Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1932

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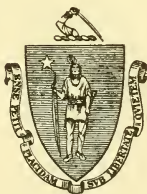

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 18, 1933.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1932.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,

State House.

Attorney General.

JOSEPH E. WARNER.

Assistants.

ROGER CLAPP.
CHARLES F. LOVEJOY.
EDWARD T. SIMONEAU.
STEPHEN D. BACIGALUPO.
GEORGE B. LOURIE.
LOUIS H. SAWYER.
EDWARD K. NASH.
DAVID A. FOLEY.
DONALD C. STARR.[1]
SYBIL H. HOLMES.

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

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[1] Resigned March 31, 1932.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1932	$99,000 00
Appropriation for small claims	4,000 00
Appropriation under St. 1931, c. 458	5,000 00
Supplemental appropriation	4,000 00
Balances brought forward	10,946 04
	$122,946 04

Expenditures.

For salary of Attorney General	$8,000 00
For law library	430 25
For salaries of assistants	42,333 33
For salaries of all other employees	20,805 50
For legal and special services	22,166 33
For office expenses and travel	3,052 69
For court expenses	1,526 77
For small claims	3,966 80
For damages by state-owned cars	3,735 50
Total expenditures	$106,017 17

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 18, 1933.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws (Tercentenary Edition), I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1932, to the number of 8,780 are tabulated below:

Cases		
Corporate franchise tax cases		2,720
Extradition and interstate rendition		249
Land Court petitions		107
Land-damage cases arising from the taking of land:		
Department of Public Works		249
Department of Mental Diseases		3
Department of Conservation		3
Department of Correction		1
Metropolitan District Commission		114
Metropolitan District Water Supply Commission		18
Miscellaneous cases		668
Petitions for instructions under inheritance tax laws		48
Public charitable trusts		300
Settlement cases for support of persons in State hospitals		9
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		4,256
Indictments for murder, capital cases		35
Disposed of	20	
Now pending	15	

THE DEPARTMENT OF THE ATTORNEY GENERAL.

The Attorney General.

The Attorney General, elected by the suffrage of the whole Commonwealth for the term of two years, is the people's law officer, charged with the administration of laws for the prosecution of crime against the Commonwealth and for the protection of the people collectively and of the Commonwealth and all its officers and departments in civil matters.

His Jurisdiction: Criminal, Civil.

The jurisdiction of the Department in this Commonwealth comprises the administration of laws as to certain criminal and all civil legal matters affecting the Commonwealth. The former is effected by the Attorney General with his staff or with or through the agency of any or all of the eight district attorneys [1] with their assistants; the latter solely by the Attorney General and his staff of nine assistants.

I. Administration of Laws for Prosecution of Crime.

Mode of its Exercise: By the Office Itself; By Offices of the District Attorneys.

The jurisdiction of the Attorney General in criminal matters is that of criminal law administration, — not of criminal law enforcement, which is the function of the police.

The jurisdiction of this administration is confined primarily to prosecutions in the Superior Court, and to prosecution of persons indicted by a grand jury for a felony, and of persons found guilty of a misdemeanor by a municipal or district court, who have appealed to the Superior Court.

It is exercised by the Attorney General, who — obliged to take cognizance of all violations of law, [2] and having powers in any district possessed by a district attorney in his own district — may, in the Superior Court, personally prosecute any felony, [3] or in any appropriate municipal or district court [4] such of those misdemeanors, in particular, as offend the administration of a State department; [5]

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[1] Northern District, Warren L. Bishop, Wayland.
Eastern District, Hugh A. Cregg, Methuen.
Southern District, William C. Crossley, Fall River.
Southeastern District, Winfield M. Wilbar, Brockton.
Middle District, Edwin G. Norman, Worcester.
Western District, Thomas F. Moriarty, Springfield.
Northwestern District, Joseph T. Bartlett, Greenfield.
Suffolk District, William J. Foley, Boston.

[2] G. L. (Ter. Ed.) c. 12, § 10.

[3] Action was had by the Attorney General in certain stock frauds. In the summer of 1930 certain so-called stock frauds were disclosed. Investigation revealed transactions of a radius over the Commonwealth too extensive for the attention of any one district attorney. Though the functions of the Attorney General are primarily civil administration, criminal jurisdiction was exercised. After intensive inquiry and preparation, necessarily requiring time, action followed. Prosecution was had either by the office directly (*a*) or by reference to the appropriate district attorney (*b*).

(*a*) Conviction in Brotherhood Coal Company case; jail sentence and fines. Conviction in New England Investment Trust, Inc., case; jail sentences and fines.

(*b*) Conviction in Page & Shaw case; District Attorney Bishop.

[4] Prosecutions for departments in municipal courts of Boston and Roxbury District, with conviction and sentence (3).

[5] Indictment for larceny (military aid); indictment for discharging factory waste into Aberjona River; company fined $200, individual cases filed.

or, unless a statute requires prosecution solely by his office, he may cause prosecution by reference to the district attorney in whose district the felony or misdemeanor occurred.[1] District attorneys are elected by the suffrage of their respective districts for a term of four years. As their offices have to do principally with criminal and not civil matters, and as each is specially equipped for intensive and competent attention to such matters (through their creation and provision by the General Court for the particular functions of prosecution) and as the office of the Attorney General has to do primarily with civil and not criminal matters, and as its general engagement in prosecutions, diverse in nature and location, would unnecessarily duplicate the work of the district attorneys, — prosecution of violations of law, of which the Attorney General is obliged to take cognizance, is generally effected, as provided by law,[2] through appropriate district attorneys as part of the greater volume of business they originate or conduct independent of the Attorney General.

Conferences of the Attorney General, District Attorneys and Assistants.

The Attorney General and the district attorneys held four conferences, as usual. At the last quarterly meeting the district attorneys presented reports as to the administration of criminal law in their respective districts, and proposed recommendations for legislation.

Account of Administration of Criminal Law by District Attorneys as to Each District.[3]

Mr. Bishop (Middlesex), whose district is considered the largest in population plus area, for which reason criminal business is quite constant, reports that all felonies and misdemeanors pending November 30, where defendants had been apprehended, will be practically cleared by December 31, though current interim entries will necessarily show triable cases pending on that date; that a first degree murder conviction was obtained within two months from date of the murder.[4]

Mr. Cregg (Essex) reports that he has disposed of 1,730 cases this year — 100 more than in 1931; that every case listed on each of the dockets for the three sittings of the court in that district has been and will be disposed of at the respective sitting if disposition is possible; that by greater care in preparation and assignment of time for appearance of witnesses, this number of dispositions has been

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[1] Action by the Attorney General for violations of banking laws, on report of the Commissioner of Banks, was had by instituting "forthwith" proceedings for prosecution, by reference to District Attorneys Bishop, Cregg, Norman and Foley.

[2] G. L. (Ter. Ed.) c. 12, § 27.

[3] List of capital cases and disposition is appended.

[4] Appeal pending. Trial by Assistant District Attorney Frank G. Volpe disclosed a series of unusual incidents, wherein circumstances and action of police and prosecutor's office presented the difficulties confronting agencies of government and disclosing exercise of talents always expected but infrequently lauded: — a bullet, shell from a .32 automatic and a murdered man on the floor of a gasoline station April 9 were sole evidences of the deed and the doer; discovery three weeks later by the Boston police of a .32 automatic; its identification with the shell by the State ballistic expert; arrest of two users of the room where found; chance identification in Philadelphia, through magazine picture relating to another matter, of a third person, with alias, posing as a seaman, whose whereabouts were unknown, having disappeared two days after the murder; flight by police by plane and return in a few hours with such person; friendly association of the three revealed through work of detectives and prosecutor; locating, twenty-one days later, one of the first two in California, where he had gone meantime after disappearance consequent to release from House of Correction on charge other than of murder, of which he was not then suspect; piecing together the incidents; ten-day trial; verdict, after deliberation of fifty-five minutes, of murder in first degree of the two of the three who had disappeared.

effected at a saving in expense of $20,000 during his tenure; that following the burning of property to defraud an insurance company, indictment, ten-day trial, conviction and sentence to State Prison for five to eight years was had, — all within fifty-two days of the day of the burning; that in another case of like nature, where the act was committed two months before a criminal sitting, the defendant at such sitting was indicted, tried, convicted and began serving sentence in twenty-nine days; and that an attacker of young high school girls was arrested, arraigned, tried and convicted, all by the twelfth day after the attack.

Mr. Crossley (Nantucket, Dukes, Barnstable and Bristol) reports, as to Nantucket, 5 cases pending; as to Dukes, 7; as to Barnstable, 14, with 2 murder cases disposed of, one of first degree and the other of manslaughter; as to Bristol, 282, plus 4 capital cases (1 already tried, with conviction in first degree but appealed, and 3 just indicted); and final disposition, requiring special session, of 3 murder cases, involving 6 defendants (resulting in life imprisonment of 4, acquittal of 1, and State Prison for the other); that 3 bank robbers began State Prison sentences after arrest, indictment, trial and conviction, in less than a month and a half from day of robbery. [1]

Mr. Wilbar (Norfolk and Plymouth) reports as to Norfolk that at the time of the last criminal sitting in October there were less than 50 cases pending and 1 murder case, with prospect of the lightest grand jury list at the convening December 5; as to Plymouth, no murder cases and about 50 cases pending at the close of the sitting in November, which include a number [2] where, after convictions already had, sentence is contingent upon certain matters, and that the docket is so cleared that, with a few felonies awaiting trial, the misdemeanors may be disposed of with expedition.

Mr. Norman (Worcester) reports a decrease last year in cases pending as of September 30, [3] but likelihood of increase over last year of cases as of December 31; a larger number of burning cases than usual; increase in number of grand jury hearings; that as recently as December 31 four out-of-state savings bank robbers were sentenced to State Prison on the twenty-third day after breaking into a bank, binding the watchman and with loaded revolvers forcing the treasurer to open the vault. [4]

Mr. Moriarty (Hampden and Berkshire) reports that there are but 148 misdemeanors, 14 indictments for felonies and 1 murder case pending in Hampden, some of which have accrued since the last court sitting in October; 40 misdemeanors and 7 felonies in Berkshire, some likewise accruing since the last court sitting in July. This indicates that all current cases have been tried as they arose and readiness to try without postponement any and all cases as they may arise. In Berkshire, in February, a first degree murder, which had been pending three years

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[1] Robbery, October 17; arrested, November 8; indicted in November; trial, five days; praise is due to the police of Taunton, where the robbery occurred, to the police of Stoughton, where the robbers were caught, and to the State Police.

[2] Eleven cases.

[3] Statistical year of reports from the clerks of the Superior Court ends September 30. The new unit basis is the defendant rather than the case, for such appears to be a better basis for indexing crime. Although several defendants may often be included in one case, a number of cases may only relate to one defendant.

[4] Prompt action by a member of the State police brought about capture after flight to Connecticut and shift at State line to Connecticut car. Robbery, November 29; indictment, December 14; sentence, December 21.

because of the concealment of the defendant, was disposed of, immediately on his apprehension, on plea of guilt to second degree murder. In the space of the same thirty days gang safe crackers were indicted, tried, convicted and sentenced, and armed robbers began serving time in State Prison after indictments, trials and convictions.

Mr. Bartlett (Hampshire and Franklin) reports, as to Franklin County, that though 18 misdemeanors and only 3 felonies, and as to Hampshire, 35 misdemeanors and 7 felonies, are listed as pending,[1] they include those tried and awaiting sentences,[2] or tried and appealed to the Supreme Judicial Court,[3] and those early terminable by matters already effected, and those[4] from district courts entered since the last criminal sitting.[5]

Mr. Foley (Suffolk, with a population of 879,536) reports that for the first time in many years no murder case is pending; that, aside from a number in one group, fewer cases are pending than in any previous year; that the crime of arson appears to have been more prevalent but convictions were obtained in nearly all cases; that, in a kidnapping case,[6] by immediate action a racket was stopped at its inception.

Recommendations of the District Attorneys and Attorney General.

1. *That surety companies, acting as bail bondsmen, shall be no longer exempt from the statute requiring registration of professional bondsmen, and providing for revocation of license on failure to satisfy judgments recovered, and for conformity to rules established by the Superior Court.*[7]

If a professional bondsman fails for thirty days to satisfy in full a judgment recovered on a bond, his registration may be revoked by a justice of the Superior Court. Surety companies are not now regulated as professional bondsmen, and are not subject to control by the Superior Court. Some surety companies have failed to satisfy judgments, yet are not prohibited from continuing to act as bondsmen, and, in some instances, professional bondsmen, whose registration has been revoked, act as their agents.

2. *That certified copies of criminal records shall be furnished to district attorneys, police officers or their agents, without charge.*[8]

By present practice the Commonwealth collects for and then charges these costs to itself through the different offices.

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[1] Dec. 31, 1932.

[2] Two hundred and fourteen.

[3] Three.

[4] Thirteen.

[5] Two grand jury investigations related to conduct of officials of a certain town and of an official of the Interstate Mortgage Trust Company, a Kansas corporation doing business in Massachusetts, with subsequent trials and convictions (appeal pending).

[6] In exactly forty-nine days from the time of kidnapping, defendants were in State Prison, due to creditable work of the police of Boston and of Hull and of the District Attorney and his office.

On the evening of October 11, Herman Rutstein was kidnapped in the rear of his home in Dorchester; October 16, place of concealment in Nantasket located; special session of Grand Jury immediately called; November 24, kidnappers indicted, charged with kidnapping and robbery; November 28, trial begun, Assistant District Attorney Frederick T. Doyle prosecuting; November 29, defendants pleaded guilty and sentenced to twenty to thirty years in State Prison.

[7] Presented by District Attorney Foley. Effected by striking out, in G. L. (Ter. Ed.) c. 276, § 61B, line 28, the words "surety companies or to."

[8] Presented by District Attorney Bishop. Add at the end of G. L. (Ter. Ed.) c. 262, § 5.

3. *That defendants shall signify election of trial without jury within ten days after they are called upon to plead upon an indictment or complaint.*[1]

This measure will result in great saving, by not requiring the maintenance of the jury panel, in the event a defendant should make up his mind to ask for a jury waived trial. If the defendant is to make the decision, it would appear that he may do so at one time as well as at another, and that a period of ten days after pleading to indictment or complaint would afford reasonable opportunity.

4. *That the credibility of the witness may be impeached by introducing in evidence his record relating to a crime where there had been a verdict of guilt or a plea of guilty and a suspended sentence or term of probation imposed.*[2]

If, to discredit a witness in a criminal case, it is proper, as now, to show his previous conviction of crime where sentence has been imposed, with fine or imprisonment, it ought to be no less proper to show conviction with suspended sentence or probation. If previous conviction of crime is deemed of importance in considering reliance on testimony, it is refinement to say that the word of a person who has been convicted of crime is acceptable if, after his conviction, — often on his own plea of guilt, — his sentence was suspended or he was placed on probation, while the word of another person is not if he was imprisoned or fined. It is difficult to see why a witness, previously convicted, should be discredited by his record if sentence had been imposed, and another witness should not be if sentence had not been imposed.

5. *That in trials of two defendants, where one has been indicted as principal and the other has been indicted as an accessory in separate indictments relating to a single chain of circumstances, one defendant may not elect to waive and the other elect not to waive jury trials, thus necessitating two separate trials, one with a jury and the other by the court, but that both defendants must elect so to waive before any hearing may be held by the court without jury, as is now the case when the two defendants are named as principal and accessory, respectively, in a single indictment.*[3]

The statute enables waiver of jury trial by a defendant but not unless all defendants, if more are named in the same indictment, have waived. But in the event defendants are named in separate indictments for different charges relating to the same common act, separate trials ensue, and each has the privilege of waiving and being tried by the court and not by a jury. There appears to be no particular

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[1] Presented by District Attorney Bishop. Amend G. L. (Ter. Ed.) c. 263, § 6, as amended by St. 1929, c. 185, § 1, by striking out the words "when called upon to plead, or later and before a jury has been impanelled to try him upon such indictment or complaint," and substituting therefor: — within ten days after he is called upon to plead upon such indictment or complaint.

[2] Presented by District Attorney Bartlett. Amend G. L. (Ter. Ed.) c. 233, § 21, by inserting after the word "crime", in the first line, the words: — or the record showing that he was found guilty or pleaded guilty to the commission of a crime and as a result thereof a suspended sentence or a term of probation was imposed, — and by inserting after the word "imposed", in the fifth line, the words: — and the record showing that he was found guilty or pleaded guilty to a complaint or indictment alleging that he committed a misdemeanor and upon which he was given a suspended sentence or placed on probation, shall not be shown for such purpose after five years from the date the suspended sentence was imposed or probation ordered, — and by inserting after the word "imposed", in the tenth line, the words: — and the record showing that he was found guilty or pleaded guilty to a complaint or indictment alleging that he committed a felony, and upon which he was given a suspended sentence or placed on probation shall not be shown for such purpose after ten years from the date on which the suspended sentence was imposed or probation ordered.

[3] Presented by District Attorney Foley. Amend G. L. (Ter. Ed.) c. 263, § 6, by striking out the comma and inserting after the word "more", in the thirteenth line, the words: — named in that indictment, or all defendants in all other indictments arising out of the same single chain of circumstances.

reason that defendants should enjoy greater privilege from the circumstance of being named in separate indictments than when named together. Moreover, this privilege enables the spectacle of a principal testifying, in his trial, to the guilt of the accessory and to his own innocence, and, in the trial of the accessory, testifying to the accessory's innocence, resulting in the acquittal of both.

Remarks on Current Comment on Crime.

It is lamented that crime is not being reduced to a minimum.

If solely an expression of regret that crime is not less, it is a lament which has often been repeated since sin began. Lips and ears until sin ceases will utter and hear the same.

If intended as an expression that crime is not being reduced by agencies capable of reducing it, the generality of the lament, without specification, wails woe to no purpose. Not woes but ways to prevent merit attention.

The lament acknowledges some minimum below which crime may not be reduced. If so, no human agency may eradicate it. How is a minimum to be rated and determined? What acts are included in the word "crime"? Is vice — gambling, for instance? What is the particular form of crime, not now being reduced, which can be reduced? What is taken as data for index and estimate of amount of crime which may be reducible? What are the modes of control, not now being exerted or not now being effectively exerted, which can be exerted to reduce it? What particular item or items, in the various factors that relate to crime, are not now provided for or wisely provided for, which will, if so provided for, effect the reduction to a minimum? Is it in Massachusetts, in some other State, or in the nation generally that there is reducible crime?

In the first place, there is no definite present means of obtaining accurate information as to the existence, prevalence and nature of acts, which, having been designated by statute as felonies and misdemeanors, are crimes. Without trial and conviction, either in the district court or the Superior Court, an act cannot even be said to be in fact criminal, much less its nature particularized. Even accumulation of statistics,[1] from every one of the police departments of the thirty-five cities and three hundred and sixteen towns, of cases reported to them but where circumstances disenabled prosecution, would not furnish an accurate index — for the reason that such cases were not judicially determined. Of the number judicially determined in the district, municipal and Superior Courts, to count convictions only as crimes is to discount discharges as not instances of predisposition to crime and to characterize the proceedings as having been instituted upon mere supposition. Even an increase in convictions may be as consequent to additional, more successful or intensive measures therefor as to increased prevalence of crime. Citation of imprisonments is no more than registry of that type of punishment. The minimum voiced in the lament is unascertainable.

There are many factors involved in the subject of crime: legislation — by which alone acts are or are not criminal; criminal disposition — born, bred, acquired or incited; detection of crime; apprehension of the criminal; prosecution; correction; crime prevention.

Legislation makes acts crimes by setting up penalties for doing them. The great complexity of the present day — multiplying the relations of man with man

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[1] Statistics as to crimes known to the police are not compiled in Massachusetts.

and employing devices and novel schemes — occasions the need for restraining measures. As the category of interdependence of social life increases, necessarily there is increase in the list of acts legislatively defined as criminal. A new statute or a change in an existing statute may greatly enlarge the number of crimes by reciting acts, thereafter committed, theretofore lawful. It is not and never has been, as has been assumed by some, the purpose of criminal law legislation to make persons moral and to prevent all crime, but to provide a penalty, to remedy wrongs and to prevent excess crime. If all persons practiced the moralities and social justice, there would be no need of legislation.

Detection necessitates the securing of evidence of identification and commission of the crime; it involves adequacy of means and equipment to detect crimes if unknown, and, if known, to prevent escape and to secure arrest. This is the task of the police, as enabled by provisions of statutes, ordinances and by-laws.

Prosecution requires presentation of evidence for complaint or for grand jury indictment and trial, in the procedure prescribed by the Legislature; and conviction is dependent, among other things, upon appearance and responsiveness of witnesses and standards of conduct in the community of prosecution, as reflected by judges and jurymen. The prosecution of misdemeanors is the task of the local police in the municipal and district courts, and the prosecution of felonies and misdemeanors appealed to the Superior Court is the task of the eight district attorneys and the duty of the Attorney General in certain cases. This factor involves personnel. But until there has been detection and apprehension there can be no prosecution.

Correction is enforcement of disciplinary measures, designed to restrain and correct perverted conduct of the convicted, and, through exemplification of the enforcement, to prevent or deter manifestation by others. This is the task of the Legislature in providing the form of discipline, of the judiciary in pronouncing it, and of the probation and penal officers in administering it. It necessitates the enactment of measures best calculated to reform [1] or cure convicted persons and to repress disposition to and engagement in criminal conduct.

Prevention of crime involves not only these factors but everything that relates to the formation of and temptation to criminal conduct. Home; school; church; social agencies; wholesome amusement; clinics for detecting social delinquencies and for rehabilitation; informal agencies for arbitration, outside of law, where loss of favorable opinion of social, fraternal, group or business associates is the penalty; devices for protection of life and property against temptation to or enablement of crime; measures for protection of neglected children and of juveniles before the courts, — all have to do with crime.

To lament that crime is not being reduced to a minimum is a lament that catalogues, even as sparsely sketched, items, personnels and conditions so innumerable that it voices the inclusive responsibility of every member of society to allay it.

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[1] If imprisonment, by the fixation of a period of years, has, as part of its purpose, the reformation of a criminal, I am unable to understand upon what basis various terms of years have been prescribed in the statutes for various crimes as calculable and effectual measures to accomplish the correction of persons committing the different crimes; nor to understand how it can be determined in advance, for the imposing of imprisonment for any years so fixed, that reformation of the convicted person will be or will have been effected upon the day terminating the period. In so far as reformation is one of the purposes of imprisonment, I cannot reconcile the present mode of fixing legal limitations with its reformative application to any individual; scientific inquiries for determining a reformation, as basis for date of release, may, at least, claim consistency, — assuming that by the exploitation of the human mind penitence and reform can be discoverable and reliable.

CONCLUDING OBSERVATIONS.

1. That mercenary crimes which, in their worst forms, are murder for money and reign-of-terror rackets, exacting, with threat of injury to person and family or destruction of property, tribute for immunity from molestation, from milkmen, laundrymen, cargo and draymen, businesses, large and small, have not as yet gained organized foothold in Massachusetts.

2. That, as I believe that means of quick get-aways, good chances for escape and lack of fear of identification consequent therefrom, detection and arrest have as much to do with daring crime as any other factors, stern, resolute and efficient measures for detection, apprehension and eradication should be given prime consideration.

3. That in the face of this form of brigandage, every agency, and particularly the local police, having responsibility in contending with it should be encouraged by measures effecting better equipment and system, linking up every municipality by radio and teletype paraphernalia, maintenance of necessary personnel, greater unity for co-operative efforts of forces, now individualized in thirty-five cities and three hundred and sixteen towns, and power of arrest, anywhere in the Commonwealth, of bandits fleeing beyond municipal and town boundaries.

4. That elimination or curtailment of efficient and necessary existing protective police agencies, whereon duties other than policing have already been imposed, cannot but afford the underworld easier opportunity to set up the supergovernment it has maintained elsewhere.

5. That inasmuch as certain measures for social rehabilitation — which it is contended should be substituted for the present measures of penal and other discipline, on the ground that they neither deter second offenders from recommission of offences, nor first offenders from commission — can possibly only affect those who have been apprehended and convicted, and inasmuch as I think the regenerative value of tints of orchid, soft mauve and saffron on chamber walls of the heinous, and of the resocializing value of de luxe conveniences for dainty foot sprays, sparing the effort of the vicious from full shower, as palliatives for freedom's forfeit, have not yet been practicably demonstrated; and inasmuch as I think no thug, killer, gangster or racketeer would be made more hesitant by knowledge of selective and sensitized measures for his rehabilitation, if caught — I think the first duty is to the tax-paying public for capture of criminals, before proposing or extending expensive experimentation for their uncertain reformation, dependent upon capture and conviction.

6. That the proposal for the abolition of the grand jury [1] (which could be effected only by constitutional amendment) is rash. If proposed as an economy measure, in that prosecutors may effect the same work on their own complaint, it is a proposal that a great fundamental of liberty, [2] which safeguards the rights of the individual citizen[3] from public accusation before probable cause through indictment, is not worth its price. If proposed as a measure for reduction of crime, in that prosecutors would be enabled to institute proceedings more rapidly for immediate judicial determination, it is a proposal too puerile for speculation.

7. That it should be borne in mind that, in this Commonwealth of 4,249,614

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[1] *Jones* v. *Robins*, 8 Gray, 329, 345.

[2] *Jones* v. *Robins*, *supra*.

[3] *Commonwealth* v. *Harris*, 231 Mass. 583; *Opinion of the Justices*, 232, 601; *Lebowitch, Petr.*, 235 Mass. 357, 361; *Attorney General* v. *Pelletier*, 240 Mass. 264, 309.

population, the good vastly outnumber the evil-minded; that, after a general analysis of incidents in cases of the current year, the incident of unemployment appears not to be appreciable, evidencing the sound moral fibre of the great rank and file; and that, if there be lamentation for evil, there may be laudation for the preponderant good; that if present penalties and disciplinary modes for control have been devised, in part, on the supposition that knowledge of such would repress manifestation of criminal disposition, it should be borne in mind that, as deterrents upon the censused evil-minded, they are partially calculable, but upon the uncounted good, they are wholly incalculable.

8. That citation of larger enumeration of youth in criminal experiences is not to be taken as general condemnation of youth, for the enumeration of youth in all human experiences is larger than formerly, and, by greater activities in espousal of the moralities, youth maintains a ratio to be taken as commendable; and that, until society adopts measures[1] best considered as means to protect neglected children and juveniles before courts it may not be said that maturity has fully minimized the hazards to youth.

9. That in so far as speedy prosecution is said to be a factor in reducing crime — in that fear of conviction through immediate trial is a deterrent — the district attorneys (by punctual attention to clearance of dockets, by readiness to try current cases as they arise, by pendency only of cases where defendants have not been apprehended and are incapable of prosecution, by demonstration, instanced in every district, of convictions measured in space of days after crimes) have faithfully and commendably performed their services toward the reduction of crime, have recognized the obligations they owe to their electorate, and have proven that speedy administration of criminal justice does not happen in England alone.

II. Administration of Civil Business.

Of the great number of cases in which consideration by courts, Federal and State, was requisite, only those with final termination already had or to be had in the highest courts are noted.

A. Cases Decided During the Year.

1. *In the Federal Courts.*

United States Circuit Court of Appeals.
United States District Court.

There were no cases in the United States Supreme Court, and the matters in the District Court and the Circuit Court of Appeals were of a character usually heard there.[2]

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[1] I endorse, as I did in 1931 and 1932, the recommendation, among others, of the Special Commission to Investigate the Laws relative to Dependent Children, which is as follows: That the definition of "neglected child" be broadened to include a child neglected through feeble-mindedness of the parent; that after determination by a court that a child has been neglected, its custody, pending appeal, should be as ordered by the court; that trial of a parent for neglect and of neglected children may be at one time in the Juvenile Court and not in two separate trials; that trial of appealed cases of neglected children shall be heard by the Superior Civil Court without jury.

[2] Defence of the Commonwealth in United States District Court on rendition proceedings (6); appealed to United States Circuit Court of Appeals (1); protecting labor and materialmen from restraining order cutting off their rights.

2. *In the State Courts.*

Supreme Judicial Court.

Twelve cases invoked decision of the full court. In nine the Commonwealth was sustained. They relate to a variety of topics, principally taxation.[1]

B. Cases pending November 30, 1932.

1. *In the Federal Courts.*

United States Court of Claims.

There is a suit seeking to recover taxes paid upon tobacco bought by the Commonwealth for use in State institutions.[2]

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[1] *Taxation.*

First National Bank, Trustee, v. *Tax Commissioner,* Mass. Adv. Sh. (1932) 947. That a resident trustee, although under a foreign trust, is taxable for income paid to a Massachusetts beneficiary.

Ness v. *Tax Commissioner,* Mass. Adv. Sh. (1932) 1037. That a person who has abandoned his home in this Commonwealth, and who is, on January first, *in itinere* to a new home in another State is still an inhabitant of this Commonwealth within the meaning of the income tax statute.

Davis v. *Commissioner of Corporations and Taxation,* Mass. Adv. Sh. (1932) 1415. That in a trust created under G. L. c. 65, § 13, by a settlor (providing for payment of income to settlor for life and remainder in fee to B, where remainderman predeceased the life tenant settlor and had willed the interest to C), the Commissioner of Corporations and Taxation properly assessed a succession tax upon the value of the remainder interest as at the time of the death of the settlor rather than the value at the time of the death of the remainderman B ($145,000).

J. G. McCrory Co. v. *Commissioner of Corporations and Taxation,* Mass. Adv. Sh. (1932) 1579. That the Commissioner of Corporations and Taxation was not authorized by G. L. c. 63, §§ 30–33, inclusive, to disregard a corporation return of a Massachusetts corporation and to compute the tax on the proportionate parts of the consolidated net income and of the consolidated net assets, shown on the consolidated Federal tax return of the parent corporation, a New York corporation, which did no business in Massachusetts.

Ruth E. Madden, executrix and trustee, v. *Charles J. Madden et als.,* Mass. Adv. Sh. (1932) 1611. That under the income tax statute as it existed prior to amendment in 1931, the value of rights was to be figured as part of the cost of stock subscribed for in determining the amount of gain resulting from a subsequent sale of such stock.

Other Topics.

Hornblower v. *Tax Commissioner,* 278 Mass. 557. That a certain distribution of stock in a new corporation constituted a dividend in liquidation rather than a sale or exchange.

Leach v. *State Fire Marshal,* Mass. Adv. Sh. (1932) 125. That insertion by the Fire Marshal of certain conditions in a decision that no fire hazard would result from the granting of a license by local authorities to store petroleum products was not beyond the powers of the Fire Marshal.

Police Commissioner of Boston v. *Commissioner of Civil Service,* Mass. Adv. Sh. (1932) 549. That suspended members of the Boston Police Department may not be reinstated without approval of the Civil Service Commission.

Grant v. *Department of Public Utilities,* Mass. Adv. Sh. (1932) 653. That it is not unlawful under existing statutes for a gas or electric company to include a service charge as an element of its rate schedule.

Lexington v. *Commonwealth,* Mass. Adv. Sh. (1932) 1153. That a statute providing for settlement because of service in army or navy was not retroactive.

Daniel Dunn v. *Civil Service Commissioners,* Mass. Adv. Sh. (1932) 1205. That leave of absence granted to a police officer under civil service constitutes a "separation from the service" as those words are used in the Civil Service Rules.

Power v. *Board of Examiners of Plumbers,* Mass. Adv. Sh. (1932) 1891. Reversing decision of Board of Examiners of Plumbers in suspending license of petitioner.

Single Justice.

Defence of judiciary on writs of error (4).

Commissioner of Banks v. *Berardini et al.* Petition for receiver of private banks. Receiver appointed.

Ryba v. *Sheriff of Hampden County* (2 cases). Habeas corpus.

In first, writ issued; in second, petition denied.

Successful defence of institutions on petitions for release on *habeas corpus* (25).

[2] *Commonwealth of Massachusetts* v. *United States.*

2. *In the State Courts.*

Supreme Judicial Court.

A few cases relating to different matters await decision.[1]

3. *Superior, Probate, Municipal and District Courts.*

Cases were of usual type.[2]

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[1] *Taxation.*

Commissioner of Banks v. *Commonwealth.* Whether taxes due from a trust company, of which the Commissioner of Banks has taken possession, are to be preferred in liquidation.

Tirrell v. *Tax Commissioner.* Whether certain income is taxable as an annuity or as income from a trust.

Harvard Trust Company v. *Tax Commissioner.* Whether the petitioner as trustee under a foreign will is liable for taxation of certain income.

Federal National Bank v. *Commonwealth.* Whether the petitioner is entitled as assignee to a certain sum of money retained under a contract under which it was expressly provided that the contractor should not, either legally or equitably, assign any money payable thereunder.

Other Matters.

Defence of the judiciary on writ of error, and one certiorari.

Dunn v. *Civil Service Commission.* Whether a certain person was entitled to veteran's preference under civil service.

Harding v. *Commonwealth.* Writ of error.

Single Justice.

Boston, Worcester & New York St. Ry. Co. v. *Commissioner of Public Works et al.* Bill in equity arising out of revocation of location of railway in city of Newton and towns of Wellesley, Natick and Framingham.

Attorney General v. *Blagden et al.* Mandamus to compel selectmen of town to give relief to a veteran.

Sampson v. *Treasurer* (mandamus).

Sampson v. *Metropolitan District Commission* (certiorari).

Admission of town of Weymouth into South Metropolitan Sewerage District.

The billboard cases (25 consolidated bills in equity, enjoining the Commissioners of Public Works from enforcing rules adopted in 1920 and 1921, regulating outdoor advertising, on grounds of unconstitutionality of both rules and St. 1920, c. 545, authorizing them) began in June, 1925. The report of the master to whom they were referred was filed June 2, 1931, and by order of a justice of the Supreme Judicial Court was, on motion of the petitioners and against objection of the Commonwealth, recommitted in September, 1931, for further hearings and findings. The master filed a supplemental report of 93 pages in the Supreme Judicial Court the latter part of August, 1932, much in substantiation of the original report.

At the request of the Commonwealth, made immediately upon the filing of the supplemental report, Chief Justice Rugg assigned the case for hearing before Mr. Justice C. H. Donahue. The outdoor advertisers again filed voluminous objections to the supplemental report, — as they had to the original report, — and again moved to recommit the report to the master. These objections and this motion were argued at length in the Supreme Judicial Court on September 7 and 8, 1932, before a justice who has them under consideration, pending which the future course of the cases may not now be ventured.

[2] *Superior Court.*

Litigations in Superior Court (among which were 49 petitions in equity chiefly relating to enforcement of claims of lien against State contracts), proceedings in special commissions, alterations of bridges in Ipswich, Groton, Bernardston; defence of the Commissioner of Banks; defence of the Commonwealth in land damage suits; final decrees on petitions to enforce claims of lien pending at beginning of year and not included in foregoing figure (7).

Probate Court.

Estate of Eva March Tappan. Probate Court of Worcester sustained the Commissioner of Corporations and Taxation and dismissed petition for abatement of tax assessed by him upon a gift to a trust company in trust for the education, in a certain college, of girls resident in Worcester County, and, if there should be an insufficient number of such girls so deserving, then, in the discretion of the trust company, for girls resident in or outside Massachusetts, which gift the trust company contended was exempt from taxation under G. L. c. 65, § 1.

Estate of Emily A. Briggs. After argument before Probate Court of Middlesex, a tax was paid which had been assessed by the Commissioner of Corporations and Taxation under G. L. c. 65, § 1, on the death of the two joint tenants of securities under a will, upon one-half the value accruing to the survivor.

Successful defence of institutions on petitions for release and discharge in probate and district courts (10).

III. Statutory Services.

Of the great number of varying services, required by many statutes, which comprise the routine of the Department, a few only are here noted.

1. *Small Claims.*

Under the act[1] enabling settlement by the Attorney General of certain claims upon finding of damages under $1,000, 81 claims[2] were filed, and 40 were approved, with a total award of $3,966.80. Of the 40, 24 came from accidents with State-owned vehicles; 10 from defects in State-owned property; and 6 from miscellaneous causes. The appropriation for the purpose is but $5,000.

2. *Defence of State Employees in Certain Suits against Them.*

Under the statute[3] providing for defence of State employees when sued for personal injuries arising out of accidents while driving State-owned cars in the course of their duty and for payment of judgments up to $5,000, there have been 6[4] actions requiring this service.

3. *Public Charitable Trusts.*

There has been an unusual number of petitions concerning the duties of trustees of charitable trusts and the application of unusable funds to purposes nearest that of the donor.[5]

4. *Public Administrators.*

Public administrators[6] paid into the treasury of the Commonwealth the sum of $43,448.08 as escheats in 57 estates to which heirs or next of kin could not be found. There are now 56 active public administrators, and 2, whose terms have expired, still have cases in process of settlement.

5. *Services Required by the Legislature.*

Membership on commissions —

To investigate governmental activities in the town of Mashpee and on board, provided in consequence thereof, to direct the affairs of the town;[7]

To investigate certain annual payments by the Commonwealth to certain towns on account of the construction of certain additions to the metropolitan water system;[8]

To pass upon existence of emergencies in municipalities and to approve loans therefor,[9] and for the renewal of certain temporary revenue loans by cities and towns;[10] and on —

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[1] St. 1924, c. 395.

[2] Ten denied; 31 pending.

[3] G. L. (Ter. Ed.) c. 12, § 3, amended by St. 1931, c. 458, § 1, effective September 10, 1931.

[4] Four settled; 1 tried in district court; 1 pending in Superior Court.

[5] In the Supreme Judicial Court, before a single justice, and the full court and in various probate courts. Examples are application of funds, left in 1905 to build or endow a Home for the Aged, and insufficient for the purpose. Application of funds left in trust with income to wife, with power to appoint recipients by will, to which power she did not specifically refer in her will, lacking which, certain specific public charities, asserting their interest as beneficiaries, were sustained by the Probate Court of Worcester County, and an appeal is pending. Estate of Alfred S. Pinkerton.

[6] The public administrators report (except 3, who failed to report) 342 estates in process of settlement; actual cash on hand November 30, 1932, $284,468.07; relatively few are more than a year old; a few ten or twelve years, obliged to be kept open for various reasons.

[7] Res. 1932, c. 1.

[8] Res. 1932, c. 13.

[9] G. L. (Ter. Ed.) c. 44, § 8 (9).

[10] St. 1932, c. 303.

The Milk Regulation Board.[1]

The office drafted form of legislative enactment[2] of 1932, which revised the Blue Sky Law in considerable entirety and incorporated new provisions, as had been recommended by the Attorney General in report of 1931, and recommended by the Director of the Division of Securities and others.

6. *Industrial Accident Cases; Approval of Contracts, Deeds and Titles.*

Appearance in claims (under G. L. c. 30, § 39, as amended) for workmen's compensation by employees of the Commonwealth (41).[3]

Requirements for examination of leases[4] and contracts[5] have increased, and of deeds[6] notably.

7. *Applications of Other States for Return of Fugitives from Justice; Application of the Commonwealth for Return from Other States of Persons Here Charged with Offences.*

There were 249 requisition papers submitted to the Department for examination and report. Of these, 48 were applications of other States and 201 were applications of the Commonwealth on other States. There were 21 hearings conducted on request of counsel and by direction of His Excellency the Governor. Of the 201 applications made by the Commonwealth, 88 were on charges of desertion, non-support or neglect of wife and minor children.

8. *Opinions.*

Such opinions as are deemed to be of general interest are annexed.

IV. Observations.

In the course of consideration of matters of wide range, either peculiar to this Department or to some one of the other nineteen departments of State government it serves, occasion for observations is afforded, and I submit them for disposition by the General Court.

1. As to the protection of the rights of the people against ruthless exploitation by banks, and for measures enabling the common people to enjoy and to share in the benefits which accrue from the common wealth.

That for the protection of depositors, so-called thrift accounts in commercial banks and trust companies be segregated; and that commercial banks be prohibited from conducting savings or thrift accounts.

That the Commissioner of Banks be authorized to remove from office officers or directors of banking institutions persisting in violating banking laws or in continuing unsafe and unsound policies and practices.

That an officer of a banking institution be prohibited from being an officer of any corporation or participant in any business engaged in the sale of securities.

That banks be prohibited from engaging in the sale of securities.

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[1] St. 1932, c. 305.

[2] St. 1932, c. 290.

[3] Conferences in 12 cases; hearings in 29; 6 hearings on review. In one case record filed in Superior Court, but later settled by agreement.

[4] One hundred and eighty-seven leases; 176 approved, 38 related to fishing rights in the Squannacook River.

[5] Four hundred and thirty-eight contracts; 189 related to food supplied for the various State institutions.

[6] In 1930, a normal year, for the Department of Public Works, 195; this year, 917; and 40 for other departments.

That banks be prohibited from engaging in any business other than the depositing of money and the making of loans on proper collateral and the ordinary commercial credits.

The welfare of the people in all things is paramount to the rights of any group or class in any thing. The right to engage in legitimate enterprise may never be denied, but no right exists in any individual or individuals to further such enterprise for private enrichment at loss to the people. The wealth of banks is the wealth of the people, though in the custody of bankers, and the people have right to demand that the power of money and its possession shall not be used by such custodians to their detriment and disadvantage.

That, in cases where accommodation by co-operative banks has been extended to unemployed home owners for periods not longer than two years under St. 1931, c. 365, § 33, the directors may have authority to renew or extend such extensions for like periods.[1]

As any accommodation, made pursuant to the statute, is likely to be terminating in 1933, and as the conditions, — for the alleviation of which said statute was enacted, — continue, it appears that provision for such further accommodation is needful.

That co-operative banks be enabled to become affiliated with the Home Loan Bank by provisions permitting them to invest in the capital stock of and to rehypothecate mortgages to the Home Loan Bank.

Under the laws of the Commonwealth as at present in force, the co-operative banks of this Commonwealth may not take advantage of the facilities of the Home Loan Bank in this district, designed at the last session of Congress to serve — much like the Federal Reserve System in rediscounting certain types of loans for commercial banks — as a rediscounting agency for banks making certain types of mortgages on small homes.

That for the protection of home owners, purchasing homes through co-operative banks or by mortgage to savings banks, in default through economic conditions and having a record of regularity in payments and dues prior to such conditions, the Commissioner of Banks may determine whether financial status, offered to such home owner as excuse for not extending the time of the mortgage, as authorized by St. 1931, c. 365, is in fact true.

Though the statute was enacted for the benefit of home owners, the co-operative banks may decline to extend such benefit upon representation of a bank, which the home owner may not verify, that conditions disenable extension. The Commissioner of Banks may verify the fact.

2. As to protection of the rights of the people against classification as criminals for violations of traffic laws.

That, as violations of traffic regulations do not involve moral turpitude, they be no longer classified as misdemeanors and cited as a criminal record unless they include other offences, such as intoxication or endangering life and property, and that arrangements be effected, either by statutory provision or by the court itself, for a special session for disposition of such cases exclusively.

That the law of the road requiring vehicles proceeding in the same direction and

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[1] Amend St. 1931, c. 365, § 33, by adding at the end of the first paragraph the sentence: — The directors shall have power to renew or extend such accommodation for periods not longer than two years.

overtaking another to drive to the left of the middle of the traveled portion of the way be modernized.[1]

Since the enactment of G. L. c. 89, § 2, at a time when the width of existing roads could only accommodate two vehicles, it has been common to build roads capable of accommodating more than two vehicles proceeding in the same direction. To require vehicles on such roads to drive to the left of the middle of the traveled portion of the way before overtaking another vehicle defeats the purpose of modern construction for the effectual separation of traffic moving in opposite directions, and its non-observance may constitute a technicality in any litigation detrimental to the automobile driver.

3. As to protection of the rights of the people against certain harassing practices of bill collection agents to the abuse of creditors and debtors.

That, to protect debtors from unscrupulous bill collectors, to secure to creditors the prompt payment of sums collected, and to safeguard honest collection agencies from disreputable practices, the business of collection agencies be licensed and regulated by a more effective system.[2]

At present the only prerequisite for conducting a collection agency is the filing of a bond with the State Treasurer, conditioned upon payment to creditors of moneys collected. If the moneys are not so paid, the creditor is put to the expense of litigation to recover on the bond by suit in the name of the State Treasurer. Meantime such collector may continue such practice of withholding collections from other creditors.

Debtors have been intimidated by notices, designed, by use of facsimiles of State and court seals and legal forms, to create the belief that they are legal summonses and court decrees, when, in fact, they are spurious. Debtors have been fraudulently and wrongfully induced to sign mortgages and assignments of life interests on representation that they were merely signing notes in payment of their debts. Clauses harmful to the debtor, have been inserted after a signature has been obtained. Criminal prosecution may follow, but conviction does not afford redress to the debtor, and, despite it, such collector may continue in business.

The creation of a licensing body, with right to entertain and hear complaints against collection agencies, and with right to suspend and revoke licenses, will protect the debtor, secure the creditor, by the turning over to him of moneys which have been collected for his account, and safeguard honest collection agencies, with assurance of honest business practices and of the confidence of the people.

Such licensing and regulation of collection agencies appropriately may be under the jurisdiction of the State Treasurer, with an additional deputy, whose service, by reason of income from fees, would entail no additional expense to the Commonwealth for its administration.

4. As to protection of the rights of the people against deprivation of liberty, by summary arrest and imprisonment, for inability to pay, in full and on demand, personal property taxes plus interest and fees of constables, or for refusal to pay assessed taxes for which a taxpayer is not liable.

That summary arrest and imprisonment for non-payment of personal property taxes plus fees of constables be abolished and civil proceedings substituted.[3]

The system of summary arrest and imprisonment of persons, unable to pay taxes — assessed for poll, old age assistance, personalty and motor vehicle charges — plus fees

[1] This may be accomplished by substituting for G. L. c. 89, § 2, provision to the effect that "the driver of a vehicle passing another vehicle traveling in the same direction shall drive a safe distance to the left of the said other vehicle; and, if the way is of sufficient width for the two vehicles to pass, the driver of the leading one shall not wilfully obstruct the other."

[2] A bill to accomplish this has been filed by me.

[3] A bill to accomplish this has been filed by me and the Automobile Owners League.

run up by constables for services, necessary and unnecessary, ought to be abolished. The jailing of a person for inability or refusal to pay a constable's fee in addition to the tax is intolerable. These fees oftentimes exceed the amount of the tax three and four fold. The municipality does not receive them; only the constables benefit. Imprisonment, therefore, is not for failure to pay taxes but chiefly for failure to pay constables their compensation. No longer should any man have power summarily to put another behind the bars for inability, failure, or, even, refusal, to pay him dollars.

The system enables arrest for refusal to pay taxes, even if facts demonstrate that the person is not liable for the amount of the tax or for any tax. Arrest first, and explanation, abatement or adjustment afterwards — all at the taxpayer's annoyance and expense — is the code. Offer to pay in instalments and tender of part payment, with definite assurance of full satisfaction, and even honest misunderstanding of processes, will not avoid hauling a man off the street and clamping him behind the bars. Moreover, a person assessed taxes or municipal charges is entitled to know on the face of the tax bill the exact items for which he is taxed, the date upon which such taxes are due, the penalties and consequences of failure applicable to assessments for realty, personalty, water, sewer and other municipal charges — for want of all of which he is obliged to inquire at town and municipal offices and meantime is subjected to hazards of which he is unaware.

We long ago abolished arrest in legal proceedings for collection of personal debts, and adopted the more just, more rational and effective system of first examining debtors relative to their liability and ability to pay, and ordering the mode of payment. I recommend the application of this principle as a means of collecting taxes and constables' fees.

5. As to protection of the rights of the people to an accurate, understandable portrayal of the finances of corporations offered to them as inducements for investments, and against the fraud of "tipster sheets."

That corporate statements, presented to the public as bases of financial and business condition for purposes of information to stockholders and inducement to investment, be required to be more uniform and understandable, and under standardized accounting, with date of statement of condition clearly expressed, accompanied by the information, in the event such statement is offered for the purpose of inducing investments, whether or not such statement accurately reflects the condition of the company on the date of offer.

6. As to protection of the rights of the people to an assured recovery from stock promoters when fraud has been adjudicated.

That, to safeguard the public further from fraudulent sale of securities, bonds shall be required of brokers and salesmen as a condition precedent to issuance of licenses to them by the Department of Public Utilities, reciting as one condition that, if it is adjudicated, either in a civil or a criminal proceeding, that the purchase of stock has been procured by fraud or misrepresentation, the purchaser may have recourse to the security for the amount of the loss in the event that the broker or salesman does not meet it.

In criminal proceedings, all that the prosecutor may do is to prosecute the crime; but prosecution cannot recover any loss. If a person desires to engage in such business, as between him and the purchaser, the burden should be his.

7. As to protection of the rights of the people in natural resources and their uses and services.

That full control of holding companies operating in the power utility field and of all companies dealing in utilities be vested in the Department of Public Utilities, covering organization of such companies, supervision of all contracts between holding

companies and their operating companies, issue of securities to the public, regulation of accounts, regulatory measures as to rates, charges and services to consumers, and measures determinable of combination and control of utility company in holding companies.

8. As to the protection of the right of the people, particularly farmers and dairymen, against fraud and hardship by practices of cattle and milk dealers.

That cattle dealers be licensed.

Though the civil law gives a remedy to the farmer by suit for breach of warranty of soundness or qualities of animals sold, it is at expense and annoyance of litigation to which he should not be subjected. As farmers who are practiced upon are generally without means for such recourse, they are practically at the mercy of such dealers. A system of licensing under the Division of Animal Husbandry would be self-sustaining, through receipt of fees, and would be a deterrent to such abuses.

That milk dealers be licensed.

The experience of dairymen, encountering hazards of season and economic conditions exacting utmost courage, ought not to be at jeopardy of continued practices of some of those collecting and distributing the milk produced by them.

9. As to the rights of the people in the arrangement of quarters for the conduct of their public business by State departments; against taxation for expenses of litigation fees in cases concerning their Commonwealth; against added taxation for records of deeds inaccurately titled; against adjudication involving the Commonwealth without its appearance; and for measures further enabling return of fugitives from justice.

That the law relating to the authority of any State department, commission or board to procure quarters or occupy premises outside the State House or other building owned by the Commonwealth and the execution of leases therefor be made uniform.[1]

There is no present authority as to the form of tenancy by the different State departments, commissions or boards, of other than State-owned property; and when leases are authorized the period for such is not prescribed. Uniformity in such authorization is desirable, and, in my opinion, the power to lease will result in a saving to the Commonwealth of rental costs.

That the Commonwealth and the counties be not required to pay entry fees for litigation in any of its courts.[2]

G. L. (Ter. Ed.) c. 262, § 4, relieves payment of fees in the Supreme Judicial and Superior Courts. But entry fees in the district courts are not fees of clerks but of the courts.

That the fee for recording a deed without accurate reference to title be greater than for recording a deed with such title.

For revenue to offset damage to books uselessly searched, and to encourage greater

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[1] For St. 1924, c. 356, now G. L. (Ter. Ed.) c. 8, § 10A, substitute a provision to the effect that any State department, commission or board, after appropriation has been made for the payment of rent for the current year, may procure quarters or occupy premises outside of the State House or other building owned by the Commonwealth, subject to the approval of the Superintendent of Buildings and of the Governor and Council; that the executive or administrative head of any such department, commission or board, in the name and behalf of the Commonwealth, may execute a lease or leases of any such quarters or premises for a term or terms not exceeding five years each; but that no such lease shall be valid until approved by the Superintendent of Buildings and by the Governor and Council.

[2] Amend G. L. (Ter. Ed.) c. 262, § 2, by providing that no entry fee in civil actions in such courts shall be required of the Commonwealth or of a county.

accuracy in conveyancing, enuring to the benefit of persons interested in the real estate, particularly in the accuracy of taxes assessed thereon.

That the rights of the Commonwealth may not be determined in any case arising under the Workmen's Compensation Act until the Attorney General has been given an opportunity to pass upon the points of law involved. [1]

There is no present provision for the consideration of the legality of claims against the Commonwealth before agreements for payment have been made by the departments concerned, whereby any right of defence may be foreclosed.

That a uniform act to secure the attendance of witnesses in criminal cases be enacted enabling extradition of any important witness in a serious case from a place anywhere within one thousand miles of the court in which his testimony is needed, if the State of such place has a similar law.

Common effort is being made by passage in the several States of such uniform act.

10. As to protection of the rights of the people against solicitation for charities which keep no accounts.

That for the protection of the public from appropriation of funds, solicited from them for charitable or political purposes, other than as solicited, — and particularly by unincorporated groups and by persons or groups unidentified with some known and responsible charitable agency, — accounts of all receipts and expenditures be required to be kept, which, on complaint by a donor, may be exhibited to and examined by any court before which such a complaint may be made.

11. As to protection of the right of the people for safeguard in the exercise of suffrage.

That when recounts of State offices are petitioned for in localities, the names of petitioners shall first be certified to be names of voters. [2]

That there be stricter regulations for responsible custody and preservation from destruction of marked ballots.

That there be provision requiring identification, by name and address, of every person taking out and filing a nomination paper, accompanied by name and address of the person who has circulated each paper filed.

That whenever recounts are demanded, every candidate for the office shall be seasonably notified [3] *to enable expression of his desire for the count on his candidacy, and, if*

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[1] Effected by adding a new section, section 69A, in G. L. (Ter. Ed.) c. 152, to the effect that no compensation shall be paid by the Commonwealth under this chapter without the previous written consent of the Attorney General, or an order of the Department or any member thereof, and that no such order of the department or a member thereof shall be entered until the Attorney General has been given an opportunity to appear and be heard in behalf of the Commonwealth.

[2] In State-wide recounts, the statute requires certification that the aggregate thousand names of petitioners are names of voters; not so as to the ten petitioners in towns or city wards (50 in Boston). Insert in G. L. (Ter. Ed.) c. 54, § 135, sixth line, after the word "clerk" the words: — city or town clerk or registrars of voters shall forthwith certify thereon the number of signatures which are names of voters in said ward or town.

[3] Every candidate for an office shall have the right to be present and to have recount of votes cast for him, if a recount is petitioned by or for another candidate without necessity of safeguarding his interests by preparing or filing a petition for recount of such votes. Insert in G. L. (Ter. Ed.) c. 54, § 135, fifty-sixth line, after the word "candidates" the words: — whose names appear on the ballot for the office in question may be, — and in the sixtieth line, after the word "candidate" the words: — whose name appears on the ballot for the office in question.

Every candidate for an office concerning which recount is petitioned for by or for another for such office ought to have three days' notice of the recount. Insert in G. L. (Ter. Ed.) c. 54, § 135, fifty-fifth line, after the word "give" the words: — three days.

so expressed, to enable his representation at such recount, if not in person, by a person lawfully designated by him.[1]

12. As to the protection of the rights of the people toward equality of labor and wealth.

That the rights of labor, asserted after many years of struggle, and measures, attained in pursuance thereof, designed for the recognition of the principle — to be ultimately achieved — of rightful equation of work with wealth, produced by it, for others without their toil, never be retracted.

13. As to the rights of the people to institute new or to modify present social, economic and political systems best exemplifying the American concept of equality in the enjoyment of life, liberty and the pursuit of happiness avowed in the Declaration of Independence and principled in the Constitutions of the United States and of Massachusetts.

That, in a modified way and in practice there has been a redistribution of capital, effected —

By expenditure in Massachusetts in 1932 of about $40,000,000 to about 400,000 persons, dependent upon organized assistance;

By transfer of title to property of about $6,000,000 to municipal governments for taxes and to mortgagees through foreclosures;

By imminency of other transfers to municipalities for non-payment of taxes;

By unemployed home owners who, though unable to pay, by reason of present title to real estate are denied welfare aid;

By those owners of real estate, who — because of loss of rent from unemployed tenants whom they are obliged by municipalities to shelter without any allowance upon tax bills — have not enough revenue to pay taxes; and —

By engagement of banks in the management of businesses and properties through foreclosed mortgages; and —

As the coming of times, better or worse, will be too late to avert pending losses to the unfortunate which the fortunate will salvage; and —

As there can be no permanent order without rearrangements enabling the common people, upon whom the burden falls heaviest in adversity, to share the benefits of prosperity;

The people have the right, as set forth in Article VII of the Declaration of Rights, to governmental measures best promotive of happiness, in the making of which the Constitutions of the United States and of Massachusetts liberally enable adaptations of the capitalistic system, without violation or destruction of its essence and with preservation of freedom of the individual, for the realization of the concept of that body politic, designed by the founders of Massachusetts, — a Common Wealth.

Conclusion.

A Recommendation.

The chief clerk, Louis H. Freese, has rendered faithful, efficient and intelligent service for forty-two years. The present cashier, Harold J. Welch, has served twenty-nine years with unimpeachable integrity, accuracy and fidelity. While successive Attorneys General have consecutively appointed them, their tenure

[1] Every candidate should have right to witness the recount, not at a distance outside the rail, but at each table. Insert in G. L. (Ter. Ed.) c. 54, § 135, sixty-first line, after the word "recount" the words: — at each table where a recount of the ballots affecting such candidate is being held.

and services to the Commonwealth ought not to be at hazard of political fortune. I may not conclude without a recommendation, affording me great pleasure, that removal of these two shall be subject to the provisions for removal of persons under G. L. (Ter. Ed.) c. 31.

An Appreciation.

To the Assistant Attorneys General, to all others associated in the Department, to the district attorneys, and to the members of police, State and municipal, upon whose fidelity, ability and co-operation depends the entire administration of the office of Attorney General, I express gratitude.

Respectfully submitted,

JOSEPH E. WARNER,
Attorney General.

Details of Capital Cases.

1. Disposition of indictments pending Nov. 30, 1931:

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Wilfred F. Dart.

Indicted September, 1931, for the murder of Charles J. Bernard, at Newton, on July 13, 1931; arraigned Sept. 15, 1931, and pleaded not guilty; trial November, 1931; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life; claim of appeal dismissed June 3, 1932, for want of prosecution.

James T. Garrick and Edward Consalvi.

Indicted May, 1931, for the murder of James M. Kiley, at Somerville, on April 9, 1931; arraigned Oct. 22, 1931, and each pleaded not guilty; April 6, 1932, *nolle prosequi* as to both, because of a new indictment.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Clarence H. Ellis.

Indicted in Plymouth County, October, 1931, for the murder of Thomas A. Marsland, at Carver, on Oct. 4, 1931; Feb. 8, 1932, entry of *nolle prosequi* as to so much of said indictment as charged murder in the first degree; arraigned Feb. 11, 1932, and pleaded not guilty; trial June, 1932; verdict guilty of manslaughter; thereupon sentenced to State Prison for not less than seven years nor more than nine years.

Southern District (in charge of District Attorney William C. Crossley).

William Brown.

Indicted in Bristol County, February, 1919, for the murder of Annie Brown; arraigned Nov. 20, 1931, and pleaded not guilty; trial April, 1932; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life.

John Canuel and Luke Vaillancourt, alias.

Indicted in Bristol County, November, 1931, for the murder of Marie Ann Gauthier; arraigned Nov. 20, 1931, and each pleaded not guilty; trial February, 1932; verdict of not guilty as to Vaillancourt; March 10, 1932, Canuel retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Michelina Filipiak.

Indicted August, 1931, for the murder of Wadislaw Filipiak, on Nov. 28, 1931; arraigned Sept. 11, 1931, and pleaded not guilty; trial April, 1932; verdict of not guilty.

Samuel Gallo.

Indicted January, 1929, for the murder of Joseph Fantasia on June 11, 1927; arraigned Jan. 11, 1929, and pleaded not guilty; trial February, 1929; verdict of guilty of murder in the first degree; motion for new trial allowed March 22, 1929; second trial September, 1930; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution; Oct. 17, 1931, motion for new trial allowed; third trial July, 1932; verdict of not guilty.

Western District (in charge of District Attorney Thomas J. Moriarty).

Joseph Pulara.

Indicted in Berkshire County, July, 1929, for the murder of Lucey Pulara, at Pittsfield, on Jan. 25, 1929; arraigned July 14, 1931, and pleaded not guilty; trial January, 1932; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life.

John Siano.

Indicted in Hampden County, December, 1922, for the murder of Nicholas Napoli, at East Longmeadow, on Sept. 18, 1922; arraigned Feb. 18, 1931, and pleaded not guilty; trial May, 1932; verdict of not guilty by order of court.

2. Indictments found and dispositions since Nov. 30, 1931:

Eastern District (Essex County case: in charge of District Attorney Hugh A. Cregg).

Charles W. Carroll.

Indicted September, 1932, for the murder of Sarah F. Hanlon, at Lynn, on Aug. 13, 1932; committed to Bridgewater State Hospital Oct. 11, 1932.

Middle District (Worcester County cases: in charge of District Attorney Edwin G. Norman).

Roy A. Martin.

Indicted August, 1932, for the murder of Pearl Ethier Moran, at Spencer, on Aug. 11, 1932; arraigned Aug. 26, 1932, and pleaded not guilty; trial October, 1932; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life.

Thaddeus Zakrzewski.

Indicted August, 1932, for the murder of Walter Witkowski, at Worcester, on June 28, 1932; arraigned Aug. 26, 1932, and pleaded not guilty; Oct. 6, 1932, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

William Irving Brown.

Indicted January, 1932, for the murder of Richard B. Wilson, at Newton, on Dec. 28, 1931; arraigned Jan. 5, 1932, and pleaded not guilty; trial February, 1932; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life.

Caroline Conley.

Indicted February, 1932, for the murder of an infant child, at Waltham, on Jan. 17, 1932; arraigned Feb. 3, 1932, and pleaded not guilty; Feb. 3, 1932, *nolle prosequi.*

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Joseph E. Bamforth.

Indicted in Plymouth County, February, 1932, for the murder of Irene Bamforth, at Bridgewater, on Nov. 11, 1931. The defendant was an inmate of the Bridgewater State Hospital, where the homicide took place, and is still confined there.

Edwin O. Wood.

Indicted in Norfolk County, September, 1932, for the murder of E. Wright Sargent, at Plainville, on April 17, 1932; arraigned Sept. 9, 1932, and pleaded not guilty; Sept. 26, 1932, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than three years nor more than five years.

Southern District (in charge of District Attorney William C. Crossley).

Sylvester N. Fernandes.

Indicted in Barnstable County, April, 1932, for the murder of John Alves, at Barnstable, on Dec. 23, 1931; arraigned April 8, 1932, and pleaded not guilty; trial April, 1932; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution, which sentence was carried out Aug. 12, 1932.

Manuel G. Fontes.

Indicted in Barnstable County, October, 1932, for the murder of Manuel Fernandes and Julia V. Fontes, at Falmouth, on Oct. 17, 1932; arraigned Oct. 21, 1932, and

pleaded not guilty; Oct. 26, 1932, retracted former plea and pleaded guilty to manslaughter as to each indictment; plea accepted; thereupon sentenced to two and one-half years in the house of correction at Barnstable.

3. Pending indictments and status:

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Chin Kee.

Indicted September, 1932, for the murder of Sam Lee, at Melrose, on Aug. 24, 1932; arraigned Sept. 14, 1932, and pleaded not guilty; trial October, 1932; verdict of guilty of murder in the first degree; motion for new trial and claim of appeal pending.

James T. Garrick, Herman Snyder and John A. Donnellon.

Indicted April, 1932, for the murder of James M. Kiley, at Somerville, on April 9, 1931; Garrick and Snyder arraigned April 6, 1932, and Donnellon on May 2, 1932, and each pleaded not guilty; trial May, 1932, as to Snyder and Donnellon; verdict of guilty of murder in the first degree as to each; claim of appeal of each pending; indictment as to Garrick pending.

Leroy B. Skillings.

Indicted June, 1931, for the murder of Catherine Skillings, at Dracut, on May 22, 1931; arraigned June 10, 1931, and pleaded not guilty; June 12, 1931, committed to Danvers State Hospital for observation.

Northwestern District (in charge of District Attorney Joseph T. Bartlett).

Herman E. Barnes.

Indicted in Franklin County, November, 1932, for the murder of Nellie E. Barnes, at Charlemont, on Sept. 14, 1932; committed to a hospital for the insane for observation.

Florence M. Williamson.

Indicted in Hampshire County, October, 1932, for the murder of William L. Williamson, at Northampton, on Oct. 23, 1932; arraigned Oct. 25, 1932, and pleaded not guilty.

Southern District (in charge of District Attorney William C. Crossley).

Louis C. Blanchette, John H. West and Clifford R. Wordell.

Indicted in Bristol County for the murder of Elizabeth T. Head; arraigned Feb. 8, 1932, and each pleaded not guilty; trial March, 1932, as to West and Wordell; verdict of guilty of murder in the second degree as to both; thereupon sentenced to State Prison for life; indictment as to Blanchette pending.

Roland G. Bousquet.

Indicted in Bristol County, February, 1932, for the murder of Edward E. Gobin, at Attleboro, on Jan. 20, 1932; arraigned Feb. 8, 1932, and pleaded not guilty; trial March, 1932; verdict of guilty of murder in the first degree; April 8, 1932, motion for new trial denied; claim of appeal pending.

Frank Dombzalski and Louis Gwizdoski.

Indicted in Bristol County, November, 1932, for the murder of John Roselowitz; not yet arraigned.

Arthur B. Manchester.

Indicted in Bristol County, November, 1932, for the murder of Arthur Pelletier and Marilla Pelletier; not yet arraigned.

Western District (in charge of District Attorney Thomas F. Moriarty).

Mary Walence.

Indicted in Hampden County, September, 1932, for the murder of Paul Walence, at Holyoke, on July 11, 1932; arraigned Oct. 6, 1932, and pleaded not guilty.

OPINIONS.

Retirement Systems — County — Employees.

Persons employed in the county hospital of Worcester County are not county employees, within the meaning of G. L. c. 32, § 20.

Persons employed in county agricultural schools are county employees, under certain circumstances, within the meaning of G. L. c. 32, § 20.

Dec. 16, 1931.

Hon. Merton L. Brown, *Commissioner of Insurance.*

Dear Sir: — You have requested my opinion upon the following question of law in connection with the duties imposed upon you by G. L. c. 32, §§ 34 and 36, as amended, with relation to county retirement systems: —

"Are persons employed in the service of the county hospital of Worcester County, created under G. L. c. 111, §§ 78 and 79, employees of said county, under G. L. c. 32, § 20?"

I answer your question in the negative.

G. L. c. 32, § 20, as amended, defines the word "employees," as used in said chapter 32 with relation to county retirement systems, as follows: —

"'Employees', any persons permanently and regularly employed in the direct service of the county whose sole or principal employment is in such service, . . ."

The statute specifically providing for the tuberculosis hospital of Worcester County, St. 1928, c. 368, which was duly accepted, in its title and first section reads: —

"*An Act authorizing the County of Worcester to raise and expend Money for the Purpose of providing a Tuberculosis Hospital for the Worcester County Tuberculosis Hospital District.*

. . . .

Section 1. For the purpose of providing a tuberculosis hospital for the Worcester county tuberculosis hospital district under the provisions of sections seventy-eight to ninety, inclusive, of chapter one hundred and eleven of the General Laws, the county commissioners of said county may raise and expend a sum not exceeding six hundred thousand dollars subject to the provisions of said sections."

Moreover, you state in your letter that the hospital to which you refer is a "tuberculosis hospital" "maintained by a district."

In *Peck's Case*, 250 Mass. 261, the Supreme Judicial Court has discussed at length the nature of hospitals provided under the provisions of G. L. c. 111, §§ 78–90, inclusive, like the one under consideration, and has held that a laborer employed in such a hospital was not the employee of the county in which it was maintained but of the county commissioners acting as trustees for a tuberculosis hospital district, so that liability under the Workmen's Compensation Act for an injury to such employee did not fall upon such county. In that opinion the court calls attention to the fact that in relation to the employees of a similar hospital, known as the Norfolk County Tuberculosis Hospital, it was assumed that an act of the Legislature was necessary to give employees at similar institutions the same rights in the Norfolk County Retirement Association that employees of the county had under G. L. c. 32.

In an opinion by one of my predecessors in office (VIII Op. Atty. Gen. 407), with which I concur, it was determined that the treasurer of such a hospital as is the subject matter of your inquiry was not an employee of the county so that his salary as county treasurer included compensation for services rendered as treasurer of such hospital.

The opinion of another of my predecessors in office given to the then Insurance Commissioner, January 19, 1922 (VI Op. Atty. Gen. 379), which appears to hold that employees of the then existing Norfolk County Tuberculosis Hospital were members of the county retirement association, is not of weight in determining the question now before me, because it was assumed in that opinion, without a determination upon the point, that the hospital therein referred to was in fact a county institution.

I am therefore of the opinion that persons employed in the service "of the county hospital of Worcester County," referred to in your question, which hospital is, as you state in your letter, a "tuberculosis hospital" "maintained by a district," and described in the title of St. 1928, c. 368, establishing the institution, as a "tuberculosis hospital for the Worcester County Tuberculosis Hospital District," are not employees of the said county, within the meaning of the word "employees" as defined in G. L. c. 32, § 20, as amended.

You have also asked me a second question: —

"Are persons employed by the board of trustees for aid to agriculture, created under G. L. c. 128, § 40, employees of the county, under G. L. c. 32, § 20?"

G. L. c. 128, § 40, as amended by St. 1931, c. 301, § 22, is as follows: —

"In each county, except Suffolk and except counties maintaining vocational agricultural schools, there shall be an unpaid board of nine trustees to be known as trustees for county aid to agriculture. The county commissioners of each such county shall annually appoint three trustees, qualified as hereinafter provided, to serve for three years from April first of the year of appointment, and shall fill any vacancy in said board for the unexpired term. All of said trustees shall be residents of the county where they are appointed, one shall always be a county commissioner of said county, and four so far as is possible shall be taken from the directors, chosen as provided in the following section, of such cities and towns as have appropriated funds toward carrying out sections forty to forty-five, inclusive. The accounts of the trustees shall be audited by the director of accounts in the manner in which other county accounts are audited under general law. The trustees shall annually submit to the county commissioners a report for the previous year with a statement of receipts and expenditures in such form and at such time as is required by them, and they shall cause the said report to be printed as a part of their regular annual report."

The other sections of said chapter 128 applicable to the said trustees read: —

"Section 41. Choice of the directors mentioned in the preceding section shall be made in such towns at the annual town meeting at which the appropriation is made, or at the next succeeding annual meeting when the appropriation is made at a special meeting, and in such cities, by the mayor, not later than fifteen days following the vote authorizing the appropriation. The directors shall serve for such terms as the mayor in cities and the voters in towns shall determine.

Section 42. The trustees may receive on behalf of the county and apply to the purposes of sections forty to forty-five, inclusive, money appropriated therefor by the general court for any county or by any town, or by the federal government, and may control the expenditure thereof either solely or in conjunction with representatives or agents of the commonwealth or of the United States, or of any department, commission, board or institution created under the statutues of this commonwealth or under an act of congress. The trustees may enter into agreements, arrangements or undertakings with any such departments, commissions, boards and institutions relative to extension work with adults and with boys and girls in agriculture, home making and country life.

Section 43. The trustees shall maintain one or more agents or instructors in agriculture, homemaking and country life, who shall meet the residents of the county individually and in groups for the purpose of teaching and demonstrating better practice in agriculture and homemaking, the benefits to be derived from co-operative efforts, better methods of marketing farm products and the organization of communities to build up country life.

Section 44 (as amended). The trustees shall annually prepare and submit to the county commissioners, not later than the first Wednesday in December, a budget containing detailed estimates of all sums required by them for carrying out sections forty to forty-five, inclusive, during the ensuing year. The county commissioners shall include in their annual estimate of county expenses to be appropriated by the general court and raised by the annual county tax levy at least one half of such sums as they deem necessary to carry out said purposes."

I answer this question in the affirmative.

The foregoing provisions of the statute indicate a legislative intent to create a system of agricultural aid which shall be an integral part of county administration. Appropriations are to be for the benefit of the whole county, and though cities and towns may contribute to the expenses and thereby secure representation on the board of trustees, yet the work of the board is to be carried on for the county as a whole, the county commissioners are to appoint the members, one of the county commissioners is to be a member of the board, the accounts of the trustees are to be audited in the manner in which "other county accounts are audited," and the trustees are to report annually to the county commissioners and to submit to them their budget. At least one half of the sum deemed necessary to carry out the purposes for which the board of trustees was created is to be raised by the annual county tax levy.

Since such part of the burden of maintenance of agricultural schools and other aids to agriculture in a county as is to be paid by the county, under the terms of the instant statute, is to be borne by the county as a whole, it would seem as a matter of law that persons employed by the said board are in the direct service of the county, within the meaning of G. L. c. 32, § 20, as amended, and, if their sole or principal employment is in such service, they are, in my opinion, to be included in the county retirement system.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Insurance — Broker — Exemption from Fee — Navy Service.

Service by a sailor of the United States Navy in the occupation of Vera Cruz in 1914 does not constitute service in the navy "in time of war or insurrection."

Dec. 22, 1931.

Hon. Merton L. Brown, *Commissioner of Insurance.*

Dear Sir: — You have asked my opinion as to whether a certain applicant for an insurance broker's license under G. L. c. 175, § 166, as amended, is exempt from paying the fee prescribed for such license by said section 166, on the ground that the applicant in question was a member of the naval forces of the United States who participated in the occupation of Vera Cruz, Mexico, in 1914.

G. L. c. 175, § 167A, as amended, enacted in its original form by St. 1924, c. 450, § 12, reads as follows: —

"No fee for a license under section one hundred and sixty-six or one hundred and sixty-seven shall be required of any soldier, sailor or marine resident in this commonwealth who has served in the army or navy of the United States in time of war or insurrection and received an honorable discharge therefrom or release from active duty therein, if he presents to the commissioner satisfactory evidence of his identity."

Before the amendment of said section 166 in 1924 the foregoing exemption was contained, in substance, in said section 166 itself, as applicable to those applying for licenses under the provisions of that section.

The meaning of the phrase "in time of war," as so used in relation to exemption from the payment of the fee required by section 166, was considered at length in an opinion of one of my predecessors in office given to the then Commissioner of Insurance on May 22, 1923 (VII Op. Atty. Gen. 172), with which opinion I concur. It was held therein that service by an applicant as a member of the Massachusetts National Guard in the military service of the United States during the punitive expedition into Mexico in 1916 did not constitute service in the army or navy of the United States "in time of war," within the meaning of the words "in time of war" as used in said section 166 before amendment, because the United States was not at that time, as a matter of law, engaged in war with Mexico.

The principles upon which such opinion was based apply with equal force to the instant matter.

The power to declare war rests with Congress, under U. S. Const., art. I, § 8.

A consideration of the address to the Senate and House of Representatives made by President Wilson on April 20, 1914, and of the debates in both bodies that followed thereafter (Cong. Rec., vol. 51, pt. 7, pp. 6909–7015), shows conclusively that the President did not ask Congress to declare war upon Mexico, with the *de facto* government of which country we had not for some time been in ordinary diplomatic relations, but that he merely asked for an expression of approval of the means which he, as the commander in chief of the army and navy, had adopted and intended to adopt to seek amends for certain indignities which had been committed against the United States by some of the various factions which were then engaged in a struggle for ascendancy in Mexico.

The joint resolution passed by Congress on April 22, 1914, after the receipt of said address, specifically disclaims an intention "to make war upon Mexico." Such resolution, approved April 22, 1914, reads as follows:

"(*No. 10.*) *Joint Resolution justifying the Employment by the President of the Armed Forces of the United States.*

In view of the facts presented by the President of the United States in his address delivered to the Congress in joint session on the twentieth day of April, nineteen hundred and fourteen, with regard to certain affronts and indignities committed against the United States in Mexico: Be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States.

Be it further resolved, That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico."

No further declaration by Congress was made in the premises.

The naval occupation of Vera Cruz appears to have begun on April 21, 1914, by virtue of orders issued by the President, and lasted until April 30, 1914, when the occupation of Vera Cruz was transferred to the army, which continued it until the final evacuation on November 23, 1914 (New International Year Book, 1914).

It is evident that neither before nor during the occupation of Vera Cruz in 1914 did the Congress of the United States declare war upon Mexico.

I am of the opinion that participation by a sailor of the navy of the United States in the occupation of Vera Cruz was not service "in time of war or insurrection," as those words are used in said G. L. c. 175, § 167A, as amended, so as to entitle an applicant who formerly served as such a sailor to the exemption provided for by said G. L. c. 175, § 167A, as amended.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Policy — Conversion into New Policies.

Under G. L. c. 175, § 139, a life insurance company may convert an insurance policy into more than one new policy, at the request of the assured.

JAN. 9, 1932.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have asked my opinion upon the following question of law: —

"Does the provision of G. L. c. 175, § 139, that a life company may exchange, alter or convert any policy of life or endowment insurance for or into 'any policy' authorize such a company, in view of G. L. c. 4, § 6, cl. Fourth, to exchange, alter or convert any such policy for or into more than one policy?"

G. L. c. 175, § 139, as amended, reads as follows: —

"Any life company may, at the request of the policy holder, exchange, alter or convert any policy of life or endowment insurance issued by it for or into any policy conforming (*a*) with the laws in force when said first mentioned policy was issued, if the rewritten policy bear the date thereof, or (*b*) with the laws in force when said exchange, alteration or conversion is effected, if the rewritten policy bear a then current date;

provided, however, that if such rewritten policy bears the date of said original policy, the amount of insurance under said rewritten policy shall not exceed the amount of insurance under said original policy or the amount of insurance which the premium paid for the original policy would have purchased if the rewritten policy had been originally applied for, whichever is the greater. Nothing in section one hundred and twenty shall be construed to prohibit the exchange, alteration or conversion of policies of life or endowment insurance under this section, and sections one hundred and twenty-three and one hundred and thirty shall not apply to the issue of any policy rewritten under authority of this section."

G. L. c. 4, § 6, cl. Fourth, provides: —

"In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

. . . .

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter."

An examination of said section 139, as amended, and earlier enactments upon the same subject, as well as a consideration of general principles of the law of insurance, convinces me that there are no sound considerations which would make the application of the rule for statutory construction with regard to words "importing the singular number," set forth in said G. L. c. 4, § 6, cl. Fourth, when applied to the word "policy" wherever used in said G. L. c. 175, § 139, as amended, to denote a contract of insurance which replaces an earlier contract, either "inconsistent with the manifest intent of the law-making body or repugnant to the context of" G. L. c. 175, as amended, either as regards said section 139, as amended, or the chapter as a whole.

Accordingly, I am of the opinion that the words "any policy," as used in said section 139, as amended, with relation to a policy for which another is to be exchanged or converted, may extend and be applied to more than one policy, and I answer your question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Auditor of the Commonwealth — Duties — Prison-made Goods.

The Auditor of the Commonwealth is not charged with the duty of determining whether prices at which prison-made goods are sold are in conformity with the wholesale prices of similar merchandise.

JAN. 25, 1932.

Hon. FRANCIS X. HURLEY, *Auditor of the Commonwealth.*

DEAR SIR: — In connection with the performance of your duty to audit the accounts and records of the State Prison, as to which you state that "it is necessary to ascertain the correctness of the computations purporting to show the distribution of the excess profits to the prisoners in accordance with the provisions of St. 1928, c. 387," and that "the size of the distribution depends on the amount of the 'excess profits,' so called, and this in turn hinges to a great extent on the selling prices set on the

merchandise, as the majority of the customers are provided by law," you have asked my opinion in the following language: —

"If there is any responsibility devolving upon the Auditor of the Commonwealth to determine whether or not the prices at which goods are offered for sale are in conformity with the wholesale prices of similar merchandise; and whether or not the Auditor is entitled to rely upon the figures set forth in the sales catalogue issued by the Department of Correction."

G. L. c. 127, § 58, provides as follows: —

"The price of all articles and materials supplied by the prisons to the commonwealth, counties, cities and towns shall conform as nearly as may be to the wholesale market rates for similar goods manufactured outside of the prisons. Any difference of opinion in regard to price may be submitted to arbitration in the manner provided in section fifty-five."

G. L. c. 127, § 55, reads as follows: —

"Annually in September the commissioner shall issue to the officers in charge of the offices, departments and institutions named in section fifty-three a descriptive list of the styles, designs and qualities of said articles and materials. Any difference between the prison officials and the offices, departments or institutions in regard to styles, designs and qualities shall be submitted to arbitrators, whose decision shall be final. One of said arbitrators shall be named on behalf of the prison by the commissioner, one by the principal officer of the other office, department or institution concerned, and one by agreement of the other two. The arbitrators shall be chosen from the official service, and shall receive no compensation for performance of any duty under this section; but their actual and necessary expenses shall be paid by the prison or office, department or institution against which their award is given."

G. L. c. 127, § 67, reads as follows: —

"Goods manufactured in any of the institutions named in section fifty-one shall, with the approval of the commissioner, be sold by the warden, superintendent, master or keeper thereof at not less than the wholesale market price prevailing at the time of sale for goods of the same description and quality. The proceeds of such sales shall be paid by the purchasers to the respective institutions from which the goods are delivered."

The duty of fixing the prices of prison-made articles so that they shall conform as nearly as may be to the wholesale market rates for similar goods manufactured outside the prisons appears to rest upon certain designated prison officials, subject to the approval of the Commissioner of Correction, and further subject to correction by arbitrators who may be established under said sections 55 and 58, "whose decision shall be final." Nowhere in the statutes does there appear to have been authority vested in the Auditor to review the correctness of prices so fixed for the sale of prison-made articles.

As I stated in an opinion to you, dated June 10, 1931 (Attorney General's Report, 1931, p. 94), —

"Inasmuch as the duties of the Auditor have been left undefined and unenumerated by the framers of the constitutional amendments . . ., he is not required to perform any duties which have not been laid upon him by the Legislature."

G. L. c. 11, § 12, as amended by St. 1923, c. 362, § 16, quoted at length in my said opinion of June 10, 1931, in effect gives to the Auditor only the authority to make audits, and such authority, as I stated in said opinion, "does not import power to make a complete and independent investigation of conditions which might be disclosed in the course of an examination of accounts."

The foregoing considerations apply to the instant matter, and I must advise you that there is no responsibility devolving upon the Auditor to determine whether or not the prices at which prison-made goods are offered for sale are in conformity with the wholesale prices of similar merchandise; and that if "the sales catalogue issued by the Department of Correction," to which you refer, purports to set up such prices in the manner indicated by G. L. c. 127, §§ 55, 58 and 67, you are entitled to rely upon it for the purpose of auditing prison accounts, including those which set forth the distribution of excess profits to prisoners.

Yours very truly,

Joseph E. Warner, *Attorney General.*

Auditor of the Commonwealth — Duties — Teachers' Retirement Board.

The Auditor of the Commonwealth has the duty of auditing the accounts of the Teachers' Retirement Board.

Jan. 27, 1932.

Hon. Francis X. Hurley, *Auditor of the Commonwealth.*

Dear Sir: — You have asked me the following question with relation to auditing accounts of the Teachers' Retirement Board, in view of the enactment of St. 1930, c. 238: —

"If, as a result of this legislation, the Auditor is required to audit the accounts of the Teachers' Retirement Board, as indicated by St. 1923, c. 362, § 16, or if St. 1930, c. 238, relieves him of the necessity of making an audit of the accounts of this Board."

The duties of the Auditor, so far as applicable to the instant matter, are set forth in G. L. c. 11, § 12, as amended by St. 1923, c. 362, § 16, as follows: —

"The department of the state auditor shall annually make a careful audit of the accounts of all departments, offices, commissions, institutions 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 and said department may require the production of books, documents and vouchers, except tax returns, relating to any matter within the scope of such audit. The accounts of the last named department shall be subject at any time to such examination as the governor and council or the general court may order. Said department shall comply with any written regulations, consistent with law, relative to its duties made by the governor and council. This section shall not apply to the accounts of state officers which the director of accounts of the department of corporations and taxation is required by law to examine. The department of the state auditor shall keep no books or records except records of audits made by it, and its annual report shall relate only to such audits."

The Teachers' Retirement Board, established by G. L. c. 15, § 16, to manage the teachers' retirement system set forth in G. L. c. 32, as amended, falls within the meaning of the words "offices . . . of the commonwealth," as used in said G. L. c. 11, § 12, as amended, and is therefore subject to audit by the Auditor unless, as you suggest in your letter, the effect of the amendment of G. L. c. 32, § 34, by St. 1930, c. 238, is such as to render it no longer subject to an audit.

The amendment of G. L. c. 32, § 34, by St. 1930, c. 238, added "the retirement system for teachers" to the other retirement systems which had previously been mentioned in said G. L. c. 32, § 34, as subject to control and oversight by the Commissioner of Insurance.

Said G. L. c. 32, § 34, as so amended, reads: —

"The commissioner of insurance shall prescribe for the state retirement system, the retirement system for teachers and for each county, city and town retirement system one or more mortality tables, and fix the rates of interest to be used in connection therewith, and may later modify such tables or prescribe other tables to represent more accurately the expense of such retirement systems, or may change the rates of interest and determine the application of such changes. He shall also prescribe and supervise methods of bookkeeping of their retirement associations.

The commissioner or his agent shall at least once every year thoroughly inspect and examine the affairs of each such retirement association to ascertain its financial condition, its ability to fulfil its obligations, whether all the parties in interest have complied with the laws applicable thereto, and whether the transactions of each board of retirement have been in accordance with the rights and equities of those in interest. Each such retirement system shall be credited, in the account of its financial condition, with its investments having fixed maturities upon which the interest is not in default at amortized values, and its other investments at a reasonable valuation.

For the purposes aforesaid, the commissioner or his agent shall have access to all the securities, books and papers of such retirement systems, and may summon and administer oath to and examine any person relative to the financial affairs, transactions and condition of the retirement system. The commissioner shall preserve in a permanent form a full record of the proceedings at such examination and the results thereof. Upon the completion of such examination, verification and valuation, the commissioner shall make a report in writing of his findings to the board, and shall send a copy thereof to the governor and council, the county commissioners, the city council or the selectmen, as the case may be."

The provisions of said section 34, as amended, do not specifically deprive the Auditor of the authority which he has under G. L. c. 11, § 12, as amended, "to make a careful audit of the accounts" of said Board, nor do such provisions deprive him of such authority by implication.

The authority given to the Commissioner of Insurance by said section 34, as amended, over the activities of the teachers' retirement system, though broad in scope, does not require him to make an audit of the accounts of the said Board, as the word "audit" is commonly understood. The Commissioner's duties of inspection and examination required by said section 34 might be carried out, within the meaning of said section 34, without a careful audit of the accounts of the said Board, as the word "audit" is ordinarily understood. St. 1910, c. 619, § 8, originally provided, in a form substantially the same as now employed in said sec-

tion 34, for the supervision and inspection of the financial condition of various retirement systems, and this enactment was continued in force by subsequent statutes. It would seem that if the Legislature had intended to exclude the accounts of the boards managing the retirement systems mentioned in G. L. c. 32, § 34, to which the teachers' retirement system has since been added, from being subject to audit by the Auditor of the Commonwealth, it would have so stated in the amendment of G. L. c. 11, § 12, by St. 1923, c. 362, § 16, in which it restated the duties of the Auditor, and specifically excluded certain departmental accounts from his power to audit.

I am of the opinion that the Auditor is not relieved by the 1930 amendment of G. L. c. 32, § 34, from the duty of making an audit of the accounts of the Teachers' Retirement Board.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Sealers of Weights and Measures — Tenure.

A sealer of weights and measures appointed in a town having a population of over 10,000 retains his status as under civil service even if the population falls below such figure after his appointment but during his incumbency.

JAN. 28, 1932.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

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

"Under G. L. c. 31, § 4, all sealers of weights and measures in towns of over 10,000 inhabitants are included within the classified civil service by the rules of the Civil Service Commissioners. Therefore, in the town of Palmer, which had a population of over 10,000 by the census of 1925, the sealer was classified under civil service. By the United States census of 1930 Palmer dropped to 9,577 inhabitants, and is, accordingly, now a town of under 10,000 inhabitants. The question arises: Does the sealer in a town having a population of over 10,000 lose his civil service rating when the population of the town drops to less than 10,000?"

G. L. c. 31, § 4, as applicable to sealers of weights and measures, reads, in part, as follows: —

"The following, among others, shall be included within the classified civil service by rules of the board:

. . . .

All sealers and deputy sealers of weights and measures in towns of over ten thousand inhabitants and in cities whether such officers are heads of principal departments or not, and also the inspectors of standards in the service of the commonwealth;

. . . ."

It was not, in my opinion, the intent of the Legislature, as expressed in said section 4 and as read in connection with the whole of said chapter 31, relative to civil service, to provide that an incumbent who was appointed to the office of sealer of weights and measures after the enactment of statutes which granted to him the protection of the civil service laws, in a town which had a population of over 10,000 at the time of such appointment, should lose such protection while he held such office, irrespective of any change in the population.

If, however, a vacancy occurs in the office of sealer of weights and measures of a town, and it then appears from the latest census that the population of such town has fallen below the 10,000 which it previously had, the position is not then to be treated as governed by the civil service laws, and the appointment of a new incumbent and his tenure of office will not be subject to the provisions of such laws, or the rules and regulations made thereunder.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Department of Labor and Industries — Minors — Dangerous Trades.

Authority of the Department of Labor and Industries to determine that trades are sufficiently dangerous to minors under sixteen or eighteen to justify their exclusion therefrom, defined.

JAN. 28, 1932.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You have asked my opinion upon several questions relative to the authority of your department to determine that trades, processes of manufacture and occupations are sufficiently dangerous to minors under sixteen or eighteen to justify their exclusion from such trades, processes and occupations.

There are certain general considerations based upon the statute law which, if observed, will indicate the answers to your various questions without the necessity of my replying to each of them individually.

Your department's authority to make the determinations in question is derived from, and is limited in its scope by, the provisions of G. L. c. 149, § 63, which reads: —

"The department may, after a hearing duly held, determine whether or not *any particular trade*, process of manufacture or occupation, in which the employment of minors under the age of sixteen or eighteen is *not forbidden by law*, or any particular method of carrying on *such trade*, process of manufacture or occupation, is sufficiently dangerous or is sufficiently injurious to the health or morals of minors under sixteen or eighteen to justify their exclusion therefrom. No minor under sixteen or eighteen shall be employed or permitted to work in *any trade*, process or occupation *thus determined to be dangerous* or injurious to such minors, respectively."

In certain particular trades, processes of manufacture and occupations the employment of minors under sixteen has been absolutely prohibited by law, and the prohibition appears to extend to every method of carrying on such trades, processes and occupations. These are set forth in G. L. c. 149, § 61, lines 1–24. Since the Legislature has so completely dealt with said trades, processes and occupations, your department has no authority to make determinations with regard to them nor to any particular method of carrying them on, either as to minors under sixteen or eighteen.

As to the employment of minors under sixteen in connection with freight elevators, the Legislature, in G. L. c. 149, § 61, lines 24–27, has not attempted to make an absolute prohibition with respect to the employment of minors under sixteen, extending to every method of working upon freight elevators, but has confined itself to prohibiting the employ-

ment of such minors in three specific forms of work only, connected with freight elevators. The language used is as follows: —

"No such minor shall be employed or permitted *to operate, clean or repair a freight elevator.*"

Since the Legislature does not purport in this enactment to deal with every method of working on freight elevators, your department has authority to make determinations with relation to other specific methods of work or employment on freight elevators, if there be any such, for minors under sixteen, but its determinations in this respect must be directed to particular, designated methods of work or employment not mentioned in the statute.

In like manner the authority of your department to make similar determinations with regard to the trades, processes or occupations in which minors under eighteen are employed, or the methods of carrying on such trades, processes or occupations, is limited to those trades, processes or occupations which in their entirety have not already been declared by the Legislature to be forbidden to minors under either sixteen or eighteen for employment. These are enumerated in G. L. c. 149, § 62.

If a trade, process or occupation in its entirety has been forbidden by the Legislature for the employment of minors of either of the two classes mentioned in said sections 61 and 62, namely, (1) minors under sixteen, or (2) minors under eighteen, such employment has been "forbidden by law," within the meaning of those words as used in said section 63, and your department has no authority to make determinations with regard thereto. If a trade, process or occupation has been forbidden by the terms of said section 61 for the employment of a minor under sixteen, that indicates a legislative intent that a minor above the age of sixteen is permitted to be employed therein — an intention which may not be destroyed by departmental action.

No authority is given to your department to make determinations with regard to employments dangerous to minors except in so far as such employment relates to two definite classes of minors, that is to say, (1) those under sixteen, and (2) those under eighteen. The department has no authority to carve out of either one of these classes, created by the Legislature, any new class established on an age basis different from those age bases, sixteen and eighteen, specified in the statute, for particular determination as to employment hazards.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Eminent Domain — Public Utility Company — Mill Act — Commonwealth.

A public utility company has no right to take nor to flood land leased to the Commonwealth and on which the Commonwealth has an option to purchase.

FEB. 2, 1932.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You request my opinion "as to whether or not a public utility company would have the right to take by eminent domain a tract of land which had been leased to the Commonwealth with the option of ultimate purchase."

It is a settled principle of law in this Commonwealth that land appropriated to one public use cannot be diverted to another public use

inconsistent therewith without plain legislation to that end. *Higginson* v. *Treasurer and School House Commissioners of Boston*, 212 Mass. 583; *Byfield* v. *Newton*, 247 Mass. 46.

Your letter, however, sets forth, as to the possibilities which you have in mind, that the power company may erect a dam on its own land and thereby flood land farther up the stream, which is land leased to the Commonwealth and on which the Commonwealth has an option to purchase. It has been decided in this Commonwealth that this right to erect a dam and flood land farther up the stream is in effect by virtue of the Mill Act (G. L. c. 253), and not by virtue of a power under eminent domain. *Otis Co.* v. *Ludlow Mfg. Co.*, 186 Mass. 89; *S. C.*, 201 U. S. 140; *Duncan* v. *New England Power Co.*, 225 Mass. 155; *Dickinson* v. *New England Power Co.*, 257 Mass. 108. The Mill Act, in much the same form as it is now, has long been the law in this Commonwealth. Its history and development are traced in *Otis Co.* v. *Ludlow Mfg. Co.*, 201 U. S. 140. In the early industrial development of the Commonwealth the flooding caused by the erection of dams sometimes interfered with the use of the highways. In *Commonwealth* v. *Stevens*, 10 Pick. 247, the court, when discussing public rights that were interfered with by flooding, said: —

"The mischief intended to be guarded against was the expense and vexation arising from a multitude of actions for damages to be brought by private owners of land. All the detailed provisions of the acts, go to show that such was the intent of the framers; and there being no provision made for an indemnity to the public, it seems manifest, that no encroachment on the public rights was intended to be sanctioned."

See also *Inhabitants of Andover* v. *Sutton*, 12 Met. 182, 186.

Because of this decision there were later enacted provisions which now appear as sections 33 to 38 of G. L. c. 253, by which a dam may be erected provided the highway is raised. These provisions are designed to provide for the damage which would be caused to the public by interference with the use of the highway from flooding. *Cheshire* v. *Adams & Cheshire Reservoir Co.*, 119 Mass. 356.

While I can find no decision directly on this question in this Commonwealth, it seems to me, from the reasoning in the cases, that there is no right under the law to flood lands belonging to the public and which are devoted to public use. *Commonwealth* v. *Stevens*, 10 Pick. 247; *Andover* v. *Sutton*, 12 Met. 182; *Howes* v. *Grush*, 131 Mass. 207; *Proprietors of Mills* v. *Commonwealth*, 164 Mass. 227; *Boston & Maine R.R.* v. *Hunt*, 210 Mass. 128.

It is my opinion, therefore, that a public utility company would not have the right to flood land leased to the Commonwealth, and on which the Commonwealth has an option to purchase, without first securing permission by legislative act to flood such land.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Retirement — Employees of the Commonwealth — Superintendent of the Massachusetts Nautical School.

The superintendent of the Massachusetts Nautical School is required to retire at the age of seventy.

FEB. 17, 1932.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have sent me the following communication: —

"Captain Armistead Rust, USN, Retired, commanding the Schoolship USS 'Nantucket' and superintendent of the Massachusetts Nautical School, will be seventy years of age on July 12, 1932. He receives a salary from the State of Massachusetts of $3,500 a year, and has been in the employ of the State and in charge of the schoolship since July, 1919. His services have been uniformly and thoroughly satisfactory. He is a captain on the retired list of the United States Navy and served through the Spanish-American War and the World War. He has not contributed to, and has never been connected with, the Retirement Association of the State. The physical and mental condition of Captain Rust is excellent.

I would respectfully request an opinion as to whether Captain Rust can be continued in employment by the State after July 12, 1932, on which date the schoolship will be abroad on its summer cruise."

The present superintendent of the Massachusetts Nautical School, appointed under the provisions of G. L. c. 74, § 49, is, in my opinion, one of the employees of the Commonwealth, as the word "employees" is defined in G. L. c. 32, § 1, as amended.

It has been suggested that the present incumbent of the office is not one of such employees because he is, as stated in your communication, "a captain on the retired list of the United States Navy." The fact that he is a captain on such retired list in no way affects his status as an employee of the Commonwealth. If he were an officer in the active service of the United States, assigned for duty under the direction of officials of the Commonwealth, his status would not be that of an employee; but as to a retired officer the case is otherwise.

Officers upon the retired list of the navy, while subject to being recalled into active service of the United States in time of war or national emergency, are not subject to such recall in time of peace, without their consent. U. S. Comp. Stat., Title XV, § 2653C. Unless actually brought back into the active service of the United States, such retired officers are as much in civil life as any other person, as far as regards their entering the service of the Commonwealth. If such retired officers accept a position in the service of the State, they are subject to all the provisions of law governing such position.

I am informed that the principal duty of said superintendent consists in the command of the USS "Nantucket." This vessel is a naval craft, and is furnished to the Commonwealth, as I am advised, by the Federal government by virtue of an act of Congress (36 Stat. at L., pt. 1, 1353; March 4, 1911), for use in connection with said Nautical School. By the terms of said act the President of the United States may detail officers on the active list of the navy to serve as superintendent or instructors in such schools, but, although such assignments have at times in the past been made, no such officers are now so assigned, as I am advised. It is also true that when the said superintendent acts as commander of the said vessel he owes certain duties, with relation to the same and to its equipment, to the Federal government, as the owner of such vessel; and

in connection with such duties may at certain times be subject to orders of the Federal authorities. Nevertheless, these considerations do not alter the fact that as such superintendent he is in the service of the Commonwealth and is paid by it alone.

It appears from your communication that the present incumbent of the superintendency will be seventy years of age on July 12, 1932, and that he was over fifty-five when he entered the service of the Commonwealth.

G. L. c. 32, § 2, as amended, establishing the State Retirement Association, provides, in that portion applicable to the said incumbent, as follows: —

"Except as provided in paragraph (3) all other persons who enter the service of the commonwealth hereafter shall, upon completing ninety days of service, become thereby members of the association, *except that such persons over fifty-five* shall not be allowed to become members of the association, *and no such person shall remain in the service of the commonwealth after reaching the age of seventy*."

There are no provisions in paragraph (3), referred to in said portion of section 2, which are applicable to the said incumbent.

I am informed that in 1918 the Nautical School had as a superintendent a person over the age of seventy. The propriety of that situation was not apparently questioned by any one at that time, but the occurrence establishes no proper precedent and cannot have the effect of altering the effect of the law applicable to the instant matter.

It follows that the said incumbent, being a person who was over fifty-five upon entering the service of the Commonwealth, although not eligible to membership in the Retirement Association, must, nevertheless, like all the persons referred to in the quoted sentence of said section 2, to which class of persons the said incumbent belongs, leave the service of the Commonwealth "after reaching the age of seventy."

Very truly yours,

Joseph E. Warner, *Attorney General.*

Civil Service — Assistant Deputy at the Massachusetts Reformatory — Appointment.

The appointment of an assistant deputy at the Massachusetts Reformatory is subject to the applicable provisions of the civil service law.

Feb. 19, 1932.

Dr. A. W. Stearns, *Commissioner of Correction.*

Dear Sir: — You have sent me the following communication: —

"I beg to refer you to G. L. c. 125, § 6, and respectfully request an opinion as to whether or not the superintendent of the Massachusetts Reformatory has authority to make an appointment to the position of assistant deputy."

I answer you to the effect that, in my opinion, the superintendent of the Massachusetts Reformatory has the right to designate for temporary service as "assistant deputy" one of the persons who are officers of that institution, as the word "officers" is employed in G. L. c. 125, subject, however, to such provisions of the civil service law (G. L. c. 31), and rules made in connection therewith, as are applicable.

G. L. c. 125, § 6, as amended by St. 1931, c. 301, § 94, reads: —

"The warden of the state prison or the superintendent of the Massachusetts reformatory or reformatory for women may designate for tempo-

rary service one of the officers of the institution as assistant deputy. He shall perform duties assigned by the warden or superintendent, and in the absence of the deputy warden or deputy superintendent shall perform the duties of that officer."

G. L. c. 125, § 4, reads: —

"All subordinate officers and employees in the several institutions shall be appointed by the warden or superintendent thereof and hold office during the pleasure of said warden or superintendent. Appointments in the prison camp and hospital and state farm shall be subject to the approval of the commissioner."

It is to be specially noted in connection with G. L. c. 125, § 4, that G. L. c. 31, § 4, as amended, the civil service law, provides: —

"The following, among others, shall be included within the classified civil service by rules of the board:

. . . .

Instructors in the state prison and the Massachusetts reformatory, and all other employees in said institutions having prisoners under their charge;

. . . ."

In my opinion, the position of assistant deputy at the Massachusetts Reformatory, designated for temporary service under G. L. c. 125, § 6, as amended, is not a public office but rather an employment, and the incumbent is not a public officer but one of the "employees" of said reformatory, in the sense in which the word "employees" is used in said G. L. c. 31, § 4, as amended. It follows that such assistant deputy, as an employee, is within one of the classes of persons specifically included within the classified civil service, since he does not fall within any of the exceptions to the general provisions of said G. L. c. 31, § 4, as amended, which are set forth in other provisions of said chapter 31.

The position of said assistant deputy, as provided for in the statute, appears to lack many of the attributes which have been held to go toward making the holder of a governmental place a public officer as distinguished from a public employee. The tenure of the position is temporary, lacking in any degree of permanence; the duties, in part at least, are such as may be assigned to the holder by his superior officer; the holder receives no compensation; the holder is the incumbent of another position which necessarily is that of a subordinate reformatory official, the importance, independence and dignity of which latter place do not appear to be such as to bear the indications of public office but rather of public employment.

Numerous criteria are resorted to in determining whether a person is an officer or a public employee, although no single one is necessarily conclusive. The nature of the duties, the method apparently presented for their performance, the end to be attained, the character of the power to be conferred, and the whole surroundings of the position are all to be considered in arriving at a determination.

All these considerations compel me to the opinion that the incumbent of the position under consideration is an "employee," whose appointment by you is governed by the civil service rules which may apply to a position of the somewhat unusual character of this one.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Civil Service — Labor Service — Failure to register.

Failure of an appointee in the labor service of the Commonwealth to register, if caused by explicit negativing of the requirement of registration by the Department of Civil Service, does not defeat the protection of the civil service laws applicable to such appointee.

FEB. 25, 1932.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

DEAR SIR: — You have written me as follows: —

"Civil Service Rule 35, paragraph 4, which pertains to the labor division, provides as follows: —

'Whenever the Commissioner shall be unable to fill a requisition, he may authorize (under the statute) the employing officer to make the selection. The persons so selected shall register before employment.'

On March 17, 1923, under the authority of the then Commissioner of Civil Service, letters concerning authorization to appoint certain persons in the labor service were sent out to the various appointing powers in the Commonwealth, . . .

The question now arises: Are these persons holding office or employment in the classified public service of the Commonwealth, and entitled to the rights and privileges of the provisions of G. L. c. 31, and amendments thereto?"

You annexed to your communication a copy of the letter of March 17, 1923, sent "under the authority of the then Commissioner of Civil Service" to various appointing authorities in the Commonwealth. The letter was signed by the Director of the Labor Bureau, and reads as follows: —

"Inasmuch as there appear to be no persons eligible for certain positions in your department, you are hereby authorized to appoint any person or persons at your discretion to fill vacancies in all Labor Service positions in your department, the salary of which is not more than . This authority is to be continued in force until further notice from this Bureau.

Under chapter 31 of the General Laws preference in appointment should be given to veterans as defined therein if any can be found qualified for the work and willing to accept.

If non-citizens are appointed, their employment can be allowed only until such time as an eligible list of citizens is established, when, in accordance with the law, names must be certified from that list and non-citizens must be discharged.

All appointments made under authority of this letter *must* be reported to this Bureau within twenty-four hours from date of same, the report to include date of appointment, name, address, date of birth, and whether or not the appointee is a citizen of the United States, and a veteran as defined by chapter 31 of the General Laws, together with the position to which he or she is appointed and the salary.

This authority cancels any and all previous letters of authority given to your department for Labor Service appointment. Appointees need not register with this Bureau."

The case of each person holding employment in the labor service of the Commonwealth, to which he or she was appointed by one of the

appointing officials who acted in relation thereto by reason of his receipt of the letter of March 17, 1923, must, of course, be dealt with as affected by all the particular facts and circumstances surrounding it. No general rule can be laid down which will necessarily be determinative of all cases alike. What these facts and circumstances which affect individual cases may be, I, of course, have no knowledge at the present moment.

For your guidance, however, let me state that I am of the opinion that in any case where it appears that a person was appointed, in reliance upon such letter, to a position in the labor service by one of the appointing authorities to whom the letter of March 17, 1923, was addressed, the person so appointed cannot be said to be outside the classified public service and not entitled to the protection given employees by G. L. c. 31, merely because such person did not register with your department (in view of the explicit statement in said letter negativing the necessity for registration), nor because the appointing authority did not give the information requested in said letter to your department, nor because such person was not certified by your department for the employment given him.

As was said by the Supreme Judicial Court in *Munds* v. *Superintendent of Streets of New Bedford*, 264 Mass. 242, 245: —

"The purpose of the civil service law to protect employees in the labor service . . . should not be defeated by setting up an innocent omission of the employee brought about by the authority which is seeking his discharge."

Nor, in my opinion, should it be defeated by an omission on the part of the appointing authority to report data required by your department, nor by a failure on the part of your department to certify appointment when made by an appointing authority acting under the terms of said letter of March 17, 1923.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Civil Service — Norfolk State Prison Colony — Officers and Employees.

The officers and employees of the Norfolk State Prison Colony are not under the civil service law.

March 4, 1932.

Hon. Paul E. Tierney, *Commissioner of Civil Service.*

Dear Sir: — You request my opinion as to whether or not subordinate officers and employees of the Norfolk State Prison Colony may be classified under civil service.

The State Prison Colony was established by St. 1927, c. 289. It is plain from a reading of the act that the institution thereby created is entirely separate and distinct from the State Prison. The provision regarding the appointment and tenure of the officers and employees of the institution is found in section 4 of St. 1927, c. 289, which is as follows: —

"All subordinate officers and employees in the several institutions shall be appointed by the warden or superintendent thereof and hold office during the pleasure of said warden or superintendent. Appointments in the prison camp and hospital, state prison colony and state farm shall be subject to the approval of the commissioner."

The force and effect of the provision "and hold office during the pleasure of" have been considered and discussed by myself and my predecessors in a number of opinions. These opinions are reviewed at considerable length in an opinion which I gave to your predecessor in office, dated December 18, 1929 (VIII Op. Atty. Gen. 643). These opinions have repeatedly held that such a provision is inconsistent with civil service regulations. Therefore, unless there are other statutes which overcome the effect of such a provision, civil service regulations do not apply to officers or employees who hold office during the pleasure of the appointing officer.

While said section 4 provides for the appointment and tenure of subordinate officers and employees of certain penal institutions, in addition to the State Prison Colony, the section must be read in connection with G. L. c. 31, § 4, as amended by St. 1924, c. 197, and as finally amended by St. 1930, c. 34. The section provides, in part, as follows: —

"The following, among others, shall be included within the classified civil service by rules of the board:

. . . .

Instructors in the state prison and the Massachusetts reformatory, and all other employees in said institutions having prisoners under their charge;

. . . ."

This section definitely places certain employees of the State Prison and the Massachusetts Reformatory under civil service. I believe that, carrying out the provisions of this section, Civil Service Rule 4 includes these employees within the classification therein specified, class 17 of said Rule 4 being described as follows: —

"Watchmen, gatemen, and guards in the public parks and ferries; turnkeys, watchmen, and all other persons doing police duty in the parks, public grounds, prisons, houses of detention, reformatories, and in all other public institutions, places and departments not otherwise included under these rules."

Since there is no statutory provision that the officers or employees of the State Prison Colony shall be included within the classified civil service, as in the case of the instructors and certain employees at the State Prison and the Massachusetts Reformatory, the question whether or not they may be so included must be controlled entirely by the words "and hold office during the pleasure of," as used in said section 4 of St. 1927, c. 289.

Following the opinion cited earlier, I am therefore of opinion that the officers and employees of the Norfolk State Prison Colony may not be included within the classified civil service by rules of the Civil Service Commissioners.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Department of Conservation — Forest Wardens — Fines — Expenditures under Supervision of Selectmen.

Forest wardens have no authority to collect fines or expenses incurred as a result of fires illegally set; and all fines imposed by the courts must be spent by the wardens, under the supervision of the selectmen, for the purposes set forth in G. L. c. 48, § 24.

March 7, 1932.

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

Dear Sir: — I am in receipt from you of the following letter: —

"I desire an opinion on the provisions of section 24 of G. L. c. 48. That section provides for the receipt and expenditure of fines received under sections 11 and 13 of chapter 48 and under section 9 of G. L. c. 266.

We have a large number of cases where a person violates section 13, in the setting and maintaining of a fire without first procuring a permit from the forest warden, and in many cases the fire has gone beyond the control of the person causing it, thereby requiring the services of the forest warden and his men and causing the town considerable expense to extinguish it. Has the forest warden a right to accept from such person the actual expense caused the town in the extinguishment of such fire, or should the person be taken into court and a fine imposed?

G. L. c. 48, § 24, further provides for the expenditure of such fines by the forest warden and under the supervision of the selectmen. Have the selectmen a right to reappropriate and expend through the forest warden such funds after they have been turned over to the town treasurer and become a part of the town receipts?"

G. L. c. 48, §§ 11 and 13, as amended, set forth in their essence penal enactments providing fines for the performance of, or failure to perform, certain acts in connection with fires. Such fines can only be imposed by courts of competent jurisdiction, after a trial upon complaints duly filed. No forest warden, himself, has any authority whatsoever to ask for any sum of money, nor to accept such, from any person who has committed any offense under said sections.

The applicable portion of G. L. c. 48, § 24, as amended, reads as follows: —

"Money appropriated by a town under section eleven of chapter forty, for the prevention of forest fires, and all fines received under sections eleven, thirteen and twenty-six of this chapter and section nine of chapter two hundred and sixty-six shall be expended by the forest warden, under the supervision of the selectmen, in trimming brush out of wood roads, in preparing and preserving suitable lines for back fires, or in other ways adapted to prevent or check the spread of fire; or such town may expend any portion of such money in taking by eminent domain such woodland as the selectmen, upon recommendation of the forest warden, consider expedient to prevent forest fires. . . ."

Under the provisions of this section no forest warden has authority to pay over any of the moneys referred to in said section 24 except under the supervision of the selectmen of a town and for the specific purposes named in said section 24. He has no right to give any of such moneys to the local operators of a telephone exchange, as, it is indicated by a communication which you have laid before me, one forest warden has done.

All moneys appropriated by a town, under G. L. c. 40, § 11, for the prevention of forest fires, and money paid in to the town treasurer by the clerk of a court from fines received by him, are required, by G. L. c. 48, § 24, to be expended by the forest warden, under the supervision of the selectmen of such town, for the purposes designated in said section 24; and it is the duty of the selectmen to see that all such moneys received by the town treasurer are available for such expenditure by the forest warden.

The foregoing statements of the law cover the subject matter of all the questions contained in your letter, and it is not necessary for me to answer them severally.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Trust Company — Savings Department — Borrowing — Pledging Securities.

A trust company has authority to borrow money in its savings department and to pledge as security the assets of such department, if the loan is to be at all times segregated for the payment of the depositors in the savings department.

MARCH 9, 1932.

HON. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion upon the following question of law: —

"Has a trust company chartered under the provisions of G. L. c. 172, authority to borrow money in its savings department and to pledge as security therefor the assets of the savings department?"

In view of the fact that you have certain duties in connection with any bank or trust company, which duties are described in G. L. c. 167, § 5, as follows: —

"If, in the opinion of the commissioner, a bank or its officers or trustees have violated any law relative thereto, he may forthwith report such violation to the attorney general, who shall forthwith, in behalf of the commonwealth, institute a prosecution therefor. If, in the opinion of the commissioner, such bank is conducting any part of its business in an unsafe or unauthorized manner, he shall direct in writing that such unsafe or unauthorized practice shall be discontinued; and if any such bank refuses or neglects to comply with any such direction of the commissioner, or if, in the opinion of the commissioner, a trustee or officer of such bank has abused his trust, or has used his official position in a manner contrary to the interests of such bank or its depositors, or has been negligent in the performance of his duties, the commissioner may, in case of a savings bank, forthwith report the facts to the attorney general, who may, after granting a hearing to said savings bank, trustee or officer, institute proceedings in the supreme judicial court, which shall have jurisdiction in equity of such proceedings, for the removal of one or more of the trustees or officers, or of such other proceedings as the case may require; or the commissioner may, in case of any bank, after giving a hearing to the directors or trustees thereof, either report to the shareholders thereof, or, with the written consent of a board composed of the state treasurer, the attorney general and the commissioner of corpora-

tions and taxation, publish such facts relative thereto as in his opinion the public interest may require." —

and inasmuch as you advise me that action such as is outlined in your question is contemplated at the present time by a trust company, it would seem that an answer to your question will presently be necessary to guide you in the performance of the duties referred to. This being so, I do not regard your question as merely hypothetical, but one that is addressed to the ascertainment of my opinion upon a question of law, the answer to which will enable you to perform your said duties in a proper manner. I answer your question, therefore, for the purpose of guiding you in the performance of such duties.

It is to be noted that no provision appears in the statutes which specifically empowers a trust company "to borrow money in its savings department and to pledge as security therefor the assets of the savings department," as the quoted words are used in your question. Nevertheless, G. L. c. 172, § 6, provides for the formation of trust companies as corporations, "with all the powers and privileges and subject to all the duties, restrictions and liabilities set forth in all general laws relating" to corporations. G. L. c. 156, § 4, subdivision (*d*), confers upon corporations the power "to make contracts, incur liabilities and borrow money on its credit and for its use."

There is no specific provision of the statutes which forbids a trust company to borrow money and to pledge in connection therewith, in the manner described in your letter, assets of the savings department. Savings banks, which in their nature resemble in many respects the savings departments of trust companies, are specifically authorized by G. L. c. 168, § 3, to borrow money and pledge assets. Said section 3 provides: —

"If necessary to pay its depositors, such corporation may, by vote of its board of investment, borrow money, and may pledge, as security therefor, its bonds, notes or other securities. A copy of the vote of the board of investment shall be sent forthwith to the commissioner."

Savings banks are not incorporated under the provisions of G. L. c. 156, as trust companies may be by virtue of G. L. c. 172, § 6, and therefore do not derive power to borrow and pledge from any of the provisions of G. L. c. 156, as do trust companies. It was therefore necessary, if it was the intent of the Legislature that savings banks were to be permitted to borrow money and to pledge securities, to manifest the legislative intent by a special enactment, which it did in the measure now incorporated in the General Laws as chapter 168, section 3. The enactment of said section 3 is an expression of a legislative determination that borrowing upon securities held for the benefit of depositors, such as might be expected to use a savings bank, is a proper proceeding. For what it is worth, such determination is not without some effect in construing powers vested in a trust company with relation to borrowing upon securities held for the sole benefit of depositors in a savings department, who in many obvious respects may well be thought to resemble the kind of depositors using savings banks; both sets of depositors being persons whose deposits are safeguarded by many stringent statutory provisions not applicable to the deposits made in commercial banking institutions or in purely commercial departments of banks and trust companies.

The operation of a savings department of a trust company is regulated by the terms of G. L. c. 172, §§ 60–72. No express authority to borrow

for, or to pledge securities of, a savings department, nor any express denial of such authority, is set forth in said sections, and no expression of a legislative intent with relation to any such implied authority, or to any implied prohibition of such actions, is to be found therein unless it lies in section 62, which reads: —

"Such deposits and the investments or loans thereof shall be appropriated solely to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to or controlled by such corporation, or be liable for the debts or obligations thereof until after the deposits in said savings department have been paid in full. The accounts and transactions of said savings department shall be kept separate and distinct from the general business of the corporation."

"The assets of the savings department," to which you refer in your question as being the subject of pledge, I assume to be bonds, stocks or notes in which deposits made in the savings department of a trust company have been invested, under the provisions of G. L. c. 172, § 61, and which are referred to in the phrase in said section 62 as "such deposits and the investments or loans thereof."

No special authority to borrow upon the pledge of the said bonds, stocks or notes can fairly be implied from the provisions of said section 62. But under the general power given to a corporation by G. L. c. 156, § 4, subdivision (*d*), to "incur liabilities and borrow money on its credit and for its use," I am of the opinion that such authority to borrow upon the pledge of said bonds, stocks or notes in which the money in the savings bank department has been invested, for the use and benefit of the depositors of said department alone, is vested in the proper officers of the trust company, unless it can be said that section 62 itself contains an implied denial or withholding of such authority. The general power to borrow on credit, which carries with it the power to pledge securities, embraces the lesser power to borrow for, and pledge securities of, the savings department.

The possibility of such an implied denial or withholding of authority by the terms of section 62 is suggested by the wording of the section in the following regard: —

"Such deposits and the investments or loans thereof . . . shall not be mingled with the investments . . . or other money belonging to or controlled by such corporation, *or be liable for the debts or obligations thereof until after the deposits in said savings department have been paid in full.*"

In my opinion, the foregoing words, as used in said section 62, do not by implication prohibit the borrowing of money upon the pledge of securities which are investments of the moneys deposited in the savings department of a trust company. The words merely forbid the application of the said securities or their proceeds to any purpose, except the payment of deposits in the savings department, until after such deposits have all been paid in full. The intent of the Legislature, as expressed in said words, was to forbid the allocation of any part of the investments or proceeds thereof, derived from moneys deposited in the savings department, to the payment of any general creditors of the company, or of any of the depositors of the commercial department. I am of the opinion

that no implication is derived from said words with relation to borrowing on the credit of the securities of the savings department or to pledging the same for the purpose of paying depositors of the savings department. The intent of the Legislature in framing section 62 in this regard has been pointed out by the Supreme Judicial Court in its opinion in *Commissioner of Banks in re Prudential Trust Co.*, 244 Mass. 64, and I do not think a further intent to prohibit borrowing and pledging can properly be inferred from said section 62.

The court in that case said, at page 76: —

"The final clause, to the effect that these assets shall not be liable for general debts until after the deposits in the savings department have been paid in full, is the equivalent of saying that, after such deposits have been paid in full, then the remainder of the assets of the savings department shall be available for payment of general debts and obligations of the trust company. It is a provision which hardly can be operative except in liquidation."

The precise question of law raised by your inquiry has not been directly passed upon by the Supreme Judicial Court. *Commissioner of Banks* v. *Cosmopolitan Trust Co.*, 240 Mass. 254, the case of a company in liquidation, was before the Supreme Judicial Court. The trust company in liquidation had, while a going concern, "through its officers, pledged mortgages and other securities, assets of the savings department . . . as collateral security upon its notes given for loans, *the proceeds of which were used wholly in its commercial department.*" The court said, in speaking of these securities which had been pledged (p. 259): —

"The securities of the savings department, which were pledged by the trust company as security for a loan *used by its commercial department*, were trust property . . . Under general principles of law governing the administration of trusts, as well as under the express terms of St. 1908, c. 520, § 3, now G. L. c. 172, § 62, it was a gross breach of duty for the . . . Trust Company to pledge these trust securities *for the benefit of the commercial department.*"

It is possible to infer, from this language as used by the court, that it would not have held it to be a breach of duty to pledge such trust securities for the benefit of the savings department, of which alone they were assets.

Of course, at all times the proceeds derived from any borrowing for, or pledging of securities of, the savings department of a trust company must be kept absolutely separate and distinct from funds pertaining to the commercial department of such company and from any other of the funds of such company, and must be used only for the benefit of depositors of the savings department.

I am not unmindful of the fact that the trust company, as such, will be the borrower of the money, that the debt incurred will be, strictly speaking, its own and not that of the savings department, as such; but if the intention be at all times to apply the proceeds of the loan to the payment of the depositors of the savings department, and it is, in fact, so applied, I am of the opinion that the securities of the savings department pledged for the repayment of the loan at some future time cannot fairly be said to be "liable for the debts or obligations" of the corporation before the deposits in the savings department have been paid in full, within the meaning of the provisions of said section 62. Literally, the loan may be a debt or

obligation of the corporation, but, being a debt or obligation incurred solely for the benefit of the savings department, it is not, in my opinion, such a debt or obligation of the corporation as was intended by the Legislature to be comprehended in the words "debts or obligations thereof," as used in said section 62.

Therefore, in view of the foregoing considerations and upon the assumption that the proceeds of the contemplated loan are at all times kept segregated for the payment of depositors in the savings department, I answer your question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Basis for Assessments on Teachers — Salaries.

The Teachers' Retirement Board should base its assessments for the annuity fund on the full salary established for a teacher, irrespective of any sum paid to such teacher or any deduction made from such salary, by a town, except when a teacher has made an agreement with the town to serve for a designated period without salary.

MARCH 11, 1932.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion as follows: —

"In many places the teachers are assisting the community where they are employed by making contributions to the city or town. These contributions have been made in different ways, and the Retirement Board would like your opinion as to the salary which should be used as a basis for assessments to the annuity fund in the following three cases:

1. If the teachers agree to contribute to the town a percentage of their salaries, as, for example, ten per cent, and each teacher receives from the town each month two checks, one for ten per cent of his monthly salary and the other check for ninety per cent of his monthly salary minus the assessment due the annuity fund, it being understood that the check for the ten per cent of his monthly salary is to be endorsed back to the town upon its receipt by the teacher, shall the assessment for the annuity fund be based on the full salary or on ninety per cent of the teacher's salary?

2. If the teachers agree to contribute to the town a percentage of their salaries, as, for example, ten per cent, and each teacher receives each month a check for only ninety per cent minus the assessment due the annuity fund, shall the assessment for the annuity fund be based on the full salary or on ninety per cent of the teacher's salary?

In some of these cases the pay rolls are being made out as follows:

Name of Teacher.	Monthly Salary.	10% due Town.	5% due Annuity Fund.	Balance due Teacher.

3. If the teachers agree to serve for a certain period during the school year without pay, should the Retirement Board receive the full annual assessment which each teacher would have paid if he had received his full salary, or shall the assessment for the annuity fund be based only on the amount received by each teacher?"

G. L. c. 32, § 9 (2), as it relates to the annuity fund of the retirement system for teachers, provides: —

"The annuity fund shall consist of assessments paid by members and interest derived from investments of the annuity fund. Each member

shall pay into the annuity fund, by deduction from his salary in the manner provided in section twelve (5), such assessments upon his salary as may be determined by the board."

G. L. c. 32, § 12 (5), referred to in said section 9 (2), reads: —

"The school committee of each town shall, as directed by the board, deduct from the amount of the salary due each teacher employed in the public schools of such town such amounts as are due as contributions to the annuity fund as prescribed in section nine, shall send to the treasurer of said town a statement as voucher for such deductions, and shall send a duplicate statement to the secretary of the board."

You have informed me that the rate of assessment upon teachers' salaries has been set at five per cent by the Retirement Board.

The word "salary," as used in said section 9 (2), means the compensation which each of the teachers affected by the statute is entitled to receive as a matter of law. If a teacher, of his own free will, makes a contribution from his salary of any amount or any percentage thereof, the manner in which he pays or causes such amount or percentage to be paid out of his salary — whether by a direct payment by himself from the total amount of his salary or by a deduction therefrom made with his consent by the body or person making payment to him — is immaterial to a determination by the Retirement Board of the amount of his salary. His "salary," as the word is used in the instant statute, is still the total amount of the compensation which he is by law entitled to receive, and such total amount is not to be considered as lessened by any sums which he may himself expend or deduct, or may authorize to be spent or deducted, therefrom for some purpose designated by him, even if such purpose be a contribution to the treasury of the town in which he teaches.

(1) I answer your first question to the effect that the Retirement Board should base its assessment on the full salary to which the teacher is entitled by law, regardless of any sum paid therefrom to the town by or on behalf of the teacher, with his consent.

(2) I answer your second question to the effect that the Retirement Board should base its assessment on the full salary to which the teacher is entitled by law, regardless of any deduction made by a town from the amount so due, with the express consent of the teacher, provided the amount so deducted is intended by the teacher as a contribution from his full salary to be applied to some purpose, even if such purpose be the replenishment of the town's treasury.

(3) If a teacher, instead of voluntarily making a contribution for some purpose from a salary due him under the law, enters into an agreement, oral or written, by which he contracts to serve for a designated period without salary, it cannot be said that for such period named in the agreement he is receiving or is entitled to receive any salary. The annual salary which he would, in the absence of such agreement, have received is reduced by the amount which has been released by contract for the said designated period, and which, accordingly, he has not been entitled to as a matter of law.

The manner in which the town pay rolls are made out, as referred to in your letter, has no real bearing upon the determinations to be made by your Board. It is quite likely that such pay rolls do not state the facts in relation to the salary cuts or contributions with such a degree of accuracy as to indicate to the Board the precise nature of such facts as they relate to the character of a particular deduction from a teacher's salary. It is

for the Board to determine, in any case before it, just what the true facts are concerning the nature of the teacher's cut or contribution, and then to apply the proper principles of law to the facts as found by them.

In view of these considerations, I answer your third question to the effect that the Retirement Board should base the assessment on the amount actually received by the teacher during the year.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

County Commissioners — Authority — Lease.

A board of county commissioners has authority to lease a building for district court purposes.

MARCH 15, 1932.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have requested my opinion in the following letter: —

"In connection with the work of auditing county accounts by the Division of Accounts, I respectfully ask to be advised as to whether a board of county commissioners may lease a building for district court purposes for a period of ten years.

The particular matter involved is a lease running for ten years from January 1, 1932, at an annual rental of $1,900, this rate being considerably in excess of the amount paid for the same quarters during the preceding years. This lease is far in excess of the $800-contract provision set forth in the statutes.

I would like to be advised, therefore, whether or not the contract for the period specified is permitted by general law, and whether the Director of Accounts is authorized to approve payment of bills on account of the lease, which calls for monthly expenditures, in the aggregate, in excess of $800."

I am of the opinion that a board of county commissioners has authority to lease a building for district court purposes.

G. L. c. 34, § 3, reads as follows: —

"Each county shall provide suitable court houses, jails, houses of correction, fireproof offices and other public buildings necessary for its use, and suitable accommodations for district courts, except that the county of Dukes need not provide a house of correction, and that Boston shall provide necessary public buildings for Suffolk county."

In specific terms the foregoing section directs the county, which in this regard acts through its board of county commissioners, to "provide . . . suitable accommodations for district courts." This direction is additional to another direction in the same statute requiring them to "provide suitable court houses." Earlier provisions of statutes upon the same subject, now codified in G. L. c. 34, § 3, have specifically authorized the hiring or renting of accommodations for district courts (R. L. c. 20, § 6; St. 1890, c. 440, § 11; St. 1891, c. 70), and I am of the opinion that the direction to provide suitable *accommodations* for district courts impliedly grants power to rent or lease such accommodations.

G. L. c. 34, § 17, as amended by St. 1922, c. 383, reads: —

"All contracts exceeding eight hundred dollars in amount made by the commissioners for building, altering, furnishing or repairing public buildings, or for the construction or repair of public works, or for the

purchase of supplies, shall be in writing and shall be filed with said commissioners or their clerk, and a copy of each such contract shall be filed in the office of the county treasurer. All changes in or additions to, or agreements for extras under, such contracts shall also be in writing and be so filed. All such contracts shall be made after notice inviting bids therefor has been posted for at least one week in a conspicuous place in each county building where the commissioners have an office and has been advertised at least three times in a newspaper, if any, published in the city or town wherein the public building, bridge, highway or public work or institution to be supplied in accordance with the contract is or is to be situated; otherwise in any newspaper of general circulation in the county. The commissioners shall in each case make and file with the county treasurer a sworn certificate of such posting and advertising, but in an emergency, to the existence of which they shall certify upon the orders to the county treasurer for the payment of bills, they may contract for repairs without such posting or advertising. All bids shall be publicly opened in the presence of the commissioners and recorded in their records. No contract made in violation of this section shall be valid against the county, and no payment thereunder shall be made. The commissioners may, however, repair county buildings or other public works by day work, if in their judgment, expressed in a vote, the best interests of the county so require; but no bill therefor in excess of eight hundred dollars shall be paid by the county treasurer unless, upon or with the bill, the clerk of the commissioners has certified that such vote is entered upon their records."

A lease is not one of the forms of contract mentioned in said section 17, and the provisions therein relative to advertising and other forms of procedure, together with a limitation on the amount of the contracts referred to in said section 17, are not applicable to the lease mentioned in your letter.

You are therefore, in my opinion, other things being equal, authorized to approve payment of bills on account of such a lease as is described in your question, even if the lease calls for monthly expenditures in excess of $800.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Police Matrons.

Police matrons in cities having a population of over 30,000, except Boston, are not within the classified civil service.

MARCH 23, 1932.

HON. PAUL E. TIERNEY, *Commissioner of Civil Service.*

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

"Are police matrons in cities having a population of over 30,000, except Boston, within the classified civil service?"

I answer your question in the negative.

The appointment and tenure of office of police matrons are set forth in G. L. c. 147, §§ 18 and 19, which are a codification of older statutes dealing with the subject, none of which, however, preceded St. 1884, c. 320, which established the civil service system substantially as we know it

today. An opinion of one of my predecessors in office to the then Civil Service Commissioner (VI Op. Atty. Gen. 152), dealing with matrons at the house of detention in the city of Boston, sets forth principles of law which are applicable to the instant matter.

The provisions of G. L. c. 147, §§ 18 and 19, are of such character, with regard to the appointment and removal of police matrons in cities having a population of over 30,000, as to be inconsistent with the application of the civil service laws to them. The Legislature, having made such provisions with general civil service laws in existence, must be held to have intended that the matrons to whom such provisions applied were not to be included within the general civil service laws.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Trust Company — Savings Department — Borrowing — Pledging Securities — Repayment of Prior Loan.

A trust company has authority to borrow in its savings department and to pledge securities of such department for the purpose of repaying an existing loan secured by assets of such department if said existing loan was made for and applied to the payment of depositors of the savings department.

MARCH 25, 1932.

Hon. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — In a communication dated March 24, 1932, you have asked my opinion upon the following question of law: —

"Has a trust company chartered under the provisions of G. L. c. 172, authority to borrow money in its savings department, and to pledge as security therefor the assets of the savings department, for the purpose of repaying existing loans secured by assets of the savings department?"

March 7, 1932, you requested my opinion upon the following question: —

"Has a trust company chartered under the provisions of G. L. c. 172, authority to borrow money in its savings department and to pledge as security therefor the assets of the savings department?"

I answered your question of March 7, 1932, in the affirmative, and stated that such answer was based "upon the assumption that the proceeds of the contemplated loan are at all times kept segregated for the payment of depositors in the savings department" (*ante*, p. 49).

In that opinion I made it plain that the authority of a trust company to pledge the assets of its savings department as security for a loan was limited to loans which were intended to be applied for the benefit of the savings department alone, and to be used in such department only for the purpose of paying depositors of said department. It was made clear therein that only when the loan was to be negotiated for such special purpose, beneficial to the savings department, was there authority to pledge such assets. It was not said that a loan intended for the general benefit of the savings department, by application in any or all means capable of producing such benefit, was of such a character that it might be secured by a pledge of savings department securities, under authority vested in the officers of the company.

Moreover, it was explicitly stated that a loan upon the pledge of such securities must at all times be kept, and presumably used when necessary, "for the payment of depositors in the savings department."

I am of the opinion, however, that a repayment of an existing loan, made for and applied, when necessary, to the payment of depositors in the savings department, which is a mere refunding of the original loan, in which one note of the trust company is given in lieu of another, though possibly to a different lender, and the assets, in effect, still continue as a pledge for money borrowed for the payment of depositors, partakes to such an extent of the character of the original loan that it may be said to be made for the purpose of paying depositors, and so the new pledging of the securities will be within the scope of the authority of the officers of the trust company.

I therefore answer your present question, as contained in your communication of March 24th, in the affirmative.

It has been suggested, however, by a letter sent to you from the Reconstruction Finance Corporation, that if the proceeds of a loan for which assets of a savings department have been pledged, though intended for the payment of depositors in said department, have in fact not been used for such purpose but have been expended, in whole or in part, for other purposes, authority to pledge the assets of said department for a new loan to refund the old might no longer exist in the officers of the trust company.

I am of the opinion that, under the circumstances described in the foregoing paragraph, the officers of the trust company would not have authority to pledge the assets of the savings department as security for a new loan intended to be applied to the repayment of the old. If the proceeds of the original loan have been used for purposes not inuring to the benefit of the savings department, or if they have been used for a purpose beneficial to the savings department other than the payment of depositors, by such transactions, and by the negotiation of a second loan to repay the first, the officers would, in effect, be repledging the assets for money borrowed for a purpose disconnected from the payment of depositors. Such a course would be a colorable pretext for borrowing money and pledging assets for some purpose other than the single purpose of paying depositors, which alone gives authority to the officers to pledge such assets.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Police Commissioner for the City of Boston — Employees.

Employees of the Police Commissioner for the City of Boston, appointed under St. 1906, c. 291, § 8, as well as police officers, are not employees of the city of Boston.

APRIL 15, 1932.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

DEAR SIR: — I am in receipt from you of the following letter: —

"It has been expressly decided in the case of *Phillips* v. *Boston*, 150 Mass. 491, 494, that police officers of the city of Boston are State employees. I respectfully request your opinion as to whether all other employees under the Police Commissioner for the City of Boston are State or city

employees. This would include police chauffeurs, clerks, stenographers, signalmen, electricians, maintenance men, laborers, janitors, etc."

In the case of *Phillips* v. *Boston*, 150 Mass. 491, 494, the Supreme Judicial Court said, with relation to a policeman of the city of Boston appointed by the then Board of Police Commissioners, which, like the present Commissioner, was appointed by the Governor, —

"There was no contract, properly speaking, between himself (the policeman) and the city of Boston, by which it had engaged to pay his salary. He was essentially a State officer, appointed to preserve its peace and to execute its laws as well as the ordinances of the city. He was not an officer of the city. After the reorganization of the police force, in October, 1878, such an officer was not appointed by the city, or by any of its governing boards, nor was he removable by them. Upon the city was imposed by law the duty of paying these officers, although they were not controlled by it, as the Legislature held this to be a proper mode of distributing the public burden. With the plaintiff's removal, neither the city nor any of its officials had anything to do."

Concerning the employees to whom you refer in the second paragraph of your letter, who are, I assume, appointed by the Police Commissioner under St. 1906, c. 291, § 8, by which he is given authority, among other things, to "employ such clerks, stenographers and other employees as he may deem necessary for the proper performance of the duties of his office," such employees, although not "officers" like policemen (*Sims* v. *Police Commissioner*, 193 Mass. 547, 549), are in a similar situation with relation to their employment to that of the policemen. They are employees of the Police Commissioner and not of the city of Boston, and, since the Police Commissioner is himself an officer of the Commonwealth, they may well be said to be State employees rather than city employees. Although their salaries are paid by the city of Boston, like that of a policeman, this fact is not an expression of legislative determination that such employees shall be employees of the city, for, as the Supreme Judicial Court has said, the duty of paying them, although they were not controlled by the city, has been placed upon the city, "as the Legislature held this to be a proper mode of distributing the public burden."

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Civil Service — Reinstatement of Employee — Conviction.

G. L. c. 31, § 17, prohibiting the appointment or employment of a person within one year after his conviction of crime, applies to the reinstatement of an employee separated from the service.

APRIL 20, 1932.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

DEAR SIR: — You request my opinion as to whether the prohibition contained in G. L. c. 31, § 17, to the effect that no person shall be "appointed or employed" in any position within one year after his conviction of crime, extends to a case of "reinstatement" of an employee who has become separated from the service. I assume, from your statement, that in the case before you there has in fact been a separation from the service.

In my opinion, the statute does apply. The statute makes no distinction between reinstatement and appointment. That distinction in terms

is made in the rules, which provide that "an appointing officer may reinstate," with the consent of the Commissioner of Civil Service, one who has been separated from the service (Rule 23, par. 3). But this distinction in terms, subsequently made in the rules, does not alter the fact that a so-called reinstatement is in substance and effect an appointment, within the proper meaning of that term as used in the statute. It is the filling of a vacancy by "an appointing officer" (Rule 23, par. 3).

Moreover, the purpose of the statute (section 17) is in accord with this construction, for it would seem to apply to the case of what the rules term "reinstatement" no less than to the case of original appointment.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Co-operative Banks — Investments — Bonds of the Boston Metropolitan District.

Bonds of the Boston Metropolitan District are a legal investment for co-operative banks.

MAY 5, 1932.

Hon. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — In a recent communication with relation to investments for co-operative banks you have set forth the following facts: —

"The Boston Metropolitan District, as created by St. 1929, c. 383, amended by St. 1932, c. 147, comprising fourteen cities and towns, has issued as of March 1, 1932, $24,000,000 of bonds, maturing serially from March 1, 1933, to March 1, 1966. This constitutes the total funded debt incurred by said district as such."

You have asked me the following question as to the law applicable thereto: —

"In connection with the foregoing, your opinion is respectfully requested upon the following question: —

In computing the net indebtedness of the district for the purposes of G. L. c. 168, § 54, should the funded debt of the cities and towns comprising the district be taken into consideration, or am I correct in assuming that for said purposes the total debt of the Boston Metropolitan District is, at the present time, $24,000,000, represented by the amount of said issue of bonds?"

Investments for co-operative banks are limited by the following statutory provisions: —

G. L. c. 170, § 23, which reads, in part, as follows: —

"The directors may invest any unsold or surplus funds in any of the securities named in the second clause of section fifty-four of chapter one hundred and sixty-eight, . . ."

G. L. c. 168, § 54, cl. Second, provides, in part, as follows: —

"Deposits and the income derived therefrom shall be invested only as follows:

. . . .

Second. . . .

(*c*) In the bonds or notes of an incorporated district in this commonwealth whose net indebtedness does not exceed five per cent of the last preceding valuation of the property therein for the assessment of taxes."

I am of the opinion that in computing the net indebtedness of the Boston Metropolitan District to ascertain whether such "net indebtedness does not exceed five per cent of the last preceding valuation of the property therein for the assessment of taxes" — in order to determine whether the bonds of said district are a legal investment for co-operative banks, under G. L. c. 168, § 54 — the funded debt of the cities and towns comprising the district need not be taken into consideration, but only the indebtedness of the district itself. This being so, upon the facts as you have set them forth the bonds of the said district would appear to be a legal investment for co-operative banks.

The district is a corporate body politic created by St. 1929, c. 383. Its name was changed by St. 1932, c. 147, from "Metropolitan Transit District" to "Boston Metropolitan District." St. 1929, c. 383, § 1, relative to the creation of the district, provides: —

"The territory within and the inhabitants of the following cities and towns, to wit: Arlington, Belmont, Boston, Brookline, Cambridge, Chelsea, Everett, Malden, Medford, Milton, Newton, Revere, Somerville and Watertown, shall constitute a district or incorporated municipality, and for the purposes of this act are made a body politic and corporate under the name of the metropolitan transit district, hereinafter called the district, with power to take and hold property, sue and be sued in law and equity, to prosecute and defend in all actions relating to the property and affairs of the district, and of contracting and doing other necessary acts relative to its property and affairs; and said territory and inhabitants shall be jointly and severally liable for the debts and obligations thereof. Said district shall have a corporate seal. Process may be served upon the treasurer of the district as hereinafter provided.

The real estate of the district, with the exception of that used for tunnels, subways, stations, transfer areas, rapid transit lines and their appurtenances, shall be subject to taxation by the city or town in which it is located in the same manner and to the same extent as if privately owned."

Under section 10 of said chapter 383, as amended, the trustees of the district have authority to issue and sell bonds; and I assume, from your communication, that the bonds which are the subject of your inquiry were in all respects properly issued.

There is nothing in the statutes which specifically indicates an intention on the part of the Legislature that the debts of municipal units within the district shall be added to the debts of the district itself in computing the net indebtedness of the district.

In the absence of an expression of specific intention on the part of a legislative body that debts of cities and towns within a district, which have a separate existence as political subdivisions, are to be included as part of the debt of the district, the ordinary rule of law in the United States is to the effect that such debts of cities and towns, which are sometimes referred to as overlapping debts, are not within a proper definition of "debts" or "indebtedness" of the district with relation to statutory or constitutional debt limitations. *Levy* v. *McClellan*, 196 N. Y. 178; *Lippert* v. *School District*, 187 Wis. 154; *Tuttle* v. *Polk*, 92 Iowa, 433; *Kennebec Water District* v. *Waterville*, 96 Me. 234; *Wilson* v. *Board*, 133 Ill. 443; *Russell* v. *Middletown*, 101 Conn. 249.

Nor does there appear to be any different principle of law to be applied to the interpretation of the words "net indebtedness" of "an incorpo-

rated district in this Commonwealth," as those words are used, with relation to investments for co-operative banks, in G. L. c. 168, § 54, cl. Second, (*c*).

There is no particular definition of "net indebtedness," as those words are employed in section 54, clause Second, (*c*), contained in said chapter 168. Said section 54, clause Second, (*g*), contains a definition of "net indebtedness," but by its terms the definition is applicable to those words only as they are employed in subdivisions (*d*), (*e*) and (*f*) of said clause, and consequently has no effect in construing the words as they are used in said subdivision (*c*). It is necessary, therefore, to apply, by way of definition of the words, the general mode of statutory definition set forth in G. L. c. 4, § 7, which is as follows: —

"In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

. . . .

Twentieth, 'Net indebtedness' shall mean the indebtedness of a county, city, town or district, omitting debts created for supplying the inhabitants with water and other debts exempted from the operation of the law limiting their indebtedness, and deducting the amount of sinking funds available for the payment of the indebtedness included."

Since the definition set forth in said section 7 does not expressly include overlapping debts of cities and towns in a district, within the meaning of "net indebtedness" "of a . . . district," there appears to be no intent upon the part of the Legislature to depart from the ordinary principle of law referred to, and to include overlapping debts of cities and towns as part of the definition of net indebtedness of a district.

Section 54, clause Second, (*c*), itself, employs the words "incorporated district" in such a manner as would tend to show an intention on the part of the Legislature to indicate that the corporate obligor, the district, rather than any or all of its component parts, was the body whose debt was to be looked to.

In the act establishing the Metropolitan Transit District, St. 1929, c. 383, § 10, the separate character of the district from that of its component parts is made clear by a provision setting forth the separation of the debts of the district, as such, from those of cities and towns therein, as follows: —

"Indebtedness incurred under the provisions of this act shall not be included in determining the statutory limit of indebtedness of any of the cities or towns constituting the district."

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Labor — Hours of Work — "Textile Goods."

The spinning of cotton or worsted yarns does not constitute the manufacture of textile goods, with relation to the limitations of working hours provided by G. L. c. 149, § 59.

MAY 7, 1932.

HON. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You have asked my opinion as to whether the spinning of cotton or worsted yarns constitutes "the manufacture of textile goods," within the meaning of G. L. c. 149, § 59, which reads as follows: —

"No person, and no agent or officer of a person, shall employ a woman over twenty-one in any capacity for the purpose of manufacturing before six o'clock in the morning or after ten o'clock in the evening, or in the manufacture of textile goods after six o'clock in the evening. Whoever violates any provision of this section shall be punished by a fine of not less than twenty nor more than fifty dollars."

I assume that such yarns are spun from raw or partially prepared material, and that the process of spinning fairly falls within the meaning of the word "manufacture" in the instant statute. "Manufacture" is defined in I Op. Atty. Gen. 209, as "the production of articles for use from raw or prepared materials by giving these materials new forms." It also has the meaning of "to work, as raw or partly wrought materials into suitable forms for use," as stated in *Commonwealth* v. *Green*, 253 Mass. 458.

Nevertheless, I am of the opinion that yarns which are so manufactured are not "textile goods," within the meaning of said statutes. The words "textile goods," as used in earlier statutes similar to G. L. c. 149, § 59, have been held by former Attorneys General to be synonymous with "textile fabrics," and the noun "textile" to be used to denote "a fabric which is woven or may be woven — a fabric made by weaving;" and these interpretations indicate that there is a distinction to be made between the words "textile fabrics" and "textile materials." III Op. Atty. Gen. 126; opinion rendered State Board of Labor and Industries, April 24, 1919 (not published). Yarn is undoubtedly a textile material, but it is not a textile fabric or textile goods, as the latter words are used in the instant statute. Fabric, in its common modern use, means a product farther advanced in manufacture than yarn, which has merely been spun. The word has been defined as follows: —

"Anything manufactured; in modern use, only, cloth that is woven or knit from fibers, either vegetable or animal; manufactured cloth; a textile fabric; as, silks, or other fabrics." (Webster's Dictionary.)

"A woven or felted cloth of any material or style of weaving; anything produced by weaving or interlacing; distinctively called textile fabric." (Century Dictionary.)

Accordingly, I advise you that the spinning of yarn alone, without performing further work with such yarn, does not of itself constitute "the manufacture of textile goods," within the meaning of G. L. c. 149, § 59.

Yours very truly,

Joseph E. Warner, *Attorney General.*

Constitutional Law — Obligation of Contract — Municipal Bonds.

A proposed measure is unconstitutional because detrimentally affecting vested rights of bondholders by lessening established security for payment.

May 13, 1932.

To the Honorable Senate.

Gentlemen: — I respectfully submit this answer to the question contained in an order adopted by the Honorable Senate on May 10, 1932.

The question relates to the constitutionality of a pending bill (H. 1404), entitled "An Act relative to street and other traffic improvements in connection with the construction of a vehicular tunnel between Boston proper and East Boston." This bill amends in several particulars St. 1929, c. 297.

The question is directed specifically to the point whether section 2 of the bill, if enacted, would alter the contractual obligations of the city of Boston with respect to bonds already issued under the authority of St. 1929, c. 297, and in the hands of investors.

St. 1929, c. 297, § 8, authorizes the city of Boston to "issue and sell . . . bonds of the city, . . . to an amount not exceeding sixteen million dollars" for "terms not exceeding fifty years," and provides for the establishment of a sinking fund for the payment of said bonds. It further provides: —

"There shall annually be paid into such fund from tolls and charges or otherwise as hereinafter provided such sum at least as is necessary to provide for the payment of the principal of all such bonds at the expiration of fifty years from their respective dates; . . . Upon and after the completion of the tunnel as aforesaid there shall also be paid into said fund the proceeds received from any sales or leases under section four and the balance of the proceeds of any bonds previously issued hereunder and no longer required for construction purposes.

All tolls, rents, percentages, compensation and other charges received for any use of the tunnel shall be used by the treasurer of the city only to meet the operating costs and, subject to the provisions of section twelve, the excess in any year of such tolls and charges over operating costs shall be paid into said fund."

It is provided by section 10 of St. 1929, c. 297, that, —

"In addition to the full credit of the city, so much of all receipts from tolls and charges for or on account of the use of the tunnel as are required to be expended, by the provisions of this act, for the payment of the principal and interest of the bonds issued under section eight, as and when the same become due and payable, are hereby pledged to such payment; and said provisions are hereby declared to constitute contracts between the city and the holders of said bonds within the meaning of section ten of Article I of the constitution of the United States, and a recital thereof shall appear on the face of said bonds."

Section 2 of House Bill 1404 provides for the issuance of $3,000,000 additional bonds, for terms not exceeding thirty years, and that the sinking fund provision of St. 1929, c. 297, § 8, shall also apply to such additional bonds. The effect of this change is to lessen the security of the bondholders who purchased and hold bonds of the original $16,000,000 issue, and to that extent impairs the contract rights of the holders of said bonds. Contract rights have vested in said bondholders, and the Legislature has no power to alter such contract rights to the detriment of those who dealt with the city of Boston upon the faith of the authority granted by the Legislature to that city. To prevent such character of injustices was one of the reasons that U. S. Const., art. I, § 10, denied to the States the power of impairing the obligation of legal contracts. *Brooklyn Park Com.* v. *Armstrong*, 45 N. Y. 234, cited with approval in *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 533; *Hubert* v. *New Orleans*, 215 U. S. 170; *St. Louis Union Trust Co.* v. *Franklin-American Trust Co.*, 52 Fed. (2d) 431.

Accordingly, I must answer your question in the negative; but I am of the opinion that said bill with appropriate amendments will be constitutional if enacted into law.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Counties — Retirement System — Clerk of District Court.

A clerk of a district court is an employee of a county, within the meaning of G. L. c. 32, § 20.
Such clerk must retire at the age of seventy.

May 27, 1932.

Hon. Merton L. Brown, *Commissioner of Insurance.*

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

"Is a clerk of a district court appointed by the Governor, with the advice and consent of the Council, under G. L. c. 218, § 8, an employee of the county, within the meaning of G. L. c. 32, § 20, as amended, or are the provisions of said section 20 inapplicable to a person appointed by the Governor, with the consent and advice of the Council?"

Such clerk is an employee of the county, within the meaning of said section 20. This section expressly defines the term "employee" as including "any officials or public officers whose compensation is paid by the county, whether employed or appointed for a stated term or otherwise."

The case of *O'Connell* v. *Retirement Board of Boston*, 254 Mass. 404, to which you refer, and in which it was held that public officers do not come within the term "employees," as used in the statute there in question, is inapplicable. After that decision, and in view of it, the statute here involved was amended in order to bring public officers within the definition. St. 1926, c. 378. The fact that the appointment was made by the Governor, with the advice and consent of the Council (G. L. c. 218, § 8), is immaterial. The clerk is paid by the county (G. L. c. 218, § 74), and so comes within the words of G. L. c. 32, § 20, above quoted.

[You will note that my answer is confined to your question. I express no opinion as to whether some particular clerk is a member of the retirement system. That depends upon other statutory provisions, and upon facts as to which I am not informed. Thus G. L. c. 32, § 22 (2), provides: "Persons over fifty-five who enter the service of the county after the establishment of the system shall not be allowed to become members, . . ." Also St. 1926, c. 378, making public officers eligible members of the retirement system, apparently provides (section 3) that certain public officers theretofore in the service might join or not at their election.]

You also ask the following question: —

"If your answer to the preceding question is that said section 20 applies to a clerk of a district court appointed under G. L. c. 218, § 8, is such a clerk required by G. L. c. 32, § 22 (4), to retire upon reaching the age of seventy years and prior to the expiration of the term of five years for which he was appointed as aforesaid?"

If the clerk be a member of the system he must be retired upon reaching the age of seventy, under the provision of said section 22 referred to in your question, which provides that "any member who reaches the age of seventy shall so retire." That this provision prevails over the provision for a five-year term (G. L. c. 218, § 8) seems settled by *Goodale* v. *County Commissioners*, 277 Mass. 144.

Yours very truly,

Joseph E. Warner, *Attorney General.*

Fraternal Benefit Society — Lord's Day — Meetings.

A vote of the governing body of a fraternal benefit society passed on the Lord's Day is not invalid because taken upon such day.

June 3, 1932.

Hon. Arthur E. Linnell, *Acting Commissioner of Insurance.*

Dear Sir: — You have asked me the following question of law: —

"Is a vote by the members of the supreme legislative or governing body of a domestic fraternal benefit society approving a merger or transfer, under G. L. c. 176, § 12, valid if the meeting of such body at which the vote is taken is held in this Commonwealth on Sunday?"

I answer your question in the affirmative.

The applicable provision of our statutes with relation to work done on Sunday is G. L. c. 136, § 5, which reads as follows: —

"Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars."

A domestic fraternal benefit society differs from many societies and organizations in that it is not, from its very nature, carried on for pecuniary gain, but, under the terms of the statute which defines and regulates it, it is a society "organized and carried on solely for the mutual benefit of its members or their beneficiaries, and not for profit, . . . which makes provision for the payment of death or disability benefits." G. L. c. 176, § 1. The taking of a vote by the members of the governing body of such a society approving a merger of the society with another organization, under G. L. c. 176, § 12, is not such an act of business as, in the language of the Supreme Judicial Court in *Bennett* v. *Brooks*, 9 Allen, 118, 120, "may be deemed to be an employment or calling carried on for purposes of gain or profit," since the society itself is not carried on for purposes of gain or profit.

The principles laid down in *Bennett* v. *Brooks*, 9 Allen, 118, and *Donovan* v. *McCarty*, 155 Mass. 543, and the language used in the opinions of the Supreme Judicial Court in these cases, in differentiating between acts which may legally be performed on the Lord's Day and those which may not, control the interpretation of the law as it applies to the facts contained in your question, and lead plainly to the conclusion that the acts to which you refer in such question may be valid even if performed on the Lord's Day, because they do not partake of the nature of "labor, business or work," as those words are used in G. L. c. 136, § 5. See *People* v. *Young Men's &c. Soc.*, 65 Barb. (N. Y.) 357; *McCabe* v. *Fr. Matthew Soc.*, 24 Hun. (N. Y.) 149; *In re Daughters of Israel &c. Soc.*, 210 N. Y. S. 541; *Pepin* v. *Soc. St. Jean*, 24 R. I. 550.

Very truly yours,

Joseph E. Warner, *Attorney General.*

County Retirement Systems — Court and Probation Officers.

Court officers of district courts and of the Supreme Judicial and Superior Courts are employees of a county, within the meaning of G. L. c. 32, § 20, and are members of the retirement systems.

Probation officers of the district, municipal and juvenile courts of Boston are employees of a county, but not those of the Superior Court.

June 7, 1932.

Hon. Merton L. Brown, *Commissioner of Insurance.*

Dear Sir: — You have requested my opinion upon certain questions of law concerning the relation of certain court officers and probation officers to the county retirement systems.

Your first question is: —

"Are court officers of district courts, appointed under G. L. c. 218, § 61, employees of the county, within the meaning of G. L. c. 32, § 20, as amended?"

G. L. c. 32, § 20, as amended, with relation to county retirement systems defines "employees" as follows: —

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

Salaries of court officers in district courts are paid by the respective counties in which such courts are established. G. L. c. 218, § 74; § 84, as amended.

Such officers, therefore, seem to fall within the definition of "employees" stated in G. L. c. 32, § 20, above quoted, and I answer your first question in the affirmative.

Your second question is: —

"Are court officers of the Supreme Judicial and Superior Courts, appointed under G. L. c. 221, § 70, employees of the county, within the meaning of G. L. c. 32, § 20, as amended?"

The court officers referred to in your question are appointed in the manner set forth in G. L. c. 221, § 70, as amended, which reads: —

"The sheriffs of Suffolk, Middlesex and Worcester counties may each appoint, subject to the approval of the justices of the superior court, officers for attendance upon the several sessions of the superior court in their respective counties, as follows:

For Suffolk, not exceeding four for each session for civil business held with juries; three for each session held without juries; and six for the session for criminal business; said officers shall be interchanged between the several sessions so as to secure as nearly as may be equal service by all.

For Middlesex, twelve for civil or criminal business, who shall, when required by the sheriff, attend the sessions of the supreme judicial or probate court when not in attendance on the superior court.

For Worcester, for civil or criminal business, such number as may be necessary, who shall also attend upon the sessions of the supreme judicial, probate and insolvency and land courts.

Each of said officers shall give to the sheriff appointing him a bond with sufficient sureties, in the sum of fifteen hundred dollars, for the faithful performance of his duties. They shall have the authority of constables to serve venires for jurors and the processes of said courts, and in Worcester county to summon witnesses; and they shall be paid by the county their actual expenses necessarily incurred in making such services."

The compensation of such officers is provided for by G. L. c. 221, § 75, as last amended by St. 1931, c. 301, § 41, and is to be paid by the respective counties in which the courts in which they serve are sitting.

I answer your second question in the affirmative.

Your third question reads: —

"If you answer the preceding question in the affirmative, is it mandatory that court officers of the Supreme Judicial and Superior Courts join the county retirement system provided for by said chapter 32, or are they exempted therefrom by virtue of the provisions of section 66 of said chapter 32?"

G. L. c. 32, § 22 (3), provides that no "employee who is or will be entitled to a pension from any county for any reason other than membership in the association may become a member."

G. L. c. 32, § 66 (as amended by St. 1923, c. 407, § 3) and § 67, read as follows: —

"Section 66. Any court officer of the supreme judicial or superior court who, in the judgment of the sheriff of his county, is disabled for useful service in either of said courts, and who is certified by a physician, designated by the sheriff, to be permanently incapacitated, either mentally or physically, by injuries sustained through no fault of his own, in the actual performance of his duty in said court, and any court officer of either of said courts who has performed faithful service in either or both of said courts for not less than twenty years, and who in the judgment of the sheriff of his county is incapacitated for further service in said courts, shall, if the sheriff so requests, with the approval of a majority of the justices of the court in which he serves, be retired, and shall annually receive a pension equal to one half of the compensation received by him at the time of his retirement.

Section 67. Pensions granted under the preceding section and all expenses connected therewith shall be paid by the commonwealth and the several counties to the same extent and in the same proportion as the salaries of the pensioners were paid at the time of their retirement."

The pensions here provided for are contingent. It has been ruled by this department that the words "is or will be entitled" are inapplicable to such pensions. V Op. Atty. Gen. 634; VIII *ibid.*, 547. I adhere to these earlier opinions, and advise you that the court officers referred to are not exempted from the retirement system by reason of the provisions of said section 66.

Your fourth and fifth questions read: —

"Are probation officers appointed under G. L. c. 276, § 83, employees of the county within the meaning of section 20 of said chapter 32, as amended?

If you answer the preceding question in the affirmative, is it mandatory that probation officers join the county retirement system provided for by said chapter 32, or are they exempted therefrom by virtue of the provisions of G. L. c. 32, §§ 75 and 76?"

G. L. c. 276, § 83, is as follows: —

"The superior court, the chief justice of the municipal court of the city of Boston, subject to the approval of the associate justices thereof, and the justice of each other district court and of the Boston juvenile court may appoint such male and female probation officers as they may respectively from time to time deem necessary for their respective courts; and if there is more than one probation officer in one court, one of such officers may be designated as chief probation officer. All officers so appointed shall hold office during the pleasure of the court making the appointment. The compensation of each probation officer appointed by the superior court shall be fixed by that court and by it apportioned from time to time among the counties wherein said officer performs his duties. . . ."

It would seem that probation officers of the district courts and of the municipal and juvenile courts of the city of Boston are officers whose compensation is paid by the county, and so are "employees," under the terms of section 20. As to the probation officers of the Superior Court, the provision for service in different counties and for apportioning the compensation among different counties presents a difficulty. In my opinion, however, an officer so employed by different counties is eligible for membership in the retirement system of each of the counties by which his compensation is paid. This result seems to be in accord with the terms of section 20. Also, it is by analogy in accord with the legislative intent as to pensions, as to which provision is made that if a probation officer "is employed by more than one county" his pension shall be paid "by the counties by which his salary is paid, and in the same proportion." G. L. c. 32, § 76.

As to your fifth question, G. L. c. 32, §§ 75 and 76, are as follows: —

"Section 75. Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated; provided, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any such probation officer or assistant probation officer who has faithfully performed his duties for not less than twenty consecutive years, and who is not less than sixty, shall be retired at his request without the aforesaid certification. Such probation officer must be retired upon attaining the age of seventy.

Section 76. Every person retired under the preceding section shall receive an annual pension equal to one half of the compensation received by him at the time of his retirement, to be paid by the county employing him, or, if he is employed by more than one county, by the counties by which his salary is paid, and in the same proportion."

The pension provided for in the first part of section 76 is contingent, and, as I have previously stated, the possibility of receiving it does not

debar from membership in the Retirement Association. The pension, however, provided for one who has had twenty consecutive years of service is not contingent, and may well render ineligible one who in fact is in a position to receive it.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Director of Animal Industry — Tuberculin Test — Reimbursement.

Acts of an owner of cattle may disentitle him to reimbursement for cattle slaughtered.

JUNE 7, 1932.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You request my opinion as to whether the statutory provisions making reimbursement by the Commonwealth for slaughter of cattle reacting to the tuberculin test dependent upon the fact that the owner has not, "in the opinion of the director, by wilful act or neglect, contributed to the spread of bovine tuberculosis" (G. L. c. 129, § 12A and § 33, as amended), should be construed as meaning contributed at any time, or should be limited to acts or conditions connected with the cattle tested.

In my opinion, the statutory provision above quoted is not limited. According to the words of the statute, and I think according to its intent also, the compensation is not to be paid if the owner has at any time contributed to the spread of tuberculosis.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Teachers' Annuity Fund — Repayment by Employee.

Duty of a member of the retirement system to make a repayment discussed.

JUNE 9, 1932.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You ask my opinion on the following facts: A man was employed by the Commonwealth at the Gardner State Colony from 1912 to February 26, 1917, and was a member of the State Employees' Retirement Association. On March 1, 1917, he entered the service of the Bristol County Agricultural School, and, not understanding that the Bristol County Agricultural School came under the teachers' retirement law, he informed the State Employees' Retirement Board that he was not entering the public schools, and received a refund from the State Employees' Retirement Board, amounting to $232.54. Your specific questions are as follows: —

"Is it necessary for this man to pay to the teachers' annuity fund the $232.54 which he withdrew from the State Employees' Retirement Association; and, also, is it necessary that he be required to pay the interest which would have been credited to his account on the $232.54 from 1917?"

The refund made in 1917 by the State Employees' Retirement Board to the man above referred to was made in error. This amount should have been transferred to the teachers' annuity fund. The applicable

statute at the time of this refund was Gen. St. 1915, c. 197, amending St. 1911, c. 536. This act provides, in section 1, that, —

"Members of the retirement association, established by chapter five hundred and thirty-two of the acts of the year nineteen hundred and eleven, as amended, who enter the service of the public schools shall have the full amount of their contributions, together with such interest as shall have been earned thereon, transferred by the treasurer of the commonwealth to the annuity fund established by paragraph (2) of this section, and these amounts shall thereby become a part of their assessments."

The annuity fund referred to is the teachers' annuity fund.

Section 3 of Gen. St. 1915, c. 197, provides for the occasions when refunds from the State Employees' Retirement Association may be made, and reads, in part, as follows: —

"Should a member of the association cease to be an employee of the commonwealth for any cause other than death, or to enter the service of the public schools as defined by paragraph (5) of section one of chapter eight hundred and thirty-two of the acts of the year nineteen hundred and thirteen, before becoming entitled to a pension, there shall be refunded to him. . . ."

St. 1913, c. 832, § 1 (5), referred to in said Gen. St. 1915, c. 197, § 3, defines "public school" as follows: —

"'Public school' shall mean . . . and also any day school conducted under the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and eleven."

The Bristol County Agricultural School was created under authority of St. 1912, c. 566. Section 3 of said act provides: —

"Any school established under this act shall be established and maintained as an approved school, subject to the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and eleven, and of any amendments thereof, . . ."

It therefore appears that the Bristol County Agricultural School is a public school, within the meaning of that term as used in Gen. St. 1915, c. 197, §§ 1 and 3, and therefore the $232.54 paid into the State Employees' Retirement Association by said employee should have been transferred to the teachers' annuity fund when he left the service of the Commonwealth to enter the employ of the Bristol County Agricultural School, and should not have been refunded to him.

In rendering this opinion I am not unmindful of the fact that in 1924 the Legislature provided that teachers in the Bristol County Agricultural School, the Essex County Agricultural School and the Norfolk County Agricultural School shall be deemed to have been public school teachers, within the meaning of G. L. c. 32, §§ 6–19, inclusive, during the entire time they shall have been employed as teachers in said school. See St. 1924, c. 281. This act was based upon recommendation No. 4 contained in the annual report of the Department of Education submitted to the General Court on November 26, 1923, in which it was set forth "that the Retirement Board placed too broad an interpretation upon the membership requirements of the law, and that the county agricultural school teachers have been enrolled in error."

It appears from the survey of legislation set forth in this opinion that the interpretation excluding employees of the Bristol County Agricultural School from the benefits of the teachers' annuity fund was erroneous, and that therefore St. 1924, c. 281, in so far as it sought to validate the inclusion of said employees in said system, was unnecessary.

On July 2, 1929, I rendered an opinion to you which held that teachers must pay back assessments and interest thereon which had not been deducted from their pay, through error, before being granted a retirement allowance. That opinion (VIII Op. Atty. Gen. 606) read, in part, as follows: —

"I am informed that in certain cases deductions have not been made and that several teachers who, under the law, are required to be members of the Association have not paid, either by deduction or otherwise, any sums into the annuity fund. In view of the fact that both membership and payments are mandatory under the statute, I am of the opinion that it is necessary that such teachers pay into the fund an amount equal to that which they would have paid had the deductions been properly made."

It was also stated in that opinion that, —

"Such a teacher must pay the interest which would have been credited on the unpaid assessments, so that he will have to his credit in the fund the same amount which he would have had if he had regularly paid the assessments as provided by law."

In my opinion, the same principles which require the payment into the teachers' annuity fund of assessments which were not deducted because of an error, with interest thereon, apply to the payment into the teachers' annuity fund of the $232.54 erroneous refund in question, and I accordingly answer both your inquiries in the affirmative.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Savings Banks — Investments — Railroad Bonds.

In determining whether a railroad has paid dividends in cash to its stockholders, of an amount required by statute, during a fiscal year, the time of actual payment to the stockholders is the date to be considered with relation to the legality of its bonds for investment.

June 14, 1932.

Hon. Arthur Guy, *Commissioner of Banks.*

Dear Sir: — You ask my opinion upon the following question: —

"In determining whether a railroad corporation has paid dividends in cash to its stockholders in an amount equal to at least four per cent upon all its outstanding capital stock during the fiscal year, is it necessary to consider the payment of the dividend —

(*a*) As of the date it is charged to the income account of the corporation; or

(*b*) As of the date the dividend is actually received by the stockholder?"

You state that this question applies to the investment by savings banks in bonds of railroads described in G. L. c. 168, § 54, cl. Third, par. (*e*) (3); and you further state as follows: —

"Certain railroads pay dividends quarterly. The time of declaring the dividend and the actual payment thereof to stockholders varies. One railroad, for instance, closes its books on the last day of January, April, July and October of each year, and the dividends declared are payable to stockholders on the following April 1, July 1, October 1 and January 1, respectively. The stockholders of this railroad during 1931 actually received dividends amounting to four and one-half per cent on both the preferred and common stocks, but the dividend that was received by the stockholders January 1, 1931, of one and one-half per cent, was declared as of the last day of October, 1930, and was charged to the 1930 income account. The corporation's accounts will show that dividends amounting to only three per cent were declared for the year 1931, because the January 1931 dividend was charged against the October 1930 earnings, and the railroad failed to declare the regular October 1931 dividend."

The law above referred to, being G. L. c. 168, § 54, cl. Third, par. (*e*) (3), as amended, is as follows: —

"Deposits and the income derived therefrom shall be invested only as follows:

. . . .

Third. . . .

. . . .

(*e*) In the mortgage bonds, as described in any of the following subdivisions of this clause, of any railroad corporation incorporated under the laws of any of the United States:

Provided, that during each of the five fiscal years of such railroad corporation preceding the date of such investment —

. . . .

(3) Such railroad corporation shall have paid in dividends in cash to its stockholders an amount equal to at least four per cent upon all its outstanding capital stock."

I assume, from the form of your question, that the fiscal year of the railroad in question coincides with the calendar year. If this assumption be correct, the sole question for determination is whether during 1931 the railroad "paid in dividends in cash to its stockholders an amount equal to at least four per cent upon all its outstanding capital stock." If the dividend paid on January 1, 1931, is taken into consideration in determining the amount of dividends paid to stockholders during the fiscal year, then four and one-half per cent has been paid, and the bonds are still "legals"; but if it cannot be counted as a payment made during the fiscal year 1931, because charged to 1930 income, then the dividends paid during the fiscal year 1931 amount to only three per cent — with the consequent disqualification of the bonds.

In my opinion, the statutory qualification laid down for railroads outside of New England means exactly what it says, — that the dividend must have been *paid* during the fiscal year, and that it is of no concern whether it was charged to a prior income account. Your question presupposes a requirement that the railroad in question must have *earned* at least four per cent upon all its outstanding stock for each of the five fiscal years preceding the date of investment. Undoubtedly this was so prior to St. 1908, c. 590, which was a codification, revision and amendment of the laws relative to savings banks. In the Revised Laws, for instance, chapter

113, section 26, clause third, occur the requirements for investments in railroad bonds. Paragraph (*a*) allowed investments in first mortgage bonds of New England railroads which *earned* and *paid* dividends of at least three per cent for the prior two years; paragraph (*c*) allowed investments in Massachusetts railroads which had *paid* a dividend of at least five per cent per annum for two years; paragraphs (*d*) to (*k*), inclusive, allowed investments in certain railroads regardless of their dividend history. Clause fourth, paragraphs (*c*) and (*d*), allowed investments in a group of railroads provided they had *earned* and *paid* dividends of at least four per cent for ten years prior to investment. It will be noticed that for all railroads except those incorporated in Massachusetts the dividends not only had to be paid but they had to be earned in a given year. The reason there was no requirement that Massachusetts railroads earn their dividends must have been because the railroads had been long established and had an excellent reputation of many years' standing; and furthermore, their returns to the Commissioner of Corporations and Taxation, or the corresponding officer at the time, could readily be checked. That the Legislature was not unmindful of the prosperity of Massachusetts railroads is shown by the report of the committee authorized to suggest changes in savings bank laws, appointed under the provisions of chapter 24 of the Resolves of 1907. See Legislative Documents, 1908, vol. 6, No. 1280, at p. 24, where the committee reports as follows, after dividing railroad bonds into three groups, namely, — (1) Massachusetts railroads, (2) New England railroads, and (3) other railroads: —

"In providing for the admission of the bonds of railroads operating in any of the United States they have felt it necessary to make much stricter requirements than in the case of railroads in New England, where railroad conditions are more established. Severe tests have therefore been provided for both the corporation and the bonds themselves.

That it shall have the highest credit is assured by the requirement: —

(1) That it shall have paid cash dividends equivalent to four per cent on all its outstanding stock for a period of ten years, showing that its business is steady and profitable.

(2) That its interest and rental charges shall not for ten years have consumed more than twenty per cent of its gross earnings, — a proportion sufficiently small to render the margin of profit over operating expenses not likely to be seriously impaired by a sudden decrease in the gross earnings. This test assures a comfortable surplus, and bars out the bonds of a railroad which is straining its resources and perhaps neglecting the maintenance of its property in order to pay dividends."

In accordance with this report St. 1908, c. 590, was passed, in which railroad bonds were divided into three groups, Massachusetts railroads, New England railroads and other railroads. See St. 1908, c. 590, § 68, cl. Third, pars. *a*, *b* and *e*. Under this law Massachusetts railroads, in order to have their bonds "legals," were required to have *paid* in dividends in cash not less than four per cent per annum on their outstanding stock for five years, and New England railroads the same; and other railroads were required to have paid in cash for ten years four per cent on their outstanding stock and to have had gross earnings for that period not less than "five times the amount necessary to pay the interest payable upon its entire outstanding indebtedness, the rentals of all leased lines, and the interest on all the outstanding indebtedness of railroads controlled and operated which is not owned by said corporation."

These requirements have remained substantially the same down to the present date. See G. L. c. 168, § 54, as amended. By St. 1931, c. 346, § 1, the ten-year requirement was lowered to five years.

There cannot be the slightest doubt but that the Legislature, with due consideration, abolished the requirement that "other railroads" need not have earned the dividend during a particular fiscal year as long as it was paid, and as long as their gross earnings complied with G. L. c. 168, § 54, cl. Third, par. (*e*) (4). If the dividend did not have to be earned in 1931, it is immaterial that the dividend paid on January 1, 1931, was charged to 1930 income account.

My opinion is further borne out by the fact that under section 54, clause fourth, street railways must *earn* and pay their dividends; under clause fifth telephone companies must have paid dividends and had a gross income of at least ten million dollars for five years; under clause sixth gas, electric or water companies must have had net earnings of a certain amount for a certain length of time but need not have paid dividends; and under clause sixth A (inserted by St. 1926, c. 351, § 1), relative to public service companies, by subdivisions (1) and (4) the gross earnings must have been so much and net earnings so much, with no requirement that dividends be paid.

It is well established law that in the absence of statutes preventing the practice dividends may be paid even though there is no net income in a particular year, as, for instance, out of surplus; or even, in peculiar circumstances, in the exercise of a wise discretion by the directors, out of money borrowed for that purpose, where the net earnings have been spent in permanent improvements. 55 A. L. R., p. 39, and cases cited. See *Morse* v. *Boston & Maine R.R.*, 263 Mass. 308, for the general rule that dividends may be paid out of earnings or surplus. Even if there are net earnings and a surplus, the directors cannot be compelled to pay a dividend (*Joslin* v. *Boston & Maine R.R.*, 274 Mass. 551), provided they act in good faith. See also 55 A. L. R., p. 8; 76 A. L. R., pp. 886 *et seq.*

The criterion laid down by the statute is simply that dividends in cash to an extent at least of four per cent be paid during five fiscal years next preceding the year of investment, and it is immaterial out of what funds the dividends are paid, provided, however, that for the same period the gross earnings have equalled at least five times enough to pay the interest on the outstanding indebtedness, in accordance with G. L. c. 168, § 54, cl. Third, par. (*e*) (4).

Answering your specific question, therefore, in determining whether a railroad corporation has paid dividends in cash to its stockholders in an amount equal to at least four per cent upon all its outstanding capital stock during the fiscal year, the payment of the dividend should not be considered as of the date it is charged to the income account but as of the date it is actually paid to the stockholders.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Credit Unions — Pledge of Securities — Limitation of Withdrawals — Debts.

The directors of a credit union may pledge securities of the union to secure a loan to the union.

Money so borrowed may be paid to withdrawing members.

Money so borrowed must be repaid, if there is a liquidation, before distribution of assets to stockholders.

JUNE 16, 1932.

Hon. ARTHUR GUY, *Commissioner of Banks.*

DEAR SIR: — You have requested my opinion upon three questions of law relative to credit unions formed under G. L. c. 171, as amended.

Your first question reads: —

"Has the board of directors of a credit union authority to pledge the securities and resources of the credit union as security for borrowing for or in behalf of such credit union?"

Credit unions are corporations authorized by G. L. c. 171, as amended, and are organized under said chapter 171 and the provisions of G. L. c. 172, §§ 7–11, relative to the incorporation of trust companies, as far as the provisions of said chapter 172 are applicable. These credit unions do not derive power to borrow money or pledge assets from the terms of G. L. c. 172, made applicable to them, for it is only by virtue of the provisions of section 6 of said chapter 172, which is not made applicable to credit unions by said chapter 171, that trust companies formed under said chapter 172 gain any authority to borrow or pledge, as pointed out in my opinion to you dated March 9, 1932 (*ante*, p. 49). However, G. L. c. 171, by section 16 as amended, itself vests in the directors a specific power to borrow money in behalf of the credit union by the following language of G. L. c. 171, § 16, as amended by St. 1926, c. 273, § 16: —

"The board of directors, with the approval of the commissioner, may borrow money for and in behalf of the credit union."

There is nowhere in G. L. c. 171, as amended, any prohibition upon the pledging of securities or assets of a credit union to secure a loan of borrowed money, and no expression of a legislative intent as to any implied prohibition of such pledging. In the absence of any such prohibitions in an applicable statute, the power to borrow money for the benefit of a corporation carries with it the implied power to pledge securities of such corporation to secure the loan, as stated in my said opinion to you of March 9, 1932.

"The securities and resources of the credit union," to which you refer in your first question as being the subject of pledge, I assume to be bonds, stocks or notes in which the deposits of members, made under section 5 of said chapter 171, have been invested in accordance with section 21 of said chapter 171, as finally amended by St. 1926, c. 273, with the accumulations thereon.

I answer your first question in the affirmative.

Your second question reads: —

"The second paragraph of G. L. c. 171, § 28, regulates the payment of withdrawals, and reads, in part, as follows:

'The amounts paid in on shares or deposited by members who have withdrawn or have been expelled shall be paid to them, in the order of withdrawal or expulsion, but only as funds therefor become available and after deducting any amounts due from such members to the credit union.'

Question: Is a limitation imposed thereby which restricts withdrawal payments to funds accumulated from current receipts, or may such withdrawals be paid from the proceeds of a loan or loans?"

It does not appear that the available funds mentioned in said section 28, whose provisions, in substance, were contained in section 26 prior to amendment by St. 1926, c. 273, were intended to be limited to funds accumulated from current receipts. There is no express mention of such a limitation in G. L. c. 171, as amended, and it does not appear to have been the intent of the Legislature to create one by implication. Since the amendment of G. L. c. 171, by St. 1926, c. 273, the authority of the directors to borrow money is not restricted, as it was, before such amendment, by the terms of section 13 (as section 13 then stood), to borrowing money solely "for the purpose of lending to members," but the directors now have authority to borrow "for and in behalf of the credit union." Money so borrowed would appear to be available for the discharge of sums payable by a credit union to withdrawing or expelled members.

Your third question reads: —

"Section 29 of chapter 171 prescribes the procedure to be followed in the event of the voluntary liquidation of a credit union, and reads, in part, as follows:

'A committee of three shall thereupon be elected to liquidate the assets of the corporation under the direction of the commissioner, and each share of the capital stock, according to the amount paid thereon, shall be entitled to its proportional part of the assets in liquidation after all deposits and debts have been paid; . . .'

Question: Does money borrowed by a credit union under the provisions of section 16 constitute a debt which must be satisfied, in case of the liquidation of the affairs of a credit union, before any distribution of its assets is made to depositors or to shareholders?"

No distinction is made, nor can it be implied from the language of G. L. c. 171, as amended, between a debt due for money which a credit union has borrowed and any other debt which it may have contracted, with relation to preference in payment.

I answer your third question to the effect that in the liquidation of a credit union money borrowed constitutes a debt which must be satisfied before any distribution of its assets is made to shareholders; but it is not required by the provisions of G. L. c. 171, as amended, that such a debt should be satisfied before the payment of "deposits."

Yours very truly,

Joseph E. Warner, *Attorney General.*

License — Lubricating Oil — Stores — Explosives.

A store is not required to obtain a license to sell lubricating oil which is not inflammable or explosive.

June 20, 1932.

Gen. Alfred F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You request my opinion as to whether stores keeping lubricating oil for sale are required to obtain a license, under G. L. c. 148, § 13, as amended by St. 1930, c. 399.

This section provides: —

"No building or other structure shall, . . . be used for the keeping, storage, manufacture or sale of any of the articles named in section nine, except fireworks, firecrackers and torpedoes, unless the local licensing authority shall have granted a license therefor after a public hearing, . . ."

G. L. c. 148, § 9, as amended by St. 1930, c. 399, provides that the department shall make rules for the keeping or sale of the following articles, —

"gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, fireworks, firecrackers, or any substance having such properties that it may spontaneously, or acting under the influence of any contiguous substance, or of any chemical or physical agency, ignite, or inflame or generate inflammable or explosive vapors or gases to a dangerous extent, . . ."

The argument of the stores, to the effect that no license is required, is, that although lubricating oil is a product of crude petroleum it is in fact neither inflammable nor explosive, and therefore does not fall within the intended scope of chapter 148, which is entitled "Fire Prevention." It is not for me to attempt to determine whether the oil to which you refer is or is not inflammable or explosive. My opinion must be limited to the question of whether the statute requires a license, assuming that the oil is not inflammable or explosive.

The provision, now contained in said section 9, for regulating the use of crude petroleum or any of its products as such was first enacted in 1904. Prior to that time cities and towns had authority to make regulations relative to the storage and sale of "camphene or any similar explosive or inflammable fluid" (R. L. c. 102, § 94), and of gunpowder or other explosive (R. L. c. 102, §§ 93, 97 and 98). There was also a statute providing that no building could be used for the storage, keeping, manufacture, or refining of "crude petroleum or any of its products" without a license (R. L. c. 102, § 114); but there was no provision for regulating the storage or sale of any products of crude petroleum except so far as they might be inflammable or explosive fluids or compounds. By St. 1904, c. 370, the power to regulate the "keeping, storage, use, manufacture, or sale of gunpowder, dynamite, or other explosive and inflammable fluids" was transferred from the cities and towns to the Fire Marshal's department of the District Police (§ 1). It was also provided (§ 2) that the Fire Marshal's department might make regulations for the keeping, etc., of "gunpowder, dynamite, or other explosives, crude petroleum or any of its products, or other inflammable fluids"; and section 3 provided that no building should be used for the keeping, etc., "of any of the articles named in section two" without a license. The provision requiring licenses for the use of buildings (now § 13 of G. L. c. 148) was thus made co-extensive with the provision for making regulations (now § 9 of G. L. c. 148). The transposition of the words "crude petroleum or any of its products" from the provision relating to the use of buildings to the provision relating to regulations was merely incidental to that change. In my opinion, it was not intended in any way to increase the number of those things which were subject to regulation. Neither was it intended to give to the Fire Marshal's department the power to make rules relating to something not involving a fire hazard. *Cf. Rawding* v. *Fire Marshal*, 272 Mass. 307. It may be noted that the use of the words "or other inflammable fluids," following the reference to petroleum or any of its products, is confirmatory

of this view. In the light of this history it is possible, I think, to construe the words "crude petroleum or any of its products" (as they now appear in section 9 of G. L. c. 148) as being confined to such products as retain some of the inflammable or explosive qualities of crude petroleum, and, if possible, this construction should be placed upon the words, for, according to my understanding, there are (and doubtless were in 1904 when the change above noted was made) a number of products of crude petroleum, such as paraffin wax (for jelly glasses), paraffin candles, vaseline, albolene (a liquid vaseline used in various sprays, nose drops, and other medicines), and various mineral oils, which are not regarded as in any sense inflammable or explosive, within the meaning of said section 9, and which are sold in drug stores and other stores everywhere. To require a license in all these cases would seem to involve a burden which I believe was never intended by the Legislature. The practice has always been, as I understand it, not to require licenses in these cases. This long continued practice, especially if antedating the act of 1904, is of importance in construing the act.

I therefore advise you that section 13 of G. L. c. 148 does not require that a store obtain a license to sell lubricating oil, *provided* it is agreed that such oil is in fact not an inflammable or explosive. If such oil is inflammable or explosive, then a license is required, irrespective of the amount kept or the manner of keeping, for the statute bases no exception upon these considerations.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

State Treasurer — Issue of Notes — Appropriation.

Certain notes may not be issued, lacking legislative authority for payment, without appropriation.

JUNE 22, 1932.

HON. CHARLES F. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You request my opinion as to whether, if the remaining amounts authorized by St. 1931, cc. 236 and 268, are borrowed in 1932, you should eliminate any maturity in 1932 and distribute equally the amount borrowed under chapter 236 through the years 1933 to 1936, inclusive, and the amount borrowed under chapter 268 through the years 1933 to 1935, inclusive.

Chapter 268 is entitled "An Act providing a two year program for the acceleration of building construction, in order to alleviate the present unemployment emergency, to be financed by the issue of four year notes." Section 3 of said act reads: —

"For the purposes of this act, the state treasurer, upon the request of the department heads having charge of construction authorized hereby, shall borrow on the credit of the commonwealth such sums, not exceeding, for any particular work of construction aforesaid, the amount authorized hereby to be expended therefor, and not exceeding, in the aggregate, two million seven hundred fifty-nine thousand dollars, as may from time to time be required, and may issue notes of the commonwealth, carrying such rates of interest as the state treasurer may fix, with the approval of the governor and council. Such notes shall be payable not earlier than one year after the effective date of this act nor later than November thirtieth,

nineteen hundred and thirty-five, and their maturities shall be so arranged that the payments of principal on account of such notes in each of the four fiscal years ending November thirtieth, nineteen hundred and thirty-five will be equal, as nearly as may be. Such notes shall be signed by the state treasurer, approved by the governor and countersigned by the comptroller. All sums necessary to meet payments of principal and interest on account of said notes shall be paid from the general fund or ordinary revenue of the commonwealth."

Chapter 236 is entitled "An Act providing for continuing and accelerating the development of the State Prison Colony, and authorizing the issue of notes therefor." Section 2 is in the same form as section 3 of chapter 268, except that the last maturity is made 1936 instead of 1935.

The question arises solely because of the fact that the legislative session has ended without any appropriation having been made for the payment of notes to be issued under these acts and maturing in 1932, items providing for such appropriations having been vetoed.

In my opinion, no notes may properly be issued maturing in 1932. Without an appropriation, the Treasurer would have no authority to pay them. G. L. c. 29, § 18, provides: —

"Except as otherwise provided, no money shall be paid by the commonwealth without a warrant from the governor drawn in accordance with an appropriation then in effect, . . ."

It does not appear that it has been "otherwise provided" that the notes here in question may be paid without an appropriation. The authorization of the issue cannot in itself amount to a provision that the notes may be paid without appropriation. Nor is the authority to pay without an appropriation to be found in the provision that, — "All sums necessary to meet payments of principal and interest on account of said notes shall be paid from the general fund or ordinary revenue of the commonwealth." If the Legislature had intended that payments be made without an appropriation it could easily have said so in unambiguous language, and would hardly have failed to say so. Moreover, the Legislature has itself, by making appropriations under these statutes, given recognition to the necessity. It is implicit in the authority given by chapters 236 and 268 to issue notes that there be at least a prospect of an appropriation to take care of them. The issue is subject to other not inconsistent provisions of law.

The question remains whether, under these circumstances, authority may be found in the acts to make maturities begin in 1933. It may be argued that the provision that the maturities in the years specified shall be equal "as nearly as may be" would authorize such a course, in view of the fact that under existing circumstances no notes may be made payable in 1932. But, in my opinion, the words quoted were inserted solely in view of the probability that the amount borrowed might not be exactly divisible among the years specified. It is the plain purpose of the acts that the burden of paying the notes should not be deferred to the future, except to the limited extent stated. It is certain that the Legislature intended that the year 1932 should bear its share of the burden. In my opinion, therefore, you have no authority to borrow the amount required upon notes of which the earliest maturities are fixed in 1933.

I have answered your question. I would add, however, that, in my opinion, the difficulty may be partly met by borrowing only that portion

of the amounts required which is allocable to 1933 and the succeeding years, and by distributing the maturities of the amounts so borrowed equally among those years. The Treasurer is authorized to borrow such sums, not exceeding the maximum stated, as are requested by the heads of the departments. If, therefore, you take the amount requested by a department head, and deduct the amount attributable to 1932, I see nothing inconsistent with the intent of the acts in borrowing the balance and dividing the maturities among the years specified, beginning with 1933.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Teacher — Length of Service.

Mode of calculating length of a teacher's service, under G. L. c. 32, § 10 (8), discussed.

JUNE 27, 1932.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — I am in receipt of a communication from you which reads, in part, as follows: —

"The Board has before it the case of a teacher who is permanently disabled, whose service has been as follows: Greenfield, September, 1911, to June, 1912; and Springfield, September, 1912, to date.

She has had the following periods of absence: February 7, 1921, to June 30, 1921; and December 10, 1931, to date.

Although she has been absent since December 10, 1931, there was an allowance for sick leave through January, 1932, and we received her regular assessments from Springfield for the months of December, 1931, and January, 1932.

In your opinion, has this teacher the twenty years of service required for retirement on account of permanent disability, under G. L. c. 32, § 10 (8)?"

G. L. c. 32, § 10 (8), is the applicable statute, and reads as follows: —

"Any member of the association whose employment by the commonwealth and service in the public schools amount to twenty or more years, the last five years of which are consecutive, and who, before attaining the age of sixty, becomes permanently incapable of rendering satisfactory service as a teacher by reason of physical or mental disability, may, with the approval of the board, be retired by the employing school committee or other employer as provided in paragraph (1)."

Whether a period of absence by a teacher from his employment is a severance of his "service in the public schools," as the quoted words are used in said paragraph (8), is largely a question of fact, depending upon a variety of circumstances which may assist in determining the nature and character of the absence. For that reason no general rule of law in this respect can be stated which may be applied to determine the effect of all absences alike. The facts relative to particular instances of absence must be known and considered before a determination can be made, as a matter of law, as to how, if at all, the period of an absence of a school-teacher from his employment will affect the computation of his total period of service in the public schools.

I must confine myself, therefore, to answering the above question which you have addressed to me in your communication, and must refrain

from attempting to express an opinion upon certain general inquiries which you have made relative to absences of teachers, with regard to which no specific facts are set forth.

With reference to the particular question before me, based upon the facts as you have stated them in the above-quoted portion of your communication, I am of the opinion that the teacher referred to has had "service in the public schools amounting to twenty or more years," and that she may be retired under the provisions of said paragraph (8).

The period of twenty years' service in the public schools, demanded by the statute as a prerequisite to retirement under said paragraph (8), is not required to be a consecutive period. It is therefore immaterial in this instance, in computing the teacher's total period of service, whether her absence from February 7, 1921, to June 30, 1921, was such an absence that the time involved therein should or should not be taken into account in computing such total period; for, since she entered the service in September, 1911, this teacher, leaving out of account the time from February 7, 1921, to June 30, 1921, had served nineteen years, ten months and twenty days up to December 10, 1931, when her second absence began. As to this second period of absence, you state that the facts are that it was occasioned by illness, that the school committee which employed the teacher, in its discretion, paid her salary throughout December, 1931, and January, 1932, and that during those two months retirement assessments were deducted in the usual course. From these facts it is proper to draw the inference that the teacher's absence during the latter part of December, 1931, and the whole of January, 1932, was not such an absence as removed her from her employment, though not physically present at her school, and therefore did not interrupt her "service in the public schools." This being so, her total period of such service, beginning in September, 1911, assuming that it ended with the close of January, 1932, and was reduced by the time between February 7, 1921, and June 30, 1921, was twenty years and ten days.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Transient Vendor — License — Agent.

Mode of determining whether a corporation is a transient vendor under G. L. c. 101, discussed.

The agent of a corporation, and not the corporation itself, is to receive the license for transient vending.

June 30, 1932.

Mr. Francis Meredith, *Director of Standards.*

Dear Sir: — In a recent letter you have set forth the following facts: —

"A domestic corporation engages floor space in an established department store for the purpose of conducting therein the retail sale of groceries, by its agent, commencing business subsequent to April first of the current year."

You have asked my opinion in relation to the law applicable thereto in the following two questions: —

"G. L. c. 101, § 1, as amended, provides as follows:

'"Transient vendor" for the purposes of this chapter shall mean and include any person, either principal or agent, who engages in a tempo-

rary or transient business in the commonwealth, either in one locality or in traveling from place to place selling goods, wares or merchandise.

"Temporary or transient business" for the purposes of this chapter shall mean and include any exhibition and sale of goods, wares or merchandise which is carried on in any tent, booth, building or other structure, unless such place is open for business during usual business hours for a period of at least nine months in each year.'

Does such person come within the provisions of the statutory definition of section 1, as above quoted, as said business will not be conducted during the usual business hours for a period of at least nine months in this calendar year; or does the fact that he may be the agent of a corporation, foreign or domestic, exempt him from the provisions of the law?"

Whether or not a person is a transient vendor, within the meaning of section 1 of G. L. c. 101, as amended, is primarily a question of fact, to be determined by an examination of all the material circumstances connected with his engagement in a particular business. The Attorney General does not pass upon questions of fact.

As a matter of law, however, the fact that such an agent is an agent for a corporation does not place him outside the definition of "transient vendor" as above set forth. In view of the opinion of the Supreme Judicial Court in *Commonwealth* v. *Newhall*, 164 Mass. 338, it must be assumed that a corporation is included within the meaning of the word "person" in the definition contained in said G. L. c. 101, § 1, by virtue of the provisions of G. L. c. 4, § 7, cl. Twenty-third; and that therefore its agent is likewise included within such definition, and when conducting a "temporary or transient" business is himself within the requirements of the statute relative to being licensed.

These requirements are to be found in section 3 of said chapter 101, as amended, which section provides: —

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

As a matter of law it is immaterial, in determining whether the business engaged in by the agent is a "temporary or transient" business, as those words are used in said section 1, that, as you state in your said questions, the business in which the said agent engaged "will not be conducted during the usual business hours for a period of at least nine months in *this calendar year*."

In my opinion, the words "nine months in each year," as used in the definition of "temporary or transient business," in said section 1, do not denote a calendar year.

I am aware that it is provided in G. L. c. 4, § 7, that, —

"In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

. . . .

Nineteenth, . . . 'year', a calendar year."

It clearly appears, however, from the context of the instant statute that the Legislature did not intend that the word "year" should, as used

in said section 1 of G. L. c. 101, have the meaning of calendar year. To have intended that it should have such meaning would have been to create a purely arbitrary rule by which a permanent business established subsequent to April first in any year would have been classified as a temporary or transient business during the first nine months of its existence; and the person conducting it would have been obliged to pay a license fee for such period, although such business was not in fact temporary. To have enacted a measure having such a meaning would have been in effect as arbitrary a use of legislative power as an endeavor to make white black by legislative fiat. It is not to be presumed that the General Court acted in such a manner in framing the instant statute; it is rather to be construed in such a fashion, if possible, as will give it a reasonable and fair meaning. That a reasonable meaning in connection with the purpose of the whole statute was intended by the Legislature is made plain by the fact that in G. L. c. 101, § 3, as amended, the General Court has provided that the license which is to be issued to the transient vendor "shall expire one year *from* the date thereof." If the Legislature had intended that the word "year," as employed in section 1, should have the meaning of calendar year, they could not have done otherwise than provide that the license to conduct the business should expire at the close of the calendar year in which it was issued; instead of which, they have plainly stated that it shall expire one year from the date of issue — a provision totally at variance with an intent to define transient business as a business carried on for a period of at least nine months in a calendar year. The true meaning of the phrase employed in said section 1 is that a temporary or transient business is one that is not carried on for at least nine months in each year of the business' existence. So that, if the business begins on June 1, 1932, in order not to fall within the category of a temporary or transient business it must be kept open for at least nine months prior to June 1, 1933. In like manner, the local or town license provided for by section 5 of said chapter 101, as amended, is not limited to a period within the calendar year of its issue, but may be in force under its terms from May 1 of 1932, to April 1 of 1933, for example.

The instant statute is not a tax statute. It purports to be, and is, passed under the police power of the Commonwealth for the purposes, as was said in *Commonwealth* v. *Newhall*, 164 Mass. 338, 340 —

"of preventing and punishing fraud in sales by itinerant vendors, and an examination of the statutes makes it appear that such is their real design, and that the provisions for State and local licenses are merely incidental means of compensating the State and the localities in which the itinerant vendors ply their business for the expenses of necessary State and local supervision."

This being so, the idea of a possible intent on the part of the Legislature to employ "year," in said section 1, as meaning calendar year, in spite of the other obvious evidences of a contrary intent already noted, is further negatived.

Again, in *Commonwealth* v. *Crowell*, 156 Mass. 215, 216, the court said, with relation to an earlier form of the instant statute substantially similar in all material respects: —

"The object of the statute would seem to be to protect the public from the imposition liable to be practised upon it by itinerant vendors who are not hawkers or pedlers because hiring, leasing, or occupying a building for

their business, but who sell temporarily or transiently in one place, or in travelling from place to place, goods, wares, or merchandise, and who might naturally be supposed to be free, to some extent at least, from the restraints and influences inducing fair and honest dealing which apply to persons established permanently in trade in a given locality. The statute applies to residents and non-residents, and is not, as we construe it, designed or calculated to prevent fair and free competition, but only to protect the public against fraud, and to place the traffic under what the Legislature, having regard to the character of the business, deems wholesome restraints. It comes within what is termed the police power, and stands on the same ground as the acts relating to hawkers and pedlers, auctioneers, pawnbrokers, and others, of which there are numerous examples."

The fact to which you allude in your said questions, namely, that a domestic corporation "engages floor space in an established department store" for the purpose of having its agent engage in its business in such space, is not, as a matter of law, determinative of the question of whether or not the business carried on in such space is "temporary and transient" or permanent. Such fact is merely important if it aids, in connection with all the other surrounding circumstances, in determining the ultimate question of fact for decision, namely, whether the person engaging in the particular business under consideration is a transient vendor. Nor is the fact that a domestic corporation may have a permanent place of business elsewhere than in such space itself determinative of the said ultimate question of fact, for the Supreme Judicial Court has said, in *Commonwealth* v. *Crowell*, 156 Mass. 215, 217: —

"A party may be engaged in selling temporarily or transiently in one city or town, while having a permanent place of business in another. So far as he is engaged in selling temporarily or transiently, he comes within the prohibition of the statute, without any regard to the fact that he is also carrying on an established and permanent business elsewhere. Whether his whole business is selling temporarily or transiently, or whether he does it more or less frequently in connection with a permanent business at a fixed place or places, does not matter. He comes in either case within the statute."

It is apparent from the foregoing language of the court that it is not the place or nature of the general business of the corporation which is of primary importance, but rather the nature of the particular business in a given town in which it is engaging, and which is under consideration, which must be examined in order to determine the latter's permanent or transient character and the permanent or transient character as a vendor of the person engaging in such localized business.

You have also asked my opinion upon a third question, as follows: —

"Can a license be issued to a corporation rather than to the individual who may be conducting the business in behalf of the corporation?"

G. L. c. 101, § 3, as amended, with relation to the license which is to be issued to a transient vendor, provides: —

". . . Such license shall contain a copy of the application therefor and of any statements required under section seven, and shall not be transferable. It shall not authorize more than one person to sell goods, wares

or merchandise as a transient vendor either by agent or clerk or in any other way than in his own proper person, but a licensee may have the assistance of one or more persons in conducting his business who may aid him but not act for or without him."

The limitations placed upon the authority conferred upon the licensee by the license are of such a character that a corporation could, from its nature, not act in compliance therewith. Such license, therefore, cannot be issued to a corporation. The agent, however, who engages in the temporary or transient business of such a corporation can and must be licensed.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Commonwealth — Buildings — Inspection — Licenses.

Laws relative to the inspection and licensing of plumbing and wiring have no application to a building of the Commonwealth placed under the full jurisdiction of a Commission while under construction.

July 11, 1932.

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

Dear Sir: — You have in effect requested my opinion upon the question of whether buildings erected by the Commonwealth on the grounds of the Brockton Agricultural Society, under the provisions of St. 1931, c. 413, are subject to inspection and licensing by the local plumbing and wire inspectors of the city of Brockton.

St. 1931, c. 413, provides that "such sums as may be appropriated therefor by the general court" may be expended "for the purpose of constructing a suitable and adequate state building upon the grounds now owned by the Brockton Agricultural Society in the city of Brockton," this expenditure to be "under the direction of the chairman of the commission on administration and finance and the commissioner of agriculture"; and "all contracts for the construction of said building shall be subject to approval by the governor and council."

G. L. c. 142, contains the law in respect to supervision of plumbing. It provides, in section 11, that, —

"Said inspectors of plumbing shall inspect all plumbing in process of construction, alteration or repair for which permits are granted within their respective cities and towns."

Section 13 provides that each city and town shall adopt regulations or by-laws, which shall provide that "no plumbing shall be done, except to repair leaks, without a permit first being issued therefor, upon such terms and conditions as such cities or towns shall prescribe."

The duties of wire inspectors are contained in G. L. c. 166, § 32, which provides, in part: —

"A city shall, by ordinance, designate or provide for the appointment of an inspector of wires . . . Such inspector shall supervise every wire over or under streets or buildings in such city or town and every wire within a building designed to carry an electric light, heat or power current; shall notify the person owning or operating any such wire whenever

its attachments, insulation, supports or appliances are improper or unsafe, or whenever the tags or marks thereof are insufficient or illegible; shall, at the expense of the city or town, remove every wire the use of which has been abandoned, and every wire not tagged or marked as hereinbefore required, and shall see that all laws and regulations relative to wires are strictly enforced."

The Legislature has entrusted the construction of the buildings in question to your Commission, subject to the approval of plans by the Governor and Council. In carrying out such construction your Commission acts as the agent of the Commonwealth, and is exercising domination over property of the Commonwealth. The general law made for the regulation of citizens in regard to the inspection and licensing of plumbing and wiring must, under general principles of statutory interpretation, be held to be subordinate to the special statute placing in your Commission complete jurisdiction over the construction of these buildings and the regulation of the use of this State property, unless there is express provision to the contrary. No such special provision to the contrary is to be found in the applicable statute. It is not to be assumed that, in the absence of such a special provision, the Legislature intended to give to the local licensing or inspecting officials authority to control or interfere with the reasonably necessary efforts of your Commission to perform its duty as the agent of the Commonwealth. *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440, 443; I Op. Atty. Gen. 290; II *ibid.* 56 and 399.

I accordingly answer your question in the negative.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Notes issued by the State Treasurer — General Revenue — Payment without Appropriation.

Under St. 1931, cc. 236 and 268, providing for the issuance of notes to be signed by the State Treasurer, approved by the Governor and countersigned by the Comptroller, to be repaid out of general revenue, it is not necessary, prior to the issuance of such notes, that the Legislature should have appropriated money for their repayment. It is sufficient that there should be a prospect of an appropriation, and, assuming such prospect, the Comptroller may properly countersign said notes.

Aug. 3, 1932.

Hon. Walter S. Morgan, *Comptroller.*

Dear Sir: — Certain notes issued by the Treasurer, with the approval of the Governor and Council, under St. 1931, cc. 236 and 268, have been presented to you to be countersigned, as required by said acts. These notes are payable November 30th of this year, and represent the portion of the total amounts to be borrowed properly allocable to the present year, under the provisions of said acts.

You request my opinion as to whether you have authority to countersign these notes, in view of the fact that no appropriation was made in the general appropriation act of this year for the payment of these notes, and that the Legislature has been prorogued.

Section 3 of said chapter 268 reads: —

"For the purposes of this act, the state treasurer, upon the request of the department heads having charge of construction authorized hereby, shall borrow on the credit of the commonwealth such sums, not exceeding, for any particular work of construction aforesaid, the amount authorized hereby to be expended therefor, and not exceeding, in the aggregate, two million seven hundred fifty-nine thousand dollars, as may from time to time be required, and may issue notes of the commonwealth, carrying such rates of interest as the state treasurer may fix, with the approval of the governor and council. Such notes shall be payable not earlier than one year after the effective date of this act nor later than November thirtieth, nineteen hundred and thirty-five, and their maturities shall be so arranged that the payments of principal on account of such notes in each of the four fiscal years ending November thirtieth, nineteen hundred and thirty-five will be equal, as nearly as may be. Such notes shall be signed by the state treasurer, approved by the governor and countersigned by the comptroller. All sums necessary to meet payments of principal and interest on account of said notes shall be paid from the general fund or ordinary revenue of the commonwealth."

Section 2 of said chapter 236 is in the same form as section 3 of chapter 268, except that the last maturity is made 1936 instead of 1935.

In an opinion dated June 22nd of this year (*ante*, p. 79) I advised the Treasurer that he would have no authority to pay notes issued under these acts without an appropriation, and that, accordingly, he should not issue notes for the present year unless "there be at least a prospect of an appropriation to take care of them."

The Treasurer has since been informed that a special session of the Legislature is to be called for the purpose, among others, of making provision for the payment of these notes at maturity, and, accordingly, he has determined that there is a prospect of an appropriation being made, and has issued the notes. I am officially informed that such a session is to be called. Under these circumstances, I cannot say that the Treasurer is not authorized to issue the notes. It is true that the acts provide that the principal and interest shall be paid from "the general fund or ordinary revenue of the commonwealth." But I am advised by the Treasurer that the notes will be so paid. I must assume that there is reasonable ground for his expectation. The Treasurer is directed by the acts to borrow such sums upon the request of the department heads "as may from time to time be required" to finance the work referred to. The money, as I am informed, is required now. In my opinion, the provision that the notes shall be paid from the general fund or ordinary revenue is not to be construed as meaning that no appropriation for the notes may be made except at the regular session of the Legislature. The requirement might conceivably not be anticipated at that time.

Accordingly, I advise you that, in my opinion, you may properly countersign the notes.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Purchasing Bureau — Supplies, Office Furniture, Etc. — Armories.

Approval by the Governor for the purchase of supplies, office furniture, equipment, etc., for a public building constructed under authority of a special act, is not needed, as authority for such purchases, by virtue of G. L. c. 30, §§ 51 and 52, is vested in the purchasing agent.

Contracts for the purchase of supplies, office furniture and equipment for armories require the approval of the Governor, by virtue of G. L. c. 6, § 17.

Aug. 3, 1932.

Brig. Gen. John H. Agnew, *The Adjutant General.*

Dear Sir: — You have requested my opinion as to whether or not, under the provisions of a section appearing in various acts making appropriations for maintenance of various departments, boards, etc., of the Commonwealth, reading as follows, —

"No payment shall be made or obligation incurred under authority of any special appropriation made by this act for construction of public buildings or other improvements at state institutions until plans and specifications have been approved by the governor, unless otherwise provided by such rules and regulations as the governor may make." —

it is necessary for a department to obtain prior approval of the Governor to purchase supplies, office furniture and equipment for a building constructed under authority of a special appropriation.

In my opinion, it would be unnecessary for a department to obtain prior approval of the Governor under that section before purchasing supplies, office furniture or equipment. In this connection, I call your attention to G. L. c. 30, §§ 51 and 52, added by St. 1923, c. 362, § 52, which read as follows: —

"Section 51. All materials, supplies and other property, except legislative or military supplies, needed by the various executive and administrative departments and other activities of the commonwealth shall be purchased by or under the direction of the purchasing bureau in the manner set forth in the following section, and sections twenty-two to twenty-six, inclusive, of chapter seven. Said bureau shall be furnished with such general supply appropriations, in addition to its departmental supply accounts, as may be necessary in order to place blanket contracts or advance orders and thereby take advantage of favorable market conditions.

Section 52. No supplies, equipment or other property, other than for legislative or military purposes, shall be purchased or contracted for by any state department, office or commission unless approved by the state purchasing agent as being in conformity with the rules, regulations and orders made under section twenty-two of chapter seven. Such approval may be of specific or blanket form at the discretion of the state purchasing agent."

You further state that, in view of the fact that the section first above quoted is similarly worded each year and specifies "construction . . . or other improvements," it has been contended that the quoted words apply only to actual construction or additions to existing buildings and do not apply to the movable contents thereof, such as furniture, supplies, etc. I am of the opinion that the statute is properly so construed; but would point out that an authorization for the construction of public buildings or other improvements at State institutions, or the appropriation

therefor, would not carry with it the right to contract for furniture, supplies and the like, but that additional authority would be required to make such purchases.

G. L. c. 33, § 40, as amended by St. 1924, c. 465, provides that the Armory Commissioners shall erect, furnish and equip certain armories, but G. L. c. 6, § 17, as amended by St. 1931, c. 452, § 2, provides that the Armory Commissioners and certain other officers "shall serve under the governor and council, and shall be subject to such supervision as the governor and council deem necessary or proper"; so that, in my opinion, any contract made by the Armory Commissioners for the purchase of supplies, office furniture or equipment for a building constructed by them should have the approval of the Governor and Council.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Corporations — Shares without Par Value — Par Value Shares — Fees.

If a corporation having shares without par value cancels such shares and issues shares with par value instead, the capital remaining the same, the minimum fee, under G. L. c. 156, § 55, is payable, rather than a fee based upon an increase of capital stock, under G. L. c. 156, § 54.

AUG. 3, 1932.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You state that a corporation having shares without par value proposes to cancel such shares and issue shares with par value instead, the capital of the corporation remaining the same; and you request my opinion as to whether a fee based upon an increase of capital stock should be demanded under section 54 of G. L. c. 156, or whether only the minimum fee provided for in section 55 is payable. I do not understand that your question relates in any way to the validity of the proposed issue.

Said section 54, as amended by St. 1928, c. 360, § 2, is as follows: —

"The fees for filing and recording the following certificates shall be as follows:

For filing and recording a certificate providing for an increase of capital stock with par value, one twentieth of one per cent of the amount by which the capital is increased; but not in any case less than twenty-five dollars.

For filing and recording a certificate providing for a change of shares with par value to shares without par value, whether or not the capital is changed thereby, one cent for each share without par value resulting from such change, less an amount equal to one twentieth of one per cent of the total par value of the shares so changed; but not in any case less than twenty-five dollars.

For filing and recording a certificate providing for an increase in the number of shares without par value, whether or not the capital is changed thereby, one cent for each additional share; but not in any case less than twenty-five dollars."

In the present case, if any fee were collectible under this section it would be under the first paragraph. But the increase referred to in this paragraph is an increase in "capital," *i.e.*, in the capital assets of the corporation. *Hood Rubber Co.* v. *Commonwealth*, 238 Mass. 369. *Cf.* last

paragraph of section 54. Here, however, the capital remains the same. No excise is, therefore, assessable under section 54, and the only fee collectible is the minimum fee provided for under section 55.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Weekly Payment of Wages — Post-office Building on Government Land — Jurisdiction of the Commonwealth.

G. L. (Ter. Ed.) c. 149, § 148, which provides for the weekly payment of wages, has no application to a contractor engaged in the erection of a post-office building within the limits of a city, upon land owned by the United States, because said building is not within the jurisdiction of the Commonwealth.

SEPT. 12, 1932.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You request my opinion as to whether G. L. (Ter. Ed.) c. 149, § 148, providing for the weekly payment of wages, applies to a contractor engaged in the erection of a post-office building within the limits of one of our cities, upon land owned by the United States.

Said section 148 provides: —

"Every person engaged in carrying on in a city, a hotel or club, and every person engaged in carrying on within the commonwealth a theater, moving picture house, dance hall, factory, workshop, manufacturing, mechanical or mercantile establishment, mine, quarry, railroad or street railway, or telephone, telegraph, express, transportation or water company, or in the erection, alteration, repair or removal of any building or structure, or the construction or repair of any railroad, street railway, road, bridge, sewer, gas, water or electric light works, pipes or lines, and every contractor engaged in the business of grading, laying out or caring for the grounds surrounding any building or structure, shall pay weekly each employee engaged in his business, and every person employing musicians, janitors, porters or watchmen shall pay weekly each such employee, the wages earned by him to within six days of the date of said payment if employed for six days in a week or to within seven days of the date of said payment if employed seven days in the week, . . ."

As the statute is drawn, the obligation of a contractor is made to depend solely upon the erection of, or doing work upon, a building within the Commonwealth. This means a building within the jurisdiction of the Commonwealth. *Mitchell* v. *Tibbetts*, 17 Pick. 298. The land in question is owned by the United States Government. You do not state when or how the land in question was acquired. I do not consider, therefore, the possible effect of any special reservation which might perhaps be the basis for argument that jurisdiction which would cover the regulation of labor was retained by the Commonwealth. Apart from some such special reservation, the Commonwealth has no jurisdiction. G. L. (Ter. Ed.) c. 1, § 7; *Mitchell* v. *Tibbetts*, 17 Pick. 298; *Opinion of the Justices*, 1 Met. 580; *Newcomb* v. *Rockport*, 183 Mass. 74; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647.

Accordingly, it is my opinion (with the possible qualification above stated) that the statute, G. L. (Ter. Ed.) c. 149, § 148 does not apply to the case stated by you.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Labor — Public Work — Contractor — Hours of Work.

G. L. (Ter. Ed.) c. 149, § 33, does not permit a contractor for public work to require employees to work forty-eight hours during the first five days of the week, except as qualified by the statutory provision relative to a Saturday half holiday.

SEPT. 12, 1932.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You request my opinion as to whether section 33 of G. L. (Ter. Ed.) c. 149, permits a contractor for a public work to require employees to work forty-eight hours during the first five days of the week, provided that no work is required on Saturday.

Said section 33 reads as follows: —

"It shall not be a violation of section thirty or thirty-one if, in the event of a Saturday half holiday being given to a laborer, workman or mechanic, his hours of labor upon other working days are increased sufficiently to make a total of forty-eight hours for his week's work."

I answer your question in the negative. Section 30 of said chapter 149 prohibits work of "more than eight hours in any one day." This is qualified by section 33 to the extent of permitting extra work to make up for a deficiency of a forty-eight-hour week caused by a Saturday "half holiday," but it is qualified only to that extent.

You also request my opinion as to whether a violation of G. L. (Ter. Ed.) c. 149, § 30, is involved in requiring a mechanic, who has worked forty-eight hours during the week, to repair his steam shovel on Saturday afternoon.

Section 30 provides: —

"The service of all laborers, workmen and mechanics now or hereafter employed by the commonwealth or any county therein or any town which, by vote of the city council, or of the voters at a town meeting, accepts this section or has accepted section one of chapter two hundred and forty of the General Acts of nineteen hundred and sixteen, or by any contractor or sub-contractor for or upon any public works of the commonwealth or of any county therein or of any such town is hereby restricted to eight hours in any one day and to forty-eight hours in any one week. . . ."

You ask whether the repair work referred to is to be construed as service "for or upon public works."

I assume that the steam shovel referred to is being used in connection with the public work, and that the repairs are being made with a view to its further use in such work.

In my opinion, the work to which you refer is in violation of the statute. The words "for or upon any public work" are descriptive of the contractor rather than of the laborer. *Cf.* St. 1911, c. 494. There seems to be no qualification of the nature of the work done by the laborers referred to other than the implied qualification that the work is in furtherance of the contract. *Cf.* IV Op. Atty. Gen. 443, 445. The work here in question was being done, I assume, in furtherance of the contract. It is immaterial whether the laborer's work consists in using his tools or in repairing them. That section 30 contains no such qualification as is suggested by your question is further confirmed by the provisions of section 34, which

provide that the public contracts there referred to shall contain a stipulation that no laborer "working within the commonwealth, in the employ of the contractor," shall be required or permitted to work more than forty-eight hours a week.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

District Attorneys — Traveling Expenses — County.

Certain traveling expenses of district attorneys are properly chargeable to a county.

SEPT. 19, 1932.

Hon. WALTER S. MORGAN, *Comptroller.*

DEAR SIR: — You request my opinion as to whether any traveling expenses of district attorneys may be paid by the county for the benefit of which they were contracted.

G. L. (Ter. Ed.) c. 12, §§ 23 and 24, provide as follows: —

"SECTION 23. Except in the Suffolk district, and except as otherwise provided in section twenty-four of this chapter and in section fifteen of chapter two hundred and seventy-six, district attorneys and assistant district attorneys shall receive for traveling expenses necessarily incurred in the performance of their official duties such sums as shall be approved by a justice of the superior court, to be paid by the commonwealth.

SECTION 24. A district attorney, in the name of any county in his district, may contract such bills for stationery, experts, travel outside of the commonwealth by witnesses required by the commonwealth in the prosecution of cases, for necessary expenses incurred by himself or by officers and others under his direction in going outside of the commonwealth for the purpose of searching for or bringing back for trial persons under indictment in said county, and for such other expenses as may in his opinion be necessary for the proper conduct of his office in the investigation of or preparation and trial of criminal causes; and all such bills shall be paid by the county for the benefit of which they were contracted upon a certificate by the district attorney that they were necessarily incurred in the proper performance of his duty, and upon approval of the auditor of Suffolk county if the bills were incurred for said county, otherwise upon the approval of the county commissioners or of a justice of the superior court."

On April 7, 1924, one of my predecessors in office rendered an opinion to the Commissioner of Corporations and Taxation (VII Op. Atty. Gen. 393) that all traveling expenses of district attorneys "necessarily incurred in the performance of their official duties are to be paid by the Commonwealth and not by the county." Since the date on which that opinion was submitted, the statute therein referred to, G. L. c. 12, § 24, has been amended (St. 1930, c. 210, § 2) so as to include within the scope of bills to be contracted by district attorneys at the expense of the county "necessary expenses incurred by himself or . . . others under his direction in going outside of the commonwealth for the purpose of searching for or bringing back for trial persons under indictment in said county." This amendment was made pursuant to a recommendation contained in my annual report for the year ending November 30, 1929 (p. 31).

The effect of this amendment is to render traveling expenses of district attorneys incurred "in going outside of the commonwealth for the purpose

of searching for or bringing back for trial persons under indictment in said county" properly chargeable to the county for whose benefit said traveling expenses were incurred. All traveling expenses of district attorneys other than those included within the scope of St. 1930, c. 210, § 2, must still be paid in accordance with the provisions of G. L. (Ter. Ed.) c. 12, § 23.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — City of Haverhill — Inspector of Plumbing.

The power of appointment of an inspector of plumbing in the city of Haverhill is vested in the board of health of said city.

SEPT. 19, 1932.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

DEAR SIR: — You have requested my opinion as to whether the power of appointment of an inspector of plumbing in the city of Haverhill is vested in the inspector of buildings or in the board of health.

R. L. c. 103, § 5, contained the following provisions relative to the appointment of an inspector of plumbing: —

"The inspector of buildings of each city and town which is subject to the provisions of this chapter, if he has control of the enforcement of the regulations relative to plumbing or, if he has not such control, the board of health, shall, within three months after the acceptance of the provisions of this chapter, appoint one or more inspectors of plumbing, . . ."

R. L. c. 103, § 7, provided, in part, as follows: —

"Each city, except Boston, the city council of which accepts the provisions of this section or has accepted the corresponding provisions of earlier laws and each town of five thousand inhabitants or more, or which has a system of water supply or sewerage, shall by ordinance or by-law prescribe regulations for the materials, construction, alteration and inspection of all pipes, tanks, faucets, valves and other fixtures by and through which waste water or sewage is used and carried; and shall provide that such pipes, tanks, faucets, valves or other fixtures shall not be placed in any building in such city or town, except in accordance with plans approved by the inspector of buildings, if he has control as provided in section five, or if he has not such control, by the board of health; . . ."

The city of Haverhill, acting under the authority of R. L. c. 103, passed ordinances providing for the construction and inspection of plumbing. Chapter XXXIV, Municipal Ordinances of the City of Haverhill, part I, section 1, provides as follows: —

"The Inspector of Plumbing, appointed by the Board of Health according to law and subject to the provisions of Section Three of Part Three of Chapter Three of these Ordinances, shall have all the powers, rights and privileges, perform all the duties, and be subject to all the liabilities of such inspector as defined by law or ordinance; he shall devote all his time to the duties of his office, and shall receive such compensation therefor as the Board of Health may, subject to the approval of the Municipal Council, determine and provide."

The provisions of R. L. c. 103, §§ 5 and 7, were not amended or changed in any manner material to the present inquiry until the recodification of the General Laws in 1921. The corresponding sections of R. L. c. 103, §§ 5 and 7, are now G. L. (Ter. Ed.) c. 142, §§ 11 and 13.

G. L. (Ter. Ed.) c. 142, § 11, 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 . . ."

G. L. (Ter. Ed.) c. 142, § 13, provides, in part, as follows: —

"Each city, except Boston, and each town which has five thousand inhabitants or more or which has a system of water supply or sewerage, shall by ordinance or by-law prescribe regulations for the materials, construction, alteration and inspection of all pipes, tanks, faucets, valves and other fixtures by and through which waste water or sewage is used and carried; and shall provide that such pipes, tanks, faucets, valves or other fixtures shall not be placed in any building in such city or town, except in accordance with plans approved by said inspector of buildings, if any, otherwise by the board of health; . . ."

G. L. (Ter. Ed.) c. 142, § 6, provides, in part, that, —

"The examiners shall forward to the board of health of each town, or to the inspector of buildings having control of the enforcement of regulations relative to plumbing in such town, the names and addresses of all persons in such town to whom such licenses have been granted."

Where sections 11 and 13 delegate powers to "said inspector of buildings, if any," the words "said inspector of buildings" refer to "the inspector of buildings having control of the enforcement of regulations relative to plumbing in such town" described in section 6. If there is not in any town an inspector of buildings vested with said control by ordinance or by-law, there is no "inspector of buildings," within the meaning of that term as employed in sections 11 and 13, and the power of appointment of an inspector of plumbing in such town vests in the board of health, under the provisions of said section 11.

It is obvious that, under the original provisions of R. L. c. 103, § 5, the power of appointment of a plumbing inspector in the city of Haverhill vested in the board of health.

The recodification of the General Laws is not to be construed as effecting substantive changes in existing law unless a clear intention is expressed. *Mackintosh, Petitioner*, 246 Mass. 482; *Byfield* v. *Newton*, 247 Mass. 45, 56. In my opinion, the provisions of G. L. (Ter. Ed.) c. 142, §§ 11 and 13, are substantively identical with those of R. L. c. 103, §§ 5 and 7 (in so far as material to the present inquiry).

In my opinion, therefore, the power of appointment of an inspector of plumbing in the city of Haverhill is vested in the board of health of said city.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

State Retirement Association — Members — Resignation on Seventieth Birthday — Refund of Contributions.

A member of the State Retirement Association, who must be retired at age seventy, may resign on his seventieth birthday, and his contributions shall thereupon be refunded.

SEPT. 22, 1932.

Hon. CHARLES F. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — You request my opinion as to whether a member of the State Retirement Association may, on his seventieth birthday, resign and obtain a refund of his contributions, under G. L. (Ter. Ed.) c. 32, § 5 *(2) A (c)*.

Said section provides that should a member "resign from the service of the commonwealth at any time after he is eligible for retirement," the money contributed by him shall be refunded, with interest, upon demand by him and upon filing a waiver to all claims for pension and annuity.

Section 2 (4) of the chapter provides that any member who reaches the age of sixty after fifteen years' continuous service "may retire or be retired by the board", and that "any member who reaches the age of seventy must so retire."

As I understand it, if this member had resigned the day before and had asked for a refund no question would be raised. The question now arises because of the provision in section 2 (4) that "any member who reaches the age of seventy must so retire." You query whether, in view of this provision of the statute, the member was not already retired at the time, and so not in a position to resign; but you state: —

"It has been the policy of the Board to allow a member to receive salary on his seventieth birthday and to retire as of the close of business on said day. We have not considered that a member must terminate active service on the day immediately prior to his seventieth birthday so that his pension instead of the salary would be paid for his seventieth birthday."

According to the policy of your Board, as stated by you, the member had not been retired, and would not be until the end of his seventieth birthday. His pension had not begun to run; he was still being paid as in the service of the Commonwealth. Since he was still, in fact, in the service, he could resign from it. It would be inconsistent for your Board to hold otherwise.

In my opinion, the member should be granted the refund which he seeks.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles — Towing Disabled Motor Vehicles — Registration — Operation.

Towed automobiles, being towed by flexible connection or by a crane raising the front end or by a rigid towbar, if actually disabled, are not being *operated*, as that word is used in G. L. (Ter. Ed.) c. 90, § 9.

SEPT. 28, 1932.

Hon. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion as to whether or not motor vehicles being towed under certain sets of conditions, which you have outlined, are being "operated," as that word is used in G. L. (Ter. Ed.) c. 90, § 9.

The first set of conditions which you outline is that in which a motor vehicle is being "towed by means of a flexible connection, in such a manner as to require the presence of an operator in the towed vehicle to operate the steering mechanism and the brakes." The second set of conditions which you outline is that where "the front end of the towed vehicle is lifted clear of the ground by a crane or other device." The third set of conditions is that in which a motor vehicle is towed "by means of a rigid towbar, which also controls the steering mechanism of the car being towed. The two cars, towing car and towed car, are operated by means of this linkage as one unit and are under the control of one driver."

I assume that under each of the sets of conditions which you have set forth the car that is being towed is, in its existing state, incapable of proceeding under its own motive power.

In *Norcross* v. *B. L. Roberts Co.*, 239 Mass. 596, the Supreme Judicial Court, in considering a statute which was a forerunner of the instant section [section 9 of G. L. (Ter. Ed.) c. 90] and which provided that "no person shall operate any motor vehicle . . . upon . . . any way, . . . unless . . . registered," held that an unregistered motor cycle which was incapable of going under its own power and was being pushed by its owner over the highway to a repair shop six miles away was not being operated so as to come within the prohibition of the statute. The court said: "The plaintiff was no more operating the machine, within the contemplation of the statute, than if he had been conveying it in a wheelbarrow."

If pushing a disabled motor cycle over the highway by hand is not *operating* it, within the meaning of this form of criminal statute, it is difficult to understand how pulling a disabled motor vehicle over the highway by another car can be deemed *operating* the motor vehicle. Nor if a person who pushes and guides a disabled motor cycle does not by such acts *operate*, within the meaning of the statute, it is equally as difficult to comprehend how the person who sits in a disabled towed automobile and merely steers and brakes it can be said to *operate* the latter. It would seem that the verb "operate" in any of its parts, as used in the instant statute, relates to action capable of causing a non-disabled motor vehicle to progress over the highway in some manner other than by propulsive power applied by some person or another vehicle.

In each of the other cases in which our Supreme Judicial Court has considered the meaning of the verb "operate" as applied to motor vehicles or motor cycles, in various sections of G. L. c. 90, the vehicle involved has been one capable of being driven under its own power, and in each the intentional doing of an act connected with the mechanism, by a person within the vehicle, has made possible the movement of the vehicle without the application of any external force other than gravity, except in the instance of stops for brief inspection or minor repairs. The construction of the verb "operate" in its various parts has always been considered by the Supreme Judicial Court in relation to what may be called "live" cars; that is, cars capable of immediately or shortly proceeding under their own power. The opinions in such cases have no real application to the question which you have asked me concerning motor vehicles which do not come within the description of "live" cars. *Commonwealth* v. *Henry*, 229 Mass. 19; *Reynolds* v. *Murphy*, 241 Mass. 225; *Commonwealth* v. *Clarke*, 254 Mass. 566; *Commonwealth* v. *Uski*, 263 Mass. 22; *Cook* v. *Crowell*, 273 Mass. 356; *Jenkins* v. *North Shore Dye House, Inc.*, 277 Mass. 440.

The opinion of the court in *Norcross* v. *B. L. Roberts Co.*, *supra*, appears to be based upon conditions of fact sufficiently analogous to those which you have set forth in your question to go far towards establishing a basis for an answer to your question.

Moreover, G. L. (Ter. Ed.) c. 90, § 9, the controlling statute, reads as follows: —

"No person shall operate any motor vehicle or draw any trailer, and the owner or custodian of such a vehicle shall not permit the same to be operated upon or to remain upon any way except as authorized by section three, unless such vehicle is registered in accordance with this chapter and carries its register number displayed as provided in section six, and, in the case of a motor vehicle, is equipped as provided in section seven, except that any motor vehicle or trailer may, if duly registered, be operated or remain upon any way between the hours of twelve o'clock noon on December thirty-first of one year and twelve o'clock noon on January first of the following year if it carries its register number of either year displayed as provided in section six, and except that a tractor or trailer may be operated without such registration upon any way for a distance not exceeding one half mile, if said tractor or trailer is used exclusively for agricultural purposes, or for a distance not exceeding three hundred yards, if such tractor or trailer is used for industrial purposes other than agricultural purposes, for the purpose of going from property owned or occupied by the owner of such tractor or trailer to other property so owned or occupied; but violation of this section shall not constitute a defence to actions of tort for injuries suffered by a person, or for the death of a person, or for injury to property, unless it is shown that the person injured in his person or property or killed was the owner or operator of the motor vehicle the operation of which was in violation of this section, or unless it is shown that the person so injured or killed, or the owner of the property so injured, knew or had reasonable cause to know that this section was being violated. A motor vehicle or trailer shall be deemed to be registered in accordance with this chapter notwithstanding any mistake in so much of the description thereof contained in the application for registration or in the certificate required to be filed under section thirty-four B as relates to the engine, serial or maker's number thereof."

Inasmuch as G. L. (Ter. Ed.) c. 90, § 9, provides that "no person shall operate any motor vehicle . . . unless . . . registered . . . and . . . is equipped as provided in section seven," and as section 7 provides that "every motor vehicle operated" shall be provided with brakes, with a muffler, with a horn, with approved lamps, and shall have the lamps, both front and back, lighted at certain hours, these latter provisions having no apparent application to disabled towed cars, I am of the opinion that the terms of said section 9 were intended by the Legislature to apply to "live" cars, not to cars which were incapable of being moved on the highway by their own power. See *Musgrove* v. *Studebaker Co.*, 48 Utah, 410.

Identification by registration plates on the vehicle which is in fact moving the towed car would seem to furnish sufficiently adequate information as to the source of responsibility to any one injured by the movements of the towed vehicle.

Accordingly, I answer your question to the effect that none of the towed cars to which you have referred, assuming that none of them is capable

of moving by means of its own power, under the conditions which you have set forth in your communication, is being *operated*, as that word is used in G. L. (Ter. Ed.) c. 90, § 9.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Secretary of the Department of Industrial Accidents.

The position of secretary of the Department of Industrial Accidents is subject to the civil service law.

OCT. 3, 1932.

Hon. CHESTER E. GLEASON, *Acting Chairman, Department of Industrial Accidents.*

DEAR SIR: — You have sent me the following communication: —

"On behalf of the Industrial Accident Board, I respectfully request an expression of your opinion whether the position of secretary of the Department of Industrial Accidents, authorized by G. L. (Ter. Ed.) c. 24, § 4, is subject to civil service rules and classification."

G. L. (Ter. Ed.) c. 24, § 4, which relates to the appointment of a secretary of your department, reads: —

"The salaries and expenses of the department shall be paid by the commonwealth. The department may appoint and remove a secretary. It shall also be allowed such sums as may annually be appropriated by the general court for clerical service and traveling and other necessary expenses. Its records shall be kept in its office."

The office of such secretary is not included within any of those classes which are specifically exempted from the operation of the civil service laws by G. L. (Ter. Ed.) c. 31, § 5, or other statute.

Although by G. L. (Ter. Ed.) c. 24, § 4, your department is given authority to "appoint and remove" a secretary, that fact alone does not indicate an intent upon the part of the Legislature to place the office of such secretary outside the provisions of law applicable generally to the officials and employees of the Commonwealth under an established system of civil service, as set forth in G. L. (Ter. Ed.) c. 31.

As was said in an opinion given by the Attorney General to the State Auditor, February 19, 1931 (Attorney General's Report, 1931, p. 56):

"It has been held in former opinions of Attorneys General that appointive positions in the government of the Commonwealth are presumptively under civil service, and that, in order to hold that such positions are not subject to civil service, it must appear that they were specifically exempted, or it must be apparent, from the context of the statute creating the positions or providing for the appointment to or removal from said positions, that it was the intention of the Legislature that said" civil service "rules and regulations should not apply to these positions."

In that opinion it was held that the words "may appoint and remove such employees as the work of the department may require" do not show any legislative intent that a removal may be made in any other manner than that which the rules of civil service contemplate. It is equally true that such words do not show any legislative intent that an appointment

may be made in any other manner than that which the rules of civil service contemplate.

The same principle of interpretation expressed in said opinion applies with equal force to the words relative to appointment and removal in G. L. (Ter. Ed.) c. 24, § 4. A power to "appoint and remove," not qualified by other phrases, is perfectly consistent with the rules and regulations of civil service which are applicable, and a grant of such power merely in these words does not disclose a legislative intention that the law and the rules and regulations relative to civil service shall not apply to an office or to the manner in which it is to be filled.

Accordingly, I am of the opinion that the position of secretary of the Department of Industrial Accidents is subject to the provisions of the civil service law and to the rules and classifications duly made thereunder.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Domestic and Foreign Mutual Insurance Companies — "Guaranty Fund" — "Guaranty Capital."

G. L. (Ter. Ed.) c. 175, § 90C, providing for a "guaranty fund," applies only to domestic mutual insurance companies.

A foreign mutual insurance company cannot engage in fidelity and surety business without first establishing a "guaranty capital," as required by G. L. (Ter. Ed.) c. 175, § 151, cl. Second (3) (*b*), and cannot rely upon a guaranty fund.

OCT. 7, 1932.

HON. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — In a recent communication you advise me as follows:

"The Lumbermen's Mutual Casualty Company and the Security Mutual Casualty Company, incorporated as mutual insurance companies under the laws of Illinois, and authorized by their charters to transact the kinds of business described in G. L. (Ter. Ed.) c. 175, § 47, cl. Fourth, have applied to the department for a license to transact business under said clause Fourth.

These companies have, by a vote of their directors, set aside a portion of their net surpluses as, or in the nature of, a permanent fund, which they describe as a 'guaranty capital fund.'"

You have asked my opinion on the following questions of law: —

"1. Do the provisions of G. L. (Ter. Ed.) c. 175, § 90C (enacted by St. 1931, c. 242), apply only to domestic mutual insurance companies?

2. If you answer the preceding question in the affirmative, is the fund, above described as 'guaranty capital fund,' established by the two aforesaid foreign mutual companies a 'guaranty capital,' within the meaning of G. L. (Ter. Ed.) c. 175, § 151, cl. Second (3), or does said clause Second (3) require that a foreign mutual company proposing to transact business under clause Fourth of section 47 of said chapter 175 have a guaranty capital similar in form and structure to that described in section 79 of said chapter 175 and required of a domestic mutual company transacting business under said clause Fourth by section 90B of said chapter?"

1. G. L. (Ter. Ed.) c. 175, § 90C (added by St. 1931, c. 242, § 1), provides as follows: —

"Any mutual company empowered by subdivision (*e*) of section fifty-four to transact the kinds of business set forth in the fourth clause of section forty-seven, which has not established a guaranty capital under section ninety B as required by said subdivision (*e*) and which has net cash assets, computed on the basis fixed by sections ten to twelve, inclusive, of not less than two million dollars may, in lieu of establishing a guaranty capital as aforesaid, if previously authorized by a vote of its policyholders at any meeting and with the written approval of the commissioner, segregate a portion of its net cash assets to an amount of not less than two hundred thousand nor more than five hundred thousand dollars and constitute said amount a guaranty fund.

Any such fund shall be maintained so long as the company transacts business under said clause fourth, shall be invested as provided by this chapter for the investment of the capital stock of domestic stock companies, and shall not be reduced or dissolved except with the written approval of the commissioner.

The said fund shall be applied solely to the payment of claims under policies or contracts issued or executed under said clause fourth, but only in case the company has exhausted its assets, exclusive of uncollected premiums.

No company with such a guaranty fund which ceases to transact business shall divide among its policyholders any of its assets or guaranty fund, until it shall have performed or cancelled all obligations under its policies and contracts.

Any company whose guaranty fund aforesaid is less than five hundred thousand dollars may, subject to the provisions of this section, from time to time increase it to an amount not exceeding said sum; provided, that no such increase shall be made unless the net cash assets of the company, computed as aforesaid, inclusive of the amount of such fund, amount to at least two million dollars at the time the increase is made."

The vital words of the foregoing statute with respect to your first question are: "Any mutual company empowered by subdivision (*e*) of section fifty-four to transact the kinds of business set forth in the fourth clause of section forty-seven, . . ."

Said section 54 (*e*) provides as follows: —

"No domestic mutual company shall transact any other kind of business than is specified in its charter or agreement of association, except that it may in addition transact the kinds of business specified below by reference to the several clauses of section forty-seven, as follows:

. . . .

(*e*) Any one or more of the fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth and thirteenth clauses, if authorized to transact business under any one of said clauses, provided that before transacting business under any such additional clause, other than the fourth, it shall have net cash assets over all its liabilities, computed on the basis fixed by sections ten to twelve, inclusive, of not less than one hundred thousand dollars for each additional clause, which net cash assets shall be maintained as long as it transacts business under such additional clause; and provided further, that before transacting business under the fourth clause, it shall have a fully paid-up guaranty capital as provided in section ninety B or a guaranty fund as provided in section ninety C, and net cash assets, so computed, exclusive of said capital or fund, of not less than one hundred

thousand dollars. Any mutual company transacting business under this clause may accumulate and maintain the net cash assets required hereunder in addition to the amount permitted by section eighty. The provision of section twenty-one that a mutual boiler company may insure in a single risk an amount not exceeding one fourth of its net assets shall not apply to any mutual company transacting business under this clause."

Said section 47, clause Fourth, provides as follows: —

"Companies may be incorporated under and subject to the provisions of this chapter for the following purposes: —

. . . .

Fourth, (*a*) To guarantee the fidelity of persons in positions of trust, private or public, (*b*) to act as surety on official bonds and for the performance of other obligations, (*c*) to guarantee or insure to the holders thereof the payment of the principal of, or interest on, bonds, notes or other evidences of indebtedness and to insure against loss or damage arising from any default in the payment of such principal or interest, and (*d*) to insure a bank, banker, investment broker, banking association or corporation against any loss of bills of exchange, notes, profits, bonds, securities, evidences of indebtedness, deeds, mortgages, documents, currency or money, except against the loss thereof during marine transportation or while being transported by a common carrier."

The language of the sections referred to in said section 90C (St. 1931, c. 242, § 1) is clear, and no further discussion seems to be required to show that said section 90C applies only to domestic mutual companies authorized to do a surety or fidelity business, so called.

I answer your first question in the affirmative.

2. G. L. (Ter. Ed.) c. 175, § 151, provides, in part, as follows: —

"No foreign company shall be admitted and authorized to do business until —

. . . .

Second, It has satisfied the commissioner that . . . (3), it has, if a mutual company, other than a life company, . . . or (*b*), if it proposes to transact business under the fourth clause of said section forty-seven, a fully paid-up guaranty capital unimpaired on the basis fixed by sections ten to twelve, inclusive, of not less than two hundred thousand dollars and net cash assets, so computed, exclusive of said guaranty capital, of not less than one hundred thousand dollars; . . ."

The foregoing provisions of law impose conditions to be observed by a foreign mutual company which proposes to do a fidelity or surety business [G. L. (Ter. Ed.) c. 175, § 47, cl. Fourth] before it can be admitted and/or authorized to do business in this Commonwealth, which conditions are that it shall have "a fully paid-up guaranty capital unimpaired . . . of not less than two hundred thousand dollars and net cash assets, . . . exclusive of said guaranty capital, of not less than one hundred thousand dollars."

The material words of said statute with respect to the matter under consideration are "guaranty capital." G. L. (Ter. Ed.) c. 175, § 79, authorizes a mutual company to be formed with, or an existing mutual company to establish, a guaranty capital, and sets forth, amongst other things, how said guaranty capital shall be established and when it shall

be applied. It shall be "divided into shares of one hundred dollars each and shall be applied to the payment of losses only when the company has exhausted its assets, exclusive of uncollected premiums."

A guaranty capital, established as authorized by said section 79, is a security for the payment of losses after the company has exhausted its assets, exclusive of uncollected premiums. See *Commonwealth* v. *Berkshire Life Ins. Co.*, 98 Mass. 25. The provisions of said section apply to foreign mutual companies where the establishment of a guaranty capital is a prerequisite to admission to or authority to do business in this Commonwealth, and also where the establishment of such guaranty capital is required before policies may be issued.

Inasmuch as a foreign mutual company cannot be admitted to or authorized to do the kinds of business as set forth in said section 47, clause Fourth, until it has established a guaranty capital, it is, upon such admission or grant of authority, authorized forthwith to issue policies. But such foreign company cannot substitute a "guaranty fund" for a guaranty capital as a condition for its admission to or authority to engage in the said kinds of business, because there is no statutory authority therefor. The creation of a guaranty fund, as authorized by section 90C, and the substitution thereof for a guaranty capital is a privilege to be enjoyed only by domestic companies.

Section 90B of the same chapter provides: —

"No policy shall be issued by a mutual company formed to transact business under the fourth clause of section forty-seven until it has established a fully paid-up guaranty capital of not less than two hundred thousand dollars, which shall be subject to the provisions of section seventy-nine . . ."

In my opinion, this statute (§ 90B) applies to both domestic and foreign mutual companies engaged in the kinds of business named therein. In the case of a domestic company it cannot issue policies until it has established a guaranty capital or has created a guaranty fund in lieu of said guaranty capital, as authorized by section 90C.

Nowhere in said chapter 175 is there authority for the creation of a "guaranty capital fund" such as said foreign mutual companies have established as a condition to secure authority to transact a fidelity or surety business in this Commonwealth. Said chapter 175, as it applies to mutual insurance companies, provides only for the creation of a guaranty capital and a guaranty fund.

A guaranty capital can only be established by the issuance and sale of capital stock divided into shares of one hundred dollars each, so as to bring within the financial structure of said corporation new capital to be used as security for the payment of losses. A guaranty fund is established by a vote of the policy holders of a domestic mutual company, with the approval of the Commissioner, by the segregation of a portion of its net cash assets. In this instance no new capital is required, as in the case of the establishment of a guaranty capital.

In my opinion, a foreign mutual company which proposes to engage in fidelity and surety business in this Commonwealth cannot be admitted and/or authorized to do so until a guaranty capital is first established, which shall be used primarily as security for the payment of losses incurred in this Commonwealth; and it cannot take advantage of the guaranty fund, as authorized in section 90C, because, as stated above, that is a privilege to be enjoyed only by domestic mutual companies.

The funds described in these certificates of the Lumbermen's Mutual Casualty Company and the Security Mutual Casualty Company of Chicago as a "guaranty capital fund" are not a guaranty capital, within the meaning of section 151, clause Second (3) (*b*). They amount to a segregation of a portion of the assets of those companies set aside and to be maintained unimpaired so long as said company shall be licensed to transact a fidelity or surety business in this Commonwealth. The funds so set aside are substantially similar to a guaranty fund as authorized by section 90C.

I answer the remaining part of your second question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

City Infirmary — Charitable Institution — Civil Service Rules.

A city infirmary is a "charitable institution," within the meaning of Civil Service Rule 4, class 1.

If the board of public welfare of a city appoints a warden for an infirmary, whose duties are those of a superintendent, his position is not classified under civil service laws, rules and regulations.

OCT. 13, 1932.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

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

"Is the city infirmary of the city of Westfield a charitable institution, within the meaning of 'charitable institutions' as set forth in Civil Service Rule 4, class 1?

Is the position of warden of the city infirmary of the city of Westfield classified under civil service laws, rules and regulations?"

You state: "The city of Westfield receives from time to time board or partial board for inmates; this is paid either by the inmate, friends, a city or town of settlement, or the State. G. L. (Ter. Ed.) c. 47, § 10."

G. L. (Ter. Ed.) c. 47, to which you refer, provides (section 1) that a town may maintain an infirmary "for persons in need." It seems clear that such an infirmary is a "charitable institution," within the meaning of Civil Service Rule 4, class 1, and, accordingly, I answer your first question in the affirmative.

As to your second question, you do not define the duties of the position and the manner of appointment of the warden, and in the absence of such information I cannot definitely determine whether he is a superintendent or deputy superintendent, within the meaning of these words as used in Civil Service Rule 4, nor whether he is excluded from civil service by any of the provisions of section 5 of G. L. (Ter. Ed.) c. 31. It is provided by G. L. (Ter. Ed.) c. 47, § 2, that the board of public welfare of a city having an infirmary shall be the directors thereof, and that they may "appoint a superintendent and assistants." If the board of public welfare of the city of Westfield appoints the so-called warden, under the authority conferred by said section 2, and he performs the duties of a superintendent or deputy superintendent, it would seem that his position is not classified under the rule to which you refer.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Minors — Minimum Wages — Females — Definition of "Minor."

The word "minors", as used in section 3 of G. L. (Ter. Ed.) c. 151, is limited to female persons.

The word "minors," as used in section 7 of G. L. (Ter. Ed.) c. 151, applies to both male and female persons.

A minor, at common law, is any person under the age of twenty-one.

Nov. 14, 1932.

Hon. Edwin S. Smith, *Commissioner of Labor and Industries.*

Dear Sir: — You request my opinion as to whether the word "minors," as used in G. L. (Ter. Ed.) c. 151, § 3, is limited to females. You also request my opinion as to whether the word is so limited in section 7, and also as to what is the age limit of minors, as that word is used in section 7.

Section 3 provides for the determination by a wage board of the minimum wages suitable for a "female employee" and also for "learners and apprentices and for minors under eighteen." The word "minors," as here used, applies only to female minors. This follows from the fact that under the provisions of the two preceding sections a wage board is appointed only as a result of an investigation by the Minimum Wage Commission, and such investigation is, by the terms of section 1, confined to "female employees." Also, no provision is made under section 2 for representation on the wage board of any employees other than "female employees." Since sections 1 and 2 apply only to female employees, section 3 is not to be construed as including any other class.

Separate provision is made in section 7 for the determination of minimum wages of minors as a class. This section provides: —

"The commission may at any time inquire into the wages paid to minors in any occupation in which the majority of employees are minors, and may, after giving public hearings, determine minimum wages suitable therefor. When the commission has made such a determination, it may proceed in the same manner as if the determination had been recommended to it by a wage board."

The word "minors," as here used, applies to both male and female.

In answer to your question as to the age limit of minors as referred to in this section, I would say that it is twenty-one years for male or female. That is the age of majority under the common law of this State. Section 7 is distinct from section 3, and the construction of the word "minors," as used in section 7, is not affected by the reference to "minors under eighteen" contained in section 3.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Civil Service — Veteran — Army Service.

Prior participation in "active service" is not necessary to the creation of the status of a "veteran."

Nov. 14, 1932.

Hon. Paul E. Tierney, *Commissioner of Civil Service.*

Dear Sir: — You request my opinion as to whether a certain applicant is entitled to veterans' preference under the civil service statute, in view of the facts set forth in his certificate of discharge, which you submit with your request.

The term "veteran" is, in part, defined in the civil service statute as "any person who has served in the army, navy or marine corps of the United States in time of war or insurrection and has been honorably discharged from such service or released from active duty therein." G. L. (Ter. Ed.) c. 31, § 21.

The certificate which you submit, dated December 21, 1918, is entitled "Honorable Discharge from The United States Army." It describes the applicant as a "Private Medical Enlisted Reserve Corps The United States Army." It states that the applicant is honorably discharged "from the military service" of the United States by reason of "services being no longer required." It recites that the applicant is thus discharged as a testimonial of honest and faithful "service." Under a heading entitled "Enlistment Record" it is stated that the applicant "enlisted" July 29, 1918; and that he was "serving in" first enlistment period at date of discharge. It is also recited that the applicant was "never in active service."

According to this record the applicant has served in the army of the United States, and so brings himself within the words of G. L. (Ter. Ed.) c. 31, § 21, above quoted. This statute in terms imposes no limitation based upon the nature of the service. The words "or released from active duty therein" express an alternative to an honorable discharge. They seem to have been inserted in the statute because of the practice prevailing in the navy, as distinguished from the army, of granting a release from active service in advance of a discharge. *Cf.* VI Op. Atty. Gen. 528; Gen. St. 1919, c. 14.

In my opinion, the applicant in question is a "veteran," within the meaning of the civil service statute.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Fraternal Benefit Societies — Election of Officers by Members — Representative Form of Government.

A fraternal benefit society the officers of which are elected directly by the members of the society, instead of by its supreme legislative or governing body, is deemed to have a representative form of government, within the purview of G. L. (Ter. Ed.) c. 176, § 3.

Nov. 18, 1932.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have advised me as to the following facts: —

"The Lithuanian Alliance of America is a fraternal benefit society incorporated under the laws of the Commonwealth of Pennsylvania, and is licensed to transact business in this commonwealth as a foreign fraternal benefit society, under G. L. (Ter. Ed.) c. 176, § 41.

This society provides in its constitution and by-laws for a supreme legislative or governing body, known as the Supreme Assembly, which is elected as provided in G. L. (Ter. Ed.) c. 176, § 3. It also provides in its constitution and by-laws for the offices of supreme president, supreme vice-president, supreme secretary, supreme treasurer, two supreme trustees and supreme medical examiner. These officers comprise what is known as the Supreme Executive Board.

The society has submitted to the Commissioner of Insurance an amendment to its constitution and by-laws, under which the aforesaid officers

of the society shall be elected directly by the members of the society and not by the Supreme Assembly, as at present."

In order to determine your duty with relation to enforcing the provisions of G. L. (Ter. Ed.) cc. 175 and 176, as required by section 3A of said chapter 175, as they may concern the said fraternal benefit society, you have requested my opinion upon the following question of law: —

"Does a fraternal benefit society have a representative form of government, as required by G. L., c. 176, § 3, if its constitution and by-laws provide that its officers shall be elected directly by its members and not by the supreme legislative or governing body of the society mentioned in said section 3?"

G. L. (Ter. Ed.) c. 176, in its applicable parts, provides with relation to fraternal benefit societies: —

"SECTION 3. Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and by-laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and by-laws; provided, that the elective members shall have not less than two thirds of the votes nor less than the number of votes required to amend its constitution and by-laws; and provided, further, that the meetings of the supreme or governing body and the election of officers, representatives or delegates shall be held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy."

The mere fact that the executive and administrative officers of a fraternal benefit society are elected by direct vote of the members cannot, in my opinion, be said to indicate, of itself, that such a society does not have a representative form of government when, as in the instant case, the society has a "supreme legislative or governing body known as the Supreme Assembly, which is elected as provided in section 3." Inasmuch as it provides by its constitution, as you inform me, such a "supreme legislative or governing body," it falls squarely within the statutory statement of what shall be deemed a representative form of government for a fraternal benefit society, irrespective of the mode of choosing executive officers. Moreover, such constitutional provisions would appear to create a representative form of government, as these words are ordinarily used. It could not well be said that we did not possess a representative form of government in this Commonwealth, possessing, as we do, a Legislature composed of persons chosen from various political units, although our executive officers are elected not by the Legislature but by direct vote of the people.

I answer your question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Labor — Veteran — Preference — Contractor.

A contractor on public work is not required by G. L. (Ter. Ed.) c. 149, § 26, to discharge a non-veteran actually at work, to make room for a veteran subsequently seeking employment, where an opportunity was given for veterans to apply before the non-veteran was employed and none did so.

Nov. 21, 1932.

Hon. Edwin S. Smith, *Commissioner of Labor and Industries.*

Dear Sir: — You request my opinion as to whether a contractor engaged in the construction of a building for the Commonwealth is required by G. L. (Ter. Ed.) c. 149, § 26, to discharge a non-veteran mechanic, who is actually at work on such building, in order to make room for a veteran applying for employment. I assume from your statement that no veterans were seeking the place, and that the contractor gave opportunity for veterans to apply when the non-veteran mechanic was first employed.

Said section 26 is as follows: —

"In the employment of mechanics, teamsters and laborers in the construction, addition to and alteration of public works by the commonwealth, or by a county, town or district, or by persons contracting therewith for such construction, addition to and alteration of public works, preference shall first be given to citizens of the commonwealth who have served in the army or navy of the United States in time of war and have been honorably discharged therefrom or released from active duty therein, and who are qualified to perform the work to which the employment relates; and secondly, to citizens of the commonwealth generally, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States, and every contract for such work shall contain a provision to this effect. The wages for a day's work paid to mechanics and teamsters employed in the construction, addition to or alteration of public works as aforesaid shall be not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality where such public works are under construction or being added to or altered; provided, that no town in the construction, addition to or alteration of public works shall be required to give preference to veterans, not residents of such town, over citizens thereof. This section shall also apply to regular employees of the commonwealth or of a county, town or district when such employees are employed in the construction, addition to and alteration of public works for which special appropriations are provided. Any person or contractor who knowingly and wilfully violates this section shall be punished by a fine of not more than one hundred dollars."

The preference in employment on public work was first given to veterans in June of 1919 (Gen. St. 1919, c. 253), by adding a provision to that effect to the Citizens' Preference Act (St. 1904, c. 311, as amended). In the preceding month of that same session of 1919 the Legislature enacted a law providing for preference of veterans in civil service (Gen. St. 1919, c. 150). Under this act (c. 150) the preference which was given to veterans was preference in filling any existing vacancy in such service. As said chapter 253 followed chapter 150, and followed it by so short a time and was part of the same series of legislation in recognition of veteran service, and as no language appears in said chapter to distinguish the word "em-

ployment" as used therein or to reveal any intent that the character of employment thereunder should be other than "employment" as originally used, it would seem that the contingency, of providing preference for veterans by discharge at any time of non-veterans in cases other than civil service, had not occurred to the Legislature. Also, chapter 253 [now G. L. (Ter. Ed.) c. 149, § 26], here in question, in providing for preference in employment used the word "employment" as applicable to all employers, whether "the commonwealth . . . or . . . town," or "persons contracting therewith," in the same sentence. If in "employment" by the Commonwealth or town under civil service a veteran could not require the discharge of a non-veteran in order to create a vacancy, and if the word "employment," when applied to such a case, could not have meaning other than employment in case of vacancy, it follows that the term "employment," as used in G. L. (Ter. Ed.) c. 149, § 26, in the absence of express provision otherwise, must have the same meaning, whether the employer be Commonwealth, county, town or district, or persons contracting therewith, namely, employment in filling any existing vacancy. Moreover, there has been a lapse of thirteen years from its enactment, during which period such meaning has been uniformly applied to civil and non-civil service employment on public works, and during which period Legislatures have had opportunity, through sufficiency of time and currency of experiences, to legislate otherwise with respect to non-civil service employment on such works. Thus the Legislature made a common rule to be observed in employment on public works.

In addition to legal reason, such rule may have been counseled by the practical one that variant interruptions of public work in process of construction, addition to or alteration, by discharge of non-veterans at any time upon application of veterans, could cause delay and financial loss which preference of veterans in filling vacancies could not.

For such reasons I answer your question in the negative and upon the assumption that no veterans were seeking the place and that the contractor gave opportunity for veterans to apply when the non-veteran mechanic was first employed, — for the spirit of the law is that contractors for public work shall not by practices foreclose the right of veterans to original preference, as such work is the people's and the people have prescribed that the rights of their defenders to preference in such employment shall precede those of any other persons in the Commonwealth.

Very truly yours,

Joseph E. Warner, *Attorney General.*

"*Batch of Clams*" — *Definition.*

The word "batch," as used in G. L. (Ter. Ed.) c. 130, § 84, means each separate lot, such as a barrel, basket, crate or bag.

Nov. 21, 1932.

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

Dear Sir: — You request my opinion as to the meaning of the word "batch," as used in the last sentence of G. L. (Ter. Ed.) c. 130, § 84.

This section provides, in part: —

"Whoever shall take or have in possession quahaugs or soft-shelled clams less than two inches in longest diameter to the amount of more than five per cent of any batch shall be punished by a fine of not less than three nor more than fifty dollars; . . ."

You state that the department has construed the word "batch" as referring to each separate lot, such as a barrel, basket, crate or bag, but that it has been suggested that the word should be construed as meaning "the total quantity" on hand.

It seems clear that the word must have been intended to mean something different from the total quantity on hand, for otherwise its use would be superfluous. And that being so, it is difficult to see, as applied to those "who have in possession," what the word can have been intended to mean other than the amount segregated in one container. If the statute referred only to those who "take," the word "batch" might well be construed as referring to the quantity taken by a single operation; that is, to one catch. And this would seem in accordance with the definition of the word given in Webster's New International Dictionary, which is: —

"(1) The quantity of bread baked at one time; a baking:

(2) A quantity of material destined for one operation, as of flour or dough for a baking or corn for a grinding:

(3) A quantity of anything produced at one operation; a group or collection of persons or things of the same kind, or taken at a time; sort; lot; as, a *batch* of letters."

But such a construction would practically nullify the statute so far as it applies to those who "have in possession," for it would be practically impossible to prove that the whole or any given part of a quantity on hand constituted a single catch; and this part of the statute may well be regarded as the more important, for, apart from it, it would be difficult in any case to obtain evidence sufficient to convict. The word "batch" is often used in common speech to refer to a segregated lot, as in the phrase "a batch of letters," quoted in the dictionary definition given above.

In my opinion, the construction put upon the word by the department is correct.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Department of Public Safety — Steam Boilers — Licenses.

G. L. (Ter. Ed.) c. 146, § 49, does not authorize the issuance of a license covering the operation of more than one plant owned by the same corporation.

Said statute authorizes the issuance of two licenses to the same person for separate plants.

Nov. 21, 1932.

Gen. A. F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You request my opinion as to whether that part of G. L. (Ter. Ed.) c. 146, § 49, which provides for the granting of a special license to operate a steam plant authorizes the granting of a license to operate two separate plants owned by the same corporation.

That part of said section 49 to which you refer reads as follows: —

"Special licenses: A person who desires to have charge of or to operate a particular steam plant may, if he files with his application for such examination a written request signed by the owner or user of the plant, be examined as to his competence for such service and no other, and, if found competent and trustworthy, he shall be granted a license for such service, and no other; provided, that no special license shall be granted

to give any person charge of or permission to operate an engine of over one hundred and fifty horse power, except that where the main power plant is run by water power exclusively during the major part of the time, and has auxiliary steam power for use during periods of low water, a special license may be issued to an applicant holding an engineer's license."

The terms of this statute, which refer to operation of "a particular steam plant" and "a license for such service, and no other," make it impossible, in my opinion, to construe the statute as authorizing the issuance of a license covering the operation of more than one plant.

You also request my opinion as to whether said section 49 authorizes the granting of two licenses to the same person, to be exercised by him in separate plants.

In my opinion, the statute authorizes this, if the licensing authority is of the opinion that it should be done.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Elections — Duties of Governor and Council — Recounts — Sheriff of Bristol County.

The duties of the Governor and Council in respect to the examination of election returns and the determination of persons elected are purely ministerial, and they have no power to go behind the returns to ascertain the true facts of an election.

The Governor and Council have no right to stay their official declaration with reference to the office of sheriff of Bristol County pending litigation concerning the validity of the election to that office.

Nov. 28, 1932.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — You have requested my opinion in the following two matters: —

"First, as to the rights, if any, of the Governor and Council, in their canvass of the returns of the election, to go behind said returns; that is, whether the Governor and Council, in examining the returns and determining who are elected, are vested with discretionary powers.

Second, with relation to the protest of Edmond P. Talbot, sheriff of Bristol County, what right, if any, have the Governor and Council to grant the request for a stay set out in said petition?"

The duties of the Governor and Council in respect to the examination of returns and the determination of persons elected are set forth in G. L. (Ter. Ed.) c. 54, §§ 115, 116 and 123, which provide as follows: —

"SECTION 115. The state secretary shall lay before the governor and council the copies of the records of votes cast, with their seals unbroken. The governor with at least five councillors shall, as soon as may be, open and examine all such copies. They shall tabulate said votes and determine who appear to be elected to the several offices, and what appears to be the result of the votes on any question or questions, and shall forthwith transmit to the state secretary an abstract of such tabulation and determination. The state secretary, upon application, shall furnish to newspapers copies of such abstract. In case of a state-wide recount under section one hundred and thirty-five, the state secretary shall in like manner lay before the governor and council the copies of the amended records received by him under said section, and the governor with at least five

councillors shall, if necessary, revise the aforesaid tabulation and determination accordingly.

SECTION 116. The governor shall, in the presence of at least five councillors, certify to the results of the examination of the copies of the records of the votes for governor and lieutenant governor, for councillors, for state secretary, state treasurer, state auditor and attorney general, and for senators, and shall issue his summons to such persons as appear to be chosen to said offices. The governor shall issue certificates of election to such persons as appear to be chosen to the offices of senator in congress, representative in congress, clerk of the courts, register of probate and insolvency, sheriff and district attorney, which shall be countersigned and transmitted by the state secretary. No certification shall be made or summons or certificate issued under this section until after five o'clock in the afternoon of the fifteenth day following a state election or, in case a state-wide recount is held in accordance with section one hundred and thirty-five, until the tabulation and determination under the preceding section have been revised in accordance with the results of such recount.

. . . .

SECTION 123. If it shall appear to the governor and council, to the board of examiners, to the election commissioners or to the county commissioners, that any copy of a record of votes examined by them is incomplete or erroneous, they may order a new copy of the records to be made and transmitted to them. Such new copy shall be transmitted by the city or town clerk within seven days thereafter, and if found to be correct and in conformity to the requirements of law, shall have the same force as a first copy."

The duties of the Governor and Council in tabulating the votes are purely ministerial in character, and do not involve going behind the copies of the records of votes cast laid before them by the State Secretary.

In an advisory opinion rendered to His Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts the Supreme Judicial Court answered the following question in the negative (Opinion of the Justices, 136 Mass. 583): —

"It being the duty of the Governor and Council to transmit a certificate of choice to the district attorneys and sheriffs who have been elected at any election duly held, in determining who is chosen, have the Governor and Council the power to examine and recount the ballots given in such elections in the several cities and towns, or either of them, in order to ascertain the true result thereof, the ballots having been sealed up and preserved according to the law by the clerks of the several cities and towns, within the counties and districts respectively, more than one person claiming an election to such office, and contesting the election of another person thereto before the Governor and Council?"

The duties of the Governor and Council in relation to the examination of returns and determination of persons elected are of the same general nature as the duties of the board of examiners in relation to returns for county commissioners. G. L. (Ter. Ed.) c. 54, § 122.

The Supreme Judicial Court, in the case of *Luce* v. *Mayhew*, 13 Gray, 83, has discussed in detail the nature of the duties of the board of examiners. The principles set forth in that discussion are equally applicable to the Governor and Council (pp. 84–85): —

"It is obvious, from an examination of these statutes, that the duties of the board of examiners are simply ministerial. By § 18, of c. 14 of the Rev. Sts., they are required to meet at a time specified, and to 'examine the returns of votes transmitted to them, and, if any person shall be found to have a majority of all the ballots,' to give the person elected written notice of his election. By subsequent statutes, the time of their meeting is changed, and a 'plurality' of votes is substituted for a 'majority.' They are not made a judicial tribunal, nor authorized to decide upon the validity or the fact of the election, in any other mode than by an examination of 'the returns' made to them, according to law. They are not required or authorized to hear witnesses, or weigh evidence. They have no power to send for persons or papers. If one result appears upon the returns, and another is the real truth of the case, they can only act upon the former."

G. L. (Ter. Ed.) c. 54, §§ 115 and 116, provide that the "governor with at least five councillors shall, as soon as may be, open and examine" the copies of records of votes cast, and "shall tabulate said votes and determine who appear to be elected to the several offices," and "the governor shall issue certificates of election to such persons as appear to be chosen to the offices of . . . sheriff. . . ."

Any contest concerning a contested election in the courts of this Commonwealth is a proceeding entirely independent of and divorced from the canvassing of votes by the duly authorized officers and the issuance of a certificate of election. It is not within the province of the body empowered solely with the ministerial duty of canvassing the votes and issuing certificates of election to consider any claims of contestants to the said office, which might properly be made the subject of appropriate litigation by the claimant. *Luce* v. *Board of Examiners*, 153 Mass. 108.

In my opinion, the Governor and Council have no right, in their canvass of the returns of the elections, to go behind said returns, and they have no right to stay their official declaration with reference to the office of sheriff of Bristol County pending the adjudication of any contested matter in connection with the election to said office in the courts of the Commonwealth.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Department of Education — Cities and Towns — Reimbursement for Adult Education.

Reimbursement to cities and towns for adult education, under G. L. (Ter. Ed.) c. 69, §§ 9 and 10, must be confined to actual expenses of supervision and instruction.

Nov. 29, 1932.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have asked my opinion with relation to the duties of your department as they concern reimbursement to towns for expenses incurred under G. L. (Ter. Ed.) c. 69, §§ 9 and 10, in the following language: —

"G. L. (Ter. Ed.) c. 69, §§ 9 and 10, provide reimbursement to cities and towns for one half the amount expended for supervision and instruction in the use of English for adults unable to speak, read, or write the same, and in the fundamental principles of government and other subjects adapted to fit for American citizenship.

Heretofore, this legislation has been interpreted to include, besides salaries for instruction and supervision, such other items as clerical service, books and supplies, and advisory service in the preparation of first and second papers for citizenship; such advisory services being not, in many cases, for those who are enrolled for class instruction.

Would the Department of Education be acting within the intent of the law in approving reimbursement to cities and towns only for salaries of supervisors and teachers in the subjects enumerated above, and for all or such part of the salaries of school supervisors as are actually chargeable to the supervision of class instruction in the subjects mentioned in the law providing for reimbursement?"

G. L. (Ter. Ed.) c. 69, §§ 9 and 10, read as follows: —

"SECTION 9. The department, with the co-operation of any town applying therefor, may provide for such instruction in the use of English for adults unable to speak, read or write the same, and in the fundamental principles of government and other subjects adapted to fit for American citizenship, as shall jointly be approved by the local school committee and the department. Schools and classes established therefor may be held in public school buildings, in industrial establishments or in such other places as may be approved in like manner. Teachers and supervisors employed therein by a town shall be chosen and their compensation fixed by the school committee, subject to the approval of the department.

SECTION 10. At the expiration of each school year, and on approval by the department, the commonwealth shall pay to every town providing such instruction in conjunction with the department, one half the amount expended for supervision and instruction by such town for said year."

Formerly said section 10 read as follows: —

"At the expiration of each school year, and on approval by the department, the commonwealth shall pay to every town providing such instruction in conjunction with the department, one half the amount expended therefor by such town for said year."

St. 1921, c. 484, amended said section 10 in its then form by striking out the word "therefor" and inserting in its place the words "for supervision and instruction," leaving the section in the form in which we now have it (as quoted above) in the Tercentenary Edition of the General Laws.

Whatever interpretation may have been placed upon the phraseology of said section 10 in its earlier form, as to the extent to which the Commonwealth should reimburse towns for expenses incurred in carrying out the provisions of said section 9, it is made plain by the act of the Legislature in amending such phraseology and in employing the wording now to be found in said section 10, that it was the intent of the Legislature that reimbursement should not extend beyond the actual expenses of supervision and instruction. Such expenses would ordinarily embrace no more than compensation paid to teachers and supervisors for instruction given in the use of English, in the fundamental principles of government, and other subjects adapted to fit for American citizenship, as described in and given under the conditions set forth in said section 9.

Accordingly, I answer your question in the affirmative.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

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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. The affidavit or affidavits should contain sufficient facts to make out a prima facie case of guilt, and should not be a reiteration of the form of the complaint nor contain conclusions of law.

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.

750. 6-'33. Order 7247.