-operate in securing reform of the jury system, and has stated that as a result of his experience in the Ponzi trial he is convinced that under the present system men totally unfit are drawn for jury service. He orally stated that he and the others who were holding out for conviction were greatly influenced in finally voting for acquittal by the distress of one of the jurors whose father had died the previous night and who was begging them to agree in order that he might go home, and that after the final vote was taken he (the foreman) stated to the jury that the verdict was an outrage.

In the recent trial of the so-called "black hand" cases in Suffolk County, which were conducted by the district attorney's office, the jury, after being out for more than twenty-four hours, found two of the defendants guilty of murder in the second degree and acquitted the third defendant, although the evidence against the one who was acquitted was as strong or stronger than that presented

against the others. Because of the verdict, an investigation was made by the district attorney's office, and it was discovered that one of the jurors, who, I am informed, was most active in urging the acquittal of this defendant, had a criminal record.

In investigating the venires that are drawn for traverse juries in Suffolk County it is not infrequently found that men who have been drawn have criminal records and are thereby disqualified for service. No adequate investigation is made of the qualifications and past records of those who are placed upon the jury list.

Changes Recommended in the Jury System.

The present system of selecting those who shall be placed on the jury list is primarily responsible for the failure to obtain jurors who meet the requirements of the law. The statute requires that jurors shall be "of good moral character, of sound judgment, and free from all legal exceptions."

If the jury lists from which the venires are drawn for grand and petit juries include persons who do not meet these requirements, some of the men ultimately drawn upon juries will lack the requisite qualifications, since the fountain cannot rise higher than the source. It has been demonstrated that proper lists are not prepared under the present system, especially in our larger cities. The remedy lies in removing from political influence the responsibility for the selection of those who shall be placed upon the jury lists.

I therefore recommend that the present system of making up and drawing venires for grand and petit juries be abolished. In its place I recommend that a State commission of five members shall be established. I suggest that this commission shall be appointed by the chief justice of the Supreme Judicial Court, or, in the alternative, that it shall consist of a justice of the Supreme Judicial Court, a justice of the Superior Court, the clerk of the Supreme Judicial Court for the Commonwealth, and two paid members to be selected by them. Provision should be made for the appointment by the commission of local or district boards, or a corps of inspectors, to aid the commission in the selection

of qualified persons for the jury lists and the maintenance of the lists when established at the required number of men qualified under the statutes.

I further recommend that the venires of grand and petit juries shall be drawn by the clerks of the Superior Courts for the several counties.

I suggest that the Legislature should consider the advisability of removing some of the exemptions from jury service which now exist.

Partial Substitution of Informations for Indictments.

In this Commonwealth a grand jury consists of not less than thirteen nor more than twenty-three persons. They are drawn, summoned and returned in the same manner as traverse jurors. The regular grand jury is drawn for six months and meets at the beginning of each month. Twelve jurors must concur in finding an indictment, which is both a finding that there is sufficient cause to believe that the accused has committed a crime and a formulation of the charge. If the grand jury votes a true bill, the indictment is actually drawn by the prosecuting officer who presents the evidence.

The reason which led to the creation of the grand jury was the need of protection from royal oppression in England. It was necessary that its deliberations should be secret. The rule of secrecy grew up because in the *Earl of Shaftesbury's Case*, 8 How. St. Trials, 759 (1681), the judges attempted to compel a grand jury to find an indictment. At that time judges did not hold their office during good behavior, but at the pleasure of the King. The need for such a safeguard against such oppression has disappeared.

For many years in this Commonwealth minor offences have been tried upon complaints brought in the district courts, and, if appealed, have been retried in the Superior Court upon the same complaint. No one would think of suggesting that in such cases an indictment was either necessary or desirable.

With a view to learning what was being done in other States, I made inquiry of a large number of the Attorneys

General in all sections of the country. The answers indicate that the States are one by one discarding indictments as a method of instituting criminal proceedings. Experience has shown that as compared with prosecution by information indictments are cumbersome, inefficient and expensive.

In 1859, over fifty years ago, Michigan substituted prosecution by information for prosecution by indictment, the grand jury being summoned only upon order of the district court and used for making investigations. Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Louisiana, Kansas, Missouri, Nebraska, North Dakota, Oklahoma, Utah, Vermont and Wyoming all provide to a greater or less extent for prosecution by information (or some substantially similar proceeding) instead of by indictment. The grand jury is usually retained but is generally used only in extraordinary cases. In some cases it is resorted to to collect evidence under oath as to an alleged crime. Occasionally it is used to prosecute corrupt officials or to institute proceedings where a corrupt official refuses to take action. In some of the States a grand jury can only be summoned upon petition of a required number of citizens. In others, it is summoned only by a special order of the court.

The details of the method pursued in instituting criminal proceedings vary somewhat in the different States.

Thus, in Connecticut and Vermont, crimes punishable by death or imprisonment for life must be prosecuted by indictment, while all other crimes may be prosecuted by information. In other States, such as Nebraska and North Dakota, a hearing before a magistrate and a finding of probable cause are conditions precedent to prosecution by information. In a considerable number of States the system of prosecution by information has been in force for years.

Nothing in the Federal Constitution prevents the States from substituting prosecution by information for prosecution by indictment. *Hurtado* v. *California*, 110 U. S. 516. It has been held, however, that article XII of the Massachusetts Bill of Rights requires an indictment in cases of felony; that is, in cases where the punishment may be

either death or imprisonment in State Prison. *Jones* v. *Robbins*, 8 Gray, 329. But this decision permits prosecution by complaint in cases of misdemeanor even though a sentence to the jail or house of correction may be imposed, such punishment not being "infamous" in the constitutional sense. There is no constitutional objection to prosecuting misdemeanors by information both in the district courts and in the Superior Court.

The reports contained in the letters received from the Attorneys General indicate that prosecution by information has worked satisfactorily, and that it has superseded prosecution by indictment in the great majority of cases, and that there is no sentiment in favor of returning to the older and more cumbersome system of indictment by the grand jury.

I therefore recommend appropriate legislation to provide that the prosecution of all crimes which are not punishable by death, or by imprisonment in the State Prison, shall be initiated by information filed in the Superior Court at the instance of the district attorney or by complaint filed in the district court, provided that court has jurisdiction. If it be thought desirable, provision may be made that a justice of the Superior Court, before granting leave to the district attorney to file an information, may require as a condition precedent a finding of probable cause by a justice of the district or municipal court.

Department of the Attorney General.

The work of the Department during the year ending Dec. 31, 1922, has shown an increase over that of the previous year, and has taxed the members of the staff to meet the requirements, and both the Assistant Attorneys General and the members of the clerical staff have rendered service outside of the usual office hours to meet the special demands occasioned by the extra work in the conduct of important cases. It is probable that the regular work of the Department will continue to show an increase, but it is to be hoped that the exigencies which have required the prosecution of

crime and the investigation of corrupt practices by public officials will not arise in the future.

The number of official opinions rendered by the Department during the year was 170. In the United States courts 9 cases have been argued before the Supreme Court, and 3 in the district court. Nineteen cases have been argued before the full bench of the Supreme Judicial Court, and there have been 45 hearings and trials before a single justice of the Supreme Judicial Court. Twenty-four cases have been tried in the civil session of the Superior Court, and 7 in the criminal session. Indictments have been procured against 20 defendants before general and special grand juries. Twenty-two cases have been tried in the probate courts of the Commonwealth, and 1 in the probate court of Marquette County, Michigan. The Department has been in attendance at 22 hearings before the Industrial Accident Board. Hearings have been held in 17 extradition cases, and, in addition, 2 hearings have been attended before the Governors of Maine and Pennsylvania.

The collections of the Department for the fiscal year amounted to $1,621,220.07.

No resignations from the staff have occurred during the year. On June 1, 1922, James H. Devlin, Esq., who was formerly legislative agent for the city of Boston and for a number of years secretary to Police Commissioner Edwin U. Curtis, was appointed an Assistant Attorney General.

The increase in the routine work of the Department during the three years of my incumbency is indicated by the amount of business which has been handled in the collection of tax claims and other claims due the Commonwealth. The amount collected during the past three years is as follows: 1920, $302,623.22; 1921, $1,139,452.42; and 1922, $1,621,220.07. In 1921 the receipts for the first time exceeded $1,000,000, and during the past year this amount has been increased by nearly half a million.

In retiring from my duties as Attorney General I desire to record the high degree of efficiency which has been maintained by the legal staff of this Department. The excellent quality of their work, both in the preparation and presenta-

tion of cases, has set a standard for public service, and has been shown by the marked success which has attended their efforts. During the period of three years the Commonwealth has won approximately 90 per cent of the cases in which she has been a party in the United States courts and in the courts of the Commonwealth, and millions of dollars of revenue and of expenditure have depended upon the outcome of these cases.

When I succeeded to the duties of the Attorney General's office three years ago, conditions attending the administration of the criminal law were menacing the good name of the State and the safety of its citizens. Corruption was rife in the two largest counties. The authority of district attorneys in the nol prossing of cases was uncontrolled, and cases were filed upon recommendation of prosecuting officers without adequate reasons and with insufficient investigation. The duties of bail commissioner were subject to great abuse, and in Suffolk County extortion was practiced by bail commissioners and professional bondsmen who had obtained a practical monopoly of the business. Defaults by defendants in criminal cases were increasing in number, and no serious effort was being made to hold the sureties accountable for such defaults. The zeal of police officials in many of our larger cities was diminished, for they found that their efforts to apprehend criminals did not result in prosecution and punishment. Crime was on the increase, due to the new trinity of crime, — hooch, the gun and the stolen automobile.

My successor, Jay R. Benton, Esq., enters upon his duties under more favorable conditions. Honest and efficient district attorneys are now administering these important offices. Greater co-operation between these officials and the establishment of an efficient State Constabulary have checked the increase in crime. The abuse of the power to nol pros and file cases has been restrained by appropriate legislation. Similarly, the extortionate practices of professional bail men have been largely eradicated. The court has revoked the authority of all bail commissioners in Suffolk County, and care is being taken in the selection of new commissioners.

The congestion in the criminal business of the Superior Court and the grave defects in the present jury system still remain uncorrected, but my successor is familiar with conditions and fully prepared to aid in securing remedial legislation. Trained under three successive Attorneys-General, he brings to the office a broad experience, sound judgment, and marked ability. The Commonwealth may well have confidence in his administration.

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,

J. WESTON ALLEN,
Attorney-General.

Appendix A.

Extract from the Confession of William J. Corcoran made on Jan. 19, 1922, relating to his Participation in the So-called Berman Case.

[*Note.* — In the Berman case as presented in the Pelletier removal proceedings (*Attorney General* v. *Pelletier*, 240 Mass. 264, 335–337) the court found, in substance (among other things), that $50,000 was demanded "in settlement of a claim which he [Corcoran] purported to have, growing out of the circumstance, as was said, that 'a married woman came in with a strange husband and slept in the house overnight'"; that $35,000 was stated by Mr. Coakley to be the least sum that would be accepted; and that Mr. Coakley said that "if the claim was not settled, Berman, his two sons and Gordon would all 'be indicted tomorrow.'" The $35,000 was paid to Mr. Coakley. The court found that "the respondent [Pelletier] consciously used the powers of his office to aid in the extortion of this money, . . . and is guilty of this charge."]

Now, then. I will take up the Higgins Hotel case and give a narrative of my connection with that. I was up in the Bellevue Hotel. I don't know the dates. It was during the latter part of my term as district attorney in Cambridge, and I have forgotten the time of day, and I cannot tell by the fact that I was eating there at the time, because I frequently ate luncheon or dinner or breakfast, or all three meals there, although I was living at home, because often I would come in with just having coffee at home. So there is no way to determine what time of day it was except that it was daylight.

I got a call to come to the phone and Coakley was on the phone. I was eating there all alone, and he said to me, "I have been telephoning you all over hell's kitchen," and he says, "Do you spend all your time in the Bellevue?"

So I said, "No, I am just having a bite to eat."

He said, "I want to see you. How soon will you be through?"

I said, "I haven't got my order yet. I will be through in half or three-quarters of an hour. Are you coming up here?"

"No, I have got a matter that I want you to handle, so," he said, "when I telephone, to —— with your dinner or whatever you are eating; you come right down here."

So I said, "All right."

He said, "You will hear from me in a minute." So in a minute he rang me and in a very brusque way says, "Mr. Corcoran?"

"Yes."

"Hello, Bill. Now I got a matter I want to see you about. Where are you?"

"I am in the Bellevue Hotel."

"You are right near here. Could you come down to my office and see me and some other men?"

"Yes, I will be down."

So he said, "I will see you in a few minutes."

I had got started out of the Bellevue when the waiter called me back and Coakley was on the phone again. He said, "There is one thing I meant to tell when I first talked to you. I haven't got time to talk about this matter. This is a matter involved, more or less; it is a matter I am not going to explain over the phone. So you do a lot of listening and —— little talking, see. So if anything occurs to you in the course of the conversation, let me handle it. You do the heavy looking on, and as soon as I get through talking that will be your time to take your hat and coat and get along. Don't have anything to say and save your prayers." I remember that very well.

He says, "Get that, because these people are all friends of mine." So I said, "All right." I was announced.

I was shot right in. In Coakley's private office was Coakley and Ike Gordon was sitting there and I think there was some young fellow sitting there. My impression is he was a relative of this man Berman. Now, Berman was there. Yes. I never knew his name unless I heard it that day, I suppose, until this case came along. As I remember, there was a man of Jewish appearance, I think, with a beard or chin whiskers; I should say a man fifty-five or sixty years of age, of medium size.

And there may have been other people there. My impression is there was quite a group of people there, but I don't recall any others. There was nobody else, as I remember, there that I knew except Ike Gordon, whom I knew very well.

As soon as I got in there Coakley jumped up and he said, "Well, now, here is brother Corcoran." And he says, "Corcoran, Mr. Yip, Mr. So-and-So, Mr. So-and-So," and intro-

duced me to two or three people, and there was the ordinary bustle of men getting up, "How do you do," and so forth.

And Coakley immediately began to talk and it was a rapid-fire, sharp talk — these "Everybody here is a friend of mine and you are a friend of mine, and now, regarding this case, what he demands and what is wanted, and I understand that the claim is for $50,000, or suit for $50,000," and Coakley talked until I can only say that he left the impression that he wanted me to bring a suit for $50,000 against the Higgins Hotel or else defend a suit for $50,000 against the Higgins Hotel, and as Christ is my judge, that is the truth, and it was a deliberately designed and framed conversation that I did not know what was going on.

Now, at that time and never before or never since had I had any case or any claim against the hotel or against anybody in connection with the hotel, and I knew Ike Gordon ran the hotel and I knew Ike well enough, if I had any case against the hotel, to ring him up on the telephone and talk to him about it, and I knew him well enough so that I would not take any case against the hotel or against him that would hurt him.

And I would put right in here, too, that I never talked with Pelletier about the Higgins Hotel; I never asked Pelletier to send for any books from the Higgins Hotel, and I never knew any book of the Higgins Hotel was sent for until I heard of it in connection with this case, and I think the first thing I heard of it in connection with this case was when I read McDevitt's, the police officer's, testimony that he went down and got them. And I do not know where I will find words or need words to fully and completely disassociate myself from ever having had a claim or client against the Higgins Hotel since, before or during this period. And I never called Pelletier or anybody connected with his office about the Higgins Hotel or Ike Gordon about it. I want to disown any association of Pelletier and me in connection with any claim against the Higgins Hotel. I want to, as clearly and as emphatically as I can, deny that I ever had a claim against the Higgins Hotel, directly or indirectly, except in so far as Coakley hurrahed me into his office for five minutes and hurrahed me out, and did all the talking, as you well know how he talks, Billy. And I did all the listening, and of course you know that anybody that is a friend of Coakley does most of that. And I have got enough association with Dan Coakley

to answer for without answering for something that I do not propose to be framed in on by him.

Now, something was said about my being abusive there. I have no recollection of saying a word, unless I assented to myself bringing a suit for $50,000 or defending a suit for $50,000. And I say that this man Berman is correct when he said he did not understand what claim was being made there. Nobody ever did understand what claim was being made there and it was purposely and designedly put in that form by Dan Coakley so nobody would know what kind of a claim was being made there. And he did not want me to know what kind of a claim was being made there because he did not want, if any money — $35,000 or $50,000, or $35 or $50 — was paid, I was counted all out, his conception of partners being that a partner is a partner on liabilities but never on assets.

So, if you are at a loss to understand why a man with my experience at the bar should walk into Coakley's office and be a participant in such a situation as that, I do not suppose that any one in the world will believe it except you or somebody that knows Dan Coakley as you and I know him. But it is a fact that I was rushed in there and rushed out of there, and it is a fact that Berman, or Berwind, or whatever his name is, is correct when he said that there was nobody down there to give him any conception of what kind of a case was being brought against him.

He says something in his testimony about my being abusive. I guess he is a little thin skinned on that, because the only recollection I have of that is abuse I made of Ike Gordon, because Coakley said it was not the Hotel Touraine. He said it was run a great part especially for the accommodation of people who did not like to go to the Hotel Touraine or did not have the means to go there, and I, knowing Ike Gordon very well, laughed out loud when he said it must be a good hotel because Ike Gordon wouldn't have anything to do with it otherwise. I said, "What the —— are you talking about, a nice hotel? I remember the Higgins Hotel ever since I remember anything, and I never thought I would live to hear anybody say it was nice or anything was nice about it unless the income from it was nice," and then Coakley gave me the eye to get out.

"And I know you are in a hurry and I will take this matter up with you after I have a further conference with my clients."

Now, as I hope for anything in this world, that is the conversation.

He says, "I know you are in a hurry, so hurry along and I will see you later."

So as I go out the door which leads from his office into the office of Mr. Sugrue which adjoins Mr. Coakley's and has a connecting door between, he says, "Wait a minute." So he says. "I will talk to you privately. Perhaps I can talk more freely privately."

I walked out into Sugrue's office and Sugrue was there and I was just speaking to Sugrue when he came out. So he says — I was just saying hello to Sugrue when Coakley called me going through the door, and I says, "What is it?"

He says, "Nothing at all. I don't want to talk to you any more. Go along if you are in a hurry and I will join you a little later. I just want to give these people a stall I am having a conference with you. Well, I will go in the library to have a smoke. I suppose you are in a hurry."

I says, "Why don't you come up and have a bite with me?"

He said, "I will stay out here. I have a word or two I will possibly have with Dan."

I went along up to the Bellevue.

Now, within two or three days of that incident I was in the Bellevue and Dan Coakley came in and came over and sat down with me. There was no appointment or anything, and we got talking about Nate Tufts who was running for district attorney at the time. This was before election. These dates were before election day, because I saw the Higgins Hotel people prior to this second interview with Coakley, and this second interview was before Nate Tufts was elected district attorney.

I think it was either election day of that year or the day before election. I can't say which, but it was one or the other. We got talking about Nate Tufts' fight and he brought the matter up and I discussed the size of his majority, which was the only question, and he asked me how much it would be in my judgment.

"Well, it depends upon whether he can get out the vote or not." I think it was presidential election and Hughes was running. I said, "This fellow will get more majority than Hughes, because Hughes may have more whiskers but he has more feet. He gets around the ground a great deal more than Hughes does, and as a walking candidate he has

got the world beat," and I says, "He knows everybody since this thing started. And he needs workers at the polls," I says.

He says, "How much will he need?"

And I said, "$1,500 or $2,000."

He says, "Well, you know that matter that you was in the office about the other day, the Higgins Hotel matter of Ike Gordon."

And I says, "Yes."

He says, "I closed that matter," and he says, "I am going to give you $1,500 or $2,000 (whichever the amount was he gave me)." It was either one or the other sum, and I cannot remember which, because the money was not given to me for my own use.

And he says, "We might as well let the tail go with the hide on this fellow and give him his majority." He said, "I will put that money up. I think it is good politics."

So he gave me a check for one amount or the other, and my impression is it was either a check of the Higgins Hotel or a check of one of the Bermans or somebody affiliated with them for that amount.

And he said to me, "This check is perfectly all right, so you can go down to your bank and cash it and get the cash and dig this fellow up and give him the money and give it to him in cash."

And that is the reason that I am particularly sure my recollection is correct, because if it was his own check there would have been no conversation relative to the check being "perfectly all right."

And I said, "All right."

I finished what I had to eat, and he said, "You go along now and get a car and jump and get ahold of this fellow."

I went down to the Beacon Trust Company. I don't know but I might have had my own car. I went down to the Beacon Trust Company and cashed the check over the counter, and I am sure I endorsed it, and I got $1,500 or $2,000, whatever the amount was in hundred dollar bills, and got hold of Tufts and gave it to him. And I am sure it was the day before election.

Now I complete the whole story of my connection with the Higgins Hotel case with that statement. The hotel case was never mentioned by Coakley to me from that day until this Pelletier information was filed, and I was dumbfounded

when I heard about the $35,000 or $50,000 conspiracy with Pelletier and me to extort that much money from these people.

In the first place, as I said to you, the only association I had with money of that size in connection with the Higgins Hotel is the recollection that it was an *ad damnum* of that size. I did not think the Higgins Hotel was worth $50,000 or $35,000, either.

. . . . . .

"Well," he said, "you know, on this Higgins hotel case you have got to stand for it that you got $35,000 and I don't know how the —— you are going to do it. What do you say on that proposition?"

Before, I say it very frankly, that, at the time, and up to the time when I found Coakley and Pelletier were betraying every confidence that I had and satisfied myself that the only thought they had in common to-day was a regret on the part of each that he could not sell out the other to save himself, I was prepared to do anything that my sense of loyalty and devotion and friendship to Dan Coakley called on me to do to save him. And I say this: That I would have done it with little regard for myself, as I have often done things for him.

But I said to him, "With regard to the Higgins hotel case, of course, this is —— for me. I never knew anything about it. You know I was hurrahed into it and hurrahed out of it, and I never knew anything about any $35,000, and my income tax returns to the State and the government show that. I never had any client, and the Supreme Court will never believe that I had any phony client that was a short, tall, dark complexioned blond and his first name was Marty. They will never believe that; and I never saw him before or knew where he came from or never saw him since. I can't do that. The only thing I can do," I told him, "I am over beyond the line of their process, except on the process of the New York courts, and on that proposition I will tell the New York courts to go to —— and that I won't testify, and it will be two years from now before they will make me testify, and there is no contempt of court there for refusing to testify before a commissioner; that I haven't got grounds enough in law on this process here — or can get them — to refuse to answer on legal grounds; and then take the matter up to the

New York Court of Appeals, and by the time those gentlemen get around to say I should have answered, I will be all ready to answer; I may be dead and buried by that time. But I can't come into court and say that I got that money. In the first place, as I said, my income tax knocks it to ——. In the second place, my bank accounts show it isn't so; and in the third place, it is incredible I had a client in a case of that importance and never saw him before or since or knew where he came from, or anything of that sort. Nobody will believe it." I said, "I can't see anything to it except refusing to testify."

And he said, "That is —— bad, too."

I said to him, "How the —— can my refusal be charged up to Pelletier? I don't give a —— what reasons are given for my refusal. My attitude might very well be: I am in New York, I am out of the State of Massachusetts; to —— with the State of Massachusetts and its officials, and what they do and don't do. How can that be charged up to Pelletier? I will adopt any attitude of belligerency or abuse that is necessary, or Pelletier can make any explanation that he wants to of why I won't go through. I will stand for any explanation at all. But I can't stand for getting that money when I didn't get it and the complete records — every record in existence shows that I didn't get it."

Appendix B.

Extract from the Confession of William J. Corcoran made Jan. 19, 1922, disclosing the Plan of Daniel H. Coakley to prevent the Trial of Pelletier by indicting Judges of the Supreme Court.

Weeks before the indictments were returned by the Suffolk County grand jury against Mr. Justice Pierce and Attorney-General Allen, the exact date of which I will be able to refresh my memory on later, I was at Dan Coakley's house, having been informed by him that indictments were being sought for by Allen, as a result of which I came from New York to Boston and went out to his house and spent several hours in conversation with him. The date of this visit with Coakley was prior to the indictment (by the same grand jury that indicted me) of Allen and Judge Pierce.

I discussed the charges which were said to be in the possession of Allen in great detail with Coakley and was told in so many words, and practically literally in these words, by him at that time:

Go back to New York and go to sleep on any indictment before this grand jury so far as you are concerned, Bill. I am getting ready to throw the harpoon into Allen and also into Pierce, and if —— stands up in his boots, also into old ——, and the indictments that that grand jury will return will be indictments against those gentlemen, and when I get through with Allen, your troubles will be over, as well as my own, because I will see to it that he is rushed to trial before Pelletier, and with criminal conviction, the Legislature will take him like Grant took Richmond.

And I said to him, "What does Joe (meaning Pelletier) say on the evidence? Have you got the goods?"

He says, "We have got the goods on Allen all right, I guess, . . . that the larceny was small enough but it was larceny all right, and to —— with it whether there was or not, because there was enough to go to a jury after his indictment, and any Suffolk grand jury would take Allen all right."

So I said to him, "Well, what about the Pierce situation?" And he told me in a good deal of detail the connections that Pierce is said to have had with a lawyer by the name of Ulmer that lived down at Nantasket Beach near Pelletier, or used to live down there in the summer. . . .

And I said to him, "It would have to be pretty strong stuff on a judge of the Supreme Court, and is there anything more to it than any lawyer might do who was socially friendly with the judge, sending him some flowers or being on pleasant sociable terms with him, as many lawyers are with many judges, and as I have been on pleasant terms with many judges; that there was no corruption involved with them. . . ."

I said, "Let's get to the point, because I know something about criminal practice. Have you got the goods on them?"

And he said, "The —— —— Suffolk grand jury is eating out of my hand and will do any —— —— thing I want done. I have got them and the —— —— Suffolk jury will do anything I want done, and I will have it for them."

He said, "We have goods enough on them to make them see that Dan Coakley is on the job, and those fellows don't want to go through with the indictment if they are wise."

I said to him, "Well, that is all right; that ends this situation if you can bring that about, but," I said, "I don't know; I can't conceive — I don't think a —— of a lot of Allen, but, by ——, I can't see, unless you have got him cold or dead to rights, where it does the Pelletier situation and everybody's situation a —— sight more harm than good; and what to —— benefit is it going to do any situation to take Pierce and indict him?" And I said, "So far as old man —— is concerned, don't believe that old man —— would get out of his chair to help Pierce or any other man on earth in fixing up any master's report," which was the story that I got; that it was a conspiracy to corrupt justice; . . ."

And he said to me, "I don't know whether we can get them to hang the tag on —— or not but," he said, "——, I am going to break my back that —— is indicted, too," "and then we get the liver scared out of —— . . ."

And he says, "With two judges under indictment and —— with a belly ache, it is all he can handle. Where the —— do they get off to get a majority to try Pelletier? They will try Pelletier after they have gone over the hot sands

themselves; that is when they will try Pelletier," and he says, "They can try you, and you can take my word on it, after they are through trying themselves." So he says, "Don't you worry about that thing." He says, "I am always —— worried about facts till I get the facts bottled up," and he says, "And I am —— glad you came in because we have got to have another talk about this Pelletier situation."

OPINIONS.

Armories — Office Furniture and Equipment — Chief Quartermaster — Superintendent of Buildings.

Under G. L., c. 33, § 44, the care and maintenance of all armories belonging to the Commonwealth, including the purchase of furniture and equipment therefor, devolves upon the chief quartermaster.

JAN. 5, 1922.

Brig. Gen. JESSE F. STEVENS, *The Adjutant General.*

DEAR SIR: — On behalf of the Armory Commission you request my opinion as to whom authority has been given to purchase certain furniture and equipment for State armories.

In your letter you point out that G. L., c. 33, § 45, provides that the Armory Commission shall erect, furnish and equip armories, and that, under G. L., c. 8, § 6, it is provided that the Superintendent of Buildings "shall have charge of purchasing all office furniture, fixtures, equipment, stationery and office supplies for all executive and administrative departments and officers. . . ."

At the outset, let me call to your attention that by G. L., c. 33, § 45, it is provided that the Armory Commissioners "shall rebuild, remodel or repair armories of the first class injured or destroyed by fire, and may reconstruct, remodel, enlarge or otherwise improve existing state armories, if they deem the needs of the service so require, and shall construct additional armories until the volunteer militia shall be provided with adequate quarters. They shall designate the location of armories so to be constructed and shall thereupon, on behalf of the commonwealth, . . . acquire . . . suitable lots of land . . ., *and shall erect, furnish and equip thereon armories* sufficient for one or more companies of militia. . . ." You will note, however, that by the preceding section (§ 44) it is provided that, on the completion and acceptance of all armories erected by the Commonwealth, the care and maintenance thereof, as well as the care and maintenance of all armories belonging to the Commonwealth, shall devolve upon the chief quartermaster.

Previously the provision as to the care and maintenance of armories devolving upon the chief quartermaster was found in Gen. St. 1917, c. 327, § 40, and the provision as to the Superintendent of Buildings having charge of purchasing supplies was found in Gen. St. 1919, c. 350, § 19.

When the statutes of the Commonwealth were revised by the commissioners and consolidated into the General Laws, both these statutory provisions were brought forward and made a part of the General Laws, as above stated. Both, therefore, must be taken as independent and co-existing statutes: the one, G. L., c. 33, § 44, relating to a particular field of purchasing office supplies, to wit, for the armories belonging to the Commonwealth, the other, G. L., c. 8, § 6, relating to the purchasing of office supplies in general. This being so, the rule of construction, that when the provisions of a particular statute conflict with those of a general statute they are in force as to the particular matters with reference to which they are enacted, should be applied.

Accordingly, in my judgment, the chief quartermaster has charge of purchasing the furniture and equipment in question for the State armory, the care and maintenance of which have been placed upon him by a particular statute.

Yours very truly,

J. Weston Allen, *Attorney General.*

Billboard Advertising — Rules and Regulations of the Division of Highways — Public Ways — Permits.

Where outdoor advertising signs and devices project into or over public ways in any city or town, the duty of granting permits for the placing and maintenance of such signs rests with the municipal board or officer having charge of the laying out of public ways.

Jan. 11, 1922.

Hon. John N. Cole, *Commissioner of Public Works.*

Dear Sir: — You request my opinion upon a question of law based on the following facts: —

Your department is in receipt of two applications for permission to erect advertising signs which will be located inside the highway location of the streets of the city of Boston. One of these signs is to be located at the corner of Hollis and Tremont streets, the other is to be located on

the second story of a building at the corner of Tremont and Eliot streets.

You ask whether or not the signs in question can be placed within highway locations, contrary to your rules and regulations concerning outdoor advertising.

G. L., c. 93, §§ 29 to 33, inclusive, provide, so far as is pertinent to your question, that the Division of Highways shall make rules and regulations for the proper control and restriction of billboards, signs and other advertising devices on public ways or on private property within public view of any highway, public park or reservation, and that no one shall post, erect, display or maintain on any public way or on private property within public view from any highway, public park or reservation any billboard or other advertising device, unless such billboards or device conforms to the rules and regulations. Your rules for the erection of advertising signs and devices, under date of June 29, 1921, provide, by section 5, clause A, that "no outdoor advertising shall be permitted within the bounds of any highway."

G. L., c. 85, § 8, provides as follows: —

> The municipal board or officer having charge of the laying out of public ways may grant permits for the placing and maintaining of signs, advertising devices, clocks, marquees, permanent awnings and other like structures projecting into or placed on or over public ways in its town, and may fix the fees therefor, not exceeding one dollar for any one permit, and may make rules and regulations relating thereto, and prescribe the penalties for a breach of any such rules and regulations, not exceeding five dollars for each day during which any such structure is placed or maintained contrary to the rules and regulations so made, after five days' notice to remove the same has been given by such board or officer, or by a police officer of the town. All such structures shall be constructed, and, when attached to a building, shall be connected therewith, in accordance with the requirements of the inspector of buildings, building commissioner or other board or officer having like authority in the town.

Previously the statutory provisions as to permits for signs and other structures projecting into ways were found in Gen. St. 1915, c. 176, and the provisions for the regulation of advertising signs and devices within the public view were found in St. 1920, c. 545. When the statutes of the Commonwealth were revised by the commissioners and consolidated into the General Laws both these statutory pro-

visions were brought forward and made a part of the General Laws, as above stated. Both, therefore, must be taken as independent and co-existing statutes: the one (G. L., c. 85, § 8) relating to particular signs, advertising devices and other structures projecting into or placed on or over public ways in a city or town, and the granting of permits therefor by the local authorities; the other (G. L., c. 93, §§ 29 to 33, inclusive) relating to the control and restriction of billboards, signs, and other advertising devices on public ways or on private property within public view in general. This being so, the rule of construction, that where a matter is within the language of a general statute and also within that of a special enactment the presumption is that the special enactment shall control, is to be applied.

The signs in question, when erected, will project into or over public ways in the city of Boston, and the duty of granting permits for the placing and maintaining of the same is placed upon the municipal board or officer of the city of Boston having charge of the laying out of public ways.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Vacancy in the Executive Council — Selection of Successor.

Where a member of the Executive Council dies upon the day that the General Court convenes, but some hours before the General Court does in fact convene, and such vacancy is not filled by the Governor and Council before the Legislature comes into session, such vacancy is to be filled by concurrent vote of the Senate and House of Representatives in the manner prescribed by Mass. Const. Amend. XXV.

Jan. 11, 1922.

Hon. Frank G. Allen, *President of the Senate.*

Dear Sir: — I have the honor to acknowledge receipt of the following order: —

Ordered, That the Senate request the opinion of the Attorney-General as to whether the vacancy existing in the Executive Council shall, under the Constitution, be filled by appointment by the Governor or by concurrent vote of the Senate and House of Representatives.

Your question is answered by Mass. Const. Amend. XXV, which provides: —

In case of a vacancy in the council, from a failure of election, or other cause, the senate and house of representatives shall, by concurrent vote, choose some eligible person from the people of the district wherein such vacancy occurs, to fill that office. If such vacancy shall happen when the legislature is not in session, the governor, with the advice and consent of the council, may fill the same by appointment of some eligible person.

I am informed that the vacancy is due to the death of a councillor at or about 9 o'clock in the morning of the day when the General Court convened. It is unnecessary to determine whether, during the interim between the death and the meeting of the General Court, the Governor might have filled the vacancy, with the advice and consent of the Council. It is sufficient that he did not do so, and that the vacancy still existed at the time when the General Court convened. Under these circumstances, I am of opinion that the vacancy existing in the Executive Council should be filled by concurrent vote of the Senate and House of Representatives.

Yours very truly,
J. Weston Allen, *Attorney General.*

Division of Fisheries and Game — Employee — Compensation — Federal Board of Vocational Education.

Under G. L., c. 29, § 27, the Commissioner of Conservation has no right to employ in the Division of Fisheries and Game a deputy inspector of fish when there are no funds available for the salary thereof, although the Federal Board of Vocational Education agrees to pay such salary and necessary traveling expenses until such time as a sufficient appropriation is made by the State.

Jan. 13, 1922.

Hon. William A. L. Bazeley, *Commissioner of Conservation.*

Dear Sir: — You request my opinion as to whether or not you have authority to employ in the Division of Fisheries and Game, as a deputy inspector of fish, a World War veteran who is a citizen of Massachusetts and first on the civil service eligible list for this position, when a vacancy may occur or more deputy inspectors of fish are added to the force, although there are no funds available in your division for the salary of another deputy inspector of fish. You state that the Federal Board of Vocational Education

agrees to pay such salary and necessary traveling expenses until such time as sufficient appropriation may be made by the State allowing the inspector of fish to increase his force of deputies or put on a temporary deputy. Your question resolves itself to this: Can a person be appointed to such position in the Commonwealth's employ while his compensation will be paid entirely by the United States government?

G. L., c. 29, § 27, provides as follows: —

> No public officer or board shall incur a new or unusual expense, make a permanent contract, increase a salary or employ a new clerk, assistant or other subordinate unless a sufficient appropriation to cover the expense thereof has been made by the general court.

This provision of law would seem to answer your question, and it would seem that reasons of public policy as well would forbid a situation where an official or employee of the Commonwealth would thus be serving in a dual capacity.

I am aware that instances have arisen in the past where an employee of the Commonwealth has been permitted to receive from the Federal government pay for overtime work performed for the latter. Such permission was based upon the fact that the overtime did not in any way interfere with the efficiency of the regular work of said employee for the Commonwealth, being done outside the hours of duty belonging to the Commonwealth. The decision in such cases, however, rests upon different facts from those presented in your communication, and I am consequently of the opinion that the statutory provision above quoted should be strictly construed and adhered to.

Very truly yours,

J. Weston Allen, *Attorney General.*

Retirement Association — Employees of the Norfolk County Tubercular Hospital and Norfolk County Agricultural School — Contributions by Employees.

Employees of the Norfolk County Tubercular Hospital and the Norfolk County Agricultural School are employees of the county and members of the Retirement Association under the provisions of G. L., c. 32, §§ 20 and 22.

Contributions to the association should be paid by said employees from the date upon which they became members, as defined in § 22.

JAN. 19, 1922.

Hon. CLARENCE W. HOBBS, *Commissioner of Insurance.*

DEAR SIR: — You request my opinion upon the following questions: —

1. Are employees of the Norfolk County Tubercular Hospital and the Norfolk County Agricultural School employees of the county, within the meaning of G. L., c. 32, § 20?

2. If the preceding question is answered in the affirmative, have such employees become members of the Retirement Association, under the provisions of section 22 of said chapter?

3. If the foregoing question is answered in the affirmative, should contributions to the association be paid by said employees from the date upon which they became members under the provisions of said section 22, or is it permissible for the association to begin to accept their contributions running from the present date?

From data submitted by you it appears that the aforesaid institutions were established after the retirement act became effective in Norfolk County, July 1, 1912.

It is assumed that both the Norfolk County Tubercular Hospital and the Norfolk County Agricultural School are purely county institutions, since each is controlled by a board of public trustees, of which boards the county commissioners form a part. The employees in question are paid entirely from county funds raised by taxation.

G. L., c. 32, § 20, defines "employees" (within the meaning of the retirement systems and pensions) as follows: —

Permanent and regular employees in the direct service of the county whose sole or principal employment is in such service.

Section 22 of said chapter provides: —

Whenever a county shall have voted to establish a retirement system under section twenty-one, or corresponding provisions of earlier laws, a retirement association shall be organized as follows:

(1) All employees of the county on the date when the retirement system is declared established by the issue of the certificate under section twenty-one may become members of the association. On the expiration of thirty days after said date, every such employee shall thereby become a member unless he shall have, within that period, sent notice in writing to the county commissioners or officers performing like duties that he does not wish to join the association.

(2) All employees who enter the service of the county after the date

when the system is declared established, except persons who have already passed the age of fifty-five, shall, upon completing ninety days of service, thereby become members. . . .

I therefore answer questions 1 and 2 in the affirmative, and in answer to question 3 it is my opinion that it is not permissible for the association to begin to accept contributions of employees running from the present date, but that contributions to the association should be paid by said employees from the date upon which they became members under the provisions of section 22.

Very truly yours,

J. Weston Allen, *Attorney General.*

Hunting or Fishing License — Unnaturalized Foreign-born Resident — Citizens.

A native of the Philippine Islands, resident in this Commonwealth, who has not been naturalized and who does not own real estate assessed for taxation at not less than $500, is not entitled to a hunting or fishing license.

Territory acquired by conquest or purchase does not, *ipso facto*, become a part of the United States, within the meaning of the Constitution.

The Fourteenth Amendment is limited, with respect to citizenship, to persons born or naturalized in the United States.

Natives of the Philippine Islands did not become, and are not, citizens of the United States.

Jan. 20, 1922.

Hon. William A. L. Bazeley, *Commissioner of Conservation.*

Dear Sir: — You have requested my opinion as to whether a native of the Philippine Islands, resident in this Commonwealth, who has never been naturalized and who does not own real estate in this Commonwealth, is entitled to a hunting or fishing license. The question is whether such a person is an unnaturalized foreign-born resident, within the meaning of G. L., c. 131, § 7, which reads as follows: —

An unnaturalized foreign born resident owning real estate in the commonwealth assessed for taxation at not less than five hundred dollars may be granted a certificate of registration. He shall pay for such registration a fee of fifteen dollars to the clerk of the town where he resides, or for a certificate to fish only a fee of one dollar to the clerk or a deputy registrar.

Article IX of the Treaty of Peace with Spain, concluded at Paris, provides, in part, that —

> The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

The act of July 1, 1902 (32 U. S. Stat. 691), reads, in part, as follows: —

> Sec. 1. . . . The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands. . . .
>
> Sec. 4. That all inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in said Islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain signed at Paris December tenth, eighteen hundred and ninety-eight.

See also act of Aug. 29, 1916, c. 416, § 2 (U. S. Comp. Stat., 1916, § 3809).

U. S. Rev. Sts. of 1878, § 1891, referred to above, provides as follows: —

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Territory acquired by conquest or purchase does not, *ipso facto*, become a part of the United States, within the meaning of the Constitution. The Fourteenth Amendment is limited, with respect to citizenship, to persons born or naturalized *in the United States*, and is not extended to persons born in any place subject to the jurisdiction of the United States. *Downes* v. *Bidwell*, 182 U. S. 244, 251; *Dorr* v. *United States*, 195 U. S. 138; *Gonzales* v. *Williams*, 192 U. S. 1. It is thus clear that natives of the Philippine Islands did not become and are not citizens of the United States.

I am therefore of the opinion that such persons residing in the Commonwealth, who have not been naturalized and who do not own real estate in the Commonwealth assessed for taxation at not less than $500, are not entitled to hunting or fishing licenses.

Very truly yours,
J. Weston Allen, *Attorney General.*

Constitutional Law — Eligibility of Women to be elected to Congress.

Under U. S. Const., art. I, §§ 2 and 5, a woman is eligible to be elected as a representative to Congress.

Jan. 27, 1922.

Hon. Frederic W. Cook, *Secretary of the Commonwealth.*

Dear Sir: — You inquire whether women are eligible to be elected as representatives in Congress. The answer to your question depends upon the Constitution of the United States. U. S. Const., art. I, § 2, provides, in part: —

> The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.
>
> No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Section 5 provides, in part: —

> Each house shall be the judge of the elections, returns and qualifications of its own members. . . .

The Nineteenth Amendment to the Constitution of the United States further provides: —

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.

Women are included among the electorate of this Commonwealth by the terms of our Constitution, as modified by the terms of the Nineteenth Amendment to the Constitution of

the United States. *Opinion of the Justices*, 237 Mass. 591. Under U. S. Const., art. I, § 2, they are entitled to vote for members of the national House of Representatives. Art. I, § 2, prescribes the express qualifications for membership in that body. Under art. I, § 5, that house is the judge of the qualifications of its own members. *In re Loney*, 134 U. S. 372, 373. See also *Dinan* v. *Swig*, 223 Mass. 516.

Women have been elected to the national House of Representatives and have been permitted to take their seats as members. In my opinion, this constitutes a decision by that house, as the judge of the qualifications of its own members, that women are not impliedly excluded. The fact that, under the Constitution of this Commonwealth, construed in the light of decisions and advisory opinions of the Supreme Judicial Court, women are not eligible to election to the state House of Representatives has no bearing upon the construction placed by the national House of Representatives upon the Constitution of the United States. Attorney General's Report, 1921, p. 217. In my opinion, the decision of the national House admitting women to membership establishes that they are eligible to membership.

Yours very truly,

J. Weston Allen, *Attorney General.*

State Finance — Public Moneys — Amount deposited in Any One Bank — How determined.

Under G. L., c. 29, § 34, the "amount deposited" by the Treasurer and Receiver-General in any one bank or trust company is determined either by the books of the bank, or by adding to the balance shown by the books of the Treasurer and Receiver-General all outstanding checks not known to have been certified at the instance of the holder or paid.

Jan. 28, 1922.

Hon. James Jackson, *Treasurer and Receiver-General.*

Dear Sir: — G. L., c. 29, § 34, provides, in part: —

The state treasurer may deposit any portion of the public moneys in his possession in such national banks, or trust companies, lawfully doing business in the commonwealth, as shall be approved at least once in three months by the governor and council; but the amount deposited in any one bank or trust company shall not at any one time exceed forty per cent of its paid up capital. . . .

You inquire whether the "amount deposited" shall be ascertained by deducting from the amount on deposit, as shown by your check book, the amount of checks drawn and issued against such deposit, or from the bank ledger which shows the actual balance on hand after deducting such checks as have been presented and certified or paid. You state that in actual practice the bank ledger balance will generally show a larger sum on deposit than the check book balance, since the bank ledger does not show outstanding checks which have not been presented for certification or payment, and that the two balances are reconciled by adding to the check book balance the amount of the unpresented checks.

G. L., c. 29, § 34, limits the amount of public money which may be subjected to the risk that a particular bank may fail to 40 per cent of the paid-up capital of such bank. G. L., c. 107, § 212, provides: —

> A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

This section declares the law as it previously existed in this Commonwealth. *Carr* v. *National Security Bank*, 107 Mass. 45, 49; *Dana* v. *Third National Bank*, 13 Allen, 445.

Since the mere issue of a check does not operate as an assignment of any part of the deposit, it cannot reduce the amount of public money which stands upon the books of the bank to the credit of the Commonwealth subject to the risk that the bank may fail. It follows that outstanding checks which have not been paid by the bank or certified at the instance of the holder (which, under G. L., c. 107, § 211, would discharge the Commonwealth as drawer) cannot be considered in determining the maximum amount which the Treasurer and Receiver-General may deposit in the bank without violating G. L., c. 29, § 34.

On the other hand, G. L., c. 29, § 34, must receive a practical construction. Zeal for mathematical accuracy at every instant of time must not be permitted to deprive the Commonwealth of the banking facilities which, as a practical matter, are essential to the discharge of public business. Neither deposits in nor payments by a bank automatically record

themselves upon the books of the bank at the instant that the transaction is completed. The physical limitations incident to all human endeavor necessarily prevent the record from keeping pace, at every instant, with the actual transactions. In spite of this necessary discrepancy, practical considerations require that both the Treasurer and Receiver-General and the bank must be permitted to rely upon the records of the bank.

The law does not ordinarily take cognizance of fractions of a day. *Portland Bank* v. *Maine Bank*, 11 Mass. 204; *Clark* v. *Flagg*, 11 Cush. 539, 540. So, also, the law will so arrange acts performed in one day and relating to one subject-matter as to render them conformable to the intentions of the parties, without regarding which was, in fact, first produced or executed. *Taunton & South Boston Turnpike Corpn.* v. *Whiting*, 10 Mass. 326, 336; *Clark* v. *Brown*, 3 Allen, 509, 511. I am therefore of opinion that, if the record of any particular day should, when extended, appear to show that at some time during that day the permitted maximum was exceeded, but should further show that subsequent transactions upon that day corrected the excess, neither the bank nor the Treasurer and Receiver-General should be deemed to have violated the statute.

Answering your precise question, I therefore advise you that, in my opinion, you may determine the maximum balance upon deposit at any given time either by inquiry of the bank as to what the books show at that time, or by taking the balance upon your own books and adding thereto any outstanding checks not known to have been paid.

Yours very truly,

J. Weston Allen, *Attorney General.*

Taxation — Abatement — Whether Tax correctly assessed upon the Basis of an Erroneous Return is illegally exacted.

A tax correctly assessed upon the facts stated in an erroneous return is not "illegally exacted," within the meaning of G. L., c. 58, § 27, and cannot be abated under that section.

Jan. 31, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — Referring to your inquiry in which my approval was requested, under G. L., c. 58, § 27, for the

issuance of a certificate to the effect that a tax has been illegally exacted from the —— Bank, the facts appear to be as follows:—

The bank, in the return filed by it on May 7, 1921, reported as the deduction allowed under G. L., c. 63, § 12, par. (*f*), the sum of $52,251.34 instead of $694,053.16. This error was not discovered by the bank until November. The bank, within the period prescribed by law for beginning legal proceedings to obtain a repayment of a tax illegally exacted, made application for an abatement of the tax. The Commissioner made an assessment of the tax upon the face of the return, and there was nothing in the return to indicate that an error had been made by the bank with respect to any item.

G. L., c. 58, § 27, provides: —

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

The precise question is whether a tax correctly assessed upon the facts which appear in the return is "illegally exacted," within the meaning of section 27.

G. L., c. 63, § 13, prescribes the return which must be made. The tax is assessed upon the basis of this return.

It may be urged that any tax which exceeds the amount which the defendant ought to pay upon the facts as they actually exist is a tax illegally exacted. In my opinion, so broad an interpretation cannot be put upon the words "illegally exacted" as employed in this section.

G. L., c. 58, § 27, makes no provision for correcting errors in the tax return at the instance of the taxpayer. In this respect it differs from G. L., c. 63, § 51, which provides: —

> Application for the abatement or correction of any tax assessed under sections thirty to fifty, inclusive, may be made within thirty

days after the date upon which the notice of assessment is sent, and from the decision of the commissioner thereon any corporation may appeal in the manner provided by section seventy-one.

Chapter 63, section 51, does not apply to the present tax, since it is not assessed under sections 30 to 50. The omission from G. L., c. 58, § 27, of any provision for correction similar to that contained in chapter 63, section 51, is a significant indication that the provision for abatement in section 27 extends only to error in the mode of assessment, and does not extend to correction of the return upon which that assessment rests. It follows as a necessary consequence that a tax correctly assessed upon the facts appearing in the return is not illegally exacted, within the meaning of that statute. The taxpayer cannot successfully attack the legality of the assessment by showing that he himself stated the facts erroneously in his return.

I am therefore of the opinion that, since chapter 58, section 27, contains no provision for correction of the return at the instance of the taxpayer, it confers no power to abate a tax correctly assessed upon the facts disclosed by the return.

Yours very truly,
J. Weston Allen, *Attorney General.*

Taxation — Abatement — Effect of Failure to apply for Abatement within Thirty Days after Notice of Assessment is sent.

Where a corporation failed to file a proper return, and the Commissioner of Corporations and Taxation assessed a tax under G. L., c. 63, § 45, upon double the amount of income as determined by him, and gave notice of such assessment, a failure by the corporation to apply for abatement within thirty days, as required by G. L., c. 63, § 51, terminates the power of the Commissioner to correct or abate such assessment.

Failure to receive a notice to file a proper return does not excuse a failure to apply for abatement within thirty days after the date of the notice of assessment of the tax.

Feb. 3, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You state the following case: —

A domestic business corporation filed a return adjudged insufficient by the Commissioner under G. L., c. 63, § 46. The Commissioner

mailed a notice to the corporation to file a proper return. This notice was not received by the corporation, which continued in default. The Commissioner, acting under said section 46, determined the income of the corporation according to his best information and belief, and assessed a tax upon double the amount so determined, and gave notice of such assessment. The corporation failed to apply for an abatement within thirty days of the date upon which notice of such assessment was sent, but did apply therefor within six months of said date. You inquire whether the Commissioner has any power to grant an abatement.

In my opinion, the failure of the corporation to receive the notice that its return was insufficient is immaterial upon the question of an abatement. G. L., c. 63, § 51, provides as follows: —

Application for the abatement or correction of any tax assessed under sections thirty to fifty, inclusive, may be made within thirty days after the date upon which the notice of assessment is sent, and from the decision of the commissioner thereon any corporation may appeal in the manner provided by section seventy-one.

It does not appear that the corporation did not receive the notice of the tax. It failed to apply for correction or abatement within the thirty days prescribed by section 51. It has lost that remedy by its own default in failing to apply within said thirty days. I am therefore of opinion that you have no power to make a correction or grant an abatement of the tax assessed by you.

Yours very truly,

J. Weston Allen, *Attorney General.*

Towns — State Tax — Interest — Abatement.

Where, owing to a controversy as to the amount of reimbursement from the proceeds of the income tax due to a town, under G. L., c. 70, § 1, the amount of the State tax assessed to the town, under St. 1921, cc. 399 and 492, was not paid within the time required, interest assessed as provided by the statute cannot be abated.

Feb. 7, 1922.

Hon. James Jackson, *Treasurer and Receiver-General.*

Dear Sir: — It appears that on Nov. 15, 1921, a town in this Commonwealth owed to the Treasurer and Receiver-General, for taxes, a balance of $26,325.08, and that on the

same day there was due to the town from the Treasurer and Receiver-General, as reimbursement from the income tax for certain school salaries, the sum of $14,416; that there had been a controversy between the Department of Education and the school department of the town as to the amount of the reimbursement due to the town, which had been settled on or about November 4, but that the amount due had not been certified to the Auditor of the Commonwealth until November 14; that consequently the Treasurer and Receiver-General did not receive the necessary certificate from the Auditor of the Commonwealth in time to include said amount in the annual settlement sheet on November 15; and that on November 17 the town treasurer sent to the Treasurer and Receiver-General a check for $26,325.08, and on the same day the Treasurer and Receiver General sent to the town treasurer a check for $14,416. The town treasurer states that the town, like other towns, depends upon the approximate amount coming from the Treasurer and Receiver-General to the town treasurer in order to meet the State tax. Interest at the rate of 1 per cent per month from Nov. 15, 1921, to the date of payment, amounting to $26.33, was demanded by the Treasurer and Receiver-General of the town treasurer, and the town treasurer requests that the claim for interest be abated. You ask me to advise you whether, in my opinion, this interest should be abated.

I assume that the balance due from the town to the Treasurer and Receiver-General was a balance of the amount of the State tax assessed to the town by St. 1921, cc. 399 and 492. Both these acts contain a provision, in substance, that if the amount due from any city or town as provided therein is not paid to the Treasurer and Receiver-General on or before November 15, the Treasurer and Receiver-General shall notify the treasurer of such delinquent city or town, "who shall pay into the treasury of the commonwealth, in addition to the tax, such further sum as would be equal to one per cent per month during the delinquency from and after November fifteenth."

G. L., c. 70, § 1, provides as follows: —

> The state treasurer shall annually, on or before November fifteenth, pay to the several towns from the proceeds of the tax on incomes, which shall be available therefor without appropriation, the sums required for the purposes of Part I of this chapter, as part reimburse-

ment for salaries paid to teachers, supervisors, principals, assistant superintendents and superintendents for services in the public day schools rendered during the year ending the preceding June thirtieth.

There is no provision in the acts assessing the State tax authorizing an abatement of the assessment of interest if the tax is not paid on or before November 15, and there is nothing in those statutes making the obligation of payment dependent upon receipt of the reimbursement under G. L., c. 70, § 1. On the other hand, there is no requirement in that section that the Treasurer and Receiver-General shall pay interest if the reimbursement is not paid on or before November 15. In fact, as the correspondence shows, the Treasurer and Receiver-General was not at fault in failing to pay the reimbursement in time, but the fault, if any, lay with the Department of Education. It must be recognized that there is a large measure of equity in the complaint of the town treasurer that the claim for interest imposes a hardship upon the town. Answering your question specifically, however, I do not see that there is any way in which the interest imposed by the statutes, without any discretion in the Treasurer and Receiver-General as to its collection, may be abated.

Very truly yours,
J. Weston Allen, *Attorney General.*

Constitutional Law — Commissioner of Public Health — Regulations and Standards for the Manufacture, Sale or Transportation of Foods, Drugs, Medicines and Liquors — Eighteenth Amendment.

Under G. L., c. 94, § 192, the Legislature has imposed upon the Department of Public Health the power and duty of making certain rules and regulations which shall conform to certain standards set forth in the statute, which standards may be changed from time to time, in which event the rules and regulations must be changed to conform therewith.

Feb. 7, 1922.

Eugene R. Kelley, M.D., *Commissioner of Public Health.*

Dear Sir: — You request my opinion as to the constitutionality of regulations and standards made by your department under the provisions of G. L., c. 94, § 192, in view of the recent opinion of the Supreme Judicial Court of Massa-

chusetts regarding proposed legislation (*Opinion of the Justices,* 239 Mass. 606), which was rendered in answer to certain questions propounded by the Senate of the Commonwealth of Massachusetts relative to House Bill No. 1612, entitled "An Act to carry into effect, so far as the Commonwealth of Massachusetts is concerned, the Eighteenth Amendment to the Constitution of the United States."

The distinguishing characteristic of that bill is that "in several sections it incorporates by reference laws made and to be made by the Congress of the United States, and regulations made and to be made thereunder, for the purpose of establishing offences to be punished by fine or imprisonment or both, by prosecutions to be instituted in the courts of this Commonwealth." It was thereby attempted "to make the substantive law of the Commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by Congress." The *Opinion of the Justices, supra,* holds that legislation of that nature would be contrary to the Constitution of this Commonwealth, and uses the following language: —

> Legislative power is vested exclusively in the General Court except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws.
>
> . . . . . .
>
> No discussion is required to demonstrate that the Congress of the United States cannot be treated as a subsidiary board or commission by the General Court.

But the question presented by you plainly does not come within the principle of said opinion, and the facts involved in your question are different from those therein considered. Your department is charged with the duty of adopting certain rules and regulations in accordance with the provisions of G. L., c. 94, § 192, which reads as follows: —

> The department of public health and local boards of health shall enforce sections one hundred and eighty-six to one hundred and ninety-five, inclusive, and, except as to standards fixed by law, the said department shall adopt rules and regulations, consistent with said sections,

standards, tolerances and definitions of purity or quality, conforming to the rules and regulations, standards, tolerances and definitions of purity or quality adopted or that may hereafter be adopted for the enforcement of the act of congress approved June thirtieth, nineteen hundred and six, and the amendments thereof, the said act being entitled, "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein and for other purposes," or now or hereafter adopted by the United States department of agriculture under any other federal law.

Failure to comply with such rules and regulations is punishable under the provisions of G. L., c. 94, § 191.

It cannot be claimed that these sections of the General Laws are contrary to the Constitution of this Commonwealth. The rules and regulations enacted by your department thereunder are not enactments of the Legislature, but are adopted by your department under authority derived from the Legislature. The Legislature, in imposing upon your department the power and duty of making such rules and regulations, specifies that they shall conform to certain standards set forth in the statute, which standards may be changed from time to time, in which event the rules and regulations of your department must be changed to conform therewith.

I am consequently of the opinion that the *Opinion of the Justices, supra,* has no application to the question raised by your communication.

Very truly yours,

J. Weston Allen, *Attorney General.*

Domicil — High School Pupil — Tuition — Transportation.

G. L., c. 76, § 6, does not apply where a minor is a legal resident of one town but goes to another for purposes of employment only, inasmuch as said minor is not residing temporarily in a town other than the legal residence of his parent or guardian "for the special purpose of there attending school."

Feb. 8, 1922.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You request my opinion on the following case: —

The town of Orleans maintains a high school. The town of Eastham does not maintain a high school, but pays tuition and transporta ion

of its pupils to the Orleans high school. A boy who is a resident of Orleans and is attending the Orleans high school in his junior year, whose father is dead and whose mother is poor and has several other children, has an opportunity to go to Eastham and live with a family on an asparagus farm, at least until he graduates from high school. If he does go to Eastham, and works on the asparagus farm, will he thereby gain a residence in Eastham? If so, the town of Eastham would have to pay his tuition and transportation to the Orleans high school. If he does not gain a residence in Eastham, but is still a legal resident of Orleans, should the town of Orleans charge Eastham for his tuition, and would the town of Eastham be required to furnish transportation to the Orleans high school? If it does furnish such transportation should it render a bill to the parent, who resides in Orleans?

G. L., c. 76, §§ 5 and 6, provide as follows: —

Section 5. Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe. No child shall be excluded from a public school of any town on account of race, color or religion.

Section 6. If a child described in section one resides temporarily in a town other than the legal residence of his parent or guardian for the special purpose of there attending school, the said town may recover tuition from the parent or guardian, unless under section twelve of chapter seventy-one, such tuition is payable by a town. Tuition payable by the parent or guardian shall, for the period of attendance, be computed at the regular rate established by the school committee for non-resident pupils, but in no case exceeding the average expense per pupil in such school for said period.

In rendering this opinion it is assumed that the boy in question is under the age of twenty-one years, although you do not so state in your communication.

It is a well-settled rule of law that the domicil of the parent of a minor is the domicil of the minor. Where the father is living, the domicil of a minor follows that of the father, but, as in the present case, where the father is dead, the domicil of the minor follows that of the mother. An infant, being *non sui juris*, is incapable of fixing his domicil, which, therefore, during his minority follows that of the parent. See IV Op. Atty. Gen. 340.

It is therefore my opinion that the boy in question is still

a legal resident of Orleans, even though he may leave that town to go to Eastham for purposes of employment only, in which event G. L., c. 76, § 6, above quoted, would have no application, inasmuch as he is not residing temporarily in a town other than the legal residence of his parent or guardian "for the special purpose of there attending school."

St. 1921, c. 296, provides: —

> . . . If a town of less than five hundred families or householders, according to such census, does not maintain a public high school offering four years of instruction, it shall pay the tuition of any pupil who resides therein and obtains from its school committee a certificate to attend a high school of another town included in the list of high schools approved for this purpose by the department. Such a town shall also, through its school committee, provide, when necessary, for the transportation of such a pupil at a cost up to forty cents for each day of actual attendance. . . .

I am of the opinion that the present case does not come within this statute, inasmuch as the town of Orleans and not Eastham is the residence of the boy in question. It follows, therefore, that the town of Eastham is not required to furnish him with transportation to the Orleans high school, nor can it be charged with his tuition thereat.

Very truly yours,

J. Weston Allen, *Attorney General.*

Income Tax — Collection from Non-resident Delinquent.

Taxes are not debts or contracts, but mere local statutory obligations. Where the delinquent is a non-resident and has no property within the jurisdiction, the Commonwealth is without power either to collect a tax in its own courts or to invoke the aid of a sister State for that purpose.

Feb. 8, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You have handed me lists of certain uncollected income taxes for the years 1917, 1918, 1919 and 1920 for such action as I may see fit to take in relation to the collection of them.

In most of the cases appearing in the lists the delinquent taxpayer now apparently resides outside the Commonwealth. In all these cases, in my opinion, any attempt to collect the taxes due would be fruitless. Taxes, it has been frequently

held, are not debts or contracts, but mere statutory obligations. There is no personal liability to pay a tax except under the statute imposing it, and that liability is purely local and statutory. Where the delinquent is outside the jurisdiction and has no property inside the jurisdiction, the State is powerless to collect a tax in its own courts and is powerless to invoke the aid of a sister State for that purpose. *State of Colorado* v. *Harbeck*, 232 N. Y. 71; *Kessler* v. *Kedzie*, 106 Ill. App. 1; *cf. Walker* v. *Treasurer and Receiver-General*, 221 Mass. 600; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Impairment of Contract — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company.

Spec. St. 1918, cc. 159 and 188, providing for the public operation of the street railway systems of the Boston Elevated Railway Company and the Eastern Massachusetts Street Railway Company, respectively, for a term of years by trustees to be appointed by the Governor, with exclusive authority to fix fares and to determine the character of the service, having been accepted by the companies, constitute contracts between the Commonwealth and said companies with respect to the management and operation thereof.

Certain proposed bills, if enacted, would be unconstitutional, for the reason that they would impair one or more of the provisions in Spec. St. 1918, cc. 159 and 188, giving the trustees the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished.

A bill repealing Spec. St. 1918, c. 159, but providing that the act should take effect on its acceptance by the directors of the Boston Elevated Railway Company before a certain date, if enacted, would be unconstitutional, since the directors of the company cannot exercise the power attempted to be conferred upon them to abrogate the contractual obligations contained in said statute.

Feb. 11, 1922.

Hon. B. Loring Young, *Speaker of the House of Representatives.*

Dear Sir: — You have asked my opinion concerning fourteen bills referred to the House committee on rules, the question in each case being, — "Would this bill, if enacted into law, be constitutional?" These bills all relate directly or indirectly to the service or management of the Eastern Massachusetts Street Railway Company or the Boston Elevated Railway Company, and involve a consideration of

the application and effect of Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188, being, respectively, "An Act to provide for the public operation of the Boston Elevated Railway Company" and "An Act relative to the Bay State Street Railway Company." Each of these statutes provides for the public operation of the respective street railway systems for a term of years by trustees to be appointed by the Governor, with exclusive authority to fix fares and determine the character of the service, and each contains provisions for the acceptance of the act by a vote of the stockholders of the company concerned.

With reference to Spec. St. 1918, c. 159, the court has recently held, in *Boston* v. *Treasurer and Receiver-General*, 237 Mass. 403, 413, 414, that that statute, "having been accepted by the railway companies (the Boston Elevated Railway Company and the West End Street Railway Company), constitutes an agreement between the Boston Elevated Railway Company and the Commonwealth that the latter shall take over the management and operation of the railway company and shall pay therefor the amount specified in way of compensation for the use thereof," and that the act is constitutional.

In an opinion to the House committee on street railways, dated April 22, 1921 (Attorney General's Report, 1921, p. 140), I had occasion to consider the effect of Spec. St. 1918, c. 188, and ruled that the provisions in sections 11 and 12 of that act, relating to the right of the trustees to regulate and fix fares, and to determine the character and extent of the service and the facilities to be furnished, and the right of the directors to pass upon contracts for the construction or operation of additional lines, constituted a contract between the Commonwealth and the Eastern Massachusetts Street Railway Company which could not be impaired without violating U. S. Const., art. I, § 10; that St. 1920, c. 613, as amended by St. 1920, c. 637, was an impairment of the contract contained in said Spec. St. 1918, c. 188, and was therefore unconstitutional, and that the proposed legislation concerning which my opinion was asked would also be unconstitutional.

I. In my judgment, the bills submitted with the petitions numbered in your letter 1, 3, 4, 5, 7, 8, 9, 11, 12, 13 and 14 would, if enacted into law, be unconstitutional for the reasons stated in my former opinion, which I now restate as applicable to each of said petitions and bills as follows: —

1. Petition for the establishment of a 5-cent fare on the lines of the Eastern Massachusetts Street Railway Company in the city of Chelsea and from said city to Scollay Square in the city of Boston.

To establish a 5-cent fare on the lines named would be a direct impairment of the provision in Spec. St. 1918, c. 188, giving the trustees the right to regulate and fix fares.

3. Petition that the service of the Boston Elevated Railway Company in Medford be extended.

To require the Boston Elevated Railway Company to construct and extend its tracks in Medford, and to require the Eastern Massachusetts Street Railway Company to permit the Boston Elevated Railway Company to make joint use of its tracks in Medford, or to make arrangements for transfers, subject to the approval of the Department of Public Utilities, substantially as provided by the bill accompanying the petition, would be a direct impairment of the provisions of Spec. St. 1918, c. 159, and of Spec. St. 1918, c. 188, giving to the trustees of the two street railway systems the exclusive right to determine the character and extent of the service and facilities to be furnished.

4. Petition for the payment of a 5-cent fare on all lines of the Boston Elevated Railway Company.

The bill submitted with this petition would be a direct impairment of the contract contained in Spec. St. 1918, c. 159, for the reasons stated with respect to petition No. 1, above.

5. Petition that the legal rate of fare on all lines of the Boston Elevated Railway Company be established at 5 cents.

The bill proposed by this petition would be a direct impairment of the contract contained in Spec. St. 1918, c. 159, for the reasons stated with respect to petition No. 1, above.

7. Petition of the mayor of the city of Chelsea that the board of trustees of the Boston Elevated Railway Company be authorized to operate lines of the Eastern Massachusetts Street Railway Company in said city.

The bill proposed by this petition would be a direct impairment of the contracts contained in Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188, for the reasons stated with respect to petition No. 3, above.

8. Petition relative to the operation by public authority of street railway lines in the Hyde Park district of the city of Boston.

This petition and bill is submitted to amend St. 1920,

c. 613, § 7. Since in my opinion of April 22, 1921, said chapter 613 was found to be unconstitutional, the proposed amendment thereof would also be unconstitutional.

9. Petition relative to amounts set aside for rehabilitation, repair and reconstruction by the trustees of the Boston Elevated Railway Company and of the Eastern Massachusetts Street Railway Company.

The bill accompanying this petition, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

11. Petition relative to street railway transportation in the city of Revere.

The bill accompanying this petition directs the Boston Elevated Railway Company to extend its transportation system in the city of Revere. This bill, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

12. Petition of the mayor of Revere that the board of trustees of the Boston Elevated Railway Company be authorized to operate the lines of the Eastern Massachusetts Street Railway Company in Chelsea, Revere, Malden and Everett.

The bill accompanying this petition, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

13. Petition of the mayor of Revere and others relative to the orders and rulings of the trustees of the Eastern Massachusetts Street Railway Company.

The bill accompanying this petition purports to amend Spec. St. 1918, c. 188, by adding a new section limiting the powers of the trustees to fix fares and to determine the character and extent of the service and facilities to be furnished. This bill, in my opinion, would be unconstitutional for the reasons stated with respect to petitions Nos. 1 and 3, above.

14. Petition relative to the operation of certain lines of the Boston & Albany and New York, New Haven & Hartford Railroad companies by the board of trustees of the Boston Elevated Railway Company, and to the electrification thereof.

The bill accompanying this petition, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

II. *2. Petition for the termination of the public management and operation of the Boston Elevated Railway.*

The bill accompanying this petition repeals Spec. St. 1918, c. 159, but contains a provision that the act shall take effect "upon its acceptance by the board of directors or a majority of the stockholders of the Boston Elevated Railway Company, providing such acceptance occurs prior to the day of nineteen hundred and ."

Spec. St. 1918, c. 159, in section 2, gives to the trustees, for the purposes of the act, except as otherwise provided, the authority to have and exercise all the rights and powers of the company and its directors, and in section 4 provides that the duties of the board of directors "shall be confined to maintaining the corporate organization, protecting the interests of the corporation so far as necessary, and taking such action from time to time as may be deemed expedient in cases, if any, where the trustees cannot act in its place." There are provisions in said chapter requiring the consent of the directors to certain contracts made by the trustees involving the payment of rental or other compensation by the company beyond the period of public operation, and other provisions requiring the approval of the stockholders to the issuing of new preferred stock.

It is my opinion that the directors cannot exercise the power attempted by the proposed act to be conferred upon them to impair the obligation of Spec. St. 1918, c. 159, by repealing that statute, which by acceptance of the stockholders of the Boston Elevated Railway Company and the stockholders of the West End Street Railway Company became a binding contract. For this reason I am of opinion that the proposed act would be unconstitutional.

Whether, if the bill provided simply that the act should take effect upon its acceptance by a majority of the stockholders of the Boston Elevated Railway Company, it would be constitutional, I do not need to consider. Ordinarily, the stockholders of a corporation by a majority vote may assent to an amendment or repeal of a statute constituting a contract between the State and their corporation. *Pennsylvania College Cases*, 13 Wall. 190; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574; *cf. Durfee* v. *Old Colony, etc., R.R. Co.*, 5 Allen, 230. Clearly, the company would not be bound except by the acceptance of the holders of a majority of its stock. Whether the words "a majority of the stockholders" mean "the holders of a majority of the stock" or merely "a majority of the persons holding the stock," whether

the stockholders of the West End Street Railway should be included, and whether the holders of the preferred stock authorized to be issued under section 5 have any special rights, may be doubtful questions. On these matters I do not attempt to pass.

III. *6. Petition relative to establishing a 5-cent fare on the lines of the Boston Elevated Railway Company and subsidizing said company from the public treasury for any resulting deficiency.*

The provisions of the bill accompanying this petition would plainly impair the contract contained in Spec. St. 1918, c. 159, if it were not for the following provision contained in section 6 of the bill: —

> This act shall not take effect unless it is accepted by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company, not including the preferred stock issued under section five of said chapter one hundred and fifty-nine, and by the holders of not less than a majority of all the stock of the West End Street Railway Company, given at meetings called for the purpose, and the filing with the secretary of a certificate to that effect signed by a majority of the directors of the Boston Elevated Railway Company.

I am informed that the preferred stock issued under section 5 of said act has the same voting power as the other stock of the Boston Elevated Railway Company. It is therefore my opinion that this bill would be unconstitutional because, by excluding the holders of that stock from the right to vote, it would in effect authorize the acceptance of the proposed act by the holders of less than a majority of the stock of the Boston Elevated Railway Company entitled to vote. Whether the holders of this preferred stock have any special rights which would be impaired by such a bill without their unanimous consent, I do not attempt to decide.

IV. *10. Petition relative to the taking of certain interests in land in the city of Boston by the Boston Elevated Railway Company.*

This petition involves entirely different considerations and will be dealt with in a separate opinion.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Unregistered Co-partners and Stockholders in Retail Drug Corporations.

The classification made by House Bill No. 124, forbidding unregistered co-partners or unregistered stockholders in a corporation doing a retail drug business from actively engaging in the drug business, with the exceptions noted, is arbitrary and unreasonable, and would render the bill unconstitutional, if enacted.

Feb. 24, 1922.

Orlando C. Bidwell, Esq., *Acting Chairman of the House Committee on Bills in the Third Reading.*

Dear Sir: — You request my opinion on the constitutionality of House Bill No. 124, relative to unregistered co-partners and stockholders in retail drug corporations. Said bill is as follows: —

Section thirty of chapter one hundred and twelve of the General Laws is hereby amended . . . so as to read as follows: — *Section 30.* Except as provided in section sixty-five, whoever, not being registered under section twenty-four or corresponding provisions of earlier laws, sells or offers for sale at retail, compounds for sale or dispenses for medicinal purposes drugs, medicines, chemicals or poisons, except as provided in sections thirty-five and thirty-six, shall be punished by a fine of not more than fifty dollars. This section shall not prohibit the employment of apprentices or assistants and the sale by them of any drugs, medicines, chemicals or poisons, provided, a registered pharmacist is in charge of the store and present therein. No unregistered copartner or unregistered stockholder in a corporation doing a retail drug business shall be actively engaged in the drug business except those who were engaged in the drug business on or before May twenty-eighth, nineteen hundred and thirteen. The term "actively engaged" as used in this section shall mean the doing of any work in the store.

Unquestionably there is no vested right to engage in the drug business free from supervision and regulation by the State in the proper exercise of its police power. Hence, in construing the bill in question due consideration must be given to the legislative purpose and to the mischief intended to be guarded against. Whether it is a fair, reasonable and valid exercise of the police power, or arbitrary and capricious, must be determined in the light of the object sought to be attained by the act.

The bill in question selects for regulation a limited class of

unregistered persons, namely, co-partners and stockholders in retail drug corporations. It does not prohibit every unregistered person from working in a drug store. The holding of stock in a drug corporation has no reasonable relation to the evil intended to be guarded against, namely, the dispensing of drugs by unregistered persons. Any unregistered person may be employed at the soda fountain, cigar stand, candy counter or other departments which commonly form a material part of practically every modern drug store. Under the terms of this bill, however, if such unregistered person purchased or acquired even one share of stock in the corporation, he must immediately be discharged.

In my opinion, the classification made by the bill is arbitrary and unreasonable, and would render the bill unconstitutional, if enacted. See *Commonwealth* v. *Boston & Maine R.R.*, 222 Mass, 206, 208; *Bogni* v. *Perotti*, 224 Mass. 152, 156.

Very truly yours,
J. Weston Allen, *Attorney General.*

Department of Public Health — Local Boards of Health — License to engage in the Business of the Manufacture or Bottling of Non-Alcoholic Beverages — Permit.

Under St. 1921, c. 303, the power to grant and revoke permits for the manufacture and bottling of non-alcoholic beverages is vested exclusively in boards of health of cities and towns, although the Department of Public Health, under G. L., c. 94, §§ 186 to 196, has certain duties to perform relative to adulteration and misbranding of food and drugs.

The Department of Public Health has no authority to order local boards of health to enforce any of the provisions of the act, should such boards be negligent in such duties.

Feb. 28, 1922.

Committee on Public Health, House of Representatives.

Gentlemen: — You request my opinion upon the following questions: —

1. Has the Massachusetts Department of Public Health, under the provisions of St. 1921, c. 303, the power to revoke, for cause, any license issued under the provisions of the act by a local board of health?

2. Has the Massachusetts Department of Public Health any power under the act to grant licenses to places properly constructed and maintained, if a local board of health refuses or neglects to do so?

3. Has the Massachusetts Department of Public Health any duties to perform under the provisions of the act, other than making regulations?

4. Has the Massachusetts Department of Public Health the right and power to enforce its rules and regulations?

5. Has the Massachusetts Department of Public Health any authority under any other statute to order local boards of health to enforce any of the provisions of the act, should such boards be negligent in such duties?

St. 1921, c. 303, provides as follows: —

Chapter ninety-four of the General Laws is hereby amended by inserting after section ten and under the heading, Non-Alcoholic Beverages, the five following sections: — *Section 10A.* Boards of health of cities and towns may annually grant permits to engage in the business of the manufacture or bottling of carbonated non-alcoholic beverages, soda waters, mineral or spring waters and may fix fees for said permits not to exceed ten dollars. The provisions of this section and the following four sections shall not apply to persons registered under sections thirty-seven to forty, inclusive, of chapter one hundred and twelve. *Section 10B.* The board of health shall, from time to time, examine the premises of any person granted a permit under the preceding section, and if such premises or the equipment used therein in connection with the business of such person is found to be in an unsanitary condition, the board may revoke such permit after a hearing, ten days' notice of which shall be given such person. *Section 10C.* All materials used in the manufacture of beverages specified in section ten A shall be stored, handled, transported and kept in such a manner as to protect them from spoilage, contamination and unwholesomeness. No ingredient or material, including water, shall be used in the manufacture or bottling of any such beverage which is spoiled or contaminated, or which may render the product unwholesome, unfit for food, or injurious to health. Persons granted permits under section ten A, shall comply with sections one hundred and eighty-six to one hundred and ninety-six, inclusive. *Section 10D.* The department of public health and local boards of health may make rules and regulations to carry out the three preceding sections. *Section 10E.* Any person who engages in the business of the manufacture or bottling of carbonated non-alcoholic beverages, soda waters, mineral or spring waters without the permit provided for in section ten A or who violates any provision of sections ten A to ten D, inclusive, or of any rule or regulation made thereunder, shall be punished for a first offence by a fine of not more than one hundred dollars and for a subsequent offence by a fine of not more than five hundred dollars.

1. The subject-matter of this act pertains to non-alcoholic beverages, and requires a permit for the business of the manufacture or bottling thereof. The power to grant such permit, and also to fix the fee therefor (not to exceed $10), is expressly vested in boards of health of cities and towns. So, also, the power to revoke such a permit is vested solely in such local boards of health, for the cause stated in the act.

While it is required that persons granted such permits shall comply with G. L., c. 94, §§ 186–196, inclusive, there is nothing therein or in St. 1921, c. 303, which gives the Department of Public Health the power to revoke any license issued by a local board of health under the provisions of said chapter 303. I accordingly answer your first question in the negative.

2. Inasmuch as St. 1921, c. 303, expressly vests the licensing power in the boards of health of cities and towns, the Massachusetts Department of Public Health has no power to grant such licenses "even if a local board of health refuses or neglects to do so." The Legislature has expressly vested the entire discretion in this matter in such local boards, and the Massachusetts Department of Public Health, in my opinion, would have no right to substitute its own discretion therefor.

3. Said St. 1921, c. 303, § *10D*, provides that "the department of public health and local boards of health may make rules and regulations to carry out the three preceding sections." But it is also provided in said act that the licensee shall comply with G. L., c. 94, §§ 186–196, inclusive (relative to adulteration and misbranding of food and drugs).

G. L., c. 94, § 192, provides: —

> The department of public health and local boards of health shall enforce sections one hundred and eighty-six to one hundred and ninety-five, inclusive, and, except as to standards fixed by law, the said department shall adopt rules and regulations, consistent with said sections, standards, tolerances and definitions of purity or quality, conforming to the rules and regulations, standards, tolerances and definitions of purity or quality adopted or that may hereafter be adopted for the enforcement of the act of congress approved June thirtieth, nineteen hundred and six, and the amendments thereof, the said act being entitled, "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or

deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein and for other purposes," or now or hereafter adopted by the United States department of agriculture under any other federal law.

In addition, G. L., c. 94, § 193, provides that —

. . . Under the authority given by section one hundred and ninety-two the department of public health shall adopt rules and regulations which shall be observed by the said department and by local boards of health in ascertaining whether there is such a guaranty which may be relied upon by the dealer.

Violation of such rules, regulations and standards is punishable as provided in G. L., c. 94, § 190. The collection of samples under said sections 186 to 195, inclusive, and section 304 may be made either "by authorized agents of the department of public health or of boards of health of towns" (see G. L., c. 94, § 188). The examination of such samples "shall be made under the direction and supervision of the department or board taking such samples" (G. L., c. 94, § 189). So, also, G. L., c. 94, § 194, imposes a duty upon the Department of Public Health or local board "which took the sample" to present the facts, warn the offender, warn dealers, etc., as therein provided.

It is thus plainly evident that the Massachusetts Department of Public Health has other duties to perform in addition to making regulations as provided in the act under consideration. Such additional duties relate to adulteration and misbranding of food and drugs under G. L., c. 94, §§ 186–196.

4. St. 1921, c. 303, § *10E*, provides the penalty for violation of any provision of sections *10A* to *10D*, inclusive. This plainly gives the Massachusetts Department of Public Health the right of enforcement of its rules and regulations made under authority of said act, and to institute prosecutions for violations thereof.

5. G. L., c. 111, §§ 2–25, inclusive, outline the duties and powers of the Department of Public Health, while §§ 26–32, inclusive, outline the duties of city and town boards of health. The duties thus respectively outlined are separate and distinct, and there is no intimation in the statutes, under authority of which these departments are created, of any right or power possessed by the Department of Public Health "to

order local boards of health to enforce any of the provisions of the act, should such boards be negligent in such duties." See *Sawyer* v. *State Board of Health*, 125 Mass. 182, 192.

In an opinion of the Attorney General, dated Feb. 7, 1917 (V Op. Atty. Gen. 12), appears the following statement: —

To a large extent the powers of local boards of health are conferred by general statutes of the Commonwealth, and the duties of such boards of health are therein prescribed. When acting under such powers and performing such duties, the members of the board of health act as public officers, that is, as agents of the State and not of the city. *Attorney General* v. *Stratton*, 914 Mass. 51; *Hathaway* v. *Everett*, 205 Mass. 246; *Haley* v. *Boston*, 191 Mass. 291.

Very truly yours,
J. WESTON ALLEN, *Attorney General.*

Domicil — Settlement — Reimbursement of Cities and Towns under the Relief Laws — Soldier — Philippine Insurrection.

A settlement is defeated under the provisions of G. L., c. 116, § 5, by an absence of five consecutive years, during which a person resides and intends to make his domicil away from his former place of settlement, although during said period such person makes visits to relatives or friends in his former place of settlement, and during a portion thereof is employed in the place of his former settlement without living there.

A soldier who served in the Philippine insurrection is not to be regarded as having been engaged in a war against a foreign power, within the meaning of G. L., c. 116, § 1, par. 5.

FEB. 28, 1922.

Mr. RICHARD K. CONANT, *Commissioner of Public Welfare.*

DEAR SIR: — You request my opinion upon the following questions, which affect claims of cities and towns for reimbursement under the relief laws: —

1. Is a settlement defeated under the provisions of G. L. c. 116, § 5, by an absence of five consecutive years, during which time a person resides and intends to make his domicil away from his former place of settlement, if (*a*) during the said five-year period the person in question makes visits to relatives or friends in his former place of settlement, and (*b*) during a portion of the said five-year period the person in question is employed in the place of his former settlement without living there. In both kinds of cases the persons in question

received no public support in the town where they had formerly been settled.

2. Does a person who enlisted or was mustered into the military or naval service of the United States as part of the quota of a town in the Commonwealth, who served not less than one year in the Philippine insurrection, gain a settlement under the provisions of G. L., c. 116, § 1, par. 5?

1 (*a*). G. L., c. 116, § 5, provides as follows: —

Each settlement existing on August twelfth, nineteen hundred and eleven, shall continue in force until changed or defeated under this chapter, but from and after said date absence for five consecutive years by a person from a town where he had a settlement shall defeat such settlement. The time during which a person shall be an inmate of any almshouse, jail, prison, or other public or state institution, within the commonwealth, or in any manner under its care and direction or that of an officer thereof, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or for losing a settlement, except as provided in section two. The settlement, existing on August twelfth, nineteen hundred and sixteen, of a soldier and his dependent eligible to receive military aid and soldiers' relief under existing laws shall be and continue in force while said soldier or dependent actually resides in the commonwealth and until a new settlement is gained in another town in the manner heretofore prescribed.

Your inquiry largely involves questions of fact.

What constitutes domicil is mainly a question of fact, and the element of intention enters into it. *Olivierieri* v. *Atkinson*, 168 Mass. 28. Mere intention, without proof of other facts with which such intention can be connected, is not enough. *Holmes* v. *Greene*, 7 Gray, 299. "So to acquire a new domicil it is not necessary for a person to reside in a place with the purpose of making it his permanent home and residence. It is enough if he resides there with the intention to remain for an indefinite period of time, without any fixed or certain purpose to return to his former place of abode." *Palmer* v. *Hampden*, 182 Mass. 511; *Whitney* v. *Sherborn*, 12 Allen, 111; *Wilbraham* v. *Ludlow*, 99 Mass. 587. "Absence, within the meaning of the statute relating to the laws of settlement of paupers, in my opinion, must be of such a character and with such intent as to constitute a change of domicil." V Op. Atty. Gen. 380.

It is therefore my opinion that question 1 (*a*) should be answered in the affirmative.

1 (*b*). While there is some authority for the proposition that under the law relating to paupers domicil and residence are identical, and that a pauper should be regarded as having a home wherever he finds work (*Needham* v. *City of Fitchburg*, 237 Mass. 354; *Palmer* v. *Hampden*, 182 Mass. 511), yet, in the case under consideration, you state that "the person in question is employed in the place of his former settlement without living there." Consequently, the same conclusion is to be reached as in my answer to question 1 (*a*), *supra*.

2. G. L., c. 116, § 1, par. 5, provides: —

A person who enlisted and was mustered into the military or naval service of the United States, as a part of the quota of a town in the commonwealth under any call of the president of the United States during the war of the rebellion or any war between the United States and any foreign power, or who was assigned as a part of the quota thereof after having enlisted and been mustered into said service, and his wife or widow and minor children, shall be deemed thereby to have acquired a settlement in such town, provided that he served for not less than one year, or died or became disabled from wounds or disease received or contracted while engaged in such service, or while a prisoner of the enemy; and any person who would otherwise be entitled to a settlement under this clause, but who was not a part of the quota of any town, shall, if he served as a part of the quota of the commonwealth, be deemed to have acquired a settlement, for himself, his wife or widow and minor children, in the place where he actually resided at the time of his enlistment. Any person who was inducted into the military or naval forces of the United States under the federal selective service act, or who enlisted in said forces in time of war between the United States and any foreign power, whether he served as a part of the quota of the commonwealth or not, and his wife or widow and minor children shall, subject to the same proviso, be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment. But these provisions shall not apply to any person who enlisted and received a bounty for such enlistment in more than one place unless the second enlistment was made after an honorable discharge from the first term of service, nor to any person who has been proved guilty of wilful desertion, or who left the service otherwise than by reason of disability or an honorable discharge.

This statute has recently been interpreted in an opinion rendered by this department to Mr. Richard R. Flynn, Commissioner of State Aid and Pensions, dated Feb. 9, 1922, wherein it is decided that "a soldier who served in the Philippine insurrection is not to be regarded as having been engaged in a war against a foreign power." I therefore answer your second question in the negative.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Impairment of Contract — Change of Remedy.

The Legislature can impose conditions on which a particular use of property will be authorized.

Where an obligation or liability exists, the Legislature can change the remedy by which it is to be enforced.

St. 1921, c. 386, § 5, providing for compensation for diminution of value of property suffered by reason of the use of a tract of land taken by eminent domain by the Boston Elevated Railway Company, to be determined by the court without a jury, may be amended by substituting the word "with" for the word "without," since a valid obligation was thereby imposed, and the proposed amendment merely changes the remedy for its enforcement.

March 1, 1922.

Hon. B. Loring Young, *Speaker of the House of Representatives.*

Dear Sir: — As chairman of the House committee on rules, you have transmitted to me a petition relative to the taking of certain interests in land in the city of Boston by the Boston Elevated Railway Company, with its accompanying bill, and have asked my opinion whether this bill, if enacted into law, would be constitutional. The bill is as follows: —

An Act relative to the Taking of Certain Interests in Land in the City of Boston by the Boston Elevated Railway Company.

Section 1. Section five of chapter three hundred and eighty-six of the Acts of nineteen hundred and twenty-one is hereby amended by striking out, in the twenty-fifth line thereof, the word "without" and substituting therefor the word: — with, — so that said sentence in the twenty-fourth and twenty-fifth lines will read: — Such petitions shall be heard by the court with a jury.

St. 1921, c. 386, section 5 of which the bill proposes to amend, is entitled "An Act authorizing the Boston Elevated Railway Company to take certain interests in land in the city of Boston."

By section 1 the Boston Elevated Railway Company is authorized and empowered to take by eminent domain for railway purposes certain rights and interests, therein specified, in and to a certain parcel of land in the city of Boston on Hyde Park Avenue and Walk Hill Street, containing about 4,404 square feet, said rights and interests being an easement to locate, construct, maintain and operate an elevated railway, and the right to construct, maintain and operate surface car tracks, sewer and drain connections and retaining walls in, upon and across the premises described.

Sections 3 and 5 of said act are as follows: —

Section 3. If said company and said city, or any person having any right or interest in said property which is injured by such taking, are unable to agree as to the damages sustained by the city or any such person on account of such taking, such damages may be determined by a jury in the superior court for the county of Suffolk, on the petition therefor of said city or of said person filed in the clerk's office of said court within one year after such taking, and judgment shall be entered upon the determination of such jury, with interest from the date of taking, and costs shall be taxed and execution issued in favor of the prevailing party as in civil cases.

. . . . . .

Section 5. The owners, lessees, mortgagees and other persons having an estate in lands abutting on Walk Hill street or Hyde Park avenue opposite a tract of land bounded by Washington street, Walk Hill street, Hyde Park Avenue, Toll Gate way and land of the Old Colony Railroad Company which the Boston Elevated Railway Company has heretofore acquired or may hereafter acquire, shall be entitled to reasonable compensation from the Boston Elevated Railway Company for any diminution in the fair market value of their said property suffered by them by reason of the use of said tract of land for an elevated railway, terminal, repair shop or other railway purposes, and the construction of an elevated railway connecting said terminal with the elevated railway system of the Boston Elevated Railway Company under plans heretofore approved by the department of public utilities which said company is hereby authorized to construct. Any such person may at any time within three years after the beginning of use of any part of said land for any of said purposes, file in the clerk's office of the superior court for the county of Suffolk, a petition setting forth his claim against the corporation. He shall give said

corporation fourteen days' notice of the filing of such petition and an answer thereto shall be filed by the corporation within thirty days from the return day of such notice. Such petition shall be heard by the court without a jury. Judgment shall be entered upon the finding together with interest from the date of the filing of the petition and execution shall issue as in other civil cases. The provisions of chapter seventy-nine of the General Laws relative to cases where damages are claimed to estates in which two or more persons have different, separate or several interests shall apply to all such proceedings. Such taking shall constitute a covenant and agreement by the company with said owners, lessees, mortgagees and other persons that they shall be entitled to recover such compensation in the manner hereinabove provided.

You do not state what action, if any, has been taken by the Boston Elevated Railway Company under this act; but I understand that the taking has been made and that construction of a terminal on the tract of land described in section 5 has been begun.

There can be no doubt that, in this State, where land or an easement in land is taken by eminent domain, any interference with light, air and prospect caused by such taking and resulting in damage to the property interfered with is a proper element of damage, for which compensation may be awarded. *McKeon* v. *New England R.R. Co.*, 199 Mass. 292, 295; *Opinion of the Justices*, 208 Mass. 603, 605; *Story* v. *New York El. R. Co.*, 90 N. Y. 122; *Lahr* v. *Metropolitan El. Ry. Co.*, 104 N. Y. 268.

I assume that where a taking by eminent domain is authorized by statute, with a provision fixing the method by which the damages of those entitled thereto shall be determined, the Legislature may subsequently, even after the taking has been made, change that method by an amendment. See *Danforth* v. *Groton Water Co.*, 178 Mass. 472; 20 C. J. 878.

But in St. 1921, c. 386, it is section 3 and not section 5 which provides for the determination of all damages caused by the taking. The right to light, air and prospect is a right in the property taken, interference with which will entitle the owner of abutting land to compensation under section 3. *McKeon* v. *New England R.R. Co., supra; Opinion of the Justices, supra.* Section 5 gives a further right to persons not entitled to compensation under section 3. The right given by section 5 is not to compensation for damages caused by the taking. It is a right given to all those having

an estate in lands abutting on the tract of land described in section 5, of which, I am informed, the premises taken are a small part, to recover reasonable compensation "for any diminution in the fair market value of their said property suffered by them by reason of the use of said tract of land for an elevated railway, terminal, repair shop or other railway purposes, and the construction of an elevated railway connecting said terminal with the elevated railway system of the Boston Elevated Railway Company." An obligation to pay this compensation, to be recovered *in the manner provided*, became valid and binding on the company, when the taking was made, by virtue of the provision of the last clause in section 5, that "such taking shall constitute a covenant and agreement by the company with said owners, lessees, mortgagees and other persons that they shall be entitled to recover such compensation in the manner hereinabove provided." The proposed amendment changes the manner in which compensation is to be recovered. Hence the company cannot be bound by its agreement to pay compensation determined as provided by the amendment.

But there is a further question to be considered, whether, aside from the operation of the last clause of section 5, the obligation created by section 5 was within the constitutional power of the General Court to create. The Legislature cannot create an obligation of one person to another without his consent. *Hampshire County* v. *Franklin County*, 16 Mass. 76; *Medford* v. *Learned*, 16 Mass. 215; *Camp* v. *Rogers*, 44 Conn. 291; *New York & Oswego Midland R.R. Co.* v. *Van Horn*, 57 N. Y. 473. But it can impose conditions on which a particular use of property will be authorized. *Commonwealth* v. *Parks*, 155 Mass. 531; *Kilgour* v. *Gratto*, 224 Mass. 78; *Transportation Co.* v. *Chicago*, 99 U. S. 635, 640. The obligation imposed by section 5 not only was a condition sanctioned by this principle, but was a condition of the taking, which the company could have declined. Clearly, therefore, the obligation was valid.

Where an obligation or liability exists, the Legislature can change the remedy by which it is to be enforced. *Commonwealth* v. *Cochituate Bank*, 3 Allen, 42; *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276; *Henley* v. *Myers*, 215 U. S. 373. The proposed amendment is a mere change of remedy. The General Court has not agreed that the amount of compensation is to be determined in the

manner provided by section 5. It is within its power to change the method of determination. I am therefore of opinion that the bill, if enacted into law, would be constitutional.

Very truly yours,
J. Weston Allen, *Attorney General.*

Narcotic Drugs — Confiscation — Disposition.

Under G. L., c. 94, § 215, the Department of Public Health is vested with discretion relative to the disposition of the articles or drugs enumerated, and they may be destroyed or disposed of in any way not prohibited by law. Said department may deliver such articles or drugs to the United States Department of Justice, to be used in evidence, in exchange for such form of receipt and upon such conditions as to custody, use and return as the Commissioner of Public Health shall deem advisable.

March 2, 1922.

Eugene R. Kelley, M.D., *Commissioner of Public Health.*

Dear Sir: — You state that certain narcotic drugs were seized by the Boston police department, samples were examined by your department as provided by statute, and certain persons involved in the illegal possession of said drugs have been convicted; whereupon the drugs were confiscated by the court and were delivered to your department on Jan. 27, 1922, in accordance with an order from the Municipal Court of the Roxbury District of the city of Boston, dated Dec. 24, 1921. You also state that you have received a written request from the United States Attorney for the District of Massachusetts, requesting that said drugs be turned over to Erwin C. Ruth, narcotic inspector in charge, Room 452, Little Building, Boston, Mass., as they are alleged to constitute very important evidence in certain investigations which are being made by that office. You now request my opinion as to your right to surrender said articles to Dr. Ruth for said purpose.

G. L., c. 94, § 215, provides: —

If after such notice as the court or trial justice orders it appears that any drug seized under the preceding section was, at the time of the making of the complaint, unlawfully in the possession of the person alleged therein, the court or trial justice shall order that such article or drug so seized be forfeited to the commonwealth and shall order such article or drug sent to the department of public health.

Possession of such drug shall be prima facie evidence that such possession was in violation of law. Said department may destroy such article or drug or cause it to be destroyed or to be disposed of in any way not prohibited by law, and, after paying the cost of the transportation and disposition of the same, it shall pay over the net proceeds to the commonwealth. Section eight of chapter two hundred and seventy-six shall apply to all judgments rendered and orders made under this and the preceding section.

It appears from this statute that considerable discretion is vested in the Department of Public Health relative to the disposition of such articles or drugs. It is clear that the drugs in question are now under the control of the Department of Public Health, and may be destroyed or disposed of in any way not prohibited by law. I am aware of no legal prohibition which would prevent your delivering them for the purpose designated, in exchange for such form of receipt and upon such conditions as to custody, use and return as in your discretion shall be deemed most advisable.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — "Anti-aid" Amendment — Payment to privately controlled Hospital for Deaf, Dumb or Blind of Reasonable Compensation for Support rendered to Such Persons.

Mass. Const. Amend. XLVI, § 2, forbids the use of public credit, public property or public funds "for the purpose of founding, maintaining or aiding" any privately controlled institution as defined in that section.

A bill which authorizes payment out of public funds to privately controlled hospitals or infirmaries for the treatment of the eye and ear, of not more than reasonable compensation for care rendered to persons suffering from diseases of the eye or ear, who are in whole or in part unable to care for themselves, to the extent that such persons are unable to care for themselves, is within the exception made by Mass. Const. Amend. XLVI, § 3, and would not be unconstitutional.

March 13, 1922.

Committee on Public Health, House of Representatives.

Gentlemen: — The committee has under consideration Senate Bill No. 293, and requests that I advise it whether or not such proposed legislation would be constitutional. Said bill reads as follows: —

An Act for the Relief of Certain Persons threatened with Blindness or Deafness.

Chapter one hundred and twenty-one of the General Laws is hereby amended by adding at the end thereof the following new section: — *Section 42.* The department may also, under such regulations as it may from time to time establish, for the purpose of preventing blindness or deafness or for conserving sight or hearing, authorize persons suffering from diseases of the eye or ear to go for care or support during treatment to such hospital or infirmaries for the treatment of the eye or ear as may be approved by the commissioner of public health, and the ordinary and reasonable compensation for such care or support actually rendered by said infirmary or other hospitals or infirmaries to such persons as may be in whole or in part unable to support or care for themselves shall be paid by the commonwealth. In so far as such persons, or the parents or guardians of any children among them, are able in whole or in part to provide for care or support received they shall, to the extent of their ability, reimburse the commonwealth therefor.

The answer to your question depends upon Mass. Const. Amend. XLVI. The second section of that amendment forbids, among other things, a grant of public money for the purpose of founding, maintaining or aiding "any . . . infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both. . . ." Under this section the question whether an institution may receive State aid depends upon the character of the institution. Opinion of the Attorney General to the committee on bills in the third reading, April 1, 1921 (Attorney General's Report, 1921, p. 111). As the proposed bill is designed to provide aid to persons suffering from diseases of the eye and ear, rather than aid to particular institutions, it is not obnoxious to the prohibitions of the second section of the amendment.

Section 3 of the amendment provides: —

Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

This section introduces an exception to the broad prohibitions contained in section 2. Although the Commonwealth cannot directly aid a privately controlled hospital, infirmary or institution for the deaf, dumb or blind, it may send deaf, dumb or blind persons to a privately controlled hospital, infirmary or institution for treatment, and pay not more than reasonable compensation for the service rendered by such hospital, infirmary or institution, provided that the persons so treated are in whole or in part unable to support or care for themselves.

In this aspect of the matter the test is whether the person aided comes within the provisions of section 3, while under section 2 the nature of the institution determines whether State aid may be directly afforded to it. For the purpose of this bill it is not material to determine whether the words "for the deaf, dumb or blind" qualify the words "hospitals, infirmaries, or institutions," or only the word "institutions."

The present bill appears to have been drawn with the third section of the amendment in view. It employs the same language in defining the class who may receive aid, namely, "such persons as may be in whole or in part unable to support or care for themselves." As it further provides that in so far as such persons are able in whole or in part to pay for the care or support received, they shall, to the extent of their ability, reimburse the Commonwealth, it avoids any constitutional question which might arise from an expenditure of public funds for the benefit of persons able to care for themselves. I need not, therefore, consider whether an expenditure of public funds to care for a person in part able to care for himself would encounter constitutional objection upon the ground that such expenditure was not for a public purpose. Under these circumstances I perceive no constitutional defect in the bill.

Yours very truly,

J. Weston Allen, *Attorney General.*

Taxation — Distribution of National Bank Stock Tax — Place of Assessment of Personal Property of Deceased Persons.

It is a general principle that taxes on personal property of deceased persons should be assessed in the place where the deceased last dwelt.

Under G. L., c. 63, § 5, distribution of a tax assessed under G. L., c. 63, § 1, to the executors of a deceased person should be credited to the town where he last dwelt.

March 14, 1922.

Hon. James Jackson, *Chairman, Board of Appeal.*

Dear Sir: — You ask my opinion as to how the Board of Appeal should decide the matter of the appeal of the town of Orleans from the determination of the Commissioner of Corporations and Taxation regarding the distribution of the national bank stock tax, as provided by G. L., c. 63, §§ 1–10, inclusive. You state that the facts appear not to be disputed, but that there appears to be a question of law involved which the Board does not feel qualified to answer.

From the information furnished me by the Commissioner it appears that a resident of the town of Orleans died on June 18, 1917, the owner of shares of stock in the First National Bank of Boston. During his life the tax on these shares, imposed by the statutes providing for taxation of bank shares (St. 1909, c. 490, pt. III, § 11; G. L., c. 63, § 1), and assessed to the owner in, and collected by, the city of Boston, had been credited to Orleans under statutory provisions (St. 1909, c. 490, pt. III, § 15; G. L., c. 63, § 5). For the two years next succeeding the death of the decedent, viz., 1918 and 1919, the tax on those shares held by and in the name of his executors was similarly credited. At some time certain of the shares were transferred by the executors to trustees under the will, and no question arises as to the tax on those shares. In 1920 the tax on the balance of the shares was credited to Beverly and Boston as the domicils of the beneficiaries under the decedent's will. The town of Orleans appealed from the decision of the Commissioner in so crediting the tax, and the Board of Appeal decided the appeal in favor of Orleans.

Certain shares of the stock of the First National Bank formerly owned by the decedent are now in the hands of his executors, and stand in their names. For the year 1921 the Commissioner has credited half the amount of the tax assessed

upon those shares to Beverly, that being the city where one of the two executors was an inhabitant on April 1, 1921. As to the other half of the tax no credit was given, because the other executor is the Old Colony Trust Company, and the statutory provision for credit does not apply. The town of Orleans has appealed from such determination to the Board of Appeal, claiming that a credit for the total amount of said tax should be given to that town.

G. L., c. 63, § 1, provides that "all shares of stock in banks, whether of issue or not, existing by authority of the United States . . . and located in the commonwealth, shall be assessed to the owner thereof in the town where such bank is located, and not elsewhere, in the assessment of state, county, city and town taxes, whether such owner is a resident of said town or not. . . ." Section 5 of said chapter is as follows: —

> Said commissioner shall thereupon determine the amount of the tax assessed upon shares in each of said banks which would not be liable to taxation in said town according to chapter fifty-nine; and such amount shall be a charge against said town. He shall, in like manner, determine the amount of tax so assessed upon shares which would be so liable to taxation in each town other than that where the bank is located; and such amount shall be a credit to such town. He shall forthwith give written notice by mail or at their office to the assessors of each town thereby affected of the aggregate amount so charged against and credited to it; and they may within ten days after notice of such determination appeal therefrom to the board of appeal from decisions of the commissioner.

In brief, these sections provide for the assessment of taxes on shares of stock in national banks at the places where the banks are located, and the distribution of taxes so assessed among the towns which would have had the benefit if the shares had been taxable as other personal property. The distribution of the present tax is therefore determined by ascertaining where the shares in question would have been assessed had they been taxed in the same manner as other personal property.

G. L., c. 59, § 18, provides that —

> All taxable personal estate within or without the commonwealth shall be assessed to the owner in the town where he is an inhabitant on April first, except as provided in chapter sixty-three and in the following clauses of this section: . . .

Clause 3d of said section provides as follows: —

Personal property of deceased persons, before the appointment of an executor or administrator, shall be assessed in general terms to the estate of the deceased, and the executor or administrator subsequently appointed shall be liable for the tax so assessed as though assessed to him.

This clause is in the form of an amendment made by Gen. St. 1918, c. 129. Prior to that amendment the clause was as it appears in St. 1909, c. 490, pt. I, § 23, cl. 7th, as follows: —

Personal property of deceased persons shall be assessed in the city or town in which the deceased last dwelt. Before the appointment of an executor or administrator it shall be assessed in general terms to the estate of the deceased, and the executor or administrator subsequently appointed shall be liable for the tax so assessed as though assessed to him. After such appointment it shall be assessed to such executor or administrator for three years or until it has been distributed and notice of such distribution has been given to the assessors stating the name and residence of the several parties interested in the estate who are inhabitants of the commonwealth and the amount paid to each. After three years from the date of such appointment it shall be assessed according to the provisions of clause Fifth of this section.

Clause 5th provided for assessment of property held in trust by an executor, administrator or trustee, to such person, in the city or town where the beneficiary resided.

These provisions contained clear directions which would determine the duty of the Commissioner under the present circumstances. The tax would be assessable to the executors in the city or town in which the deceased last dwelt until the end of three years from their appointment, or until it had been distributed and notice given, and after that time would be assessable to them in the places of residence of the beneficiaries.

It seems to be agreed that the reason for the change made by the act of 1918, in the clause last above quoted, was because it was thought that the provisions which were eliminated had been rendered unnecessary by the income tax law, which altered the mode of taxation of intangible personal property. It was thought that a consistent system had been established for the taxation of tangible personal property at its situs,

and intangible personal property merely through the income tax. The application of these provisions to the distribution of the tax on national bank shares was overlooked.

The question which I have to determine is the proper method of crediting the tax collected on shares of stock in national banks in the estate of a deceased person and in the hands of that person's executor or administrator. It must be conceded that the question is a difficult one and cannot be answered with entire certainty.

Some argument is made by the Commissioner that the executors here should be treated as trustees, but the cases are clear that until the executor has made an actual transfer to the trustee, even where the executor and the trustee are the same person, and such transfer is shown by his account and approved by decree of court, the property of a deceased person must be regarded as remaining in the hands of his executor. *Hardy* v. *Yarmouth*, 6 Allen, 277; *Williams* v. *Acton*, 219 Mass. 520, 524.

All the personal property of a testator vests in his executor by the probate of the will, but the ownership of the executor is a qualified one. He is said to hold title to his testator's goods in *autre droit*, and not in his own right. *Weeks* v. *Gibbs*, 9 Mass. 74, 75, 76; *Hutchins* v. *State Bank*, 12 Met. 421, 425; *Lathrop* v. *Merrill*, 207 Mass. 6, 10.

Statutory provisions in our Commonwealth for assessing personal estates of deceased persons first appear in the Revised Statutes (R. S., c. 7, § 10, cl. 7th), which provided as follows: —

> The personal estate of deceased persons, which shall be in the hands of their executors or administrators and not distributed, shall be assessed to the executors and administrators, in the town where the deceased person last dwelt, until they shall give notice to the assessors, that the estate has been distributed and paid over to the parties interested therein.

Prior to the enactment of the Revised Statutes the court had held such property to be assessable, not upon the deceased person, but upon his estate in the hands of his representatives. *Cook* v. *Leland*, 5 Pick. 236.

With respect to R. S., c. 7, § 10, cl. 7th, the commissioners on the Revised Statutes said in their report: —

After the decease of a person, all taxes must be assessed to his heirs, executors, or administrators, or whomever may be in possession of it, 5 Pick. Rep. 236 (*Cook* v. *Leland*); and the provision of this section is intended as a practical rule for assessors, who, whatever diligence and care they may exercise, often find that they have assessed property to executors or administrators after it has gone from their hands and been distributed among the heirs and legatees. It is respectfully suggested that some provision is necessary on this subject, to point out the respective duties of the assessors and the representatives of deceased persons.

In *Vaughan* v. *Street Commissioners*, 154 Mass. 143, 145, the court, after referring to this note, said: —

It is evident that the statute thus passed provided for two things: the place where and the person to whom the personal estate of a deceased person should be assessed.

The amendment made by Gen. St. 1918, c. 129, has left the law as it was before the enactment of R. S. c. 7, § 10, cl. 7th. There is no statute now covering the subject of that provision.

In the case of *Smith* v. *Northampton Bank*, 4 Cush. 1, 12, Chief Justice Shaw says as follows: —

It may be well admitted, that the liability of property to taxation in this commonwealth depends upon the provisions of statutes; but the statutes upon this subject, like all others, must be construed with a reference to the reasons and principles of the common law, and with a just regard to the subject matter to which they apply.

While the decisions in Massachusetts have not established any common law principle as to the place where the personal property of a deceased person in the hands of an executor or administrator should be assessed, there are decisions in other States, where the subject is not covered by statute, which hold, in accordance with the rule defined by the Revised Statutes, that taxes on such property should be assessed in the place where the deceased last dwelt. They rest on the principle that the situs of personal property, for taxation purposes, does not change upon the death of the owner. *San Francisco* v. *Lux*, 64 Cal. 481; *Cornwall* v. *Todd*, 38 Conn. 443; *Millsaps* v. *City of Jackson*, 78 Miss. 537; *Stephens* v. *Mayor of Booneville*, 34 Mo. 323; *City of Staunton* v.

Stout's Executor, 86 Va. 321; *Rixey's Executors* v. *Commonwealth*, 125 Va. 337; *Commonwealth* v. *Peebles*, 134 Ky. 121; *Alexander's Executor* v. *City of Versailles*, 152 Ky. 357; *State* v. *Beardsley*, 77 Fla. 803; *City of Blakely* v. *Hilton*, 150 Ga. 27; Burroughs on Taxation, § 98; Desty on Taxation, vol. I, p. 333.

The case of *Dallinger* v. *Rapello*, 14 Fed. 32, should be mentioned. It holds that personal property of a deceased inhabitant of Massachusetts is not taxable after the appointment of an executor and before distribution, when the property is not within the Commonwealth, and neither the executor nor any person having an interest in or right to receive the property has a domicil or residence there. This case seems not to be inconsistent with the other cases cited.

In view of the fact that an executor or administrator is not an absolute but a qualified owner of the decedent's estate, that G. L., c. 59, § 18, cl. 3d, provides for the assessment of personal property of deceased persons before the appointment of an executor or administrator to the estate, apparently assuming that such assessment shall be at the place where the deceased last dwelt, and that the omission of the following provisions in the clause as it read before the amendment of 1918 was, so far as it affects the crediting of the tax from national bank shares, admittedly due to an oversight and not to an intention to change the existing rule; and in view of what seems to be the general principle that the personal property of deceased persons in the process of administration, while it should be assessed to their personal representatives, should be so assessed at the place where the deceased last dwelt, on the theory or fiction that the situs of the property is not changed by the death — it is my opinion that that procedure should be followed in the present instance, and that the town of Orleans should be credited with the tax in question.

Very truly yours,

J. Weston Allen, *Attorney General.*

District Attorneys — Members of the Bar — Constitutional Law.

An act requiring that district attorneys shall be members of the bar is constitutional.

A district attorney is not an officer created by or provided for in the Constitution.

The Legislature may constitutionally require that such officers shall possess certain qualifications, provided that the qualifications required bear a reasonable relation to the duties of the office and may be acquired by any person.

March 14, 1922.

Joint Committee on the Judiciary.

Gentlemen: — You have requested my opinion as to the constitutionality of House Bill No. 1034, entitled "An Act providing that district attorneys shall be members of the bar," which reads as follows: —

Section twelve of chapter twelve of the General Laws is hereby amended by inserting after the word "therein," in the second line, the words: — and a member of the bar of the commonwealth, — so as to read as follows: — *Section 12.* There shall be a district attorney for each district set forth in the following section, who shall be a resident therein and a member of the bar of the commonwealth and shall be elected as provided by section one hundred and fifty-four of chapter fifty-four. He shall serve for four years beginning with the first Wednesday of January after his election and until his successor is qualified.

In *Attorney General* v. *Tufts*, 239 Mass. 458, the Supreme Judicial Court said: —

The district attorney is not an officer created by or provided for in the Constitution. . . . These provisions (Articles of Amendment VIII, XIX) merely recognize an existing office. They do not secure its tenure nor confer any rights in the office superior to the control of the Legislature. The Constitution ordains how the officer shall be elected and a single act of one so elected which shall vacate the office. It does nothing more. It is within the constitutional power of the Legislature by general law to change the term of office or abolish the office itself and transfer the powers and duties to another.

See also *Attorney General* v. *Pelletier*, 240 Mass. 264.

A district attorney not being an officer created by or provided for in the Constitution, the Legislature may constitutionally require that such an officer shall possess certain qualifications, provided that the qualifications required bear such a relation to the duties imposed that they tend to

secure that kind and degree of knowledge, experience and impartiality which are requisite for the satisfactory performance of the duties, and provided further, that it is open to any person to acquire the qualifications required. *Brown* v. *Russell*, 166 Mass. 14, 16, 17; *Taft* v. *Adams*, 3 Gray, 126, 130; *Graham* v. *Roberts*, 200 Mass. 152, 156; *Lee* v. *Lynn*, 223 Mass. 109, 112; *Attorney General* v. *Tufts*, 239 Mass. 458; *Attorney General* v. *Pelletier*, *supra*.

In *Attorney General* v. *Tufts*, *supra*, the court said: —

> Where an office is created by law and one not contemplated nor its tenure declared by the Constitution but created by law solely for public benefit, it may be regulated, limited, enlarged or terminated as the public exigency or policy may require.

In *Graham* v. *Roberts*, 200 Mass. 152, the court said (page 156): —

> It is not unreasonable to require that only persons believed to be of good moral character and *qualified to perform the duties of the office* shall be accepted as candidates whose names are to go upon the official ballot.

The proposed bill requires that district attorneys shall be members of the bar. A knowledge of law is essential to the satisfactory performance of the duties of a district attorney. The qualification required may be acquired by any person. It is therefore a reasonable requirement and one which the Legislature may impose. Accordingly, I am of opinion that House Bill No. 1034, providing that district attorneys shall be members of the bar, if enacted, would be constitutional.

Very truly yours,

J. Weston Allen, *Attorney General*.

District Courts — Double Trials — Statute.

If a criminal case has been tried upon the merits in a district court or before a trial justice, G. L., c. 263, § 8A, prohibits a retrial of said case in said court or before said justice, even though the case is disposed of upon appeal otherwise than upon the merits.

March 14, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth*.

Sir: — You have submitted for my consideration Senate Bill No. 327, entitled "An Act to prevent double trials in district courts and before trial justices," which provides: —

Chapter two hundred and sixty-three of the General Laws is hereby amended by inserting after section eight the following new section: — *Section 8A.* A person shall not be held to answer in a district court or before a trial justice to a second complaint for an offense for which he has already been tried upon the facts and merits in said court or before such justice.

The bill does not appear to be objectionable upon constitutional grounds, but there are certain other legal aspects of the bill which may require your consideration, bearing upon the practical effect which this measure, if it becomes law, might have upon the administration of criminal justice in the district courts.

Ordinarily, an acquittal by the district court disposes of the crime charged in the complaint. In most cases such acquittal could be pleaded in bar at a subsequent trial either before the district court or before the Superior Court. The bill is therefore unnecessary as a protection to the innocent.

If a person is found guilty in the district court, he has an unlimited and absolute right of appeal. Such appeal vacates the judgment of guilt and removes the case to the Superior Court for a new trial upon the merits. If upon that trial the defendant is either acquitted or found guilty, that judgment, when it becomes final, is an absolute bar to further prosecution for the same offence. It therefore appears that the act is unnecessary if the case is disposed of by final judgment in the Superior Court.

If, on the other hand, the appeal is disposed of without trial, by the entry of a *nolle prosequi* or otherwise, the present bill would preclude a retrial in the district court upon the same complaint, although such entry of *nolle prosequi* was made by mistake or even in bad faith. In other words, this bill would give immunity from further prosecution in the district court to one convicted in the district court, whose conviction has been vacated by an appeal, and who then has procured a disposition of his case otherwise than by trial.

With respect to the form of the proposed bill, I suggest that the phrase "for which he has already been tried upon the facts and merits in said court or before such justice," would be improved as to form if the words "the facts" were omitted therefrom. A trial upon the merits necessarily involves a trial upon the facts.

Yours very truly,

J. Weston Allen, *Attorney General.*

Drainage Law — Meaning of the Words "the Determination of the Board thereon."

The words "the determination of the board thereon," in G. L., c. 252, § 7, refer to the action of the Drainage Board pursuant to the provisions of G. L., c. 252, § 5.

The Attorney General cannot be required to discharge his duty to advise a department within any fixed time.

March 15, 1922.

Dr. Arthur W. Gilbert, *Commissioner of Agriculture.*

Dear Sir: — You ask me to give you an explanation of the words "the determination of the board thereon" as used in G. L., c. 252, § 7, line 5. These words seem to me to contain no ambiguity of meaning. Section 7 authorizes the commissioners, after the certificate of organization of the drainage district has been issued by the Secretary of the Commonwealth, to petition the county commissioners of the county where the greater part of the land lies, "annexing a certified copy of the petition under section five and of the determination of the board thereon." Section 5 provides for the filing of a petition with the Board by the proprietors of the land, setting forth their desire to form a drainage district for the improvement of low land, and continues as follows: —

Upon the receipt of said petition the board shall proceed, at the expense of the commonwealth, to make such surveys of the land proposed to be drained as it shall deem necessary, and shall further ascertain by such surveys or other investigations the need of any drainage required for the benefit of the public health, agricultural and other uses to which the land can be put after drainage, and its value for such uses after drainage, and in general the advisability of undertaking the proposed drainage or maintenance, and shall make recommendations in relation thereto, including a statement of what portion, if any, of the expense should be borne by the commonwealth on account of the cost of that part of the improvement relating to the public health; and if the board approves of the undertaking, it shall issue a certificate appointing three, five or seven district drainage commissioners.

The words "the determination of the board thereon," appearing in section 7, refer to the action of the Board as shown by its minutes, indicating their ascertainment of the need of any drainage required, of the value of the land after

drainage, and, in general, the advisability of the undertaking and the recommendations of the Board in relation thereto.

In submitting your inquiry you requested an opinion "if possible by Tuesday afternoon, March 14." Requests for opinions from the Governor and from the General Court, by established custom, are given precedence in the work of the department. The Attorney General cannot be required to discharge his duty to advise a department of the government within any fixed time. As to what is a due performance of his duty, he must be the judge. II. Op. Atty. Gen. 125, 405; III. Op. Atty. Gen. 424, 471.

Very truly yours,

J. Weston Allen, *Attorney General.*

Volunteer Militia — Armory — Cities and Towns — Grounds for Parade, Drill and Small Arms Practice.

Under our statutes the quartering of troops and their training are distinct functions.

A city or town is not relieved from its obligation to furnish suitable grounds for parade, drill and small arms practice merely because an armory of the first or second class has been furnished by the Commonwealth in the city or town in question.

March 16, 1922.

Brig. Gen. Jesse F. Stevens, *Adjutant General.*

Dear Sir: — You have asked my opinion as to whether the requirement placed on cities and towns, under G. L., c. 33, § 42, ceases when an armory of the first or second class is furnished by the Commonwealth in the city or town in question but no grounds for parade, drill or small arms practice are furnished.

Section 42 provides: —

The aldermen or the selectmen shall provide and maintain for each command of the volunteer militia or detachment thereof permanently stationed within the limits of their respective towns suitable grounds for parade, drill and small arms practice, unless such grounds have been furnished for such command by the commonwealth. Any town failing to comply with this provision shall forfeit to the commonwealth a sum not exceeding five thousand dollars for each year during which such failure continues, to be recovered upon an information in equity brought in the supreme judicial court by the attorney general at the relation of the adjutant general. Any amount so forfeited shall be credited to the appropriation for small arms practice for the

fiscal year in which the forfeiture occurs. When two or more commands of the volunteer militia are permanently stationed in the same town, the aldermen or the selectmen may, if practicable, provide for such commands suitable grounds for parade, drill and small arms practice, to be used by them in common. Land for drill and parade grounds and for ranges for small arms practice may be acquired by purchase or lease, or under chapter seventy-nine. Towns where headquarters, commands or detachments of the volunteer militia are permanently stationed may raise money by taxation or otherwise for the acquisition of land for drill and parade grounds or ranges for small arms practice or for complying with sections thirty-nine and forty-three.

The above section is included in that group of sections of the law on the volunteer militia which relate to the furnishing of accommodations for, and the training of, the militia.

A review of our statutes relating to these matters shows that the housing and the training of troops have always been regarded as distinct functions; that is, it has never been provided that a city or town shall furnish, for example, an armory with a target range, but there have been provisions with respect to the furnishing of armories or quarters, and subsequent provisions with respect to the facilities for the training of the troops. In this connection it seems to me that the last two sentences of the foregoing section are particularly relevant in establishing the proposition that quarters and parade grounds or target ranges are distinct matters. It is sections 39 and 43 which make mandatory upon cities and towns the furnishing of armories or quarters unless the same have been furnished by the Commonwealth. The same distinction appears in section 45, which recites how land may be acquired by the Armory Commissioners for armories, and how it may be acquired for parade and drill grounds and ranges. So, too, in section 46, where it is provided how the Armory Commissioners may acquire title to armories already built or furnished by the cities and towns, and how it may acquire title to drill and parade grounds or target ranges. There is nothing in the statutes which compels the Commonwealth to furnish parade and drill grounds to any city or town where a unit may be stationed, or where there may be an armory, or when an armory is completed, but the obligation is mandatory on each city or town to "provide for each command of the volunteer militia, or detachment thereof, not provided with an armory of the first class, and permanently stationed within the limits of their

respective towns, an armory . . ." (§ 39), and to "provide and maintain for each command of the volunteer militia or detachment thereof permanently stationed within the limits of their respective towns suitable grounds for parade, drill and small arms practice, unless such grounds have been furnished for such command by the commonwealth" (§ 42). The policy of the act seems to be to make the local accommodation of the militia a local charge. See I Op. Atty. Gen. 63. The act clearly seems to recognize the differentiation between quartering and training troops.

I am consequently of the opinion that a city or town is not relieved from its obligation to furnish parade and drill grounds or ranges for target practice merely because and if an armory of the first or second class has been furnished in the city or town in question. I believe that section 49 should properly be interpreted as meaning that if any armory of the first or second class is furnished by the Commonwealth the obligation of a town, under sections 39 and 40, to furnish quarters ceases; and that if the Commonwealth furnishes parade and drill grounds or ranges for target practice, the obligation of such city or town shall cease, under section 42.

Very truly yours,
J. Weston Allen, *Attorney General.*

Fish and Game — Taking Pickerel "from the Waters of the Commonwealth" — Decision of District Court — Effect.

The term "waters of the commonwealth," as used in G. L., c. 130, § 59, applies to all waters within the jurisdiction of the Commonwealth, and is not confined to waters owned by the Commonwealth.

While it is not the function of the Attorney General to review a decision of the district court, and such decision will be accorded due consideration and respect, it does not conclude him in advising State officers in regard to their official duties.

March 20, 1922.

Hon. William A. L. Bazeley, *Commissioner of Conservation.*

Dear Sir: — You request my opinion as to whether or not the term "waters of the commonwealth," as used in G. L., c. 130, § 59, applies to all waters or merely to State-owned waters in the Commonwealth.

Section 59 provides as follows: —

Whoever takes from the waters of the commonwealth a pickerel less than ten inches in length, or sells or offers for sale, or has in possession any such pickerel, shall be punished by a fine of one dollar for each pickerel so taken, held in possession, sold or offered for sale; and in prosecutions under this section the possession of pickerel less than ten inches in length shall be prima facie evidence of such unlawful taking.

G. L., c. 130, defines the powers and duties of the Division of Fisheries and Game and regulates various fisheries. The power to regulate fisheries is of broad scope, resting, as it does, upon the constitutional grant of authority to enact "all manner of wholesome and reasonable orders, laws, statutes and ordinances." *Commonwealth* v. *Feeney*, 221 Mass. 323, 325. Such authority may be invoked not only to preserve the public health (*Commonwealth* v. *Feeney*, *supra*), but also to preserve the natural resources of the Commonwealth from undue depletion. *Plumley* v. *Massachusetts*, 155 U. S. 461; *Geer* v. *Connecticut*, 161 U. S. 519; *Silz* v. *Hesterberg*, 211 U. S. 31; *Patsone* v. *Pennsylvania*, 232 U. S. 138; see also *Walls* v. *Midland Carbon Co.*, 254 U. S. 300. It is by no means confined to natural resources owned by the Commonwealth in its proprietary capacity as distinguished from resources held upon a *quasi* trust for the benefit of all the citizens. *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, *supra*. No limitation upon the scope of the power requires that the exercise thereof be restrained by construction to resources of the former class.

Examination of sections 58 and 60 of chapter 130 throws light upon the meaning of "the waters of the Commonwealth" as used in section 59. Section 58 provides that no person shall take pickerel between March 1 and May 1 in any year, or during said period shall sell, offer or expose for sale or have in possession "a pickerel taken in this commonwealth." Section 60 authorizes any town to forbid, under penalty, the taking of pickerel "in any river, stream or pond therein" in any other manner than by angling. In both these sections the prohibition is not confined to waters owned by the Commonwealth. The limitation is geographical. Section 58 applies throughout the Commonwealth. Section 60 applies to any river, stream or pond within the town which adopts the by-law against angling. Under these circumstances, in my opinion, the words "waters of the com-

monwealth," as used in section 59, mean waters within the Commonwealth and not waters belonging to the Commonwealth.

In reaching this conclusion, I have given due consideration to the ruling of the district court to which you call my attention. It is not the function of the Attorney General to review decisions of the district courts. In advising a State official as to the performance of his official duties, rulings of the inferior courts of the Commonwealth have persuasive value and are entitled to consideration and respect. But as a binding and authoritative ruling upon questions of State law can be rendered by the Supreme Judicial Court alone, the ruling of an inferior court cannot be held to be conclusive except in the case and upon the parties before it. It cannot, as matter of law, conclude the Attorney General in advising you as to your duties under this act.

Yours very truly,

J. Weston Allen, *Attorney General.*

Commissioner of Correction — Special State Police Officer — Warrants.

A special State police officer appointed under the provisions of G. L., c. 127, § 127, has authority to serve only the warrants and orders of removal or transfer of prisoners issued by the Commissioner of Correction.

March 21, 1922.

Hon. Sanford Bates, *Commissioner of Correction.*

Dear Sir: — You request my opinion as to whether or not a special State police officer appointed under the provisions of G. L., c. 127, § 127, may serve a warrant issued by an authority other than the Commissioner of Correction.

Said section 127 reads as follows: —

> The governor, upon the written recommendation of the commissioner, may appoint any agent or employee of the department of correction or any employee of any penal institution a special state police officer for a term of three years, unless sooner removed. Officers so appointed may serve warrants and orders of removal or transfer of prisoners issued by the commissioner, and may perform police duty about the premises of penal institutions.

The statutory provisions as to the powers of the State police are found in G. L., c. 147, § 2, and the general provisions

relative to the service of criminal warrants are found in G. L., c. 276, § 23. Both of these statutes are general.

G. L., c. 127, § 127, however, is a special statute. Sections 97 to 127, inclusive, of that chapter have to do with the removal of prisoners from and to the institutions therein designated by the Commissioner of Correction. This legislation was first enacted in 1899. The bill which resulted in chapter 243 of the acts of that year, authorizing the appointment of special officers for the removal and transfer of prisoners, was reported in pursuance of a recommendation in the annual report of the Board of Commissioners of Prisons covering the year ending Sept. 30, 1898. In that report the commissioners stated as follows concerning the removal of prisoners: —

> The statutes authorize the commissioners to transfer prisoners from one prison to another; they also require the Board to secure and return to prison such prisoners as have violated the terms of their permit of release. An appropriation is annually made by the Legislature to cover the expense of this work. After the issuing of the proper papers by the secretary, the duty of removing the prisoner is delegated to either the local police or a member of the State force. The amount of this work has increased to such an extent that it is frequently inconvenient to secure the services of the police in order promptly to perform the work. It is believed that the duty of removals of prisoners by order of the commissioners should be performed by the agents of this office. It is therefore recommended that authority be given the commissioners to appoint one or more of its agents who shall be empowered to serve their warrants and orders of removal or transfer of prisoners anywhere within the limits of the Commonwealth.

The provisions of chapter 243 were carried along as follows: R. L., c. 225, § 112; Gen. St. 1919, c. 105; G. L., c. 127, § 127.

In the light of the history of this statute, it is my judgment that a special State police officer appointed under said section 127 has authority to serve only the warrants and orders of removal or transfer of prisoners issued by the Commissioner of Correction.

Yours very truly,

J. Weston Allen, *Attorney General.*

Public Health — Dangerous Diseases — Support — Overseers of the Poor.

Under G. L., c. 111, § 6, the Department of Public Health shall define what diseases shall be deemed to be dangerous to public health, and, under section 32, where a local board of health has acted in the matter, it shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.

March 23, 1922.

Eugene R. Kelley, M.D., *Commissioner of Public Health.*

Dear Sir: — You request my opinion as to whether all cases involving a disease which the Department of Public Health has declared to be dangerous to the public health are now to be supported by the local board of health, where support may be needed, to the exclusion of the overseers of the poor.

G. L., c. 111, § 6, provides that the Department of Public Health shall define what diseases shall be deemed to be dangerous to the public health.

Section 112 of said chapter provides as follows: —

If the board of health of a town has had notice of a case of any disease declared by the department dangerous to the public health therein, it shall within twenty-four hours thereafter give notice thereof to the department, stating the name and the location of the patient so afflicted, and upon request the department shall forthwith certify any such reports to the department of public welfare.

Section 32 of said chapter provides: —

A board of health shall retain charge, to the exclusion of the overseers of the poor, of any case arising under this chapter in which it has acted.

Section 116 of said chapter provides as follows: —

Reasonable expenses incurred by boards of health or by the commonwealth in making the provision required by law for persons infected with smallpox or other disease dangerous to the public health shall be paid by such person or his parents, if he or they be able to pay, otherwise by the town where he has a legal settlement, upon the approval of the bill by the board of health of such town or by the department of public welfare. Such settlement shall be determined by the overseers of the poor, and by the department of public welfare in cases cared for by the commonwealth. If the person has no settlement, such expense shall be paid by the commonwealth, upon the approval of

bills therefor by the department of public welfare. In all cases of persons having settlements, a written notice, sent within the time required in the case of aid given to paupers, shall be sent by the board of health of the town where the person is sick to the board of health of the town where such person has a settlement, who shall forthwith transmit a copy thereof to the overseers of the poor of the place of settlement. If the person has no settlement, such notice shall be given to the department as provided in section one hundred and twelve; and also, in any case liable to be maintained by the commonwealth when public aid has been rendered to such sick person, a written notice shall be sent to the department of public welfare, containing such information as will show that the person named therein is a proper charge to the commonwealth, and reimbursement shall be made for reasonable expenses incurred within five days next before such notice is mailed, and thereafter until such sick person is removed under section twelve of chapter one hundred and twenty-one, or is able to be so removed without endangering his or the public health.

I am consequently of the opinion that in any case involving a disease which your department has declared to be dangerous to the public health, and which, accordingly, is to be reported under section 112, *supra*, and a local board of health has acted in the matter, such local board of health shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Referendum Petition — Law subject to Referendum Petition.

Under Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, a law, "the operation of which is restricted to a particular town, city or other political subdivision or to particular districts or localities of the commonwealth," is not subject to a referendum petition.

St. 1922, c. 161, which regulates the granting of licenses to take lobsters from the waters of the Commonwealth within three miles of the shore of the nine seacoast counties of the Commonwealth is subject to a referendum petition, since it is a general regulation of the lobster fishery of the Commonwealth, even though the nine counties to which a general law could physically apply are expressly enumerated.

March 24, 1922.

Hon. F. W. Cook, *Secretary of the Commonwealth.*

Dear Sir: — You inquire whether St. 1922, c. 161, is excluded by section 2 of part III of Mass. Const. Amend.

XLVIII, The Referendum, from the operation of the referendum provisions. Said section 2 is as follows: —

No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

St. 1922, c. 161, amends G. L., c. 130, § 104, in a manner not material to your inquiry. G. L., c. 130, § 104, provides in part: —

The clerk of any town in Essex, Middlesex, Suffolk, Norfolk, Plymouth, Barnstable, Bristol, Dukes or Nantucket county, situated on the shores of the commonwealth, shall grant licenses in the form prescribed and upon a blank furnished by the director, to catch or take lobsters from the waters of the commonwealth within three miles of the shores of the county where the town lies. Except as hereinafter provided, such licenses shall be granted only to individuals who are citizens of the commonwealth and who have resided therein for at least one year next preceding the date of the same. . . .

The further provisions define how and to whom licenses may be granted, impose certain duties on the town clerk granting the license, and require certain acts by the licensees.

If this act had provided that "the clerk of any town shall grant licenses . . . to catch and take lobsters from the waters of the commonwealth within three miles of the shores of the county where the town lies," there can be no question that the law would be a general law. In all probability no licenses would be granted in the inland counties, since there would be no waters upon which such licensees could operate, but this physical situation would not in any way affect the general character of that law. The present act is plainly intended as a general regulation of the lobster fishery of the Commonwealth. The counties enumerated are the only ones which possess seashore. Such enumeration does not, from the practical standpoint, limit the operation of the law, since, in any event, the license is confined to the waters of the Commonwealth within three miles of the shores of the county

where the town lies. I am therefore of opinion that the present law is a general law, the operation of which is not "restricted to . . . a particular town, city or other political subdivision or to particular districts or localities of the commonwealth," within the meaning of Mass. Const. Amend. XLVIII. A law, general in its terms, may be restricted in its operation to a few counties or even a single county for the reason that it is not applicable elsewhere. Statutes relating to alewife fisheries and salmon and trout fishing obviously are local in their application, although included among the general laws. For the reasons stated, I am of the opinion that the statute about which you inquire is not excluded from the referendum.

Yours very truly,

J. Weston Allen, *Attorney General.*

Domicil — Settlement — Married Woman.

Under G. L., c. 116, § 1, where a woman born in Boston, having a settlement there derived from her parents, married a man who never had a legal settlement in any city or town in the Commonwealth, and her parents left Boston in 1911 and acquired a settlement elsewhere, the legal settlement of such woman after the death of her husband continues to be in Boston.

March 25, 1922.

Mr. Richard K. Conant, *Commissioner of Public Welfare.*

Dear Sir: — You request my opinion as follows: —

The question is as to the place of settlement of a woman who was born in Boston April 4, 1896, and married July 18, 1914. At the date of marriage she had a settlement in Boston derived from her parents. The husband died Jan. 8, 1919, and never had a legal settlement in any city or town in the Commonwealth. Her parents left Boston in 1911 and acquired a settlement in Hanson by residence from 1911 to 1916. What was her legal settlement after the death of her husband?

G. L., c. 116, § 1, provides, in part, as follows: —

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

First, Except as provided in the following clause, each person who after reaching the age of twenty-one has resided in any town within the commonwealth for five consecutive years shall thereby acquire a settlement in such town.

Second, A married woman shall follow and have the settlement of her husband; but if he has no settlement within the commonwealth, she shall retain the settlement, if any, which she had at the time of her marriage and may acquire a settlement under the preceding clause.

. . . . . .

In the case of *Treasurer and Receiver-General* v. *City of Boston*, 229 Mass. 83, it is stated: —

A woman who has a legal settlement in the Commonwealth, at the time of her marriage to a man who is without a settlement here does not lose her settlement; . . . The statute should not be so construed as to deprive the wife of a settlement once acquired, in the absence of language clearly manifesting such an intention; and it is not to be extended by implication or judicial construction to include persons whom the Legislature has not seen fit to embrace within its scope.

Accordingly, it is my opinion that under the facts stated the place of settlement of the woman above referred to continued to be in Boston after the death of her husband, that being her settlement at the date of her marriage and her husband never having had a legal settlement in any city or town in the Commonwealth.

Very truly yours,

J. Weston Allen, *Attorney General.*

Attorney General — Duty to advise.

As the Attorney General is an executive, not a judicial, officer, who cannot exercise judicial power, he will not give an advisory opinion upon a justiciable controversy pending between third parties.

March 27, 1922.

Charles M. Davenport, Esq., *Chairman, Commission on Probation.*

Dear Sir: — Your inquiry concerning a controversy between certain probation officers and the county treasurer of Middlesex County does not, so far as I can perceive, involve any question of the duties imposed by law upon the commission. Under these circumstances, the question arises whether I can properly advise you in answer to your inquiry.

The Attorney General is an executive, not a judicial, officer. He cannot exercise the judicial power; that is, the power to hear and determine controversies or causes. The Supreme Judicial Court takes the same view of the duty to

advise the Governor and Council or either branch of the Legislature, imposed upon it by Mass. Const., pt. 2d, c. III, art. II. It will not exert this advisory power in order to decide controversies which should be determined by the exercise of the judicial power in a cause arising between party and party. In *Opinion of the Justices*, 122 Mass. 600, that court declined to advise the House of Representatives whether a certain judicial officer had vacated his office by accepting a seat in the House of Representatives, upon the ground that the inquiry presented a judicial question which could not be definitely or justly decided without trial and argument.

Your inquiry presents a judicial question which can readily be determined in a suit by the officers in question to recover the salary alleged to be due. Under these circumstances, I am constrained to advise you that I ought not to forecast the outcome of legal proceedings by an answer to your inquiry.

Yours very truly,
J. Weston Allen, *Attorney General.*

Constitutional Law — Police Power — Garage — School, Hospital or Church — Property Rights.

The Legislature, in the exercise of the police power, may regulate and limit rights of property in the interest of public health, public morals and public safety.

A statute providing that no permit shall be issued for the erection, maintenance or use of a building as a garage for more than two cars on the same street as, and within 500 feet of, a school, hospital or church, is not an unreasonable exercise of the police power.

March 27, 1922.

Hon. Frank G. Allen, *President of the Senate.*

Dear Sir: — I acknowledge 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 House Bill No. 1358, entitled "An Act relative to garages in the city of Boston."

House Bill No. 1358 reads as follows: —

Section 1. Section three of chapter five hundred and seventy-seven of the acts of nineteen hundred and thirteen, as amended by section two of chapter one hundred and nineteen of the acts of nineteen hundred and fourteen, is hereby further amended by adding at the end thereof the following: — ; provided, that no application shall be granted and no permit issued for the erection, maintenance or use of any structure or building as a garage for more than two cars on the same street as, and within five hundred feet of, any building occupied in whole or in part as a public or private school for more than fifty pupils, or as a public or private hospital having more than twenty-five beds, or as a church, — so as to read as follows: — *Section 3.* At the time and place specified in the notice for the hearing the said board shall hear all parties interested, and after giving consideration to the interests of all owners of record notified, and the general character of the neighborhood in which is situated the land or building referred to in the application, shall determine whether or not the application shall be granted and a permit issued; provided, that no application shall be granted and no permit issued for the erection, maintenance or use of any structure or building as a garage for more than two cars on the same street as, and within five hundred feet of, any building occupied in whole or in part as a public or private school for more than fifty pupils, or as a public or private hospital having more than twenty-five beds, or as a church.

Section 2. The provisions of this act shall not apply to a building maintained as a garage for the storage, keeping or care of automobiles at the time of the passage of this act, but any enlargement or alteration of, or addition to, any such building shall be subject to the provisions of this act.

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

The order of the Senate is not directed to any particular feature of the bill, and I have confined my attention to those questions which I conceive might be raised. The principal question may be subdivided as follows: — First, can the Legislature, in the exercise of the police power, regulate the erection and maintenance of garages; second, can it prohibit the erection, maintenance or use of any structure or building as a garage for more than two cars on the same street as, and within 500 feet of, any building occupied in whole or in part as a public or private school for more than fifty pupils, or as a public or private hospital having more than twenty-five beds, or as a church.

As to the first question, in my opinion it is well settled that the Legislature can regulate the erection and maintenance of

garages. This is a valid exercise of the police power. In the exercise of this power the Legislature may regulate and limit rights of property in the interest of public health, public morals and public safety. *Welch* v. *Swasey*, 193 Mass. 364.

In *Storer* v. *Downey*, 215 Mass. 273, the Supreme Judicial Court used the following language concerning the regulation of garages: —

> Oil and gasoline, almost inevitably stored and used in them, are so highly inflammable and explosive that they may increase the danger of fire, no matter how carefully the building be constructed nor how non-combustible its materials. Although lawful and necessary buildings, they are of such character that regulation of the place of their erection and use is well within settled principles as to the police power.

The second question, summarized, is whether or not the Legislature may prohibit the erection, maintenance and use of a garage for more than two cars within a specified distance of a public or private school, or a public or private hospital, or a church. Similar statutes and municipal ordinances have been attacked in the courts on constitutional grounds in several instances. In the case of *Re McIntosh*, 211 N. Y. 265, it was held that no constitutional property rights were interfered with, even with respect to existing plants, by forbidding the issuance of any garage permit allowing the storage of volatile, inflammable oil for a building within a prescribed distance of any school, place of public amusement, tenement house or hotel. The regulation was challenged as being in violation of the applicant's constitutional rights because it deprived him of his property without due process of law and denied to him the equal protection of the law. In that case it was held that the object sought was the preservation of the public safety and the welfare of the community, and that the regulation was not an arbitrary interference with the rights of the individual, but was a fair, reasonable and appropriate exercise of the police power. In the case of *People* v. *Ericson*, 263 Ill. 368, it was held that forbidding the location of a public garage within 200 feet of a church was not unreasonable.

In my opinion, the Legislature is clearly empowered to deal with a subject which may endanger the safety of persons and property, and the provision that no permit shall be issued for the erection, maintenance or use of a building as

a garage for more than two cars on the same street as, and within 500 feet of, a public or private school for more than fifty pupils, or a public or private hospital having more than twenty-five beds, or a church, is not, in my judgment, an unreasonable exercise of the police power.

Accordingly, I advise you that, in my opinion, said House Bill No. 1358 would be constitutional if enacted.

Yours very truly,

J. Weston Allen, *Attorney General.*

Workmen's Compensation — State Employees — Metropolitan District Commission — Appropriation.

Compensation for injuries received by laborers, workmen and mechanics employed under the provisions of St. 1922, c. 13, should be paid from the appropriation under that act.

March 29, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You request my opinion as to whether compensation for injuries received by men employed under the provisions of St. 1922, c. 13, should be paid from the appropriation under that act.

The act creates a special commission for the purpose of clearing the forests of the metropolitan parks of fallen trees and broken limbs and branches, provides that the work shall be done under the immediate supervision of the Metropolitan District Commission, and appropriates $50,000 to provide for the expenditures, half of which shall be paid from the Metropolitan Parks Maintenance Fund, and be assessed upon the cities and towns of the metropolitan parks district.

Under the act the work can be done only in the metropolitan parks and under the immediate supervision of the Metropolitan District Commission. It is similar to some of the work now being carried on by the Metropolitan District Commission, and but for this act would in all probability have been performed by that commission in so far as its regular appropriation permitted.

G. L., c. 152, § 69, provides that compensation shall be paid by the Commonwealth to laborers, workmen and mechanics employed by it who receive injuries arising out of and in the course of their employment. It is the established practice that compensation for injuries received by laborers,

workmen and mechanics employed by the Metropolitan District Commission be paid out of the regular appropriation of that commission, because half of its expenditures is assessed upon the cities and towns comprising the metropolitan district. The work performed under St. 1922, c. 13, is in all respects similar, and half of the expenditures is similarly assessed upon the cities and towns of the metropolitan parks district. Uniformity of practice would seem to require, in the absence of other compelling circumstances, that compensation should be paid in the same manner.

I am therefore of the opinion that compensation for injuries received by laborers, workmen and mechanics employed under St. 1922, c. 13, should be paid from the appropriation under that act.

Very truly yours,
J. Weston Allen, *Attorney General.*

Warehouseman — Bond — Release by Governor and Council.

As the bond given by a warehouseman, under G. L., c. 105, § 3, is held in trust to secure the public, the Governor and Council should not undertake to determine and advise the warehouseman and his surety as to the effect upon the bond of the retirement of the warehouseman from business.

March 30, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You ask my opinion upon the following state of facts: A public warehouseman gives bond according to law. He later ceases to do business, surrenders his license and makes proper publication of that fact. You inquire whether the Governor, by and with the consent of the Council, may properly advise the surety upon said bond that his liability thereunder is confined to defaults occurring prior to the time when the warehouseman completes his retirement from the business.

The bond in question is given to secure faithful performance of his duties by the warehouseman. G. L., c. 105, § 1. Whoever is injured by failure of the warehouseman to perform his duties or by his violation of any provision of chapter 105 may bring action upon the bond in the name of the Commonwealth, but for his own benefit. G. L., c. 105, § 3. The bond is, therefore, held in trust to protect the public

from the defaults of the warehouseman. Liability thereon is in most cases a mixed question of law and fact.

If, under the circumstances of the particular case, surrender of the license and due publication thereof are, as matter of law, a good defence to future liability, both warehouseman and surety have the benefit of it, irrespective of any further action by the Governor and Council. If, under the particular circumstances of the case, such defence does not exist as matter of law, neither warehouseman nor surety ought to be relieved from liability upon the bond. In view of the fact that public warehousemen are required to issue receipts (G. L., c. 103, §§ 8, 9), retirement from business and surrender of the license do not preclude subsequent accrual of liability for default upon a receipt outstanding at the time of such retirement. Under these circumstances, I am of opinion that the Governor and Council should not determine for the benefit of the warehouseman and surety what effect retirement, under the circumstances of the particular case, has upon an outstanding bond. The question is one for the judicial rather than the executive branch. Bill of Rights, art. XXX.

Yours very truly,
J. Weston Allen, *Attorney General.*

Statutes — Amendment — Amendment of Act by a Resolve.

The General Court has power to ratify corrections made in the General Laws by the committee which printed the same.

While the question whether an act can be amended by a resolve appears to be open in this Commonwealth, such amendment should, as matter of form, at least, be made by an act.

To avoid question, corrections made by the committee on printing the General Laws should be ratified by an act rather than by a resolve.

April 1, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You have submitted for my consideration House Resolve No. 703, entitled "Resolve ratifying certain corrections in the General Laws." There can be no question that the General Court has power to correct the General Laws and also to ratify any corrections made by the committee on printing the same, pursuant to Res. 1921, c. 54. There is, however, serious question whether such ratification should

not be made by an act rather than by a resolve. It may be assumed that a distinction exists between acts and resolves, and that an act ought, as a matter of form, at least, to be amended by an act. The question whether an act can be amended by a resolve appears to be open in this Commonwealth. If any of these "corrections" change the meaning of the law corrected, even by eliminating an obvious error, a resolve might be held insufficient to render the correction effective. This question would be eliminated if an act of like tenor were substituted for the present resolve. If this should be done, I further suggest that such act expressly include the corrections "ratified" by Res. 1921, c. 55.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Theatres — Regulation of Price charged for Admission — Regulation by Condition inserted in the License.

As a theatre is not a business affected with a public use, a statute fixing the rates of admission to be charged, or forbidding an increased price upon Saturdays or holidays, would not be constitutional.

As a statute directly forbidding theatres to charge an increased admission upon Saturdays or holidays would not be constitutional, a statute which requires that condition to be inserted in the theatre license is equally unconstitutional.

April 4, 1922.

Hon. Frank G. Allen, *President of the Senate.*

Dear Sir: — I have the honor to acknowledge the following order adopted by the Senate: —

Ordered, That the Senate request the opinion of the Attorney General as to the constitutionality, if enacted into law, of Senate Bill No. 159, entitled "An Act to prevent discriminatory admission charges by theatres and places of public amusement."

Senate Bill No. 159 reads as follows: —

Chapter one hundred and forty of the General Laws is hereby amended by inserting after section one hundred and eighty-one the following new section: — *Section 181A.* Licenses granted under the preceding section shall be expressed to be subject to the condition that prices for admission shall be uniform throughout the week, and that the price for admission on a Saturday or a holiday shall not exceed that charged for the same performance on any other day. The licensing

authority shall revoke the license of any licensee for violation of the foregoing condition. Said violation shall also be punished by a fine of not more than five hundred dollars.

This bill does not directly fix the prices to be charged for theatre tickets, nor directly forbid an increase of price on Saturdays or holidays. Instead, it provides that there shall be inserted in the license a condition that the price charged on a Saturday or a holiday shall not exceed the price charged for the same performance on any other day, and violation of this condition requires revocation of the license. Two questions are presented: Can the Legislature directly regulate the price of theatre tickets to the extent above indicated? If such direct regulation is not within the scope of legislative power, can the result be lawfully achieved through the exercise of the licensing power?

1. A theatre is not a public enterprise affected with a public use, but is, on the contrary, a private business. *People* v. *Flynn*, 189 N. Y. 180; *Collister* v. *Hayman*, 183 N. Y. 250; *People* v. *Steele*, 231 Ill. 340; *Chicago* v. *Powers*, 231 Ill. 560; *Ex parte Quarg*, 149 Cal. 79; III Op. Atty. Gen. 491; IV Op. Atty. Gen. 519. Ordinarily the Legislature has no power to regulate the price to be charged by a private business. V Op. Atty. Gen. 484. On the other hand, an unusual emergency — such as the shortage of houses — may so affect the health and welfare of the people that an unusual measure of regulation, appropriate to the emergency, may be proper during the continuance of such emergency. *Marcus Brown Holding Co., Inc.*, v. *Feldman*, 256 U. S. 170; *Edgar A. Levy Leasing Co., Inc.*, v. *Siegel*, 258 U. S. 242. The present act discloses no emergency which in any constitutional sense so affects the health, safety, morals or, in a limited sense, the welfare of the people as to justify special regulation of the character proposed in this bill. I am unable to perceive any reasonable ground upon which the sale of theatre tickets can create an emergency of the kind held sufficient to sustain the extraordinary rent regulations upheld in *Marcus Brown Holding Co., Inc.*, v. *Feldman, supra.* The subject-matter excludes it from the grounds which sustain a regulation of the sale of goods reasonably adapted to check monopolies. *Commonwealth* v. *Strauss*, 191 Mass. 545; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441. In my opinion, the sale of theatre tickets is governed

by the ordinary rule that in a private business the price to be charged must be fixed by agreement of the parties themselves. III Op. Atty. Gen. 491; IV Op. Atty. Gen. 519; V. Op. Atty. Gen. 484. I am constrained to advise you that a direct regulation of the kind provided in this bill would be unconstitutional.

2. It may be assumed that theatres are subject to a reasonable measure of regulation under the police power. It is not beyond the scope of that power to require a license, upon appropriate conditions, reasonably adapted to secure the health, safety, morals and, in a limited sense, the general welfare of the people. *Mutual Film Corpn.* v. *Industrial Commission of Ohio,* 236 U. S. 230; *Brazee* v. *Michigan,* 241 U. S. 340. But the power to license cannot be invoked in order to impose by indirection restrictions or regulations which would be unconstitutional if directly imposed. Such use of the licensing power could be made as efficient as direct regulation to deprive the citizen of those rights of liberty and property guaranteed to him both by the Constitution of Massachusetts and by the Fourteenth Amendment. *Wyeth* v. *Cambridge Board of Health,* 200 Mass. 474; IV Op. Atty. Gen. 207. The present bill cannot be distinguished in principle from a bill proposed in 1914, which made it a condition of the theatre license that the licensee should not sell theatre tickets to any other person with intent or knowledge that such tickets should be resold at an advanced price. In advising that such an act would be unconstitutional, the then Attorney General said (IV Op. Atty. Gen. 207): —

> The Legislature has certain powers of regulation and has not certain other powers of regulation, and the distinction between these two sorts of powers remains the same, regardless of the manner in which the Legislature seeks to enforce them. Direct statutory prohibition or indirect prohibition by means of conditions in licenses is merely a method of enforcement, and does not go to the root of the question of legislative power.

With this opinion I agree.

I am therefore constrained to advise you that the present bill, if enacted, would infringe upon the right of property and of liberty of contract guaranteed by the Constitution of this Commonwealth and by the Fourteenth Amendment. See *Wyeth* v. *Cambridge Board of Health,* 200 Mass. 474.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — "Anti-aid" Amendment — Appropriation of Public Money to a Private Academy to pay for High School Instruction — Exemption of Town from Statutory Duty to maintain a High School.

The Department of Education has no power, under G. L., c. 71, § 4, to exempt a town from the statutory duty to maintain a high school, because such town, in violation of Mass. Const. Amend. XLVI, § 2, is appropriating money to pay for high school instruction to children resident in such town at a private academy located therein.

April 6, 1922.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You ask my opinion upon the following state of facts: Prior to the adoption of Mass. Const. Amend. XLVI, commonly known as the "anti-aid" amendment, the Department of Education, acting under authority of laws since re-enacted in G. L., c. 71, § 4, exempted certain towns containing over five hundred families from maintaining high schools. It appears that three of these towns are appropriating money to private academies located therein to pay for high school instruction to children resident in those towns. In this way a large number of such children are obtaining their high school education from these academies at an expense to the town less than the town would pay for maintaining a high school of its own. You inquire whether the Department of Education should withdraw or deny the aforesaid exemption provided for by G. L., c. 71, § 4, if it is established that the town is providing or intends to provide high school facilities in a private academy at public expense in the manner above described.

G. L., c. 71, § 4, provides, in part: —

> Every town containing, according to the latest census, state or national, five hundred families or householders, shall, unless specifically exempted by the department and under conditions defined by it, maintain a high school, adequately equipped, which shall be kept by a principal and such assistants as may be needed, of competent ability and good morals, who shall give instruction in such subjects as the school committee considers expedient. . . .

This provision does not define the conditions under or upon which the Department of Education may exempt a town containing over five hundred families from maintaining a high school. The authority to exempt is given without qualifica-

tion. It is coupled with a further power to affix conditions to the exemption, to be performed by the town. The words "and under conditions to be defined by it" manifestly refer to conditions imposed by the department upon the town rather than to a definition by the department of the rules which should govern its own action in granting or withholding the exemption. The statute does not define what these conditions shall be. But neither authority is wholly without limits. Both must be exerted in accordance with a sound discretion and with due regard for the rules of law.

The duty imposed by law upon cities and towns to maintain public schools is of stringent character. *Commonwealth* v. *Dedham*, 16 Mass. 141; *Commonwealth* v. *Connecticut Valley St. Ry. Co.*, 196 Mass. 309, 311. It includes the duty to provide high schools when the law so requires. G. L., c. 71, § 4; *Jenkins* v. *Andover*, 103 Mass. 94, 98. It must be discharged in the mode prescribed by law. *Commonwealth* v. *Dedham*, 16 Mass. 141. Even under Mass. Const. Amend. XVIII (now superseded by Mass. Const. Amend. XLVI) the Legislature had no power to authorize a town to discharge this duty by appropriation of public money to aid in maintaining a free school in the nature of a high school, which had been founded by a private benefactor, and which, under the terms of his will, was not under public superintendence and control. *Jenkins* v. *Andover*, 103 Mass. 94. Nor could the constitutional prohibition be evaded by payment of the money for tuition of such children, resident in the town, as might attend the school. I Op. Atty. Gen. 319. The same principles apply to the broader provisions of article XLVI of the Amendments. Under that amendment a town cannot constitutionally appropriate money either to pay for the tuition of town pupils at a privately controlled academy or to reimburse the parents for tuition paid to such academy by them. V Op. Atty. Gen. 204; V Op. Atty. Gen. 711. The exception made by section 3 of the latter amendment, in respect to institutions for the deaf, dumb and blind, does not apply to ordinary academies for normal pupils. V Op. Atty. Gen. 711. I am therefore of opinion that a plan to educate town pupils at public expense at an academy which is not "under the order and superintendence of the authorities of the town or city in which the money is expended" would be insufficient, as matter of law, to warrant you in granting or continuing the exemption authorized by G. L., c. 71, § 4.

It does not follow, however, that the execution of such a plan in the past or the tender of such a plan in the present would, as matter of law, require you to withhold or cancel the exemption. It may be that the required high school instruction can be furnished in some manner permitted by law without building and maintaining a high school. See *Dickey* v. *Putnam Free School,* 197 Mass. 468. The question whether the plan submitted by the town is one which would warrant your department in granting the exemption, either absolutely or upon terms, is to be determined by your department in the exercise of a sound discretion and subject to the rules of law. It is not for this department to determine how that discretion shall be exercised by your department within the limits permitted by law. I am, however, constrained to advise you that even a saving of expense to the town would not authorize the granting or continuance of the exemption if such exemption involves an expenditure of public money in a manner forbidden either by statute or by the Constitution.

Yours very truly,

J. Weston Allen, *Attorney General.*

State Highway — County Commissioners — Taking by Eminent Domain — Entry within Two Years.

Under G. L., c. 82, § 11, county commissioners are authorized to take land by eminent domain for the purpose of relocating a State highway.

Where an order of taking for highway purposes has been adopted, in accordance with the provisions of G. L., c. 79, § 3, entry must be made or possession taken within two years from the date of the order.

April 11, 1922.

Hon. John N. Cole, *Commissioner of Public Works.*

Dear Sir: — You have requested my opinion upon a question of law arising out of the following situation: —

In connection with the reconstruction of a State highway in Leicester it is necessary to make certain takings outside of the existing State highway in order to widen and straighten the same. The town of Leicester, at a town meeting, voted not to agree to indemnify the Commonwealth against any land damage, and, consequently, the county commissioners have been asked to make the necessary takings of land for the widening of the highway and to assess the land damage as they might see fit. One of the county commissioners has

stated that inasmuch as this is a State highway, and not a county way, he did not consider that the county had a right to make takings for the purpose of widening a State highway. You inquire as to whether or not the county commissioners can take action as outlined above.

On Jan. 6, 1920, the then Attorney General stated in an opinion: —

> Upon oral inquiry from your department I find that when it is desired to relocate a State highway it has been a common practice to have the relocation made in the first instance by the county commissioners, and then to take over the relocation as a State highway under Gen. St. 1917, c. 344, pt. I, §§ 5 and 6 (now G. L., c. 81, §§ 4 and 5).

I am of the opinion that county commissioners may make a taking, as requested by your department, under the authority given them by G. L., c. 82, § 11, which reads as follows: —

> If application is made to the commissioners by a town, or by five inhabitants thereof, to relocate or order specific repairs on a way within such town, whether it was laid out by authority of the town or otherwise, they may, either for the purpose of establishing the boundary lines of such way or of making alterations in the course or width thereof, or of making specific repairs thereon, relocate it in the manner prescribed for laying out highways in sections two to nine, inclusive. The expense shall be assessed upon the petitioners or upon the county or town, or upon the land benefited by the improvement under chapter eighty, as the commissioners may order. The commissioners may, without petition, after giving notice as provided in section three, relocate any public way for the purpose of establishing its boundaries, or of making specific repairs thereon, in which case no part of the expense shall be assessed upon the town.

You will note that this section applies to a way within a town, whether it was laid out by authority of the town or otherwise, and that the county commissioners may, for the purpose of making alterations in the width thereof, relocate it in the manner prescribed by G. L., c. 82, §§ 2–9, inclusive, for laying out highways.

It is important that your attention be called, also, to the provision found in G. L., c. 79, § 3, that, if an entry is not made or possession taken within two years of the date of the order of taking, the taking shall be void. As to this point, referring again to the opinion of Jan. 6, 1920, it was stated: —

If it is desired to place liability for land and grade damages upon the county, city or town, as the case may be, possession should be taken for the purpose of construction of the relocation by the county commissioners before the two-year period expires. In my opinion, an entry and doing of some construction work would be sufficient for this purpose. It would not, in my opinion, be necessary to complete construction immediately, or even within any stated period. But under a county, city or town location, construction should be completed within a reasonable time under all the circumstances.

I also call your attention to an opinion rendered to you under date of May 10, 1920, the conclusion of which reads as follows: —

The Commonwealth will be doubly protected if the actual entry and some construction work is done in the first instance by the county, city or town and then have the Commonwealth take over the relocation and secure a stipulation or indemnification from the county, city or town, as the case may be.

Yours very truly,
J. Weston Allen, *Attorney General.*

Constitutional Law — Public Schools — Superintendency Union — Withdrawal — Effect of Dissolution.

Under G. L., c. 71, § 63, where the joint committee of a superintendency union has entered into a contract with a superintendent for a term of three years, which contract will not expire until June, 1924, the contract comes within the protection afforded by U. S. Const., art. I, § 10. Accordingly, in the event of the withdrawal of one of the towns from the superintendency union, the constituent towns will not be relieved of their financial obligations under the contract, provided the superintendent fulfils his part thereof and has not been previously removed in accordance with said section 63.

April 11, 1922.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You request my opinion on the following question: —

The joint committee of a superintendency union consisting of the towns of Lee, Otis, Monterey and Tyringham elected a superintendent of schools in June, 1921, for a term of three years, in accordance with the provisions of G. L., c. 71, § 63. The school committee of Lee is now desirous that Lee should withdraw from the union, and has petitioned the department to take such steps as may be necessary to

effect a dissolution of said union. The question arises as to whether such dissolution would relieve the constituent towns of their financial obligations to the superintendent of schools for the remainder of his three-year term.

G. L., c. 71, § 61, provides as follows: —

The school committees of two or more towns, each having a valuation less than two million five hundred thousand dollars, and having an aggregate maximum of fifty, and an aggregate minimum of twenty-five, schools, and the committees of four or more such towns, having said maximum but irrespective of said minimum, shall form a union for employing a superintendent of schools. A town whose valuation exceeds said amount, may participate in such a union but otherwise subject to this section. Such a union shall not be dissolved except by vote of the school committees representing a majority of the participating towns with the consent of the department, nor by reason of any change in valuation or the number of schools.

The authority of a superintendency union to contract with a superintendent of schools for a three-year term is contained in G. L., c. 71, § 63, as follows: —

The school committees of such towns shall, for the purposes of the union, be a joint committee and shall be the agent of each participating town, provided that any school committee of more than three members shall be represented therein by its chairman and two of its members chosen by it. The joint committee shall annually, in April, meet at a day and place agreed upon by the chairmen of the constituent committees, and shall organize by choosing a chairman and a secretary. It shall employ for a three year term, a superintendent of schools, determine the relative amount of service to be rendered by him in each town, fix his salary, which shall not be reduced during his term, apportion the payment thereof in accordance with section sixty-five among the several towns and certify the respective shares to the several town treasurers. He may be removed, with the consent of the department, by a two thirds vote of the full membership of the joint committee.

Under the authority vested by the above statute, the joint committee of the superintendency union has entered into a contract with the superintendent in question for a term of three years, which contract will not expire until June, 1924. It is therefore my opinion that said contract comes within the protection afforded by U. S. Const., art. I, § 10, whereby it is provided that no State shall pass any law impairing the obligation of contracts. It accordingly follows that in the

event of a withdrawal of the town of Lee from the superintendency union the constituent towns will not be relieved of their financial obligations to the superintendent of schools for the remainder of his three-year term, provided that he continues willing, able and fit to perform the duties of his position, and also provided that he has not previously been removed in accordance with the right reserved and contained in the statute under which his position is created, to wit, section 63, *supra*. See *Hall* v. *Wisconsin*, 103 U. S. 5; V Op. Atty. Gen. 422.

Yours very truly,

J. Weston Allen, *Attorney General.*

Savings Banks — Definition — Powers and Duties — Life Insurance Business.

A savings bank is an institution for receiving the moneys of depositors in moderate amounts, and investing them for the use and benefit of depositors.

The powers and duties of a savings bank are strictly defined and regulated by statute, and do not include those pertaining to a general banking business.

A contract by which a savings bank is to act as agent for a depositor in holding a life insurance policy and receiving and transmitting premiums thereon, and is to make payments to the depositor and others of amounts called for by the policy, requires the doing of a life insurance rather than a savings bank business, and is unauthorized.

April 11, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — You state that there have been presented to you three plans providing for a combination of savings accounts and life insurance, with requests for rulings whether contracts made under the conditions imposed by those plans would be in violation of law. You ask my opinion whether a savings bank or a trust company in its savings department may contract to receive deposits, pay life insurance premiums from such deposits, and act generally as provided for in any or all of the plans submitted.

The question arises at the outset whether the persons who seek an opinion on the legality of the plans which they have submitted are entitled to such opinion, whether it is my duty to give advice on that subject, and whether, if given, it would be of any binding effect. I have come to the conclusion, although not without hesitation, that these requests

may be treated as requests for approval of proposed services to be performed by a savings bank under G. L., c. 178, § 13, and therefore proceed to consider the question which you ask.

A savings bank is an institution for receiving the moneys of depositors in small or moderate amounts, and investing them for the use and benefit of the depositors. *Lewis* v. *Lynn Institution for Savings*, 148 Mass. 235, 243; *Commonwealth* v. *Reading Savings Bank*, 133 Mass. 16, 19. Its powers and duties are strictly defined and regulated by statute. It has no authority to do a general banking business. *Bradlee* v. *Warren Savings Bank*, 127 Mass. 107. It is not authorized to establish a safe deposit department or to make a business of receiving securities for safe keeping, except to the extent and under the conditions prescribed by G. L., c. 168, § 33. V Op. Atty. Gen. 661.

The General Court has made specific statutory provision authorizing savings banks, with the written permission of and under regulations approved by the Commissioner of Banks, to receive and hold for their depositors any securities issued by the United States (G. L., c. 168, § 33); to contract for the deposit, at intervals within any period of twelve months, of sums of money in the aggregate not in excess of the statutory limit on deposits in savings banks (G. L., c. 167, § 16); and, with the approval of the Commissioner of Banks and the Commissioner of Insurance, to act as agents for savings and insurance banks (G. L., c. 178, § 13). Said three sections are as follows:

G. L., c. 168, § 33: —

> Savings banks may, with the written permission of and under regulations approved by the commissioner, receive and hold for their depositors any securities issued by the United States.

G. L., c. 167, § 16: —

> Savings banks and trust companies in their savings departments may contract, on terms to be agreed upon, for the deposit at intervals within any period of twelve months, of sums of money in the aggregate not in excess of the statutory limit on deposits in savings banks, and for the payment of interest on the same at a rate not more than one per cent less than the rate of their last regular dividend on savings deposits. A sum thus accumulated, if left in such a depository as a regular savings deposit within fifteen days after the date on which money ordinarily begins to draw interest, may, if the depository so provides, draw interest from such prior date.

G. L., c. 178, § 13: —

Savings and insurance banks shall not employ solicitors of insurance, and shall not employ persons to make house to house collections of premiums; but the trustees may establish such agencies and means for the receipt of applications for insurance and of deposits and of premium and annuity payments, at such convenient places and times, of such nature and upon such terms as the commissioner of banks and the commissioner of insurance may approve. The trustees may also, with like approval, appoint any savings bank or savings and insurance bank its agent to make, so far as thereunto authorized, payments due on policies of insurance and on contracts for annuities, and to perform other services for the insurance department. All savings banks and all savings and insurance banks may, with like approval, act as such agents. The business of the insurance department may, in the discretion of the trustees, be carried on either in the same building with that of the savings department or in a different building.

These provisions authorizing savings banks to do acts outside the ordinary business of a savings bank must be construed to define the limits of their powers in respect to the subjects to which the provisions relate.

By the first of the three plans which you have submitted to me it is proposed that a savings bank shall enter into a contract, evidenced by a certificate, with each depositor desiring to secure the benefits of the plan, by which the depositor agrees to open a savings account with the depository upon signing the certificate, to deposit $7.40 monthly for a period of ten years, to take out a policy of insurance on his life in the sum of $1,000, written by a savings and insurance bank, and to deliver the policy to the depository; and the depository agrees, so long as the depositor makes the deposits, to pay the premiums and charge them to his account, and, in ten years from date, if the depositor has made his monthly deposits, upon surrender of the certificate and pass book, to pay the depositor the balance standing to his credit and, at his option, either (A) to pay him the cash surrender value of his policy or (B) to deliver the policy to him, and, in the event of the death of the depositor, to pay the balance in his account to the person entitled to receive it, and, if the premiums are fully paid, to pay to the beneficiary under the policy $1,000. There are further provisions authorizing the depository to hold the policy and in the event of his death to deliver it to the beneficiary, to receive from the insuring bank all dividends payable under the policy,

to pay the premiums in his behalf, and at the expiration of ten years, if he elects to take option (A), to surrender the policy and receive its cash surrender value for his account; and other provisions in case the depositor is in default or desires to withdraw the whole or a part of his account. By the certificate the savings bank certifies that the depositor "is insured and is a depositor under its ten-year savings-insurance plan," and that the bank is holding the policy subject to the terms of the agreement, and has delivered the pass book to the depositor.

These provisions of the proposed contract manifestly purport to require the savings bank to engage in a business which is not the business of a savings bank and which is not authorized by any of the statutes which I have referred to. The contract is a contract for the deposit at intervals of sums of money, not within a period of twelve months as authorized by G. L., c. 167, § 16, but for a period of ten years. The bank agrees to hold for the depositor a security which is not of the kind authorized by G. L., c. 168, § 33. In so far as it acts as an agent the bank is to act as the agent of the depositor and not the agent of the savings and insurance bank, as permitted by G. L., c. 178, § 13. And beyond that the bank agrees to pay to the depositor, at the end of the ten-year period, at his option, the cash surrender value of the policy, and in the event of his death to pay the beneficiary under the policy $1,000, thereby lending its own credit to the transaction, and to that extent itself engaging in the business of life insurance. There can be no legal justification for a scheme which assumes to permit and require savings banks to act as agents for depositors in transmitting insurance premiums for depositors, and to make payments to depositors and others of amounts called for by insurance policies. Such a business has nothing in common with a savings bank business.

It will not be necessary to describe in detail the other two plans submitted, since an examination shows that they are open to most, if not all, of the objections which I have stated.

I must advise you, therefore, that savings banks and trust companies in their savings departments cannot lawfully do business as outlined in the plans submitted.

Very truly yours,

J. Weston Allen, *Attorney General.*

Legacy and Succession Tax — Stock of Voluntary Association owned by Non-resident.

Under St. 1920, c. 396, stock of a voluntary association owned by a non-resident is not subject to a succession tax on his death, where the property of the association consists wholly of stocks of foreign corporations, and neither the trustees nor any office for the transfer of shares is within the jurisdiction, since complete succession may be accomplished without invoking the aid of our laws, and there is nothing to which the taxing power can be applied.

But if at the time of the decedent's death the voluntary association owned property in the Commonwealth, his interest through the voluntary association in that property is subject to the tax.

The mere fact that a voluntary association is stated to be organized under the laws of Massachusetts does not give jurisdiction to tax its shares, where neither shareholders, trustees nor property of the association is within the State.

April 12, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You request my opinion whether stock of The Mackay Companies owned by a non-resident of Massachusetts who died since the enactment of St. 1920, c. 396, is subject to a succession tax in this Commonwealth. You state that it appears by Poor's Manual of Public Utilities for 1921 that The Mackay Companies is "a voluntary association organized under Massachusetts laws by an agreement and declaration of trust executed and carried out on December 19, 1903;" and that Poor's Manual also contains the information that The Mackay Companies owns the entire $25,000,000 capital stock of the Commercial Cable Company, and the whole or a portion of the capital stock of a number of telegraph and cable companies in the United States, Canada and Europe, including the land line system known as the Postal Telegraph-Cable Company; that there are twelve trustees, of whom ten are residents of New York, one of London, Eng., and one of Toronto, Can.; and that the company has an office in New York and an office in Boston.

By a subsequent communication you state further that you are informed that The Mackay Companies maintains an office in Boston, at which there is an agent of the company upon whom process may be served, and that the annual meeting of the company is held in Boston; that none of the officers of the company have an office in Boston, and, except as previously stated, none of the business of the company is

transacted here; that the stock is not transferable in Massachusetts, and none of the trustees are residents of this Commonwealth; that the subsidiary companies, the stock in which is owned by The Mackay Companies, have offices in Massachusetts at which the regular business of sending and receiving telegrams, etc., is carried on. I am further informed by counsel for The Mackay Companies that it has no office here for which it pays rent; that one of the officials of the subsidiary companies doing business here is an officer of The Mackay Companies, but that, so far as he can learn, no business of that organization is transacted here. He also states that at one time The Mackay Companies owned stock in subsidiary companies which were Massachusetts corporations; that recently that stock has been transferred to other of its subsidiary companies; but that he does not know whether that stock was transferred before or after the decease of the non-resident referred to.

By St. 1920, c. 396, § 1, "all property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to the inhabitants of the commonwealth or not, which shall pass by law, or by the laws regulating intestate succession," is made subject to a legacy and succession tax. Such a tax is an excise tax imposed upon the privilege of passing title to property. It can lawfully be applied only when some necessary incident of the transfer of title depends for its efficacy upon the law of the State levying the tax. "Where the property is not physically within the jurisdiction of the taxing power, and its complete succession may be accomplished without invoking any privilege or sanction conferred by its law, then there is nothing to which taxation can attach." *Walker* v. *Treasurer and Receiver-General*, 221 Mass. 600, 602. See also *Kinney* v. *Treasurer and Receiver-General*, 207 Mass. 368, 369; *Peabody* v. *Treasurer and Receiver-General*, 215 Mass. 129, 130; *Welch* v. *Treasurer and Receiver-General*, 223 Mass. 87, 92.

Where property is held by a voluntary association organized under a declaration of trust, the beneficial interest in which is represented by certificates of shares, the organization may be in law either a partnership or a strict trust, depending upon the construction of the instrument by which it was created. *Williams* v. *Milton*, 215 Mass. 1; *Frost* v. *Thompson*, 219 Mass. 360, 365. If the organization is a partnership, the shares may be taxable to the owners in the places of their

residence, or they may be taxable at the situs of the property owned by the organization. *Dana* v. *Treasurer and Receiver-General*, 227 Mass. 562; *Priestley* v. *Treasurer and Receiver-General*, 230 Mass. 452. If the organization is a trust, they may also be taxable at the place of residence of the trustees. *Kennedy* v. *Hodges*, 215 Mass. 112; *Peabody* v. *Treasurer and Receiver-General*, 215 Mass. 129; *Welch* v. *Boston*, 221 Mass. 155; *Dana* v. *Treasurer and Receiver-General, supra*; *cf. Clark* v. *Treasurer and Receiver-General*, 218 Mass. 292. It may be, also, that such shares would be taxable in any place where the trustees had an office for the transaction of the business of the trust, especially if the office were one at which shares could be transferred, since that would give the State power to direct the succession. *Cf. Blackstone* v. *Miller*, 188 U. S. 189; *Buck* v. *Beach*, 206 U. S. 392; *Wheeler* v. *New York*, 233 U. S. 434.

If at the time of the decedent's death The Mackay Companies owned stock in Massachusetts corporations, it is my opinion that his interest through The Mackay Companies in that stock was subject to a legacy and succession tax.

But where the property of an association consists wholly of stocks of foreign corporations, and neither the trustees nor the certificate holders nor any office for the transfer of shares is within the jurisdiction of the State, and where, accordingly, complete succession may be accomplished without invoking the aid of the laws of that State, there is nothing to which the taxing power can be applied. Assuming that the facts are as stated, that The Mackay Companies has no real office in Boston where business is transacted and where certificates may be transferred, it is my opinion that no jurisdiction to tax is conferred by the existence of any power over the trustees. The mere fact that this trust is stated to be organized under the laws of Massachusetts does not mean that the Commonwealth has acquired any control over the organization as a separate entity or that the organization receives any benefit from its laws. The organization derives no power from statutory enactment. *Eliot* v. *Freeman*, 220 U. S. 178; *cf.* G. L., c. 182.

It is true that in *Kennedy* v. *Hodges, supra,* and in *Peabody* v. *Treasurer and Receiver-General, supra,* the court, in holding that shares in certain real estate trusts where the trustees were resident in the Commonwealth were taxable here, although owned by non-residents, said, in substance, that

shares in such organizations were, in respect to those cases, indistinguishable in principle from shares of stock in domestic corporations; but, in my judgment, the court relied largely on the fact that the trustees and the office for the transfer of shares were within the jurisdiction, and the dictum should be confined to the circumstances of those cases. It cannot be that the mere fact that a group of people make an agreement relating to the management of property, providing for a representation of interests therein by shares, and state in their agreement that it is made under the laws of Massachusetts, gives jurisdiction to this State to tax those shares, where neither the property, the owners or managers of the property nor the shareholders are within this jurisdiction.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Elections — Municipal Primaries — Freedom of Elections.

G. L., c. 43, § 44G (added by St. 1922, c. 282, § 1), is not in conflict with the Bill of Rights, art. IX.

April 12, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You have submitted for my consideration Senate Bill No. 334, entitled: "An Act providing for the nomination at preliminary elections of candidates for elective municipal office in cities governed under a standard form of city charter." Section 1 of the proposed bill amends G. L., c. 43, by inserting therein, after section 44, seven new sections providing for preliminary elections or primaries, designed to select candidates for the various city offices which are to be filled by popular election. Section 44G provides: —

If at the expiration of the time for filing statements of candidates to be voted for at any preliminary election not more than twice as many such statements have been filed with the city clerk for an office as are to be elected to such office, the candidates whose statements have thus been filed shall be deemed to have been nominated to said office, and their names shall be voted on for such office at the succeeding regular or special election, as the case may be, and the city clerk shall not print said names upon the ballot to be used at said preliminary election and no other nomination to said office shall be made. If in consequence it shall appear that no names are to be printed upon the

official ballot to be used at any preliminary election in any ward or wards of the city, no preliminary election shall be held in any such ward or wards.

You inquire whether said section 44G is in conflict with article IX of the Bill of Rights, which provides: —

All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

The precise point appears to have been determined in *Graham* v. *Roberts*, 200 Mass. 152, where the court said, at pages 155–157: —

The petitioners contend that the rights of inhabitants of Haverhill are not equal to the rights of other inhabitants of the Commonwealth in the following particulars, namely: —

1. Restricting printed names on the ballot to the two highest candidates for an office in a preliminary election for nomination.

. . . . . .

The first five of these particulars are merely regulations of the methods of voting. First, for the final election, an official ballot is prescribed. Then a preliminary election for nomination is provided, to determine what names shall appear on the final official ballot. General provisions for a similar object are found in our law for voting by the Australian ballot, the constitutionality of which has been affirmed. *Cole* v. *Tucker*, 164 Mass. 486.

The regulation that only the names of the two candidates chosen at the preliminary election shall appear on the final official ballot is simply a regulation for the election, which the Legislature and the people may adopt, and the same is true of the prohibition of the use of the names of candidates nominated by nomination papers, or by a caucus of a political party.

. . . . . .

There is no constitutional restriction upon the power of the General Court to fix the qualifications of city officers. *Opinion of the Justices*, 138 Mass. 601, 603; *Larcom* v. *Olin*, 160 Mass. 102, 108; *Commonwealth* v. *Plaisted*, 148 Mass. 375, 386; *Opinion of the Justices*, 165 Mass. 599, 601. There is a space for writing in names not printed on the ballot. This secures the right of every one to vote as he pleases, and the requirements limiting the names that are to be printed on the ballot are within the power of the Legislature. That was settled in regard to the Australian ballot in *Cole* v. *Tucker*, 164 Mass. 486, and

Miner v. *Olin*, 159 Mass. 487. See also *Eckerson* v. *Des Moines*, 115 N. W. Rep. 177; *In re Pfahler*, 150 Cal. 71; *Brown* v. *Galveston*, 97 Texas, 1.

It is covered in principle by *Cole* v. *Tucker*, 164 Mass. 486, which upheld the constitutionality of the Australian ballot. I am therefore of opinion that section 44G is not unconstitutional.

Yours very truly,
J. Weston Allen, *Attorney General.*

Fire — Fire Prevention — Removal of Slash after cutting Timber.

Under G. L., c. 48, § 16, both the owner of lands, as therein defined, and the owner of standing timber thereon, who cuts or permits the cutting of brush, wood or timber, under the circumstances therein defined, may be liable to the penalty prescribed by section 20 if he fails to dispose of the slash in the manner prescribed in said section 16.

The purchaser of timberland after the timber has been cut but before the slash is disposed of, who fails to dispose of such slash in the manner prescribed by G. L., c. 48, § 16, is not liable to the penalty prescribed by section 20, since he has neither cut such timber nor permitted the cutting of such timber.

April 12, 1922.

Hon. William A. L. Bazeley, *State Forester.*

Dear Sir: — G. L., c. 48, § 16, provides: —

Every owner, lessee, tenant or occupant of lands or of any rights or interests therein, except electric, telephone and telegraph companies, who cuts or permits the cutting of brush, wood or timber on lands which border upon woodland, or upon a highway or railroad location, shall dispose of the slash caused by such cutting in such a manner that the same will not remain on the ground within forty feet of any woodland, highway or railroad location.

Section 20 provides: —

Violation of any provision of sections sixteen to eighteen, inclusive, shall be punished by a fine of not less than twenty nor more than one hundred dollars.

The owner of a tract of timber sells the standing timber thereon, to be removed. You inquire whether the owner of the land or the purchaser of the timber shall comply with the

provisions of section 16 relative to the disposal of slash. You further inquire where the responsibility would rest if, after the timber has been removed and before the slash has been disposed of, the owner of the land shall sell the land to a third party.

1. Section 16 imposes the duty to dispose of the slash upon every person who satisfies both conditions of that section, to wit: (1) he must be the owner of lands or of some right or interest therein or an occupant thereof; (2) he must cut or permit the cutting of brush, wood or timber under the conditions defined in that section. It is plain that more than one person may fulfill the conditions prescribed by the statute at one and the same time and with respect to the same timber and slash, yet the statute does not designate which of these several persons shall be first subject to the penalty. I am unable to believe that the Legislature intended that the order in which the several parties are named in the section determines the order in which they should be prosecuted, assuming all to be guilty. Answering your first inquiry, therefore, it would seem that both the owner of the land and the purchaser of the timber may be found liable under this section. The owner of the land may be liable if he cuts or permits the cutting of brush, wood or timber, as in this section provided. Since standing timber is a right or interest in land, the purchaser of the timber, if he cuts it or permits it to be cut, may be liable also. It follows that the answer to your first inquiry must be either or both.

2. Like considerations determine the answer to your second question. The purchaser of the land after the timber has been removed but before the slash is disposed of does not satisfy the second condition imposed by section 16. He has neither cut nor permitted the cutting of brush, wood or timber, as therein defined. It follows that he cannot be prosecuted under this section.

Yours very truly,

J. Weston Allen, *Attorney General.*

Department of Public Health — Rules and Regulations — Delegation of Legislative Power — Protection of Water Supply — Great Ponds.

Under the delegation of legislative power conferred by G. L., c. 111, § 160, the Department of Public Health may make rules and regulations to prevent the pollution and secure the sanitary protection of all waters in this Commonwealth used as sources of water supply.

April 13, 1922.

Dr. Eugene R. Kelley, *Commissioner of Public Health.*

Dear Sir: — You have requested my opinion upon a question of law in the following situation: —

The city of Fall River takes water from North Watuppa Pond, the flowage rights in which are in the Watuppa Reservoir Company, but the city of Fall River has the unlimited use of the water for domestic purposes and owns most of the land around the pond. The city is negotiating for the full control of the flowage rights. A plan to prevent the pollution of this pond has been adopted by the city and approved by the State Department of Public Health, which provides for two intercepting drains, one on the easterly and the other on the westerly shore of the pond, to intercept and divert polluted waters from the north pond into the south pond. The intercepting drain on the westerly shore has been built, but on the easterly shore the construction work was held up by the war.

Certain persons are now proposing to erect ice houses on the easterly shore of the pond on the portion of that shore which would be cut off from North Watuppa Pond and diverted to South Watuppa Pond as soon as the intercepting drain is built. A chain of ice houses already exists on the pond, which will doubtless be taken by the city when arrangements therefor can be made.

Your question is as to whether or not the Department of Public Health, under the above circumstances, can make rules and regulations for the sanitary protection of North Watuppa Pond and, to that end, prohibit ice cutting thereon under the provisions of G. L., c. 111, § 160.

G. L., c. 111, § 160, reads as follows: —

> The department may cause examination of such waters to be made to ascertain their purity and fitness for domestic use, or the possibility of their impairing the interests of the public or of persons lawfully

using them or of imperilling the public health. It may make rules and regulations to prevent the pollution and to secure the sanitary protection of all such waters used as sources of water supply. It may delegate the granting and withholding of any permit required by such rules or regulations to state departments, boards and commissions and to selectmen in towns, and to boards of health, water boards and water commissioners in cities and towns, to be exercised by such selectmen, departments, boards and commissions, subject to such recommendation and direction as shall be given from time to time by the department; and upon complaint of any person interested, the department shall investigate the granting or withholding of any such permit, and make such orders relative thereto as it may deem necessary for the protection of the public health. Whoever violates any such orders, rules or regulations shall be punished by a fine of not more than five hundred dollars, to the use of the commonwealth, or by imprisonment for not more than one year, or both.

The essential facts in determining your question are two: first, North Watuppa Pond is a great pond, situated near the city of Fall River, about four miles long and from three-fourths of a mile to a mile and a quarter wide (*Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 549); second, the said pond is used by the city of Fall River as a source of water supply.

It is well settled that the control of great ponds in the public interest is in the Legislature, which represents the public. It may regulate and change these public rights or take them away altogether, to serve some paramount public interest. *Hittinger* v. *Eames*, 121 Mass. 539, 546; *Paine* v. *Woods*, 108 Mass. 160, 169; *Commonwealth* v. *Vincent*, 108 Mass. 441, 447; *Commonwealth* v. *Tiffany*, 119 Mass. 300; *Gage* v. *Steinkrauss*, 131 Mass. 222; *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, 557, 564, 567; *Rockport* v. *Webster*, 174 Mass. 385, 392; *Sprague* v. *Minon*, 195 Mass. 581, 583.

It is within the power of the Legislature to deprive the general public of the right to go upon a great pond with boats or otherwise, on the ground that a safe and advantageous use of the water for drinking, and for other domestic purposes, would be best promoted by terminating this former public right and putting the property in the control of a public board. It could give to this public board, as its representative, power to exclude all persons from the waters of the great pond. This power naturally and properly might include the right to permit persons to go upon them under

reasonable regulations. *Sprague* v. *Minon*, 195 Mass. 581, 583; *Brodbine* v. *Revere*, 182 Mass. 598, 601; *Sprague* v. *Dorr*, 185 Mass. 10; *Commonwealth* v. *Sisson*, 189 Mass. 247; *Commonwealth* v. *Plaisted*, 148 Mass. 375. Such legislation might be enacted under the sovereign power of this Commonwealth to control and regulate our public rights, as there are no private rights of property in the great ponds. *Sprague* v. *Minon*, 195 Mass. 581.

The Legislature, if it sees fit, may make rules and regulations, and the delegation of its right to make rules and regulations is within its power. *Commonwealth* v. *Hyde*, 230 Mass. 6; *Commonwealth* v. *Sisson*, 189 Mass. 247; *Commonwealth* v. *Kingsbury*, 199 Mass. 542.

In the Hyde case, *supra*, a regulation of the State Board of Health forbade fishing in Crystal Lake in Haverhill. Concerning this regulation the court stated that —

> The regulation passed by the State Board of Health, in pursuance of the statutory authority, prohibiting fishing upon a body of water used as a source of water supply for a municipality, cannot be pronounced unreasonable. It requires no discussion to demonstrate that the preservation of the purity of the water supply for the domestic uses of the people is within the police power. The absolute prohibition of fishing upon such a source of supply could not be said to be unreasonable under the circumstances here disclosed. It is not irrational for a public board to deem it likely or possible that sources of contamination and germs of disease might have a causal connection with the presence of fishermen upon the ice or waters of a supply of drinking water. *Nelson* v. *State Board of Health*, 186 Mass. 330; *Sprague* v. *Minon*, 195 Mass. 581.

You will note that the practical result of this power might lead to the forbidding of an ice-cutting business that had been conducted on the pond for some years, and that no compensation would be due to the owners because of the enforcement of a health rule and regulation. This may seem a drastic right, but it is no more drastic than the practical results in several cases which have been decided by our Supreme Judicial Court. For instance, in the case of *Nelson* v. *State Board of Health*, 186 Mass. 330, the petitioner claimed that his land had been used as a farm for over one hundred years, and he had maintained a privy on the shore for some thirty years, but it was held that the State Board of Health had the power to pass a general regulation forbidding, among

other things, privies within a specified distance from the shore of the pond, and the right to maintain the same ceased, although the order was made without a hearing, and the action of the Board was final. In the case of *Commonwealth* v. *Sisson*, 189 Mass. 247, a riparian owner had maintained a sawmill on the bank of a stream for thirty years, but, nevertheless, the court decided that he held his property subject to the right of the Legislature to prohibit or regulate the discharge of sawdust into the stream, for the protection of edible fish; that the defendants were not entitled to a hearing; that the action of the Board was final; and that no compensation was due to the owners. The theory is that the determination of the facts is legislative in case the Legislature decides to make a thing a nuisance *per se*. The court points out that the delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature, if a remedy should be given. In the opinion of the court it is within the constitutional power of the Legislature, and the court can give no remedy.

Accordingly, in consideration of the statutory authority, to wit, G. L., c. 111, § 160, and the decisions of our Supreme Judicial Court, in my judgment, your department has the power to make rules and regulations to prevent the pollution and secure the sanitary protection of the waters of North Watuppa Pond at Fall River.

Yours very truly,

J. Weston Allen, *Attorney General.*

Sergeant-at-Arms — Authority to arrest Disorderly Persons in the Chambers of the General Court — Superintendent of Buildings.

The sergeant-at-arms is charged with the duty of maintaining order in the chambers of the General Court, and he is authorized to make arrests, if necessary, in the performance of this duty.

The Superintendent of Buildings has authority to make arrests for criminal offences committed in any part of the State House or its appurtenances.

April 13, 1922.

Charles O. Holt, Esq., *Sergeant-at-Arms.*

Dear Sir: — You have requested my opinion as to what your authority is and how far you can go in case of disorder among the spectators in the chambers of the General Court,

or in case of an interruption of the business of either branch or of the committees thereof, or in case of any disturbance by a member of the General Court. You also ask as to whether or not the General Laws give you and your doorkeepers and messengers sufficient authority to quell disturbance if the occasion should arise, and to lay hands on a person to remove him from a chamber or a committee room if the necessity requires, and also to make an arrest if necessary.

G. L., c. 3, § 17, reads as follows: —

> The sergeant-at-arms shall serve such processes and execute such orders as may be enjoined upon him by the general court or by either branch thereof, attend the members or clerks of either branch when they are charged with a message from one branch to the other or to the governor and council, maintain order among the spectators admitted into the chambers in which the respective branches hold their sessions, prevent the interruption of either branch or of the committees thereof, and shall have the control of, and superintendence over, his subordinate officers, taking care that they promptly perform their duties.

Considering, first, the question as to whether or not you have the power to make an arrest in the performance of your duties, I would state that the general powers to make arrests for criminal offences committed in any part of the State House, or the grounds thereof, have been given to the Superintendent of Buildings by G. L., c. 8, § 12, which reads as follows: —

> The superintendent shall take proper care to prevent any trespass on, or injury to, the state house or its appurtenances, or any other building or part thereof in Boston owned by or leased to the commonwealth for public offices; and if any such trespass or injury is committed, he shall cause the offender to be prosecuted therefor. For any criminal offence committed in any part of the state house or the grounds appurtenant thereto, or in any other building in Boston owned by or leased to the commonwealth, the superintendent and his watchmen shall have the same power to make arrests as the police officers of Boston.

These general powers to make arrests at the State House were formerly given to the sergeant-at-arms. See R. L., c. 10, § 8. Consequently, in my judgment, the sergeant-at-arms and his subordinate officers do not now have the power to make arrests that they had before this power was trans-

ferred to the Superintendent of Buildings and his officers by Gen. St. 1919, c. 350, § 17.

You will note, however, that, by Mass. Const., pt. 2d, c. I, § III, art. X, it is provided that the House of Representatives "shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence"; or who threatens or assaults members; or assaults or arrests witnesses, etc., ordered to attend the house; or rescues any person arrested by it. By article XI it is provided: —

> The senate shall have the same powers in the like cases; . . . provided, that no imprisonment on the warrant or order of the . . . senate, or house of representatives, for either of the above described offences, be for a term exceeding thirty days.

Under this constitutional provision it has been held that the sergeant-at-arms may lawfully detain in the county jail, with the permission of the sheriff, a prisoner committed by authority of the House of Representatives. See *Burnham* v. *Morrissey*, 14 Gray, 226. Accordingly, you would have the power to arrest and detain a person upon a process enjoined upon you by the General Court, or either branch thereof, under authority of the constitutional provision referred to.

Considering, second, the question of your authority, as sergeant-at-arms, and that of your subordinates to quell disturbances in the chambers of the General Court, and in the committee rooms thereof, you will observe that, by G. L., c. 3, § 17, it is provided that you shall "maintain order among the spectators admitted into the chambers in which the respective branches hold their sessions, prevent the interruption of either branch or of the committees thereof, . . ." This duty to maintain order and to prevent the interruption of the Legislature is obligatory upon you, and, in my judgment, you, as sergeant-at-arms, and your subordinates are justified in using such force as is reasonably necessary to secure and maintain the order contemplated by the Legislature. In other words, within reasonable limits the amount of force and the means employed are necessarily left to the sound discretion of the sergeant-at-arms.

Yours very truly,

J. Weston Allen, *Attorney General.*

State Police Officers — Additional Appointments — Date of Commencement of Service — Pensions — State Retirement Association.

The provisions of G. L., c. 32, § 68, as amended by St. 1921, c. 487, § 1, relative to retirement for disability, are not applicable to the additional officers appointed to the Division of State Police under G. L., c. 22, § 9A.

The provisions of law relative to the State Retirement Association are applicable to the additional officers appointed under G. L., c. 22, § 9A.

April 14, 1922.

Col. Alfred F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You have requested my opinion upon the following questions of law: —

1. Do the provisions of G. L., c. 32, § 68, apply to the additional officers appointed to the State police under G. L., c. 22, § 9A?

G. L., c. 32, § 68, was amended by St. 1921, c. 487, § 1, and reads, so far as is pertinent to your question, as follows: —

Any officer or inspector of the department of public safety, who began continuous service prior to July first, nineteen hundred and twenty-one, if in the judgment of the commissioner of public safety he is disabled for useful service in the department and a physician designated by said commissioner certifies that he is permanently incapacitated, either physically or mentally, for the further performance of his duty in the department, by injuries sustained through no fault of his own in the actual performance of his duty, or any such officer or inspector of said department who has performed continuous faithful service for the commonwealth for not less than twenty years, if in the judgment of said commissioner he is incapacitated for further service as a member of the department, shall, if he so requests, be retired, and shall annually receive a pension from the commonwealth equal to one half the compensation received by him at the time of his retirement. . . .

Said section 9A, referred to by you, was enacted May 27, 1921. See St. 1921, c. 461. No emergency clause having been placed in the act, it did not take effect for ninety days after enactment. Consequently, none of the State police officers in question could have begun continuous service prior to July 1, 1921. Accordingly, said section 68 does not apply to the said additional State police officers.

2. Whether or not the provisions relative to the State Employees' Retirement Association apply to the additional officers appointed under said section 9A.

By an order passed by the Senate and House on June 4, 1920, a joint special committee on pensions was established to study the entire question of pensions and retirement allowances provided under existing laws for officials and employees of the Commonwealth and of the counties, cities and towns. That committee transmitted a report to the Legislature in January, 1921. In this report it was stated that —

We believe that all future pension laws should be based on the contributory plan, and that future appointees in the services for which non-contributory pensions are now provided should be brought into the contributory system.

The committee recommended certain legislation relative to the State police, and drafted a bill, by section 1 of which it was provided that "the present non-contributory pensions for state police shall be limited to those appointed before July first, nineteen hundred and twenty-one. Those appointed after July first, nineteen hundred and twenty-one will thereby automatically come under the state system." Pursuant to this recommendation, St. 1921, c. 487, was enacted. As stated above, the additional State police officers appointed under said section 9A began continuous service after July 1, 1921, and, consequently, the provisions relative to the State Employees' Retirement Association are applicable to them.

I might point out, in addition, that, even before G. L., c. 32, § 68, was amended, State police officers were not prohibited from becoming members of the Retirement Association. This was for the reason that their right to the pension conferred by said section 68 was not absolute and did not necessarily become absolute even upon completion of the term of service prescribed. There were certain conditions that might never be fulfilled. Thus, while an officer might have become entitled to a non-contributory pension if all the conditions were fulfilled, it could not be said that he "either is or will be entitled" thereto, within the meaning of G. L., c. 32, § 2, cl. (3) [St. 1911, c. 532, § 3, par. (3)]. See V Op. Atty. Gen. 634.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Taxation — Due Process of Law — Appropriation of Public Money for Private Purpose — Payment of Unearned Salary to Dependents of Deceased Officer or Employee of a City or Town.

An appropriation of public money to a private purpose takes the property of the taxpayer without due process of law, in violation both of the State Constitution and of the Fourteenth Amendment.

In the absence of any showing that a public purpose is thereby accomplished, the Legislature has no power to authorize cities and towns to pay to the widow or dependents of a deceased officer or employee the salary which such person would have received during a stated period after his decease.

April 17, 1922.

Hon. Frank G. Allen, *President of the Senate.*

Dear Sir: — I have considered the question presented by the following order: —

Ordered, That the Senate request the opinion of the Attorney General as to the constitutional right of the General Court to authorize cities and towns to pay to the widow or dependents of a deceased officer or employee thereof sums of money equivalent to the salary or compensation which would have been payable to such deceased officer or employee for a stated period following his decease.

I note that no bill accompanies this request. No concrete question is before me. I am therefore necessarily confined to a statement of the constitutional principle applicable to your inquiry.

Most of the public revenue is raised by taxation. Taxes cannot constitutionally be raised or spent for a purpose not public. Bill of Rights, art. X; Mass. Const., pt. 2d, c. I, § I, art. IV; pt. 2d, c. II, § I, art. XI; *Freeland* v. *Hastings*, 10 Allen, 570; *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Kingman* v. *Brockton*, 153 Mass. 255; *Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608; *Opinion of the Justices*, 211 Mass. 624; *Boston* v. *Treasurer and Receiver-General*, 237 Mass. 403. To tax or to expend taxes for a purpose not public takes the property of the taxpayer without due process of law, within the meaning of the Fourteenth Amendment. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1. Even public money not derived from taxation cannot be expended for a private purpose. *Opinion of the Justices*, 211 Mass. 624. The

reason for and justice of this rule is plain. Taxes are raised according to law, and, by compulsion of law, for purposes authorized by law. The Constitution limits both the power to tax and the power to expend. To take property from the citizen by force in a manner or for a purpose not authorized by the Constitution of the Commonwealth denies to him that protection from lawless force which is one of the fundamental purposes of government.

The precise question is whether a payment authorized under the circumstances disclosed in the order would be an appropriation for a private purpose. If that be the case, the Legislature cannot authorize such payment by cities and towns. *Mead* v. *Acton*, 139 Mass. 341; *Kingman* v. *Brockton*, 153 Mass. 255. In *Whittaker* v. *Salem*, 216 Mass. 483, the principal of a school, who had worked especially hard, devoted his entire vacation to installing furnishings in a new school building, and had become ill from overwork, was reappointed principal for another year and granted leave of absence for that year upon half pay. In holding that the grant of half pay for work not performed was beyond the power of the school committee, the court said, by Rugg, C.J.: —

> But they must keep within the broad principles which govern all public boards of officers. They are charged with the expenditure of moneys raised by taxation. They can vote it only for public uses. They have no right to devote it to private purposes. However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respecting a great variety of subjects and cannot be doubted. *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624.

In my opinion, the facts stated in the order are even less favorable to the widow and dependents than the facts of the Whittaker case. If the grant to Whittaker could not be sustained, I am unable to perceive any ground upon which payment of unearned salary to the widow or dependents, under the circumstances stated in the order, can be held to be for a public purpose. I am therefore constrained to advise you that an act authorizing cities and towns to make such payment would, in my opinion, be unconstitutional.

Yours very truly,

J. Weston Allen, *Attorney General.*

Civil Service — Fire Department — Appointment and Removal — Plymouth.

Acceptance of G. L., c. 31, § 48, applying the civil service classification to the permanent members of the Plymouth fire department, does not conflict with Spec. St. 1916, c. 84, § 1, authorizing said town to establish a fire department to be under the control and direction of one fire commissioner appointed by the selectmen.

April 18, 1922.

Payson Dana, Esq., *Commissioner of Civil Service and Registration.*

Dear Sir: — You request my opinion upon the question as to whether or not acceptance of the civil service law by the town of Plymouth conflicts with Spec. St. 1916, c. 84.

Spec. St. 1916, c. 84, § 1, reads as follows: —

The town of Plymouth is hereby authorized to establish a fire department, to be under the control and direction of one fire commissioner, who shall be appointed by the selectmen for a term of three years. He shall signify his acceptance in writing and shall receive no salary. He shall serve until his successor is appointed and may be removed for cause by the selectmen at any time after a hearing. The fire commissioner shall have charge of extinguishing fires in said town and the protection of life and property in case of fire, and he shall purchase and keep in repair all apparatus used by the fire department. He shall have and exercise all the powers and discharge all the duties conferred or imposed by statute upon boards of engineers for towns, and he shall appoint a chief of department and such other officers and firemen as he may think necessary, and may remove the same at any time. He shall have full and absolute authority in the administration of the department, shall make all rules and regulations for its control, shall report to the selectmen from time to time as they may require, and shall annually report to the town the condition of the department, with his recommendations relative thereto. In the expenditure of money the fire commissioner shall be subject to such limitations as the town may prescribe.

It appears that at a town meeting held on March 4, 1922, the town of Plymouth voted to accept G. L., c. 31, § 48, applying the civil service classification to the permanent members of the Plymouth fire department. This section reads as follows: —

A town which has not accepted this chapter or the corresponding provisions of earlier laws may accept this section as to its regular or permanent police and fire forces, or as to either of them. Acceptance

as to the fire force shall include regular members, and may include call members, and a town which has accepted this section or the corresponding provisions of earlier laws as to regular firemen may afterward accept it as to call firemen. In a town which accepts this section by vote of the town at a town meeting, or has accepted corresponding provisions of earlier laws, as to any or all of said forces, the members of the forces to which the acceptance relates shall be subject to this chapter and the rules made hereunder, and shall hold office until their death, resignation or removal; but members in office at the time of such acceptance shall continue in office without examination or reappointment.

G. L., c. 31, § 50, provides: —

Nothing in this chapter shall repeal, amend or affect any special provision of law relative to any city or town, or extend to any city or town any provision of law to which it is not now subject.

It is my opinion that the provisions of Spec. St. 1916, c. 84, relating to appointment and removal of a fire commissioner, chief of the department and such officers and firemen as may be thought necessary, are not so inconsistent with the civil service law or so unworkable as to involve either a surrender of powers granted to the town or an abatement or modification of any essential provision of said special act of 1916. In the matter of appointments of permanent members of the fire force, authority is limited only in that the selection of the appointees must be made from a list of competent persons duly certified by the Civil Service Commission, while in the matter of removals, under the Civil Service Rules formal charges must be preferred and an opportunity given for a public hearing. *Tucker* v. *Boston*, 223 Mass. 478. "To say that any city was to be exempted from the provisions of either the whole or any particular part of this legislation (civil service law) would be to frustrate the manifest intent of the Legislature." See *Logan* v. *Mayor and Aldermen of Lawrence*, 201 Mass. 506, 511.

Accordingly, I am of the opinion that G. L., c. 31, § 50, does not exempt the Plymouth fire department from the application of the civil service law.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Taxation — Due Process of Law — Appropriation of Public Money for Private Purpose — Authority of Town to reimburse the Victims of a Powder Explosion.

An appropriation of public money for a private purpose takes the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

The General Court cannot authorize a city or town to expend public money for a private purpose.

An incidental advantage to the public will not sustain a gift of public money for a purpose primarily private.

The General Court cannot constitutionally authorize a town to reimburse the victims of an explosion of a fireworks factory not caused by any act or default of the town.

Since article XXX of the Bill of Rights forbids the General Court to exercise judicial power, a recital in the bill that a fireworks factory was "illegally licensed by said town" is an expression of legislative opinion and not a determination that such was the case.

A bill authorizing a town to reimburse the victims of an explosion of a fireworks factory, "in consideration of the fact that said factory was illegally licensed by said town," would be unconstitutional in that it neither primarily promotes a public purpose nor discharges any moral but unenforceable obligation of the town, since the responsibility for the explosion (if any) rests upon those who caused it and not upon the town.

April 20, 1922.

Senate Committee on Bills in the Third Reading.

Gentlemen: — You have submitted for my consideration House Bill No. 1523, entitled "An Act authorizing the town of Randolph to pay certain claims for damages arising from an accident caused by an explosion at a fireworks factory located in said town." The material portion of this bill is as follows: —

Section 1. The town of Randolph may pay to the following named persons, to reimburse them for damages sustained as a result of an explosion occurring at a fireworks factory located in said town on April fifteenth, nineteen hundred and twenty-one, in consideration of the fact that said factory was illegally licensed by said town, the following sums of money: . . .

Then follows an enumeration of the sums to be paid to various designated persons. The words "in consideration of the fact that said factory was illegally licensed by said town" were inserted by amendment in the Senate. You inquire whether the bill, thus amended, would be constitutional.

Public money cannot be spent for any purpose for which it would be unconstitutional to levy a tax. Taxes are levied in order to raise money for public purposes. They are collected by force, if need be. The Legislature cannot appropriate, or authorize cities and towns to expend, public money for a private purpose. To do so would take the property of the taxpayer in violation of the rights guaranteed to him not only by the Constitution of this Commonwealth but also by the Fourteenth Amendment. *Freeland* v. *Hastings*, 10 Allen, 570; *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Kingman* v. *Brockton*, 153 Mass. 255; *Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608; *Opinion of the Justices*, 211 Mass. 624; *Boston* v. *Treasurer and Receiver-General*, 237 Mass. 403; *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *LaGrange*, 113 U. S. 1; Opinion, Attorney General to the President of the Senate, April 17, 1922.

The test which distinguishes a public from a private use is whether the expenditure primarily promotes a public rather than a private purpose. No matter how strong the appeal to sentiment or generosity may be, money cannot constitutionally be taken by taxation in order to make a gift to individuals. The principle is declared in no uncertain words by Chief Justice Rugg in *Whittaker* v. *Salem*, 216 Mass. 483, 485, where, in holding that a school committee had no power to give a school teacher, ill from overwork, a year's leave of absence upon half pay, he said: —

> But they must keep within the broad principles which govern all public boards of officers. They are charged with the expenditure of moneys raised by taxation. They can vote it only for public uses. They have no right to devote it to private purposes. However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respecting a great variety of subjects and cannot be doubted. *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624.

The bill in its original form would seem to be within *Lowell* v. *Boston*, 111 Mass. 454. In that case the court, in

holding unconstitutional an act authorizing a loan of public money upon mortgage to private individuals to aid them in rebuilding after the great fire of 1872, said, by Wells, J. (page 460): —

> The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

If it was beyond the power of the Legislature to authorize a loan of public money to fire victims, to aid them to rebuild, a gift of public money to reimburse those injured by an explosion can scarcely be sustained.

It remains to consider whether the Senate amendment has so changed the original bill as to make it constitutional. The amendment provides that the proposed payments are authorized "in consideration of the fact that said factory was illegally licensed by the town." I assume that the license referred to was the license required by G. L., c. 148, § 13, which provides: —

> No building shall be used for the manufacture of fireworks or firecrackers without a license from the aldermen or selectmen and a permit from the marshal.

The inquiry whether a license was "illegally" issued by the selectmen under this section raises a judicial question. The judicial power, that is, the power to hear and determine judicial questions, is not vested in the Legislature but in the

judicial branch. Indeed, article XXX of the Bill of Rights provides, in part: —

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: . . .

In view of this express prohibition, I am of opinion that the Legislature cannot finally determine, either as against the town or in favor of the claimants, whether this license was "illegally" issued. *Denny* v. *Mattoon*, 2 Allen, 361, 378; *Opinion of the Justices*, 237 Mass. 619, 623. If so, the Senate amendment must be regarded as a statement of opinion as to the conclusion of law to be drawn from facts not stated, rather than as an effective determination that the town has failed in any duty to the claimants.

I am not unmindful that there are authorities which hold that the legislative branch may authorize the payment of a just but unenforceable obligation. *United States* v. *Realty Co.*, 163 U. S. 427. In this class falls a statute authorizing repayment of expenses incurred in reliance upon a subsidy act which was repealed before the subsidy was earned (*United States* v. *Realty Co.*, *supra*); or a tax illegally collected (*United States* v. *Jordan*, 113 U. S. 418). It is unnecessary to determine whether the Legislature of this Commonwealth possesses so broad a power. In my opinion, the present act discloses no such obligation on the part of the town.

The fireworks factory was either lawful or it was not. If lawful, no semblance of responsibility for its continuance could rest upon the town. If unlawful, it constituted a nuisance, the liability for which rested upon those who maintained it rather than upon the town. *Oulighan* v. *Butler*, 189 Mass. 287; *Moeckel* v. *Cross & Co.*, 190 Mass. 280. Even assuming that the town might have maintained a bill in equity to abate the factory as a public nuisance (*Somerville* v. *Walker*, 168 Mass. 388), or that the Commonwealth might have proceeded by indictment (*Commonwealth* v. *Packard*, 185 Mass. 64), any person as to whom the factory constituted a private nuisance could also have had relief in equity. *Wright* v. *Lyons*, 224 Mass. 167. Under these circumstances, a contention that the citizens of the town can constitutionally be taxed in order to make good damage caused by the supposed wrongful acts of third parties presents a claim far weaker than

that overthrown in *Whittaker* v. *Salem*, 216 Mass. 483. On no theory can those who maintained the factory be relieved at public expense from liability to the claimants. *Woodward* v. *Central Vermont Ry. Co.*, 180 Mass. 599. Even if those who maintained the factory are financially unable to respond in damages, no just claim arises against the town. As matter of law, the town cannot be found to have caused the injury. *Horan* v. *Watertown*, 217 Mass. 185.

I am not unmindful that, when a statute is assailed in court, the court will make all rational presumptions in favor of constitutionality. *Perkins* v. *Westwood*, 226 Mass. 268, 271. What are rational presumptions necessarily depends upon the apparent purpose of the bill. *Lowell* v. *Boston*, 111 Mass. 454; *Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608. In other words, the court assumes that the Legislature intended to exercise only those powers conferred upon it by the Constitution, according to the true meaning and construction thereof. But this presumption cannot add to those powers or enlarge their scope. On the contrary, it adds, if anything can add, to the obligation assumed by each legislator under his oath of office "to discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution. . . ." Mass. Const., pt. 2d, c. VI, art. I. The test applicable to the present bill is whether the proposed expenditure primarily benefits the public rather than individuals. I assume that you desire me to advise you from the viewpoint of legislative duty, unaffected by any presumption, subject to which the court might ultimately examine this bill. So considering the bill, and giving due effect to the amendment added by the Honorable Senate, I am constrained to the conclusion that the proposed expenditure neither furthers a public purpose nor discharges any just but unenforceable obligation of the town, and therefore cannot constitutionally be authorized. *Lowell* v. *Boston*, 111 Mass. 454; *Woodward* v. *Central Vermont Ry. Co.*, 180 Mass. 599; *Whittaker* v. *Salem*, 216 Mass. 483.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Police Power — Statute forbidding One who deals in Refined Petroleum Products to sell or lease Distributing Apparatus upon Condition that it be used exclusively for his Own Products.

A statute which forbids a person engaged in producing or selling refined petroleum products to sell or convey distributing apparatus upon condition that it be used exclusively for the distribution of his own products would be constitutional.

A statute which forbids a person engaged in producing or selling refined petroleum products to lease or loan distributing apparatus upon condition that it be used exclusively for the distribution of his own products would conflict both with the Constitution of this State and with the Fourteenth Amendment.

As the manufacture and sale of refined petroleum products is a private business not affected with a public use, one engaged therein cannot constitutionally be compelled to permit distributing apparatus leased or loaned by him to a retailer to be used to distribute the products of competitors, either with or without compensation.

Good will is property, within the meaning of those constitutional guaranties which forbid the taking of property without due process of law.

Reasonable agreements for the protection of goodwill are within that liberty of contract guaranteed by the Constitution.

May 1, 1922.

Hon. Frank G. Allen, *President of the Senate.*

Dear Sir: — You inquire whether Senate Bill No. 47, entitled "An Act to prevent discrimination in sales or leases of apparatus for dispensing refined petroleum products," would be unconstitutional if enacted into law. The bill amends G. L., c. 93, by inserting a new section, the material part of which is as follows: —

Section 14A. No person, firm, association or corporation engaged in the production, refining, sale or distribution of refined petroleum products shall insert in or make it a condition or provision of any sale, lease, loan or other conveyance or letting of any machinery, apparatus or device for retailing, distributing or dispensing such products that the same shall be used for the sole and exclusive sale or distribution of the products of such person, firm, association or corporation. . . .

The bill further punishes violation by fine or imprisonment, and provides for specific enforcement of the prohibition by injunction or other appropriate remedy.

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

And further, full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and estab-

lish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; . . .

For convenience this power is termed the police power. Broadly speaking, it embraces regulations which promote the safety, health, morals and, in a limited sense, the public welfare. *Commonwealth* v. *Libbey*, 216 Mass. 356, 358; *Commonwealth* v. *Beaulieu* 213 Mass. 138, 141; *Opinion of the Justices*, 208 Mass. 619, 622; *Commonwealth* v. *Strauss*, 191 Mass. 545, 550; *Chicago & Alton R.R.* v. *Tranbarger*, 238 U. S. 67, 69, 77. On the other hand, both the State and Federal Constitutions place limits upon the exercise of the police power. The Fourteenth Amendment forbids any State to "deprive any person of life, liberty or property without due process of law," or to deny to any person the equal protection of the laws. The State Constitution contains provisions (Bill of Rights, arts. I, X, XII, XXIX) which guarantee life, liberty and property and the equal protection of the laws to the same extent as does the Fourteenth Amendment. *Opinion of the Justices*, 220 Mass. 627, 630; *Opinion of the Justices*, 211 Mass. 618; *Wyeth* v. *Cambridge*, 200 Mass. 474, 478; V Op. Atty. Gen. 484. Neither the police power nor the limitations thereon are capable of precise and exhaustive definition. The lines are pricked out by gradual approach and contact of decisions on opposing sides. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 112.

Statutes which prohibit monopolies and contracts in unreasonable restraint of trade are within the police power. *Commonwealth* v. *Strauss*, 191 Mass. 545; *Opinion of the Justices*, 193 Mass. 608; *Opinion of the Justices*, 211 Mass. 620; *Mallinckrodt Chemical Works* v. *Missouri*, 238 U. S. 41. See also *International Harvester Co.* v. *Missouri*, 234 U. S. 199. We have laws of that character upon our statute books. G. L., c. 93, §§ 1, 2, 14. Federal legislation forbidding similar practices in interstate commerce has been upheld. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451.

The line of power may be discerned from three concrete examples: A statute forbidding sales of goods, wares and merchandise upon condition that the purchaser shall not deal in the goods, wares and merchandise of others than the seller is valid, especially if it does not forbid exclusive agencies. *Commonwealth* v. *Strauss*, 191 Mass. 545. See also *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346. So, also, an act forbidding the sale or lease of any tool, implement, appliance or machinery upon condition that the purchaser or lessee shall not buy or use tools, implements, appliances, machinery, materials or merchandise of others than the seller or lessor is not invalid where due provision is made for the monopoly conferred by patents, and exclusive agencies are not forbidden. *Opinion of the Justices*, 193 Mass. 608. Again, section 3 of the Clayton Act, which forbids persons engaged in interstate commerce to lease machinery, supplies or other commodities, whether patented or unpatented, upon an agreement or condition that the lessee shall not use or deal in the machinery, supplies or commodities of competitors where the effect of such lease, agreement or condition may be substantially to lessen competition or tend to create a monopoly, has recently been held to forbid tying clauses inserted in leases of shoe machinery where the effect of those clauses substantially lessened competition and tended to create a monopoly in shoe machinery and supplies therefor. *United Shoe Machinery Corp.* v. *United States, supra.* Taking these cases together, it seems clear that the police power extends to prohibiting either leases or sales upon agreements or conditions which unreasonably limit competition or tend to monopoly.

There are likewise cases which to some extent indicate the line of limitation. Both the State Constitution and the Fourteenth Amendment forbid taking private property for private use even upon payment of full compensation. *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242, 247; *Salisbury Land & Imp. Co.*, v. *Commonwealth*, 215 Mass. 371; *Hairston* v. *Danville & Western Ry.*, 208 U. S. 598, 606; *Madisonville Traction Co.* v. *St. Bernard Traction Co.*, 196 U. S. 239, 251; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164

U. S. 403. Still less can private property be taken by law from one party and given to another without compensation. *Woodward* v. *Central Vermont Ry. Co.*, 180 Mass. 599; *Kingman* v. *Brockton*, 153 Mass. 255; *Whittaker* v. *Salem*, 216 Mass. 483; *Loan Association* v. *Topeka*, 20 Wall. 655; *Cole* v. *LaGrange*, 113 U. S. 1. Opinion, Attorney General to the President of the Senate, April 17, 1922. Although reasonable burdens fairly incident to the transaction of its business or the discharge of its duties may be placed upon a railroad or other business affected with a public use, even a railroad cannot be required to furnish to the public special facilities not reasonably required for the performance of its public duties, such as unnecessary spur tracks (*Missouri Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 196, *Washington* v. *Fairchild*, 224 U. S. 510); unnecessary track scales (*Great Northern R.R.* v. *Minnesota*, 238 U. S. 340); or a site for a grain elevator (*Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403). And while reasonable interchange of business between connecting railroads may be compelled, a statute which in effect compels a railroad to furnish car and terminal facilities to a competitor cannot be sustained. *Louisville & Nashville R.R.* v. *Central Stock Yards Co.*, 212 U. S. 132. If even a railroad which is affected with a public use cannot be compelled to furnish unnecessary facilities to the public or special facilities to a competitor, it seems plain that one engaged in private business cannot be required to do so.

The provisions of the proposed bill divide into two classes, — those which govern sale or conveyance, and those which govern leases or loan. One who sells or who in effect parts with final control of personal property may be forbidden to attach conditions to its subsequent use. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502; *United States* v. *A. Schrader & Son, Inc.*, 252 U. S. 85; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; but *cf. Garst* v. *Hall & Lyon Co.*, 179 Mass. 588. Devices designed to conceal the fact that the transaction is in effect a sale, or to reserve a nominal control which does not exist in fact, cannot avail to support what are in truth restraints upon use or alienation. I am therefore of opinion that the proposed bill would not be unconstitutional as applied to sales of the apparatus in question.

The application of the bill to leases or loans of vending

apparatus presents a different question. Refined petroleum products are inflammable. Some are explosive. The bill recognizes that special apparatus is required to distribute them with safety to the public. The form of such apparatus and the safeguards to be taken are to some extent prescribed by law. It is common knowledge that special tanks, pumps, tank wagons and cans are used; that the refiners identify their product by placing their brands or names upon such apparatus; and that such brands or names are relied on by the public as a guarantee of the genuineness of the product within. In this way some manufacturers have won a good-will of large commercial value. Moreover, the cost of such apparatus is in some instances considerable. The precise question, therefore, is whether the Legislature has power to forbid a refiner to lease or loan such vending apparatus upon condition that it shall be used exclusively to sell his own products.

The condition which this bill forbids does not restrict the retailer either with respect to the refiners with whom he shall deal or the products which he shall sell. Even if enforced to its full extent, it leaves the retailer free to procure apparatus from as many refiners as he chooses, and to sell any products which he sees fit. The validity of such a condition under the sweeping provisions of the Clayton Act has been passed on by the Circuit Court of Appeals of the Second, Sixth and Seventh Circuits, and all three courts have upheld it upon the ground that it neither substantially lessens competition nor tends to monopoly. *Standard Oil Co.* v. *Federal Trade Commission*, 273 Fed. 478; *Canfield Oil Co.* v. *Federal Trade Commission*, 274 Fed. 571; *Auto Acetylene Light Co.* v. *Prest-O-Lite Co.*, 276 Fed. 537; *Sinclair Refining Co.* v. *Federal Trade Commission*, 276 Fed. 686. At most, it forbids the retailer to use the vending facilities, and, possibly, the goodwill, of one refiner to sell the goods of another, to the possible deception of the public. To such a condition cases upholding the constitutionality of statutes which forbid leases which restrain trade or tend to monopoly cannot, in my opinion, apply.

The manufacture, sale and distribution of refined petroleum products is not charged with a public use. It is private business. One engaged in private business cannot be required by law to furnish selling facilities to another either with or without compensation. Such a statute would take

private property for private use without due process of law. *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern R.R. Co.* v. *Minnesota*, 238 U. S. 340; *Louisville & Nashville R.R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132. In my opinion, to forbid a private manufacturer to lease selling apparatus upon condition that it shall not be used to sell the goods of others not only takes his property in such apparatus without due process of law, but also denies that reasonable liberty of contract which is guaranteed by both State and Federal Constitutions. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Coppage* v. *Kansas*, 236 U. S. 1, 14; *Commonwealth* v. *Boston & Maine R.R.*, 222 Mass. 206, 208; *Opinion of the Justices*, 220 Mass. 627, 630; V Op. Atty. Gen. 484.

Another aspect of the matter must not be overlooked. Frequently the vending apparatus bears a name or brand which purports to identify the goods sold therefrom. Customers may prefer one brand to another. Such demand or preference is known as goodwill. To a qualified extent it is property which may be protected by reasonable agreements. *Oregon Nav. Co.* v. *Winsor*, 20 Wall. 64; *Old Corner Book Store* v. *Upham*, 194 Mass. 101. Equity will enjoin A from imitating the brand of B, and thereby appropriating B's goodwill to himself by deceiving the public into buying his goods as and for the goods of B. *George G. Fox Co.* v. *Glynn*, 191 Mass. 344. Putting aside the manifest injury to the public, it seems plain that a statute which forbids a manufacturer to require that his own goods alone shall be sold under his name or brand not only appropriates his goodwill to others without compensation, but also denies to him liberty to make an agreement which reasonably protects his fair name and the business reputation of his goods.

I am therefore constrained to advise you that, as applied to leases or loans of any machinery, apparatus or device for retailing, distributing or dispensing petroleum products, the proposed bill would, in my opinion, be unconstitutional, if enacted.

Yours very truly,

J. Weston Allen, *Attorney General.*

Department of Labor and Industries — Appeal from Ruling of Director of Standards — Standard Clinical Thermometers.

A person aggrieved by a ruling of the Director of Standards under G. L., c. 98, §§ 9–14, has no right of appeal from such ruling to the Commissioner of Labor and Industries, as the head of the department, or to the full board.

As to whether the Commissioner of Labor and Industries, of his own motion, may review the decisions of the Director of Standards, *quære*.

A third party cannot raise a question of conflict of jurisdiction or powers between executive and administrative departments, or officers or boards thereof, so as to bring a situation within the provisions of G. L., c. 30, § 5, where no conflict actually exists between such departments.

May 2, 1922.

E. Leroy Sweetser, Esq., *Commissioner of Labor and Industries.*

Dear Sir: — You have requested my opinion upon certain questions respecting the powers, duties and responsibilities of the Commissioner of Labor and Industries in relation to the conduct of the Division of Standards; more specifically, in a case where the Director of Standards, acting under that portion of G. L., c. 98, relating to the examination of clinical thermometers, has made a ruling which the manufacturer contends is wrong. You ask, first, whether such manufacturer has the right to appeal either to the Commissioner, as the head of the department, or to the full board, and second, whether the Commissioner, as executive and administrative head of the department, has power, upon his own motion, to review any decision the Director of Standards has made concerning the standard set for the sale of clinical thermometers in this Commonwealth, or any other matter concerning the same.

The powers and duties of the Director of Standards, relating to clinical thermometers, are prescribed by G. L., c. 98, §§ 9–14. They contain no provision for appeal by any person aggrieved, either to the Commissioner or to the full board. If the Legislature had intended to provide for such appeal it could easily have done so. The express provisions for appeal in certain other cases (*cf.* G. L., c. 149, § 9), coupled with their omission here, constrain me to the conclusion that no right to appeal to the Commissioner or to the full board has been conferred. The question is not presented, and I express no opinion, as to whether and to

what extent the decision of the Director of Standards is subject to judicial review.

With respect, however, to the second part of your inquiry I do not now determine the question as to whether the Commissioner has power of his own motion to review the acts of the Director of Standards. That necessarily involves a conflict of jurisdiction, as to which our statutes specifically prescribe the tribunal to determine such questions.

G. L., c. 30, § 5, provides: —

> In all cases where a question arises between executive or administrative departments, or officers or boards thereof, as to their respective jurisdictions or powers, or where such departments, or officers or boards thereof, issue conflicting orders or make conflicting rules and regulations, the governor and council may, on appeal by any such department or by any person affected thereby, determine the question, and order any such order, rule or regulation amended or annulled; provided, that this section shall not deprive any person of the right to pursue any other lawful remedy. The time within which such appeal may be taken shall be fixed by the governor and council.

It is clear from this section that it is intended to apply broadly to two situations: first, to a situation where there is a conflict between departments, or officers or boards thereof; and second, where conflicting rules or regulations have been made. So far as is disclosed by the facts upon which your present inquiry is based, neither of these situations obtains. A determination of that question must necessarily be deferred until the time when the question actually arises, and before the tribunal authorized to settle the issue. It is quite clear that a third person or party cannot raise the question of conflict to bring the situation within the provisions of the section last cited, where no conflict actually exists.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Sheppard-Towner Maternity and Infancy Act — Extent of General Welfare Clause of Federal Constitution — Violation of Rights reserved to States — Right of State to bring Suit.

The purpose and effect of the Federal Constitution was to secure a Federal government with limited and enumerated powers, for national purposes, reserving all other powers to the States and the people.

The power of local self-government, commonly called the police power, was reserved to the States by the Tenth Amendment.

The so-called "general welfare" clause of the Federal Constitution (art. I, § 8) is not a substantive grant of power but a qualification of the power "to lay and collect taxes, duties, imposts and excises."

The act of Congress approved Nov. 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," commonly known as the Sheppard-Towner Act, purporting to establish a system by which States desiring to secure the benefits of promised appropriations are required to submit plans for carrying out the provisions of the act, to make appropriations to match Federal appropriations and to co-operate with Federal authorities in the administration of the act, is an incursion into the field of the local police power reserved to the States by the Tenth Amendment, and is unconstitutional.

The power to declare an act unconstitutional can be exercised only when proper parties are before the court, in an actual controversy, involving the constitutional question in the determination of the rights of litigants.

It seems probable that the Commonwealth may maintain a suit in equity in the Supreme Court of the United States to test the constitutionality of the Sheppard-Towner Act, on the ground either that its own rights or those of its taxpaying citizens are invaded, the issue being plainly justiciable.

In such case Federal officials charged with the duty of administering the act may properly be made defendants, and an injunction may be sought against them.

The passage of an act by the General Court accepting the provisions of the Sheppard-Towner Act would place the Commonwealth in a less favorable position to contest its validity.

May 2, 1922.

To the Honorable Senate and House of Representatives.

Gentlemen: — You have requested my opinion on the following questions: —

1. Is the act of Congress, approved Nov. 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," within the constitutional powers of the Federal government?

2. Has the Commonwealth of Massachusetts any right, as a sovereign State, to question the constitutionality of said act?

3. Would the Commonwealth of Massachusetts, by the acceptance of said act, waive its rights as a sovereign State, if such rights exist, to contest the constitutionality of said act before the courts of the United States?

4. If, in your opinion, said act is unconstitutional, what procedure can the Commonwealth adopt to raise the question of constitutionality?

It is a matter of considerable delicacy for a State official to venture to pass upon the validity of acts of Congress and the rights of sovereign States before the Supreme Court of the United States, and it is with some hesitation that I undertake to comply with your request. It would seem, however, that it is within the statutory duty imposed upon me, as that duty has been construed by my predecessors in office, to give you an opinion upon questions of law, when such opinion is requested, in order that you may be informed as to your powers and duties with respect to pending matters of legislation.

I. The act of Congress, approved Nov. 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," commonly known as the Sheppard-Towner Act, authorizes annual appropriations "to be paid to the several States for the purpose of co-operating with them in promoting the welfare and hygiene of maternity and infancy." It contains provisions substantially as follows: —

It authorizes the appropriation, for the purposes of the act, of $480,000 for the current year and $240,000 for subsequent years, for a period of five years, to be equally apportioned among the several States, and an additional sum of $1,000,000 a year, for a period of five years, to be apportioned $5,000 to each State and the balance among the States in proportion to their population, with a proviso that no payment out of the additional appropriation shall be made in any year to any State until an equal sum has been appropriated by such State.

The act creates a "Board of Maternity and Infant Hygiene," with certain supervisory powers. It provides that the "Children's Bureau of the Department of Labor" shall be charged with the administration of the act, and gives the Children's Bureau all necessary powers to co-operate with the States in such administration, for which purpose the Children's Bureau may deduct an amount not exceeding 5 per cent of the additional appropriations in any year.

Every State is required, in order to secure the benefits of the appropriations authorized, through its Legislature to accept the provisions of the act and to designate or authorize the creation of a State agency to co-operate with the Children's Bureau.

Any State desiring to receive the benefits of the act is required by its agency to submit to the Children's Bureau detailed plans for carrying out the provisions of the act within such State, such plans to be subject to the approval of the board.

Within sixty days after any appropriation under the act, the Children's Bureau is directed to make the apportionment provided for, to certify to the Secretary of the Treasury the estimated expense of administration, and to certify to the Secretary of the Treasury and to the treasurers of the various States the amount apportioned to each State. Within the same period and from time to time thereafter the Children's Bureau is directed to ascertain the amounts appropriated by the several States and to certify to the Secretary of the Treasury the amount to which each State is entitled by reason of such appropriation.

Each State agency co-operating with the Children's Bureau is required to make such reports concerning its operations and expenditures as shall be prescribed by the Children's Bureau, which may, subject to the supervision of the board, withhold the certificate authorizing payment to any State whenever it is determined that the agency thereof has not properly expended the money paid to it or the moneys required to be appropriated by the State for the purposes of the act, an appeal being given from such determination to the President of the United States.

Thus, in effect a system is created by which appropriations are to be made by the Federal government and the States which accept the provisions of the act, and plans are to be submitted to Federal boards, the nature of which appears to be wholly undetermined except that they must have some relation to the "welfare and hygiene of maternity and infancy" and are subject to certain restrictions stated in the act. Those plans are to be administered by officials, agents and representatives of the Children's Bureau in co-operation with the different State agencies, and control over the conduct of the State agencies is vested in the Children's Bureau and the board by the provision authorizing the withholding

of the Federal appropriation in cases where it is determined as to any State that Federal or State funds have not been properly expended.

The purpose and effect of the Federal Constitution was to secure a Federal government with limited and enumerated powers, for national purposes, reserving all other powers to the States and the people. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405; *United States* v. *Cruikshank*, 92 U. S. 542, 549–551; *Kansas* v. *Colorado*, 206 U. S. 46, 81. The powers expressly granted to Congress, including the power to make all laws necessary and proper for carrying the powers enumerated into execution, are all stated in section 8 of article I of the Constitution. All powers not granted to the United States by the Constitution are reserved by the Tenth Amendment to the States or the people. *United States* v. *Cruikshank*, *supra*.

The powers given to the Federal government are only those which are necessary to the existence and effective maintenance of the nation. There is no grant of power to Congress to regulate the internal affairs of the States (excepting that given by the Eighteenth Amendment). The police power is a necessary part of the sovereign powers of the States, and was reserved to them by the Tenth Amendment. Each State has the right and duty to provide for the general welfare of its people, and in those respects the authority of the State is complete, unqualified and exclusive. *New York* v. *Miln*, 11 Pet. 102, 139; *In re Rahrer*, 140 U. S. 545, 554, 555; *Keller* v. *United States*, 213 U. S. 138; *Hammer* v. *Dagenhart*, 247 U. S. 251, 274–276; The Federalist, No. 45.

The present act vests in the Federal government certain powers relating to maternity and infancy. These matters manifestly fall within the scope of the police power. Most of the expense will be borne by a small minority of the States, while a majority of the States will receive a corresponding benefit for which they do not pay. If the United States possesses no police power, as the Supreme Court of the United States has often held, it would seem that this act is an attempt to usurp an authority reserved to the States, and to exercise it at the expense of a minority of them, of which this Commonwealth is one.

It appears from the debates in Congress that the proponents of this measure attempt to support it upon the ground that it is a provision for the general welfare of the people of the

United States. The words "general welfare" occur twice in the Constitution, once in the preamble and once in article I, section 8.

The preamble is as follows: —

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The preamble, however, contains no grant of power. It is a mere statement of the purposes effected by the Constitution itself. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 22; Story on the Constitution, § 462.

I pass, therefore, to a consideration of article I, section 8, of which the first clause is as follows: —

> The congress shall have power . . . to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

It is plain that the words "to pay the debts and provide for the common defence and general welfare of the United States" are not a substantive grant of power, but a qualification of the first-enumerated power "to lay and collect taxes, duties, imposts and excises." Argument is not needed to support this proposition because the authority for it is conclusive.

The history of the adoption of this clause is given in George Ticknor Curtis's Constitutional History of the United States, vol. I, pp. 518–521, as follows: —

In the first draft of the Constitution the power to tax was stated in what was there article VII, section 1, in the following words (5 Elliot's Debates, p. 378): —

> The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises.

It was thought that there should be some restraint on the revenue power, with a view to prevent perpetual taxes of any kind. The matter was referred to a committee of detail, which reported the following addition (*Ibid.* p. 462): —

For payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than years.

This was referred to a grand committee, which introduced an amendment making the whole clause read as follows (*Ibid.* pp. 506, 507): —

The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States.

This amendment was unanimously adopted. The provision for uniformity was added later. 5 Elliot's Debates, p. 543.

In *Loughborough* v. *Blake*, 5 Wheat. 317, 318, Chief Justice Marshall said: —

The eighth section of the first article gives to Congress the "power to lay and collect taxes, duties, imposts and excises," for the purposes thereinafter mentioned.

Again, in *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, 448, 449, the court said: —

The revenue of the United States is intended by the Constitution to pay the debts and provide for the common defence and general welfare of the United States; to be expended, in particulars, in carrying into effect the laws made to execute all the express powers, "and all other powers vested by the Constitution in the government of the United States."

In *Ward* v. *Maryland*, 12 Wall. 418, 428, the power to tax was referred to as existing "by virtue of an express grant for the purpose; among other things, of paying the debts and providing for the common defence and general welfare."

In *United States* v. *Boyer*, 85 Fed. 425, it was held that the "general welfare clause" did not confer any distinct and substantial power on Congress to enact any legislation, but constituted a limitation upon the taxing power.

The text writers also are agreed that the words "to pay the debts and provide for the common defence and general welfare of the United States" are to be construed as if they were preceded by the words "in order," or similar words amounting to a declaration of purpose. Story on the Con-

stitution, §§ 906–911; Miller on the Constitution of the United States, pp. 229–231.

The form of the Constitution lends strong support to this construction. The document in the rolls of the Department of State shows that in article I, section 8, each of the enumerated powers is numbered, from 1 to 18 inclusive, the first being the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;" and the second the power "to borrow money on the credit of the United States;" and that each power is separated by a semi-colon. Curtis's Constitutional History of the United States, vol. I, pp. 728 note, and 731.

While it seems to be definitely settled that the words "to pay the debts and provide for the common defence and general welfare of the United States" are not a substantive grant of power, there has been from the time the Constitution was adopted a controverted question regarding the interpretation of those words and their bearing on the power of Congress to appropriate money. Hamilton held that Congress had a power to appropriate as broad as the power to tax, and that the revenues of the United States could be appropriated for any public purpose connected with the general welfare of the United States. This doctrine was stated by Hamilton in his Report on Manufactures in 1791. It was adopted and followed by Story (§§ 975–992), and by President Monroe in his message respecting the bill for the repairs of the Cumberland Road, May 4, 1822. On the other hand, Madison held that the general welfare clause is merely descriptive of and limited by the specific grants of power to Congress contained in section 8, and that the power to appropriate money is also confined to the enumerated powers. Madison expressed this view in the Federalist, No. 41, and the statement there made must be presumed to have had some effect in obtaining the ratification of the Constitution by the States. He renewed the same statement in his message vetoing the bill for internal improvements, March 3, 1817, and in a letter to Speaker Stevenson, dated Nov. 27, 1830. Madison's view was supported and emphasized by Jefferson, as stated in his Opinion on the Constitutionality of a National Bank, Feb. 15, 1791. See Tucker's Constitution of the United States, §§ 222–231.

The view that the general welfare clause is merely descriptive of the substantive grants of power which follow it in section 8 is supported by the circumstance that provisions for the common defence are contained in the grants of power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, and to provide for organizing, arming and disciplining the militia, while the other powers granted in that section are clearly provisions for the general welfare of the United States.

The question as to the extent of the general welfare clause in its application to appropriations of money was expressly reserved by the Supreme Court in *United States* v. *Realty Co.*, 163 U. S. 427, 440, where the court said: —

> It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises.

But the question which I have to determine does not depend for its answer upon a solution of the controversy concerning the limits of the power of Congress to appropriate money. In fact, the Sheppard-Towner Act makes no appropriation of money. It merely purports to authorize sums to be appropriated, thereby announcing, it seems, an intention to appropriate at some future time. It does, however, establish a system by which States desiring to secure the benefits of promised appropriations are required to submit plans for carrying out the provisions of the act to designated Federal authorities for their approval, to make appropriations to match Federal appropriations, and to co-operate with the Federal authorities in the administration of the act, subject to the supervision of those authorities, who, if they determine that either Federal or State funds have not been properly expended, may withhold the Federal appropriation. This, in my judgment, is not an appropriation bill, but an attempted exercise of power over the subject of maternity and infancy, and thus an incursion into the field of the local police power, reserved to the States by the Tenth Amendment. The objections to the act go further, in that the proposed appro-

priations are not *general* in their application, but are confined to those States which accept the act and appropriate their own funds to be used for its purposes. Hamilton, in his Report on Manufactures, cited above, although contending for the broad power of appropriation, says that "the object to which an appropriation of money is to be made must be *general* and not *local*." For this reason the appropriations, if made, in my opinion, would not be for the "general welfare of the United States," even if those words are given the broadest signification. Indeed, it is yet to be determined that Congress has the power to appropriate to the States, according to any method of apportionment, revenues raised from the people of the United States for national purposes.

If the powers attempted to be exercised by the Sheppard-Towner Act are outside the powers conferred upon Congress by the Constitution and within the field of the powers reserved to the States, the act is not made constitutional and valid by the circumstance that those powers will only be exercised in or with respect to those States whose Legislatures accept it; for Congress cannot assume and the State Legislatures cannot yield the powers reserved to the States by the Constitution. They can only be granted to the Federal government by an amendment to the Constitution. On this precise subject President Monroe, in his message vetoing the Cumberland Road bill, referred to above, holding that Congress had not the power, even with the consent of the States affected, to establish turnpikes with gates and tolls as internal improvements, said: —

> I am of opinion that Congress do not possess this power; that the states, individually, cannot grant it; for, although they may assent to the appropriation of money within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution, and in the mode prescribed by it.

In reply to your first question, I am therefore constrained to say that I am of opinion that the act referred to is not within the constitutional powers of the Federal government.

II. Your second question, whether the Commonwealth of Massachusetts has any right as a sovereign State to question the constitutionality of the act, and your fourth question, what procedure can be adopted to raise the question of constitutionality, will be considered together.

It is well established that any person whose rights are directly affected by an act of Congress may question its constitutionality before the court, and that it is the court's duty, in a proper case, where an act of Congress infringes upon the provisions of the Constitution, to declare that act unconstitutional and void. *Vanhorne's Lessee* v. *Dorrance,* 2 Dall. 304, 308, 309; *Marbury* v. *Madison,* 1 Cranch, 137; *M'Culloch* v. *Maryland,* 4 Wheat. 316, 400, 401.

But the right to declare an act unconstitutional can be exercised only when proper parties are before the court, in an actual controversy, involving the constitutional question in the determination of the rights of litigants. *Liverpool, etc., Steamship Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *Muskrat* v. *United States,* 219 U. S. 346, 361; *Fairchild* v. *Hughes,* 258 U. S. 126.

The most direct method of testing the constitutionality of the Sheppard-Towner Act, if not the only method, is by proceedings in equity against those officials of the Federal government who are acting or preparing to act to carry its provisions into effect. By U. S. Const., art. III, § 2, the Supreme Court has original jurisdiction of all cases in which a State shall be a party. The inquiry, therefore, is, in the first instance, whether the Commonwealth may maintain such a suit in the Supreme Court as party plaintiff, and secondly, whether the suit will lie against Federal officials as parties defendant.

1. There are instances of suits brought by States which the Supreme Court has declined to entertain, on the ground that they called upon the court to determine questions which were political and not judicial. The most noteworthy of these cases is *Georgia* v. *Stanton,* 6 Wall. 50, where the State brought an original bill to restrain the Secretary of War and other officers of the government from carrying into effect the so-called Reconstruction Acts. The court held that the rights for which protection was sought were rights of sovereignty, that no rights of persons or property were being infringed, and that the questions were political; and they dismissed the bill for want of jurisdiction. The decision, however, seems to go no further than *Luther* v. *Borden,* 7 How. 1, and *Pacific States Teleph. & Teleg. Co.* v. *Oregon,* 223 U. S. 118, holding that it is for Congress and not for the court to decide what is the established government in a

State, and to enforce the constitutional guaranty of a republican form of government, the questions involved being political and beyond the judicial power.

On the other hand, the court has from early times entertained suits to determine which of two States had political jurisdiction over disputed territory, since such a controversy is clearly justiciable. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 736–738; *Virginia* v. *West Virginia*, 11 Wall. 39. More recently, the jurisdiction has in many cases been sustained in suits by States to enforce their sovereign rights, and as *parens patriæ* or representatives of their citizens.

The question whether a State may sue as representative of its citizens was presented but not settled in *Louisiana* v. *Texas*, 176 U. S. 1, 19. But in later decisions this question has been answered in the affirmative, and the distinction made in *Georgia* v. *Stanton*, 6 Wall. 50, between rights of property and rights of sovereignty has been disregarded. These decisions have made it plain that suits by States will lie for the protection both of their own sovereign rights and of the personal and property rights and welfare of their citizens generally. On these grounds suits have been sustained to restrain interference with the flow of rivers and water supply and pollution of the air. Jurisdiction is accepted broadly wherever the controversy is justiciable in its nature, in recognition of the fact that the States, in joining the Union, relinquished the right they would otherwise have had to seek remedies by negotiation or force, that there should be some remedy for the settlement of disputes, and that one may be found in the constitutional provisions giving the Supreme Court jurisdiction of suits by States. *Missouri* v. *Illinois & Sanitary District of Chicago*, 180 U. S. 208, 241; *Kansas* v. *Colorado*, 185 U. S. 125; 206 U. S. 46, 83, 84, 99; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237; *Virginia* v. *West Virginia*, 220 U. S. 1, 27; *New York* v. *New Jersey*, 256 U. S. 296, 301, 302.

The question whether an act of Congress is in violation of the reserved powers of the States, and therefore unconstitutional, seems clearly to be justiciable, and the Supreme Court has so decided in *Hammer* v. *Dagenhart*, 247 U. S. 251. In that case the court held that a United States district attorney should be enjoined from enforcing an act of Congress prohibiting the transportation in interstate com-

merce of products of child-labor, on the ground that the law was an invasion of the local police power reserved to the States by the Tenth Amendment.

Where an act of Congress encroaches upon the rights reserved to the States by the Tenth Amendment, any State affected thereby must have the right to resort to some tribunal for the protection of those rights, or be without remedy. That the States themselves are entitled to such protection by the judicial power, and that it is the duty of the court, in a proper case, to hold such an act unconstitutional, and to grant relief, has several times been declared. *Ableman* v. *Booth*, 21 How. 506, 519, 520; *Gordon* v. *United States*, 117 U. S. 697, 700, 701, 705; *Matter of Heff*, 197 U. S. 488, 505; *South Carolina* v. *United States*, 199 U. S. 437, 448.

If, for the reasons stated, the Sheppard-Towner Act is unconstitutional as representing an attempt by Congress to exceed its constitutional powers and to usurp the rights reserved to the States by the Tenth Amendment, it follows that the Commonwealth, in a proper case, can raise the question of constitutionality by bringing suit in the Supreme Court, if and when it is affected by the act.

The act does not confer upon the Federal agencies created or designated by it any authority which operates in Massachusetts unless and until its Legislature accepts the act and makes the required appropriation. If the Legislature purports to accept the act, the right of the Commonwealth subsequently to complain that the act is unconstitutional, as hereafter stated in reply to your third question, will be open to serious question. If the act is not accepted and does not become operative within the Commonwealth, there would be no encroachment upon the police power of Massachusetts if the act should be put into effect in other States.

It does not follow, however, that the Commonwealth is not affected if the act is put into effect in other States. The grants to such States are to be paid out of the Federal treasury. That treasury is replenished by internal revenue taxes paid by the people of the several States. It has been estimated that 5.66 per cent of those taxes are paid by the citizens of Massachusetts. If Massachusetts can and does accept the act it has been estimated that the return to it thereunder will be less than half the amount collected from its citizens. If Massachusetts does not accept the act, its citizens will be taxed in order to carry into effect an uncon-

stitutional law in other States. Assuming that a Federal tax, otherwise lawful, imposed to raise revenues for lawful purposes does not become unconstitutional because it taps and diminishes a source of revenue available to the States (*Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Co.* v. *Eisner*, 256 U. S. 345), it does not follow that a State whose revenues are diminished by Federal taxation imposed in order to execute an unconstitutional law is not so affected thereby that it cannot attack that expenditure in the Supreme Court of the United States. If the State is without remedy it is under the dilemma of consenting to be stripped of a power reserved by the Tenth Amendment, in order to share in such unconstitutional benefits as Congress may choose to accord, or else of bearing unheard and without redress a part of the burden of conferring such alleged benefits on other States.

The right of Massachusetts to bring suit may be supported upon the further ground that the rights of its taxpaying citizens are invaded. It is doubtful whether taxpayers can maintain suits in their individual capacity to restrain an unconstitutional expenditure. See *Bradfield* v. *Roberts*, 175 U. S. 291; *Millard* v. *Roberts*, 202 U. S. 429, 438. There is, however, in my opinion, strong argument for the view that the State can present the question on their behalf as *parens patriæ*, following the analogy of the nuisance cases already cited. If neither the State nor the taxpayer can sue, then there can be no remedy against such an unconstitutional exercise of power by Congress, although the issue is plainly justiciable.

The novelty of the question prevents a more definite answer to your inquiry. It is for the Legislature, in its wisdom, to determine whether a question of such vital importance to the State, involving, as it does, a principle capable of indefinite application in the broad and paternalistic field of social welfare, should not be submitted for adjudication to our highest court.

2. It remains to be considered whether suit may be brought against the Federal officials whose duty it is to administer the act.

In *Mississippi* v. *Johnson*, 4 Wall. 475, the Supreme Court denied leave to file a bill against President Johnson to restrain him from putting the Reconstruction Acts into force. In *Georgia* v. *Stanton*, 6 Wall. 50, the Supreme Court dismissed

a similar bill, as already stated. The circumstances which led to the passage of these bills, which were designed to create a temporary government for the seceded States, and the effect of later decisions, afford ground for belief that those decisions would not govern in the present case.

Later cases hold that suit will lie where rights of property are unlawfully invaded by Federal officers, and where the United States is not a defendant or a necessary party. *United States* v. *Lee*, 106 U. S. 196, 204–208; *Noble* v. *Union River Logging R.R. Co.*, 147 U. S. 165, 171, 172; *Belknap* v. *Schild*, 161 U. S. 10, 18; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Lane* v. *Watts*, 234 U. S. 525, 540. Furthermore, the court has frequently held broadly that State officers clothed with some duty in regard to the enforcement of the laws of the State may be enjoined from proceeding under an unconstitutional statute which they are about to enforce to the plaintiff's injury, and that a suit for such injunction cannot be regarded as a suit against the State. *Osborn* v. *United States Bank*, 9 Wheat. 738, 846, 857; *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Smyth* v. *Ames*, 169 U. S. 466, 518, 519; *Ex parte Young*, 209 U. S. 123, 149, 155, 156; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Truax* v. *Raich*, 239 U. S. 33, 37; *Greene* v. *Louisville & I. R.R. Co.*, 244 U. S. 499, 506, 507. Recently this same principle has also been extended to suits against Federal officers seeking to restrain them from acting under statutes alleged to be unconstitutional. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619, 620; *Wilson* v. *New*, 243 U. S. 332; *Hammer* v. *Dagenhart*, 247 U. S. 251. Federal jurisdiction does not depend on diversity of citizenship, but exists because such suits arise under the Constitution or laws of the United States. *Ex parte Young*, 209 U. S. 123, 143–145.

In the *National Prohibition Cases*, 253 U. S. 350, two of the cases were suits by the States of Rhode Island and New Jersey against the Attorney General and the Commissioner of Internal Revenue, seeking to have the Eighteenth Amendment and the Volstead Act declared unconstitutional and void, and to enjoin the enforcement of the act. The main ground on which unconstitutionality was claimed was that the amendment and the act constituted an interference with the sovereign rights of the States to govern their internal affairs, that is, the local police power. Original bills in each

of the two cases were permitted by the court to be filed (252 U. S. 570), and no question of jurisdiction was raised or reserved in the opinion by which all the suits were dismissed on the merits.

The opinion in the recent case of *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, contains an intimation that the original jurisdiction of the court over suits where States are parties may be somewhat narrow, but the decision of the case goes on the ground that necessary parties were not before the court.

I conclude, therefore, that assuming that the Commonwealth may bring the suit as party plaintiff, the fact that the defendants would be Federal officials would not defeat it.

III. Your third question is whether the Commonwealth by accepting the act would waive any right it may have to contest the constitutionality of the act before the courts of the United States.

The act provides that any State, in order to secure the benefit of Federal appropriations, must accept the provisions of the act, designate the State agency with which the Children's Bureau is to co-operate, and submit to the Children's Bureau detailed plans for carrying out the provisions of the act within the State. It contemplates also appropriations by the State to match Federal appropriations. These provisions, it seems to me, must be construed as a proposal for a contract with the several States which, when accepted by any State, would constitute an agreement by the State to be bound by the terms of the act, if such an agreement could be made. Whether the State, acting by its Legislature alone or in any manner other than that provided by the Constitution itself, can contract away its sovereign rights is a matter of grave doubt. But apart from any question of the validity of such a contract, there would appear to be an inconsistency in accepting the benefits of the act and then bringing suit to avoid its obligations and effect.

I am therefore of opinion that the passage of an act by the General Court accepting the provisions of the Sheppard-Towner Act would place the Commonwealth in a less favorable position to contest its validity.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Eminent Domain — Taking of Picture exhibited in a Public Library upon a Public Charitable Trust — Public or Private Purpose.

The power to take private property for public use, upon payment of reasonable compensation, extends to all property within the jurisdiction of the Commonwealth, including personal property, and can neither be bargained away by statute nor defeated by private contract.

A "taking" by eminent domain of private property which is subject to a contract does not "impair" that contract, within the meaning of U. S. Const., art. I, § 10, even though further performance of that contract is defeated by such "taking."

Private property cannot be "taken" by eminent domain for a private purpose, even upon payment of reasonable compensation.

A statute which authorizes a "taking" by eminent domain for a public purpose or for a private purpose is unconstitutional.

A picture held and publicly exhibited in a public library upon a public charitable trust cannot be "taken" by eminent domain in order to remove it from exhibition in said library, since such a taking is not for a public purpose.

A "taking" by eminent domain of property already devoted to a public purpose is unconstitutional if the taking may or does work a mere change of control without change of use.

A picture held and publicly exhibited in a public library upon a public charitable trust cannot be "taken" by the Department of Education by eminent domain under a statute which would permit the use of the picture by the department for the same public purpose to which it is now devoted, since such a taking would work a mere change in control without change of use.

May 5, 1922.

Joint Committee on the Judiciary.

Gentlemen: — You submit for my consideration a bill entitled "An Act to take the picture 'The Synagogue' for educational purposes," which provides: —

Section 1. The department of education of the commonwealth is hereby authorized and directed within thirty days of the passage of this act to take by right of eminent domain for educational purposes the picture entitled "The Synagogue" now in the Boston public library. At the time of the taking, the department shall file a statement of the taking with the city clerk of the city of Boston, and shall award all damages sustained by any person by reason of such taking.

Any person entitled to an award of damages under this act, or the commonwealth, whether or not an award has been made, may petition for the assessment of all such damages to the superior court of Suffolk county within sixty days from the taking.

All damages incurred under this act shall be paid by the treasurer of the commonwealth upon due presentation.

The provisions of chapter seventy-nine of the General Laws, save as herein expressly provided, shall apply to this act so far as they are applicable.

Section 2. The department of education is authorized to make rules and regulations for the custody of the picture and its use for educational purposes under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws or for any other educational purpose.

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

With the bill have been submitted: (1) a contract, dated Jan. 18, 1893, between the trustees of the Boston Public Library and John S. Sargent, an artist of recognized reputation, by which Mr. Sargent agreed, for the sum of $15,000, to paint certain pictures for the "Special Library Hall of the new Public Library building in Copley Square in Boston;" (2) a contract between said Sargent and the trustees of a fund subscribed by citizens, dated Dec. 5, 1895, whereby said Sargent agreed to paint certain additional pictures for lunettes in said hall, and the said trustees agreed to pay said $15,000 for the original paintings and the extra panels. It further appears that over eighty persons subscribed to this fund over $16,000; that "The Synagogue" was painted pursuant to said contracts and installed in said hall in said library in 1919; that a movement for the removal of said picture was undertaken; and that the corporation counsel of Boston, on April 12, 1920, advised the trustees of the library that the facts disclosed a public charitable trust which precluded them from removing said picture. *Eliot* v. *Trinity Church*, 232 Mass. 517.

At this legislative session a petition (No. 723) was filed, praying "for legislation relative to the removal of the picture 'The Synagogue' from the Boston Public Library, or for such further legislation as may be necessary for the taking of the picture by the right of eminent domain." This petition was accompanied by a bill (House 1131), which directed the trustees of the Boston Public Library to remove said picture from the library. Upon suggestion that this bill impaired the obligation of the contract with the subscribers, the present bill was substituted.

You ask whether the proposed bill would be constitutional. Your inquiry raises two questions: first, whether the contracts with Mr. Sargent and with the subscribers prevent taking said picture by eminent domain either with or without

taking said contracts; second, whether the "taking" is for a public purpose.

1. The power to take private property for public use is incident to and inseparable from sovereignty. *Kohl* v. *United States*, 91 U. S. 367, 371. It extends to all property within the jurisdiction of the Commonwealth, including personal property (*Offield* v. *New York, N. H. & H. R.R. Co.*, 203 U. S. 372) and contracts. *West River B. Co.* v. *Dix*, 6 How. 507; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Cincinnati* v. *Louisville & Nashville R.R.*, 223 U. S. 390, 400; *Meade* v. *United States*, 2 Ct. Cl. 224; *Brimmer* v. *Boston*, 102 Mass. 19. It cannot be diminished or bargained away by statute. *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20. Nor can private parties remove property from the scope of the power of eminent domain by making contracts concerning it. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685; *Chicago, etc., R.R. Co.* v. *Nebraska*, 170 U. S. 57, 74; *McGrath* v. *Boston*, 103 Mass. 369. The fact that the taking renders impossible further performance of a contract touching the property taken does not "impair" the obligation of such contract, within the meaning of U. S. Const., art. I, § 10. *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685. I am therefore of opinion that the contracts with Mr. Sargent and with the subscribers are not a bar to taking said picture for a public purpose.

2. The authority of the Commonwealth could not be preserved if it lacked power to take the instruments needed by it to execute public ends. But the social necessity upon which the power rests imposes limits upon its exercise. Article X of the Bill of Rights provides, in part: —

> . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The property must be "appropriated to public uses" and "reasonable compensation" must be paid. While neither individual obstinacy nor individual greed can defeat an appropriation to public uses, both the citizen whose property is taken and the taxpayer who pays for the taking have a right under both the State and the Federal Constitution to require that private property shall not be appropriated to private uses by eminent domain. *Riverbank Improvement Co.*

v. *Chadwick*, 228 Mass. 242; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403. In *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 377, the court said: —

> Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use. Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional. It would enable that to be achieved by indirection which by plain statement would be impossible.

The question whether a statute appropriates property by eminent domain to a public use or to a private use is a judicial one upon which the constitutionality of the act depends.

The picture is now held upon a charitable trust of indefinite duration. *Eliot* v. *Trinity Church*, 232 Mass. 517. It is one of a series which is daily exhibited free to the public in a building dedicated to public education, which is centrally located in the capital and largest city of the Commonwealth. As the picture is in effect a part of the Public Library of the city of Boston, it is, in my opinion, dedicated to educational purposes to the same extent as that library. See *Cary Library* v. *Bliss*, 151 Mass. 364

The proposed bill directs the Department of Education to take the picture for "educational purposes." Section 2 provides as follows: —

> The department of education is authorized to make rules and regulations for the custody of the picture and its use for educational purposes under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws or for any other educational purpose.

G. L., c. 69, § 7, provides: —

> The department may co-operate with existing institutions of learning in the establishment and conduct of university extension and correspondence courses; may supervise the administration of all such courses supported in whole or in part by the commonwealth; and also, where deemed advisable, may establish and conduct such courses for the benefit of residents of the commonwealth. It may, in accordance with rules and regulations established by it, grant to students satisfactorily completing such courses suitable certificates.

G. L., c. 73, § 1, provides: —

The department of education, in this chapter called the department, shall have general management of the state normal schools at Barnstable, Bridgewater, Fitchburg, Framingham, Lowell, North Adams, Salem, Westfield and Worcester, and the normal art school at Boston, wherever said schools may be hereafter located, and of any other state normal schools hereafter established, and of boarding houses connected therewith, and may direct the expenditure of money appropriated for their maintenance.

While the act appropriates the picture to educational purposes generally, the manner in which it shall be used to accomplish those purposes is left to be determined by the Department of Education. The picture is already appropriated to educational purposes by the trust under which it is now held. Under the proposed bill the Department of Education might determine that the picture should remain where it now is and be exhibited in the same manner as heretofore. If so, the bill works simply a change of control. To such a situation *Cary Library* v. *Bliss*, 151 Mass. 364, seems applicable. In that case, in holding that a public library held upon a public charitable trust of indefinite duration by trustees provided by the donor could not be taken by eminent domain and transferred to a corporation created to manage it for like purposes, the court said: —

The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the Legislature to be, a matter of public necessity. *West River Bridge* v. *Dix*, 6 How. 507; *Lake Shore & Michigan Southern Railway* v. *Chicago & Western Indiana Railroad*, 97 Ill. 506; *Chicago & Northwestern Railway* v. *Chicago & Evanston Railroad*, 112 Ill. 589.

The suggestion that the Department of Education might make a different or more effective use of the picture for educational purposes than the use to which it is at present devoted cannot, in my opinion, save the bill. It is not enough that under the authority of a statute the property may be appropriated either to public or to private uses. An act which appropriates private property either to a use which is public or to a use which is private is unconstitutional. *Salisbury Land & Improvement Co.* v. *Commonwealth,* 215 Mass. 371. Similarly, an act which permits the Department of Education to devote the picture either to the same use to which it is now devoted or to a different use would not be constitutional.

The committee is entitled to take into consideration all the facts relating to the pending bill in determining whether or not, in the particular case now before it, the necessity exists for taking the picture. If the result which is to be achieved by the proposed legislation is in reality to secure the removal of the picture from the place where it is now devoted to a public use, a taking to achieve such a result would not be authorized. See also Mass. Const. Amend. XI and XLVI. If the result is to take the picture from public trustees who hold it for a public use, to be held by a public official for what is in effect the same public use, such taking would not be within the power of the Legislature. In order to enable the Commonwealth to take the picture by eminent domain the committee must be satisfied that the result to be achieved by the taking is not to accomplish the removal of the picture to prevent it from being put to the public use to which it is now devoted, but that, when taken by the Department of Education, it is not only to be devoted to a public use which is in reality different from the exhibition purposes to which it is now devoted, but also to such a use that the resultant benefit to the public will justify the expenditure of the taxpayers' money as a matter of public necessity. Otherwise, under the rule laid down in *Cary Library* v. *Bliss, supra,* the result would not be one to achieve which the power of eminent domain could constitutionally be employed or public money spent.

Yours very truly,

J. Weston Allen, *Attorney General.*

Drainage Law — Land owned by Two Proprietors — Meaning of Word "Several."

Under G. L., c. 252, §§ 1 and 5, improvements of low land can be made on petition to the Drainage Board only when such land is owned by more than two proprietors.

The word "several," in relation to number, means more than two, but not very many.

May 5, 1922.

Dr. Arthur W. Gilbert, *Commissioner of Agriculture.*

Dear Sir: — You ask me to advise you whether or not the Drainage Board can act on a petition in regular form signed by two men who own a swamp of thirty acres and who ask help of the Board in forming a drainage district.

G. L., c. 252, § 1, is as follows: —

If it is necessary or useful to drain or flow a meadow, swamp, marsh, beach or other low land held by several proprietors, or remove obstructions in rivers or streams leading therefrom, such improvements may be made as provided in the thirteen following sections.

G. L., c. 252, § 5, provides, in part, as follows: —

The proprietors, or a majority in interest either in value or area, may petition the board setting forth their desire to form a drainage district. . . . If the board approves of the undertaking, it shall issue a certificate appointing three, five or seven district drainage commissioners. . . .

I understand your inquiry to be directed to the question whether the provisions of the chapter are applicable where the land which it is desired to improve is owned by but two proprietors.

The answer to your question seems to be governed by the provision in section 1 limiting the application of the chapter to low land held by "several proprietors." The word "several," in relation to number, is defined by Webster as "consisting of a number more than two, but not very many," and other definitions are to the same effect. This definition was approved in *Einstein* v. *Marshall*, 58 Ala. 153. See also *Lunt* v. *Post Printing Co.*, 48 Colo. 316, 321. While the question is not free from doubt, I am of opinion that the intention of the General Court, as expressed in section 1, was to limit the application of G. L., c. 252, to improvements of low land owned by more than two proprietors.

Very truly yours,

J. Weston Allen, *Attorney General.*

Town Meeting — Warrant — Appropriation — Municipal Finance — Vote — Rescission — Director of Accounts.

Under an article of the warrant for an annual town meeting an appropriation was passed by a majority vote for the purpose of building a school building. Under another article of the same warrant the town authorized the borrowing of the amount appropriated by a two-thirds vote "of the voters present and voting," as required by G. L., c. 44, §§ 1 and 7.

Subsequently, at a special town meeting called pursuant to a warrant containing articles expressly calling for the rescinding of the action taken at the annual town meeting, it was voted by a majority vote to rescind the appropriation aforesaid, while consideration of the remaining articles specifically referring to the borrowing was indefinitely postponed.

Held, That the revocation and rescission of the original appropriation by a majority vote of the special town meeting resulted in rendering the action taken at the annual town meeting ineffective without an express rescission thereof. Accordingly, the Director of Accounts would not be authorized to approve notes issued under authority granted by vote of the annual town meeting.

May 11, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You request my opinion upon the following facts: —

The town of Chatham has voted to borrow $65,000 to build, furnish, and equip a new school building; and it is proposed to issue notes of the town for this purpose.

Under article 22 of the warrant for the annual town meeting, it was voted, by a vote of 243 to 152, to raise and appropriate $65,000 for the purpose of building a school building. Under article 23 a committee was appointed to carry out the preceding vote; under article 24 the committee was given full powers to construct the school building; and under article 25 the treasurer was authorized to borrow $65,000 on notes of the town.

Subsequently, on March 23, a special town meeting was held. The warrant for this meeting contained articles calling for the rescinding of the action taken at the annual town meeting. The first article was to rescind the vote passed under article 22; and it was voted to rescind the vote passed, by 195 to 167, or a majority vote. The articles in the warrant for the special meeting which referred to articles 23, 24, and 25 were indefinitely postponed.

I would therefore like to be advised as to whether the Director of Accounts is authorized to approve notes issued under authority granted by the vote passed under article 25 of the warrant for the annual town meeting, in view of the action taken at the special town meeting held on March 23.

. . . . . .

I would also like to be advised as to whether or not all four articles in the warrant for the annual town meeting must be considered in connection with the articles in the warrant for the special town meeting, as a question arises as to whether a two-thirds vote would be required to rescind the authority granted under article 25 of the warrant for the annual town meeting.

The facts stated disclose that the original action taken under article 22 of the warrant for the annual town meeting was passed by a majority vote. This was sufficient to pass the appropriation of $65,000 for the purpose stated.

The action taken under article 25 of said warrant, authorizing the borrowing of said sum, received the two-thirds vote "of the voters present and voting" (G. L., c. 44, § 1), as required by G. L., c. 44, § 7, which provides, in part, as follows: —

> Cities and towns may incur debt, within the limit of indebtedness prescribed in section ten, for the following purposes, and payable within the periods hereinafter specified:
>
> . . . . . .
>
> (3) For acquiring land for any purpose for which a city or town is or may hereafter be authorized to acquire land, not otherwise herein specified, and for the construction of buildings which cities and towns are or may hereafter be authorized to construct, including the cost of original equipment and furnishing, twenty years.
>
> . . . . . .
>
> Debts may be authorized under this section only by a two thirds vote.

Subsequently, at the special town meeting called pursuant to a warrant containing articles calling for the rescinding of the action taken at the annual town meeting, and referring specifically to the articles contained in the warrant thereof, it was voted by a majority vote to rescind the action taken at the annual town meeting under article 22, while consideration of the remaining articles, which specifically referred to articles 23, 24 and 25 of the annual town meeting, was indefinitely postponed. Apparently this was done under the supposition that the rescinding of the action taken under article 22 aforesaid automatically rescinded the action taken under the remaining articles, which specifically referred thereto, that being the keystone article under which the appropriation was voted. But since article 25 required a two-thirds

vote for its passage (G. L., c. 44, § 7, *supra*), it would follow that the same majority would be required for its express rescission.

It is apparently well settled that a corporate body may rescind previous votes and orders at any time before the rights of third persons have vested. "But where the original vote requires for its adoption a specified proportion of the council, *e.g.*, three-fifths or three-fourths, the same proportion is necessary to carry a motion to reconsider." II Dillon on Municipal Corporations, § 539; *Whitney* v. *Hudson*, 69 Mich. 189; *Beach* v. *Kent*, 142 Mich. 347. "Where by statute a vote of two-thirds is required to pass a resolution, and no rule has been adopted regulating practice on motions for reconsideration, a two-thirds vote is necessary therefor." 29 Cyc. 1690, and cases cited.

It would seem, therefore, that the action taken under said article 25, authorizing the treasurer to borrow $65,000 on notes of the town, would still be outstanding unless the rescinding of the action taken under article 22 aforesaid renders it ineffective, in that it cancels the original purpose for which the appropriation was made, and to meet the expenditure for which the action under article 25 aforesaid was taken. The vote under said article 25 was as follows: —

Voted, That the treasurer, with the approval of the selectmen, be and hereby is authorized to borrow a sum not to exceed sixty-five thousand dollars ($65,000) for the purpose of building, furnishing and equipping a new school building on the town lands near the high school building, in accordance with the provisions of a vote under a preceding article in this warrant, and to issue notes therefor, said notes to be payable in accordance with the provisions of section 19, chapter 44, General Laws, so that the whole loan shall be paid in not more than ten years from the date of the issue of the first bond or note, or at such earlier dates as the treasurer and selectmen may determine.

Clearly, this vote is not an unconditional authorization to expend money for the building of a new high school, but by its express terms the vote limits the expenditure of the money to building, furnishing and equipping the building *in accordance with the prior vote*. If the words "in accordance with the provisions of a vote under a preceding article in this warrant" were not included, a different interpretation of the statute might be argued with some force. But it is not necessary to consider what might be the effect of a different

wording of the statute. The question is not before us. It is to be observed that the four articles in the warrant for the annual town meeting relate to one and the same objective, and each expressly refers to and is dependent upon the passage of the appropriation called for by article 22 aforesaid.

In view of all the surrounding facts, it would seem, therefore, that the words above quoted, as contained in said article 25, cannot be treated as mere surplusage, but condition the authority to borrow upon the appropriation called for and passed under article 22. Since the original purpose upon which rested the authority to borrow has been rescinded, the authority to borrow lapses.

I am therefore led to the conclusion that the revocation and rescission of the original appropriation by a majority vote of the special town meeting under article 2 resulted in rendering the action taken at the annual town meeting under articles 22, 23, 24 and 25 ineffective without an express rescission thereof. It accordingly follows that, as the facts stand, the Director of Accounts would not be authorized to approve notes issued under authority granted by the vote passed under article 25 of the warrant for the annual town meeting.

Very truly yours,
J. Weston Allen, *Attorney General.*

Constitutional Law — Contract made by Statute — Review of Question whether Contract was procured by Fraud or Undue Influence.

The Legislature has power to investigate the conduct of its own members in enacting legislation.

If a contract be made by statute, a repeal of said act impairs the obligation of said contract, within the meaning of U. S. Const., art. I, § 10.

If a contract be made by statute, the Legislature has no power to set said contract aside upon the ground that it was procured by fraud and corruption.

As the court does not possess legislative power and cannot repeal a statute which the Legislature has constitutional power to enact, it will not hear and determine whether a constitutional statute, which creates a contract, was procured by fraud or corruption.

May 15, 1922.

Committee on Rules, House of Representatives.

Gentlemen: — You request my opinion upon the following question: —

If a contract be made by a statute which is within the constitutional power of the Legislature, is there any tribunal which has power to hear and determine whether such contract was procured by fraud, bribery or undue influence and to set such contract aside if such fraud, bribery or undue influence be established?

I am informed that this question, though general in form, relates to the so-called Boston Elevated Act, Spec. St. 1918, c. 159. It divides naturally into two parts, — first, as to the power to investigate; second, as to the power to set an act aside for the reasons named.

1. There can be no question that the Legislature has power to investigate the conduct of its own members in respect to legislation. *In re Chapman,* 166 U. S. 661. The Legislature conducted such an investigation last year to ascertain the circumstances under which Spec. St. 1918, c. 159, was passed. The record of that investigation was referred by the Legislature to the then district attorney for the Suffolk District. I assume that that record is still in the office of the district attorney and that it is available to the Legislature. If in any respect the Legislature should deem that investigation to be incomplete, I perceive no obstacle either to reopening it or to instituting a new one.

2. In *Boston* v. *Treasurer and Receiver-General,* 237 Mass. 403, the Supreme Judicial Court held that Spec. St. 1918, c. 159, created a contract, and that said act was constitutional. Where a contract is made by an act which is within the constitutional power of the Legislature, the question whether such contract can be set aside upon the ground of legislative corruption has been several times considered by the Supreme Court of the United States. By reason of U. S. Const., art. I, § 10, which forbids any State to impair the obligation of contracts, the decisions of that court constitute the ultimate and binding authority upon the second branch of your inquiry.

In *Fletcher* v. *Peck,* 6 Cranch, 87 (1810), the Legislature of Georgia, by an act within its constitutional authority, contracted to sell certain public lands, which were sold and granted pursuant to said act. Subsequently the Legislature of Georgia repealed said act upon the ground that it was procured by legislative fraud and corruption. In holding that the repealing act impaired the obligation of the contract previously made, and therefore was unconstitutional, the Supreme Court said, by Chief Justice Marshall, at page 132: —

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the Legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

The circumstances under which both the original and the repealing acts were passed by the Georgia Legislature, as described in Beveridge's Life of Marshall, vol. III, c. X, set in high relief the decision in *Fletcher* v. *Peck*, *supra*. That description is too long to quote and must be briefly summarized. A previous bill, in which a majority of Georgia's law-making body was financially interested, which was passed, to use Beveridge's own words, amid "a saturnalia of corruption," had been vetoed by the Governor (pp. 546–549). A new bill, which disposed of more than thirty million acres of fertile, well-watered and well-wooded land to four corporations, at less than 1½ cents an acre, was introduced as a supplement to a law just enacted to pay the State troops. Again every possible influence was brought to bear to pass this bill with the utmost dispatch. Some members who would not support it were induced to leave the capital; others who were recalcitrant were browbeaten and bullied.

One senator actually menaced, with a loaded riding whip, members who objected to the scheme. In little more than a week the bill was rushed through both houses, and this time received the reluctant approval of the Governor on Jan. 7, 1795 (pp. 549, 550). It later came out "that every member of the Legislature who had voted for the measure, except one, had shares of stock in the purchasing companies" (p. 561).

The tidings of the corruption which attended the sale were swiftly carried over the State. Indignation meetings were held in every hamlet. Crowds marched on the capital determined to lynch their legislative betrayers, whose lives were saved either by the pleadings of those who had voted against the bill or by flight (pp. 559, 560). Nearly every man elected to the new Legislature was pledged to vote for the undoing of the fraud in any manner that might seem the most effective (p. 561). The repealing act declared the former statute null and void and "annulled" all claims directly or indirectly arising therefrom (p. 563). The Legislature further enacted that all records, documents and deeds connected with the fraud be expunged, and that the "usurped act" be publicly burnt (p. 564). This was done, with elaborate ceremonies, in front of the State House and in the presence of both branches of the Legislature (p. 565).

It is perhaps not without interest that the decision in *Fletcher* v. *Peck*, *supra*, was anticipated by the Supreme Judicial Court of Massachusetts by some eleven years. In *Derby* v. *Blake*, decided in 1799, which was a case involving a subsequent sale of some of the Georgia lands, and of which a fragmentary report is reprinted in 226 Mass. 618, that court, in holding unconstitutional the repealing act of Georgia, said, in substance: —

> It was also decidedly the *opinion of the Court*, that the bargain with J. and Williamson, had not been legally affected by the *Repealing Act of Georgia* — That Act they considered a mere nullity — as a flagrant, outrageous violation of the first and fundamental principles of social compacts. The idea of a Legislature reclaiming property they had once sold, and been paid for, was said by the Court to be not less preposterous, than for an individual to repeal his own note of hand, or to render void by his own act and determination, any contract, however sacred or solemn. The vociferations of the Georgia Legislature, who were the very granters of the property in question, about fraud and circumvention, could not be admitted in a Judiciary of

Massachusetts, as evidence of the real existence of such facts — Whether the original grant of the Georgia Legislature were valid or not, was considered by the Court a cause of judicial, and not of legislative cognizance. The Repealing Act of Georgia was moreover declared void, because it was considered directly repugnant to Article 1st, Sec. 10, of the United States Constitution, which provides that "no State shall pass any *ex post facto Law*, or Law impairing the obligation of contracts." — On this ground, the Court expressed a clear and decided opinion, that the title of the State of *Georgia*, at the time of their grant, held to the territory in dispute, had been fairly and legally conveyed to the purchasers, under J. and Williamson.

Although the question as to the effect of legislative corruption arose in *Fletcher* v. *Peck, supra*, in a suit between private individuals, the broad rule laid down in that case has been affirmed and reaffirmed by the Supreme Court of the United States without any qualification as to the manner in which the question is presented. *Ex parte McCardle*, 7 Wall. 506, 514; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 541; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710; *Amy* v. *Watertown*, 130 U. S. 301, 319; *United States* v. *Des Moines Nav. & R. Co.*, 142 U. S. 510, 545; *United States* v. *Old Settlers*, 148 U. S. 427, 463; *Angle* v. *Chicago, St. Paul &c. Ry.*, 151 U. S. 1, 17–19; *New Orleans* v. *Warner*, 175 U. S. 120, 145; *Calder* v. *Michigan*, 218 U. S. 591, 598. In *Soon Hing* v. *Crowley*, 113 U. S. 703, 710, the court said: —

And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.

In *Angle* v. *Chicago, St. Paul &c. Ry.*, 151 U. S. 1, 18, the court, after quoting from *Fletcher* v. *Peck*, said: —

The rule upon which this decision rests has been followed in many cases and has become a settled rule of our jurisprudence. The rule,

briefly stated, is that whenever an act of the Legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the Legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly.

In *New Orleans* v. *Warner*, 175 U. S. 120, 145, the court said, before proceeding to quote from *Fletcher* v. *Peck*: —

It may be that the city made a bad bargain. It may be that it paid far more than the fair value of the property and claims purchased. It may be that the action of the common council was dictated by improper considerations, though this is rather hinted at than asserted; but from the case of *Fletcher* v. *Peck*, 6 Cranch, 87, 130, to the present time we have uniformly refused to inquire into the motives of legislative bodies.

In *Calder* v. *Michigan*, *supra*, the State was a party to the proceeding, but the rule was reaffirmed none the less. The same is true of *Lynn* v. *Polk*, 8 Lea (Tenn.), 121, and *State* v. *Terra Haute, etc., R.R.*, 166 Ind. 580, in each of which the court declined to investigate whether the action of the Legislature was procured by corrupt means.

The question, in the last analysis, turns upon the scope of the judicial power. As to that, the ultimate authority is the courts of this Commonwealth (see Bill of Rights, art. XXX; *Boston* v. *Chelsea*, 212 Mass. 127; *Dinan* v. *Swig*, 223 Mass. 516), subject to review by the Supreme Court of the United States as to any question arising under the Federal Constitution. The decisions of the latter court, to which your attention has been directed, seem to be conclusive as to the power of the court to set aside a statute upon the ground of corruption practised by or upon a Legislature. If, in the face of these decisions, any person desires to put that question to the test of judicial determination again, the courts are always open.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Rearrangement of the Constitution — Printing of Rearrangement in Blue Book — Expenditure of Public Money.

Under Mass. Const., pt. 2d, c. I, § I, art. IV, and c. II, § I, art. XI, authority to expend public money must be conferred by an act or resolve.

G. L., c. 5, § 2, does not authorize the printing of the Rearrangement of the Constitution in the annual laws (Blue Book), since that rearrangement is neither a constitution nor an act or resolve.

As the rearrangement is neither a constitution nor an act or resolve, it can itself confer no authority to expend public money to print the same as a part of the annual laws (Blue Book).

May 16, 1922.

Hon. F. W. Cook, *Secretary of the Commonwealth.*

Dear Sir: — You inquire whether, in view of *Loring* v. *Young*, 239 Mass. 349, both the Constitution, with amendments thereof, and the Rearrangement of the Constitution which was ratified by the people on Nov. 4, 1919, shall be printed in the annual volume of laws of the Commonwealth, and, if so, in what order.

G. L., c. 5, § 2, provides, in part: —

> The state secretary shall, at the close of each regular session of the general court, collate and cause to be printed in a single volume the following:
>
> (1) The constitution of the commonwealth.
>
> (2) All acts and resolves passed at such session.
>
> (3) All amendments to the constitution referred at such session to the next general court or to be submitted to the people at the next state election.
>
> (4) All acts and resolves passed at any special session of the general court, except a general revision of the statutes, and not theretofore published in any preceding annual volume.
>
> (5) All laws and constitutional amendments adopted by the people at the last preceding state election, with the aggregate vote thereon, both affirmative and negative, arranged in such detail as the secretary may determine.

1. In *Loring* v. *Young* and *Bates* v. *Loring*, decided together (239 Mass. 349), the Supreme Judicial Court decided that the Rearrangement was not the Constitution of the Commonwealth, and dismissed two petitions for writs of mandamus ordering it to be printed as and for such Constitution. Under those decisions it is clear that the Rearrangement is not within said section 2, clause (1), which directs

the secretary to print "the constitution of the commonwealth." For the same reason the Rearrangement is not within section 2, clauses (3) and (5). In my opinion, the two latter clauses are also inapplicable for the further reason that the Rearrangement is not a constitutional amendment referred at the session of 1922 to the next General Court or to be submitted to the people at the next State election, nor is it a law or constitutional amendment adopted by the people at the last preceding State election.

2. The Rearrangement is not within section 2, clause (2). It is not an act or resolve passed at the session of 1922.

3. Articles 157 and 158 of the Rearrangement do not authorize you to print it. Those articles provide: —

Art. 157. Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative.

Art. 158. This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of such laws.

As the Rearrangement is not the Constitution, those sections impose no constitutional duty. Nor is the Rearrangement an act or resolve. It was not passed by the Legislature and either approved by the Governor or permitted to become a law without his signature, in the manner prescribed by the Constitution. It was not enacted by the people in the manner prescribed by the Mass. Const. Amend. XLVIII. If the Rearrangement be neither a constitution nor a law, it cannot impose any duty to print it.

Mass. Const., pt. 2d, c. I, § I, art. IV, provides that public moneys shall "be issued and disposed of . . . according to such acts as are or shall be in force within" the Commonwealth, and pt. 2d, c. II, § I, art. XI, further provides: —

No moneys shall be issued out of the treasury of this commonwealth, and disposed of . . . but by warrant . . . and agreeably to the acts and resolves of the general court.

The printing of the Rearrangement as a part of the annual laws (Blue Book) necessarily involves some expense which, if incurred, must be met out of public funds. If neither G. L., c. 5, § 2, nor any other act or resolve authorizes such expenditure, and the Rearrangement itself is neither a constitution nor an act or resolve, it seems plain that, under the constitutional provisions above cited, no money can be issued from the treasury for this purpose.

I am not unmindful of the opinion of my predecessor to which you call my attention, but, as it was rendered on Jan. 21, 1920, long prior to *Loring* v. *Young*, *supra*, and in part relies upon article 158 of the Rearrangement, I am constrained to a different conclusion. I am therefore of opinion that the Constitution of 1780, with amendments thereof, should be printed, and that the Rearrangement should not be printed in the annual volume of laws.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Women — Eligibility to be appointed a Justice of the Peace — Effect of Nineteenth Amendment.

As the Constitution prescribes the mode of appointment, tenure and method of removing justices of the peace, the qualifications for that office cannot be prescribed or modified by statute, and therefore St. 1922, c. 371, does not apply thereto.

By reason of the adoption of the Nineteenth Amendment to the Constitution of the United States, women are not excluded by the Constitution from any elective or appointive office, and are therefore now eligible to appointment as justices of the peace.

May 25, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You inquire whether, in view of St. 1922, c. 371, women are eligible to appointment as justices of the peace.

St. 1922, c. 371, § 1, provides, in part: —

> Women shall be eligible to election or appointment to all state offices, positions, appointments and employments. . . .

The office of justice of the peace is a constitutional office. The mode of appointment, tenure and method of removal are all prescribed by the Constitution. Mass. Const., c. III, arts. I and III; Amend. XXXVII. The question whether women are eligible depends upon the Constitution. *Opinion*

of the Justices, 107 Mass. 604. If the Constitution fixes the qualifications for an office, they cannot be modified by statute. *Kinneen* v. *Wells*, 144 Mass. 497; *Opinion of the Justices*, 165 Mass. 599. In my opinion, St. 1922, c. 371, is inapplicable to any office the qualifications for which are fixed by the Constitution, but for the reasons hereinafter stated the right of women to hold such offices is not thereby diminished or abridged.

Prior to the adoption of the Nineteenth Amendment to the Constitution of the United States, women were ineligible to the office of justice of the peace in this Commonwealth. *Opinion of the Justices*, 107 Mass. 604. In *Opinion of the Justices*, 240 Mass. 601, the justices advised that, by reason of that amendment, "women are not excluded by the Constitution from any elective or appointive civil office." In the light of that opinion it is plain that the earlier opinions which advised that women were ineligible to certain constitutional offices no longer apply. I therefore advise you that, irrespective of St. 1922, c. 371, women are now eligible to appointment as justices of the peace.

Yours very truly,

J. Weston Allen, *Attorney General.*

Civil Service — Veteran — Reappointment within Two Years after Honorable Discharge or Release from Active Duty.

A person who is employed in the classified public service of the Commonwealth, or of any city or town therein, and who leaves such employment for the purpose of serving in the military or naval service of the United States, is entitled, under G. L., c. 31, § 27, within two years from the date of the receipt of his honorable discharge or release from active duty, whichever is granted first, to be reinstated in his former position.

June 6, 1922.

Payson Dana, Esq., *Commissioner of Civil Service.*

Dear Sir: — You have asked my opinion as to the construction of G. L., c. 31, § 27, reading, in part, as follows: —

Any person who resigns from or leaves the classified public service of the commonwealth or of any city or town therein or who is discharged, suspended or granted a leave of absence therefrom, for the purpose of serving in the military or naval service of the United States in time of war, and who so serves, shall, if he so requests of the appointing authority within two years after his honorable discharge from

such military or naval service, or release from active duty therein, and if also, within said time, he files with the division the certificate of a registered physician that he is not physically disabled or incapacitated for the position, be reappointed or re-employed, without civil service application or examination, in his former position, provided that the incumbent thereof, if any, is a temporary appointee; . . .

Your question is whether the two years commenced to run from the date of receiving the honorable discharge, or whether it is reckoned from the date of receiving a release from active duty, if the release is received before the honorable discharge.

I quote a portion of an opinion of my predecessor which seems to cover the precise question in point, and with the reasoning in which I concur: —

I am informed that the release from active duty is given in the navy only to men who will later receive an honorable discharge, and that the only difference between the release and a discharge is that in the former case the navy reserves the right to call a man back into service. Under the bonus act a release from active duty is sufficient to entitle a man to his compensation, and is treated as equivalent to an honorable discharge, so far as the terms of that act are concerned.

It is my opinion that the words are used in a similar sense here, and that the year commences from the date of receipt of the honorable discharge or release from active duty, whichever is granted first, and that a man who has received a release from active duty, and at some later date gets his honorable discharge, is not entitled to be reappointed within the year after the date of the receipt of said honorable discharge.

In the case in which the above opinion was given the question related to reappointment of members to the Boston police force. In your case it is a question of reinstating an employee of the city of Boston.

Any other interpretation of the statute as it now stands, which is the result of the amendments of Gen. St. 1919, c. 14, and St. 1920, c. 219, would defeat the very purposes toward which these amendments were directed, namely, to treat men serving in the army and navy on an equal basis, as far as possible, with respect to their right to reinstatement in the classified public service.

Very truly yours,

J. Weston Allen, *Attorney General.*

Workmen's Compensation — State Employees — Medical Services.

State employees, not entitled to the benefits of the workmen's compensation act, are not entitled to medical services for injuries sustained in the course of their employment.

June 6, 1922.

Hon. Alonzo B. Cook, *Auditor of the Commonwealth.*

Dear Sir: — You have requested my opinion on the following question: —

If a State employee who is not entitled to the benefits of G. L., c. 152, commonly known as the Workmen's Compensation Act, is injured while in the course of his employment, may the charges for medical services be paid out of the maintenance appropriation of his department?

Money can be paid out of the State treasury for such purposes only by statutory authority. There is no statute which authorizes payment for medical services in the case of employees who are not entitled to the benefits of G. L., c. 152. I am therefore of the opinion that the question should be answered in the negative.

Very truly yours,

J. Weston Allen, *Attorney General.*

Constitutional Law — Taxation — Due Process of Law — Appropriation of Public Money for a Private Purpose — Payment of Unearned Salary of Deceased Representative to his Widow.

An appropriation of public money for a private purpose takes the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

A payment of public money as a reward for conspicuous public service, in order to stimulate others to render similar service, may be found to promote the public welfare and to be constitutional even though the recipient has no right to the money in law or in equity.

Public money cannot constitutionally be given away as a mere gratuity.

In the absence of any showing by recital in the resolve or otherwise that a deceased representative to the General Court has rendered such conspicuous public service that a payment of the unearned balance of his salary to his widow will primarily promote a public purpose, such resolve violates both the Constitution of this Commonwealth and the Fourteenth Amendment.

June 9, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You have submitted for my consideration House Resolve No. 1736, entitled "Resolve providing for the payment to the widow of the late representative Walter S. Hale of the balance of the salary to which he would have been entitled for the current session," and which provides as follows: —

Resolved, That there be allowed and paid out of the treasury of the commonwealth to the widow of Walter S. Hale of Gloucester, who died while a member of the present house of representatives, the balance of the salary of fifteen hundred dollars to which he would have been entitled had he lived and served until the end of the present session. The state treasurer is hereby directed to make the payment hereby authorized out of the appropriation made in item three of the current general appropriation act.

The question before me is whether this resolve is constitutional.

In the leading case of *Lowell* v. *Boston,* 111 Mass. 454, the court, in holding unconstitutional a statute which authorized a loan of public money upon mortgage to victims of the Boston fire of 1872, in order to enable them to rebuild, said, by Wells, J.: —

The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude

of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

In 1900 the Senate submitted to the justices the following question: —

Has the General Court the right to appropriate money to pay to the widow, heirs or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of the Commonwealth, or from the treasury of a county, city or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office?

In *Opinion of the Justices*, 175 Mass. 599, in answering that question the justices said, in part: —

In general the power to pay gratuities to individuals is denied to the Legislature by the Constitution. Ordinarily a gift of money to an individual would be an appropriation of public funds to private uses which could not be justified by law. *Mead* v. *Acton*, 139 Mass. 341; *Lowell* v. *Boston*, 111 Mass. 454; *Freeland* v. *Hastings*, 10 Allen, 570; *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487, 500, 501; *Cole* v. *LaGrange*, 113 U. S. 1, and cases cited there and in *Kingman* v. *Brockton*, 153 Mass. 255, 259. Cooley, Const. Lim. (6th ed.) 601, 602. We deem this proposition so plain that we do not delay to enforce it, but it is not a proposition which disposes of the questions before us. For it is hardly less clear that when a public purpose can be carried out or helped by spending public money, the power of the Legislature is not curtailed or destroyed by the fact that the money is paid to private persons who had no previous claim to it of any kind.

. . . . . .

The power to give rewards after the event for conspicuous public service, if it exists at all, cannot be limited to military service. If a man has deserved greatly of the Commonwealth by civil services, the public advantage of recognizing his merit may stand on ground as strong as that for rewarding a general. We cannot foresee the possibilities of genius or distinguished worth and settle in advance the tariff at which its action shall be paid.

It will be plain from what we have said that in our opinion the public welfare alone must be the ground, as it is the only legal justification, for this kind of payment. And it follows that our answer to the first of the two questions before us is that the General Court has the right to appropriate money for the purposes supposed in a case

where it fairly can be thought that the public good will be served by the grant of such an unstipulated reward, but that it has not that right where the only public advantage is such as may be incident and collateral to the relief of a private citizen. To a great extent the distinction must be left to the conscience of the Legislature. Whether a judicial remedy could be found if a clear case should arise of an unconstitutional appropriation, it happily is unnecessary to inquire.

In *Opinion of the Justices*, 186 Mass. 603, the Governor and Council requested the justices to advise as to the constitutionality of St. 1904, c. 458, section 1 of which read as follows: —

There shall be allowed and paid out of the treasury of the Commonwealth the sum of one hundred and twenty-five dollars to every veteran of the civil war living at the date of the passage of this act, not being a conscript or a substitute, who served in the army or navy of the United States to the credit of Massachusetts during the civil war, and who was honorably discharged from such service: *provided*, that he has not received a bounty from any city or town or from the Commonwealth for such service; and *provided*, that he makes application for the said bounty prior to the first day of November in the year nineteen hundred and six.

In advising that this act was unconstitutional the justices said: —

It is a familiar rule of law that, under the Constitution of the Commonwealth, money can be raised by taxation only for public purposes. This rule has been stated and explained in many judicial opinions. See *Lowell* v. *Boston*, 111 Mass. 454, and cases hereinafter cited. Whether the use of money under the provisions of a particular statute is for a public purpose, or merely for the benefit of individuals, is sometimes a question difficult to answer, although usually it is easy of determination. In the present case, if the only object of the statute is to give gratuities to individuals of a certain class, without any benefit to the general public, the statute is unconstitutional.

. . . . . .

But in this opinion we need not consider the subject of pensions to soldiers, for the statute does not purport to grant pensions or rewards for meritorious service, or money for the relief of present necessities. It purports to give bounties now only to those who did not receive them at the time of enlistment, which, if given then, would have been given as inducements to enlist in the service of the United States. Under the provisions of this statute, those who enlisted without a bounty, under other influences or upon other inducements, would

receive now as a gratuity this sum of money representing an additional inducement. The object of the act, as disclosed by its provisions, is not to give rewards in recognition of valuable services, and thus to promote loyalty and patriotism, but to equalize bounties given to induce enlistments in a particular military service many years ago.

Following the law as stated in *Mead* v. *Acton*, we are of opinion that the proposed expenditure of money is for a use which is not public, but private, and that therefore the statute is not in conformity with the Constitution of the Commonwealth.

In *Opinion of the Justices*, 190 Mass. 611, the Senate submitted to the justices the following question: —

Is it a constitutional exercise of the legislative power of the General Court to enact a law providing for an appropriation of money from the treasury of the Commonwealth for the purpose of recognition of valuable services of persons who served to the credit of Massachusetts during the Civil War and who were honorably discharged from such service, such appropriation to be used either for the payment of sums of money to such persons, or for medals or other evidences of appreciation of their services, if in the opinion of the General Court the public good will be served, and loyalty and patriotism promoted, by such recognition?

In advising thereon the justices said: —

It is a familiar rule of law that a statute is to be interpreted in reference to its purpose and effect, as shown by its application to the subject to which it relates. If a bill should appear, by its substantive provisions, to be a measure for the equalization of bounties among the soldiers of Massachusetts who served in the Civil War, or for the payment of moneys to make the result of their contracts of enlistment more favorable to certain soldiers because the contracts of other soldiers were made on better terms, it would be unconstitutional, even if it contained recitals that the payments would be made in recognition of valuable services, with a view to the promotion of loyalty and patriotism.

We cannot undertake to answer the question of the Honorable Senate in reference to every conceivable application of it. We infer that our opinion is desired in regard to the right of the State to give sums of money or other like rewards, in recognition of valuable military service. The power to reward distinguished public service, with a view to the promotion of loyalty and patriotism, has long been regarded as one of the attributes of organized government.

. . . . . .

The question asked by the Honorable Senate should be answered in the affirmative, so far as to say that the general principle referred to

may have legitimate application to services such as generally have been treated as deserving recognition by the payment of sums of money, the erection of statues, or the bestowal of medals, decorations or other badges of honor. In the application of the principle the question ordinarily will be, whether the benefit is conferred as an appropriate recognition of distinguished and exceptional service, such that the dignity of the State will be enhanced and the loyalty and patriotism of the people will be promoted by making it a subject of governmental action.

In *Opinion of the Justices,* 211 Mass. 608, the Senate requested the justices to advise as to the constitutionality of Senate Bill No. 240, the first two sections of which provided as follows: —

Section 1. For the purpose of promoting the spirit of loyalty and patriotism, and in recognition of the sacrifice made both for the commonwealth and for the United States by those veteran soldiers and sailors who volunteered their services in the civil war, and for the purpose of promoting the public welfare, by giving visible evidence to this generation and future generations that, if danger should again threaten the nation and the call should again come for men, Massachusetts will not forget the great service of those who volunteer, a gratuity of one hundred and twenty-five dollars to each veteran is hereby authorized to be paid from the treasury of the commonwealth under the conditions hereinafter set forth.

Section 2. The gratuity herein provided for shall be paid to every person, or his legal representative, not being a conscript or a substitute, and not having received a bounty from the commonwealth or from any city or town therein, who served in the army or navy of the United States to the credit of the commonwealth during the civil war, and was honorably discharged from such service, and is living at the time of the passage of this act; it being intended and provided that the said gift shall not be a bounty, nor a payment in equalization of bounties, nor a payment for services rendered, nor a payment for the purpose of making the result of their contracts of enlistment more favorable to them because the contracts of other soldiers were on better terms, but a testimonial for meritorious service such as the commonwealth may rightly give, and such as her sons may honorably accept and receive.

Five of the justices advised that, in view of the provisions and recitals of the bill, it sufficiently appeared that the payments authorized were for a public purpose, namely, the promotion of the spirit of loyalty and patriotism, and that the bill was therefore constitutional. Mr. Justice Rugg

dissented, upon the ground that in spite of the recitals of the bill it was upon its face a measure designed to equalize bounties, and was therefore unconstitutional.

In *Whittaker* v. *Salem*, 216 Mass. 483, the school committee reappointed as principal of the high school for another year one who had been principal for several years, who had worked especially hard during the previous year, had devoted his entire vacation to school matters, and who had, as a result, become ill from overwork. At the same meeting the committee granted such principal leave of absence for the year upon half pay on account of sickness. In holding that the grant of half pay was void as an unauthorized gift of public money for a private purpose, the court said, by Rugg, C.J.: —

> The power of school committees within the scope of the authority conferred upon them by the statute is extensive. Their right to fix the salaries of teachers is comprehensive. Their duty and responsibility in this direction is a heavy one. *Charlestown* v. *Gardner*, 98 Mass. 587; *Batchelder* v. *Salem*, 4 Cush. 599. In the performance of their functions they have a wide discretion, and to a large degree they are unhampered as to the details of administration and their acts are not subject to review. *Morse* v. *Ashley*, 193 Mass. 294; *Kimball* v. *Salem*, 111 Mass. 87. But they must keep within the broad principles which govern all public boards of officers. They are charged with the expenditure of moneys raised by taxation. They can vote it only for public uses. They have no right to devote it to private purposes. However meritorious the project may appear to be, either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respecting a great variety of subjects and cannot be doubted. *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624.

The court has more rigidly applied the rule that public money can be expended only for a public purpose in actual, decided cases than in its advisory opinions. *Freeland* v. *Hastings*, 10 Allen, 570; *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Kingman* v. *Brockton*, 153 Mass. 255; *Whittaker* v. *Salem*, 216 Mass. 483. An advisory opinion is given by the justices as individuals, without the benefit of argument, and is not a decision binding upon the court under the rule of *stare decisis*. *Young* v. *Duncan*, 218 Mass. 346,

351. On the contrary, if the question considered in an advisory opinion arises in actual litigation, "the ground is reëxamined by the justices sitting as a court in the light of the arguments presented, and with the effort to guard against any influence flowing from the earlier opinion." *Boston* v. *Treasurer and Receiver-General*, 237 Mass. 403, 410. In so far as decisions and advisory opinions differ, the decisions must control.

Both decisions and advisory opinions agree that public money cannot be presented to individuals as a gratuity. The advisory opinions indicate that there is power to reward conspicuous public service where such reward will promote the public welfare by inducing others to render similar service and inculcating loyalty and patriotism. On the other hand, the decisions clearly declare that an incidental benefit to the public will not sustain either a gratuity or an expenditure which is primarily and in essence for a private purpose. *Lowell* v. *Boston*, 111 Mass. 454; *Whittaker* v. *Salem*, 216 Mass. 483. It seems, also, that where a bill or statute authorizes a payment of public money to one who has no legal right thereto, the ordinary presumption of constitutionality does not obtain, and the bill must disclose upon its face a sufficient public purpose to warrant the payment. *Cf. Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608; *Whittaker* v. *Salem*, 216 Mass. 483. Were it otherwise, a bare direction to pay would, in such a case, be a substitute for the constitutional authority to authorize the payment. In my opinion, a bill or resolve which directs a payment of public money to persons not legally entitled to it, without affirmatively disclosing any sufficient public purpose which is thereby primarily and directly furthered, would not be constitutional. Opinion, Attorney General to President of the Senate, April 17, 1922.

The present resolve directs that the balance of the salary to which a deceased member of the House would have been entitled had he lived shall be paid to his widow. It contains no statement of any public purpose to be furthered by such payment. Even if it were permissible to infer what the Legislature has not chosen to determine and declare, no public purpose appears by inference. The sum paid increases in proportion to the service which has *not* been rendered, and diminishes in proportion to the service which *has* been rendered. A payment which is inversely as the service rendered can scarcely be intended as a reward for

conspicuous and meritorious service. It does not appear, and I cannot believe, that a payment of unearned salary is intended to inculcate loyalty and patriotism among the members of the House or to stimulate the citizens to volunteer for legislative service. These considerations compel the conclusion that the resolve authorizes a private gratuity rather than an expenditure for a public purpose. I am therefore constrained to advise you that, in my opinion, it is unconstitutional.

Yours very truly,

J. Weston Allen, *Attorney General.*

Armories — Use for a "Business Pageant" — Public Purpose.

Under G. L., c. 33, § 52, armories may be used for certain public purposes therein defined.

Whether an entertainment to be given in an armory and designed to raise funds for a purpose authorized by G. L., c. 33, § 52, is a "meeting," within the meaning of the statute, is a mixed question of law and fact, to be determined by the Adjutant General.

June 12, 1922.

Brig. Gen. Jesse F. Stevens, *Adjutant General.*

Dear Sir: — You have submitted a request by the Elks Charitable Relief Association of Wakefield for authority to use the armory at Wakefield for a "business pageant," the proceeds to be used "for any and all charitable purposes in the towns of Wakefield, Stoneham and Reading."

Armories may be used for a "public purpose," as defined in G. L., c. 33, § 52. Under this section meetings to raise funds are limited to "meetings to raise funds for any non-sectarian charitable or non-sectarian educational purpose," or funds "for a benefit association of policemen or firemen." As the present request states that the proceeds are to be used "for any and all charitable purposes," it is not limited to "non-sectarian charitable purposes," as required by the act.

The question whether an entertainment designed to raise funds for a purpose authorized by the statute is a "meeting," within the meaning of the act, is a mixed question of law and fact, to be determined by your department in the exercise of a sound discretion, in the light of the principles already set forth in opinions previously rendered to you. See Attorney General's Report, 1921, p. 69.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Eminent Domain — Taking of Picture exhibited in Public Library upon Public Charitable Trust — Public or Private Purpose — Reasonable Compensation.

The promotion of popular education is a public purpose for which property may be taken by eminent domain.

Where a picture is held by a public library upon a public charitable trust for educational purposes, a bill already enacted, which provides that the picture shall be taken by the Department of Education for use in teaching art or the history of art, under G. L., c. 69, § 7, or c. 73, but not in or in connection with any public library, cannot be held, as matter of law, to take the picture for a purpose not public.

Article X of the Bill of Rights requires that reasonable compensation shall be paid for property taken by eminent domain.

Payment of reasonable compensation for property taken by eminent domain cannot be limited to a particular fund or made to depend upon a contingency.

A bill which provides for taking private property by eminent domain, all damages to be paid "from such appropriation as the General Court may make for the purpose," does not adequately secure the right to receive reasonable compensation, since such compensation is restricted in amount to such appropriation as shall be made, and is contingent upon the appropriation, which may never be made.

June 13, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You have submitted for my consideration House Bill No. 1749, entitled "An Act providing for the taking, for educational purposes, of the picture entitled 'The Synagogue,' " which provides: —

Section 1. The department of education of the commonwealth is hereby authorized and directed within six months of the effective date of this act to take by right of eminent domain for educational purposes in teaching art or the history of art under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws, but not in, or in connection with, any public library, the picture entitled "The Synagogue," now in the Boston public library, and all rights therein, of whatever nature or description. At the time of the taking the department shall file a statement of the taking with the city clerk of the city of Boston, and shall award all damages sustained by any person by reason of such taking. Any person entitled to an award of damages under this act, or the commonwealth, whether or not an award has been made, may petition to the superior court for Suffolk county within six months from the taking for the assessment of all such damages. All damages incurred under this act shall be paid from such appropriation as the general court may make for the pur-

pose by the treasurer of the commonwealth upon due presentation. The provisions of chapter seventy-nine of the General Laws, so far as applicable and save as herein otherwise expressly provided, shall apply to any action under this act.

Section 2. The department of education is authorized to make rules and regulations for the custody of said picture and its use for the educational purposes stated in section one.

I assume that you desire to be advised whether this bill is constitutional.

1. It is settled that property cannot be taken by eminent domain for a private use. *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242. A taking ostensibly for a public purpose, but in reality for a private purpose, cannot be sustained. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 377. The picture is held upon a public charitable trust for educational purposes. *Cary Library* v. *Bliss*, 151 Mass. 364; *Eliot* v. *Trinity Church*, 232 Mass. 517. The bill now provides that the picture shall be taken for educational purposes different from those to which it is now put, and thereby avoids a constitutional defect which existed in an earlier form of the same measure. See opinion of the Attorney General to the Joint Committee on the Judiciary, May 5, 1922. The promotion of popular education is a public purpose. *Knights* v. *Treasurer and Receiver-General*, 237 Mass. 493, 496. In view of the amendment of the use for which the picture is to be taken, and of the presumption of constitutionality which attends enactment by the Legislature, I cannot advise you that the bill does not appropriate the picture to a public purpose.

2. Article X of the Bill of Rights provides, in part: —

> And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

A "taking" without compensation is also forbidden by the Fourteenth Amendment to the Federal Constitution. *Chicago, etc., R.R. Co.* v. *Chicago*, 166 U. S. 226, 241. Unless adequate provision for compensation is made, either by the statute which authorizes the "taking" or by a general act applicable to it, the authority to "take" is void. *Boston & Lowell R.R. Corpn.* v. *Salem & Lowell R.R. Co.*, 2 Gray, 1, 37. Nor can the Legislature prescribe in advance the amount of the com-

pensation which shall be paid. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312. Moreover, the right to receive compensation must be given unconditionally. Nichols: Eminent Domain, 2d ed., § 206. It cannot be restricted to a particular fund. *Bent* v. *Emery,* 173 Mass. 495, 498; *Connecticut River R.R. Co.* v. *County Commissioners,* 127 Mass. 50. By an amendment made since the measure was previously before me, the bill now provides that "all damages incurred under this act shall be paid from such appropriation as the general court may make for the purpose. . . ." This clause expressly excludes the provisions for compensation made by G. L., c. 79. Under it the right to compensation is contingent upon an appropriation which may never be made, and is restricted in amount to such appropriation as shall be made.

I am therefore constrained to advise you that under the bill in its present form the right to compensation is not secured in the manner required by the Constitution.

Yours very truly,

J. Weston Allen, *Attorney General.*

Restraint of Trade — Minimum Resale Prices — Agreements to maintain Prices.

Agreements designed to maintain prices after the seller has parted with the title to his goods, and to prevent competition among those who trade in them, is a violation of law.

Such agreements may be expressed or implied from a course of dealings, or other circumstances.

A system for maintaining resale prices, which is made effective by co-operative methods between the manufacturer and various dealers and agents to the extent that it constitutes a scheme which restrains the natural flow of trade, is illegal.

June 13, 1922.

Mr. Eugene C. Hultman, *Chairman, Special Commission on the Necessaries of Life.*

Dear Sir: — You have requested my opinion as to whether the practice of a baking company in refusing to sell its bread to retail dealers who do not maintain a minimum resale price is a violation of law.

G. L., c. 93, § 2, provides: —

Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

Section 13 of that act reads as follows: —

Maintaining or increasing unreasonably the price of any necessary of life is hereby declared to be unlawful. Whoever, in combination or association with another or others, enters into any agreement or understanding to maintain or increase or cause to be maintained or increased unreasonably the price of any necessary of life shall be deemed guilty of criminal conspiracy, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the house of correction for not more than two years, or both. Prosecutions hereunder shall be under the control of the attorney general and shall be conducted by him or an assistant designated by him.

It seems to be firmly established that *agreements* designed to maintain prices after the seller has parted with the title to the articles, and to prevent competition among those who trade in them, is a violation of law. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373; *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441. See also opinion of the Attorney General to the Senate, dated May 1, 1922. Such agreements may be expressed or implied from a course of dealing, or other circumstances. *United States* v. *A. Schrader's Son, Inc., supra; Federal Trade Commission* v. *Beech-Nut Packing Co., supra.*

If the system for maintaining resale prices is made effective by co-operative methods between the manufacturer and various dealers and agents to the extent that it constitutes a scheme which restrains the natural flow of trade or commerce

and the freedom of competition, it is illegal. *Federal Trade Commission* v. *Beech-Nut Packing Co., supra.*

The facts stated in your letter are not sufficient to enable me to determine whether the refusal of the company in question to sell its bread to retail dealers who do not sell at a minimum resale price constitutes a violation of law.

Very truly yours,

J. Weston Allen, *Attorney General.*

Taxation — Banks and Banking — Savings Deposits — Nature of Such Deposits — Returns by Trust Companies to the Commissioner of Corporations and Taxation of the Amount of Profits paid upon Deposits in the Savings Department.

A deposit in the savings department of a trust company is a trust rather than a debt.

A book evidencing a deposit in the savings department of a trust company is not an "evidence of indebtedness," within the meaning of G. L., c. 62, § 33.

While the division of profits made by trust companies upon deposits in their savings departments may for some purposes be regarded as "interest" and for other purposes be regarded as "dividends," it is not interest paid by the trust company "on its bonds, notes or other evidences of indebtedness," within the meaning of G. L., c. 62, § 33, and the trust company is not required by that section to make a return thereof to the Commissioner of Corporations and Taxation.

June 14, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You inquire whether, under G. L., c. 62, § 33, you can require trust companies and national banks which have savings departments to return the names and addresses of all residents of the Commonwealth to whom they have paid "taxable interest" in such departments during the preceding calendar year. You state that by taxable interest you mean interest upon deposits in such departments which exceed the amount prescribed by G. L., c. 168, § 31, and which are not taxable to the corporation under G. L., c. 63, § 11. You have submitted with your request two specimen books, each of which provides that the book must be presented at the time when deposits are made or withdrawn. See G. L., c. 172, §§ 60, 70.

G. L., c. 62, § 33, provides, in part: —

Every corporation, partnership, association or trust doing business in the commonwealth shall report annually to the commissioner, in such form as he shall from time to time prescribe, the names and addresses of all residents of the commonwealth to whom it has paid interest during the preceding calendar year on its bonds, notes or other evidences of indebtedness, and to whom it has paid any annuities, except, however, interest coupons payable to bearer, and income exempt from taxation under this chapter. In any individual case, any such corporation, partnership, association or trust shall, upon request of the commissioner, state the respective amounts of interest and annuities so paid by it to any person during any calendar year.

Assuming, without deciding, that the book "evidences" the obligation from the trust company or bank to the customer, the controlling question is whether that obligation is an "indebtedness." A deposit in the commercial department of a bank or trust company is a debt. *Demmon* v. *Boylston Bank*, 5 Cush. 194; *National Mahaiwe Bank* v. *Peck*, 127 Mass. 298. But deposits in the savings department of a trust company have in general the incidents of a deposit in a savings bank. *J. S. Lang Engineering Co.* v. *Commonwealth*, 231 Mass. 367; *Bachrach* v. *Commissioner of Banks*, 239 Mass. 272, 273. Under G. L., c. 127, § 61, they constitute "special" deposits, and the legal relation between bank and depositor is not that of debtor and creditor, but substantially that of trustee and *cestui que trust*. *Bachrach* v. *Commissioner of Banks*, 239 Mass. 272, 274; *Greenfield Savings Bank* v. *Abercrombie*, 211 Mass. 252; *Kelly* v. *Commissioner of Banks*, 239 Mass. 298, 301; see also *Commissioner of Banks* v. *Jordan Marsh Co.*, 241 Mass. 273. As a trust is not a debt, it would seem that a book which "evidences" the obligation of a trustee to the *cestui que trust* is not an "evidence of indebtedness" within the meaning of this statute.

G. L., c. 167, § 17, and G. L., c. 172, § 65, describe the payments made upon savings deposits as "interest or dividends." G. L., c. 172, § 67, refers to them as "interest," while section 68 refers to them as dividends. It may be that this seeming confusion in terms springs from the dual character of these payments. They are at no fixed rate and can be made only out of earnings. G. L., c. 167, § 17; G. L., c. 172, §§ 65, 68; V Op. Atty. Gen. 442. In this respect they resemble dividends upon corporate stock rather than interest paid upon money loaned by the depositor. On the

other hand, they are derived in large part from interest paid upon loans made by or bonds owned by the trust company. Even if they are viewed as a division of the earnings of trust funds which are invested by the trust company in loans or bonds, rather than as hire paid by the trust company for the use of money loaned by the depositor, they might still be regarded as payments of interest earned by those funds. I am of opinion, however, that such interest is not interest paid in the manner defined by G. L., c. 62, § 33. A division of interest earned by trust funds is not interest paid upon the bank books as "evidences of indebtedness," similar to notes or bonds.

For these reasons I am constrained to advise you that, in my opinion, your inquiry must be answered in the negative. This renders it unnecessary to determine whether G. L., c. 62, § 33, can apply or does apply to national banks, which are Federal instrumentalities.

Yours very truly,

J. Weston Allen, *Attorney General.*

Drainage Law — Application of Amendatory Statute to Pending Proceedings.

It is a general principle that a new statute which provides merely for changes in remedy or in modes of procedure will not invalidate steps taken before the statute goes into effect, but will apply to all proceedings taken thereafter.

St. 1922, c. 349, making certain changes in the procedure prescribed by G. L., c. 252, and other changes not material to the inquiry, is applicable to proceedings pending when the statute took effect, since no constitutional rights are impaired.

June 20, 1922.

Dr. Arthur W. Gilbert, *Commissioner of Agriculture.*

Dear Sir: — You request my opinion in behalf of the Drainage Board regarding the effect of St. 1922, c. 349, upon a pending petition from landowners in the town of Salisbury for the formation of a drainage district. Said statute amends certain sections of G. L., c. 252, relative to the improvement of low land and swamps, and adds a new section thereto. You state that upon receipt of the petition the Board proceeded to appoint district drainage commissioners, and ask whether it will be necessary, in view of the passage of the amendatory law, to reappoint them or whether they may go ahead and function under the new law.

The principal purpose and effect of St. 1922, c. 349, is to make certain changes in the procedure prescribed by G. L., c. 252, for the formation by the district drainage commissioners of a drainage district and for the submission of estimates and the drawing of funds from the county treasury, to give the district drainage commissioners expressly the power to acquire property outside the Commonwealth, and to give to the drainage district the power to assess upon its members such sums as may be necessary for further improvements and maintenance. Other changes are merely incidental and not material to the present inquiry. The effect of the amendments is merely to substitute the language of the sections as amended for the sections as they appear in G. L., c. 252; and of course the sections of that chapter not amended stand as they are. *Fitzgerald* v. *Lewis*, 164 Mass. 495. The act contains an emergency preamble reciting that "it is important and for the interest of the Commonwealth that prompt action should be taken in respect to the method of formation of drainage districts and their powers."

The object of the act appears, from the nature of its provisions as well as from the preamble, to be to make needed changes in the existing law, to clarify provisions which were uncertain, and to supply omissions for the purpose of making the law more workable. The intention seems clearly to have been that the amendments should go into effect upon the passage of the act, and should apply to all proceedings thereafter, whether or not they had been begun before the passage of the amending act.

It is a general principle that a new statute which provides merely for changes in remedy or in modes of procedure will not invalidate steps taken before the act goes into effect, but will apply to all proceedings taken thereafter. In *Commissioners of Union County* v. *Greene*, 40 Oh. St. 318, there were proceedings before county commissioners, begun by petition, for the improvement of a road pursuant to a statute. After the proceedings were brought, but before contracts for the improvement had been made and before assessment of the cost had been ordered, the statute was amended in a way which materially changed the rule of apportionment. The assessors subsequently applied the rule prescribed in the amendatory act. The court held that the assessment was correctly made, that the statute was simply remedial in its operation on pending proceedings, and was not in conflict

with constitutional inhibition against retroactive laws. See also *Howard* v. *Fall River Iron Works Co.*, 203 Mass. 273, 276; *In re Hickory Tree Road*, 43 Pa. St. 139; *Mayne* v. *Huntington County*, 123 Ind. 132; Endlich: Interpretation of Statutes, § 482.

The intention manifested by the Legislature must be observed and carried into effect unless the amendatory act is found to operate retroactively to destroy or diminish rights created by the former law and proceedings under it which could not be constitutionally taken away by the Legislature.

The objection to retroactive legislation, to be valid, must be founded on the constitutional prohibition against the taking away of vested rights or the impairment of the obligation of a contract. *Wilson* v. *Head*, 184 Mass. 515, 518; *Danforth* v. *Groton Water Co.*, 178 Mass. 472; *National Surety Co.* v. *Architectural Co.*, 226 U. S. 276. In my opinion, the amendatory act has no such effect. The changes made thereby were in part formal and in part changes in procedure. There was in addition an amendment giving to the district drainage commissioners a power to acquire land outside the Commonwealth, which, as a corporation organized under the provisions of G. L., c. 158, it probably had before, and an additional provision authorizing the drainage district to assess upon its members such sums as might be necessary for further improvements and for maintenance, which previously, under G. L., c. 252, §§ 13 and 14, were to be paid for by the towns where the land improved was located, and assessed on the parcels benefited by the improvement.

It is my opinion that there were no constitutional rights acquired either under the original statute or by virtue of the filing of the petition prior to the amendatory act, which are taken away by St. 1922, c. 349, and that the amendments are applicable to proceedings under the petition filed by landowners in Salisbury.

Very truly yours,

J. Weston Allen, *Attorney General.*

Public Records — Registrar of Motor Vehicles — Report of Accident.

The report required to be sent to the registrar by every person operating a motor vehicle which is in any manner involved in an accident is not open to public inspection.

June 20, 1922.

Hon. John N. Cole, *Commissioner of Public Works.*

Dear Sir: — I have your request for an opinion as to whether you should allow examination of the records of automobile accidents on file in your department.

I assume that your inquiry concerns the report required to be sent you by every person operating a motor vehicle which is in any manner involved in an accident, which is required by St. 1913, c. 530, now G. L., c. 90, § 26. This report is not a paper "received for filing," within the meaning of G. L., c. 4, § 7, cl. 26. It is therefore not a public record open to public inspection, as provided by G. L., c. 66, § 10. See *Round* v. *Police Commissioner*, 197 Mass. 218.

Yours very truly,

J. Weston Allen, *Attorney General.*

Civil Service — Veterans — Inspectors of Plumbing — Qualifications — Interpretation of the Word "Continuously."

Whether persons, otherwise eligible, would be precluded from taking the civil service examination for plumbing inspectors because, by reason of having served in the military or naval service during the past five years, they have not had "practical experience . . . continuously," as required by G. L., c. 142, § 11, is a mixed question of law and fact, the decision of which rests upon the official who passes upon the qualifications of applicants for examination.

June 21, 1922.

Payson Dana, Esq., *Commissioner of Civil Service.*

Dear Sir: — You have requested my opinion upon a question of law in connection with the interpretation of G. L., c. 142, § 11, relating to the appointment of inspectors of plumbing, which section provides, in part, as follows: —

The said inspector of buildings, if any, otherwise the board of health, of each city and town, shall, within three months after it becomes subject to sections one to sixteen, inclusive, appoint from the classified civil service list one or more inspectors of plumbing who shall be prac-

tical plumbers and shall have had practical experience either as master plumbers or journeymen, continuously, during five years next preceding their appointment.

Your specific inquiry concerns the correctness of a ruling made by you, as Commissioner, to the effect that persons who have served in the military or naval service during the last five years, and who would otherwise be eligible to take the civil service examination for plumbing inspectors, are excluded by the law, for the reason that they have not had "practical experience either as master plumbers or journeymen, continuously, during the five years next preceding their appointment."

Your inquiry, of course, requires a construction of the phrase "shall have had practical experience either as master plumbers or journeymen, continuously, during five years next preceding their appointment." While it is to be presumed that "continuously" is used in the ordinary sense, as meaning without interruption, this does not necessarily mean that the individual must have been engaged every day or every week or every month of the specified period. But in view of the fact that interruptions, if of long duration, might affect the knowledge and ability of the applicant to perform the duties incumbent upon the position of plumbing inspector, and would prevent such applicant from keeping up with the improvements and changes made from time to time in the practice of his trade, particular care must be taken not to give an interpretation to the law which is contrary to its spirit and which would defeat its purpose.

This is really a mixed question of law and fact, and it is for the official upon whom rests in a given case the responsibility to determine whether the applicant has been continuously having practical experience, within the meaning of the statute. In determining this question the intent of the applicant with respect to his occupation during the interim period, the length of the interim period, and all other facts respecting his employment are to be considered, the decision to rest upon the person finally passing upon the qualifications of the applicant, having due regard for the express language, the spirit and the purpose of the law.

Very truly yours,

J. Weston Allen, *Attorney General.*

Foreign Mortgage Corporations — Branch Offices — Use of Words "Trust Company."

With certain exceptions, only trust companies incorporated under the laws of Massachusetts can lawfully use the words "Trust Company."

An exemption in a statute which limits the application of a general policy should be construed strictly in favor of the Commonwealth.

Such a statute should be construed so as to carry out the intent of the Legislature, if the intent can be reasonably ascertained from the words used, or by fair implication, although such construction may seem contrary to the ordinary meaning of the letter of the statute.

Foreign mortgage corporations which were authorized to do business in the Commonwealth prior to Oct. 1, 1899, and which were conducting an established business here at the time of the passage of that act, may use the words "Trust Company."

June 30, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — You request my opinion upon the following question: —

May a foreign corporation not now registered under G. L., c. 181, legally establish and maintain a branch office in this Commonwealth, by registration with the Commissioner of Corporations and Taxation, and carry on a foreign mortgage business within the meaning of G. L., c. 172, § 4?

From the papers and data submitted by you it appears that the —— Trust Company was incorporated under the laws of North Dakota in 1886; that it paid the assessment required by St. 1889, c. 427, § 6, for several years; that it paid the Commissioner of Foreign Mortgage Corporations' tax in 1894; that it had no usual place of business in Massachusetts; that it contended that it was not required to, and that it did not, comply with the provisions of St. 1884, c. 330; and that it conducted its business through the mails or through persons principally in banks who were not agents of the company.

G. L., c. 172, § 4 (St. 1899, c. 467, as amended), reads as follows: —

No person or association and no bank or corporation, except trust companies, shall use in the name or title under which his or its business is transacted the words "Trust Company" even though said words may be separated in such name or title by one or more other words, or advertise or put forth a sign as a trust company or in any way solicit or receive deposits as such. Whoever violates this section

shall forfeit one hundred dollars for each day during which such violation continues. But this section shall not prohibit an insurance company authorized prior to October first, eighteen hundred and ninety-nine, to do business in the commonwealth nor a company authorized prior to said date to transact a foreign mortgage business in the commonwealth from using the words "Trust Company" as a part of its corporate name.

St. 1899, c. 467, established the policy, which has since been strictly adhered to, that, with certain exceptions, only trust companies incorporated under the laws of the Commonwealth could lawfully use the words "Trust Company." The reason for the policy, obviously, was that trust companies were subject to specific laws affecting such companies and were subject to the supervision of the Savings Bank Commissioners, and that the use of the words "Trust Company" by persons or corporations not subject to such laws or supervision might deceive the public.

The Legislature, however, provided that certain companies should not be prohibited from using the words "Trust Company." Since this exemption limits the application of the general policy thus laid down and is in the nature of a privilege or legislative grant, it should be construed strictly in favor of the Commonwealth, and should not be extended by implication in favor of parties on whom such rights may be bestowed. *Butchers Slaughtering &c Assn.* v. *Boston*, 214 Mass. 254, 258. The act must also be construed so as to carry out the intent of the Legislature, if the intent can be reasonably ascertained from the words used or by fair implication, although such construction may seem contrary to the ordinary meaning of the letter of the statute. *Staniels* v. *Raymond*, 4 Cush. 314, 316; *Moore* v. *Stoddard*, 206 Mass. 395, 399; *Bergeron, Petr.*, 220 Mass. 472, 475; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459, 472.

In *Moore* v. *Stoddard, supra*, the court said, at page 399: —

> A construction which would lead to such a result is to be avoided if that fairly can be done. The manifest intention of the Legislature, as gathered from its language considered in connection with the existing situation and the object aimed at, is to be carried out. This rule has been declared in many of our decisions.

In *Holy Trinity Church* v. *United States, supra*, the court said, at pages 459, 463 and 472: —

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

. . . . . .

Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

. . . . . .

The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute.

G. L., c. 172, § 4, was aimed at a specific evil. The Legislature, while laying down a new policy, manifestly intended not to disrupt the *existing* business of foreign mortgage corporations in the Commonwealth. This was fair dealing with respect to such corporations which had for a number of years paid a special tax for the privilege of doing business here. But the Legislature clearly did not intend to extend the privilege or exemption to companies which were not at the time of the passage of the act doing business in Massachusetts, merely because such companies had at some prior time been authorized to do business here.

The act provides that it shall not be construed "to *prohibit* . . . any company heretofore authorized to transact a foreign mortgage business in this commonwealth *from using* the words 'Trust Company' as a part of its corporate name." A company which was not doing business in the Common-

wealth at the time of the passage of the act was not within our jurisdiction, and the prohibition could not operate upon such company. The language also clearly applies to a present situation and to a company doing business at that time.

Whether or not the corporation above referred to was authorized to do business in the Commonwealth prior to Oct. 1, 1899, and was conducting an established business at that time, is a question of fact for you to determine. The mere payment of the assessment under St. 1889, c. 427, would not constitute such authorization, since the Commissioner of Foreign Mortgage Corporations, under that act, had no power to authorize or prohibit the transaction of such business. The issuance of a license under St. 1893, c. 303, would constitute such authorization.

St. 1895, c. 311, § 2, provides: —

> Such corporations [foreign mortgage corporations] shall make an annual return to the commissioner of corporations of their assets and liabilities, and shall make such further statements of fact to him at such times and in such form as he may require or approve.

Whether or not the —— Trust Company filed such returns might be of assistance to you in determining whether the company did business in Massachusetts continuously to Oct. 1, 1899. I am of the opinion that the question should be answered in the negative unless it be found as a fact that the company was authorized to do business in the Commonwealth prior to Oct. 1, 1899, and was actually conducting an established business at that time.

Very truly yours,

J. Weston Allen, *Attorney General.*

Banks — Bond and Investment Companies.

The business of selling foreign currency on the instalment plan and issuing certificates therefor is not the business of receiving deposits of money for transmission abroad, under G. L., c. 169, § 1, but is the business of issuing, negotiating or selling bonds, certificates or obligations on the instalment plan, and is subject to the requirements of G. L., c. 174.

June 30, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — You call my attention to an examination made by you of three closely affiliated companies, as follows: —

1. The First State Bank, a banking corporation organized and doing business under R. L., c. 115. This bank receives deposits of money for transmission to foreign countries.

2. The Nutile-Shapiro Company, a Massachusetts corporation now dissolved by legislative act as a delinquent corporation. This company sells steamship tickets. Although the corporation is dissolved, the business, you state, is still being conducted under the name of the company.

3. The State Bankers Corporation, organized under the laws of Massachusetts for the purpose of dealing in notes, drafts and other evidences of debt, securities of all kinds, coin and bullion, and for other purposes. This company is engaged in the business of buying and selling foreign bonds and foreign currency. It sells foreign currency on the partial payment plan, a certain amount being paid in cash and a note given for the balance. The customer receives a so-called "exchange interim certificate," on the back of which successive payments are entered. It also receives payments in money of the United States, the equivalent of which in foreign currency is placed to the credit of the customer and a certificate given for a like amount. Interest is allowed on a full-paid certificate at the rate of 2 or 2½ per cent. The certificate states that the holder is entitled to receive upon surrender a draft for the amount named in foreign currency, and that the corporation agrees upon request to convert the foreign amount into dollars at the corporation's buying rate of exchange. You state that the State Bankers Corporation does not have a foreign correspondent, but that it buys drafts from the First State Bank, drawn on the First State Bank's correspondent. Your examination has disclosed that the State Bankers Corporation is in an insolvent condition.

The officers and stockholders of the three corporations are the same, the same officers and clerks handle their daily transactions, and they all do business in the same building at 107 Salem Street, Boston.

On the above facts you ask the following three questions: —

1. Would the close connection between the State Bankers Corporation, the First State Bank and the Nutile-Shapiro Company and the manner of receiving funds, as set forth above, warrant the Commissioner of Banks in taking the position that the State Bankers Corporation is subject to the provisions of G. L., c. 169, § 1?

2. Does the fact that the "exchange interim certificate," issued by the State Bankers Corporation, states that the holder is entitled to a

draft on a correspondent abroad warrant the Commissioner of Banks in assuming that the corporation is engaged in the business of transmitting money or equivalents thereof to foreign countries, and therefore subject to the provisions of the second clause of the above section?

3. As the State Bankers Corporation issues a certificate payable on the instalment plan, and as this corporation is insolvent, is the Commissioner of Banks warranted in taking the position that this corporation is transacting business in the Commonwealth in violation of the provisions of G. L., c. 174, § 1?

1. G. L., c. 169, § 1, is as follows: —

This chapter shall apply to —

First. All persons engaged in the selling of steamship or railroad tickets for transportation to or from foreign countries, or in the supplying of laborers, who, in conjunction with said business, carry on the business of receiving deposits of money for safe keeping, or for the purpose of transmitting the same, or equivalents thereof, to foreign countries, or for any other purpose.

Second. All persons who carry on the business, or make a practice, of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries, except banks or trust companies or express companies having contracts with railroad or steamship companies for the operation of an express service upon the lines of such companies, or persons engaged in the banking or brokerage business.

Third. Any person engaged or financially interested in the selling of tickets or supplying of laborers as aforesaid who is also engaged or financially interested in the business of receiving deposits of money as aforesaid, and any person engaged or financially interested in the business of receiving deposits of money as aforesaid who is also engaged or financially interested in the selling of tickets or supplying of laborers as aforesaid, under whatever name or by whatever persons the said business of selling tickets or supplying laborers or the said business of receiving deposits is carried on.

Your first question is largely a question of fact. If the business purporting to be done by the First State Bank or by the Nutile-Shapiro Company were really being done by the State Bankers Corporation, either directly or through the other concerns as agents, then the State Bankers Corporation would be engaged in the business done by the other concerns, within the meaning of G. L., c. 169, § 1, but otherwise not. I am informed by conversation with an officer of your department that the business done by the three concerns is

probably actually an independent business. That being so, there seems to be no basis for the application of G. L., c. 169, to the State Bankers Corporation on account of the business done by the other two concerns.

2. G. L., c. 169, § 1, cl. 2d, is applicable only to "persons who carry on the business, or make a practice, of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries." The business of the State Bankers Corporation, as you state it, is the selling of certificates for cash or on the instalment plan, entitling the holder to a draft in foreign currency on a foreign correspondent. These drafts the State Bankers Corporation procures from the First State Bank. The customer frequently leaves the money which he has deposited with the corporation, even after the maturity of the certificate, receiving interest from the corporation thereon.

It is apparent that the purpose for which deposits are received is not to transmit money to foreign countries but to speculate in foreign exchange, and that the State Bankers Corporation does not do the business of transmitting money to foreign countries but merely receives deposits, and, when necessary, purchases drafts on foreign correspondents from the First State Bank. It takes no part itself in the transmission of any money abroad. In my opinion, therefore, its business does not come within the second clause.

3. G. L., c. 174, § 1, provides, in part, as follows: —

> The business of issuing, negotiating or selling any bonds, certificates or obligations of any kind on the partial payment or instalment plan, unless such bond, certificate or obligation shall at the time of issuance, negotiation or sale be secured by adequate property, real or personal, shall be transacted in the commonwealth only by corporations subject to the requirements of this chapter. . . .

In my opinion, the business of the State Bankers Corporation, as already described, of selling exchange interim certificates to be paid for on a partial payment plan, comes within the description of this provision as the business of issuing, negotiating and selling unsecured certificates or obligations on the partial payment or instalment plan in this Commonwealth. The corporation, doing business in Boston, issues documents which it calls certificates, purporting to state its obligation upon surrender thereof to deliver drafts in foreign currency for stated amounts or to convert them on

request into dollars. Such certificates are issued on a partial payment plan, and they are unsecured. Consequently, the corporation is subject to the requirements of said chapter. Sections 1 and 3 of said chapter contain requirements, as a prerequisite to the doing of such business by corporations in the Commonwealth, for the deposit of capital with the Treasurer and Receiver-General or some other duly authorized officer, and the receipt of a certificate of authority from the Commissioner of Banks. Section 4 authorizes the Commissioner to examine the affairs of any corporation engaged in such business. Section 8 provides as follows: —

> If upon examination the commissioner is of opinion that any domestic corporation subject to the requirements of this chapter is in an unsound financial condition or has exceeded its powers, or has failed to comply with any provision of law, he shall apply to the supreme judicial court in equity for an injunction restraining the corporation from further proceeding with its business in whole or in part. The court may issue an injunction forthwith, and may, after a full hearing, make the injunction permanent, and may appoint a receiver or receivers to take possession of the property and effects of the corporation and to settle its affairs, subject to the order of the court.

Since, as you state in your letter, the State Bankers Corporation is in an insolvent condition, and as I am informed it has not complied with the provisions of G. L., c. 174, it is my opinion, and I advise you, that you may apply to the Supreme Judicial Court in equity for relief, under section 8.

Very truly yours,

J. Weston Allen, *Attorney General.*

Savings Banks — Savings Insurance Plan.

A plan by which a savings bank, as agent for a savings and insurance bank under G. L., c. 178, § 13, transmits payments of premiums and receives dividends for a depositor, and performs other incidental services for the savings and insurance bank, is not unlawful.

Since G. L., c. 178, § 13, does not authorize the savings departments of trust companies to act as agents of savings and insurance banks, they would not be authorized to engage in business under the plan proposed.

June 30, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — Following my opinion of April 11, 1922, you have submitted to me a revised savings insurance plan pre-

pared by parties interested in savings bank life insurance, and ask my opinion whether such a plan may be lawfully adopted by savings banks and trust companies in their savings departments.

The plan originally presented was in the form of a certificate purporting to be issued by a savings bank and signed by the depositor desiring to secure the benefits of the plan and by the treasurer of the bank, whereby the depositor agreed to open a savings account, to deposit a certain amount monthly for a period of ten years, to take out a policy of insurance on his life written by a savings and insurance bank, and to deliver the policy to the savings bank; and the savings bank agreed to pay the premiums on the policy, to hold the policy for the depositor, and upon surrender of the certificate and pass book to pay the depositor the balance standing to his credit, and also either to pay him the cash surrender value of his policy or to deliver the policy to him, and in the event of the death of the depositor to pay the balance in his account to the person entitled to receive it, and to pay the amount of the policy to the beneficiary thereunder. I stated that in my opinion this plan seemed to require the savings bank to engage in a business which was not the business of a savings bank and which was not authorized by the statutes; that the contract for the deposit at intervals of sums of money exceeded the authority given by G. L., c. 167, § 16; that the agreement by the bank to hold the policy for the depositor was in excess of the authority given by G. L., c. 168, § 33; that in so far as the bank was to act as an agent it was to act as the agent of the depositor and not of the savings and insurance bank, as permitted by G. L., c. 178, § 13; and that the bank, by agreeing at the end of the period to pay the depositor the cash surrender value of the policy, and in the event of his death to pay the beneficiary the amount of the policy, was to that extent itself engaging in the business of life insurance.

By the revised plan the objections stated to the original plan appear to have been eliminated. By this plan the savings bank certifies that it has been appointed agent of the insurance department of the insuring bank, under G. L., c. 178, § 13, and as such has agreed, so far as authorized by the depositor, to receive and transmit payments of premium on the policy issued to him by the insuring bank, to receive for the depositor dividends paid him by the insuring bank,

and to perform other incidental services for the insurance department. The certificate states the amounts which the depositor will be entitled to receive, either ascertained or estimated, from the insuring bank on his policy and from the savings bank on his account, either at the end of the period or on his death. There is no agreement by the depositor to make monthly deposits, but a mere statement that he intends to do so. The depositor does not deliver his policy to the savings bank, but merely states that he has received it. The depositor authorizes the bank to receive dividends payable under the policy and to pay premiums in his behalf as they become due. The savings bank's liability under the certificate is limited to the making of payments on the depositor's account, as it is required to do by law.

The objections which I stated to the original plan appear to have been removed in the revised plan. This plan seems to provide for the doing of certain acts by a savings bank as agent for a savings and insurance bank under the authority given by G. L., c. 178, § 13. I therefore find nothing objectionable in the plan which you have now submitted to me so far as it applies to services to be performed by savings banks. But G. L., c. 178, § 13, does not authorize the savings departments of trust companies to act as agents of savings and insurance banks. With respect to trust companies in their savings departments, therefore, I conclude that they would not be permitted by statute to engage in the business proposed.

Very truly yours,
J. Weston Allen, *Attorney General.*

Public Park — Change of Use — Metropolitan District Commission — Armory Commission.

To transfer certain land now owned by the Commonwealth and acquired for boulevard purposes by the Metropolitan Park Commission, now succeeded by the Metropolitan District Commission, to the Armory Commission, to construct and maintain an armory thereon, legislative authority is necessary.

July 7, 1922.

Brig. Gen. Jesse F. Stevens, *Adjutant General.*

Dear Sir: — You ask my opinion as to the proper procedure to be followed in the matter of transferring to the Armory Commission, to construct an armory thereon, cer-

tain land now owned by the Commonwealth and taken for boulevard purposes by the Metropolitan Park Commission, now succeeded by the Metropolitan District Commission.

In this situation it should be noted that while the title to lands taken by the Metropolitan District Commission vests in the Commonwealth, the expense of acquiring such land does not fall on the Commonwealth altogether, but one-half is assessed on the cities and towns of the district.

G. L., c. 92, § 85, empowers the Metropolitan District Commission, under certain conditions and under a certain form of procedure, to sell any of its lands thus obtained. I am of the opinion that this section is not sufficiently broad to authorize a transfer of the said land to the Armory Commission, especially in view of section 87 of said chapter 92, which provides for a transfer of care and control of such land by the Metropolitan District Commission. Section 87, however, does not empower a transfer to any State department, and apparently contemplates such transfer as will substantially carry out the purpose of the taking by the Metropolitan District Commission.

It appears, therefore, that the transfer you desire would be appropriating for a public use land taken for another distinct public use.

In *Eklon* v. *Chelsea*, 223 Mass. 213, 216, the court said: —

> Land taken for one public use may be devoted to another public use only by legislative authority clearly expressed, whose mandate as to the method of actually making the change must be exactly followed.

And in *Higginson* v. *Treasurer, etc., of Boston*, 212 Mass. 583, 591, the court said: —

> Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end.

See also III Op. Atty. Gen. 406.

Neither does this transfer come within G. L., c. 79, § 5, relating to the taking of land already in public use.

I am of the opinion, therefore, that there is no "legislative authority clearly expressed" by virtue of which the Metropolitan District Commission may transfer this land to the care and control of the Armory Commission, and that the power granted the Armory Commission by G. L., c. 33, § 45,

to take land by eminent domain is not such "explicit legislation" as would permit the exercise of that power in this instance.

I am therefore of opinion that such transfer as you desire requires further authorization by the Legislature.

Yours very truly,

J. Weston Allen, *Attorney General.*

Banks and Banking — Savings Banks — Investment of Deposits — Purchase of, and Extraordinary Alterations in, Bank Building.

A savings bank may, with the approval of the Commissioner of Banks, invest in the acquisition of a suitable bank building a sum not exceeding an amount determined in the manner prescribed by the first sentence of G. L., c. 168, § 54, cl. 11, but in no event exceeding $200,000.

The authority of a savings bank, with the approval of the Commissioner, to invest deposits in extraordinary alterations in or additions to a bank building already owned by it, which is conferred by the second sentence of G. L., c. 168, § 54, is separate from and independent of the authority to invest such deposits in the acquisition of such building, and the amount which may be expended for alterations is not diminished by the sum spent for such acquisition, although the amount which may be invested in such alterations is likewise determined in the manner prescribed by the first sentence.

The amount which the Commissioner should approve either for the acquisition of a bank building or for extraordinary alterations in or additions thereto, is, within the limits prescribed, to be determined by him in the exercise of a sound discretion.

July 10, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — G. L., c. 168, § 54, cl. 11, provides: —

Deposits and the income therefrom shall be invested only as follows:

. . . . . .

A sum not exceeding the guaranty fund and undivided earnings of such corporation, nor in any case exceeding five per cent of its deposits or two hundred thousand dollars, may, subject to the approval of the commissioner, be invested in the purchase of a suitable site and the erection or preparation of a suitable building for the convenient transaction of its business. Extraordinary alterations in, or additions to, a bank building owned by a savings bank, involving an expense exceeding ten thousand dollars, shall not be made without the approval of the commissioner, and the cost of such alterations or additions shall not exceed the sum specified in this clause.

A certain savings bank, which carries its bank building upon its books at $100,000, now proposes to expend a further sum for additions and alterations which will increase the amount invested in the building to more than $200,000. You inquire whether such expenditure is permitted by said section 54, clause 11.

1. Section 54, clause 11, places two limitations upon the investment of the funds of a savings bank in the purchase of a suitable site for, and the preparation or erection of, a suitable bank building. In the first place, such investment must be approved by the Commissioner of Banks. In the second place, the maximum amounts which the Commissioner has power to approve for this purpose must be determined in the manner prescribed by the first sentence. Even with such approval, the bank cannot invest for this purpose more than the amount of its guaranty fund and undivided surplus earnings. If this sum exceeds 5 per cent of the deposits, the latter amount is the permitted maximum. Finally, if each of said sums exceeds $200,000, not more than $200,000 may be so invested in the acquisition and erection or preparation of such building. In other words, that one of the three prescribed sums which is the smallest is the maximum amount which, with the approval of the Commissioner, may be invested in the purchase of a suitable site and the erection or preparation of a suitable bank building.

2. The second sentence of section 54, clause 11, is in form a prohibition. No extraordinary alterations in or additions to a bank building already owned, which involve an expense of more than $10,000, can be made without the approval of the Commissioner, and even with such approval the cost of such alterations or additions must "not exceed the sum specified in this clause." But an express prohibition of such expenditures beyond certain prescribed limits authorizes, by implication, an expenditure for extraordinary alterations or additions within such limits. The prohibition was imposed and the implied authority was conferred by St. 1910, c. 281, which was enacted after the first sentence of clause 11 had been in force many years.

In my opinion, the authority conferred by the second sentence is separate from and independent of the authority conferred by the first sentence. In other words, the amount which may, with the approval of the Commissioner, be expended for extraordinary alterations in or additions to a

building already owned does not depend upon, and is not diminished by, the sum originally expended to erect or prepare that building. On the other hand, it would be a plain evasion of the law for a bank to expend the maximum sum to acquire the building, and then to ask immediate approval of alterations or additions.

The amount which the Commissioner may approve for extraordinary alterations or additions is not without limit. The second sentence of clause 11 expressly provides that "the cost of such alterations or additions shall not exceed the sum specified in this clause." In my opinion, the "sum specified" refers to the several limits of cost defined in the first sentence, and makes those applicable to the alterations or additions authorized by the second sentence. Whichever one of those limits is applicable to the particular bank at the time when the Commissioner is asked to approve an expenditure for extraordinary alterations or additions fixes the maximum sum which the Commissioner may approve for that purpose. I am of the opinion, however, that if the Commissioner approves an expenditure for extraordinary alterations or additions, the authority to approve for that purpose is correspondingly diminished, and if further approval be subsequently sought, the maximum sum which the Commissioner may authorize for such purpose is the appropriate limit less the sum already approved for such alterations or additions.

3. In the present instance the bank already owns the building. Approval of extraordinary alterations or additions is therefore governed by the second sentence of clause 11. In my opinion, you have power to approve an expenditure for this purpose not exceeding the limit applicable to this particular bank at the present time. This amount is not diminished by the sum which the bank originally spent to acquire the building, but any sum which you now approve for alterations or additions does diminish the amount which you can later approve for this purpose. Within the limits prescribed by law, the actual amount which you should approve is to be determined by you, in the exercise of a sound discretion, in the light of all the facts.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Mass. Const. Amend. XLVI — Legal Obligations already entered into — Exemption of a Town from maintaining a High School — Attorney General.

The exception touching "legal obligations . . . already entered into," made by Mass. Const. Amend. XLVI, § 2 (anti-aid amendment), must be construed to mean lawful contracts entered into prior to the adoption of the amendment, and still existing.

A bequest to trustees to establish a high school, free to all the children of Deerfield, made upon condition that the town shall annually appropriate and pay over to the trustees a sum equal to all the taxes assessed upon the trust estate, with a gift over to the town of Whately in case the town of Deerfield should fail to comply with said condition for the space of one year, does not, when accepted by the town, constitute a legal obligation to make such appropriation, within the meaning of Mass. Const. Amend. XLVI, § 2, since the town is left free either to fulfil the condition or to forfeit the property.

A bequest upon condition that the town of Deerfield shall pay over to trustees who hold the gift a sum equal to the taxes assessed upon the trust estate imposes no obligation upon the town to make any payment, where the property is by special statute exempted from taxes.

An illegal appropriation of money by a town to a private academy which furnishes free high school teaching to the children of the town will not justify the Department of Education in exempting the town from maintaining a public high school.

The Attorney General does not determine the facts upon which he advises; such facts must be determined by the department which requests the opinion.

July 11, 1922.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You state the following facts: —

Mrs. Esther Dickinson died in 1875, leaving the residue of her property to five trustees to carry out certain trusts, largely for public purposes. Finally, it was provided that the funds should accumulate until they should be sufficient to erect necessary buildings for a school, library and reading room, the school to be under the management of the trustees, "in which the scholars may be fitted for college, and free to all the children of Deerfield whom my trustees may deem qualified for admission thereto." The will went on to provide: —

As a condition on which this bequest for the establishment of the high school, library and reading room and other minor objects of a public character is given, I order and direct that from and ever after the establishment of the high school, library and reading room, *the town of Deerfield shall annually appropriate and pay over to my said trustees or their successors, a sum of money at least equal to all the taxes*

assessed upon the estate held in trust by my trustees not including any tax assessed by the government of the United States. Should the town of Deerfield refuse or neglect for the space of one year to comply with this condition, then *I give and bequeath my entire estate (except the legacies to private individuals) to the town of Whately, for the establishment of a high school and library on the same principles as designated for the town of Deerfield.*

St. 1876, c. 97, § 1, provides: —

For the purpose of encouraging the establishment of a high school, library and reading-room, under the will of Mrs. Esther Dickinson, late of Deerfield, deceased, and of obviating certain objections which now exist to the execution of the trusts thereby created, all the estate real and personal held in trust under said will for the purpose aforesaid, shall be exempt from all manner of taxes, rates and impositions, so soon and so long as the trustees shall maintain the high school, library and reading-room therein provided for: *provided, however,* that this act shall not take effect unless accepted by the town of Deerfield on or before the fifteenth day of June next, at a regular annual town meeting, or a town meeting called for the purpose.

Section 2 incorporated the trustees of the Deerfield Academy and Dickinson High School.

On April 10, 1876, the town voted to accept said St. 1876, c. 97.

Of late the town has made appropriations for the support of said school.

Mass. Const. Amend. XLVI, § 2, provides: —

All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in

Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

You inquire whether, upon the above facts, there was any "legal obligation . . . already entered into" by the town, prior to the adoption of said amendment on Nov. 6, 1917, by which the town was and is bound to appropriate public money for the support of said school.

The Attorney General has no power to determine the facts upon which he advises. That must be done by the department by whom the inquiry is made. While your letter does not expressly state that you find the above facts to be true, I have assumed that such was the case.

Your letter discloses that your inquiry is made in order to determine whether the town of Deerfield should be exempted, under G. L., c. 71, § 4, from maintaining a high school. It appears that the Deerfield Academy and Dickinson High School is not under public control, within the meaning of Mass. Const. Amend. XLVI. St. 1876, c. 97. It further appears that the town is appropriating public money to the support of said school. If Deerfield is providing high school facilities at public expense in a manner forbidden by Mass. Const. Amend. XLVI, such facilities would not justify your department in exempting the town from the statutory duty to maintain a high school, imposed by G. L., c. 71, § 4. Opinion, Attorney General to Commissioner of Education, April 6, 1922. Upon the facts presented by you, the determination of that question depends upon whether the town is under a legal obligation to make the appropriations which it has made to the Deerfield Academy and Dickinson High School.

The exception touching "legal obligations . . . already entered into" was undoubtedly inserted in Mass. Const. Amend. XLVI in order to save it from possible conflict with U. S. Const., art. I, § 10, which forbids any State to pass any "law impairing the obligation of contracts." The exception must therefore be construed to mean lawful contracts entered into prior to the adoption of the amendment, and still existing, which are within the protection of said U. S. Const., art. I, § 10. The question whether the town of Deerfield entered into such a contract with the academy, and whether such contract, if any, justifies the appropriations made to the academy by the town, are

questions of fact to be determined by your department in deciding whether or not to exempt the town under G. L., c. 71, § 4. I can only advise you whether the facts submitted by you do or do not, as matter of law, warrant a finding that such a contract now exists. Opinion, Attorney General to Commissioner of Education, May 24, 1922.

The quoted portion of Mrs. Dickinson's will, coupled with acceptance of the bequest upon the part of the town, does not, in my opinion, warrant a finding that the town contracted to make the designated appropriation "annually." There is serious doubt whether the town could have so bound itself even if it had desired to do so. *Drury* v. *Natick*, 10 Allen, 169, 183. But the will does not require such an agreement on the part of the town. Instead, the will imposes a condition, to be annually fulfilled, violation of which entails a forfeiture of the property. The provision for a forfeiture of the bequest for breach of the condition is not a contract upon the part of the town upon which the condition is imposed. The town is left free either to fulfil the condition or to give up the property. The threat of forfeiture is an inducement to perform the condition, but it is not an obligation to do so. No action would lie to recover the designated appropriation in case the town failed to make it.

Even if the condition imposed by the will upon the town could be held to be a contract by the town to fulfil it, I am of opinion that it would not warrant any appropriation by the town at the present time. When the town accepted St. 1876, c. 97, all the real and personal property of the trust was exempted from taxation in the manner therein provided. That statute is still in force. No State taxes are assessed upon the property. If no State taxes are assessed upon the property, no obligation to appropriate a sum equal to such taxes can or does arise. The exemption from taxes is the equivalent of an appropriation to pay them. If the condition be satisfied, no further appropriation can be rested upon any assumed (but in my opinion non-existent) obligation to fulfil it.

I am therefore constrained to advise you that, in my opinion, the facts submitted by you do not, as matter of law, warrant any finding by you that there is any legal obligation upon the town to appropriate public money to this academy.

Yours very truly,

J. Weston Allen, *Attorney General.*

Banks and Banking — Property of Insolvent Private Banker in Possession of Commissioner of Banks, under G. L., c. 167, §§ 1 and 22 — Right of Banker's Administrator to administer Such Property.

Where the Commissioner of Banks takes possession of the property of an insolvent private banker, under G. L., c. 167, §§ 1 and 22, the bond given by such banker, under G. L., c. 169, §§ 2 and 3, is not an asset of the estate of such banker after his decease, and neither that bond nor its proceeds should be surrendered by the Commissioner to the administrator of such banker.

Where the Commissioner of Banks takes possession of the property of an insolvent private banker, under G. L., c. 167, §§ 1 and 22, and such banker fails to contest his right so to do within the ten days prescribed by section 33, and thereafter dies, his administrator succeeds only to the rights of his intestate, and is likewise barred.

July 12, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — You ask my opinion upon the following facts: —

Acting under G. L., c. 167, §§ 1 and 22, on Feb. 11, 1921, you took possession of the property and business of F, a private banker. I assume, therefore, that you found that said F was not only conducting the business defined in G. L., c. 169, § 1, but was also "doing a banking business in the commonwealth under the supervision of the commissioner," within the meaning of G. L., c. 167, § 1, and that the circumstances rendered said section 22 applicable. You further state that said F conducted the business of a private banker as an individual, that he carried all his assets, both real and personal, upon the books of the bank, and that you took possession of all said assets whenever discovered. Said general assets consisted principally of real estate which has not been sold. Under the provisions of G. L., c. 169, §§ 2 and 3, said F filed a bond in the sum of $200,000, and out of the proceeds of this bond a dividend of 25 per cent has been paid, leaving a balance of between $6,000 and $7,000 therefrom which is still undistributed. Said F died subsequently to Feb. 11, 1921, and an administrator of his estate has been appointed. You inquire whether you should surrender to such administrator (1) the said general assets, and (2) the balance of the proceeds of said bond given under G. L., c. 169, §§ 2 and 3. You do not state what, if any, demand has been made upon you by said administrator. For convenience I shall consider these questions in the reverse order.

1. G. L., c. 169, § 2, provides, in part, as follows: —

All persons subject to this chapter shall, before entering into or continuing in any business described in section one, make, execute and deliver a bond to the state treasurer in such sum as the commissioner of banks, in this chapter called the commissioner, may deem necessary to cover money or deposits received for the purposes mentioned in said section by such persons, the bond to be conditioned upon the faithful holding and repayment of the money deposited, and upon the faithful holding and transmission of any money, or equivalent thereof, which shall be delivered to them for transmission to a foreign country, and in the event of the insolvency or bankruptcy of the principal upon the payment of the full amount of such bond to the assignee, receiver or trustee of the principal, as the case may require, for the benefit of such persons as shall deliver money to said principal for safe keeping or for the purpose of transmitting the same to a foreign country. . . .

The bond required by this section is not an asset of the banker. It is a liability. *Russo* v. *Chapin*, 197 Mass. 64. G. L., c. 169, § 3, further provides, in part: —

. . . The money and securities deposited with the state treasurer as herein provided, and the money which in case of default shall be paid on the aforesaid bond by any licensee or the surety thereof, shall constitute a trust fund for the benefit of such persons as shall deliver money to the licensee for safe keeping or for the purpose of transmitting the same to foreign countries, and such beneficiaries shall be entitled to an absolute preference as to such money or securities over all general creditors of the licensee. . . .

Under these circumstances it seems plain that the administrator of the defaulting banker has no claim to any part of the proceeds of said bond.

2. In taking possession of a "bank," under G. L., c. 167, § 22, *et seq.*, the Commissioner of Banks exerts administrative powers conferred upon him by statute. *Greenfield Savings Bank* v. *Commonwealth*, 211 Mass. 207; *Commonwealth* v. *Commissioner of Banks*, 240 Mass. 244. The statute covers the entire field and provides a comprehensive and exclusive scheme for the liquidation of such "bank." *Commonwealth* v. *Commissioner of Banks, supra.* Section 33 provides a mode in which the "bank" may contest the right of the Commissioner to take possession. In my opinion, this remedy is exclusive. As such remedy must be invoked within ten days after the Commissioner takes possession, I assume that F did not successfully avail himself of it, and that it had been

lost prior to F's death. If F was barred of this exclusive remedy prior to his death, F's administrator could not succeed to it. I am therefore of opinion that upon the facts presented the rights of F's administrator cannot rise higher than the rights of F at the time of F's death. Accordingly, I advise you that unless and until a court of competent jurisdiction shall order you to surrender the property in your possession, or some part thereof, to F's administrator, you should retain it and conduct the liquidation according to law.

Yours very truly,
J. Weston Allen, *Attorney General.*

Retirement — Pension — Perquisites.

The right of the superintendent of the State Farm to reside there, with his family, is a perquisite and not a part of his salary.

The value of the family maintenance of such superintendent cannot be considered in determining the amount of his pension upon retirement.

July 13, 1922.

Hon. Sanford Bates, *Commissioner of Correction.*

Dear Sir: — You request my opinion upon the following facts: —

The superintendent of the State Farm at Bridgewater, whose retirement you are about to recommend, has in addition to receiving a salary of $4,000 been permitted to reside with his family at the State Farm. Last year the State Income Tax Division assessed a tax on the basis of an income of $4,425, and the tax so assessed was paid. His maintenance for many years has been worth at least $425 to him. You desire to know whether upon retirement the superintendent should be allowed a pension equal to one-half of $4,000 or one-half of $4,000 plus one-half the value of his family maintenance.

G. L., c. 32, § 48, provides, in part: —

An officer, instructor or employee who is retired under section forty-six shall be allowed a pension equal to one half of the salary which he was receiving at his retirement. . . .

G. L., c. 125, § 47, provides: —

The superintendent and physician may reside with their families at the state farm. The superintendent shall receive no perquisites for his services except as aforesaid.

The statute thus refers to the family maintenance as a perquisite. A "perquisite," as defined by Webster in the International Dictionary, is "a gain or profit incidentally made from employment in addition to regular salary or wages." A similar definition is given by Bouvier's Law Dictionary and by "Words and Phrases." It therefore seems clear that the right of the superintendent and his family to reside at the State Farm is in the nature of a privilege granted by the Commonwealth, and is not part of his salary, within the purview of G. L., c. 32, § 48. See also III Op. Atty. Gen. 128, 141.

I am therefore of the opinion that the salary of the superintendent of the State Farm at Bridgewater is $4,000, and that upon retirement he should be allowed a pension equal to one-half of that amount.

Very truly yours,
J. Weston Allen, *Attorney General.*

Board of Health — Public Funds — Appropriation — Emergency.

The failure on the part of a town to appropriate a reasonable sum of money for board of health work does not constitute an emergency, within the meaning of G. L., c. 44, § 31, but if a case of extreme emergency, as therein defined, should arise, the selectmen of a town, who act as a board of health, could incur liability in excess of the appropriation made for the use of such department to the extent of adequately caring for the emergency existing.

July 25, 1922.

Eugene R. Kelley, M.D., *Commissioner of Public Health.*

Dear Sir: — You request my opinion on the following questions: —

1. As to whether or not the failure on the part of a town to appropriate a reasonable sum of money for board of health work does not constitute an emergency whereby it would be permissible to expend public funds which have not been specifically appropriated.

2. What is the proper procedure for the local board to adopt where no reasonable fund has been appropriated?

The powers and duties vested in boards of health of cities and towns under the present law are broad and comprehensive. G. L., c. 111, enumerates many of these, among which are the following: organization, section 27; regulations, section 31; report of diseases to State Department of Public Health, section 112; householders to report to local boards of health, section 109; local board of health to examine nuisances, section 122; duties relative to vaccination, sections 181–183; control of communicable diseases, section 122. These and many other duties imposed upon local boards of health all require and involve the expenditure of money.

G. L., c. 40, § 5, par. (19), authorizes the expenditure of money by towns for board of health purposes in the following language: —

> A town may at any town meeting appropriate money for the following purposes:
>
> . . . . . .
>
> (19) For the performance of the duties of the board of health and for the establishment and maintenance of hospitals, or of beds therein, sanitary stations, clinics, dispensaries and quarantine grounds, and for the care of indigent persons suffering from disease, in accordance with the provisions of chapter one hundred and eleven.

It is a fixed principle that cities and towns shall not incur liability in excess of appropriations. An exception to this rule exists "in cases of extreme emergency involving the health or safety of persons or property." This authority is conferred by G. L., c. 44, § 31, as follows: —

> No department of any city or town, except Boston, shall incur liability in excess of the appropriation made for the use of such department, except in cases of extreme emergency involving the health or safety of persons or property, and then only by a vote in a city of two thirds of the members of the city council, and in a town by a vote of two thirds of the selectmen.

I am informed that in the town of Rowe, to which your inquiry especially pertains, the selectmen also act as the board of health, as is the case in many other towns. No separate appropriation for the salary of such members of the board of health is therefore necessary, and I am accordingly of the opinion that the failure on the part of the town to appropriate a reasonable sum of money for board of health

work does not constitute an emergency, within the meaning of G. L., c. 44, § 31, *supra*, and I so answer your first question.

It would seem that your second question is answered by the provisions of law above quoted, for if a case of "extreme emergency," as defined in section 31, *supra*, should arise, the selectmen of such towns, acting as a board of health, could incur liability in excess of the appropriation made for the use of such department to the extent of adequately caring for the emergency existing.

Yours very truly,

J. Weston Allen, *Attorney General.*

Ordinances — Fruits and Vegetables — Hawkers and Pedlers — License.

G. L., c. 101, § 22, is to be construed as an assumption by the Commonwealth of the right to regulate the sale by hawkers and pedlers, in any city or town mentioned in the license, of any fish, fruits, vegetables or other goods, wares or merchandise, the sale of which is not prohibited by law; and while the aldermen or selectmen may license the sale of fish, fruit and vegetables within their respective territories, under the authority conferred by G. L., c. 101, § 17, they have no legal right or power to prohibit the sale of said articles by hawkers and pedlers duly licensed by the Director of Standards, regardless of whether a local license has or has not been granted therefor.

Aug. 8, 1922.

E. Leroy Sweetser, Esq., *Commissioner of Labor and Industries.*

Dear Sir: — You request my opinion on the following question: —

Has a city or town any legal authority to restrain or limit the exercise of a State license in the sale of fruits and vegetables in such municipality by adopting ordinances, by-laws or regulations prohibiting the sale of fruits and vegetables by hawkers and pedlers unless a local license has been granted therefor.

The general question which arises, where a by-law of a town or ordinance of a city is concerned, is whether it is authorized by a statute, and whether it is reasonable. See *Commonwealth* v. *Stodder*, 2 Cush. 562; *Commonwealth* v. *Crowninshield*, 187 Mass. 221.

The right of towns and cities to require the licensing of hawkers and pedlers of fish, fruit and vegetables is conferred by G. L., c. 101, § 17, which provides as follows: —

Hawkers and pedlers may sell without a license books, newspapers, pamphlets, fuel, provisions, yeast, ice, live animals, brooms, agricultural implements, hand tools used in making boots and shoes, gas or electric fixtures and appliances, flowering plants and all flowers, fruits, nuts and berries that are uncultivated. The aldermen or selectmen may by regulations, not inconsistent with this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and pedlers, of said articles without the payment of any fee; may in like manner require hawkers and pedlers of fish, fruit and vegetables to be licensed except as otherwise provided, and may make regulations governing the same, provided that the license fee does not exceed that prescribed by section twenty-two for a license embracing the same territorial limits; and may in like manner affix penalties for violations of such regulations not to exceed the sum of twenty dollars for each such violation. A hawker and pedler of fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two.

G. L., c. 101, § 22, provides as follows: —

The director may grant a license to go about carrying for sale or barter, exposing therefor and selling or bartering any goods, wares or merchandise, the sale of which is not prohibited by section sixteen, to any person who files in his office a certificate signed by the mayor or by a majority of the selectmen, stating that to the best of his or their knowledge and belief the applicant therein named is of good repute as to morals and integrity, and is, or has declared his intention to become, a citizen of the United States. The mayor or selectmen, before granting such certificate, shall require the applicant to make oath that he is the person named therein, and that he is, or has declared his intention to become, a citizen of the United States. The oath shall be certified by an officer duly qualified to administer oaths and shall accompany the certificate. The director shall cause to be inserted in every such license the amount of the license fee and the name of the town for which it is issued. The licensee may go about carrying for sale or barter, exposing therefor and selling or bartering in any town mentioned in his license any fish, fruits, vegetables or other goods, wares or merchandise, not prohibited in section sixteen, upon payment to the director of the following fees: for each town containing not more than one thousand inhabitants, according to the then latest census, state or national, four dollars; for each town containing more than one thousand and not more than two thousand inhabitants, seven dollars; for each town containing more than two thousand and not more than three thousand inhabitants, nine dollars; for each town containing more than three thousand and not more than four thousand inhabitants, eleven dollars; and for each city and each other town, eleven dollars, and one dollar for every one thousand

inhabitants thereof over four thousand; but the fee shall in no case exceed twenty-six dollars, and the amount paid shall be certified on the face of the license. The director shall retain one dollar for every city and town named in each of the above described licenses, and shall pay over to the respective cities and towns at least semi-annually the balance of said fees so received. The director may grant, as aforesaid, special state licenses upon payment by the applicant of fifty dollars for each license; and the licensee may go about carrying for sale or barter, exposing therefor and selling or bartering in any city or town in the commonwealth any fish, fruits, vegetables, or other goods, wares or merchandise, the sale of which is not prohibited by statute.

It is to be observed that section 17 applies to the hawking and peddling of the specific articles therein mentioned, while section 22 vests in the Director of Standards the authority to grant a license to go about carrying for sale or barter "any goods, wares or merchandise," including fish, fruits and vegetables, the sale of which is not prohibited by G. L., c. 101, § 16, which forbids the sale by hawkers or pedlers of jewelry, furs, wines, spirituous liquors and playing cards. It is also significant that said section 17, in conferring authority upon aldermen of cities or selectmen of towns to require hawkers and pedlers of fish, fruit and vegetables to be licensed, contains the phrase "except as otherwise provided," and that said section 22 specifically confers upon the hawker or pedler acting under a license given by the Director of Standards authority to go about carrying for sale or barter, exposing therefor and selling or bartering "in any town mentioned in his license" any fish, fruits, vegetables or other goods, wares or merchandise not prohibited in said section 16, and fixes the fees for such licenses according to the number of inhabitants of the respective towns, as shown by the latest census.

In the case of *Greene* v. *Mayor of Fitchburg*, 219 Mass. 121, it was decided that the express authority given by R. L., c. 65, § 15, as amended by St. 1906, c. 345 (now G. L., c. 101, § 17), to cities and towns to license the sale by hawkers and pedlers of fruits and vegetables must be interpreted as excluding any authority in cities and towns to require a license for the sale of the other articles mentioned in that section, and it accordingly follows that cities and towns have no authority to require licenses of hawkers and pedlers before permitting them to sell the articles described in that section, other than fruits and vegetables.

If a city or town has in fact licensed the hawking and peddling of fish, fruit and vegetables, there is no necessity for the obtaining of a license under section 22, covering the sale of said articles in such city or town.

But if, on the other hand, a license has been granted by the director under section 22, no other license is required to enable the licensee to sell as a hawker and pedler fish, fruit and vegetables in any city or town in the Commonwealth.

It is to be observed that the statute (section 17) does not confer any authority upon cities and towns to enact ordinances and by-laws regulating the sale by hawkers and pedlers of the aforesaid articles. Such authority, in fact, existed under R. L., c. 65, § 15, and subsequent amendments thereto. St. 1920, c. 591, § 20, repealed said section and substituted in place thereof the present law embodied in section 17, which confers upon the aldermen of cities and the selectmen of towns the authority to impose regulations upon, and to require licenses by, such hawkers and pedlers. But it is expressly provided therein that such regulations, if made, shall be "not inconsistent with the provisions of this chapter."

I am accordingly of the opinion that section 22 is to be construed as an assumption by the Commonwealth of the right to regulate the sale by hawkers and pedlers, in any city or town mentioned in the license, of any fish, fruits, vegetables or other goods, wares or merchandise, the sale of which is not prohibited by law; and that while the aldermen or selectmen may license the sale of fish, fruit and vegetables within their respective territories, under the authority conferred by section 17, they have no legal right or power to prohibit the sale of said articles therein by hawkers and pedlers duly licensed by the director under section 22, regardless of whether a local license has or has not been granted therefor.

Yours very truly,

J. Weston Allen, *Attorney General.*

Commonwealth — Back Bay Lands — Enforcement of Restrictions.

Even though the Commonwealth has sold all of its lands in the Back Bay (Boston), it may, in its sovereign capacity, enforce restrictions imposed by it in the deeds conveying such lands.

Under G. L., c. 91, § 37, grantees of the Commonwealth may enforce in equity, in the manner and under the conditions defined in that section, restrictions imposed upon lands in the Back Bay by the Commonwealth.

Unless a public interest in enforcing such restrictions is disclosed, the Commonwealth should leave its grantees to the remedy provided by G. L., c. 91, § 37.

Aug. 9, 1922.

Hon. John N. Cole, *Commissioner of Public Works.*

Dear Sir: — You submit certain correspondence from which it appears that certain real estate owners in the Back Bay hold under deeds from the Commonwealth to them or their predecessors in title, which deeds impose certain restrictions upon the use of said premises and reserve a right to the Commonwealth to enter upon the premises, and, at the expense of the party at fault, to remove or alter any building or portion thereof which may be erected in violation of the restrictions. Certain other owners who hold under similar deeds from the Commonwealth to them or their predecessors are proposing to erect private garages upon their lots. It appears that the Commonwealth has sold all its lands in the Back Bay area. You inquire whether the erection of said garages is in violation of the restrictions imposed by said deeds from the Commonwealth, and if so, what your duty is under G. L., c. 91, § 37, which provides: —

> If the commonwealth has the right under stipulations in a deed given in its name to enter upon premises and, at the expense of the party at fault, to remove or alter a building, any of its grantees under similar deeds, their heirs, legal representatives or assigns may institute proceedings in equity to compel the division to enforce such stipulations.

When the Back Bay lands were laid out by the Commonwealth it imposed certain restrictions as a part of the scheme of development. Even though it has disposed of all its lands, it may still enforce these restrictions in its sovereign capacity by an information in equity in the name of the Attorney General. *Attorney General* v. *Williams,* 140 Mass. 329;

Attorney General v. *Gardiner*, 117 Mass. 492. On the other hand, the several grantees of the Commonwealth have a private remedy, as between themselves, by a proceeding under G. L., c. 91, § 37, to which the Commonwealth, by the Division of Waterways and Public Lands of the Department of Public Works, is a party, because the Commonwealth holds the restrictions in trust for the benefit of all its grantees. *Attorney General* v. *Williams*, 140 Mass. 329, 331.

The question whether the Commonwealth should proceed by an information in the name of the Attorney General or should leave its grantees to assert such rights as they may have in the manner provided in G. L., c. 91, § 37, depends primarily upon whether a public or a private interest is involved. Litigation necessarily involves risk, burden and expense. Public money cannot be spent for a private purpose. *Whittaker* v. *Salem*, 216 Mass. 483. It ought not to be spent for a purpose nominally public and in fact private. To bring an information in the name of the Attorney General in order to enforce these restrictions against one grantee for the private benefit of another grantee would in effect be an expenditure of public money for a private purpose. In such a case the risk, burden and expense of the controversy should fall upon the party who is in effect asserting his private right. Unless, therefore, a public interest is disclosed, the question whether or not these restrictions have been violated may properly be left to a proceeding under G. L., c. 91, § 37. *Lawrence* v. *Smith*, 201 Mass. 214.

Your inquiry and the correspondence attached do not disclose that any interest of the Commonwealth is involved. It appears that the Commonwealth has sold all its lands in the Back Bay area. Certain grantees of the Commonwealth or their successors in title object to the erection of private garages upon the lands of other grantees of the Commonwealth or their successors in title. The fact that the controversy arises under restrictions imposed by the Commonwealth does not necessarily give to it a public character. See *Lawrence* v. *Smith*, 201 Mass. 214. It does not appear to differ in any practical respect from a similar question arising under restrictions imposed by a private grantor. See *Riverbank Improvement Co.* v. *Bancroft*, 209 Mass. 217. Under these circumstances, I perceive no reason why the Commonwealth should assume the risk and expense of litigation de-

signed to determine this question for the benefit of certain of its grantees as against other grantees. Even if it be a trustee for the benefit of all its grantees, no reason appears why it should take sides at the expense of the general taxpayer as between its beneficiaries. In my opinion, the parties should be left to their remedy under G. L., c. 91, § 37.

That proceeding, if brought, will determine the question. It is therefore unnecessary to decide whether the erection of such garages does or does not violate the restrictions in question. In my opinion, your department should await such action as the objectors may take under G. L., c. 91, § 37.

Yours very truly,

J. Weston Allen, *Attorney General.*

License — Permit to store Gasoline — Permit to erect a Garage — Fire Marshal — Street Commissioners of Boston.

The authority vested in the Fire Marshal by G. L., c. 148, §§ 30, 31 and 45 (formerly St. 1914, c. 795), to issue permits for the storage of gasoline is entirely distinct from the authority vested in the street commissioners of Boston by St. 1913, c. 577, as amended, to issue permits for the erection of garages; and the authority so vested in the Fire Marshal does not depend upon the issuance of a permit to erect a garage, and is not affected by St. 1922, c. 316.

Aug. 19, 1922.

Col. A. F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You state, in substance, the following facts: —

Acting under St. 1913, c. 577, as amended by St. 1914, c. 119, the street commissioners of the city of Boston, on Sept. 13, 1921, issued a permit to a certain corporation to erect a garage in Charlestown on land bounded on three sides by Tremont, Edgeworth and Ferrin streets. At the same time the street commissioners, acting under authority delegated by the Fire Marshal under G. L., c. 148, §§ 30, 31 and 45, issued a permit to store gasoline on said premises, from which an appeal to the Fire Marshal was taken under said section 45. On Dec. 19, 1921, the street commissioners, without hearing, voted to revoke both permits. On June 29, 1922, the Supreme Judicial Court, in *General Baking Co.* v. *O'Callaghan*, held that the permit to erect the garage had not been effectively revoked. By St. 1922, c. 316, which was approved on April 18, 1922, and was accepted by the city of Boston on May 1, 1922, the Legislature amended St. 1914, c. 119, so as to prohibit the issue of a permit for the erection, maintenance or use of any building as a garage for more than four cars on the same

street as, and within 500 feet of any building occupied as, a public or private school. Section 2 of said act excepted garages "maintained" at the time of the passage of this act. You state that upon Edgeworth Street there is located a school within 100 feet of the wall of the proposed garage, but that the garage will not have an entrance on Edgeworth Street.

On these facts you inquire (1) whether St. 1922, c. 316, has affected the validity of the license to *erect the garage* previously granted by the street commissioners; and (2) whether the State Fire Marshal has power to act upon the appeal from the issue of the permit *to store gasoline*. I shall deal with these questions in reverse order.

1. Under St. 1914, c. 795, since re-enacted as G. L., c. 148, §§ 30, 31 and 45, power to grant permits for the *storage of gasoline* is vested in the Fire Marshal. This authority is entirely distinct from the power to issue permits for the *erection of garages*, which is vested in the street commissioners of Boston by St. 1913, c. 577, as amended by St. 1914, c. 119, and St. 1922, c. 316. V Op. Atty. Gen. 718; Attorney General's report, 1921, 320. The issue by the street commissioners of a permit to erect a garage is not in law a condition precedent to the issue by the Fire Marshal of a permit to store gasoline. The permit to store gasoline may be issued for a purpose wholly unconnected with a garage. St. 1922, c. 316, does not amend or affect the power of the Fire Marshal to issue permits for the storage of gasoline. On the contrary, it expressly amends the statute under which the street commissioners issue permits for the erection of garages. It follows that the power of the Fire Marshal to hear and determine an appeal from the issue of the permit to store gasoline is not affected by St. 1922, c. 316.

2. Your inquiry as to the effect of St. 1922, c. 316, upon the permit to erect the garage previously issued by the street commissioners presents a legal question which you need not consider. St. 1913, c. 577, as amended, is distinctly a home rule measure, and in its enforcement the State officials have no concern. V Op. Atty. Gen. 718. It is therefore unnecessary to answer this question.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — Fuel Administrator — Power to fix Price of Fuel in Time of Emergency — Power of Governor to determine whether Emergency exists.

Those portions of Gen. St. 1917, c. 342, relating to the appointment, duties, authority and powers of a fuel administrator, which are revived and made operative until April 1, 1923, by St. 1922, c. 544, confer power upon the Governor, "when in his opinion the public exigency so requires," to fix reasonable prices for fuel during the period of the emergency, and to delegate power to such persons as he may select, to do in his name whatever may be necessary to carry said powers into effect; and as so construed the statute is not unconstitutional.

Under the police power and the authority conferred by Mass. Const. Amend. XLVII, the General Court has power to provide for distribution of fuel at reasonable rates in time of public emergency, and to that end may authorize the Governor to determine whether such emergency exists, to fix reasonable prices for fuel during the continuance of the emergency, and to delegate to persons selected by him power to do in his name whatever may be necessary to carry said powers into effect.

Aug. 21, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You inquire (1) whether St. 1922, c. 544, is constitutional; (2) whether, if a Fuel Administrator were appointed under it, such Fuel Administrator would have power to fix the price of coal sold within the Commonwealth.

St. 1922, c. 544, is as follows: —

An Act authorizing the Appointment by the Governor of a Fuel Administrator.

Whereas, In order to secure an adequate supply of fuel for the citizens of Massachusetts in the event of an emergency, the services of a fuel administrator are necessary, and whereas, the provisions of the Commonwealth Defence Act of nineteen hundred and seventeen have become inoperative, therefore this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public health and convenience.

Be it enacted, etc., as follows:

The provisions of the Commonwealth Defence Act of 1917, being chapter three hundred and forty-two of the General Acts of nineteen hundred and seventeen, relating to the appointment, duties, authority and powers of a fuel administrator, are hereby revived and made operative until April first, nineteen hundred and twenty-three.

Gen. St. 1917, c. 342, contains the following provisions: —

. . . . . .

Section 6. Whenever the governor shall believe it necessary or expedient for the purpose of better securing the public safety or the defence or welfare of the commonwealth, he may with the approval of the council take possession: (*a*) Of any land or buildings, machinery or equipment. (*b*) Of any horses, vehicles, motor vehicles, aeroplanes, ships, boats, or any other means of conveyance, rolling stock of steam or electric railroads or of street railways. (*c*) Of any cattle, poultry and any provisions for man or beast, and any fuel, gasoline or other means of propulsion which may be necessary or convenient for the use of the military or naval forces of the commonwealth or of the United States, or for the better protection or welfare of the commonwealth or its inhabitants. He may use and employ all property so taken possession of for the service of the commonwealth or of the United States, for such times and in such manner as he shall deem for the interests of the commonwealth or its inhabitants, and may in particular, when in his opinion the public exigency so requires, sell or distribute gratuitously to or among any or all of the inhabitants of the commonwealth anything taken under clause (*c*) of this section and may fix minimum and maximum prices therefor. He shall, with the approval of the council, award reasonable compensation to the owners of any property of which he may take possession under the provisions of this section and for its use, and for any injury thereto or destruction thereof caused by such use.

Section 7. Any owner of property of which possession has been taken under section six of this act, to whom no award has been made, or who is dissatisfied with the amount awarded him by the governor and council as compensation, may file a petition in the superior court to have the amount to which he is entitled by way of damages determined. Either the petitioner or the commonwealth shall have the right to have the amount of such damages fixed by a jury in the said court upon making claim in such manner as the court may have provided or shall provide by its rules.

Section 8. The petition provided for by section seven of this act may be filed either in the county in which the petitioner lives or has his usual place of business, if the petitioner either lives or has a usual place of business in the commonwealth, or otherwise in the county of Suffolk. The petition shall be brought within one year after the date when possession of the property was taken under section six of this act, and except as is otherwise provided herein, shall be heard and determined in accordance with the provisions of chapter two hundred and one of the Revised Laws and all acts in amendment thereof or in addition thereto.

Section 9. Upon such petition full damages shall be awarded whether or not the same had fully accrued at the time of the filing of

the petition, and, whenever necessary, the hearing on the petition shall on the application of either the petitioner or the commonwealth be continued for assessment of damages until the same are fully ascertained.

. . . . . .

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

On Oct. 6, 1920, the Governor, acting under the authority of Gen. St. 1917, c. 342, as continued to Jan. 1, 1922, by St. 1920, c. 610 (an act substantially similar to St. 1922, c. 544), appointed a Fuel Administrator, to hold said office until Jan. 1, 1922. It thus appears that the powers revived and made operative by St. 1922, c. 544, have been exercised in this Commonwealth from Oct. 6, 1920, to Jan. 1, 1922.

1. There can be little, if any question as to the power of the Legislature to revive and continue in force a statute previously enacted. St. 1922, c. 544, revives and continues certain powers created by Gen. St. 1917, c. 342. It follows that the questions which underlie your inquiry are (1) whether the portion of Gen. St. 1917, c. 342, so revived and continued is constitutional, and (2) whether it confers power to fix the price of coal sold within the Commonwealth.

2. Gen. St. 1917, c. 342, § 6, expressly provides that —

> Whenever the governor shall believe it necessary or expedient for the purpose of better securing the public safety . . . or welfare of the commonwealth, he may with the approval of the council take possession . . . of any fuel . . . which may be necessary or convenient . . . for the better protection or welfare of the commonwealth or its inhabitants. He may, . . . when in his opinion the public exigency so requires . . . fix minimum and maximum prices therefor.

By St. 1922, c. 544, these powers and others are revived and made operative. This act was declared an emergency measure by the preamble, which states that it was passed "in order to secure an adequate supply of fuel in the event of an emergency." In my opinion, the two acts when con-

strued together authorize the Governor, during the period indicated, to fix minimum and maximum prices for fuel (which includes coal) "when in his opinion the public exigency so requires." The remaining question is whether the act as so construed is constitutional.

3. Mass. Const. Amend. XLVII provides: —

> The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.

In addition to the powers specifically conferred by this amendment, the General Court has the broad powers conferred by Mass. Const., pt. 2d, c. I, § I, art. IV, which are for convenience called the police power. While the courts have not made an exhaustive and complete definition of the police power, it is in general held to include legislation reasonably adapted to promote the safety, health, morals, and, in a limited sense, the welfare of the people. *Commonwealth* v. *Libbey*, 216 Mass. 356, 358; *Commonwealth* v. *Beaulieu*, 213 Mass. 138, 141; *Commonwealth* v. *Strauss*, 191 Mass. 545, 550; *Chicago & Alton R.R.* v. *Tranbarger*, 238 U. S. 69, 77. Ordinarily, this power does not extend to regulating the price of property which is not affected with a public use. V Op. Atty. Gen. 484; Opinion, Attorney General to President of the Senate, April 4, 1922. On the other hand, a change in circumstances may carry a business previously private across the line into the classes of business which are affected with a public use. *Munn* v. *Illinois*, 94 U. S. 113; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; V Op. Atty. Gen. 484. Even an emergency of a continuing though not necessarily permanent character — such as a shortage of houses — may temporarily affect a business ordinarily private with a public use, and thereby subject the rates charged therein to an appropriate measure of public regulation. *Marcus Brown Holding Co., Inc.* v. *Feldman*, 256 U. S. 170; *Edgar A. Levy Leasing Co., Inc.*, v. *Siegel*, 258 U. S. 242. Moreover, a finding and declaration by the Legislature that such an emergency exists or continues will not be lightly disturbed. *Marcus Brown Holding Co.* v. *Feldman, supra*; *Edgar A. Levy Leasing Co., Inc.*, v. *Siegel, supra*; *Block* v. *Hirsh*, 256

U. S. 135. As Amendment XLVII declares in express words that "the maintenance and distribution at reasonable rates . . . during time of . . . public exigency, emergency or distress of a sufficient supply of food and other common necessaries of life are public functions . . ." I am of opinion that if such exigency, emergency or distress is determined to exist with respect to fuel, which is manifestly a common necessary of life in this State, the power to fix the price of fuel comes into existence and may be exerted in the manner prescribed by the General Court. *Jones* v. *Portland*, 245 U. S. 217; V Op. Atty. Gen. 331. In view of Amendment XLVII, the *Opinions of the Justices* in 155 Mass. 598 and 182 Mass. 605, advising that the Legislature has no power to authorize cities and towns to buy coal and wood for resale to their inhabitants, no longer apply.

The question then arises whether the Legislature may authorize the Governor to determine whether the emergency exists, so as to put into operation the emergency powers conferred by Gen. St. 1917, c. 342, as revived by St. 1922, c. 544. This question is, in essence, whether the act is an unconstitutional delegation of legislative power. The true distinction is between a delegation of power to make the law, and conferring a discretion as to its execution to be exercised under and in pursuance of the law. *Field* v. *Clark*, 143 U. S. 649, 692; *Cincinnati, Wilmington, &c. R.R.* v. *Commissioners*, 1 Ohio St. 77, 88. In the present case the power to fix coal prices, conferred by the law, already exists. It comes into operation when and if the Governor determines that the emergency exists. The power to determine whether the emergency exists does not differ materially from the power to fix rates, which latter power, though it may be exerted by the Legislature, may be conferred upon the executive or upon a commission. *Martin* v. *Witherspoon*, 135 Mass. 175, 178; *Brown* v. *Boston & Maine R.R.*, 233 Mass. 502, 510; *Minnescta Rate Cases*, 230 U. S. 352. Nor is the authority vested in the Governor by section 12 to delegate the power to fix prices open to constitutional objection. As the Legislature might have directly conferred it upon the nominee appointed by the Governor, with the approval of the Council, it may confer power to select that nominee. In my opinion, the act is not an unconstitutional delegation of legislative power. Opinion, Attorney General to President of the Senate, May 23, 1921, and cases cited (Attorney General's Report, 1921, p. 171).

The final question is whether the act confers too broad a power to regulate prices. It is well settled that the constitutional power to fix prices is not unlimited. The price must be reasonable, not confiscatory. *Denver* v. *Denver Union Water* Co., 246 U. S. 178. V Op. Atty. Gen. 484; *ibid.* 507. The present act confers power to "fix minimum and maximum prices." It does not, in express words, require that such prices shall be reasonable. The act must, however, be construed in connection with Amendment XLVII, which is expressly confined to "reasonable rates," and in connection with the police power, which is subject to a similar restriction. It is well settled that if an act is susceptible of two constructions, one constitutional and one unconstitutional, it will be presumed that the Legislature intended the constitutional construction. *County of Berkshire* v. *Cande,* 222 Mass. 87, 90; *Salisbury Land and Improvement Co.* v. *Commonwealth,* 215 Mass. 371, 373. This is simply one aspect of the broader principle that every rational intendment is made in favor of constitutionality. *Perkins* v. *Westwood,* 226 Mass. 268. In view of the well-settled limitation upon the power to fix prices, it is not to be presumed that the Legislature intended to authorize either the Governor or his nominee to fix prices which would be unreasonable or confiscatory. I am therefore of opinion that the act must be construed in relation to the scope of the power vested in the Legislature; that, as so construed, it confers power to fix only reasonable rates or prices; and that, as so construed, it is constitutional.

Yours very truly,

J. Weston Allen, *Attorney General.*

Officers — Women — Eligibility to be appointed Standing Masters in Chancery.

A standing master in chancery is not a "judicial officer," within the meaning of Mass. Const., pt. 2d, c. III, art. I.

Under St. 1922, c. 371, a woman is eligible to appointment as a standing master in chancery.

Aug. 22, 1922.

His Excellency Channing H. Cox, *Governor of the Commonwealth.*

Sir: — You have inquired whether a woman may be appointed a master in chancery. I assume that your inquiry relates to the standing masters in chancery for which G. L.,

c. 221, § 53, provides, rather than to the special masters appointed from time to time by the court in specific cases, under the authority conferred by G. L., c. 221, § 55.

Originally, masters in chancery acted as assistants of the chancellor. *Eastern Bridge & Structural Co.* v. *Worcester Auditorium Co.*, 216 Mass. 426, 430. One of my predecessors has advised that a standing master is not a "judge of any court in this Commonwealth," within the meaning of Mass. Const. Amend. VIII, which forbids such a judge to have, at the same time, a seat in the Senate or House of Representatives. IV Op. Atty. Gen., 457. The first provision for appointment of standing masters by the Governor was made by St. 1826, c. 109, § 4, which authorized such appointment for a term of four years. This is a legislative determination that standing masters are not "judicial officers," within the meaning of Mass. Const., pt. 2d, c. III, art. I, since such officers hold their offices during good behavior. As this legislative construction of the words "judicial officers" has stood, apparently unquestioned, for nearly a century, it is entitled to weight in determining the meaning of that provision.

It is not necessary to determine whether the eligibility of women to appointment as standing masters in chancery depends in any respect upon the Constitution. In *Opinion of the Justices*, 240 Mass. 601, the justices advised that by reason of the adoption of the Nineteenth Amendment to the Constitution of the United States "women are not excluded by the Constitution [of Massachusetts] from any elective or appointive civil office." In view of this opinion, I have already advised you that women are now eligible to appointment as justices of the peace — an office for which Mass. Const., pt. 2d, c. III, art. III, expressly provides. Opinion, May 25, 1922. That opinion disposes of any constitutional aspect of your inquiry.

St. 1922, c. 371, § 1, approved May 2, 1922, provides, in part: —

> Women shall be eligible to election or appointment to all state offices, positions, appointments and employments. . . .

Section 2 makes similar provision in respect to "county offices, positions, appointments and employments." That act has now taken effect. In so far as the eligibility of women to the office of standing master in chancery depends upon

statute, these provisions clearly make them eligible, whether the office be a State or a county office. See III Op. Atty. Gen. 186.

I am therefore of opinion that women are now eligible to appointment as standing masters in chancery.

Yours very truly,

J. Weston Allen, *Attorney General.*

Certified Public Accountant — Right of Certified Public Accountant registered in Another State to hold Himself out as Such in this Commonwealth.

A person registered as a certified public accountant in another State is forbidden, by G. L., c. 93, § 39, as amended by St. 1922, c. 395, § 2, to designate himself as a certified public accountant, either with or without letters indicating the State in which he is registered, if he is not registered in this Commonwealth under G. L., c. 93, § 37.

A foreign certified public accountant is not forbidden to do business as such in Massachusetts if he does not designate or hold himself out as a certified public accountant, in violation of G. L., c. 93, § 39, as amended by St. 1922, c. 395, § 2.

Aug. 28, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — You ask my opinion upon the following question: —

Has a person, registered as a certified public accountant under the laws of any State other than the Commonwealth of Massachusetts, but not so registered in Massachusetts, the legal right to advertise or otherwise designate himself as a certified public accountant on his stationery heading or on the doors of his business office, or to solicit or receive business as a certified public accountant in any way in the Commonwealth of Massachusetts, even though he may affix after the letters "C. P. A." the name of the State from which he holds a certificate as a certified public accountant?

G. L., c. 93, §§ 35 to 39, as amended, provide a comprehensive scheme for licensing certified public accountants in this State. Both character and professional ability are conditions not only of receiving but also of retaining the certificate. These are to be ascertained by the Commissioner in the manner prescribed in section 36 and in section 37, as amended by St. 1922, c. 395, § 1. If the accountant is registered under section 37, he may, if his certificate is in force, style himself "Certified Public Accountant." (§ 38.) The

plain purpose of these provisions is to protect the public from public accountants who are unscrupulous or unfit, by subjecting both the character and the qualifications of the applicant to scrutiny by an official of this Commonwealth.

Section 39 formerly provided as follows: —

> Any person who falsely represents himself to be a public accountant registered under section thirty-seven shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or both.

By St. 1922, c. 395, § 2, it was amended so as to read as follows: —

> No person not registered under section thirty-seven shall designate himself or hold himself out as a certified public accountant. No partnership unless all of its members are registered under section thirty-seven, and no corporation, shall use the words "certified public accountant" in describing the partnership or corporation or the business thereof; provided, that any partnership or corporation may represent that a specified person registered under section thirty-seven is a member of such partnership or is in the service of such partnership or corporation. Any violation of this section shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months or both.

The change is significant. Formerly, section 39 provided punishment for one who falsely represented that he was registered under section 37. It may be assumed, without deciding, that one who described himself as registered in another State did not violate this provision. Section 39, as amended, now punishes one who designates himself or holds himself out as a certified public accountant *unless* he is registered under section 37. It seems plain that one who designates himself or holds himself out as a certified public accountant does not cease to do so because he adds words or letters which sufficiently indicate that he is registered in another State. To designate himself or hold himself out as a certified public accountant of that State manifestly embraces and includes designating himself or holding himself out as a certified public accountant. He therefore commits the offence made punishable by section 39, as amended, unless he is registered under section 37.

Your inquiry whether a foreign certified public accountant who "solicits or receives business in any way in Massa-

chusetts" commits an offence under section 39, as amended, presents questions of fact upon which it is not my province to pass. The statute does not forbid a certified public accountant from another State to receive or do business here if he obtains and does that business without violating section 37, as amended. It does forbid him to designate himself or hold himself out as a certified public accountant in this State if he is not registered under section 37. In this aspect the answer to your inquiry depends upon the facts of each case.

Yours very truly,

J. Weston Allen, *Attorney General.*

Illegitimate Child — Support from Labor of Father in the Massachusetts Reformatory.

Where the father of an illegitimate child is committed to the Massachusetts Reformatory on a complaint for bastardy, the child and its mother, when in needy circumstances, may claim the benefit of G. L., c. 273, § 9.

Aug. 28, 1922.

Hon. Sanford Bates, *Commissioner of Correction.*

Dear Sir: — You ask my opinion whether, in the case of a prisoner committed to the Massachusetts Reformatory on a complaint for bastardy, under G. L., c. 273, § 11, the reformatory should pay over to the probation officer the sum of 50 cents per day as provided by G. L., c. 273, § 9. You state as a fact that the court has found that the mother and child are in needy circumstances.

G. L., c. 273, § 9, is as follows: —

If the court imposing a sentence under section one, finds the wife or child, as the case may be, of the defendant to be in destitute or needy circumstances, the superintendent, master or keeper of the reformatory or penal institution where he is confined upon such sentence shall pay over to the probation officer of such court at the end of each week, out of the annual appropriation for the maintenance of such reformatory or penal institution, a sum equal to fifty cents for each day's hard labor performed by the person so confined, and shall state the name of the person for whose labor the payment is made. The probation officer shall pay over said sum in the manner provided in section five for the payments therein provided for.

G. L., c. 273, § 16, is as follows: —

After the adjudication and the birth of the child, in proceedings under section eleven, or after conviction, in proceedings under the preceding section, the defendant shall be subject upon the original complaint or indictment in such proceedings to penalties and orders for payments similar to those provided by the first ten sections of this chapter; and the practice established thereby shall, so far as applicable, apply to any proceedings under sections eleven to nineteen, inclusive.

G. L., c. 273, § 15, is as follows: —

Any father of an illegitimate child, whether begotten within or without the commonwealth, who neglects or refuses to contribute reasonably to its support and maintenance, shall be guilty of a misdemeanor. If there has been any final adjudication of the paternity of the child, such adjudication shall be conclusive on all persons in proceedings under this section; otherwise, the question of paternity shall be determined in proceedings hereunder. The duty to contribute reasonably to the support of such child shall continue during its minority.

The question is not free from doubt in that section 16 says: "After the *adjudication* and the *birth* of the child, in proceedings under section eleven, or after *conviction*, in proceedings under the preceding section, the *defendant* shall be subject upon the original complaint or indictment in such proceedings to penalties and orders for payments similar to those provided by the first ten sections of this chapter." It does not refer to section 9 or make specific provision for payment by the superintendent, master or keeper of the reformatory or penal institution. However, section 16 goes on to say: "and the practice established thereby shall, so far as applicable, apply to any proceedings under sections eleven to nineteen, inclusive." It may, therefore, be fairly said that it was the intent of the Legislature that the mother and the illegitimate child, when in needy circumstances, should have the benefit of section 9, and I so advise you.

Very truly yours,

J. Weston Allen, *Attorney General.*

Public School — Federal Reservation — State Reimbursement — Tuition.

The town of Harvard is not required by St. 1921, c. 296, to provide high school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens. In this respect there can be no distinction between a high school and an elementary school.

Aug. 30, 1922.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You request my opinion on the following questions: —

1. Is the town of Harvard required to provide high school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens?

2. Is the town of Harvard entitled to receive State reimbursement for expenditures for high school tuition of such pupils?

3. Is the town of Harvard under legal obligation to provide elementary school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens?

1. By the provisions of St. 1921, c. 456, the consent of the Commonwealth of Massachusetts was granted to the United States of America to acquire by purchase or condemnation a certain tract of land situated in the townships of Shirley and Ayer, county of Middlesex, and the townships of Lancaster and Harvard, county of Worcester, known as Camp Devens. Section 2 of said chapter provides as follows: —

Jurisdiction over the said land is hereby granted and ceded to the United States of America, but upon the express condition that the commonwealth of Massachusetts shall retain concurrent jurisdiction with the United States of America in and over the land so acquired, in so far that all civil processes, and such criminal processes as may issue under the authority of this commonwealth against any person or persons charged with crimes, may be executed thereon in the same manner as though this consent and cession had not been granted; provided, that the exclusive jurisdiction shall revert to and revest in the commonwealth whenever the area so acquired shall cease to be used for purposes of national defence.

St. 1921, c. 296, § 1, provides as follows: —

Chapter seventy-one of the General Laws is hereby amended by striking out section six and inserting in place thereof the following: —

Section 6. If a town of less than five hundred families or householders, according to such census, does not maintain a public high school offering four years of instruction, it shall pay the tuition of any pupil who resides therein and obtains from its school committee a certificate to attend a high school of another town included in the list of high schools approved for this purpose by the department. Such a town shall also, through its school committee, provide, when necessary, for the transportation of such a pupil at cost up to forty cents for each day of actual attendance, and it may expend more than said amount. The department shall approve the high schools which may be attended by such pupils, and it may, for this purpose, approve a public high school in an adjoining state. Whenever, in the judgment of the department, it is expedient that such a pupil should board in the town of attendance the town of residence may, through its school committee, pay toward such board, in lieu of transportation, such sum as the said committee may fix.

If the school committee refuses to issue a certificate as aforesaid, application may be made to the department, which, if it finds that the educational needs of the pupil in question are not reasonably provided for, may issue a certificate having the same force and effect as if issued by the said committee. The application shall be filed with the superintendent of schools of the town of residence, and by him transmitted forthwith to the department with a report of the facts relative thereto.

Practically the same question raised in your first inquiry was presented to the justices of the Supreme Court by the House of Representatives in 1841, and their answer was as follows: —

We are of opinion that persons residing on lands purchased by, or ceded to, the United States for navy yards, forts and arsenals, where there is no other reservation of jurisdiction to the State, than that above mentioned (referring to the right to serve civil and criminal processes), are not entitled to the benefits of the common schools for their children, in the towns in which such lands are situated. — *Opinion of the Justices*, 1 Met. 580, 583.

This opinion is cited with approval by the Supreme Court of the United States in the case of *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U. S. 525, where the subject-matter is fully considered. In that case it was said by Mr. Justice Field: —

Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses

of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

See also *Benson* v. *United States*, 146 U. S. 325; *Chappell* v. *United States*, 160 U. S. 499; *Palmer* v. *Barrett*, 162 U. S. 399.

The question was also considered by the Supreme Court of Massachusetts in the case of *Newcomb* v. *Inhabitants of Rockport*, 183 Mass. 74. In that case the court used the following language (pages 78 and 79): —

Conceding, for the purposes of the case, that the United States has not exclusive jurisdiction over the islands in question, it by no means follows that the prayer of the petitioners should be granted. The petitioners contend that the town ought either to build a schoolhouse on Thatcher's Island or to provide suitable transportation for the scholars. We are of opinion that the town is not bound to do either. It is agreed that on the mainland the town of Rockport provides and maintains a sufficient number of schoolhouses, properly furnished and conveniently located for the accommodation of all children therein who are entitled to attend the public schools. This being so, we are of opinion that the town has done its whole duty so far as the building of schoolhouses is concerned. If a few persons happen to live on a small island, it cannot be expected that the town within the territorial limits of which the island is, is bound to build and maintain a schoolhouse for their benefit, especially where, as here, it does not appear that the town would have a right to build a schoolhouse, without authority derived from the Commonwealth, which owned the islands when the grants were made to the United States, and which, for aught that appears, may own them now.

See also *Davis* v. *Inhabitants of Chilmark*, 199 Mass. 112; V Op. Atty. Gen. 435.

I am accordingly of the opinion that the town of Harvard is not required by St. 1921, c. 296, to provide high school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens.

2. G. L., c. 71, §§ 8 and 9, are as follows: —

Section 8. If the valuation of a town of less than five hundred families or householders for its fiscal year preceding any school year does not exceed five hundred thousand dollars, the commonwealth shall reimburse it, subject to the following section, for the whole amount paid by it for such school year for tuition under section six; if said valuation exceeds five hundred thousand dollars but not one million dollars, the reimbursement shall be for three fourths of said amount; and if said valuation exceeds one million dollars, the reimbursement shall be one half of said amount.

Section 9. No town shall receive any reimbursement for a school year under sections five and eight if its valuation for its fiscal year preceding said school year, divided by the net average membership of its public schools as defined by section five of chapter seventy for the school year preceding the year for which reimbursement is claimed, exceeds the corresponding quotient for the commonwealth.

The provision for reimbursement to towns for amounts expended from the treasury of the Commonwealth for tuition, in my opinion, refers to sums which the towns are compelled to pay. "If the town sees fit to expend money for tuition which it is not compelled to, it cannot ask reimbursement therefor from the treasury of the Commonwealth." See II Op. Atty. Gen. 98.

3. G. L., c. 76, § 5, provides as follows: —

Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe. No child shall be excluded from a public school of any town on account of race, color or religion.

G. L., c. 71, § 68, provides as follows: —

Every town shall provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools. If the distance between a child's residence and the school he is entitled to attend exceeds two miles, and the school committee declines to furnish transportation, the department, upon appeal of the parent or guardian of the child, may require the town to furnish the same for a part or for all of the distance. If said distance exceeds three miles, and the distance between the child's residence and a school in an adjoining town giving substantially equivalent instruction is less than three miles, and the school committee declines to pay for tuition

in such nearer school, and for transportation in case the distance thereto exceeds two miles, the department, upon like appeal, may require the town of residence to pay for tuition in, and if necessary provide for transportation for a part or for the whole of said distance to, such nearer school. The school committee, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, shall keep them in good order, and shall, at the expense of the town, procure a suitable place for the schools, if there is no schoolhouse, and provide fuel and all other things necessary for the comfort of the pupils.

I am of the opinion that the same general principles of law laid down in the cases above cited, in answer to your first and second questions, must govern the answer to your third question, as in this respect there can be no distinction between a high school and an elementary school. I am accordingly of the opinion that the town of Harvard is under no legal obligation to provide elementary school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens.

Very truly yours,

J. Weston Allen, *Attorney General.*

Civil Service — Veterans' Preference — Special Preference to Disabled Veterans — Established Lists.

The special preference accorded to disabled veterans by St. 1922, c. 463, applies to disabled veterans upon eligible lists already established.

Aug. 31, 1922.

Payson Dana, Esq., *Commissioner of Civil Service.*

Dear Sir: — You inquire whether St. 1922, c. 463, applies to eligible lists established prior to Aug. 21, 1922, the date when said chapter took effect. St. 1922, c. 463, amends G. L., c. 31, § 23, by striking out said section and inserting in place thereof a new section, of which the following are the provisions material to the present inquiry: —

The names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the order of their respective standing above the names of all other applicants, except that any such veterans who are disabled and who present a certificate of any physician, approved by the board, that their disability is not such as to prevent the efficient performance

of the duties of the position to which they are eligible and who shall present proof satisfactory to the commissioner that such disability was received in line of duty in the military or naval service of the United States in time of war or insurrection and is a continuing disability shall be placed ahead of all other veterans on such eligible lists in the order of their respective standing. . . . A disabled veteran shall be appointed and employed in preference to all other persons, including veterans.

In answer to oral inquiries your department informs me that eligible lists are from time to time established as a result of competitive examinations held for that purpose; that under the regulations adopted by your department an eligible list remains in force for not exceeding two years from the date of establishment; that such lists are divided into two groups, consisting (1) of veterans in the order of their examination rank; and (2) of civilians in the order of their examination rank; that in some cases, where the list is a very active one, competitive examinations are held once a year or oftener; that in such a case the successful applicants are placed upon the proper eligible list (with due regard for veterans' preference) in the positions to which their respective marks entitle them, so that the head of an existing list may be displaced by an applicant who obtains a higher mark in a subsequent examination; that a person already upon a list may compete in a subsequent examination, taking such rank as he may achieve in that examination; that for these, and other reasons which need not be here enumerated, not only the absolute but also the relative rank upon a list already established is subject to change; and that from the head of such established lists the proper number of names is certified in response to requests from time to time received.

Assuming that St. 1922, c. 463, is constitutional (see *Brown* v. *Russell*, 166 Mass. 14; *Opinion of the Justices*, 166 Mass. 589), it seems clear that if an examination should be held on or after Aug. 21, 1922, in connection with a list already established, and one who duly establishes that he is a disabled veteran, within the meaning of the act, should pass such examination, he would outrank all veterans not disabled and all civilians upon such established list, irrespective of his competitive mark, just as a veteran not disabled, passing such an examination under the law as it previously existed, would outrank civilians already on the established

list, even though such civilians had higher competitive marks than he. In other words, a place upon an established list ensures neither absolute nor relative rank, but is, on the contrary, held in continuing competition not only with those who in subsequent examinations achieve better competitive marks, but also with those to whom the Legislature accords a valid preference by law. I am therefore of opinion that the preference accorded to disabled veterans by St. 1922, c. 463, applies to any such veteran who, as a result of an examination held on or after Aug. 21, 1922, is placed upon an eligible list already established.

A somewhat more difficult question arises in connection with a disabled veteran already upon an eligible list, in connection with which no examination is held subsequent to the date when St. 1922, c. 463, took effect. If such an examination were held, such veteran could take it, and if he passed, would outrank all others except other disabled veterans who obtain a better mark than he. The fundamental question is the order in which those upon such eligible list shall be certified for employment. If the act had said "veterans who shall hereafter pass examinations," it would clearly not apply to those who had already passed when it took effect. If, on the other hand, it had said "veterans who pass or shall have passed examinations," it would as clearly apply to those already upon the eligible lists. It actually employs the words "veterans who pass examinations," which may be so construed as to describe either class.

I am not unmindful that a statute will not be held to be retroactive unless that intention is clearly expressed. *Martin L. Hall Co.* v. *Commonwealth*, 215 Mass. 326, 329. But this principle seems inapplicable to a list as fluid in character as these eligible lists appear to be. If both the absolute and relative standing of an applicant may be affected by preferences flowing from an examination held subsequent to the creation of such list, I am unable to believe that it remains unaffected by preferences created by a subsequent statute, assuming that such preferences are otherwise valid. A different conclusion would make the preference conferred upon disabled veterans by St. 1922, c. 463, depend upon whether an examination shall or shall not be held in connection with the particular list upon which such veteran happens to be. I cannot believe that the Legislature intended such a dis-

crimination as between disabled veterans. I am therefore of opinion that if a veteran shall establish, in the manner prescribed by the act, that he is a disabled veteran, within the meaning of the act, he becomes entitled to the preference thereby accorded, assuming that said act is constitutional.

Yours very truly,

J. WESTON ALLEN, *Attorney General.*

Salaries of Officers and Employees of the Commonwealth — Classification — Metropolitan District Commission.

The power granted to the commissioners of the Metropolitan District Commission, under G. L., c. 28, § 4, to fix the compensation of employees is subject to G. L., c. 30, §§ 45 and 46, providing that the salaries of all officers and employees holding offices and positions required to be classified, with certain exceptions, shall be fixed in accordance with the classification and specifications of the Supervisor of Administration.

The salaries of employees of the Metropolitan District Commission are not "salaries . . . regulated by law," within the excepting clause of G. L., c. 30, § 46.

SEPT. 12, 1922.

Metropolitan District Commission.

GENTLEMEN: — You ask my opinion as to whether the Commission has authority to fix the rate of pay of laborers and other employees in its employ, or whether, on the contrary, its exercise of this authority is subject to the approval of the Supervisor of Administration and may be limited by him.

G. L., c. 28, § 4, granting certain powers to the commissioners of the Metropolitan District Commission, is as follows: —

> The commissioners may appoint a secretary, engineering chiefs, a purchasing agent, engineers, inspectors, officers and members of the police force, one or more women as special police officers, clerks and such other officers and employees as the work of the commission may require, may assign them to divisions, transfer and remove them, and fix their compensation. The secretary and engineering chiefs shall be exempt from chapter thirty-one.

G. L., c. 30, §§ 45–50, inclusive, provide for the classification of "all appointive offices and positions in the government of the commonwealth, except those in the judicial branch and those in the legislative branch other than the

additional clerical and other assistants in the sergeant-at-arms' office" (G. L., c. 30, § 45). Section 46 is, in part, as follows: —

> . . . The salaries of all officers and employees holding offices and positions required to be classified under said section, except those whose salaries are now or shall be otherwise regulated by law and those whose salaries are required by law to be fixed subject to the approval of the governor and council, shall be fixed in accordance with such classification and specifications.

Whether the Metropolitan District Commission is a part of the "government of the commonwealth," within the meaning of G. L., c. 30, § 45, so that appointive offices and positions under the Commission are required to be classified, might, in the absence of legislative enactment, be a question of considerable doubt. See Gen. St. 1919, c. 150. But the General Court has expressly provided that the power of the Commission to fix compensation of officers and employees is subject to the statute requiring classification. G. L., c. 28, § 4, is a re-enactment of Gen. St. 1919, c. 350, § 126, which contains the provision: —

> The commissioners may also appoint a secretary and engineering chiefs, and, subject to the civil service law and rules, where they apply, appoint a purchasing agent, engineers, inspectors, officers and members of the police force, clerks and such other officers and employees as the work of the commission may require; may assign them to divisions, transfer and remove them, and, subject to the provisions of chapter two hundred and twenty-eight of the General Acts of nineteen hundred and eighteen, and to the approval of the governor and council, where that is required by law, fix the compensation of the said persons.

Gen. St. 1918, c. 228, is the act which appears in codified form in G. L., c. 30, §§ 45–50, providing, in section 1, for the classification of "all appointive offices and positions in the government of the commonwealth, except those in the judicial and legislative branches."

In G. L., c. 28, § 4, the provisos appearing in Gen. St. 1919, c. 350, § 126, are omitted; but it is a familiar principle of statutory interpretation that "verbal changes in the revision of a statute do not alter its meaning, and are construed as a continuation of pre-existing law in the absence of some accompanying report of revisers or other indication showing an express purpose to change the substance of the law."

Derinza's Case, 229 Mass. 435, 442. See also *Wright* v. *Dressel*, 140 Mass. 147, 149; *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, 387; G. L., c. 281, § 2. In this instance the revisers have indicated a purpose not to change the law. In the report to the General Court of the Joint Special Committee on Consolidating and Arranging the General Laws, at the end of chapter 30, there is the following note: —

> The classification of salaries provided for in §§ 45 to 50 is a general provision relating to all state employees or appointees unless otherwise provided therein, and therefore the fact that the fixing of the salaries of such persons is subject to said sections has been omitted in each particular instance where the fixing of such salaries is provided for.

A further question arises whether the salaries of the employees of the Commission are "salaries . . . regulated by law," within the excepting clause of G. L., c. 30, § 46. In an opinion rendered by me to the Supervisor of Administration, under date of May 12, 1920 (V Op. Atty. Gen. 552), I advised him that the phrase "salaries . . . regulated by statute" in Gen. St. 1919, c. 320, § 1, and now appearing in G. L., c. 30, § 46, as "salaries . . . regulated by law," meant "salaries fixed by law either in some definite sum or by a sliding scale which is automatically effective." It clearly was not intended to apply to all those cases in which departments, commissions and officers are given authority to fix the compensation of employees. It is with respect to just those cases that the note referred to above is intended to apply.

I am clearly of the opinion that the provision in G. L., c. 28, § 4, authorizing the Metropolitan District Commission to fix the compensation of employees, is subject to G. L., c. 30, §§ 45–50, providing that the salaries of all officers and employees holding offices and positions required to be classified shall be fixed in accordance with the classification and specifications of the Supervisor of Administration, with the exceptions stated in section 46, and that the employees of your Commission are not within those exceptions.

Very truly yours,

J. Weston Allen, *Attorney General.*

Board of Dental Examiners — Determination whether Applicant for Registration has received a Diploma from a Reputable Dental College — Attorney General.

Under G. L., c. 112, §§ 45 and 46, the Board of Dental Examiners, in the exercise of a sound discretion, should determine whether an applicant for registration has furnished "satisfactory proof," under section 45, that he has attended a "reputable dental college," within the meaning of section 46, and in so determining the board is not, as matter of law, bound to accept the affidavit of the applicant.

The Attorney General neither decides questions of fact nor substitutes his discretion for the discretion vested by law in another officer or board.

Sept. 13, 1922.

Mr. William F. Craig, *Director of Registration, Department of Civil Service and Registration.*

Dear Sir: — I have your inquiry on behalf of the Board of Dental Examiners relative to acceptance of the affidavit of a graduate of a Russian dental school as proof of the requirements imposed by G. L., c. 112, §§ 45 and 46.

Section 45 requires the applicant to furnish "satisfactory proof" either that he has received a diploma from a "reputable dental college," as defined in section 46, or that he has attended such college for four years and has passed the examinations for the first three years. In order that there may be no doubt as to what is meant by a "reputable dental college" the Legislature has defined the same in section 46. "Satisfactory proof" means proof which either does satisfy the Board or ought to satisfy it, as reasonable men. Whether any particular proof is "satisfactory" is a question of fact for the Board itself to determine. Unless the decision of the Board in that regard is plainly unreasonable, it will not be reversed. The Board is not, as matter of law, bound to accept the affidavit of the applicant as a substitute for proof which the Board ordinarily requires from other sources. Indeed, the credibility of any affidavit is peculiarly a question of fact to be determined by the Board, under the circumstances of each case.

It should be, and doubtless is, unnecessary to point out that the Attorney General does not decide questions of fact or substitute his judgment for the judgment of the officer or Board to which the decision of such questions is committed by law.

Yours very truly,

J. Weston Allen, *Attorney General.*

Private Detective — Effect of License — Right of Constable to engage in the Business of a Private Detective.

The license granted to a private detective, under G. L., c. 147, § 23, authorizes the licensee to engage in and to solicit the business of procuring evidence for use in civil or criminal proceedings, and to employ operators, agents and assistants for the conduct of such business.

A constable, by virtue of his appointment as such, has no right to solicit business as, or engage in the business of, a private detective.

Sept. 16, 1922.

Col. Alfred F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You ask my opinion upon the following questions: —

1. Referring to G. L., c. 147, §§ 22 to 30, inclusive, being the law relative to the licensing of private detectives, will you please advise me what rights and privileges can be exercised by the person granted a private detective's license, in consequence of holding such license?

2. Is a constable, appointed in accordance with the provisions of G. L., c. 41, §§ 91 to 95, authorized, by virtue of such appointment, to exercise any or all of the rights and privileges granted to a licensed detective?

1. Prior to the enactment of Gen. St. 1919, c. 271, the licensing of private detectives was governed by R. L., c. 108, §§ 36 and 37. In construing these provisions the court said, in *Frost* v. *American Surety Co.*, 217 Mass. 294, 296: —

> It is made a misdemeanor punishable by fine or imprisonment or both, for any citizen to engage in the general business of a private detective without having obtained a license from the public authorities authorized to grant it. While the statute expressly provides that the licensee shall not be clothed with the power and authority of constables or police officers, the purpose for which the license is granted is to enable him "to act as a private detective for the detection, prevention and punishment of crime."
>
> It is for the licensing board to pass upon the competency and integrity of the applicant and while by the proviso he is not ranked with public officials entrusted with the conservation of the public peace, yet, in the accepted meaning of the words, he is designated as a person unofficially engaged in obtaining secret information for the use and benefit of those who choose to employ him and to pay his compensation. *State* v. *Bennett*, 102 Mo. 356. The license enables him to engage in a business which, if unlicensed, is prohibited, and, as a precedent condition to granting the license, a bond with sureties to be approved by

the licensing board is required, running to the treasurer of the municipality with a condition that the licensee will properly discharge "the services which he may perform by virtue of such license." The "services" obviously are the services rendered in "the detection, prevention and punishment of crime" under his employment by private persons who generally desire to obtain evidence enabling them to support or defend civil actions or criminal prosecutions successfully.

R. L., c. 108, §§ 36 and 37, were repealed by Gen. St. 1919, c. 271, and the provisions of said chapter 271 are now codified in G. L., c. 147, §§ 22 to 30, inclusive, to which you call my attention. The significant sections are sections 22, 23 and 29, which provide as follows: —

Section 22. No person shall engage in the business of or solicit business as a private detective, or the business commonly transacted by a private detective, under any name or title whatsoever, without first obtaining a license so to do as provided in sections twenty-three to thirty, inclusive.

Section 23. The said license may be granted by the commissioner to any reputable citizen of the United States, or to any firm or corporation making written application therefor. The persons making the application shall be not less than twenty-one years of age, and shall have had at least three years' experience as investigators. The holder of a license may employ as many agents, operatives and assistants as may be deemed necessary by the licensee for the conduct of the business.

. . . . . .

Section 29. Any person other than an agent, employee or assistant of a licensee hereunder, and any corporation acting as a private detective without obtaining a license in accordance with sections twenty-three to thirty, inclusive, shall be punished by a fine of not more than five hundred dollars or by imprisonment for a term not exceeding one year, or both; but no corporation shall be liable to the said penalty if its resident manager or superintendent is duly licensed under said sections.

It is not without significance that the Legislature has not itself defined the "business of a private detective." It has not enumerated the rights thereto appertaining. My predecessor has already given you a general but not exhaustive definition of a private detective. V Op. Atty. Gen. 425. As both the court and my predecessor point out, the primary function of a detective is to seek out evidence for use in civil or criminal proceedings. The license issued to a private

detective authorizes a private person, who would not otherwise have that right, *to engage in that business* for private persons *and to solicit that business* from private persons, and, further, to employ agents, operators and assistants for the conduct of such business. The things which he may lawfully do in connection with and in execution of that business must necessarily depend upon the facts of each case.

2. A constable is a public officer charged with the performance of public duties. G. L., c. 41, §§ 91 to 95; *Frost* v. *American Surety Co.*, 217 Mass. 294, 296. It is no part of the duty of a policeman, who is also a public officer, to act as a detective in order to procure evidence for private parties. *Attorney General* v. *Tufts*, 239 Mass. 458, 513. I find nothing in the powers conferred on constables by G. L., c. 41, §§ 91 to 95, which authorizes them to engage in the business of a private detective. A private detective is a private person engaged in a private business. The appointment of a constable as a public officer does not, in my opinion, carry by implication a right to engage in or solicit business as a private detective.

Yours very truly,

J. Weston Allen, *Attorney General.*

Income Tax — Local Taxation of Intangible Personal Property — Exemption — Domicil.

A person who becomes a resident of this State prior to April 1 is not subject to local taxation upon intangible personalty owned by him upon that date when the income received therefrom during the previous year is not subject to the income tax.

G. L., c. 59, § 5, cl. 27, when construed with G. L., c. 62, §§ 49–53, exempts from local taxation intangibles, the income of which is of the kind made taxable by G. L., c. 62, even though such income cannot in fact be taxed because the recipient was not a resident of this State at the time such income was received.

Sept. 19, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You state the following facts: —

A was domiciled in another State in 1921. During that year he received income from intangible personal property, which income would have been taxable if he had been an inhabitant of this State. On Jan. 2, 1922, he became domiciled in this Commonwealth. On April 1, 1922, he owned intangible personal property which would

have been taxable prior to the enactment of the income tax law. Upon the authority of *Hart* v. *Tax Commissioner*, 240 Mass. 37, A seasonably and lawfully refused to pay an income tax upon said income so received in 1921. You inquire whether you should, because of such refusal, instruct the local assessors to levy a personal property tax upon said intangible personal property, under G. L., c. 59, §§ 2, 5, cl. 27, and § 75.

G. L., c. 59, §§ 2, 5 and 75, provide: —

Section 2. All property, real and personal, situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempt, shall be subject to taxation.

. . . . . .

Section 5. The following property and polls shall be exempt from taxation:

. . . . . .

Twenty-seventh, Property the income of which is taxed under chapter sixty-two, or would be taxable thereunder if the property yielded income, except as provided in sections forty-nine to fifty-three, inclusive, of said chapter.

. . . . . .

Section 75. If the real or personal estate of a person, to an amount not less than one hundred dollars and liable to taxation, has been omitted from the annual assessment of taxes, the assessors shall between December tenth and twentieth following, both inclusive, assess such person for such estate. The taxes so assessed shall be entered on the tax list of the collector, who shall collect and pay over the same. Such additional assessment shall not render the tax of the town invalid although its amount, in consequence thereof, shall exceed the amount authorized by law to be raised.

A lawful and seasonable refusal by A to pay a 1922 income tax (see G. L., c. 62, §§ 43 to 47) cannot subject him to local assessment upon the intangible personalty owned by him on April 1, 1922. A is either taxable upon such personalty or he is not. If he is subject to a local assessment thereon, he can neither discharge that liability nor acquire an exemption therefrom by payment of a 1922 income tax for which he is admittedly not liable. If he is not subject to such local assessment, that assessment cannot be grounded upon a seasonable refusal to pay an income tax which he does not owe. A's refusal, therefore, is immaterial and may be laid aside. The fundamental question is whether a want

of jurisdiction to tax A's 1921 income (*Hart* v. *Tax Commissioner*, 240 Mass. 37) renders A subject to local assessment upon the intangible personal property owned by him on April 1, 1922.

Prior to the adoption of Mass. Const. Amend. XLIV and the enactment of Gen. St. 1916, c. 269, which imposed the income tax, intangible personal property was subject to local assessment. That assessment had to be "proportional," within the meaning of Mass. Const., pt. 2d, c. I, § I, art. IV. *Perkins* v. *Westwood*, 226 Mass. 268. But the word "proportional" did not require that the rate be uniform throughout the Commonwealth. *Northampton* v. *County Commissioners*, 145 Mass. 108. The variation in local rates and the failure to require compulsory returns led to grave inequalities in the taxation of intangible personalty. Various expedients were suggested or tried, but they did not meet the "proportional" requirement. See *Perkins* v. *Westwood*, *supra*. In November, 1915, the people ratified Mass. Const. Amend. XLIV, which conferred power to levy a tax "at a uniform rate throughout the commonwealth upon incomes derived from the same class of property," and authorized the Legislature to exempt from proportional taxes "any class of property, the income from which is taxed under this article." Pursuant to the authority thus conferred, the Legislature enacted Gen. St. 1916, c. 269, which classified the income from intangible personal property, imposed a tax upon each class of income at a uniform rate throughout the Commonwealth, and, by section 11, conferred certain exemptions, which, as amended, are not codified in G. L., c. 59, § 5, cl. 27. The history of this legislation manifests a general purpose to substitute a State-wide tax upon the income of intangible personalty for the more onerous and unequal local tax previously imposed upon the property itself. *Duffy* v. *Treasurer and Receiver-General*, 234 Mass. 42; *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 525; *Maguire* v. *Tax Commissioner*, 230 Mass. 503, 506; *Dane* v. *Jackson*, 256 U. S. 589. It is plain that the exemptions conferred by Gen. St. 1916, c. 269, § 11, and now codified, as amended, in G. L., c. 59, § 5, cl. 27, must be construed in the light of the history of the law of which they form a part.

The exemption from local taxation conferred by G. L., c. 59, § 5, cl. 27, is of broad scope. It is not confined to such specific property as produces income which is in fact assessed

under G. L., c. 62. It also includes property the income of which would be taxable under chapter 62 if such property yielded income. This second clause of the exemption is plainly generic; that is, it describes a class of property which is exempted from local taxation. It does not define a condition which must be met by specific parcels of property in order to secure exemption. This is a plain indication that the first clause of the exemption is generic also. If so, the words "property the income of which is taxed under chapter sixty-two" must be held to describe those classes of property, the income of which is taxable under chapter 62, rather than the specific property, the income of which is actually assessed thereunder. This construction is consistent with and effectuates the general intent to substitute for the local tax upon intangible personalty a tax upon the income thereof.

The scope of the exemption from local taxation conferred by G. L., c. 59, § 5, cl. 27, may be tested by the express exception to it. This exception is defined in G. L., c. 62, §§ 49 to 53, inclusive, which read as follows: —

Section 49. All property owned by a resident of the commonwealth on April first in any year, which during the preceding calendar year had produced for such owner any income taxable under this chapter, shall, despite anything in this chapter, be subject to taxation to such owner in accordance with chapters fifty-nine and sixty, if such owner does not make to the commissioner a full return of his taxable income from such property on or before September first of the year in which a return of income is required by sections twenty-two to twenty-five, inclusive, and provided the tax so assessed is greater than the amount of the tax properly payable under sections one and thirty-five to thirty-seven, inclusive.

Section 50. Property taxable in any year under the preceding section shall be assessed in that year between September second and December tenth, both inclusive. The amount of taxes assessed by the local assessors upon such property in such town in any year, less the amount assessed and collected by the commissioner as hereinafter provided, shall be entered on the tax list of the collector of such town, and he shall collect and pay over the same to the town.

Section 51. Any taxpayer aggrieved by the assessment of a tax under section forty-nine may appeal to the commissioner within thirty days after the receipt of the tax bill therefor, or other actual notice of the assessment. In case of an adverse determination by the commissioner, the taxpayer may appeal to the board of appeal as provided in section forty-five, or to the superior court as provided in section forty-seven; and if the taxpayer shall prove that the income

of the property was duly returned or that it was not taxable or that there was reasonable excuse for not making the return, the tax shall be abated, and, if it has previously been paid, the amount abated shall be repaid by the town to the taxpayer, with interest from the time of such payment.

SECTION 52. At any time prior to the collection by the town of the tax provided for by section forty-nine the commissioner may assess and collect the tax provided for by this chapter on the income of the property, subject to the limitation of time provided by section thirty-seven. Upon the collection of the tax, the commissioner shall at once notify the tax collector of the town where the taxpayer resides, and the tax collected by the commissioner shall be deducted from the tax assessed in that town; and if the tax assessed therein has been collected, the amount so deducted shall be repaid by the town to the taxpayer. If a tax collected by a town under section forty-nine is afterward abated, the amount of the abatement, together with the amount of any interest paid by the taxpayer on that amount, shall be paid by the town to the taxpayer.

SECTION 53. Upon discovery of property the income of which for the preceding calendar year, taxable under this chapter, has not been returned on or before September first of the year in which the return is required, the commissioner shall forthwith notify the assessors of the town where the property is taxable, unless there is within his knowledge a reasonable excuse for the failure of the taxpayer to file the return. Upon making any assessment under section forty-nine, the assessors shall forthwith notify the commissioner.

Section 49 subjects to local taxation "all property owned by a resident of this commonwealth on April first in any year, which during the preceding calendar year had produced for such owner *any income taxable under this chapter*" (*i.e.*, chapter 62) if such owner does not make "a full return of his *taxable income from such property*" on or before September 1 as required by law. The condition upon which liability to local taxation attaches, and the nature of the property to be taxed in that event, are both significant. Liability to local taxation does not attach unless there be a failure to file a return of the "taxable income from such property." The property to be locally taxed in that event is property "which during the preceding year . . . produced . . . income taxable under this chapter" (*i.e.*, chapter 62). Thus, the liability to local taxation accrues because of failure to return taxable income, not because the jurisdiction to tax such income fails. The property subjected to local taxation is property which produces taxable income which is not

returned, not property which produces income which would normally be taxable, but which cannot in this instance be taxed because it is not within the jurisdiction of the Commonwealth.

Sections 51 and 53 support and compel the same conclusion. Section 51 requires that a local tax assessed under section 49 shall be abated, or if paid, shall be repaid with interest, if the taxpayer seasonably appeals and proves either "that the income of the property was duly returned *or that it was not taxable.*" Section 53 imposes on the Commissioner a duty to notify the local assessors "upon discovery of property, the income of which for the preceding calendar year, *taxable under this chapter,*" has not been duly returned. It is plain that this duty does not arise in respect of property the income of which for the preceding calendar year is *not* taxable under chapter 62. Indeed, if such property should be locally taxed, the taxpayer could, under section 51, compel an abatement or recover such tax if paid, by proving that the income thereof was not taxable. Both these provisions repel any intention to tax the property locally because the income thereof, though within the provisions of chapter 62, is outside the taxing jurisdiction of Massachusetts.

Comparison of G. L., c. 59, § 75, with G. L., c. 62, § 50, is significant. Section 75 provides that the local assessment of omitted property to be made thereunder shall be made between December 10 and 20, both inclusive. Section 50 provides that the local assessment to be made under section 49 shall be made between September 2 and December 10, both inclusive. Neither assessment can be made at a different time. *Gannett* v. *Cambridge,* 218 Mass. 60. It is plain that property, the income of which is subjected to taxation under chapter 62, cannot be included in the regular local assessment, made as of April 1, since the liability to local assessment does not arise until there is a failure to file the required income tax return on or before September 1. The local assessment upon such property is in that case made under G. L., c. 62, § 50, between September 2 and December 10, both inclusive. It is not made between December 10 and 20 under G. L., c. 59, § 75. In my opinion, the provisions of G. L., c. 62, § 50, exclude such property from local assessment under G. L., c. 59, § 75.

When G. L., c. 59, § 5, cl. 27, is read in connection with G. L., c. 62, §§ 49 to 53, I am constrained to the conclusion

that intangible personal property is not to be subjected to local taxation except under the conditions and in the manner defined by the latter provisions. Such seems to be the necessary scope of the express exemptions conferred by said section 5, clause 27. This is entirely in accord with the principle that an exemption from taxation is not to be lightly inferred, but must be established either expressly or by clear intendment of the statute. *Wheelwright* v. *Tax Commissioner*, 235 Mass. 584, 586; G. L., c. 59, § 2. G. L., c. 62, §§ 49 to 53, must be held to define a comprehensive and exclusive scheme for local taxation of intangible personalty under chapter 59, and the exemption conferred by G. L., c. 59, § 5, cl. 27, must, in my opinion, be construed accordingly.

For the reasons already pointed out, it is plain that the facts stated by you do not present a case which is within G. L., c. 62, §§ 49 to 53. So far as appears, there has been no failure by A to return taxable income on or before Sept. 1, 1922. Indeed, it does not appear that the intangible personalty owned by A on April 1, 1922, produced in 1921 any income which would have been taxable if A had then been an inhabitant of this State. But even if it be assumed that the intangible personalty owned by A on April 1, 1922, produced income otherwise taxable, it is admitted that under the rule of *Hart* v. *Tax Commissioner, supra*, such income cannot be taxed. If, therefore, the intangible personalty in question were locally taxed in 1922 under G. L., c. 62, § 49, A could require such tax to be abated if he seasonably invoked the remedy given by section 51. I am therefore constrained to advise you that your inquiry must be answered in the negative.

Yours very truly,

J. Weston Allen, *Attorney General.*

Insurance — Declaration of Trust — Partnership — Agent's or Broker's License.

Partnership licenses under G. L., c. 175, § 173, may not be granted to persons doing business under a declaration of trust.

Sept. 20, 1922.

Hon. Clarence W. Hobbs, *Commissioner of Insurance.*

Dear Sir: — I have your letter, with copy of an instrument attached purporting to be a declaration of trust, stating

that application has been made by three persons under said declaration for agents' or brokers' licenses from your department, under G. L., c. 175, § 173. Section 173 reads as follows: —

The licenses described in sections one hundred and sixty-three, one hundred and sixty-six, one hundred and sixty-seven, one hundred and sixty-eight and one hundred and seventy-two may be issued to partnerships on the conditions specified in and subject to said sections, except as otherwise provided herein. Each member of the partnership shall file the statement or application required by law, including a written request that the license be issued in the partnership name. Together with said statements or applications, there shall be filed a duplicate original of the written partnership agreement signed by all the partners. The license shall be issued in the partnership name, and may be revoked or suspended as to one or all members of the partnership. Minors who are parties to the written articles of partnership may be included in the partnership license, provided that there is one adult member of the firm. If the partnership is terminated prior to the expiration of the license, the partners shall forthwith give notice thereof to the commissioner, who shall thereupon without a hearing revoke the license. Each partner shall be personally liable to the penalties of the insurance laws for any violation thereof, although the act of violation is done in the name of or in behalf of the partnership. Whoever, being licensed as a partner under this section, fails to give notice as required herein of the termination of the partnership, or after the partnership is terminated acts under such license, shall be punished by a fine of not less than twenty nor more than five hundred dollars.

You ask the following questions: —

1. Does said section 173 authorize the Commissioner to license, as agents or brokers, persons operating under a declaration of trust in the form hereto attached?
2. Is the declaration of trust a written partnership agreement within the meaning of said section?
3. If the provisions of article 13 and article 14 were omitted from the declaration, would the Commissioner have the authority referred to in question 1, and would the declaration then constitute a partnership agreement for the purposes of said section 173?

Answering your first question, I point out that the instrument filed with you purports on its face to be an agreement and declaration of trust. I am advised by counsel for the petitioners that it is intended to be one, drafted, however,

to make the trust as responsible for its acts as a corporation. It is apparent, therefore, that these petitioners do not consider themselves partners, and the instrument submitted is not a partnership agreement such as section 173 requires. I am of opinion that the Legislature contemplated and intended the usual partnership relation, especially since limited partnerships are not permitted to do insurance business. G. L., c. 109, § 1. Your first and second questions, therefore, are answered in the negative.

In the light of my answer to questions 1 and 2, I do not think I should advise you further as to what the suggested change in the instrument might effect as a matter of law. These petitioners would still, on the face of things, be applying for the license, not as partners, but as trustees under a written declaration of trust.

Yours very truly,

J. Weston Allen, *Attorney General.*

Taxation — Income Taxes — Additional Assessments — Notice and Opportunity to confer with the Commissioner of Corporations and Taxation.

An additional assessment of income taxes cannot be made after the two-year period prescribed by G. L., c. 62, § 37, has expired.

The notice and opportunity to confer, for which G. L., c. 62, § 37, as amended by St. 1922, c. 143, provides, are conditions precedent to the making of an additional assessment of income tax.

If a taxpayer, having received notice of the intention of the Commissioner of Corporations and Taxation to assess an additional income tax, confers with the Commissioner before the ten days prescribed by G. L., c. 62, § 37, as amended by St. 1922, c. 143, have expired, the Commissioner need not wait to make the assessment until the ten-day period has expired.

The Commissioner cannot shorten the ten-day period by prescribing the time at which such conference shall be had.

If the taxpayer has not conferred with the Commissioner, the Commissioner cannot make an additional assessment of income tax until the ten-day period prescribed by G. L., c. 63, § 37, as amended by St. 1922, c. 143, has expired, even though the two-year period within which such assessment may be made will expire before the ten days have elapsed.

Sept. 25, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You ask my opinion upon the following facts: —

A formal notice in respect of a proposed additional assessment of income taxes for the year 1920 is given to the taxpayer on Aug. 28, 1922. The taxpayer has his hearing on Aug. 30, 1922. You inquire whether, under G. L., c. 62, § 37, as amended by St. 1922, c. 143, the Commissioner may proceed to make the assessment on August 31 or September 1, without waiting for the ten days after August 28 to expire. You further inquire whether, if a verification of 1920 income taxes be begun on Aug. 28, 1922, and during such verification omissions are called to the attention of the taxpayer, the taxpayer may insist upon the notice and opportunity to confer, for which section 37 provides.

The material portion of G. L., c. 62, § 37, as amended by St. 1922, c. 143, provides: —

> If the commissioner finds from the verification of a return, or otherwise, that the income of any person subject to taxation under this chapter or any portion thereof, has not been assessed, he may, at any time within two years after September first of the year in which such assessment should have been made, assess the same, with interest at six per cent from the date when such tax was due under section thirty-nine, first giving notice to the person so to be assessed of his intention, and such person shall thereupon have an opportunity within ten days after such notification to confer with the commissioner in person or by counsel or other representative as to the proposed assessment. After the expiration of ten days from such notification the commissioner shall assess the income of such person subject to taxation, or any portion thereof, which he believes has not theretofore been assessed, and he shall thereupon give notice under section thirty-nine to the person so assessed, and the tax, with interest as aforesaid, shall be payable fourteen days after the date of such notice. . . .

1. In my opinion, the provisions of the first sentence are mandatory. In *Gannett* v. *Cambridge*, 218 Mass. 60, it was held that where a statute (now G. L., c. 59, § 75) provided that property omitted from the regular annual assessment of real and personal property should be assessed "between December tenth and twentieth, following, both inclusive," an assessment made in May of the next year was void, because not made within the permitted period. I am of opinion that the provision for assessment "within two years after September first of the year in which such assessment should have been made" is a limitation upon the power to make such additional assessment. An assessment made after the

expiration of that period would be void. *Gannett* v. *Cambridge, supra.*

2. The statute provides that before making the assessment the Commissioner shall "first" give notice to the person to be assessed, who "shall thereupon have an opportunity, within ten days after such notification, to confer with the commissioner . . . as to the proposed assessment." In *Torrey* v. *Millbury,* 21 Pick. 64, 67, Chief Justice Shaw stated the test for distinguishing directory regulations from conditions precedent as follows: —

> In considering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory merely, and do not constitute conditions. One rule is very plain and well settled, that all those measures, which are intended for the security of the citizen, for ensuring an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax.
>
> But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which, does in no respect affect the rights of tax-paying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them; but yet their observance is not a condition precedent to the validity of the tax. On consideration, the Court are of opinion that the requirement in the statute, in regard to "reduced value," is of the latter character.

In my opinion, the provisions for notice and opportunity to confer must be regarded as conditions precedent to the assessment rather than as merely directory. Doubtless the notice may be given in the manner provided in section 39 (*i.e.*, either by mail, postage paid and duly addressed, or otherwise delivered at such address), and it may be that failure to receive such notice would not affect the validity of the tax. But it is significant that both sections 35 and 36 likewise provide for notice as a condition precedent to the action therein provided for. I am therefore constrained to the view that failure to give the required notice or to accord

the prescribed opportunity to confer would render the assessment invalid.

3. I am of opinion, however, that upon the facts stated in your first inquiry there has been a sufficient compliance with these conditions precedent. The notice was given on August 28. The taxpayer had his conference on August 30. He has therefore received every substantial right to which these provisions of law entitle him. The provision of the next sentence, that the assessment shall be made "after the expiration of ten days from such notification," must be construed with the first sentence. It is manifestly intended to ensure to the taxpayer the opportunity for conference "within ten days after such notification," to which he is entitled under the first sentence. It does not require that the Commissioner shall wait the whole ten days, if within that time the taxpayer has had his conference. I am therefore of opinion that, under these circumstances, the assessment may be made at any time after the conference and before midnight of September 1.

4. These considerations dispose of your second inquiry. Even if it be assumed, without deciding, that calling certain omissions to the attention of the taxpayer in the course of verification under G. L., c. 62, § 30, could be found to be equivalent to the notice required by section 37 (a question of fact as to which I express no opinion), the taxpayer is still entitled to choose his own time, within the ten days, for the conference with the Commissioner. The conference is not an idle ceremony. It is an opportunity for the taxpayer to show why he should not be subjected to an additional assessment. He is entitled to prepare for it. If the Commissioner could select the time for such conference, the taxpayer would not receive the right which the statute gives him, namely, opportunity to confer "within ten days after such notification." Unless such conference shall have been had, I am of opinion that the assessment cannot be made until the ten days after such notification have expired. The possible expiration of the two-year period for assessment within the ten days cannot relieve from compliance with the conditions precedent upon which the assessment depends.

Yours very truly,

J. Weston Allen, *Attorney General.*

Registration of Births, Marriages and Deaths — Illegitimate Children.

Marriage of the parents of a child born out of wedlock does not operate to change the name of the child.

G. L., c. 46, § 13, does not provide for the making of any change in the record of birth, upon the marriage of the parents of a child born out of wedlock.

The recording of the name of the father of an illegitimate child, on the written request of both father and mother, as authorized by G. L., c. 46, § 1, does not change the rule that illegitimate children have no family names and take the names they have gained by reputation.

Under G. L., c. 46, § 13, the record of a birth, marriage or death can be corrected only to conform with the facts as they existed at the time of the birth, marriage or death to which the record relates.

Sept. 25, 1922.

Hon. Frederic W. Cook, *Secretary of the Commonwealth.*

Dear Sir: — You ask my opinion in answer to the following questions: —

1. Does a child born out of wedlock, when parents subsequently marry, take the name of the father, and can the record of birth be corrected accordingly, as provided in G. L., c. 46, § 13?

2. Does an illegitimate child take the name of the father when the name of the father is recorded on the written request of both the father and mother, as provided in G. L., c. 46, § 1?

3. Can a record made at the time the birth, marriage or death occurred be amended or corrected to agree with subsequently acquired names or facts, or can the record only be corrected in accordance with the facts as they existed at the time of the happening of the event?

To these questions I reply in order, as follows: —

1. Your first question consists of two distinct parts, which must be answered separately, the first being whether a child born out of wedlock takes the name of the father upon the subsequent marriage of the parents; and the second, whether, in that event, the record of birth can be changed.

In an opinion to you under date of June 10, 1921 (Attorney General's Report, 1921, p. 198), I stated: —

> Illegitimate children have no family names, and take the names which they have gained by reputation. . . . If a child goes by its mother's name it should be so recorded; otherwise not.

If a child born out of wedlock has gained a name, that name can be changed only in ways provided or recognized

by the law. Our statutes permit a change of name by petition to the probate court. G. L., c. 210, §§ 12–14. In addition to the statutory method, it seems also that a person may assume a name by which he can contract and be sued. *Young* v. *Jewell*, 201 Mass. 385; *William Gilligan Co.* v. *Casey*, 205 Mass. 26, 31. But while it is true that the marriage of the parents of a child born out of wedlock and the acknowledgment of the child by the father will legitimatize that child (G. L., c. 190, § 7), there is no statute or rule of law which operates to change the name of the child in that event. In my judgment, the child's name will not be changed except by a decree of the probate court or by the assumption and common use of the father's name by the child.

If in any way the name of the child is changed upon the marriage of the parents, it is my opinion that the statute does not provide for the making of any change in the record of birth. G. L., c. 46, § 13, which you cite, providing for the correction of errors in the record, is, in part, as follows: —

> If the record relating to a birth, marriage or death does not contain all the required facts, or if it is claimed that the facts are not correctly stated therein, the town clerk shall receive an affidavit containing the facts required for record, if made by a person required by law to furnish the information for the original record, or, at the discretion of the town clerk, by credible persons having knowledge of the case. . . .

The remainder of the section provides for the filing and recording of the affidavit, correcting the record by drawing a line through the incorrect statements, and entering the facts required to amend the record, etc. Manifestly this section is intended to provide for a correction of the record by the addition of facts not previously stated, or a correction of facts incorrectly stated, and not to provide for a change of the record occasioned by subsequent occurrences.

2. G. L., c. 46, § 1, is, in part, as follows: —

> Each town clerk shall receive or obtain and record in separate columns the following facts relative to births, marriages and deaths in his town;
>
> In the record of births, date of record, date of birth, place of birth, name of child, his sex and color, names, places of birth and residence of his parents, including the maiden name of the mother and occupation of the father. In the record of birth of an illegitimate child, the name of, and other facts relating to, the father shall not be recorded except on the written request of both father and mother. The term

"illegitimate" shall not be used in the record of a birth unless the illegitimacy has been legally determined, or has been admitted by the sworn statement of both the father and mother. . . .

I find nothing herein to change the rule of law which I have previously stated to be that illegitimate children have no family names and take the names which they have gained by reputation.

3. My answer to this question is, as I have already indicated, that the record can only be corrected so as to conform with the facts as they existed at the time of the birth, marriage or death to which the record relates.

Very truly yours,

J. Weston Allen, *Attorney General.*

Drainage Law — Jurisdiction of Drainage Board.

Under G. L., c. 252, § 5, as amended by St. 1922, c. 349, § 4, the question whether the petitioners hold an interest sufficient to authorize them to petition the Drainage Board is a jurisdictional question, for the Board to determine.

Oct. 3, 1922.

Dr. Arthur W. Gilbert, *Commissioner of Agriculture.*

Dear Sir: — You state that a question has arisen with respect to the State drainage law (G. L., c. 252, as amended by St. 1922, c. 349), as to how the valuation of property held by proprietors who seek to form a drainage district is to be determined in case the petitioners claim a majority in interest in respect to value, but do not have a majority in interest in respect to area. You ask whether in such a case the Drainage Board should determine the question of valuation, and if not, by whom such question should be determined and upon what basis. You say that in some instances mill rights or other special privileges may be involved which would give lands in a proposed district a special value, and might, if such value should be set very high, enable the holder of the mill right practically to control the formation of the district.

G. L., c. 252, § 5, as amended by St. 1922, c. 349, § 4, is, in part, as follows: —

> The proprietors, or a majority in interest either in value or area, may petition the board setting forth their desire to form a drainage district as provided in the following section, stating the proposed

name of said district, the necessity for the same, the objects to be accomplished, and a general description of the lands proposed to be affected, together with the names of known owners of said lands. Upon the receipt of said petition the board shall proceed, at the expense of the commonwealth, to make such surveys of the land proposed to be drained as it shall deem necessary, and shall further ascertain by such surveys or other investigations the need of any drainage required for the benefit of the public health, agricultural and other uses to which the land can be put after drainage, and its value for such uses after drainage, and in general the advisability of undertaking the proposed drainage or maintenance, and shall make recommendations in relation thereto, including a statement of what portion, if any, of the expense should be borne by the commonwealth on account of the cost of that part of the improvement relating to the public health, and, after notice by publication in a newspaper published in the county where the greater part of the land lies and further notice to each known proprietor by registered mail and a hearing, if the board approves of the undertaking, it shall issue a certificate appointing three, five or seven district drainage commissioners, who shall be sworn to the faithful performance of their duties, and fix their compensation, which shall not exceed five dollars a day, while in conference, and their necessary traveling expenses while performing their duties, and authorize said commissioners to form a drainage district under the following section. . . .

The authority given by this section to proprietors of land to petition for the formation of a drainage district extends to all cases where either the value of the lands held by the proprietors amounts to more than half of the value of the land in the district proposed to be formed, or the area of the lands so held amounts to more than half of the area of the proposed district. The question whether the petitioners hold an interest sufficient to authorize them to petition the Board is a jurisdictional question which the Board must determine. Every tribunal has necessarily the power, in connection with proceedings before it, to hear and determine in the first instance the question of its own jurisdiction. *Cf. Brougham* v. *Oceanic Steam Navigation Co.*, 205 Fed. 857. What remedy a proprietor of land in the district, who is not a petitioner, may have by certiorari or otherwise, it is not for me to decide.

You refer to instances where mill rights and other special privileges may give to lands in a proposed district a special value which might enable the holder of such a right to exercise an influence disproportionate to the area of the land held by him. No doubt the value of land may be increased by mill rights and other rights involving the use of water or

water power appurtenant to the land. *Lowell* v. *County Commissioners*, 152 Mass. 372; *Essex Co.* v. *Lawrence*, 214 Mass. 79, 90. In every such case the question must be, what is the value of the land with the appurtenant rights?

Yours very truly,

J. Weston Allen, *Attorney General.*

State Teachers' Retirement Association — Termination of Membership — Part-Time Employment by City of Boston.

Teachers who are members of the State Teachers' Retirement Association discontinue their membership in such association after appointment by the city of Boston to positions where they receive only part of their salary for courses that come under the provisions of G. L., c. 74, §§ 1–24, inclusive, serving the remainder of their time in courses for which there is no reimbursement, and under which they would be subject to the retirement laws for regular Boston public school teachers.

Oct. 9, 1922.

Teachers' Retirement Board, Department of Education.

Gentlemen: — You request my opinion as to whether teachers who are members of the State Teachers' Retirement Association continue to be members of the association after they are appointed by the city of Boston to positions where they receive only part of their salary for courses that come under the provisions of G. L., c. 74, §§ 1–24, inclusive, serving the remainder of their time in courses for which there is no reimbursement, and under which they would be subject to the retirement laws for regular Boston public school teachers.

St. 1908, c. 589, established a permanent school pension fund for the payment of pensions to members of the teaching and supervising staff of the public day schools of the city of Boston. These pensions are non-contributory and are met out of taxation (§§ 4, 5 and 6). The act was accepted by the city in accordance with the provisions of section 9 thereof, and went into effect on June 22, 1908.

St. 1913, c. 832, established a Massachusetts Retirement Association for teachers in the public day schools of the Commonwealth. Members of this association are assessed a certain proportion of their salaries, and at retirement receive an annuity based upon the contributions so made. In addition, they receive from the State a pension equal to the

amount of such annuity. Attorney General's Report, 1921, p. 315. This act became effective on July 1, 1914, and as amended is now codified in G. L., c. 32, §§ 6–19. Section 7 of said G. L., c. 32, provides, in part: —

> There shall be a teachers' retirement association organized as follows:
> (1) All persons now members of the teachers' retirement association established on July first, nineteen hundred and fourteen, shall be members thereof.
> (2) All teachers hereafter entering the service of the public schools for the first time shall thereby become members of the association. . . .

But this provision must be read with section 18, which provides: —

> Sections six to fifteen, inclusive, shall not apply to teachers in the public schools of Boston, except teachers employed by Boston in day schools conducted under sections one to twenty-four, inclusive, of chapter seventy-four.

As originally enacted in St. 1913, c. 832, § 3, cl. 3, this provision read: —

> Teachers in the service of the public schools of the city of Boston shall not be included as members of the retirement association.

It is plain that under this clause teachers in the "public schools" of Boston were excluded from and were ineligible to membership in the State Retirement Association. I am of opinion that the change in form made in G. L., c. 32, § 18, has not in this respect changed the meaning. Verbal changes made in the course of the periodic codifications of our laws will not be held to change the meaning unless the intent to change clearly appears. *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, 387. Teachers in the "public schools" of Boston are still excluded by said section 18 from membership in the State Retirement Association. The reason for the exclusion appears to be that membership in the State association would render such teachers ineligible to receive the non-contributory pension for which St. 1908, c. 589, provides. (G. L., c. 32, § 15.)

St. 1911, c. 471, §§ 1–24 (now G. L., c. 74), provided for the establishment of vocational schools. St. 1914, c. 494, §§ 1 and 2, provided, in substance, that teachers employed

by the city of Boston in such vocational schools, prior to June 30, 1914, might become members of the State Retirement Association established by St. 1913, c. 832, and that all teachers employed in said vocational schools for the first time after July 1, 1914, "shall thereby" become members of such association. These provisions are now re-enacted in and continued in force by G. L., c. 32, § 7. In other words, while teachers employed in the regular "public schools" of Boston, no matter at what date employed, were and are excluded from membership in the State Retirement Association, teachers in the vocational schools, which are not a part of the regular public school system, were required to join the State Retirement Association if employed for the first time in such schools after July 1, 1914.

In June, 1920, the Department of Education presented to this Department the question of the status of a teacher in the regular "public schools" of Boston who was thereafter employed upon a part-time basis in the vocational schools of Boston, for the first time, after July 1, 1914. This presented a situation where, under the particular circumstances, one provision of law excluded such teacher from the State association, while another provision required such teacher to be a member. Under these circumstances, the Attorney General advised that the provision of law which required the teacher in the vocational schools to be a member of the State association (St. 1914, c. 494, § 1) did not relieve from the disability arising from the fact that such teacher was, at the same time, a teacher in the regular "public schools" of Boston, and that therefore such teacher should not be enrolled in the State association. V Op. Atty. Gen. 576. In the same opinion the Attorney General further advised, in answer to another inquiry, that even though both employments were entered into at the same time, employment as teacher in the regular "public schools" of Boston excluded such teacher from the State Retirement Association. This opinion governs in the present case. Even though the teacher in question be a member of the State Retirement Association by reason of employment in the vocational schools of Boston, subsequent acceptance of employment in the regular "public schools" renders such teacher ineligible to continue a member of such association. A different view would lead to the confusing and inequitable result that the respective rights of two teachers, each em-

ployed in both classes of schools, would depend upon the order in which the employments were undertaken. I am unable to believe that such was the intention of the Legislature, and therefore advise you that under the circumstances stated in your inquiry such teacher does not continue to be a member of the State Association.

Yours very truly,

J. Weston Allen, *Attorney General.*

Druggist — License — Federal Permit — Board of Registration in Pharmacy — Intoxicating Liquor — Attorney General.

The revocation of the Federal permit issued to a druggist, authorizing him to have intoxicating liquor in his store, is not a judgment which establishes a violation of law, and it is the duty of the Board of Registration in Pharmacy to give a hearing, as required by G. L., c. 112, § 40, and decide for itself, upon the evidence, whether or not a violation of law has occurred which would justify the Board in suspending or revoking the registration of such druggist.

The Attorney General does not decide questions of fact or substitute his judgment for the judgment of the officer or Board to which the decision of such questions is committed by law.

Oct. 18, 1922.

Mr. William F. Craig, *Director of Registration.*

Dear Sir: — You request my opinion on the following case: —

A drug store in Cambridge was visited by Federal authorities in search of liquor. The druggist held a permit from the Federal government authorizing him to have liquor in his store. The agents found, however, several bottles of whiskey, spuriously labeled, which had not been purchased under the permit from the Federal government. The druggist testified that these bottles of whiskey had been given him by a friend, and that they were kept in his store for his personal use.

This druggist has been brought before the Board, has had a hearing at which he appeared and testified, confirming the facts as given above. He holds a permit to operate a drug store, issued to him by the Board of Registration in Pharmacy under the provisions of G. L., c. 112, §§ 37–42. The Board desires to know whether, under these circumstances, it is authorized by law to suspend this drug store permit.

It is disclosed that, by order of the Federal Prohibition Director of the Third Judicial District of Massachusetts,

dated Aug. 9, 1922, permit No. H-5428, issued to the druggist in question, "be, and the same hereby is, revoked and canceled upon the following grounds, to wit; in that said permittee has not in good faith conformed to the provisions of the National Prohibition Act and the permit issued from this Department."

G. L., c. 112, § 40, provides as follows: —

> The board may suspend or revoke any registration made under the preceding section and any permit issued thereunder for any violation of the law pertaining to the drug business or the sale of intoxicating liquors or for aiding or abetting in a violation of any such law; but before such suspension or revocation the board shall give a hearing to the holder of the permit, after due notice to him of the charges against him and of the time and place of the hearing. Such holder may appear at the hearing with witnesses and be heard by counsel. Witnesses shall testify on oath and any member of the board may administer oaths to them. The board may require the attendance of persons and compel the production of books and documents. Three members of the board shall be a quorum for such a hearing, but no registration or permit shall be suspended or revoked unless upon the affirmative vote of three or more members thereof.

This section expressly provides that the Board may suspend or revoke any registration or permit issued thereunder "for any violation of the law pertaining to the drug business or the sale of intoxicating liquors or for aiding or abetting any violation of any such law."

In my opinion, this provision must be held to include violations of the Federal law passed to enforce the Eighteenth Amendment to the Federal Constitution, commonly called the Volstead Act, which is operative in Massachusetts and regulates the sale of liquor in this State. Under appropriate circumstances a violation of that law, or aiding or abetting in such violation, may be found to establish that the violator is not of fit character to hold the license or permit in question. See *Lawrence* v. *Board of Registration*, 239 Mass. 424, 428. On the other hand, proof of such violation cannot be held in every instance to require revocation of such license or permit. Each case must rest upon its own facts and be determined by the Board in the exercise of a sound discretion. I therefore advise you that the Board must determine in the manner prescribed by law whether or not a violation of the Volstead Act has occurred. If that fact be found adversely

to the druggist, the Board should than determine what action ought to be taken, in the exercise of a sound discretion.

In this connection it may be advisable to point out that the office of Federal Prohibition Director is an administrative and not a judicial office. Accordingly, the revocation of the Federal permit in question is not a judgment which establishes a violation of law. It is a finding of fact which neither adds to nor detracts from the evidence upon which it rests. Such a finding of fact by an administrative officer cannot relieve your Board either from the duty to give a hearing, as required by G. L., c. 112, § 40, or from the duty to decide for itself upon the evidence whether or not a violation of law has occurred.

With reference to what action the Board may take in the present case, it should be, and doubtless is, unnecessary to point out that the Attorney General does not decide questions of fact or substitute his judgment for the judgment of the officer or Board to which the decision of such questions is committed by law.

Yours very truly,

J. Weston Allen, *Attorney General.*

State Employee — Pension Deduction — Workmen's Compensation Act — Wages — Board — Auditor.

St. 1922, c. 341, § 2, providing for the addition of $5 per week, in certain instances, to the cash payment for regular services, concerns only the basis upon which annuity contributions and computation of pensions based upon prior service are to be made under the retirement and pension system outlined in G. L., c. 32, and, consequently, should not enter into the basis of the computation of awards made to injured employees under the workmen's compensation law.

Whenever an employee is provided with board, in accordance with the practice in a State institution, the same is in the nature of a perquisite, which is not to be included in determining the "average weekly wages" under G. L., c. 152.

Accordingly, the State Auditor is not required to approve vouchers for awards made by the Department of Industrial Accidents under the provisions of G. L., c. 152, if it appears that the $5 addition granted under St. 1922, c. 341, and the value of maintenance have been included in the basis of computation for said awards.

Oct. 27, 1922.

Hon. Alonzo B. Cook, *Auditor of the Commonwealth.*

Dear Sir: — You request my opinion as to whether or not St. 1922, c. 341, § 2, which adds $5 per week to the

cash payments made to institution employees for the purpose of pension deductions, would also have the effect of fixing the full amount of salary or wage said institution employees would receive for the purpose of finding the amount which should be used when making payments under the provisions of G. L., c. 152.

You state that recently the Department of Industrial Accidents has filed with your office certain agreements made with injured institution employees, which show the addition to their cash wages of amounts for maintenance valued at $4.60, $5 and $7 per week, and then allowing payment on the basis of two-thirds of the same. You inquire whether the Department of Industrial Accidents has the right to fix the value of said maintenance, and, if so, whether the amount should be the same in all cases.

I assume that the purpose of your question is to ascertain whether or not it is your duty to approve vouchers of the Department of Industrial Accidents which disclose that said additions have been made or allowed in connection with payments under the provisions of G. L., c. 152. It would seem that your query is divisible into two parts, viz.: First, is the Department of Industrial Accidents justified, under the provisions of St. 1922, c. 341, in adding the sum of $5 per week to the weekly wage of an institution employee who becomes injured, when determining the basis of compensation under the provisions of G. L., c. 152? Second, has the Department of Industrial Accidents the right to compute the value of maintenance where the same is allowed to such institution employee and include it when determining the basis of said compensation?

1. St. 1922, c. 341, § 2, provides as follows: —

> Section three of said chapter thirty-two is hereby amended by inserting after the word "limits" in the fourteenth line the following: — It shall add to the cash payment for regular services, in cases where an employee of a state institution receives a non-cash allowance to cover compensation in the form of full or complete boarding and housing in accordance with the practice in such state institution, an amount at the rate of five dollars per week, which amount added to said cash payment shall be the basis upon which annuity contributions shall be made; and the foregoing provision shall also apply in computing pensions based upon prior service, — so that paragraph (4) will read as follows: — (4) It shall determine the percentage of wages or salary that employees shall contribute to the fund, subject

to the minimum and maximum percentages, and may classify employees for the purposes of the system and establish different rates of contribution for different classes within the prescribed limits. It shall add to the cash payment for regular services, in cases where an employee of a state institution receives a non-cash allowance to cover compensation in the form of full or complete boarding and housing in accordance with the practice in such state institution, an amount at the rate of five dollars per week, which amount added to said cash payment shall be the basis upon which annuity contributions shall be made; and the foregoing provision shall also apply in computing pensions based upon prior service.

It is to be observed that this amends G. L., c. 32, which provides for retirement systems and pensions only. G. L., c. 152, embodies the workmen's compensation law and defines what shall be the basis of computation for compensation, namely, the average weekly wages of the injured employee. Section 1, paragraph (1), thereof defines "average weekly wages" as follows: —

(1) "Average weekly wages," the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

In *Gagnon's Case*, 228 Mass. 334, 338, the Supreme Court has defined "wages" in this connection in the following language: —

"Wages" as used in the statute must be taken to refer to the only wages referred to anywhere in the act (with the exception noted), namely, the wages earned in the particular employment out of which the injury arose. If any exception to this rule were intended, doubtless it would have been stated with the same explicitness with which the only exception in the definition is set forth.

It is significant that St. 1922, c. 341, does not in terms refer to or amend the provisions of G. L., c. 152, and it is fair to assume that if the Legislature had intended to amend the workmen's compensation law in this connection it would have done so expressly.

I am accordingly of the opinion that St. 1922, c. 341, providing for the addition of $5 per week, in certain instances, to the cash payment for regular services, concerns only the basis upon which annuity contributions and computation of pensions based upon prior service are to be made under the retirement and pension system outlined in G. L., c. 32, and, consequently, should not enter into the basis of the computation of awards made to injured employees under the workmen's compensation law.

2. The above considerations determine the answer to the second question as well, and it is accordingly my opinion that wherever an employee is provided with board, in accordance with the practice in a State institution, the same is in the nature of a perquisite, which is not to be included in determining "average weekly wages" under G. L., c. 152.

I therefore answer each of the above questions in the negative, and advise you that you are not required to approve vouchers for awards made by the Department of Industrial Accidents under the provisions of G. L., c. 152, if it appears that the $5 addition granted under said chapter 341 and the value of maintenance have been included in the basis of computation of said awards.

Very truly yours,

J. Weston Allen, *Attorney General.*

Civil and Military Settlements — Military Aid and Soldiers' Relief — Dependents.

An existing civil settlement of a soldier or sailor who served in the Spanish War, Philippine Insurrection or World War is not defeated by the provisions of St. 1922, c. 177.

While St. 1922, c. 177, is retroactive, and the military settlement is acquired as of the date of the entry of the soldier or sailor into the service, and not as of the date when the act takes effect, such settlement may be defeated or changed in any of the ways provided by law.

Dependents of a soldier or sailor who died prior to June 17, 1922, the date upon which St. 1922, c. 177, took effect, acquire the same military settlement as the soldier or sailor would have acquired had he lived.

Dependents eligible to receive soldiers' relief under G. L., c. 115, and amendments thereof, may receive it in the place where the soldier or sailor had acquired a civil settlement, if such settlement has not been lost; otherwise, from the city or town in which such dependents are deemed to have acquired a military settlement, unless such military settlement has been lost.

Nov. 3, 1922.

Mr. Richard R. Flynn, *Commissioner of State Aid and Pensions.*

Dear Sir: — You have asked my opinion with respect to the proper interpretation to be given to St. 1922, c. 177, amending the settlement law, with reference to men who served in the Spanish War, Philippine Insurrection and World War, and which became effective on June 17, 1922. More specifically you ask, first, whether said chapter 177 defeats the existing civil settlement of a soldier, thus obliging him and certain dependents to apply for military aid or soldiers' relief in the city or town of his residence at the time of his acceptance into the United States service; and second, whether the dependents of a soldier who died prior to June 17, 1922, the date when said chapter became effective, will be eligible to receive soldiers' relief under G. L., c. 115, §§ 17 and 18, as amended by St. 1921, c. 222, in the place where the soldier had acquired a civil settlement by continuous residence, or will the dependents be obliged to apply to the city or town of the soldier's residence at the time of his enlistment or draft.

The statute involved, while amendatory of section 1 of G. L., c. 116, which is the chapter relating to settlement of paupers, with respect to the questions here raised effected no change material to our present inquiry. Said St. 1922, c. 177, is entitled "An Act relative to the acquisition of settlements by soldiers and sailors," and provides as follows: —

Section one of chapter one hundred and sixteen of the General Laws is hereby amended by striking out all after the word "town" in the twenty-seventh line down to and including the word "enemy" in the thirtieth line, by inserting after the word "not" in the thirty-ninth line the words: —, or who enlisted and served in said forces during the Philippine insurrection, — and by striking out, in the fortieth line the words ", subject to the same proviso,", — so that clause Fifth will read as follows: — *Fifth*, A person who enlisted and was mustered into the military or naval service of the United States, as a part of the quota of a town in the commonwealth under any call of the president of the United States during the war of the rebellion or any war between the United States and any foreign power, or who was assigned as a part of the quota thereof after having enlisted and been mustered into said service, and his wife or widow and minor children, shall be deemed thereby to have acquired a settlement in such town; and any person who would otherwise be entitled to a settlement under this clause, but who was not a part of the quota of any town, shall, if he served as a part of the quota of the commonwealth, be deemed to have acquired a settlement, for himself, his wife or widow and minor children, in the place where he actually resided at the time of his enlistment. Any person who was inducted into the military or naval forces of the United States under the federal selective service act, or who enlisted in said forces in time of war between the United States and any foreign power, whether he served as a part of the quota of the commonwealth or not, or who enlisted and served in said forces during the Philippine insurrection, and his wife or widow and minor children shall be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment. But these provisions shall not apply to any person who enlisted and received a bounty for such enlistment in more than one place unless the second enlistment was made after an honorable discharge from the first term of service, nor to any person who has been proved guilty of wilful desertion, or who left the service otherwise than by reason of disability or an honorable discharge.

1. A statute will not be held to be retroactive in the absence of a plainly expressed intention that it shall be so. *Martin L. Hall Co.* v. *Commonwealth*, 215 Mass. 326, 329. This statute does plainly express the intention that it shall be retroactive. In *Boston* v. *Warwick*, 132 Mass. 519, 520, the court, in construing a similar statute, said: —

The pauper to whom it [the statute] applies is to be "deemed to have acquired a settlement" by his service for a term not less than one year as a part of the quota of the town. The settlement conferred upon him is not a settlement acquired at the time of the passage of the statute, but, by virtue of the retroactive force of the statute, is

to be treated in all respects as a settlement acquired by him at the expiration of his service for a term not less than a year. *Worcester* v. *Springfield*, 127 Mass. 540.

. . . There is nothing in the statutes to prevent his changing this settlement and acquiring a new one in any of the modes provided by law. . . . It was intended for the benefit of the soldier, and not to disable him from gaining a settlement after he left the service in any of the modes provided by statute, as any other person might.

In view of this decision, it is plain that the present act is retroactive, that the settlement is, by virtue of the statute, acquired as of the time of enlistment or induction into the service and not as of the date when the act takes effect, and that such settlement may be defeated or changed in any of the modes provided by law. I am of the opinion that the act neither prevents a soldier from acquiring a subsequent settlement in some other city or town nor defeats a subsequent settlement so obtained, and therefore answer your first question in the negative.

2. With respect to your second inquiry, the answer is to be arrived at in understanding the purpose of the act, and I believe that to be, not to give the widow or children more than the soldier or sailor himself would have been entitled to, but to put them in the same position he would have been in had he lived. The phraseology of the statute, that the persons enumerated "shall be deemed to have acquired a settlement," clearly shows that it is retroactive in its purpose. Consequently, the widow or minor children of a soldier or sailor who has died prior to June 17, 1922, acquire the same military settlement which the husband or father would have acquired had he lived; but, just as the soldier or sailor might have lost this military settlement, so too, if the widow or minor children have moved from the city of whose quota the soldier formed a part, this military settlement may be lost by them. I am consequently of opinion that the dependents eligible to receive soldiers' relief under G. L., c. 115, and amendments thereof, may receive it in the place where the soldier or sailor had acquired a civil settlement, if said settlement has not been abandoned or lost; otherwise, from the city in which the dependent is deemed to have acquired a military settlement, unless said military settlement has been abandoned or lost.

Very truly yours,

J. Weston Allen, *Attorney General.*

Division of Fisheries and Game — Acceptance of Unconditional Gifts — Trust.

In the absence of any express prohibition in the Constitution or statutes of the Commonwealth, the Division of Fisheries and Game, as a part of the Department of Conservation, is entitled to receive unconditional gifts of chattels, the title to which, however, vests in the Commonwealth, but any sums of money which may be offered to the Division of Fisheries and Game by way of absolute and unconditional gift to the Commonwealth must be deposited in the treasury of the Commonwealth, in accordance with Mass. Const., pt. 2d, c. II, § I, art. XI, and G. L., c. 30, § 27, and can only be withdrawn from the treasury in accordance with the method provided by law. On the other hand, the Department of Conservation has no authority to receive and accept any gift of money charged with any form of trust for the purpose of carrying on local activities of the Division of Fisheries and Game.

Nov. 10, 1922.

Hon. William A. L. Bazeley, *Commissioner of Conservation.*

Dear Sir: — You ask my opinion on the following facts: —

The Division of Fisheries and Game is about to receive as a gift an automobile as an addition to its law-enforcement equipment. The deed is an out and out gift, with no conditions attached.

There is a movement on foot among certain clubs in the western part of the State to supply the funds with which to build a camp at the Montague Rearing Station, for housing the superintendent during a portion of the year.

It is likely that sums of money may be offered to the Division from time to time to help defray the cost of extending the rearing facilities at some of the fish hatcheries and bird farms.

Is there any statutory provision which would prevent this Division from accepting gifts of money or materials to assist in carrying on its work, provided that these are unconditional gifts and are not to be construed in any sense as the creation of trusts or as giving the donors any right to follow the property or the funds and have a voice in their handling or expenditure?

Your question is properly divisible into two parts: first, has the Division of Fisheries and Game the right to receive and hold chattels by unconditional gift; and second, has said division the right to receive money by unconditional gift?

The Division of Fisheries and Game forms a part of the Department of Conservation. G. L., c. 21, § 1. As such it is a branch of the administration of government of the Com-

monwealth. In and of itself it is not an entity. It would accordingly follow that the donee should be the Commonwealth of Massachusetts. The right of the Commonwealth to acquire and hold property may be thus generally stated (36 Cyc. 869, and cases cited): —

A state has in general the same rights and powers in respect to property as an individual. It may acquire property, real or personal by conveyance, will, or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit.

In the absence, therefore, of any express prohibition in the Constitution or statutes of the Commonwealth, it is my opinion that the Division of Fisheries and Game is entitled to receive unconditionally gifts of chattels, the title to which, however, vests in the Commonwealth.

In this connection I desire to point out that the expenditure for operation of such chattels, for example, an automobile, might raise a different question involving consideration of other principles.

Mass. Const. Amend. LXIII, § 1, provides as follows: —

Collection of Revenue. — All money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof.

The Constitution of Massachusetts also provides in pt. 2d, c. II, § I, art. XI: —

No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

G. L., c. 30, § 27, provides: —

All fees or other money received on account of the commonwealth shall be paid into the treasury thereof and such payments shall, except as otherwise expressly provided, be made at least once in each month.

See also *Opinion of the Justices*, 13 Allen, 593, and opinion of the Attorney General to the Treasurer and Receiver-General, dated Sept. 10, 1921 (Attorney General's Report, 1921, p. 264).

It is accordingly my opinion that any sums of money which may be offered to the Division of Fisheries and Game from time to time by way of absolute and unconditional gift to the Commonwealth must be deposited in the treasury of the Commonwealth, in accordance with the foregoing provisions of the Constitution and acts of the Legislature, and can only be drawn therefrom in accordance with the method provided by law.

Inasmuch as you state that the proposed gifts to the division are to be devoted "to assist in carrying on its work," it may be well to point out that such a gift would unquestionably constitute a trust, regardless of the fact that such gifts "are not to be construed in any sense as the creation of trusts or as giving the donors any right to follow the property or the funds and have a voice in their handling or expenditure." There is nothing to prevent the Commonwealth of Massachusetts, as a sovereign, from sustaining the character of a trustee for such a purpose as that under consideration, but in such case the money would have to be received and accepted by some officer, commission or department of the Commonwealth, duly authorized by statute to receive the money, in trust for the designated purpose, as, for example, the Department of Education, G. L., c. 69, § 3. See also G. L., c. 45, §§ 3 and 14, relating to powers of boards of park commissioners; G. L., c. 114, §§ 20 and 21, relative to care of cemeteries and cemetery lots; G. L., c. 45, § 19, relative to public domain. I find no statute authorizing the Department of Conservation or the Division of Fisheries and Game to receive money in trust for the purpose of expanding or carrying on the work of that department or division.

I am therefore of the opinion that your department has no authority to receive money on behalf of the Commonwealth in trust for the purpose of carrying on lawful activities of the Division of Fisheries and Game. I am accordingly constrained to advise you that while your department may receive and deposit in the treasury an absolutely unconditional gift of money, your department has no authority to accept any gift of money charged with any form of trust.

Yours very truly,

J. Weston Allen, *Attorney General.*

Auditor of the Commonwealth — Inspection of Income Tax Returns.

St. 1922, c. 545, § 27, when construed with G. L., c. 62, §§ 32 and 58, does not authorize the Auditor of the Commonwealth to inspect income tax returns in making an audit of the Income Tax Division.

Nov. 13, 1922.

Hon. Alonzo B. Cook, *Auditor of the Commonwealth.*

Dear Sir: — G. L., c. 62, § 32, provides, in part: —

Returns shall be open to the inspection of the commissioner, and his deputies, assistants and clerks when acting under his authority, and the income tax assessors, and their deputies, assistants and clerks when acting under their authority. The books, accounts and other records in the hands of the commissioner, except returns, shall be open to the inspection of the state auditor, and his deputies, assistants and clerks when acting under his authority for the purpose of auditing the accounts of the commissioner. . . .

Section 35 of said chapter provides: —

The commissioner shall determine from the returns required by this chapter, or in any other manner, the income of every person taxable thereunder, and shall assess thereon the tax hereby provided; but he shall not determine the income of a person who has filed a return in accordance with sections twenty-two to twenty-five, inclusive, within the time prescribed by law, to be in excess of that disclosed by such return, without notifying such person and giving him an opportunity to explain the apparent incorrectness of his return.

Section 58 of said chapter provides: —

The disclosure by the commissioner or by the state auditor, or by any deputy, assistant, clerk or assessor, or other employee of the commonwealth or of any city or town therein, to any person but the taxpayer or his agent, of any information whatever contained in or set forth by any return filed under this chapter, other than the name and address of the person filing it, except in proceedings to collect the tax or by proper judicial order, or for the purpose of criminal prosecution under this chapter, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment for not more than six months, or both, and by disqualification from holding office for such period, not exceeding three years, as the court determines.

St. 1922, c. 545, § 27, provides, in part: —

The department of the state auditor shall annually make a careful audit of the accounts of all departments and activities of the commonwealth, including those of the income tax division of the department of corporations and taxation, and for said purpose the authorized officers and employees of said department of the state auditor shall have access to such accounts at reasonable times. Said department shall keep no books or records except records of such audits, and its annual report shall relate only to such audits. . . .

You inquire whether, under these provisions of law, you have a right to inspect income tax returns for the purpose of making an audit of the Department of Corporations and Taxation.

In an opinion rendered to the Tax Commissioner on May 3, 1918, the Attorney General advised that, under Gen. St. 1916, c. 269, § 16, the Auditor could not lawfully inspect the books or cards which set forth in detail the name and address of each taxpayer, the amount of the tax and penalty, the amount of abatement, if any, the additional charges for costs and interest, and the final balance paid or unpaid. At that time the statute forbade the disclosure of any information contained in the return of each taxpayer, and there was no act which authorized the Auditor and his deputies, assistants and clerks to inspect the books, accounts and other records in the hands of the Commissioner, except returns, for the purpose of making an audit. The latter authority, with an express exception as to returns, was conferred by Gen. St. 1919, c. 117, which is now codified as G. L., c. 62, § 32. Under that act, therefore, the Auditor and his deputies, assistants and clerks may inspect "the books, accounts and other records of the tax commissioner, *except returns,*" in order to make an audit.

I find nothing in St. 1922, c. 545, which enlarges the authority of the Auditor in this respect. That act establishes a Commission on Administration and Finance. Section 1 of that act transfers to said commission "all the rights, powers, duties and obligations . . . of the state auditor except such as relate to the auditing of accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits." Section 27 simply reaffirms the existing duty to "make a careful audit," a duty which already rested upon the Auditor under the powers and obligations reserved to him by section 1. If the

Legislature had intended to abolish the express exception as to inspection of income tax returns, it would probably have done so by words equally clear and unambiguous. When section 27 is construed with section 1, I am unable to discover any intention to enlarge the powers of the Auditor.

I am confirmed in this conclusion by the consideration that inspection of the returns is unnecessary in order to make a careful audit. The tax is assessed by the Commissioner upon the basis of those returns (and possibly supplementary information), but until that assessment is made, no money obligation to the Commonwealth arises. I can discover no intention in this act to make the Auditor a reviewing officer charged with the duty to determine whether the Commissioner is assessing income taxes according to law. If the Auditor is permitted to see the books, accounts and other records, except returns, which show the amount of the tax as assessed, any abatement of it, any charges for costs or interest, and the final balance paid or unpaid, he has before him all the financial history of that money obligation from the time when that obligation comes into existence. A careful audit does not require the Auditor to go behind the assessment of the tax. I am therefore of opinion that St. 1922, c. 545, § 27, does not confer power to inspect the returns

Yours very truly,

J. Weston Allen, *Attorney General.*

Optometry — Examination and Registration of Applicants — Approval of Schools.

G. L., c. 112, § 68, giving to the Board of Registration in Optometry power to approve schools of optometry whose graduates may apply for examination, is a valid exercise of the police power, and is constitutional.

Nov. 14, 1922.

Payson Dana, Esq., *Commissioner of Civil Service and Registration.*

Dear Sir: — You ask my opinion on points relative to the optometry law. Your first question is whether, under G. L., c. 112, § 68, the Board has a right to approve schools of recognized standing and reject those of questionable character and standing, and whether the clause of that section which relates to qualifications of applicants for examination will stand the test of constitutionality.

G. L., c. 112, § 68, is, in part, as follows: —

No person, except as otherwise provided in this section, shall practice optometry until he shall have passed an examination conducted by the board in theoretic, practical and physiological optics, theoretic and practical optometry, and in the anatomy and physiology of the eye, and shall have been registered and shall have received a certificate of registration which shall have conspicuously printed on its face the definition of optometry set forth in section sixty-six. Every applicant for examination shall present satisfactory evidence, in the form of affidavits properly sworn to, that he is over twenty-one, of good moral character, that he has studied the subjects herein prescribed for at least three years in a registered optometrist's office or has graduated from a school of optometry, approved by the board, maintaining a course of study of not less than two years with a minimum requirement of one thousand attendance hours and that he has graduated from a high school approved by the board or has had a preliminary education equivalent to at least four years in a public high school; provided, that if he is unable to prove graduation from, or four years' actual attendance at, a high school the board shall determine his qualifications by proper preliminary examination, the fee for which shall be five dollars to be paid by the applicant. . . .

The case of *Commonwealth* v. *Houtenbrink*, 235 Mass. 320, 323, to which you refer in your letter, holds directly that St. 1912, c. 700, re-enacted in G. L., c. 112, §§ 66 to 73, inclusive, is a valid exercise of the police power, and is constitutional. In that case section 5 of the statute, re-enacted in G. L., c. 112, § 68, is expressly referred to. In G. L., c. 112, § 2, there is a corresponding provision requiring an applicant for registration as a qualified physician to furnish satisfactory proof that he has received the degree of doctor of medicine, or its equivalent, from a legally chartered medical school having the power to confer degrees in medicine. The constitutionality of such a provision relating to physicians is settled by numerous decisions. *Hewitt* v. *Charier*, 16 Pick. 353; *Dent* v. *West Virginia*, 129 U. S. 114; *Collins* v. *Texas*, 223 U. S. 288. *Cf. Commonwealth* v. *Porn*, 196 Mass. 326; *Commonwealth* v. *Zimmerman*, 221 Mass. 184. I have no doubt that the requirements to which you refer are not in violation of any constitutional provision.

Section 68, in the part quoted above, gives the Board power, where an applicant has graduated from a school of optometry maintaining certain standards, to approve or disapprove that school, as a condition of registration. The

discretion which the Board is thus called upon to exercise cannot be reviewed unless the exercise is arbitrary or unreasonable. See *Chelsea* v. *Treasurer and Receiver-General*, 237 Mass. 422.

Very truly yours,
J. Weston Allen, *Attorney General.*

Gifts to the Commonwealth — Acceptance — Delegation of Legislative Authority — Department of Education, Division of the Blind.

Authority to accept a gift to the Commonwealth is in the Legislature unless the Legislature has delegated such authority.

The Department of Education is authorized by G. L., c. 69, § 3, to receive "in trust for the Commonwealth . . . any gift or bequest of personal property for educational purposes," and therefore may receive a legacy of $2,000 "to the Massachusetts Commission for the Blind."

Nov. 14, 1922.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have asked my opinion as to whether the Commission for the Blind, known as the Division of the Blind, Department of Education, may receive a legacy of $2,000. The will containing the bequest was executed Sept. 9, 1914, and by the seventh clause thereof the testator requested his executor to pay, among other legacies, the following: "Two thousand dollars to Massachusetts Commission for the Blind." By a codicil executed March 25, 1916, the testator provided that one-third of the principal of his estate theretofore undisposed of should go "to the Massachusetts Commission for the Blind of said Boston to help in its work for the adult blind."

As a general proposition, authority to accept a gift to the Commonwealth is in the Legislature unless the Legislature has delegated such authority. G. L., c. 69, § 3, provides as follows: —

> The department of education, in this chapter called the department, may receive, in trust for the commonwealth, any grant or devise of land or any gift or bequest of personal property for educational purposes, and shall forthwith transfer the same to the state treasurer, who shall administer it as provided in section sixteen of chapter ten.

This section is a re-enactment of a similar provision coming down from St. 1850, c. 88.

The Legislature has, then, delegated to the Department of

Education authority to accept gifts for educational purposes, so that the question in the present case turns upon whether or not this legacy comes within the scope of said section. In this connection it is material to review briefly the establishment of the Massachusetts Commission for the Blind and its functions as a subdivision of said department.

St. 1906, c. 385, established a State board to be known as the Massachusetts Commission for the Blind, and enumerated among its functions that of acting as a bureau of information and industrial aid for the purpose of aiding the blind in finding employment and developing home industries for them, giving to the commission authority to furnish materials and tools to any blind person, and to assist such blind persons as are engaged in home industries in marketing their products. Said chapter also authorized the commission to establish, equip and maintain one or more schools for industrial training. It is quite evident, then, from the law originally establishing such a commission, that one of the primary purposes was to aid and assist the blind by education and training to make themselves self-supporting, or as nearly so as possible. The provisions of the original statute were, in substance, re-enacted in Gen. St. 1918, c. 266, and in turn incorporated in G. L., c. 69, §§ 12 to 25, inclusive.

The duties of the Division of the Blind are prescribed by section 12 of said chapter 69, which is as follows: —

> The division of the blind shall make its own by-laws and adopt all necessary rules and regulations, and shall act in an advisory capacity with respect to the administration and execution of the laws by the director and shall visit all schools and workshops established under its authority.

In thus incorporating this division within the Department of Education our Legislature gave tangible recognition to the modern and broad scope which education to-day embraces. As was said by Knowlton, J., in *Mount Hermon Boys' School* v. *Gill*, 145 Mass. 139, 146: —

> Education is a broad and comprehensive term. It has been defined as "the process of developing and training the powers and capabilities of human beings." To educate, according to one of Webster's definitions, is "to prepare and fit for any calling or business, or for activity and usefulness in life." Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all.

Having in mind, then, the legislation which has led up to the establishment of a commission for the blind, its incorporation within the Department of Education and its defined duty and authority to establish schools for the aid and advancement of the blind, I am of opinion that the gift above referred to may properly be received by the Massachusetts Commission for the Blind, now known as the Division of the Blind, to be administered in accordance with such rules and regulations as said division may deem necessary to adopt under said section 12, and in conformity with G. L., c. 10, § 16.

Very truly yours,

J. Weston Allen, *Attorney General.*

Savings Banks — Business of Receiving Deposits — Automatic Receiving-Teller Machines.

Automatic receiving-teller machines installed by savings banks for receiving deposits of small coins may properly be regarded as depots, within G. L., c. 168, § 25.

Under G. L., c. 168, § 25, automatic receiving-teller machines may be maintained and established by a savings bank, with the written permission of, and under regulations approved by, the Commissioner of Banks.

Nov. 15, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — You state that automatic receiving-teller machines have been installed by certain savings banks in department stores, factories, etc., that these machines are of the slot machine type and are arranged for the depositing of small coins, stamps being received in return, which may be attached to cards and later taken to the savings banks and redeemed or credited to depositors' accounts, and that no persons are in attendance, no withdrawals can be made, and no offices are maintained by the banks at the places where the machines are located. You ask whether there is any authority for the conduct of this form of business by savings banks.

G. L., c. 168, § 25, provides, in part, as follows: —

Such corporation shall carry on its usual business at its banking house only, and a deposit shall not be received or payment on account of deposits be made by the corporation or by a person on its account in any other place than at its banking house, which shall be in the town where the corporation is established; except that the corpora-

tion may, with the written permission of and under regulations approved by the commissioner, maintain and establish one or more branch offices or depots in the town where its banking house is located, or in towns not more than fifteen miles distant therefrom where there is no savings bank at the time when such permission is given; . . .

The remainder of the section deals with the collection of savings from school children, and with the holding of meetings.

In my judgment, the business which you have described comes within the excepting clause in section 25, quoted above. While, clearly, a slot machine such as you have described is not a branch office, it seems to me that it may properly be regarded as a depot. The primary meaning of the word "depot" is "a place of deposit" (Century Dictionary). Other definitions, such as "warehouse" or "railroad station," would seem to be wholly inapplicable. It is not, I think, an unreasonable construction of the word "depot," as used in section 25, to hold that it includes slot machines installed in a particular place for the purpose of receiving deposits. It follows that, with the written permission of, and under regulations approved by, the Commissioner, such machines may be maintained and established by a savings bank in the town where its banking house is located, or in towns not more than fifteen miles distant therefrom where there is no savings bank at the time when such permission is given.

Very truly yours,

J. Weston Allen, *Attorney General.*

License — Division of Waterways and Public Lands — Date.

A license which requires the approval of the Governor and Council takes effect when so approved, and its date is the date of such approval.

Nov. 16, 1922.

Mr. Frederick N. Wales, *Acting Commissioner of Public Works.*

Dear Sir: — You write me stating that "a question has arisen as to whether or not a license which was issued by the Department of Public Works, Division of Waterways and Public Lands, requiring the approval of the Governor and Council, and bearing the date of Oct. 3, 1921, immediately preceding the signatures of the Associate Commissioners and the date of approval by the Governor and Council, Oct. 19, 1921, is void, in view of the fact that said license and the

accompanying plans were filed in the registry of deeds Oct. 17, 1922."

G. L., c. 91, § 18, in respect to such licenses says, in part: —

. . . Such license shall be void unless, within one year after its date, it and the accompanying plan are recorded in the registry of deeds for the county or district where the work is to be performed.

I assume that Oct. 3, 1921, is the actual date of the signing by the Commissioners, and Oct. 19, 1921, the actual date of approval by the Governor and Council. The instrument did not become effective as a license until the approval of the Governor and Council, and could not be filed in the registry of deeds before that date.

I am therefore of opinion that Oct. 19, 1921, is the date of the instrument, and as it was recorded Oct. 17, 1922, the requirement of the statute has been met. See *Old Colony Trust Co.* v. *Medfield & Medway St. Ry. Co.*, 215 Mass. 156.

Yours very truly,

J. Weston Allen, *Attorney General.*

Constitutional Law — "Anti-aid" Amendment — State Scholarships in Institutions not under Public Control — Attorney General.

The Attorney General does not advise officers, boards or commissions which are subordinate to the Legislature upon constitutional questions, unless such advice is clearly required in order to enable such officers, boards or commissions to discharge the duties required of them by law.

Mass. Const. Amend. XVIII did not forbid payment of public money to colleges or universities not under public control.

Mass. Const. Amend. XVIII did forbid an appropriation of public money to aid a private school or to pay the tuition of scholars therein or to reimburse parents for tuition paid by them to such academy, even though such appropriation is made from moneys other than those raised by taxation for the support of common schools.

Mass. Const. Amend. XLVI, § 2, which superseded Amend. XVIII but re-enacted and reaffirmed the prohibitions contained therein, forbids an appropriation of public money to aid a school not under public control or to pay the tuition of scholars therein, or to reimburse parents for tuition so paid by them, but subject, nevertheless, to the exception made by section 3.

Mass. Const. Amend. XLVI forbids an appropriation of public money for the purpose of founding, aiding or maintaining a college or university not under public control.

If the effect of paying the tuition of a student at a privately controlled college or university is to aid the institution, such payment is forbidden by Mass. Const. Amend. XLVI, § 2, even though the payment be made to the student instead of directly to the institution.

The scope of the prohibitions made by Mass. Const. Amend. XLVI, § 2, may be measured by the exception made by section 3.

If the payment of public money to a student at a privately controlled college or university is in effect a private gratuity which does not directly accomplish some public purpose, such payment would take the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

The promotion of popular education is a public purpose.

A statute has no magic to alter facts, nor can constitutional restrictions be brushed aside by a descriptive phrase.

Dec. 4, 1922.

George F. Zook, Esq., *Director, Special Commission on Higher Education.*

Dear Sir: — You inquire, in substance, whether a law providing for the payment out of public funds of scholarships to individuals, to be classified as "Massachusetts State University students," in order to assist such students in attending some approved university or college within the Commonwealth, could be drafted without infringing Mass. Const. Amend. XLVI, commonly known as the "anti-aid" amendment. Your inquiry does not relate to the powers and duties vested in your commission by Res. 1922, c. 33. It draws in question the powers vested by the people in the General Court, to which your commission owes its existence.

While the Legislature, or either house thereof, or a committee of either house, or the Governor, may properly inquire whether a proposed bill would be constitutional, if enacted, the Attorney General does not advise officers, boards or commissions upon constitutional questions unless such advice is clearly required to enable such officers, boards or commissions to discharge the duties required of them by law. This principle is so far applicable to the present case that I feel that I ought not to attempt to advise you whether a bill which has yet to be drawn would be beyond the power of the General Court. On the other hand, the nature of the duties imposed upon your commission by Res. 1922, c. 33, renders it proper, in my opinion, to advise you as to the general principles which you should take into consideration if you deem it expedient to draft a bill.

On May 23, 1855, the people ratified the eighteenth amendment to the Massachusetts Constitution, which provided as follows: —

All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such money shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school.

This amendment was confined to expenditures for public or common schools. It did not forbid payment of public money to higher institutions of learning, such as colleges or universities. *Merrick* v. *Amherst*, 12 Allen, 500; *Opinion of the Justices*, 214 Mass. 599, 601. But as applied to expenditures by cities or towns on account of education similar to that given in common schools, this amendment has been so construed as to give full effect to the prohibition.

The Supreme Judicial Court has decided that the Legislature has no power to authorize a town to appropriate money to aid in maintaining, as a high school, a free academy founded by a private benefactor, which was under private superintendence and control. *Jenkins* v. *Andover*, 103 Mass. 94. Three Attorneys General have advised that the prohibition cannot be evaded by appropriating the money to pay the tuition of the children, instead of appropriating it directly for the maintenance of the private academy as a high school. I Op. Atty. Gen. 319 (Knowlton); V Op. Atty. Gen. 204 (Attwill); V Op. Atty. Gen. 711 (Allen); Opinion, Attorney General to Commissioner of Education, April 6, 1922. An appropriation to reimburse parents for tuition paid by them to the academy is equally forbidden, "since the substance, not the mere form of the transaction must be considered." V Op. Atty. Gen. 204, 205; Opinion, Attorney General to Commissioner of Education, April 6, 1922. So, also, it is of no consequence that the appropriation is made from moneys other than those raised by taxation for the support of common schools. I Op. Atty. Gen. 315, 321. The guiding principle was thus declared by Attorney General Knowlton in 1896 (I Op. Atty. Gen. 315, 321, 322): —

It is of no consequence that the tuition of such pupils may not be paid from money especially appropriated by the town for the support of its public schools. The question is not one of mere appropriation. The purpose of the constitutional amendment was to prohibit the use

of public funds for the education of the children of the Commonwealth in any institution, however conducted, and whether sectarian or not, the control of which is not in the municipal authorities. If the expenditure be for the purpose of the education of the children of the town, it is within the spirit of the prohibition of the amendment. *Jenkins* v. *Andover*, 103 Mass. 94.

Undoubtedly the statute in question may be in some cases of great benefit to the children of small towns, and, incidentally, to the taxpayers of the towns, who are thus relieved from the disproportionate expense of maintaining a high school established for the benefit of a few pupils. The question, however, is not to be determined by considerations of mere convenience in special cases. If this statute is allowed to stand, the policy of paying the tuition of school children may be further extended, and it might even be possible to provide for the education of all the children of a town in sectarian schools and at the public expense; a proposition which the people of the Commonwealth would be slow, I apprehend, to accept, and against which, indeed, the amendment in question may be said to have been principally directed.

An executive construction of Mass. Const. Amend. XVIII, which has been approved and followed for over thirty years (see V Op. Atty. Gen. 711, 713), is entitled to great weight, even though it may not be, perhaps, conclusive. *Costley* v. *Commonwealth*, 118 Mass. 1, 36; *Commonwealth* v. *Lockwood*, 109 Mass. 323, 339.

On Nov. 6, 1917, the people ratified Amendment XLVI, commonly known as the "anti-aid" amendment, of which sections 2 and 3 provide: —

Section 2. All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may

be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Section 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

This amendment superseded Amendment XVIII. It will be observed, however, that the first clause of section 2 (*supra*) is in effect a re-enactment of Amendment XVIII. So far, therefore, from weakening or in any way qualifying Amendment XVIII, Amendment XLVI reaffirms it, presumably with the construction placed thereon during the past thirty years. Indeed, Amendment XLVI contains further prohibitions which were not included in Amendment XVIII.

There can be no question that Amendment XLVI embraces colleges and other higher institutions of learning. Section 2 expressly forbids any use of public money, property or credit —

for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any *college . . . institution, or educational . . . undertaking* which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both. . . . (Italics ours.)

In view of these prohibitions, a former Attorney General advised that payments which had theretofore been made by the Commonwealth for the purpose of aiding or maintaining educational institutions under private control, such as the Perkins Institution for the Blind, were no longer lawful. Opinion, Attorney General to Joint Special Committee on Finance, Dec. 28, 1917; V Op. Atty. Gen. 315. On the other hand, the opinion of Dec. 28, 1917, advised that payments to the Massachusetts Agricultural College would be lawful because that institution was owned by the Commonwealth and under

exclusive public control. It seems clear, therefore, that, in view of the express language of the amendment, the use of public money or public property or public credit "for the purpose of founding, maintaining or aiding" any college or university not owned by the Commonwealth and under exclusive public control is now forbidden, and further, that even public ownership and control cannot avail if any denominational doctrine is inculcated by such university or college.

It may be suggested, however, that a payment of the scholarship money to the individual, to enable him to obtain a college education at some approved institution to be selected by him, could be found not to be made for the purpose of aiding or maintaining the institution that he elects to attend. That suggestion presents a question which cannot be determined with certainty until the precise plan be cast in the form of a bill. We may assume, however, that any plan must be subjected to the test of substance rather than to a mere test of form. A payment of tuition, whether directly to the private institution (Opinion, Attorney General to the Commissioner of Education, Dec. 14, 1921, Attorney General's Report, 1921, p. 344) or to the scholar under such conditions that in effect it is a payment to the institution, if the effect of it is to aid the institution, would seem to achieve the forbidden result by indirection. See I Op. Atty. Gen. 319; V Op. Atty. Gen. 204 and 711.

The shadow cast by section 2 upon payments in either of these forms is deepened by section 3. It may be that the scope of the prohibition in the second section is measured by the exception made by the third section. That section, by way of exception, permits payments to privately controlled institutions for the deaf, dumb or blind of not more than reasonable compensation for care or support rendered to such persons who are unable in whole or in part to care for themselves. Opinion, Attorney General to Committee on Public Health, March 13, 1922. The exception thus expressly made may exclude similar payments for the benefit of those who are not deaf, dumb or blind, and who, therefore, do not come within the terms of the third section. Opinion, Attorney General to Commissioner of Education, Dec. 14, 1921, *supra*. Thus, the third section would appear to emphasize the doubt whether the Commonwealth may, directly or indirectly, pay the tuition, in whole or in part, of normal persons who attend colleges or institutions not owned by the

Commonwealth and not under exclusive public superintendence and control.

If the scholarship payment be made outright to the individual, without restriction upon its use for tuition fees, in order to aid him in obtaining a college education, a different problem is presented. It is too well settled to require discussion that public money cannot be spent for a private purpose. *Opinion of the Justices*, 136 N. E. 157; *Whittaker* v. *Salem*, 216 Mass. 483; *Lowell* v. *Boston*, 111 Mass. 454; Opinion, Attorney General to the Governor, June 9, 1922; Opinion, Attorney General to President of the Senate, April 17, 1922; Opinion, Attorney General to Senate Committee on Bills in the Third Reading, April 20, 1922; see also Mass. Const. Amend. LXII, § 1. With minor exceptions, public money is raised by taxation. To tax A in order to make a private gift to B takes A's property without due process of law. It is true that public money may be appropriated to one who has no legal claim to it, if a public purpose is thereby directly achieved. *Opinion of the Justices*, 136 N. E. 157. But an ostensible public purpose cannot be made the cover and excuse for a private gratuity. *Lowell* v. *Boston*, 111 Mass. 454; *Whittaker* v. *Salem*, 216 Mass. 483; Opinion, Attorney General to the Governor, June 9, 1922. While I am not unmindful that the promotion of popular education constitutes a public purpose for which public money may constitutionally be spent (*Knights* v. *Treasurer and Receiver-General*, 237 Mass. 493, 496), that public purpose cannot be made a cloak for a mere gift which is essentially private in character. In seeking to avoid the prohibition upon expending public funds in order to aid or maintain colleges or universities not under public control, care must be exercised to avoid the prohibition upon giving away public money for a private purpose. To formulate a bill which will avoid both this Scylla and that Charybdis will require no little skill.

The suggestion that the difficulty may be met by calling the recipients of the scholarships "Massachusetts State University students" is of no avail. To attach that title to the holders of the scholarships will not affect the situation nor legalize a payment if such payment is forbidden by the Constitution. A statute may provide that certain things shall be done or not done, but it has no magic to alter facts. Opinion, Attorney General to Committee on Bills in the Third Reading, April 1, 1921 (Attorney General's Report, 1921, p. 111). Con-

stitutional restrictions cannot be brushed aside by a descriptive phrase. The constitutionality of the bill, when drafted, will depend upon whether the money is spent in a manner and for a purpose permitted by the Constitution.

Yours very truly,

J. Weston Allen, *Attorney General.*

Taxation — Legacy and Succession Tax.

Under St. 1922, c. 403, stock of Massachusetts corporations, the property of a resident who died intestate, is not subject to a succession tax on the death of a non-resident next-of-kin, before distribution of the estate of the resident decedent, as property of the non-resident decedent.

The title to all the personal property of a deceased person vests in his executor or administrator by relation from the time of his death.

Dec. 6, 1922.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You request my opinion in regard to the application of St. 1922, c. 403, to the following facts: — A resident of the Commonwealth died, without leaving a will, owning stock of Massachusetts corporations. Before any distribution of his estate was made, and subsequent to the effective date of the act, one of his next-of-kin died, a non-resident of Massachusetts. You ask whether under these circumstances the non-resident decedent has such an ownership in the stock referred to that said stock is subject to a succession tax under said St. 1922, c. 403.

St. 1922, c. 403, amends G. L., c. 65, § 1, so as to read, in part, as follows: —

> All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth or any interest therein and all stock in any national bank situated in this commonwealth or in any corporation organized under the laws of this commonwealth belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by laws regulating intestate succession, . . . shall be subject to a tax at the percentage rates fixed by the following table: . . .

Under this law *all* property of a non-resident decedent which is within the jurisdiction is no longer subjected to

inheritance tax. Broadly speaking, the inheritance tax upon non-resident decedents is now confined to three classes of property, — namely, (*a*) real estate and any interest therein, (*b*) stock in any national bank situated in the Commonwealth, and (*c*) stock in any corporation organized under the laws of this Commonwealth. Under the facts disclosed by your present inquiry no inheritance tax accrues upon the stock in Massachusetts corporations to which you refer unless the non-resident was at the time of his death the owner of such stock.

The title to all the personal property of a deceased person vests in his executor or administrator by relation from the time of his death. *Dawes* v. *Boylston*, 9 Mass. 337, 352; *Lawrence* v. *Wright*, 23 Pick. 128; *Hutchins* v. *State Bank*, 12 Met. 421, 425; *Pritchard* v. *Norwood*, 155 Mass. 539; *Flynn* v. *Flynn*, 183 Mass. 365; *Lathrop* v. *Merrill*, 207 Mass. 6, 10; 24 C.J. 204. I know of no exception to this rule except, perhaps, in the case of personal property which is the subject of a specific legacy. 24 C.J. 205, 208. *Cf. Duffy* v. *Bourneuf*, 227 Mass. 513, 517. With that possible exception, an executor or administrator has absolute power to sell personal property of the estate, and can pass good title to a purchaser. *Clark* v. *Blackington*, 110 Mass. 369; 24 C.J. 207, 208. But if he sells for less than the appraised value of the property he is allowed for the loss only if the court finds that the sale was expedient and for the interest of all concerned. G. L., c. 206, § 5; *Dudley* v. *Sanborn*, 159 Mass. 185. *Cf.* G. L., c. 206, § 21. As against an administrator, the rights of persons entitled to distribution are fixed by, and can be enforced only pursuant to, a decree for distribution in the probate court. G. L., c. 197, § 24; *Norton* v. *Lilly*, 210 Mass. 214, 217; *Case* v. *Clark*, 220 Mass. 344. *Cf. Rhines* v. *Wentworth*, 209 Mass. 585. As against an executor, prior to Gen. St. 1915, c. 151, a legatee could recover his legacy only in an action at law. *Lathrop* v. *Merrill*, 207 Mass. 6, 10; R. L., c. 141, § 19. By section 1 of Gen. St. 1915, c. 151 (G. L., c. 197, § 19), it was provided that a legatee might recover his legacy by proceedings in equity in the probate court, and that no action at law should be brought against the estate of the testator for such recovery; but this provision merely changes the remedy. It does not give to a legatee a right in the personal property held by the executor.

My conclusion is, therefore, that the non-resident decedent did not have such an ownership in the stock of Mssachusetts corporations belonging to the deceased resident of this Commonwealth as to make that property subject to an inheritance tax on the death of the non-resident.

Very truly yours,

J. Weston Allen, *Attorney General.*

Trust Company — School Savings System.

The powers of trust companies with respect to receiving deposits are defined by G. L., c. 172, § 31, and are not limited in that respect by laws regulating the receiving of deposits by savings banks.

G. L., c. 172, §§ 60 and 61, are not a limitation of the powers of trust companies with respect to receiving deposits.

G. L., c. 168, § 25, containing provisions authorizing savings banks to arrange for the collection of savings from school children, applies only to savings banks.

A certain described plan for a school savings system, introduced by a trust company, is held not to be in violation of law.

Dec. 6, 1922.

Mr. Joseph C. Allen, *Commissioner of Banks.*

Dear Sir: — You state that a trust company has introduced a school savings system in neighboring public schools under a plan substantially as follows: —

The pupil makes his deposits with the teacher, who enters the amount in a receipt book. A carbon copy of the entry and the money deposited are enclosed in an envelope, which is taken to the trust company by the principal of the school. No withdrawals are made at the school. After a sufficient sum is accumulated by a pupil, the amount is transferred to a regular pass book, entries in which are made only at the trust company.

You ask my opinion whether a trust company, through its savings department, may solicit and receive deposits from pupils at schools under the plan as outlined above.

The powers of trust companies with respect to receiving deposits are defined by G. L., c. 172, § 31, which is substantially a re-enactment of St. 1888, c. 413, § 6. Said section 31 is, in part, as follows: —

> Such corporation may receive on deposit, storage or otherwise, money, government securities, stocks, bonds, coin, jewelry, plate, valuable papers and documents, evidences of debt, and other property

of any kind, upon terms or conditions to be agreed upon, and at the request of the depositor may collect and disburse the interest or income, if any, upon said property received on deposit and collect and disburse the principal of such of said property as produces interest or income when it becomes due, upon terms to be prescribed by the corporation. Such deposits shall be general deposits, and may be made by corporations and persons acting in dividually or in any fiduciary capacity. . . .

G. L., c. 172, §§ 60 and 61, are, in part, as follows: —

Section 60. Every such corporation soliciting or receiving deposits (*a*) which may be withdrawn only on presentation of the pass book or other similar form of receipt which permits successive deposits or withdrawals to be entered thereon, or (*b*) which at the option of such corporation may be withdrawn only at the expiration of a stated period after notice of intention to withdraw has been given, or (*c*) in any other way which might lead the public to believe that such deposits are received or invested under the same conditions or in the same manner as deposits in savings banks, shall have a savings department in which all business relating to such deposits shall be transacted. . . .

Section 61. All such deposits shall be special deposits and shall be placed in said savings department, and all loans or investments thereof shall be made in accordance with the law governing the investment of deposits in savings banks. . . .

These provisions of sections 60 and 61 were first enacted by St. 1908, c. 520. They are not a limitation of the powers of trust companies with respect to receiving deposits. Their purpose and effect is merely to require that the deposits defined in section 60 shall be special deposits, to be placed in a savings department and to be safeguarded by the same restrictions on their investment which are imposed with respect to deposits in savings banks. *Cf. J. S. Lang Engineering Co.* v. *Commonwealth*, 231 Mass. 367.

In my opinion, the powers of trust companies to receive deposits in their savings departments are the powers granted by G. L., c. 172, § 31, except in so far as those powers may be curtailed by provisions of other statutes, and are not limited in that respect by the laws regulating the receiving of deposits by savings banks. Otherwise, the limitation of the amount which a savings bank may receive on deposit from any person, fixed by G. L., c. 168, § 31, at $2,000, would apply to trust companies in their savings departments. In fact, however, the amount which may be so deposited is not limited. *J. S.*

Lang Engineering Co. v. *Commonwealth*, 231 Mass. 367, 370. Where, in any statutory provisions affecting deposits in savings banks, trust companies in their savings departments are intended to be included, they are expressly mentioned, as in G. L., c. 167, § 16, concerning deposits at intervals. It should be noted that that statute, as originally enacted (Gen. St. 1919, c. 37), provided in section 2 that "nothing herein contained shall be construed to abridge the powers of trust companies under general or special laws." See also *Bachrach* v. *Commissioner of Banks*, 239 Mass. 272, 274.

G. L., c. 168, § 25, relating to the business of savings banks, contains provisions authorizing a savings bank to arrange for the collection of savings from school children under conditions with which the plan which you have outlined does not comply. But this section in its terms applies only to savings banks, and, for the reasons which I have stated, is not, in my judgment, intended to cover the business of receiving deposits in the savings departments of trust companies. That business, as I have said, is governed by G. L., c. 172, § 31, subject to such restrictions as are imposed by other statutes.

It remains to be considered whether, in receiving deposits under the plan which you have described, there is any violation of any other statute. I find no statute which seems to have any application, other than G. L., c. 172, § 45. That section forbids a trust company to maintain a branch office, with certain exceptions not here material. You suggest that under the plan stated, by which the teacher receipts for money received from pupils, it might be held that the teacher acts as an agent for the trust company, and might therefore be considered to be conducting a branch office in violation of the statute. Whether the teacher under that plan is actually acting as agent for the pupil or as agent for the trust company is largely a question of fact. Assuming, but by no means deciding, that the teacher acts as agent for the trust company, while it would follow that the trust company was doing business in the schoolroom, it would not follow that it was maintaining a branch office in the schoolroom in violation of G. L., c. 172, § 45. It should be observed that while a savings bank, by G. L., c. 168, § 25, is required to carry on its usual business at its banking house only, and is forbidden to receive deposits elsewhere, with certain exceptions, there is no such provision applicable to trust companies.

An office is defined as "the place where a particular kind

of business or service for others is transacted" (Webster's Dictionary). It is, in short, a place for the transaction of business. A passenger room in a railway station, although having within it a separate enclosed room where books were kept and tickets sold, has been held not to be an office within the meaning of a criminal statute. *Commonwealth* v. *White*, 6 Cush. 181. The fact, if it is so found, that the teacher in receiving deposits from the pupil is to be regarded as the agent of the trust company, and in that respect is carrying on the business of the trust company, it seems to me, does not lead to the consequence that the schoolroom in which such deposits are received is therefore to be regarded as a branch office of the trust company. In my opinion, therefore, in the system which you have stated there is no violation of G. L., c. 172, § 45.

There is, however, one aspect of the plan which you ought to consider in the exercise of the general powers vested in you as Commissioner of Banks. You state that the bank considers the teacher to be the agent of the pupil and not of the bank. I do not determine whether this intention has been accomplished by the receipt book and other documents which are attached to your request. I am, however, of the opinion that this intention is not sufficiently declared and brought to the attention of the prospective depositors. The receipt book, particularly, might well lead the depositor to believe that the deposit with the teacher was a deposit with the bank.

A plan which misleads the depositors conceivably might be found to constitute conducting the business "in an unsafe and unauthorized manner," within the meaning of G. L., c. 167, § 22. See V Op. Atty. Gen. 726. This difficulty may, of course, be met by making the teacher the agent of the bank or by declaring clearly and unequivocally, in such a manner that the depositor cannot overlook it, that the teacher is the agent of the pupil. This matter is one within your discretion. That discretion I cannot and ought not to control. But I feel that the matter should be brought to your consideration for such action as you may see fit to take in the premises.

Very truly yours,

J. Weston Allen, *Attorney General.*

State Officers — Powers and Duties of the Auditor of the Commonwealth.

Under St. 1922, c. 545, all the powers and duties of the Auditor of the Commonwealth, existing before Dec. 1, 1922, are to continue until the appointment and qualification of the commissioners whose offices are created by that act.

DEC. 7, 1922.

Hon. ALONZO B. COOK, *Auditor of the Commonwealth.*

DEAR SIR: — You ask my opinion whether, under the provisions of St. 1922, c. 545, the powers and duties of the Auditor with respect to the work of the 1923 fiscal year cease on Dec. 1, 1922, or whether they continue until the new Commissioners on Administration and Finance are appointed and qualified.

Section 1 of said act is as follows: —

The office of supervisor of administration existing under authority of section one of chapter seven of the General Laws is hereby abolished. All the rights, powers, duties and obligations of said office, and those of the state treasurer relative to bookkeeping and accounting functions not necessarily connected with the cash and funds which he handles, those of the state auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits, those of the state secretary relative to the purchase of paper for printing and general use and those of the superintendent of buildings relative to purchasing and storeroom functions, are hereby transferred to, and shall hereafter be exercised and performed by, the commission on administration and finance established by this act, which shall be the lawful successor of said office, and of the state treasurer, state auditor, state secretary and superintendent of buildings with respect to said rights, powers, duties and obligations.

Section 2 provides for the establishment of a Commission on Administration and Finance, to serve directly under the Governor and Council and to be appointed by the Governor, with the advice and consent of the Council.

Section 29 of said act is as follows: —

So much of this act as authorizes appointments by the governor and council shall take effect on September fifteenth, nineteen hundred and twenty-two. So much as relates to the commission on administration and finance shall take effect upon the appointment and qualification of the commissioners thereof, but not before December first,

nineteen hundred and twenty-two. All other provisions of this act shall take effect on said December first, provided that the state auditor shall retain such of his existing powers and duties as may be necessary to enable him to close up, prior to January first, nineteen hundred and twenty-three, the accounts of the current fiscal year.

Section 1, providing for the transfer to the Commission on Administration and Finance of certain rights, powers, duties and obligations of certain offices, including the Auditor, is clearly one of the provisions which relate to the Commission on Administration and Finance, and therefore, by section 29, is to take effect upon the appointment and qualification of the commissioners thereof. Before the appointment and qualification of such commissioners there can be no commission to which said rights, powers, duties and obligations can be transferred. I advise you, therefore, that all the powers and duties of the Auditor existing before Dec. 1, 1922, are to continue until the appointment and qualification of said commissioners.

Very truly yours,
J. Weston Allen, *Attorney General.*

License — Intoxicating Liquor — Payment of Required Fee.

Under G. L., c. 138, § 19, the fee for a license of the fourth class must be not less than $250, and no valid license may be issued by the licensing authorities upon payment of a fee fixed by them at a lesser figure.

Dec. 18, 1922.

Hon. Frederic W. Cook, *Secretary of the Commonwealth.*

Dear Sir: — I have your request for my opinion as to the action of the license commissioners of the city of Springfield in relation to the fee charged for a certain license issued by them under G. L., c. 138, § 11. You state that the license in question is a license of the fourth class, as described in section 18 of the same chapter. You also state that the return filed with you by the city clerk, in accordance with section 11, above referred to, shows that the fee charged for the fourth class license in question was $2; that you sent back the return to the city clerk, calling his attention to G. L., c. 138, § 19. You further state that he has informed you that the license commissioners are of the opinion that they may charge what they see fit for a license.

You state a case in which the Commonwealth has a definite interest. The license commissioners issue these licenses as public officers under the authority of the Commonwealth, not as agents of the city of Springfield. *Brown* v. *Nahant*, 213 Mass. 271. Furthermore, the Commonwealth is entitled to one-fourth of the money received for licenses of this class. G. L., c. 138, § 46.

G. L., c. 138, § 19, states, in part: —

> The fees for licenses shall be as follows:
> For a license of the first, second or fourth class, not less than two hundred and fifty dollars. . . .

It seems clear, therefore, that the license commissioners should have charged at least $250 for this license, and the city treasurer should have remitted one-fourth of that sum to the Treasurer and Receiver-General.

Furthermore, G. L., c. 138, § 43, says, in part: —

> A license shall not be issued until the license fee has been paid to the treasurer of the city or town by which it is to be issued. . . .

In this case the fee required by statute has not been paid, and I am of the opinion that the license under discussion is void and of no effect. *Howes* v. *Maxwell*, *157 Mass. 333*; *Taber* v. *New Bedford*, 177 Mass. 197.

Yours very truly,

J. Weston Allen, *Attorney General.*

Registration of Motor Vehicles — Operator's License — Motor Trucks used by National Guard.

Motor trucks furnished by the United States for the use of the National Guard do not have to be registered, nor are the operators of them required to be licensed.

Dec. 19, 1922.

Brig. Gen. Jesse F. Stevens, *Adjutant General.*

Dear Sir: — You ask my opinion whether, as a matter of law, it is necessary to register certain motor vehicles used by the National Guard, paying the registration fee therefor, with the Department of Public Works, Division of Highways, and also whether it is necessary for the operators of such vehicles to procure a license from the same division.

As to your first question you say: —

I beg to advise you that the motor vehicles in question are not the property of the Commonwealth of Massachusetts, but they are the property of the United States of America, which are issued to the National Guard the same as all other items of equipment. They are used only for military purposes, and are used by members of the National Guard, who are drawing Federal pay, for their drills and for their tours of duty which make necessary the use of the motor vehicles.

As to your second question you say: —

The operators of the motor vehicles in question are all enlisted men in the National Guard who are operating these vehicles while on duty, either at drill or camp, under enlistment contract, under orders and under pay from the Federal government.

You further advise me that the Registrar of Motor Vehicles feels that this registration is necessary. You also state that "the present forces, while raised by the State, are disciplined, paid and controlled by the Federal government."

It seems plain that the National Guard as at present constituted is an instrumentality of the Federal government. U. S. Stat. at L. 1916, c. 134; G. L., c. 33. The Commonwealth of Massachusetts, therefore, may not require these motor vehicles to be registered nor the enlisted men who drive them to be licensed. III Op. Atty. Gen. 318; V Op. Atty. Gen. 49; *Johnson* v. *Maryland*, 254 U. S. 51.

Yours very truly,

J. Weston Allen, *Attorney General.*

Auditor of the Commonwealth — Taxation — Membership on Board of Appeal.

St. 1922, c. 545, does not transfer from the Auditor of the Commonwealth to the Comptroller membership upon the Board of Appeal for which G. L., c. 6, § 21, provides.

Dec. 20, 1922.

Hon. Alonzo B. Cook, *Auditor of the Commonwealth.*

Dear Sir: — You inquire whether, under St. 1922, c. 545, the Auditor remains a member of the Board of Appeal, as provided in G. L., c. 6, § 21, or whether that function is transferred to the Comptroller created by St. 1922, c. 545, §§ 2, 3 and 5.

G. L., c. 6, § 21, provides: —

The state treasurer, the state auditor and a member of the council designated by the governor, shall constitute the board of appeal from decisions of the commissioner of corporations and taxation.

St. 1922, c. 545, § 1, provides: —

The office of supervisor of administration existing under authority of section one of chapter seven of the General Laws is hereby abolished. All the rights, powers, duties and obligations of said office, and those of the state treasurer relative to bookkeeping and accounting functions not necessarily connected with the cash and funds which he handles, those of the state auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits, those of the state secretary relative to the purchase of paper for printing and general use and those of the superintendent of buildings relative to purchasing and storeroom functions, are hereby transferred to, and shall hereafter be exercised and performed by, the commission on administration and finance established by this act, which shall be the lawful successor of said office, and of the state treasurer, state auditor, state secretary and superintendent of buildings with respect to said rights, powers, duties and obligations.

Section 2 of said act establishes a Commission on Administration and Finance, to consist of four members appointed by the Governor, with the advice and consent of the Council, which serves directly under the Governor and Council, within the meaning of Mass. Const. Amend. LXVI. Section 3 of said act provides: —

Said commission shall be organized in three bureaus, namely: a comptroller's bureau, a budget bureau and a purchasing bureau. Each bureau shall be in charge of a commissioner of the commission to be designated by the governor, with the advice and consent of the council, and to be known, respectively, as the comptroller, budget commissioner and state purchasing agent. Any commissioner so designated shall be a person of ability and extended experience in the line of work required in his bureau.

Section 5 of said statute provides, in part: —

The comptroller's bureau shall include those functions heretofore exercised by the state treasurer and state auditor and hereinbefore transferred to the commission on administration and finance.

The rights and duties of said bureau shall in general be as follows:

To perform all the accounting duties hereinbefore transferred from the department of the state auditor, and all the accounting duties hereinbefore transferred from the department of the state treasurer.

St. 1922, c. 545, does not in express and specific words prescribe that the duties imposed upon the Auditor by G. L., c. 6, § 21, shall either be transferred or retained. St. 1922, c. 545, § 1, provides that "those [rights, powers, duties and obligations] of the state auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits . . . are hereby transferred to, and shall hereafter be exercised and performed by, the commission on administration and finance established by this act. . . ." Taken alone, the description of the duties transferred might be broad enough to include membership upon the Board of Appeal. But the broad words of section 1 are somewhat narrowed by section 5, which refers to the duties transferred as "accounting duties." Manifestly, the duty to sit upon the Board of Appeal is not aptly described by the words "accounting duty." Moreover, the duties transferred are transferred to and are to be exercised by the commission. As the Board of Appeal consists of three members, it is plain that the Legislature did not intend that all four members of the commission should succeed the Auditor upon that Board.

If the Legislature had intended to transfer this duty from the Auditor to the Comptroller, it would have been easy to have so prescribed clearly and unambiguously. This the Legislature has not done. Indeed, the provisions relative to the Comptroller do not naturally bear this construction. Under section 3 he is in charge of the Comptroller's bureau. The "accounting duties" transferred from the Auditor are, under section 5, to be performed by that bureau. They are not in terms transferred to or to be performed by the Comptroller. The bureau cannot sit upon the Board of Appeal. To infer, from the fact that the "accounting duties" of the Auditor are to be performed by the bureau, that the head of that bureau shall succeed the Auditor upon the Board of Appeal adds by implication something which the Legislature has failed to enact in express words. While no one of the provisions of these statutes, taken alone, is decisive, when they are considered in their relation to each other I am of

opinion that the more probable construction of the act is that the Auditor still retains his position upon the Board of Appeal.

I am confirmed in this opinion when the question which you have submitted is viewed from a different aspect. Membership on the Board of Appeal may well be regarded as an independent position, with duties separate and apart from the respective duties of the three members in their constitutional offices of Treasurer, Auditor and member of the Governor's Council. On this aspect of the case it would seem that the persons holding from time to time the offices of Treasurer, Auditor and the member of the Council designated by the Governor hold their membership upon the Board of Appeal during incumbency in their respective offices, without regard to any duties which may devolve upon such offices.

Yours very truly,

J. Weston Allen, *Attorney General.*

Metropolitan Water Works — Statute — Construction.

Under St. 1897, cc. 445 and 467, requiring annual payments to be made by the Commonwealth to certain towns on lands taken or acquired for the metropolitan water works, in amounts equal to the previously assessed value of such land, so long as the land shall remain the property of the Commonwealth, no deduction from the amounts of such payments may be made on account of the subsequent removal or destruction of buildings on the land when assessed.

Dec. 21, 1922.

Hon. James A. Bailey, *Commissioner, Metropolitan District Commission.*

Dear Sir: — You request my opinion in regard to a matter of construction of St. 1897, cc. 445 and 467.

St. 1897, c. 445, § 2, is as follows: —

The treasurer of the Commonwealth shall pay hereafter as a part of the expenses of the metropolitan water works annually on or before the thirty-first day of December to the town of Sterling an amount equal to the assessment made by the assessors of the town of Sterling as of the first day of May in the year eighteen hundred and ninety-four, on all real estate taken or acquired, and held by the metropolitan water board on the first day of May in each year, under authority of said chapter four hundred and eighty-eight of the acts of the year eighteen hundred and ninety-five and acts in amendment thereof, so long as said property is held by said metropolitan water board, such payment to be in place of taxes and any other payment required by law upon such property.

St. 1897, c. 467, amends St. 1895, c. 488, § 16, so as to read, in part, as follows: —

. . . *provided, however,* that the Commonwealth shall pay annually, on or before the thirty-first day of December, to the towns of West Boylston and Boylston, until such time as the payments to said towns hereinbefore set forth become due and payable, an amount equal to the assessment made by the assessors of each of said towns as of the first day of May in the year eighteen hundred and ninety-four, on all property in their towns taken or acquired on or before the first day of May in such year, under the authority of this act; and shall pay to said towns annually, on or before the thirty-first day of December, an amount equal to the assessment made as aforesaid on all real estate in their towns so taken or acquired on or before the first day of May in each year by the Commonwealth, outside the limits of said proposed reservoir, so long as the same shall remain the property of the Commonwealth; . . .

You state that various houses and barns which were taken or acquired by the Metropolitan Water Board in Sterling, West Boylston and Boylston have been torn down, removed or burned down since they were taken or acquired. You ask whether the Commonwealth is required to pay for all time sums in lieu of taxes on the buildings which no longer exist, or whether the Commonwealth may deduct an amount equal to the assessment as of the first day of May, 1894, on such houses, barns or other buildings as may no longer exist.

The statutes quoted above are explicit. They provide for payment by the Commonwealth to the towns concerned of certain sums of money, in lieu of taxes, for real estate taken, equal in amount to assessments already made on such real estate, so long as said property is held by the Commonwealth. These amounts were then definitely determined and were identified by the statutes. To rule that the Commonwealth might pay any less sum than the sums there stated would change the terms of the statutes themselves; and that the Legislature alone can do.

I must advise you, therefore, that under the statutes as they now stand no deduction can be made on account of the removal or destruction of buildings, the value of which was included in the amount of the assessments on real estate taken under these acts.

Very truly yours,

J. Weston Allen, *Attorney General.*

Trading with the Enemy Act — License — Royalties — Repayment.

Under the provisions of the Trading with the Enemy Act, the royalties paid under a license to manufacture processes under any patent owned or controlled by an enemy or ally of an enemy are deposited in the treasury of the United States as a trust fund for the benefit of the licensee and the owner of the patent.

The sole reason for the requirement of the payment of royalties is to secure the owner of the patent in the event that he brings suit within the statutory period.

If the owner of the patent does not bring suit within the statutory period, further royalties need not be paid, and the sums already paid in are to be returned to the licensee.

DEC. 29, 1922.

EUGENE R. KELLEY, M.D., *Commissioner of Public Health.*

DEAR SIR: — You request my opinion as to whether your department should continue to pay a royalty under the arsphenamine license issued to the department by the Federal Trade Commission. The facts, as submitted by you, are as follows: —

On March 21, 1919, a license was issued by the Federal Trade Commission "under authority of and in conformity with the Trading with the Enemy Act and with the Executive Order of Oct. 12, 1917," to the Department of Public Health, to make, use and vend, within a certain area, "Salvarsan" or "606," now designated as "arsphenamine." The license determines the aggregate royalty to be paid, and is "for the term of the patent unless sooner terminated." The Federal Trade Commission has advised you that "it is believed" that royalties accruing after July 2, 1922, need not be paid. No suit has been brought by the owner of the patent within the time limit prescribed by statute.

Section 10 (*c*) of the Federal Act of Oct. 6, 1917, known as the Trading with the Enemy Act, gives the President of the United States authority to grant licenses to manufacture processes under any patent owned or controlled by an enemy or ally of an enemy, and to prescribe the conditions of the license. Subsection (*d*) provides, in part, that the licensee shall pay royalties fixed by the President to the Alien Property Custodian, and that the "sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund" for the said licensee and for the owner of the said patent. Subsection (*e*) provides,

in part, that "upon violation by the licensee of any of the provisions of this Act, or of the conditions of the license, the President may, after due notice and hearing, cancel any license granted by him." Subsection (*f*) provides that the owner of any patent under which a license is granted may, "after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, . . . for recovery from the said licensee for all use and enjoyment of the said patented invention"; that the amount of any judgment and decree obtained shall be paid to the owner of the patent from the fund deposited by the licensee, and that the balance, if any, shall be repaid to the licensee on order of the Alien Property Custodian; that "if no suit is brought within one year after the end of the war, . . . then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian."

Under the terms of the statute, therefore, the sole reason for the requirement of payment of royalties under the license is to secure the owner of the patent in the event that he brings suit within the period prescribed by the statute. If the owner of the patent fails to bring suit within that period, further royalties need not be paid, and the sums already paid in are to be returned to the licensee. Since no suit was brought by the owner of the patent under which the license was granted to the Department of Public Health, within the statutory period of limitations, I am of the opinion that under the terms of the statute there is no obligation to pay royalties accruing after July 2, 1922, one year after the termination of the war.

Very truly yours,

J. Weston Allen, *Attorney General.*

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.

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 ninth 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.

Cambridge. Directors of Boston & Maine Railroad, petitioners. Petition for abolition of grade crossings at East and Short streets. Henry C. Mulligan, Joseph P. Lyons and Henry A. Wyman appointed commissioners. Commissioners' report filed. 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.

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. Report filed and recommitted. 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 appointed commissioners. Commissioners' report filed and recommitted. Joseph B. Lyons appointed commissioner in place of Winfield S. Slocum, deceased. Commissioners' second report filed. Henry A. Wyman appointed auditor. 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. 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. George W. Bishop appointed auditor. Auditor's first 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 fourteenth 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.