Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1935

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FOR THE

YEAR ENDING NOVEMBER 30, 1935 - 37

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 15, 1936.

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, 1935.

Very respectfully,

PAUL A. DEVER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL.

State House.

Attorney General.

PAUL A. DEVER.

Assistants.

JAMES J. RONAN.
HENRY P. FIELDING.[1]
ROGER CLAPP.
CHARLES F. LOVEJOY.[2]
JOHN S. DERHAM.
ARTHUR V. SULLIVAN.
EDWARD McPARTLIN.
MAURICE M. GOLDMAN.
WALTER W. O'DONNELL.
JOHN PATRICK CONNOLLY.
JENNIE LOITMAN BARRON.[3]
RAYMOND H. FAVREAU.[4]
JAMES J. BACIGALUPO.
DONALD R. SIMPSON.
GOLDA RICHMOND WALTERS.[5]

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

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[1] Appointed January 31, 1935.
[2] Resigned July 16, 1935.
[3] Resigned August 31, 1935.
[4] Appointed July 17, 1935.
[5] Appointed September 3, 1935.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1935	$132,230 00
Balance brought forward from 1934 appropriation	556 47
Appropriation for small claims	10,000 00
Appropriation under G. L. (Ter. Ed.) c. 12, § 3B	14,000 00
	$156,786 47

Expenditures.

For salary of Attorney General	$8,000 00
For salaries of assistants	55,324 64
For salaries of all other employees	32,376 14
For sheriffs' fees, court stenographers and all other special services	25,010 22
For law library	902 83
For office expenses and travel	8,950 51
For court expenses (includes witness fees charged to incidentals, $151.64)	1,804 37
For small claims	9,958 31
For claims under G. L. (Ter. Ed.) c. 12, § 3B	11,365 55
Total expenditures	$153,692 57
Balance	$3,093 90

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 15, 1936.

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, 1935, to the number of 8,540, are tabulated below:

Corporate franchise tax cases		1,852
Extradition and interstate rendition		133
Land Court petitions		38
Land-damage cases arising from the taking of land:		
Department of Public Works		371
Department of Mental Diseases		2
Department of Conservation		1
Department of Correction		1
Metropolitan District Commission		55
Metropolitan District Water Supply Commission		49
Miscellaneous cases		427
Petitions for instructions under inheritance tax laws		53
Public charitable trusts		350
Settlement cases for support of persons in State hospitals		26
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth		5,152
Indictments for murder, capital cases		30
Disposed of	19	
Now pending	11	

Corrupt Practices in Elections.

It is my sincere opinion that one of the great menaces to truly responsive democratic government is the inordinate and increasingly large expenditures made necessary in political campaigns. The demands of the electorate, the competition with candidates who have large sums of money at their disposal, and the modern inventions for the dissemination of propaganda, all combine to cause the expenditure of funds by a candidate for public office totally disproportionate to the proprieties of an election.

The demand for heavy campaign expenditures by parties and candidates, however legitimate the objects for which they are incurred, often makes tempting the offer of contributions from those who have a special interest to serve. To the end that the contributions of special interests might be effectually prevented, I believe that the State should assume every legitimate campaign and election expense.

I therefore recommend that an official campaign bulletin of information to the voters, together with a so-called sample ballot, should be supplied by the State, giving the duly nominated candidates of each political party an impartial opportunity for statements regarding the qualifications and the issues which they are attempting to present to the public. I also believe that there should be ample provision, at public expense, for meeting places for the discussion of political principles and issues, and that there are several other items of necessary campaign expenditure which might well be assumed by the Commonwealth.

I am persuaded that the adoption of a program calling for the strict prohibition of other than legitimate expenditures and the assumption by the Commonwealth of the costs of legitimate political activity would ultimately be in the interest of a genuine economy. I am free to admit that the program which I suggest is one which should not be hastily adopted. It should have the study and consideration of students of government, combined with the knowledge of those who have spent years in active political life.

I therefore recommend to the General Court the appointment of a recess commission to study the general subject of the conduct of political campaigns, with power to recommend to the succeeding General Court such proposals as they feel practicable and pertinent in the premises.

Law Enforcement against Criminals.

The fact-gathering agencies upon whose skill, integrity and diligence the Attorney General and the several District Attorneys must in most cases predicate action, are the local, metropolitan and State police and detective forces. Unless a lawbreaker or felon is apprehended and the net of evidence woven about him, the Attorney General and the District Attorneys are powerless. It is the primary duty of police agencies to apprehend the criminal and gather the facts of his connection with the commission of the crime charged, in all instances. Then the prosecuting agencies and the courts can fulfill their full duty in the interests of justice, and consequently in the public interest. The great majority of our people are in word, deed and conduct law-abiding. The bandit, the gangster, the racketeer, and other more or less organized violators of law, are, fortunately, but a relatively small minority. But they are a pressing danger. They must

be fought, and fought with means and methods of crime detection at least equal in ability and efficiency to their own. We cannot permit the poison of the law-breaking activities of these parasites on society, or the corruption of their anti-social and calloused greed for money and underworld power to challenge and impair the integrity of our institutions and the morality of our people. Geographical or other barriers and obstacles, which needlessly interfere with public officers in answering the challenge of criminals, should be removed. While it is recognized that certain fundamental rights woven into our organic law as safeguards of liberty must not be disturbed, yet common sense dictates that society must by every reasonable means outwit and outgeneral the criminal and bring him to swift and certain justice. Modern inventions have given him a mobility and a deadly danger not only to the property, but to the life of the citizen. The condition thus created must be met by sensible and practical means.

There was passed by the Seventy-third Congress of the United States, in June, 1934, an act "granting the consent of Congress to any two or more States to enter into agreements or compacts for co-operative effort and mutual assistance in the prevention of crime and for other purposes" (U. S. Stat. at L. pt. 1st, c. 406). I have given the most careful study to this timely and progressive congressional sanction with reference to the objects sought to be attained in law enforcement. The possibility it unfolds for crime detection, prevention and punishment is highly important for the well-being of the Commonwealth, the great mass of whose people desire it to be the abiding place of right living, right thinking, good order and decency. I am convinced that this congressional act should be translated into action, and recommend that suitable legislation be adopted giving it force and effect. It is hardly conceivable that adjoining sister States would lag behind our Commonwealth in this matter of crime detection, apprehension and law enforcement.

Licensing the Carrying of Firearms.

There should be established a central authority, under some department of the Commonwealth, which central authority should have the exclusive function of finally approving all applications for licenses to carry pistols or revolvers. There are now by far too many agencies throughout the Commonwealth empowered by law with full authority to grant such licenses. It would appear that there are more than 2,000 persons possessing this authority. This system has resulted in abuse, which is the natural result of widely scattered authority. It is a system which challenges the peace and good order of the Commonwealth, and tends to smooth and make easy the path of the gunman and the gangster. I strongly urge legislation making provision for a central authority for the final approval of all applications to carry pistols and revolvers, and making the further provision that all existing licenses heretofore granted expire by operation of law on a day certain, which said day certain shall be uniform throughout the Commonwealth. This is a reform which I have long advocated. It is encouraging to note that in principle it has been endorsed by the Commissioner of Public Safety, the Police Commissioner of Boston, and other persons in touch with the problem of crime suppression.

Defaults in Criminal Cases.

Unnecessary delay and obstruction of justice occur more or less frequently where defendants charged by indictment or complaint with criminal offences fail to appear, and default when their cases are called in court for trial or other disposition.

The moving purpose in such failures to appear in court may be to avoid having the case tried before a particular judge, to gain delay for some other purpose, or to elude justice entirely.

I am convinced that this is a situation which can be met by legislation making it a felony to knowingly and intentionally default in court where the crime charged is a felony, and making it a misdemeanor to knowingly and intentionally default in court where the offence charged is a misdemeanor.

In making this recommendation I do so with the approval of the several District Attorneys of the Commonwealth.

Criminal Prosecutions.

During the year there were instituted by the Department of the Attorney General several criminal prosecutions of major importance, several of which have been concluded in the courts. Soon after coming into office, there was called to my attention the matter of the extensive fraudulent financial operations of Dill & Co., Inc., and the Investors Trading Corporation, each company affiliated with the other.

The ramifications of this gigantic fraud and the criminal acts connected therewith extended into practically every county in the Commonwealth. In this investigation it was discovered that a sworn statement of holdings in the portfolio of the Investors Trading Corporation had been filed at various periods with the Securities Division of the Department of Public Utilities. The alleged holdings of the Investors Trading Corporation, as disclosed by this sworn statement, approximated half a million dollars. Shares of stock in the Investors Trading Corporation, predicated upon the alleged holdings of sound securities, had been sold in large quantities to persons throughout the Commonwealth by Dill & Co., Inc. The purchasers of stock in the Investors Trading Corporation were, for the most part, elderly persons, many of them women, who could ill afford to lose the money and other properties invested in this fraud.

It was found upon investigation that Dill & Co., Inc., and its president had been made the custodians of the properties and security holdings of the Investors Trading Corporation, and that the statement of portfolio holdings of Investors Trading Corporation filed with the Securities Division was utterly false and fraudulent.

This fact should have been disclosed upon the slightest diligent inquiry by responsible public officers. Many of the purchasers of stock in the Investors Trading Corporation relied upon the assurance contained in the statement filed with the Securities Division that the company into which they were buying possessed approximately half a million dollars' worth of assets, when in fact it possessed practically nothing, all assets, so far as they ever existed, having been dissipated by Dill & Co., Inc., the promoting company, through its president.

Under the direction of the Attorney General the president of Dill & Co., Inc., was promptly indicted by the Grand Jury of Suffolk County on a number of crim-

inal charges. To several indictments he pleaded guilty, and upon recommendation of the Attorney General the court sentenced him to a substantial term in State Prison.

The case just recited characterizes the type of fraud which has been perpetrated with more or less variation upon credulous persons, many of them aged and infirm, seeking to better their incomes, who parted, not only with their money but with securities of established standing and credit and dividend-paying power, and received nothing in return therefor but pieces of paper representing worthless stock of no value whatsoever.

The fact that the Attorney General in the past year has undertaken several criminal prosecutions is in no sense a reflection upon any District Attorney. It is due in the main to the State-wide character of the criminal acts concerned in certain cases, and the desire of the Attorney General to bring about an effective co-ordination of all agencies in the Commonwealth for the prevention, as well as the prosecution, of crime.

Fraudulent Business Practices.

Several conclusions of principal importance have been reached after a year of intensive study relative to fraudulent business practices, and more particularly fraudulent business practices in connection with the promotion and sale of stocks, bonds and other securities. These several conclusions are summarized as follows, and are embodied in this report as recommendations:

1. The Securities Division of the Department of Public Utilities should be transferred to the Department of Banking and Insurance, and made a division of that Department.

2. The Attorney General should be given authority to institute injunctive proceedings in the Supreme Judicial Court or in the Superior Court, at his election, whenever he believes and finds from evidence satisfactory to him that any person, partnership, corporation, company, trust or association has engaged in, is engaged in, or is about to engage in, fraudulent practices in connection with the promotion, sale or distribution of stocks, bonds or other securities, including oil and mineral deeds or leases, and any interest therein, with the end in view of enjoining such person, partnership, corporation, company, trust or association from continuing such fraudulent practices or engaging therein, or doing any act or acts in furtherance thereof, and with the further end in view of enjoining permanently the sale or offering for sale to the public within the Commonwealth, as principal, broker or agent, or otherwise, any securities issued or to be issued which are concerned in said fraudulent practices. "Fraud" and "fraudulent practices", as contemplated in this recommendation, include those defined in G. L. (Ter. Ed.), c. 110A, as amended by St. 1932, c. 290, § 2 (*g*).

3. It should be made a misdemeanor for any broker or salesman to make a representation, either orally or in writing, directly or indirectly, to a prospective customer, for the purpose of inducing the sale of any security, that the security has been qualified under the Sale of Securities Act of the Commonwealth, without disclosing to the customer at the time of making such representations that the qualification of the security does not evidence its economic value.

4. The Sale of Securities Act of the Commonwealth (G. L. [Ter. Ed.], c. 110A, as amended by St. 1932, c. 290) should be further amended so as to define pre-

cisely as securities coming within the scope of the provisions of the act, oil and mineral deeds and leases, and any interest therein or royalty therefrom.

5. To effectively administer the provisions of the legislation recommended as to injunctive proceedings, and to more effectively conduct inquiries in relation to violations of the Sale of Securities Act of the Commonwealth, the Attorney General should be empowered to summons before him, or before an Assistant Attorney General deputized by him in writing, witnesses and books, papers, documents, writings and memoranda for the taking of testimony and for examination and inquiry, under the pains and penalties of perjury.

6. For the further prevention of fraud, where a statement of portfolio holdings of securities is filed with the Securities Division, it shall be the duty of the director of that Division to ascertain the existence of such securities by physical inspection made by some officer responsible to him, who shall file in the records of the Division a sworn memorandum in writing in relation to his findings.

Delays in the Administration of Justice.

Delays in the administration of justice necessarily and inevitably breed a disrespect for justice and for law. This applies with equal force to the civil as well as to the criminal branch of the law. When a case is heard on the facts and merits, or argued on points of law, it is intolerable that months and sometimes years elapse before the rendering of decision or opinion. There is no valid excuse for a continuance of this condition; yet it is regretfully impressive that the condition exists. Its existence is particularly true with reference to certain district court judges. A remedy for this evil should be adopted. It may be noted that a forward step in the prompt administration of justice was taken in this Commonwealth by the passage of the so-called Fielding Act (St. 1934, c. 387). This act gives district courts exclusive original jurisdiction of actions of tort arising out of the operation of motor vehicles. In a large percentage of the district courts of the Commonwealth this act has operated with commendable and encouraging results. It has tended in no small measure toward a speedier administration of justice. But the increased and continued successful operation of this valuable piece of legislation is dependent upon the quality and character, as well as upon the fairness, impartiality and industry, of the district court judges assigned to hear the cases, and the promptness with which they render decisions and opinions.

Delays in the rendering of decisions and opinions in all classes of cases have crystallized into a long-continued, regrettable practice, and to such an extent as to constitute a great public abuse. I therefore recommend the enactment of a law making it obligatory upon the clerk of each of the seventy or more district courts throughout the Commonwealth to cause to be posted in a public place, on a bulletin board in the office of each clerk of court, at stated periods, — say at least once a month, — a list of cases held by judges in their respective courts for decision or opinion. All cases where decision has not been rendered should be so posted by the clerks where thirty days have elapsed from final hearing, giving the date when the case was taken under advisement by the court. This notice should also be posted in the judges' lobby and in the public corridor of each district court, giving the name of each case delayed for decision or opinion in that court beyond a period of thirty days, together with the name of the judge having the same under advisement.

I believe that such a mandatory practice would, through the sanction of professional and public opinion, operate as an instrument to reform the condition to which I allude. However, should it appear after a fair trial that results do not follow, I would be willing to suggest a more drastic remedy.

Amendment of Laws relating to Savings Banks.

The laws relating to savings banks should be amended by providing that no executive or administrative officer, or member of the board of investment of such banks, should act as counsel therefor.

The mutual savings banks of Massachusetts are quasi-public institutions. They should not be used as instruments for unconscionable private gain. When a prospective mortgagor applies for a mortgage, the bank counsel who is to charge the mortgagor for legal services rendered should not have within his power as an officer of the bank a voice in the granting or the denial of the mortgage. The possession of such power has too often served as a deterrent to protest at the amount charged allegedly for legal services. There have been called to the attention of the Department instances of fees so charged, which lend color to a conclusion that the fees in fact constituted inducements to the officer of the bank.

This is especially true in the instance of mortgages for a large amount, where the size of the loan serves as a flimsy defense, but because it does serve as a defense it makes more difficult the plight of the small home owner who seeks a renewal of a mortgage only to find that available funds are used to finance mortgages which are a source of profit to the officer of the institution.

Boston Port Authority.

The Department of the Attorney General participated in twelve cases and proceedings before various tribunals on matters concerning ocean and rail freight rates, storage charges, charges for handling, and other accessorial services affecting the movement of water-borne traffic through the Port of Boston and other ports of the Commonwealth.

The Port of Boston since 1920 has been laboring under a handicap, in that ocean rates are now equalized to all United States North Atlantic ports, and the rail differentials on traffic moving to and from interior points in favor of Philadelphia, Baltimore and Norfolk, which were originally intended to offset the higher ocean rates to these ports, now result in higher through ocean and rail charges by way of the Port of Boston. This and some other discriminatory practices indulged in by the rail carriers serving New York, Philadelphia, Baltimore and Norfolk have been assailed during the past year by the Department in conjunction with the Boston Port Authority.

The Department of the Attorney General, co-operating with practically every port of the United States, with the exception of New Orleans, appeared in connection with H. R. Bill 3006, 74th Congress, and S. Bill 874, 74th Congress, which were designed to correct the situation existing, whereby "a port" was not "a locality", as a result of the decision of the United States Supreme Court. This legislation was enacted into law, thereby giving ports an opportunity for protection from undue preference and prejudice.

The prosperity of this Commonwealth is dependent upon the prosperity of its individual cities and towns. The Port of Boston is the concern of the Commonwealth of Massachusetts. The present decrease from one and one quarter million tons of export trade during the ten-year period prior to the war to less than one-quarter of a million tons in recent years is a matter of grave concern to the entire State.

While the Port Authority of Boston is a State board, its only meagre means of support is the city of Boston. I believe that the worth-while work which it is doing should be assisted financially and the scope of its activities enlarged by the Commonwealth. I therefore recommend a comprehensive study by a recess commission of the functioning and problems of the Boston Port Authority. The commission might also consider the advisability of transferring the operation of the waterfront terminals of the Commonwealth to the Boston Port Authority. I am persuaded that such a recess commission would recommend legislation which would facilitate the protection and development of the commerce of the Port of Boston and other ports of the Commonwealth.

The Division of Collections.

Shortly after my induction into office I established within the Department a separate division to be known as the Division of Collections.

It was my belief that by the establishment of this Division, systematic effort would be made for the collection of money owed the Commonwealth, chiefly for the board of patients in the various institutions of the Commonwealth. The establishment of such a division necessarily demanded an increase in the budgetary requirements of the Department. In making the request for such an increase, I stated to the committee on ways and means of your Honorable Body that it was my opinion that if such provision were made, at least twice the amount collected in the previous fiscal year could be collected, due to the establishment of such a division.

I am pleased to report that during the fiscal year 1935 this Division collected $162,272.24. This sum is nearly four times the amount collected during the previous year, namely, $46,822.33. This does not take into consideration the sum of $11,092.22 which has been collected as a result of the activity of this Division, but which was paid directly to the several departments of the Commonwealth.

Land Damage Petitions.

It seems to have been the policy of this Department in recent years, in cases growing out of petitions for the assessment of damages for land taken by the Commonwealth, to await action by the petitioners for the trial of those cases.

This year all petitions for the assessment of damages for land taken, unless there has been some extraordinary reason for delay, have been marked by the Department for trial, and this will result in either the trial or disposition of cases which have for a long time been drawing 4 per cent interest against the Commonwealth upon the value of the land taken.

I doubt the wisdom of a policy which allows cases of this character to drag, as interest is constantly running against the Commonwealth. Furthermore, the public improvement usually involved in the taking of land by the Commonwealth

results in the improvement of the neighborhood, and juries, upon a view taken several years later, are apt to get a wrong impression of the value of the land at the time of the taking.

Representation of the Commonwealth by Other than the Department of the Attorney General.

It has been my contention that the office of the Attorney General should represent the Commonwealth in all cases involving litigation. Without any reflection upon the professional capacity of those involved, I have indicated that the services of certain counsel are no longer necessary, and that the Department of the Attorney General would assume the prosecution of several cases.

For instance, a Special Assistant Attorney General was appointed to represent the Commonwealth in Federal court proceedings arising out of the so-called Millen-Faber case. This work was successfully assumed by the Department. In the Davis tax case the estate of the late William Flaherty has a claim for a substantial sum for services rendered in obtaining a judgment, upon which nothing has as yet been collected, and the collection of the judgment was in the hands of other outside counsel, who has been dismissed. The Metropolitan District Water Supply Commission has expended in recent years more than $50,000 for the retention of outside counsel, whose work has been assumed by this Department. In the so-called Billboard Cases, a Special Assistant Attorney General was receiving a salary of $3,000 a year. This relationship was discontinued, and the work has been assumed by this Department. There are several other instances of like nature, in each of which this Department now represents the Commonwealth.

The adoption of the policy to which I have referred has necessarily increased the work of the Department. The full-time services of two Assistant Attorneys General are needed to represent the Metropolitan District Water Supply Commission in the trial of petitions arising out of the taking of land incident to the construction of the new Metropolitan District Water Supply reservoir in Western Massachusetts.

Charitable Bequests and Trusts.

Under the law the Attorney General is the protector of the rights of the public in relation to charitable bequests and trusts created by will.

At the outset of my incumbency, I was surprised to learn that there had never been a complete and accurate check upon the disposition of the income of charitable trusts and charitable bequests. Some trustees have made yearly reports to the Department of the Attorney General; others have made reports to the Probate Courts having original jurisdiction of the estates; and a surprisingly large number have made reports to neither.

The extent of the failure to make reports is well illustrated by citing three matters which have recently come to the attention of the Department. The first had to do with a fund established to conduct a home for aged persons who were resident in a certain city. This fund, which consisted of real estate, was established nineteen years ago, and the first report submitted by the trustees was within the past few months, as a result of the investigation by this Department. The second case had to do with a trust created for the purpose of expend-

ing the money to purchase fuel for needy persons. The trustee died, and the executor of the trustee's estate desired to have the estate released from liability under the bond filed by the trustee with the Probate Court at the time of his appointment. Upon investigation it was found that for a period of more than twelve years the trustee had never made a report of income received and disbursements made under the trust. The third case concerned a trust created in 1927, which involved several hundred thousand dollars, its purpose being to create a recreation center. No steps had been taken for the appointment of a trustee, nor had there been anything constructive done towards carrying out the purposes of the trust created under the will. The Department has had new trustees appointed and the trust fund turned over to them. The matter is now being followed out in accordance with the bequest as set forth in the will.

The second reason for the extensive examination and survey of public charitable bequests and trusts which this Department is now making is to ascertain the existence of any income from a trust or any fund which is not being used, and which could be used, to alleviate somewhat the tax burden of the cities and towns in relation to the welfare expenses of such cities and towns. At the present time it is unknown whether or not such sums exist, but it is expected that upon the completion of the survey sums will be found which can be used for this purpose and which today are lying dormant in banks and are not being put to the use which was the express wish of the benefactor. Owing to the fact that there is a large amount of detail work involved in setting up the system needed for a constant check upon these charitable trusts and bequests, and that no such survey has been made before this time, the completion of the work will take considerable time and money, but it is expected that the results obtained will adequately compensate the time and effort involved.

To the end that this Department might keep in touch with the management of public charitable trusts, I recommend that legislation be enacted whereby notice shall be given by the court to all named beneficiaries of public charitable bequests, as set forth in any will filed in court, and further, that similar notice be given to the Attorney General of the Commonwealth.

Unauthorized Practice of Law.

The steadily increasing number of lay agencies practicing law has been the concern of the General Court and of the Supreme Judicial Court of the Commonwealth. By chapter 346 of the Acts of 1935, the Legislature provided that, upon the petition of the Attorney General, acts constituting unauthorized practice of law might be brought to the attention of the Supreme Judicial Court or the Superior Court, which have concurrent jurisdiction in equity to restrain such conduct. The Supreme Judicial Court, on January 30, 1935, rendered an opinion to the Honorable Senate, wherein was clearly set forth the right of the judicial department of government to deal with persons other than those admitted to the Bar who practice law.

The combination of the legislative enactment and the Opinion of the Justices of the Supreme Judicial Court constituted a mandate to this Department to institute a comprehensive inquiry and investigation into the affairs of every agency so operating in violation of law within the Commonwealth.

Legal Aid Societies.

It should be noted that the Supreme Judicial Court stated "the gratuitous furnishing of legal aid to the poor and unfortunate without means in the pursuit of any civil remedy, as a matter of charity, . . . does not constitute the practice of law." See *Opinion of the Justices*, January 30, 1935.

It clearly follows that legal aid societies, coming as they do under the foregoing class, may continue as heretofore, and that no legislation is necessary to give them such right.

Collection and Adjustment Agencies.

An investigation into the affairs of every collection agency operating in the Commonwealth revealed that unscrupulous collection agencies, by their improper practices, have been collecting more than a million dollars a year in false charges, fictitious costs, and other expenses, which have been saddled on the backs of debtors, chiefly among low-salaried people.

In some instances constables have been working in co-operation with these collection agencies. In other cases they simply gave a badge to an employee, with which to hound people and scare them into paying not only their legitimate bills but exorbitant fees. Letters were sent to debtors outlining the dire catastrophe which would befall them through the operation of the judicial system if their demands were not met. Communications wherein the most exaggerated and distorted views, statements and descriptions were made of judicial procedure and process, and of their operation and effect upon a distressed and harassed debtor, were constantly sent. Threats of attachment of wages, — likely to lead to loss of employment, — seizure of property and the like, were all set forth with a detailed description of their merciless effectiveness. Forms simulating court process were both used and sold in blocks to those firms desiring an effective method of collection. Instruments and printed forms purporting to emanate from the court, bearing a facsimile of State and court seals, were constantly used to mislead the debtors into a belief that they were from the court, as a warning of the consequences of their failure to heed the demands of these operators. Debts originally for a small sum would ultimately result in the execution of a mortgage on furniture and other property of the debtors, which otherwise was exempt from attachment or levy, in a sum increased by 100 per cent to 1,000 per cent. Many agencies would institute outlawed and fraudulent actions at law, well knowing that by their continued, steady and regular practices they would force the debtors to pay even an unjust bill rather than face the consequences of court action or possible loss of employment. Hundreds of mortgages and assignments of life policies, salaries and the like were secured by false and fraudulent representations that the debtors were only signing an agreement to pay their just debt.

Groups of collection agencies have combined against small business men, threatening bankruptcy or coercing them into making an assignment for the benefit of creditors. The effectiveness of collection agencies comes from their brutal and "hard-boiled" tactics, using our judicial system to justify their existence and practices. The latest method of extortion is for collection agencies to threaten and in fact to advertise "accounts for sale" in newspapers and circulars, and thus hold an unfortunate debtor up to shame and ridicule among his friends and neighbors, regardless of whether or not the debt is actually due.

These agencies not only victimized the debtors, but have withheld moneys actually collected as trustee for their customers or creditors, and have refused to pay over, under one pretense or another, their usual excuse being that the account was "withdrawn"; thus they are entitled to be paid as if actually collected, and, in some cases, at a still higher rate.

Indictment and prosecution may follow in some cases, but obviously this could not remedy the existing conditions. The Department therefore, with a view of eliminating a manifestly evil condition, investigated 282 agencies, resulting in the Department filing with the Supreme Judicial Court —

163 informations invoking a remedy to protect the courts and the public;
99 companies are no longer in business (foreign corporations having no place of business in Massachusetts or bond filed with the State Treasurer, companies not occasioning legal action);
20 companies pending in the Department for further investigation; making a total of

282

Of the 163 informations filed with the Supreme Judicial Court —

96 were enjoined from conducting collection agencies;
3 have gone out of business after informations were filed and before trial;
1 was enjoined from conducting a collection agency, and appealed to the full court;
1 was dismissed, as the respondent was deceased;
1 is awaiting decision before a master;
11 are assigned for trial before masters;
50 are pending in the Supreme Judicial Court, awaiting trial or assignment.

Six large foreign collection agencies which filed bonds with the State Treasurer to operate collection agencies have had their bonds ordered cancelled by our Department.

It should not be assumed that all collection agencies engaged in the reprehensible practices which I have outlined above. There were some which conducted their affairs in a businesslike and humane manner. However, because their activities constituted the unauthorized practice of law they are subject to restraint by the judicial department of government.

I recommend that legislation be enacted to prevent the advertising of "accounts for sale" by newspapers and circulars, wherein the names and addresses of the creditors and debtors and the amounts and nature of action are listed.

Automobile and Protective Associations.

The Department's attention has been directed to some thirty-four so-called automobile and protective associations, operating in this Commonwealth, which charge their members yearly dues for various privileges. In soliciting their membership these associations offer to furnish the members with certain services of their "legal department" in connection with the ownership and operation of automobiles. They engage in other general activities, such as legislative effort to improve the traffic and road conditions, the marking of highways, the furnishing

of information as to roads and road conditions, and the like. These "legal departments" consist of various attorneys who are engaged in general practice and who devote to this service only such of their time as is necessary. They are in most cases paid per case. When matters in which they are consulted by members result in suit or other legal proceedings they are also entitled to charge such members their usual and customary fees.

With few exceptions these so-called associations are nothing more than instrumentalities through which certain lawyers have been able to secure business, contrary to the rules of the court and the canons of legal ethics. In some cases they give a small premium policy, together with certain emblems, and publish a periodical, which seems to be their method of constant solicitation to procure professional employment for their lawyers. These associations, with practically no exception, are nothing more than cloaks for the indirect solicitation of law matters, constituting an imposition and fraud upon the court, in that they solicit claims which are law matters and which solicitation the lawyers would be prohibited from doing by the canons of legal ethics.

During the year there was instituted an inquiry into, and an investigation of, the affairs of every automobile and protective association operating in this Commonwealth. The Department, with a view to eliminating these unlawful conditions, investigated some thirty-four cases, from which group —

18 informations invoking a remedy to protect the courts and the public were filed with the Supreme Judicial Court;
12 associations are no longer in business — companies not occasioning action;
4 are pending in our Department under further investigation; making a total of
—
34

Of the 18 cases in which informations were filed with the Supreme Judicial Court —

6 associations have been enjoined from conducting a "legal department" in connection with their operation;
1 case was tried before a single justice of the Supreme Judicial Court and reported to the full court;
1 was tried before a single justice and is awaiting decision; and
10 are pending in the Supreme Judicial Court awaiting trial or assignment.

Small Loan Agencies.

The purpose of G. L. (Ter. Ed.), c. 140, § 96, is to protect a borrower from paying an excessive rate of interest on loans of $300 or less. Small loan agencies advertise to hold themselves out as bonded, licensed and under the supervision of the Department of Banking and Insurance.

When the wage earner, driven by lack of the necessaries of life, or in a similar genuine emergency, must borrow money, he goes to a licensed small loan agency, believing it entirely under the regulatory supervision of the Commonwealth. The circumstances under which the loan is needed are such that interest charges

become a secondary consideration, as compared to the emergency requiring such a loan. With a view to defeat and evade the purpose of the so-called Small Loan Statute, a loan is made for $301, thereby enabling the operators of the licensed small loan agency to charge any rate of interest. The borrower does not know that where a loan of $301 or more is made, the agency is no longer under the regulatory supervision of the Department of Banking and Insurance, and may charge any rate of interest, depending on what the traffic will bear.

These practices have caused a great amount of suffering and hardship to many unfortunates, whose misfortune is their need for ready cash, and have thus supplied the opportunity for others to obtain usurious interest charges. The Department investigated eight cases involving these practices, where partial relief was afforded the borrowers.

I recommend that legislation be enacted —

1. To prevent a small loan agency from engaging in any activity other than the so-called small loans business, and from making loans other than in accordance with G. L. (Ter. Ed.), c. 140, §§ 96–111, inclusive.

2. To raise the amount of $300 to $1,000, as defined in G. L. (Ter. Ed.), c. 140, §§ 96 and 110, as the business of making small loans.

3. To provide for legal services for the victims of unlawful practices by loan agencies, and that payment for such services be made by the loan agency, in accordance with a method similar to the provisions of G. L. (Ter. Ed.), c. 140, § 97.

Banks and Trust Companies.

The Department has concerned itself with the alleged unauthorized practice of law by the banks and the trust companies of the Commonwealth.

I called a conference of the representatives of the Massachusetts Bar Association, The Law Society of Massachusetts, and the several County Bar Associations. As a result of this conference, a subcommittee of five was appointed to formulate a program of procedure to deal with this particular aspect of the problem of unauthorized practice of law. It will be generally agreed that hasty and ill-conceived action against financial institutions might lead to a loss of confidence in them on the part of the public, which would prove harmful to the financial structure of the Commonwealth. It therefore is a prudent course to make adequate preparation for any effort along this line.

The trust companies of the Commonwealth hold in trust more than one billion dollars of assets. That they have a legal right so to do is clear. It is also clear that in dealing with these assets they have no right to perform legal services or to render legal advice. The problem presents a difficulty, however, in that in this field of activity an exact definition of what is the practice of law cannot be drawn which can be rigidly applied to all cases. There is a hazy line of demarcation which separates the practice of law from other activities which are legitimate business functions to be exercised by a bank through its trust officers. It is the hope of the Department that an agreement may be reached which will solve these difficulties of definition. However, the law in this regard is in its formative stage. Judicial effort should be made to obtain precise definitions. The public interest will be clearly served by confining the banker to banking activities and leaving the practice of the law to duly admitted members of the Bar.

Lowell Gas Light Company Case.

The Lowell Gas Light Company was for nearly eighty-two years a very successful and prosperous organization. It was created by Massachusetts men and financed by Massachusetts capital. It was conducted as a separate independent entity, willing to rise or fall on its own merits.

In 1929 a group of outside financiers bought the Lowell Gas Light Company from its Massachusetts owners. They organized the American Commonwealth Power Associates, a Massachusetts trust, because the laws of the Commonwealth require that Massachusetts public utilities shall be held only by Massachusetts institutions.

In the background of this American Commonwealth Power Associates was the usual holding company, known as the American Commonwealth Power Corporation. The issuance of the $1,500,000 notes in the name of the Lowell company was presumably for the purpose of making extensions to the plant of the Lowell company. The money, however, went to the holding company and the parent company for the purpose of buying, among other things, new power plants in foreign States. The parent company went into the hands of a receiver, and the Lowell company was compelled to pay the notes.

In view of the fact that the persons adversely affected by the issuance of these notes were the minority stockholders of the Lowell Gas Light Company, our office conducted an investigation, resulting in full restitution to both the minority stockholders and the company itself.

Official Opinions.

The Department has rendered one hundred and thirty-seven written opinions.

An Appreciation.

In conclusion, I desire to express my sincere appreciation of the loyalty, industry and ability of those who shared with me the responsibilities of the chief law office of the Commonwealth. The several Assistant Attorneys General, the office personnel, and all the co-operating agencies have manifested commendable willingness to serve to the best of their talents the people of Massachusetts.

Respectfully submitted,

PAUL A. DEVER,
Attorney General.

Details of Capital Cases.

1. Disposition of indictments pending Nov. 30, 1934:

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

Claude Taylor.

Indicted October, 1934, for the murder of Stanley J. Watson, at Littleton, on Aug. 23, 1934; arraigned Oct. 17, 1934, and pleaded not guilty; May 8, 1935, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to the house of correction for one year.

Northwestern District (in charge of District Attorney David H. Keedy).

Charles Maeules, *alias*.

Indicted in Hampshire County, February, 1929, for the murder of George Chepules, at Amherst, on Dec. 20, 1928; arraigned Feb. 25, 1929, and pleaded not guilty; June 19, 1930, committed to Bridgewater State Hospital; May 25, 1935, returned as recovered; Aug. 22, 1935, taken to Norfolk Prison Colony because of illness, and died there Sept. 12, 1935.

Southeastern District (in charge of District Attorney Edmund R. Dewing).

Murton Millen, *alias*, Irving Millen and Abraham Faber, *alias*.

Indicted in Norfolk County, February, 1934, for the murder of Forbes A. McLeod, at Needham, on Feb. 2, 1934; arraigned March 10, 1934, and each pleaded not guilty; trial April 16, 1934, to June 9, 1934; verdict of guilty of murder in the first degree as to each; appeal as to each dismissed by the Supreme Judicial Court Feb. 14, 1935 (Adv. Sh. [1935] 475); second appeal of Murton Millen and Irving Millen dismissed by the Supreme Judicial Court April 18, 1935 (Adv. Sh. [1935] 1087); petition of Murton Millen and Irving Millen for writ of certiorari to the Circuit Court of Appeals for the First Circuit, and motion for leave to proceed further *in forma pauperis* denied by the Supreme Court of the United States (*Millen* v. *Capen, Sheriff*, 292 U. S. 639); petition of Murton Millen for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied by the Supreme Court of the United States (55 S. Ct. 650); petition of Irving Millen for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied by the Supreme Court of the United States (55 S. Ct. 650); petition of Murton Millen and Irving Millen for writ of certiorari to the Superior Court in and for the County of Norfolk, Commonwealth of Massachusetts, denied by the Supreme Court of the United States (55 S. Ct. 924); petition of Abraham Faber for writ of certiorari to the Superior Court in and for the County of Norfolk, Commonwealth of Massachusetts, denied by the Supreme Court of the United States (55 S. Ct. 924); during the pendency of proceedings respites were granted Murton Millen, Irving Millen and Abraham Faber by the Governor and Council on April 24, 1935, for a period of six days from April 28, 1935, to and including May 4, 1935, and on May 1, 1935, from May 4, 1935, to and including June 5, 1935; the sentence of death pronounced by the Superior Court for Norfolk County as to Murton Millen, Irving Millen and Abraham Faber on Feb. 26, 1935, was carried into execution on June 7, 1935.

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

John J. Moore.

Indicted April, 1933, for the murder of Charles Solomon, on Jan. 24, 1933; arraigned Nov. 14, 1934, and pleaded not guilty; trial May, 1935; verdict of not guilty.

Nicholas Porazzo, *alias*.

Indicted April, 1933, for the murder of Michael Richardi, on Jan. 1, 1933; arraigned May 4, 1933, and pleaded not guilty; trial January, 1934; jury disagreed; second trial February, 1935; verdict of not guilty.

Michael J. Walsh.

Indicted October, 1931, for the murder of Honora A. Walsh, on Sept. 18, 1931; arraigned Oct. 23, 1931, and pleaded not guilty; Nov. 19, 1931, adjudged insane and committed to Bridgewater State Hospital; Jan. 17, 1935, restored to sanity and ordered to trial; April 15, 1935, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not more than twenty years and not less than fifteen years.

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

Alexander Kaminski, *alias*.

Indicted in Hampden County, December, 1933, for the murder of Merritt W. Hayden, at Springfield, on Oct. 22, 1933; arraigned Jan. 5, 1934, and pleaded not guilty; trial February, 1934; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution within the week beginning Jan. 20, 1935; Jan. 16, 1935, respite to and including Feb. 16, 1935; Feb. 4, 1935, motion for new trial denied; sentence carried out Feb. 19, 1935.

Armand Santaniello.

Indicted in Hampden County, September, 1934, for the murder of Lena Resigne, at Springfield, on Aug. 12, 1934; arraigned Dec. 27, 1934, and pleaded not guilty; trial March, 1935; verdict of guilty of manslaughter; thereupon sentenced to State Prison for not more than ten years and not less than six years.

2. Indictments found and dispositions since Nov. 30, 1934:

Middle District (Worcester County cases: in charge of District Attorney Owen A. Hoban).

Martin Dudeck.

Indicted August, 1935, for the murder of Sophie Dudeck, at Southbridge, on July 11, 1935; arraigned Sept. 6, 1935, and pleaded not guilty; trial September, 1935; verdict of not guilty by reason of insanity; thereupon committed to Bridgewater State Hospital for life.

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

John Evangelista.

Indicted April, 1935, for the murder of Francis A. Veinot, at Woburn, on March 30, 1935; arraigned April 5, 1935, and pleaded not guilty; May 28, 1935, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than ten years nor more than fifteen years.

Edmund J. Walsh.

Indicted December, 1934, for the murder of Isaiah McLain, at Malden, on Nov. 12, 1934; arraigned Dec. 6, 1934, and pleaded not guilty; trial March, 1935; verdict of guilty of manslaughter; thereupon sentenced to State Prison for not less than five years nor more than seven years.

Southeastern District (in charge of District Attorney Edmund R. Dewing).

Clifford C. Spokesfield.

Indicted in Norfolk County, December, 1934, for the murder of Marie Spokesfield, at Westwood, on Sept. 22, 1934; arraigned Dec. 10, 1934, and pleaded not guilty; trial March, 1935; verdict of not guilty.

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

Anthony Cognato.

Indicted April, 1935, for the murder of Jacob Cohen, on March 6, 1935; arraigned April 22, 1935, and pleaded not guilty; trial November, 1935; verdict of not guilty.

Frank Trani.

Indicted May, 1935, for the murder of John Jannoni, *alias*, on May 10, 1935; arraigned May 28, 1935, and pleaded not guilty; trial June, 1935; during the trial retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not more than twenty years nor less than twelve years.

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

Elario Bordoni.

Indicted in Hampden County, May, 1935, for the murder of James Parrotti, at Wilbraham, on Feb. 4, 1935; arraigned May 24, 1935, and pleaded not guilty; Oct. 7, 1935, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not more than five years and not less than three years.

Alexander Lemanski.

Indicted in Hampden County, September, 1935, for the murder of Mary Lemanski, at Chicopee, on May 17, 1935; arraigned Sept. 26, 1935, and pleaded not guilty; Oct. 14, 1935, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

3. Pending indictments and status:

Middle District (Worcester County cases: in charge of District Attorney Owen A. Hoban).

Newell P. Sherman.

Indicted August, 1935, for the murder of Alice D. Sherman, at Sutton, on July 20, 1935; arraigned Aug. 26, 1935, and pleaded not guilty; trial September, 1935; verdict of guilty of murder in the first degree; claim of appeal pending.

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

Julius Darish.

Indicted April, 1935, for the murder of Albert E. Gilbert, at Everett, on April 5, 1935; arraigned April 16, 1935, and pleaded not guilty.

Frank DiStasio and Anthony DiStasio.

Indicted May, 1935, for the murder of Daniel Crowley, at Hudson, on May 6, 1935; arraigned May 9, 1935, and each pleaded not guilty; trial October, 1935; verdict of not guilty by order of the court as to Anthony DiStasio, and verdict of guilty of murder in the first degree as to Frank DiStasio; motion for new trial and claim of appeal pending.

Julio Ventura, Aniello Orlando, James Penta and Angelo DeVito.

Indicted October, 1934, for the murder of Luigi Girgo, at Wilmington, on Oct. 3, 1934; arraigned Oct. 11, 1934, and each pleaded not guilty; trial January, 1935; verdict of guilty of murder in the second degree as to each; thereupon each sentenced to State Prison for life; motion for new trial and claim of appeal pending as to each defendant.

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

Harold C. Look.

Indicted in the County of Dukes County, September, 1935, for the murder of Knight Owen, at Tisbury, on Sept. 12, 1935; arraigned Oct. 10, 1935, and entry of a plea of not guilty ordered by the court.

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

Miller F. Clark, *alias*.

Indicted January, 1935, for the murder of Ethel Zuckerman, on Dec. 20, 1933; arraigned Jan. 17, 1935, and pleaded not guilty; trial March, 1935; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution within the week beginning Jan. 12, 1936.

Ralph Pacini, *alias*.

Indicted May, 1935, for the murder of Clara Pacini, *alias*, on April 2, 1935; defendant an inmate of Boston State Hospital.

Forrest K. Wells.

Indicted August, 1935, for the murder of Helen Wells, *alias*, on July 15, 1935; arraigned Oct. 11, 1935, and pleaded not guilty.

OPINIONS.

Licenses — Business of receiving Deposits of Money for Transmission to Foreign Countries — Bond.

The Commissioner of Banks may require a new bond to be given before the renewal of a license under G. L. (Ter. Ed.) c. 169, § 1, in any year.

JAN. 21, 1935.

HON. HENRY H. PIERCE, *Commissioner of Banks.*

DEAR SIR: — I am in receipt of a communication from you in relation to a requested renewal of a license to carry on the business of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries, as described in G. L. (Ter. Ed.) c. 169, § 1.

Such a license is issued "for a period of one year" (c. 169, § 3). As a prerequisite to receiving such a license, the licensee must give a bond with a surety company approved by the Commissioner of Banks. Other modes of securing such a bond are authorized by the statute, but inasmuch as a bond with sureties is offered, as you inform me, by the licensee as to whose renewal you inquire, I confine myself to a discussion of such type of bond only. The bond "shall be conditioned upon the faithful holding and transmission of any money . . . which shall have been delivered to" the person engaging in the business "for transmission to a foreign country . . ." (c. 169, § 2). A copy of such a bond, executed by the particular licensee to whom you refer in your communication and by a surety company, dated March 24, 1925, is annexed to your letter as the one now offered to you by the applicant for renewal of the license. This particular bond appears to have been approved by the then Deputy State Treasurer and the then Commissioner of Banks, on April 24, 1925.

You inform me that this same bond has continued to be treated as sufficient under the statute since its date of approval, and that the license of the principal has been renewed yearly upon application; that the license will expire on or about January 22, 1935; and that an application for its renewal, upon the basis of the old bond as previously approved, is now before you.

With relation to the bond which the licensee is to furnish, said section 3 of chapter 169 further provides that it shall not be accepted "until it has been first examined and approved by the commissioner and unless also approved by the state treasurer . . . Upon notice of such approval by the state treasurer, the commissioner shall issue a license . . ." These acts were all done, as has been said, at the time of the issuance of the first license in 1925.

It is probable that the bond as required by the statute and the bond given by the instant licensee remain in effect as long as the principal continues to engage in the specified business, and for a further period described in said section 3, so that, under ordinary circumstances, it is not improper to treat the original bond, as first approved, as a sufficient security upon which to base the issuance of subsequent annual licenses, as you tell me has been done heretofore, and it could at any time be enforced against principal and surety.

Nevertheless, this point is not necessarily determinative of the course of action which may be followed in regard to the exigencies of the existing

situation concerning this application for a renewal of a license, as you have set them before me in your communication.

You have advised me that the surety has recently "purported to terminate liability upon its surety bond," and that a controversy has developed between the principal and surety as to whether the surety is still bound, and, in effect, that the surety is prepared to deny liability upon this bond if now it should be sued thereon. If such be the facts, permission to the licensee to continue business upon no other security than the present bond, repudiated by the surety, would scarcely afford adequate protection to such of the public as might do business with the licensee. Since the officers of the Commonwealth have now in fact notice that the surety repudiates liability, it is certainly their duty to refuse to accept for another year an obligation which can perhaps be enforced only by a long and expensive resort to the courts. Such a bond cannot furnish that certain, speedy and adequate protection which depositors in this particular sort of private banking business, for the most part persons of relatively small means, are entitled to, and which it was obviously the intent of the Legislature to provide for.

Because a State Treasurer and a Commissioner of Banks approved and accepted a bond almost nine years ago, it does not follow that such bond is necessarily approved and accepted now when it is offered, as security for a new annual license, by one "continuing to engage . . . in the business of receiving deposits of money for the purpose of transmitting the same."

The present State Treasurer and the present Commissioner of Banks have the authority at the present time, upon the instant application for a new license for the coming year, to signify their disapproval of this surety and of this bond with relation to the application for a new license. If in the exercise of their judgment they should now withhold approval, no license could properly be issued on January 22nd unless another acceptable bond or security was furnished by the applicant for a license.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Civil Service — Probationary Period — Promotion.

The rule relative to service of a probationary period does not apply to service rendered by an employee upon promotion to a new position.

JAN. 22, 1935.

HON. JAMES M. HURLEY, *Commissioner of Civil Service.*

DEAR SIR: — You request my opinion as to whether Civil Service Rule 18, section 1, providing for a six months' probationary period, applies in cases of promotion.

The rule reads as follows: —

"No person appointed in the official or labor division shall be regarded as holding office or employment in the classified public service until he has served a probationary period of six months."

In an opinion rendered to your department on February 8, 1923, by one of my predecessors in office, it was ruled that the civil service rule providing for a probationary period of six months applied only to original appointments under civil service; and it was pointed out that if the rule applied

to promotions a civil service employee could accept a promotion only by sacrificing for a period of six months the protection given him by the Civil Service Law against removal except for cause. VII Op. Atty. Gen. 37. Moreover, the rule providing for a probationary period formerly applied, by its terms, only to "original appointment" (see the rule as cited in *McDonald* v. *Fire Engineers of Clinton*, 242 Mass. 587, 589); and doubtless the rule as it now reads is intended to mean the same thing.

There is nothing inconsistent with the opinion of the Attorney General above referred to and *McDonald* v. *Fire Engineers of Clinton*, 242 Mass. 587. The rule there in question referred to "original appointment for permanent employment," and the original appointment of the petitioner in that case to permanent employment was the appointment in question, namely, as a permanent fireman. Moreover, subsequently to that decision G. L. c. 48, § 36, then before the court, was amended (St. 1923, c. 109) by providing that in towns promotion from the call department to the permanent fire force should be "without any probationary period."

Nor is there anything necessarily inconsistent with the said opinion of the Attorney General and the recent case of *Buckley* v. *Mayor of North Adams*, to which you refer me, decided by a single justice of the Supreme Judicial Court. That was a case where a fireman was appointed, without certification, from the reserve to the permanent force, and then dismissed without a hearing. The decision of the single justice dismissing the petition was probably based upon the ground that the appointment, having been made without certification by the Civil Service Commissioner, was invalid, as not in accordance with G. L. (Ter. Ed.) c. 31, § 19A (St. 1932, c. 146), which provides that appointments shall be made "upon certification by the commissioner from the list of members of the reserve force of firemen." It was unnecessary, therefore, to pass upon the question as to whether, if the petitioner had been validly appointed to the permanent force, he would have had to serve a probationary period, under the civil service rules.

In my opinion, the ruling of the Attorney General above referred to is correct, and I adhere to it.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Licenses — Sale of Methyl Alcohol — Agent — Association.

An association of garage owners may buy, for resale, methyl alcohol through its secretary; and if its secretary is in fact acting as the agent of the members of the association, he may distribute to them severally without himself having a license to sell.

JAN. 22, 1935.

Dr. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You request an opinion as to the requirement of a license to sell methyl alcohol by either the secretary or the association referred to in the following circumstances.

You inform me that there is an association composed of garage owners; that when these individual garage owners desire to buy methyl alcohol they transmit an order therefor to the secretary of this association, together with a check in payment therefor; the secretary then transmits the order to a wholesale chemical supply house, with which he has made a contract in behalf of each member of the association; that this chemical

supply house has been furnished by the secretary with a list of the members of the association; that on receipt of orders from the secretary the chemical house ships the goods directly to the member who ordered the same and receives payment therefor from the secretary, who pays the supply house after deducting a commission as agreed upon between the supply house and the association.

The question to be determined is whether the secretary or the association is acting as owner of the alcohol or merely as an agent of the purchasing garage owner.

If the secretary or the association, in operating under this arrangement, possesses title, which is then transferred to the garage purchaser, then a license to sell the product is required. If, on the other hand, the relationship of the association or its secretary is merely that of agency, then no license is necessary.

Your letter does not disclose the terms of the contract made by the secretary, acting as agent of the individual garage owners, with the supply house. While the Department of Public Health would not be bound by this agreement, and would not thereby be prevented from showing the true relationship existing between the parties, yet the contract would be material in determining the rights of the parties between themselves, and in disclosing the situation in which each stood to the other. However, sufficient appears upon which to pass an opinion.

The fact that the secretary handles the financial features of each transaction would not prevent him from acting as agent of the purchasers; neither would the fact that the goods are shipped directly from the supply house to the garage owner. It is apparent that the secretary acts as the agent of disclosed principals in his relation to the supply house, and, in the absence of any provisions to the contrary in the agreement made by the secretary with the supply house, the latter could sue and collect from the individual garage owners for the goods sold and delivered to such owners upon orders furnished by the secretary. The commission deducted is either compensation to the secretary for his services or goes into a common fund for the benefit of the members of the association. Indeed, the whole plan is suggestive of a co-operative buying agreement by which certain trade advantages are secured and such association's funds are held by agents of its participating members rather than vendors.

Even though the statute applies to a person engaged in the business of manufacturing, buying, selling, transporting, importing or exporting or dealing in methyl alcohol or wood alcohol, so called (see G. L. [Ter. Ed.] c. 94, § 303A), yet an individual agent is not required to have a license if one has been secured by his principal, any more than an individual salesman selling such products would be required to have a license if his employer had one.

Consequently, I am of the opinion that no license is required from either the secretary or the association in continuing to conduct the above-described arrangement.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Licenses — Alcohol — Local Boards of Health.

All licenses granted during 1934, by municipal boards of health, for the sale of methyl alcohol or denatured alcohol ceased to be effective on January 1, 1935.

JAN. 22, 1935.

Dr. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You inform me that the board of health of one of our large cities has refused to issue new licenses for the sale of wood alcohol, as it contends that such licenses issued in 1934 by that board would not expire until April 30, 1935; and you request an opinion as to the expiration date of such licenses.

For a number of years prior to the enactment of St. 1933, c. 376, boards of health were authorized to grant licenses for the sale of methyl alcohol and denatured alcohol, which licenses expired on the thirtieth day of April following the date of their issuance. G. L. (Ter. Ed.) c. 138, § 35. This licensing authority was continued in the various boards of health by the provisions of G. L. (Ter. Ed.) c. 138, § 72, inserted by St. 1933, c. 376. Under this last-mentioned chapter all licenses and permits issued thereunder were to expire on the last day of the calendar year in which they were issued (see G. L. [Ter. Ed.] c. 138, § 23, inserted by St. 1933, c. 376), except that licenses then in effect should "continue to have full force and effect for the term for which issued, unless sooner revoked by the authority issuing the same." St. 1933, c. 376, § 5.

It is therefore clear that all licenses issued prior to the adoption of this last-mentioned act expired not later than April 30, 1934, and that since January 1, 1934, all licenses thereafter issued could not continue in force later than the thirty-first day of December of that calendar year.

G. L. (Ter. Ed.) c. 138, § 72, inserted by St. 1933, c. 376, under which licenses for the sale of both methyl alcohol and denatured alcohol were issued by the various boards of health, was repealed by St. 1934, c. 372, § 1. Thereafter, the power to grant licenses for the sale of denatured alcohol was given to the local licensing authorities and to the Alcoholic Beverages Control Commission. G. L. (Ter. Ed.) c. 138, § 76, inserted by St. 1934, c. 372.

The authority, however, to issue licenses for the sale of methyl alcohol was retained in the various boards of health and in the Department of Public Health. G. L. (Ter. Ed.) c. 94, §§ 303A and 303B, inserted by St. 1934, c. 372. Upon the enactment of said chapter 372, licenses granted for the sale of denatured alcohol and those issued for the sale of methyl alcohol all expired on the thirty-first day of the following December, although such licenses were then issued by different boards.

It is manifest that after September 27, 1934, the sale of denatured alcohol was not authorized by any licensee of a board of health. One who held an effective license at the date last mentioned, and which, but for the passage of St. 1934, c. 372, would continue in effect until December 31, 1934, cannot complain that the term of his license was shortened by an act of the Legislature subsequent to the date of the issuance of his license. His license was a mere personal privilege granted to do what otherwise would be unlawful. The license was simply a means adopted by the Legislature, in the exercise of the police power, to regulate the sale of an article, in the interest of the public health and safety. The recipient

of such a license did not, by virtue thereof, secure any contractual rights. He had merely a permit whose tenure always depended upon the chance that it might be modified, restricted or eliminated if the Legislature determined that the existence of such licenses was detrimental to the public good.

It is familiar law that licenses governing the regulation of a trade or business may be abolished by the Legislature before the expiration of the period for which they were originally granted. The granting, however, of any such license cannot prevent the Legislature from enacting all reasonable laws for the common good, and to effect such changes in the conduct of any business as the exigencies of the public welfare may demand.

I am therefore of the opinion that all licenses granted during 1934, by boards of health of the various cities and towns, for the sale of either methyl alcohol or denatured alcohol were not effective later than January 1, 1935, and that in no case can any such licenses issued prior to the date last mentioned be held to be still in full force and effect.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Licenses — Sale of Methyl Alcohol — Local Boards of Health.

Local boards of health were under a duty to issue new licenses for the sale of methyl alcohol, after January 1, 1935.

JAN. 23, 1935.

DR. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You have advised me that a local board of health has declined to issue a new license to any applicants for a license for the sale of methyl alcohol under the provisions of G. L. (Ter. Ed.) c. 94, §§ 303A – 303E, as inserted by St. 1934, c. 372, apparently upon the ground that such applicants hold licenses to sell methyl and denatured alcohol previously issued to them on April 30, 1934; and you ask my opinion as to the effect of amendments to the General Laws affected by the amending statute, St. 1934, c. 372, with relation to the necessity for the issuance of new licenses to such applicants after December 31, 1934.

Prior to 1933, local boards of health were authorized to issue licenses for the sale of methyl alcohol and denatured alcohol to certain persons, such licenses to expire on April thirtieth of each year. G. L. (Ter. Ed.) c. 138, §§ 34 and 35. Said chapter 138 was stricken from the General Laws and a new chapter 138 inserted in its place by St. 1933, c. 376, § 2. This new chapter 138 provided, in section 72, that local boards of health might annually grant to persons who applied therefor licenses for the sale of methyl alcohol or denatured alcohol, and that the State Department of Public Health might also grant certain licenses with relation to such alcohols.

The amending statute, said chapter 376, provided, in section 5, that all licenses theretofore issued under the authority of the old chapter 138, and in effect immediately prior to the taking effect of the new act, should continue to have full force and effect for the term for which they were originally issued; so that licenses granted in April, 1933, expired on April 30, 1934. But it was provided by the new chapter 138 that all licenses granted under this chapter, unless otherwise provided therein, should expire on the

thirty-first day of December of the year of issue. Therefore, a license issued or renewed in April, 1934, being then, since the said new act had become effective, a license granted under chapter 376, expired by express provision of the statute on December thirty-first of the year of its issue, which would be 1934.

Accordingly, it became necessary that new licenses should be issued in January, 1935, or thereafter, to persons desiring to deal in methyl alcohol; and provision for such licenses was established by an amendment to G. L. (Ter. Ed.) c. 94, by St. 1934, c. 372, which provided that a local board of health might issue licenses for the sale of methyl alcohol to qualified applicants, and that the Department of Public Health might likewise issue similar licenses applicable to use anywhere within the Commonwealth. St. 1934, c. 372, became effective on September 27, 1934, and under its provisions it is the duty of local boards of health to issue licenses for the sale of methyl alcohol to proper persons, and it is likewise the duty of the Department of Public Health to take similar action when required.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Attorney General — Opinions — Municipal Authorities.

JAN. 29, 1935.

Hon. RICHARD R. FLYNN, *Commissioner of State Aid and Pensions.*

DEAR SIR: — You have written me relative to the use by the Boston soldiers' relief department of the Social Service Index, and request my opinion as to whether or not such use constitutes a violation of G. L. (Ter. Ed.) c. 40, § 51. There were inclosed with your letter copies of two letters, — one from the soldiers' relief commissioner of Boston to you, asking that you obtain an opinion from me; and the other setting forth an opinion rendered to the said commissioner by the then acting corporation counsel of Boston.

This department has no authority whatever to advise heads of municipal departments in matters of entirely local concern and pertaining solely to the administration of some city or town office. This has always been the established policy of this department. Consequently, I must decline, as I respectfully do, to comply with your request.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Public Building — Licensed Premises — Vessel.

A floating vessel tied to a wharf is not a public building, within the meaning of G. L. (Ter. Ed.) c. 143, § 1.

JAN. 30, 1935.

Hon. PAUL G. KIRK, *Commissioner of Public Safety.*

DEAR SIR: — You desire my opinion in the following matter: —

"I respectfully request your opinion as to whether or not a floating vessel tied to a wharf and licensed by the city as a dine-and-dance hall, to which the public is admitted, comes within the definition of 'public building' as defined by G. L. (Ter. Ed.) c. 143, § 1, and therefore requires a certificate of occupancy from this department."

A floating vessel, even if tied to a wharf, does not fall within the definition of "public building" set forth in G. L. (Ter. Ed.) c. 143, § 1, which reads: —

"'Public building', any building or part thereof used as a public or private institution, schoolhouse, church, theatre, special hall, public hall, miscellaneous hall, place of assemblage or place of public resort."

A floating vessel is not a "building," which latter word is construed in law as denoting a structure built where it is to stand or affixed to the soil. Bouvier's Law Dictionary; *Small* v. *Parkway Auto Supplies, Inc.*, 258 Mass. 30, 33; *Rouse* v. *Catskill, etc., Steamboat Co.*, 59 Hun (N. Y.) 80; *Southwestern Bell Tel. Co.* v. *Drainage District*, 247 S. W. (Mo.) 494, 495.

I therefore answer your question in the negative.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Attorney General — Opinions — Hypothetical Question.

FEB. 14, 1935.

Brig. Gen. CHARLES H. COLE, *Chairman, State Racing Commission.*

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

"There has been much agitation and many newspaper reports about this question: 'Is it legal to build within fifty miles of another track, though the other track is located in another state?'

Therefore, to clarify this question, we would like a statement from you stating your interpretation."

It would appear from your letter that there is not before you any application for a license for a horse racing meeting, nor any other similar matter upon which your Commission is required to take action. The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise, as distinguished from questions relative to actual states of fact set before the Attorney General, upon which states of fact public officials are presently required to act; nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty. See I Op. Atty. Gen. 275; II *ibid.* 100; III *ibid.* 425; Opinion of the Attorney General to the Commissioner of Correction, February 8, 1935 (not published).

The members of this department are always at your service for consultation and assistance with reference to the work of your Commission, but for the foregoing reasons I may not properly, in a formal opinion, comply with the request contained in your letter.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Teachers' Retirement System — Public School — Private Academy.

FEB. 18, 1935.

Dr. PAYSON SMITH, *Chairman, Teachers' Retirement Board.*

DEAR SIR: — You request my opinion upon the application of the law relative to the teachers' retirement system, now embodied in G. L. (Ter. Ed.) c. 32, as amended, which in its original form went into effect, by virtue of St. 1913, c. 832, on July 1, 1914, as it concerns teachers who are or have been employed in the Punchard Academy at Andover.

By an opinion of a former Attorney General, rendered August 6, 1924, it was determined that the Punchard Academy was then a "public school." VII Op. Atty. Gen. 500.

By an opinion of a former Attorney General, rendered May 28, 1934, you were told that it was within your province and a part of your duty, in view of matters before you for your consideration, to determine as a matter of fact, guided by certain principles of law which were set forth, the date between 1902 and 1924 at which the Punchard Academy became a "public school." Attorney General's Report, 1934, p. 86. With these opinions I concur.

You now advise me that you have in effect made a determination that the Punchard Academy became a "public school on January 1, 1910," and has remained such since that date. I assume that your finding of fact in this respect, which you state to have been based on evidence before you, was correct.

In view of this determination on your part, you now ask my opinion upon the law applicable to the following questions, which relate to cases actually before you for determination in administering the Teachers' Retirement Law.

1. Your first question reads: —

"Are teachers now employed in the public schools of Massachusetts (irrespective of their present place of employment), who were employed in Punchard Academy at any time between September, 1914, and August 6, 1924, required to pay the omitted assessments which should have been deducted for the retirement fund, with interest on these assessments to the date of payment, in the following cases:

(*a*) If the teachers had no service prior to July 1, 1914?

(*b*) If the teachers had service in the public schools of Massachusetts prior to July 1, 1914, and voluntarily joined the Retirement Association before entering the academy?"

It is obvious that since the Punchard Academy is to be taken to be a public school since January 1, 1910, it is to be treated since that date as any other public school would be, and the rights and obligations, relative to the teachers' retirement system, of those who are or have been teachers in said academy are to be governed by the same principles of law that are applicable to teachers in any of the public schools of the Commonwealth. The fact that certain teachers have since January 1. 1910, been connected with the said academy cannot in any manner entitle them to the application of any different rules of law from those which apply to all other public schoolteachers in connection with the teachers' retirement system.

Teachers who entered the service of the Punchard Academy between September, 1914, and August 6, 1924, became, by virtue of that fact, members of the Retirement Association, if they had had no previous service as

teachers in any public school prior to July 1, 1914. If they had had such previous service before June 30, 1914, they became members of the Retirement Association before entering the academy, if they had made application in writing for that purpose before September 30th; and if they had not made such application before September 30th they became members if they made it thereafter and paid an amount equal to the total assessments, together with regular interest thereon, that they would have paid if they had joined before September 30, 1914. St. 1913, c. 832, § 3; G. L. (Ter. Ed.) c. 32, § 7.

With either of these classes, however, the members are required to keep up the payment of assessments after they have once become members of the association. The fact that such payments have not been demanded of them does not relieve them of the obligation of payment. I assume that, by reason of the uncertainty as to the status of the Punchard Academy, no assessments had been paid by any of the teachers for periods covered by their service in such academy before August 6, 1924. Nevertheless, as is now apparent, the laws relative to the retirement system were applicable to them while at the academy, and whatever assessments were not paid during the time of their connection with the academy should now be made up. This principle of law was enunciated at considerable length in an opinion of a former Attorney General, with which I concur. VIII Op. Atty. Gen. 606 (1).

Accordingly, I answer your first question in the affirmative, as regards both (*a*) and (*b*).

2. Your second question reads: —

"Teachers who were employed in Punchard Academy between January 1, 1910, and July 1, 1914, who had no other service in Massachusetts prior to July 1, 1914, were required to join the Retirement Association in September, 1924, or if they left the academy prior to September, 1924, to enter a Massachusetts public school, membership was required at that time. As these teachers should have been given the option of joining the Retirement Association (the Department of Education having recently ruled that Punchard Academy has been a public school since 1910), shall they now be permitted to terminate their membership and withdraw the amount to their credit?

If they wish to continue their membership, are they required to pay the omitted assessments for service in the academy between July 1, 1914, and August 6, 1924, with interest to the date of payment?"

In view of the fact that the teachers whom you mention in this question were entitled to have given them an opportunity to elect whether they would or would not become members of the Retirement Association, the simplest principles of fair dealing, since a contrary action is not specifically required by the statute law, require that they now be permitted to terminate their membership and withdraw the amount to their credit, if they so desire. If, however, they now elect to remain in the association, the same principles of law, outlined in my answer to your preceding question, are applicable, and they must now pay up omitted assessments for periods of service in the academy, with interest. VIII Op. Atty. Gen. 606 (2).

I answer your second question in the affirmative, as to both parts.

3. Your third question, as regards both its inquiries, reads: —

"Teachers who were employed in the public schools of Massachusetts prior to July 1, 1914, who were employed in the Punchard Academy at

any time between July 1, 1914, and August 6, 1924, and who voluntarily joined the Retirement Association after August 6, 1924, were not required to pay assessments for their service in the academy prior to August 6, 1924.

Are these teachers required to pay the omitted assessments, with interest, if they wish to continue their membership?

If it is required that the omitted assessments, with interest, shall be paid in order to continue their membership, and as they joined with the understanding that these assessments were not due, shall they now be permitted to terminate their membership and withdraw the amount to their credit?"

The same principles of fair dealing, to which I have alluded in my answer to your second question, impel me to say that the teachers referred to in this third question should be permitted to terminate their membership in the association if they wish, and withdraw the amount of payments standing to their credit. If, on the other hand, they wish to continue membership, they must, like those teachers referred to in the second question, pay up all omitted assessments, with interest. This answers the two queries contained in your third question.

4. In view of my previous answers, your fourth question does not require any specific response.

5. In view of the fact that the opinion heretofore referred to, VIII Op. Atty. Gen. 606, stated that "a teacher may not be granted a retiring allowance before the amount due the retirement fund has been paid in full," your fifth question does not call for an answer. Where assessments are eventually paid, services rendered at Punchard Academy will be entitled to the same credit as services rendered at any other public school, after January 1, 1910.

If it be thought by your Board that payment at the present time or in the near future of large amounts of back assessments, which should have been required in small amounts over a long period but were not so required by reason of lack of information as to the provisions of the applicable statutes, on the part of your Board, works a hardship, request might properly be made by your Board, on behalf of the teachers, for legislation tending to mitigate the difficulties inherent in the existing situation.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Racing Commission — Licenses — Race Track.

A license may be issued for a racing meeting to be held at a track within fifty miles of a race track outside the Commonwealth.

FEB. 19, 1935.

Brig. Gen. CHARLES H. COLE, *Chairman, State Racing Commission.*

DEAR SIR: — You have advised me that your Commission has before it for action applications for licenses for several horse racing meetings, each of which racing meetings, if licensed, is to be conducted at a race track within fifty miles of another race track located entirely outside the Commonwealth.

You inquire in effect as to whether, in my opinion, you may properly issue a license for any of such horse racing meetings, regardless of the fact

that each of such meetings is to be conducted at a place which is within fifty miles of a race track situated entirely outside the Commonwealth.

I answer your inquiry to the effect that the fact that a horse racing meeting is to be conducted at a race track within fifty miles of a race track outside the Commonwealth is not of itself sufficient to prevent your Commission from licensing such a racing meeting.

The applicable provision of G. L. (Ter. Ed.) c. 128A, § 3 (*h*), as inserted by St. 1934, c. 374, § 3, reads: —

"No licenses shall be issued to permit running horse racing meetings to be held or conducted, except in connection with a state or county fair, at the same time at more than one race track within the commonwealth, nor at any time at a race track located within fifty miles of another race track, one mile or more in circumference."

That the words "another race track" in the foregoing section refer to a track within, and not outside, the Commonwealth is, in the first instance, to be gathered from an application to the words of said section of the definitions of "racing meeting" and of "race track," as established by the Legislature in section 1 of said G. L. (Ter. Ed.) c. 128A, which section is as follows: —

"Terms used in this chapter shall, unless the context otherwise requires, be construed as follows: —

'Racing meeting' shall include every meeting within the commonwealth where horses or dogs are raced and where any form of betting or wagering on the speed or ability of horses or dogs shall be permitted, but shall not include any meeting where no such betting or wagering is permitted even though horses or dogs or their owners, are awarded certificates, ribbons, premiums, purses, prizes or a portion of gate receipts for speed or ability shown.

'Race track' shall include the track, grounds, auditorium, amphitheatre and/or bleachers, if any, and adjacent places used in connection therewith, where a horse or dog racing meeting may be held."

If, then, by the terms of the foregoing definitions a "racing meeting" is "one within the commonwealth" and a "race track" is a track where "a horse or dog racing meeting may be held," it follows that the race track referred to in said section 3 (*h*) as "another race track" must be a track within the Commonwealth. The definition says that "race track" means a track "where a horse or dog racing meeting may be held," and a "racing meeting" is defined as a "meeting *within* the commonwealth." Obviously, a racing meeting may not be held at a track *not* within the Commonwealth; so that "race track" whenever used in the statute, unless "the context otherwise requires," means a race track *within* the Commonwealth.

There is nothing in the context of the particular portion of the statute contained in section 3 (*h*), nor in the statute itself, which requires that any construction of the words "race track" prefixed by the word "another" should be other or different than that definitely prescribed by the Legislature in said section 1.

Indeed, it appears from the provisions of the statute that it was the intent of the General Court, among other things, to promote the public welfare by limiting the number of racing meetings which might be held simultaneously in Massachusetts. It is not to be assumed that the General Court was attempting to legislate with regard to the use of tracks

and the conduct of racing outside the territory of the Commonwealth. Furthermore, it cannot well be doubted that, had it been the intention of the Legislature to make prohibitions as to the use of Massachusetts licenses in relation to places situated or events occurring outside its jurisdiction, it would have so stated in plain and unequivocal language; and if it had intended that the definitions set forth in said section 1 should not apply to words used in said section 3 (*h*) it would have so said. Had such been its intention, it, obviously, would have used after the phrase in said section 3 (*h*), "within fifty miles of another race track," the words "whether within or without the commonwealth," or some similar expression, so as to cause the construction of the words "racing meetings" and "race track" to be different from that required by the definitions of said section 1. The Legislature has not done this.

If it was also the intent of the Legislature, among other things, as it seems to have been in enacting the provisions of the statute under discussion, to promote the public welfare by protecting licensees against ruinous competition due to the issuing of too many licenses, its statutory phraseology cannot properly be interpreted so as to place prohibitions upon licensees of Massachusetts for the benefit of persons not licensees, who conduct racing meetings or maintain tracks entirely outside the Commonwealth. It cannot properly be supposed that the General Court would enact legislation discriminating against licensees of this Commonwealth for the benefit of persons conducting business in other States, so as to give to such persons whose business is in other States a virtual monopoly of the racing business in various wide areas of Massachusetts.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Licenses — Fuel Oil — Appeal — State Fire Marshal.

The State Fire Marshal has no authority to consider an appeal from the granting of a license for the keeping of fuel oil, under G. L. (Ter. Ed.) c. 148, § 13, which is not filed within ten days from the date of the order granting such license.

FEB. 19, 1935.

MR. STEPHEN C. GARRITY, *State Fire Marshal.*

DEAR SIR: — You state that on March 1, 1933, a license was granted by the board of street commissioners of the city of Boston, approved by the mayor, to the White Fuel Corporation for the keeping, storage and sale of fuel oil, under G. L. (Ter. Ed.) c. 148, § 13; and that on March 31, 1933, a written appeal was filed with you from the granting of said license. You request my opinion as to whether said appeal may properly be heard by you.

Said section 13 provides that a person aggrieved by the granting of a license under said section may, "within ten days after the granting thereof," appeal to the Marshal. Section 31 of said chapter 148 also provides that any person aggrieved by any act, order or decision of any person acting under authority derived from said chapter (except section 5) may appeal to the Marshal, and that such appeal "shall be filed with the marshal not later than ten days following the act, order or decision appealed from."

There is no statutory provision giving you authority to consider an appeal not filed with you in accordance with the requirements above

referred to. Inasmuch as, according to your statement, the so-called appeal was not filed with you within ten days following the granting of the license, you have no jurisdiction to consider it.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Commission — Licenses — Town — Census.

A return made by the selectmen of a town to the Secretary of the Commonwealth, as to the population of the town, is not to be adopted by the Alcoholic Beverages Control Commission as a correct statement of such population, in applying the provisions of G. L. (Ter. Ed.) c. 138, § 17, if it differs in its figures from those of the last preceding census as compiled by the Secretary of the Commonwealth.

FEB. 25, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You state that the selectmen of the town of Ipswich, in connection with taking the State census in the present year, have returned, under oath, to the Secretary of the Commonwealth a statement showing the population of that town to be in excess of the population shown by the last preceding State or national census. G. L. (Ter. Ed.) c. 138, § 17, fixes the number of licenses to be granted for the sale of alcoholic liquor in a city or town according to "population" units. You request my opinion as to whether the number of licenses to be granted by the town of Ipswich is to be determined by the population as shown by the last preceding census or by the return now made by the selectmen to the Secretary of the Commonwealth.

By G. L. (Ter. Ed.) c. 4, § 7, cl. Forty-first, "population" is defined as "population as determined by the last preceding state or national census."

Mass. Const. Amend. LXXI, adopting article XXI, provides, in part:

"In the year nineteen hundred and thirty-five and every tenth year thereafter a census of the inhabitants of each city and town shall be taken and a special enumeration shall be made of the legal voters therein."

G. L. (Ter. Ed.) c. 9, § 9 (as amended by St. 1934, c. 127), provides for the appointment by the Secretary of the Commonwealth of a State census director, to act under the direction of the Secretary of the Commonwealth.

Section 7 of G. L. (Ter. Ed.) c. 9 (as amended by St. 1934, c. 25, § 2), reads as follows: —

"In nineteen hundred and twenty-five and every tenth year thereafter, the mayor of every city and the selectmen of every town shall cause a census to be made of the inhabitants of their respective cities and towns residing therein on January first, on forms provided by the secretary, and in accordance with his instructions, and shall return the same under oath to the office of the secretary on or before June thirtieth following, together with a sworn statement of the total of such census. In making such census the services and facilities of the assessors and police of a city or town shall be available to the mayor of such city or the selectmen of such town. The secretary may in his discretion verify any such census in such manner as he deems advisable, and for this purpose may inspect the records of any city or town and call upon the mayor or selectmen for such further information as he desires. From the returns so made, with such amendments

as the secretary may find necessary to correct any errors or omissions therein, he shall compile the census of inhabitants of each city and town required by Articles XXI and XXII of the amendments to the constitution, and may publish the results thereof in such form as he may determine."

Inasmuch as this section provides that the Secretary of the Commonwealth shall "compile the census" of inhabitants of each city and town from the returns, "with such amendments as the secretary may find necessary to correct any errors or omissions therein," it is my opinion that the census cannot be said to be complete until compiled by the Secretary of the Commonwealth, and that the return made by the selectmen of the town of Ipswich cannot, prior to compilation by the Secretary of the Commonwealth, be used as a determination of the population of the town in applying the provisions of G. L. (Ter. Ed.) c. 138, § 17. See, also, *In re Sewer Assessment for Passaic*, 54 N. J. L. 156, 161; *Wolfe* v. *City of Moorhead*, 98 Minn. 113.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Civil Service — Veterans' Preference — Service.

MARCH 1, 1935.

Hon. JAMES M. HURLEY, *Commissioner of Civil Service.*

DEAR SIR: — You request an opinion as to whether a certain man is entitled to veterans' preference under G. L. (Ter. Ed.) c. 31, § 21. It appears that the person referred to was an enlisted man in the United States Navy during the period from December 14, 1922, to April 10, 1928; that he was honorably discharged; and that he has been awarded the Yangtze Service Medal.

His services in the navy during the above-mentioned years were not during the time of war or insurrection. In the next place, one is not entitled to veterans' preference who has served in the armed forces of the United States other than during the time of war or insurrection, unless he has received the Congressional Medal of Honor. The Yangtze Service Medal is not the medal referred to in the section above cited, and, consequently, is not sufficient to entitle him to the benefits of the section above referred to.

I am therefore of the opinion that he does not come within the definition of those persons entitled to veterans' preference under said section 21.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Plumbing — Licenses and Permits — Commonwealth.

The provisions of G. L. (Ter. Ed.) c. 142, with relation to the licensing of plumbers and the procuring of permits to do plumbing work, have no application in connection with buildings owned or occupied by the Commonwealth.

MARCH 1, 1935.

Mr. MICHAEL ZACK, *Director of Registration.*

DEAR SIR: — You request an opinion as to whether or not the provisions of G. L. (Ter. Ed.) c. 142, "relative to the licensing of plumbers and

the procuring of permits to do plumbing work are applicable to plumbing done in State-owned buildings." You further call my attention to sections 11 and 13 of said chapter 142 as seeming "to indicate that no exception was contemplated in favor of State-owned buildings."

An opinion bearing somewhat directly on the question presented by you has already been rendered by one of my predecessors, under date of July 11, 1932, to the Commissioner of Agriculture, to the effect that the provisions of the last-mentioned chapter do not apply to a building being erected by a State commission. Attorney General's Report, 1932, p. 86. I am satisfied with that opinion. In the next place, it is clear that there is an exception in section 11 as to buildings owned or occupied by the Commonwealth, in that plumbing is to be inspected only in such buildings for the construction, alteration or repair of which permits are required, and it is clear that no permit for doing any such work is required of the Commonwealth, by the express provisions of G. L. (Ter. Ed.) c. 143, § 3.

I am therefore of opinion that the provisions of said chapter 142 have no application to buildings owned or occupied by the Commonwealth.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Dentist — Registration — Annual Fee — Commonwealth.

MARCH 4, 1935.

Mr. MICHAEL ZACK, *Director of Registration.*

DEAR SIR: — You request my opinion as to whether or not a dentist employed full time by the Commonwealth and/or a city or town must pay an annual registration fee.

G. L. (Ter. Ed.) c. 112, § 44, provides: —

"Every registered dentist when he begins practice, either by himself or associated with or in the employ of another, shall forthwith notify the board of his office address or addresses, and every registered dentist practicing as aforesaid shall annually, before April first, pay to the board a license fee of two dollars."

It is clear that before commencing practice every dentist must be registered, and thereafter every registered dentist while actually engaged in the practice of his profession must pay an annual fee at the time and in the amount prescribed by the above-mentioned statute.

Moreover, there is nothing in the statute exempting a dentist employed by the Commonwealth or by a city or town from its provision relative to annual registration.

I am therefore of the opinion that such a dentist comes within the provisions of the statute above cited, and must be registered and pay an annual fee in the manner therein mentioned.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

National Guard — Town — Target Practice — Transportation.

MARCH 11, 1935.

Lt. Col. PORTER B. CHASE, *Adjutant General, Executive Officer.*

DEAR SIR: — You advise me that the town of Wakefield "makes a yearly appropriation for target hire of the unit stationed in that town at

the rifle range at Camp Curtis Guild; . . . that the town is willing to pay transportation to and from the range in addition to target hire, but that it does not feel that it has authority to do so under the statute."

The statute referred to is G. L. (Ter. Ed.) c. 33, § 37.

It is not the duty of the Attorney General to advise town officers, either directly or indirectly, as to the exercise of their authority, nor as to the powers and obligations of towns as such; nor are such officers bound by any such advice which the Attorney General may give. I know of no provision of the statutes which explicitly or impliedly authorizes towns to appropriate money for the transportation of members of the Militia or the National Guard to or from such "suitable grounds for parade, drill and small arms practice" as are provided and maintained by the selectmen.

It has been held by one of my predecessors in office that the duty to provide suitable grounds for the designated purpose carries with it, by necessary implication, the duty to provide thereon targets and other structures reasonably necessary for the use of the grounds (I Op. Atty. Gen. 63); but the principle of such opinion cannot reasonably be extended to include the furnishing of transportation.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Auditor — Duties — Lowell Textile Institute.

MARCH 18, 1935.

Hon. THOMAS H. BUCKLEY, *Auditor of the Commonwealth.*

DEAR SIR: — You request advice relative to the right of your department to audit the accounts of the Textile Co-operative Society of the Lowell Textile Institute, and I advise you as follows.

In a letter from the president of the school to this department, dated March 4, 1935, he says, in statement No. 4: —

"The profits derived have accumulated into a fund, the income from which has been used to help worthy students in defraying in part their school expenses."

Upon due investigation of the facts, and in view of the above information received from the president, and an examination of the statute, namely, G. L. (Ter. Ed.) c. 11, § 12, it would seem that your department has a right to audit the accounts, as from the facts it would appear that this organization may be described as an "activity," as set forth in the above-mentioned section.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

National Guard — Compensation for Injuries — Federal Service.

Compensation may be awarded to an officer for injuries received while attending a Federal school of instruction under orders of his superiors.

MARCH 21, 1935.

Brig. Gen. WILLIAM I. ROSE, *The Adjutant General.*

DEAR SIR: — You have asked my opinion, in effect, as to whether or not a military board of inquiry, acting under G. L. (Ter. Ed.) c. 33, § 69,

is authorized to award compensation to a certain officer of the National Guard (which is part, at least, of the organized Volunteer Militia of Massachusetts) who in 1926 was injured in the course of his duties while at a school of instruction maintained by the United States War Department, which National Guard officers were permitted by Federal authorities to attend.

Under the provisions of the National Defense Act the United States disburses payment and various allowances itself to such officers while they are at such a school, and also provides medical attendance for them if injured during their course of studies, but does not award them compensation for disability due to injuries so received. U. S. C. A., Title 32, §§ 64, 65, 145 and 146.

You advise me that the officer in question was attending such a school of instruction upon specific orders issued by the Commander-in-Chief of the Militia of this Commonwealth, through the appropriate subordinate officers, so that such attendance was in the line of duty as a member of the organized Volunteer Militia or of the National Guard of Massachusetts.

An officer so attending a Federal school of instruction in peacetime, even when his compensation while there is paid by the United States, does not lose his status as a member of the Volunteer Militia of this Commonwealth, although subject temporarily to the orders and discipline of the United States Army.

G. L. (Ter. Ed.) c. 33, § 69, in its first sentence provides: —

"A member of the volunteer militia who shall, when on duty or when assembled therefor under sections seventeen, twenty-five, twenty-six, one hundred and twenty-three, one hundred and thirty-five and one hundred and eighty-one, receive any injury by reason of such duty or assembly, or who shall without fault or neglect on his part be wounded or disabled, or contract any sickness or disease, while performing any such lawfully ordered militia duty, incapacitating him from pursuing his usual business or occupation, shall, during the period of such incapacity, receive compensation to be fixed by a board appointed to inquire into his claim, not exceeding in amount the pay plus ration allowance provided for by this chapter and actual necessary expenses for care and medical attendance."

The particular types of duty, performance of which entitles the militiaman to compensation for injury, as set forth in the above-quoted section, are of two classes, — (1) those customarily performed with units of the service within the jurisdiction of the Commonwealth, described in sections 17, 25, 26, 123 and 135 of said chapter 33; and (2) those duties of all other sorts which a member of the Militia may properly render not only with a unit but individually, and not only within the Commonwealth but outside it, in conjunction with the Federal forces or otherwise, under directly prescribed terms and conditions of duty set forth by the Commander-in-Chief himself, mentioned in section 181 of said chapter 33, which reads: —

"The commander-in-chief may prescribe the terms and conditions under which, and the types of duty for which, officers and enlisted men shall be entitled to receive compensation, transportation, subsistence or other allowances and emoluments."

The officer in question, as you inform me, was specifically ordered by the Commander-in-Chief, through his proper subordinate officers, to

perform individually the particular type of duty in which he was engaged at the time of his injury, and the Commander-in-Chief, in the special order, prescribed the terms and conditions under which such type of duty was to be performed. Such duty was one of the forms of "other duty under orders of the commander-in-chief" specifically referred to in G. L. (Ter. Ed.) c. 33, § 138 (*d*), wherein special provision is made for the rate of pay therefor, with the express condition that such rate of pay does not apply where, as in the instant case, "payment is made therefor from federal funds."

It has long been the public policy of Massachusetts to award compensation for injuries received in the line of duty to members of its Volunteer Militia, and it would indeed be a surprising thing had the Legislature manifested an intention to exclude from the benefits resulting from such a policy those members of the Militia who performed special duties individually at the direct orders of the Commander-in-Chief. That it was not the intention of the General Court to work such an exclusion is manifest from the insertion of a reference to said section 181 in the text of said section 69.

That no double payment for services rendered should unfairly result from the application of section 181 has been carefully guarded against by the Legislature in enacting the terms of said section 138 (*d*) above referred to. Inasmuch as the Federal government does not grant compensation for injuries to members of the National Guard under the circumstances of the instant case, no double award for such injuries could result.

Accordingly, I answer the question contained in your communication to the effect that a military board has authority to award compensation for injuries occurring to the designated officer, under the facts which you have disclosed to me, by reason of the inclusion in said section 69 of a reference to said section 181 rather than by its reference to said section 17.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Public Utilities — Telephone Locations — Interstate Business.

A foreign telephone company may carry on intrastate business together with interstate business over locations granted to domestic companies.

MARCH 22, 1935.

Hon. HENRY C. ATTWILL, *Chairman, Department of Public Utilities.*

DEAR SIR: — You request an opinion "as to whether the carrying on of intrastate business, in connection with its interstate business, by the New England Telephone and Telegraph Company, over locations granted to domestic telephone and telegraph companies, is a violation of law within the purview of G. L. (Ter. Ed.) c. 159, § 39."

The section referred to in your inquiry provides: —

"If in the judgment of the department any common carrier violates or neglects in any respect to comply with the provisions of any law, and after written notice by the department continues such violation or neglect, or neglects to make returns as required by law, or to amend the same when lawfully required so to do, the department shall forthwith present the facts to the attorney general for action."

A telephone and telegraph company is a common carrier, and so within the sweep of this statute by virtue of the provisions of G. L. (Ter. Ed.) c. 159, § 12, cl. (*d*), and therefore, at least in so far as its domestic business is concerned, is subject to the supervision and control expressly conferred by the last-mentioned section.

In the case of *Mentzer* v. *New England Tel. & Tel. Co.*, 276 Mass. 478, 483, the court said: —

"The transmission of intelligence by electricity is a business of a public character, to be exercised under reasonable public regulation subject to the same general principles as govern transportation of goods or passengers by common carriers."

Your inquiry was discussed in an opinion rendered by a former Attorney General in 1926 to the then Governor (VIII Op. Atty. Gen. 1), in which it was said that the State had "power" to exclude foreign corporations from the use of its public ways in "intrastate commerce," although the State had no power to interfere with the conduct of an interstate business by such a corporation. The fact that the same corporation is at the same time engaged in both interstate and an intrastate business will not prevent it from having those activities dealing entirely with the latter kind of business come within the supervision and regulation of local authorities. *Barrows* v. *Farnum's Stage Lines, Inc.*, 254 Mass. 240; *Interstate Busses Corp.* v. *Holyoke St. Ry. Co.*, 273 U. S. 45; *Boston & Maine R.R.* v. *Armburg*, 285 U. S. 234.

Such regulations, however, even if confined entirely to a domestic aspect of the corporate business, will not be sustained if they in fact result in placing an undue burden upon the interstate business of the corporation. *Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass. 47; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105.

Whether the foreign and local business done by the New England Telephone and Telegraph Company of New York is so intrinsically connected that the validity of any order for the separation of one from the other would depend not only upon the nature of the order, but principally upon its effect on the interstate business of the company. We have not sufficient facts to determine if such an order would result in a direct and material interference with the operation of its interstate business, and so we can only lay down the governing principle of law.

It is clear that our statutes do not prohibit a foreign telephone company from doing business in this Commonwealth, as was pointed out with an ample citation of authorities in the previous opinion of my predecessor. While a domestic company engaged in furnishing telephone and telegraph service is not free to cease exercising its franchise for the benefit of the public so long as it retains its charter, yet there is nothing in our law that prevents such a domestic company from permitting the use of its facilities and equipment by another company for the operation of an interstate business, provided, of course, that the domestic company is not thereby prevented from doing the business for which it was chartered.

The locations granted to the domestic company were not a mere personal right which would prohibit the company from sharing in the use of such locations with another company that was engaged in an interstate business. The assignment of such locations has been at least impliedly recognized by our court. *Postal Telegraph Cable Co.* v. *Chicopee*, 207 Mass. 341, 343.

There is nothing in our statutes that prohibits a foreign company from doing interstate business in this State. It is not unlawful for such a corporation to engage in intrastate telephone and telegraph business within the Commonwealth. *Ellis* v. *American Telegraph Co.*, 13 Allen, 226, 231. I see no reason why a foreign corporation has not the same right to make permissive use of a location granted to a domestic corporation that another domestic corporation or a foreign corporation engaged in interstate commerce has.

I am therefore of the opinion, on the facts set forth in your letter, that the carrying on of intrastate business together with an interstate business by a foreign corporation over locations granted to domestic companies constitutes no violation of G. L. (Ter. Ed.) c. 159, § 39.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Hunting and Fishing — Public Ways — Posted Land.

MARCH 23, 1935.

Hon. SAMUEL A. YORK, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion "as to whether or not the officers of the Division of Fisheries and Game should proceed to stop hunting or fishing" within the boundaries of public ways where the adjoining land is posted.

I am not aware of any statute which specifically forbids hunting or fishing in open seasons within the boundaries of public ways as such, except as G. L. (Ter. Ed.) c. 131, § 101, as amended, forbids the discharge of any firearm upon "any state or paved highway" for the purpose of hunting, which offense the said Division may prosecute.

Inasmuch as in most public ways an easement of travel has alone been taken by the condemning authorities, a member of the public has no right, where this is the case, as against the owner of the fee, to use the way for hunting or fishing even within its boundaries. Such use by a member of the public, however, gives rise only to a trespass as against such owner, for which the latter may enforce civil remedies.

Land in which an easement of travel has been taken and which has been laid out and used by the public as a way cannot be said to be "private land," within the meaning of G. L. (Ter. Ed.) c. 133, § 123, which makes hunting and fishing on private land which has been posted a criminal offense; and if the hunting or fishing is entirely confined within the boundaries of the public way, no criminal offense is committed. This does not mean, however, that a person may stand within the boundaries of the public way and shoot at game which is upon adjoining posted land or, so standing, cast a line into waters on such posted land or running underneath a bridge in such way for the purpose of taking fish. To do so is not to confine the acts of hunting or fishing entirely within the boundaries of the public way, but is as much fishing or hunting on private posted land as if the hunter or fisher had himself actually walked into or upon such private land, and constitutes an offense under said G. L. (Ter. Ed.) c. 131, § 123, as amended, which the said Division may properly prosecute.

Even if hunting or fishing be entirely confined within the boundaries of a public way, the hunting of certain animals and birds is forbidden at any time, anywhere, by various statutes; and as to the hunting of such animals

and birds or as to hunting and fishing out of season or by unlawful means or in any unlawful manner, the said Division may properly prosecute.

The foregoing considerations will, I think, entirely answer your questions as to what the said Division should do relative to stopping hunting and fishing on public ways.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Judicial Functions — Impartiality — Member of a Quasi-judicial Board.

It is not in accordance with concepts of right and justice that a member of a board which exercises judicial functions should hear and determine a cause in which a member of his own law firm appears as counsel for one of the litigants.

MARCH 25, 1935.

His Excellency JAMES M. CURLEY, *Governor of the Commonwealth.*

SIR: — You state that you are "desirous of ascertaining the propriety of a member of the State Board of Tax Appeals sitting on a case where a member of his own law firm appears in behalf of an applicant."

The framers of our Constitution evidently realized that every citizen had a right to be protected in the enjoyment of his life, liberty and property and to secure a remedy under the law for any injuries or wrongs which he might receive in his property, person or character, and they appreciated that the establishment of such rights would be of no avail unless they could be enforced and safeguarded, and, to that end, they provided in the Bill of Rights (art. XXIX) that —

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. . . ."

No one ought to be permitted to perform a judicial function "whose character is not unblemished and above reproach. His mind ought always to be open to the truth and susceptible to every right influence flowing from the evidence" (*Dittemore* v. *Dickey*, 249 Mass. 95, 99, 100), and those charged with the performance of judicial duties "should be deeply solicitous not only to be impartial but to avoid every appearance of bias. They should be clear and fair in all their motives, and do nothing to give ground for inferences that they are not proceeding with a just regard for all the rights involved. A high standard of integrity and propriety in all their conduct is essential to performance of the trust reposed in them." *National Fire Ins. Co.* v. *Goggin*, 267 Mass. 430, 436, 437.

There is, however, nothing in our law expressly prohibiting a member of a law firm from presiding at a hearing conducted by another member of the same firm. Yet, even if the presiding officer conducts himself fairly and impartially and arrives at a right decision, the judicial system ought not to be impaired by a tribunal attempting to decide a controversy where the judge and one of the counsel are associates in the same legal firm. Such conduct is open to just criticism. It is subversive of all fundamental concepts of right and justice. It tends to bring the judicial system into reproach and disrepute, and warrants strong condemnation. The fact

that a just decision might have been obtained is no justification for a procedure which is highly improper and should be no longer tolerated.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Banking — Co-operative Bank — Federal Savings and Loan Association — Constitutional Law.

A State co-operative bank may convert itself into a Federal savings and loan association, under Federal law, without any enabling State statute.

MARCH 27, 1935.

Hon. HENRY H. PIERCE, *Commissioner of Banks.*

DEAR SIR: — You request my opinion as to whether a co-operative bank, organized under the laws of this Commonwealth, has the right to convert itself into a Federal savings and loan association without express statutory power having been granted by the Legislature of this Commonwealth.

The Federal Home Loan Bank Act was enacted by Congress on July 22, 1932. This act provided for the establishment of District Federal Home Loan banks. It provided (§§ 4 and 24) that any building and loan association, savings and loan association, co-operative bank, homestead association, insurance company, or savings bank, meeting the qualifications prescribed in the act, might become a member of the Federal Home Loan bank for its district, through subscription to stock in such Home Loan bank; and as a member might, under the terms and conditions stated, obtain advances from such Home Loan bank (§ 10).

By a statute of this Commonwealth (St. 1933, c. 46, § 2; G. L., c. 170, § 56, as enacted by St. 1933, c. 144) co-operative banks were authorized to become members of the Federal Home Loan Bank for the District of New England, and to invest in the amount of stock in such Federal bank necessary for membership.

By Act of Congress, June 13, 1933, the Federal Home Loan Bank Board was authorized, by section 5 (a), to incorporate Federal savings and loan associations, in order "to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes." Under section 5 (i) of the act, Congress authorized a member of a Federal Home Loan bank to convert itself into a Federal savings and loan association. This section read as follows:

"(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of its stockholders as provided by the law under which it operates; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

By amendment, April 27, 1934, section 5 (i) was made to read as follows: —

"Section 5 (i). Any member of the Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon the vote of 51 per centum or more of the votes cast at a legal meet-

ing called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this Act and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

If Congress has the implied authority to provide for the incorporation of Federal savings and loan associations in order to provide "local mutual thrift institutions," as set forth in the Act of June 13, 1933, section 5(a), an authority similar to the power which Congress possesses to incorporate national banks (*McCulloch* v. *Maryland*, 4 Wheat. 316) — which must be upon the theory that the functions performed by such associations as instruments of the Federal government are so vital as to justify Congress in regulating the existence of such associations completely and preventing competition therewith — the settled doctrine of the Massachusetts courts, which permits State banks to convert themselves into national banks by authority of Congress alone without enabling State legislation, is applicable to the present situation, and the conversion of a co-operative bank which is a member of a Home Loan bank into a Federal savings and loan association will be considered lawful by our courts. *Worcester County National Bank, Petitioner*, 263 Mass. 444, 450; 279 U. S. 347.

In the absence of authoritative judicial decision to such effect, I cannot say that the Federal statute creating Federal savings and loan associations is unconstitutional, as an act outside the implied powers of Congress. If the act be constitutional — and I must give weight to a presumption in favor thereof — it follows that a co-operative bank may become a Federal savings and loan association under authority of Congress, and, accordingly, I answer your question in the affirmative.

I am not unmindful of the fact that the Supreme Court of Wisconsin in *State* v. *Hopkins Street Building & Loan Assn.*, 257 N. W. 684 (December 11, 1934), held that said section 5 (i) of the Act of Congress, as amended April 27, 1934, did not authorize a building and loan association incorporated in Wisconsin to convert itself into a Federal savings and loan association *without* enabling State legislation. In the opinion in said case, however, the Supreme Court of Wisconsin specifically repudiated the doctrine heretofore enunciated by the Supreme Judicial Court of Massachusetts, already pointed out herein, that a State bank could change its organization to that of a Federal bank upon Federal authority alone, and held that the law of Wisconsin upon such point was established as being exactly contrary to that of Massachusetts. This being so, the Wisconsin court would of necessity arrive at a different result in passing upon the question at issue than would a court in this Commonwealth.

I prefer, however, to rest my opinion upon the last-mentioned decision of our own Supreme Judicial Court, permitting a State bank to convert itself into a national bank without any specific legislative authority of the State, and feel that the conclusion which is herein reached is but a logical extension of the governing principles therein enunciated, applied to our co-operative bank system.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Banking — Home Owners' Loan Corporation Bonds — Investment — The Co-operative Central Bank.

The bonds of the Home Owners' Loan Corporation are "obligations of the United States" in which The Co-operative Central Bank may invest.

March 27, 1935.

Hon. Henry H. Pierce, *Commissioner of Banks.*

Dear Sir: — You have asked my opinion as to whether the bonds of the Home Owners' Loan Corporation are "obligations of the United States," within the meaning of the quoted words as they are employed in St. 1932, c. 45, § 7, with relation to The Co-operative Central Bank, established by said chapter, said section 7 reading, in its applicable part, as follows: —

"The resources of the central bank shall be invested only in obligations of the United States and of the commonwealth, or in loans to member banks under conditions herein provided."

The bonds of the Home Owners' Loan Corporation, as to which you inquire, are issued by said corporation under the direct authority of an Act of Congress (Home Owners' Loan Act of 1933, as amended), which provides for the creation of such corporation [section 4 (a)] as "an instrumentality of the United States," and for the issue of such bonds by the corporation, with the approval of the Secretary of the Treasury. The Act of Congress further provides [section 4 (c)] that: —

"Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States . . ."

The members of the Federal Home Loan Bank Board are directors of such corporation, and its capital stock is subscribed for under the terms of the Act by the Secretary of the Treasury on behalf of the United States. The bonds in question are exempted by the terms of the Act from taxation by the States. It may well be that the relation of the Home Owners' Loan Corporation as an instrumentality of the Federal government to such government itself is so close that the bonds are, in whatever form issued, to be regarded solely as obligations of the United States. In the absence of authoritative judicial decision upon the point, however, I do not pass upon this point nor base my opinion upon any assumption that such is the law.

Even though the bonds be regarded as direct obligations of the corporation, nevertheless they are contingent obligations of the United States, the nature and terms of which are particularly outlined in said section 4 (c) of the Act in the following words: —

"In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, . . ."

The purpose of the Legislature in enacting the quoted provisions of section 7 of said chapter 45 was to provide for the safety of the investments of the central bank. Bonds of an instrumentality of the United States containing provisions for the direct payment of the principal and interest thereon to the holder, upon the inability of the corporation to pay, by the United States itself, without the necessity for further appropriation or grant of authority, would appear to be on a parity, as regards safety of investment, with securities directly issued by the United States. Such bonds so issued, with the exact terms of the liability which the United States itself agrees to assume expressed on their face, are obligations of the United States, though the United States may never become liable to discharge its obligation to the holders.

I am of the opinion that this form of obligation of the United States as represented by the bonds of the said corporation, itself an instrumentality of the United States, is such as to bring the said bonds within the meaning of said St. 1932, c. 45, § 7, as "obligations of the United States" in which The Co-operative Central Bank may properly invest.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Constitutional Law — Old Age Assistance — Institutional Residents.

Mass. Const. Amend. XLVI does not prohibit legislation enabling old age assistance to be paid to residents of institutions which themselves may not be supported by public funds.

APRIL 1, 1935.

Hon. JAMES G. MORAN, *President of the Senate.*

DEAR SIR: — The Clerk of the Senate has transmitted to me the following order: —

"*ORDERED, That* the Senate request the opinion of the Attorney General as to whether the provisions of law relative to old age assistance may constitutionally be amended in such manner as to authorize the granting of such assistance to aged inmates in certain institutions that may not constitutionally receive financial aid from the public treasury."

There has not been laid before me any specific measure which it is proposed to enact to carry out the general legislative purpose suggested in the foregoing order.

The existing legislation (G. L. [Ter. Ed.] c. 118A) relative to old age assistance does not, in my opinion, forbid giving necessary aid under all circumstances to aged persons themselves, even if they happen to reside in institutions for whose support public moneys may not be appropriated under Mass. Const. Amend. XLVI, irrespective of the fact that said statute contains the words: "Such assistance shall, wherever practicable, be given to the aged person in his own home or in lodgings or in a boarding home, and it shall be sufficient to provide such suitable and dignified care."

In my opinion, new legislation, if it should be thought necessary, clarifying the existing statutory law for the purpose of making evident beyond all doubt the legislative intent in this respect would not be unconstitutional if drawn in such form as to make plain that assistance is to be rendered only to individuals as such, irrespective of their place of abode.

The justification, however, for the validity of such legislation rests entirely and exclusively upon the direct aid immediately furnished to the individual recipient, to be used by him for his sole and personal benefit. Any systematic distribution of relief which has for its object or effect the aid of any of the institutions mentioned in the amendment must be considered as contrary to the Constitution and as utterly illegal.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Member of Local Licensing Board — Engaging in Business.

APRIL 1, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You state that a member of a local licensing board owns a controlling interest in a newspaper publishing corporation which publishes liquor advertisements, and that in another instance a member holds a minority interest in such a corporation and is also said to solicit such advertisements. You request my opinion as to whether such persons are acting in violation of the provisions of G. L. (Ter. Ed.) c. 183, § 4 (St. 1933, c. 376), which provides that a member of a local licensing board "shall not be engaged, directly or indirectly, in the manufacture or sale of alcoholic beverages," and that "if any member of said board engages directly or indirectly in such manufacture or sale, his office shall immediately become vacant."

Evidently neither publishing corporation was formed for the purpose of enabling the license commissioner to circumvent the provisions of the cited section. In any event, there is nothing in your letter to indicate that either or both of these corporations are really individuals, who happen to be members of a licensing board, doing business in corporate form, or that the corporations are merely cloaks to conceal conduct which otherwise might come within the interdiction of the sections now in question. The publication of liquor advertisements was incidental to the ordinary and usual conduct of the publishing business, and such publications give rise to nothing of a sinister or suspicious nature. There is always a presumption of fair dealing, and there is nothing set forth in your communication that will warrant one in inferring that the publications were not made in good faith.

The mere publication by a newspaper of advertisements concerning sales of liquor by retail concerns, in the ordinary course of business, and in which concerns the advertising company has no proprietary interest, does not make a stockholder in the latter company a participant in any sales that may result from such advertisements, even though, theoretically at least, the stockholder may share in increased profits due to the insertion of such advertisements in newspapers in which he has a beneficial interest as stockholder. Neither do we believe that the publication of such advertisements could in any way be held to constitute the publishing company as engaging, either directly or indirectly, in the sale or manufacture of alcoholic beverages; much less could it be said that a stockholder in such a publishing company should be held to be so engaged simply on account of his relation as a stockholder in the publishing company. In other words, there must be a closer approximation to the business whose goods are advertised in order to bring a stockholder in the company so advertising

these goods within the sweep of the statute. *Commonwealth* v. *Peaslee*, 177 Mass. 267; *Begley* v. *O'Neill*, 281 Mass. 164.

The question whether the solicitation of advertisements or the other acts referred to would constitute "cause" for removal by the mayor under G. L. (Ter. Ed.) c. 138, § 5, or other statutory provisions, is not here involved. The jurisdiction of your Commission under section 10B, to declare vacant the office of a member of the licensing board in case the local authority fails to act, exists only if such member "engages directly or indirectly in the manufacture or sale of alcoholic beverages."

I am therefore of the opinion that the matters contained in your communication do not show a violation of any of the sections therein enumerated.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Pharmacist — Employee.

A sale of alcohol may lawfully be made by an unregistered employee of a registered pharmacist, in the absence of the pharmacist, if the latter has authority to sell.

APRIL 5, 1935.

Mr. MICHAEL ZACK, *Director of Registration.*

DEAR SIR: — You request my opinion as to whether a sale of alcohol may be lawfully made by an unregistered employee of a registered pharmacist who has authority to sell alcohol under G. L. (Ter. Ed.) c. 138, § 29, as amended, at any time when the employer is not present in the store.

There is nothing in G. L. (Ter. Ed.) c. 138, which prohibits a person, who is authorized thereunder to sell, from making a sale by and through an employee at his place of business at a time when he is not personally present. The question is not affected by G. L. (Ter. Ed.) c. 112, § 30, providing that no person not registered as a pharmacist shall sell for medicinal purposes drugs, medicines, chemicals or poisons, and which further provides that sales of drugs, medicines, chemicals or poisons may be made by apprentices or assistants if a registered pharmacist is "in charge of the store and present therein." This section refers only to the sale of those things for which authority may be obtained by registration under chapter 112. Alcohol is not one of them. The sale of alcohol is regulated by chapter 138.

Accordingly, I answer your question in the affirmative.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Flag — Placing Words on the Flag — Veterans' Organizations.

APRIL 6, 1935.

His Honor JOSEPH L. HURLEY, *Lieutenant Governor.*

DEAR SIR: — You have requested my opinion relative to the placing of certain words upon flags of the American Legion.

I am of the opinion that the words used in G. L. (Ter. Ed.) c. 264, § 5, "but a flag belonging . . . to a post or department of The American Legion," which, with the other words employed in connection therewith, authorize the placing of certain words upon such a flag, are not to be construed so narrowly as to have application only to the colors of such a post

or department, but are equally applicable to any flag owned by such an organization and to flags of such organization used to decorate graves.

The purpose of the statute is, as has been pointed out in an opinion of one of my predecessors in office (IV Op. Atty. Gen. 470), "to prohibit the misuse of the national and state flags. It should be interpreted in the light of this purpose with a view to increase respect for our flags, and, if possible, not in such a manner as to restrict the proper use of the flags or to reduce the statute to an absurdity. It apparently seeks to prohibit . . . insults to the flags; . . . their use as part of any form of advertising, . . ."

The exception to the general prohibition of the statute with regard to placing words upon flags is broad enough to justify the use of all the authorized words upon the designated kinds of flags large enough to receive them, but does not preclude the use of some only of the authorized words upon smaller flags belonging to the designated organizations.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Civil Service — Temporary Emergency Unemployment — Cities and Towns.

St. 1935, c. 90, applies to cities as well as to towns, and to clerical employees as well as to laborers.

APRIL 13, 1935.

HON. JAMES M. HURLEY, *Commissioner of Civil Service.*

DEAR SIR: — You request my opinion (1) as to whether St. 1935, c. 90, applies to cities as well as to towns; and (2) whether said act permits the employment of clerks, stenographers, etc., as well as persons "classified in the labor service."

The act reads as follows:

"An Act relative to Temporary Emergency Funds in Towns.

During the calendar years nineteen hundred and thirty-five and nineteen hundred and thirty-six any town may by two thirds vote appropriate money to be set apart and administered as a general unemployment relief fund, for expenditure by or under the direction of the boards and officers in charge of town departments, subject to the approval of a board of administration consisting of such town officers ex officiis as the town shall by its vote determine, for the construction, improvement, or repair of public ways, public parks, sewerage and water supply systems, municipal buildings and other municipal works or undertakings, whereby employment may be afforded citizens of the town who shall be determined, in such manner as the town shall by its vote, prescribe to be in need thereof, or for the purchase or hire of materials, supplies and equipment and the employment of labor for the furtherance of, or as the contribution of the town to, any federal unemployment relief project undertaken or to be undertaken within the town.

In any town which has established a reserve fund under the provisions of section six of chapter forty of the General Laws, the finance or appropriation committee, if the town has such a committee, or, if it has not such a committee, the selectmen may make transfers therefrom to an appropriation made for the aforesaid purpose if the unexpended balance thereof, with other available funds, is insufficient therefor."

G. L. (Ter. Ed.) c. 4, § 7, provides: —

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

Clause Thirty-fourth of said section 7 provides: —

"'Town', when applied to towns or officers or employees thereof, shall include city."

G. L. (Ter. Ed.) c. 40, § 1, provides in part: —

"Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charter or by general or special law, and all laws relative to towns shall apply to cities."

G. L. (Ter. Ed.) c. 39, § 1, provides in part: —

"Except as otherwise provided by law, city councils shall have the powers of towns; boards of aldermen shall have the powers, perform the duties and be subject to the liabilities of selectmen, . . ."

The purpose of St. 1935, c. 90, would seem to apply to cities at least as much as to towns. It cannot be said that an intention that it should not apply to cities "clearly appears" (G. L. [Ter. Ed.] c. 4, § 7, cl. Thirty-fourth); and it is, therefore, my opinion that the act does apply to cities. It is immaterial that the Civil Service Act (G. L. [Ter. Ed.] c. 31) provides (section 1) that "town," as therein used, shall not include city. The act here in question is no part of G. L. (Ter. Ed.) c. 31, nor is its primary purpose to affect in any way the laws of civil service.

As to your second question. The first part of paragraph 1 of the act refers only to "employment" in connection with the enterprises therein specified. In my opinion, the character of the employment is immaterial, provided the work done by the employee is connected with, and essential to, the enterprises specified. The last part of the first paragraph, relating to the furtherance of Federal unemployment relief projects, refers to the "employment of labor." Although the terms "labor" and "laborers," under civil service classification and under some statutes, would not include clerks or stenographers (*White's case*, 226 Mass. 517), yet it is my opinion, in view of the purposes of the statute here in question, that the words "employment of labor" are not here used in any restricted sense, and that they may include the employment of clerks and stenographers if such employment is necessary for the performance of the work referred to. See *Commonwealth* v. *John T. Connor Co.*, 222 Mass. 299.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

State Milk Control Board — Milk — Ice Cream — Contracts.

APRIL 13, 1935.

Hon. JAMES O'BRIEN, *Chairman, State Milk Control Board.*

DEAR SIR: — The administrator of the Milk Control Board has requested the opinion of the Attorney General upon two questions of law. I am assuming, for the purpose of this letter, that the request for my opinion is in fact made by your Board, though the request does not indicate that such is the case. A long line of practice followed by my

predecessors in office for many years, and by myself, requires that requests for official opinions on questions of law shall be signed by the chairman of the board or commission which propounds them. The Attorney General may not be required to give opinions on such questions to individual members of boards or commissions or to their appointees.

I. You ask my opinion with relation to St. 1934, c. 376, as follows: —

"Your opinion is respectfully requested as to whether or not this act applies to milk sold to a milk dealer and subsequently used by him, or any other dealer, in the manufacture of ice cream, or in the manufacture of cream to be ultimately used in the manufacture of ice cream."

It is specifically stated in section 20 of said chapter 376 that the "act shall not apply to cream to be used for manufacturing purposes, including the manufacture of . . . ice cream . . ."

If, at any given time, in the course of its passage from its source to its ultimate consumer it can be said of any particular quantity of milk, as defined in section 3 of said chapter 376, that as a matter of fact it is "cream to be used" in "the manufacture of ice cream," beginning at such time the provisions of the statute will be inapplicable to it. Irrespective of whose hands the milk or cream may be in at such given time, the question of fact is determinable by a consideration of the true intent of the then owner, taken in connection with all the surrounding circumstances.

II. You have also asked my opinion as to whether contracts between milk dealers and their customers, covering prices of milk and cream, which contracts were made prior to the effective date of St. 1934, c. 376, are suspended when their provisions are contrary to the minimum schedule of resale prices "recognized by the Milk Control Board" after said chapter 376 became operative.

The Milk Control Board is given authority by said chapter 376 to establish minimum prices for the sale and resale of milk, and sale or resale below such prices is forbidden. If such prohibition is to be taken as applicable to milk sold under existing contracts entered into prior to the effective date of said chapter 376, the obligation of such contracts is certainly impaired by this legislation. Nevertheless, "all contracts are to be taken as made subject to modification or impairment incidental to the legitimate exercise of the police power of the state."

The language of section 1 of said chapter 376 sets forth the conditions which, in the opinion of the Legislature, made its enactment necessary for the promotion of the general welfare and the public health. As incidental to the accomplishment of these purposes, minimum price charges were established and made effective by appropriate provisions, and are as applicable to pre-existing contracts as to future ones. In view of the solemn declarations of the Legislature as to the necessity of this legislation for the designated purposes under "emergency conditions," in the absence of authoritative or judicial pronouncement adverse to the validity of the terms of the instant statute I cannot say that its provisions are not a valid exercise of the police power, and, accordingly, I must conclude that the terms of contracts executed prior to the effective date of said chapter 376, in so far as they are in conflict with minimum price provisions created by virtue of the authority of this statute, may not now be considered enforceable.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Sentence — State Farm — Massachusetts Reformatory.

One under sentence to the State Farm or the Massachusetts Reformatory, for desertion, may, under an indeterminate sentence, be held for more than a year.

April 16, 1935.

Hon. Richard Olney, *Chairman, Board of Parole.*

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

"The Board of Parole would appreciate an opinion in regard to the following: —

G. L. (Ter. Ed.) c. 279, § 36, provides: 'In imposing a sentence of imprisonment in the state farm, the court or trial justice shall not fix or limit the duration thereof. Whoever is sentenced to the state farm for drunkenness may be there held in custody for not more than one year, and if so sentenced for any other offence may be there held in custody for not more than two years.'

G. L. (Ter. Ed.) c. 273, § 1, limits the sentence for nonsupport to a 'fine of not more than two hundred dollars or by imprisonment for not more than one year, or both.'

(*a*) Can a man sentenced to the State Farm for nonsupport be held in custody longer than one year, not including time to be served for fine?

(*b*) Can a man sentenced to the Massachusetts Reformatory or any other institution for nonsupport be there held in custody longer than one year, not including time to be served for fine?"

In addition to the provisions of G. L. (Ter. Ed.) c. 279, § 36, which you have set forth as above, with relation to sentences to the Massachusetts Reformatory, sections 32 and 33 of said chapter 279 read as follows: —

"Section 32. The court imposing a sentence of imprisonment in the Massachusetts reformatory shall not fix the term thereof unless it exceeds five years, but shall merely impose a sentence of imprisonment therein; but prisoners may be received and held therein who have been sentenced thereto by a court of the United States for a fixed or limited term.

Section 33. Whoever is sentenced to the Massachusetts reformatory for larceny or for any felony may be held therein for not more than five years unless sentenced for a longer term, in which case he may be held therein for such longer term; if committed to said reformatory as a delinquent child he may be held therein for not more than two years; if sentenced to said reformatory for drunkenness he may be held therein for not more than one year; if sentenced to said reformatory for any other offence he may be held therein for not more than two years."

Although G. L. (Ter. Ed.) c. 273, § 1, as above noted, provides for a possible specific sentence by a judge, after a conviction for nonsupport, of a term of imprisonment limited to one year, nevertheless, if the judge, instead of awarding a sentence for a fixed term of years, desires to avail himself of the indeterminate sentence, so called, he may sentence the defendant under either said section 32 or section 36, in which case the defendant may be held at either institution to which he may have been so sentenced for not more than two years.

That the apparent inconsistencies in the General Laws, in relation to prescribed sentences for a specific term and indeterminate sentences, "are

not," in reality, "contradictory and incompatible, but constitute a consistent frame of law" was pointed out by the Supreme Judicial Court in *Platt* v. *Commonwealth*, 256 Mass. 539, 543, and the principles governing the opinion which I have expressed were enunciated and the history of the applicable legislation was discussed at length in VIII Op. Atty. Gen. 596.

I answer the questions (*a*) and (*b*) in your communication in the affirmative.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Common Victualler — License.

APRIL 25, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You state that a certain inn holding a common victualler's license, but holding no license for the sale of alcoholic beverages, inserts in advertisements of dinners served by it the statement, "You may bring your own liquor," and permits persons dining at the inn to serve themselves with liquor which they have brought there. You request my opinion as to whether the local licensing board, which has granted the victualler's license, has power to revoke that license if the inn, after notice from such board to discontinue, persists in the practice of advertising as stated or in permitting the drinking of liquor as stated.

G. L. (Ter. Ed.) c. 140, § 9, provides in part: —

"If a licensee at any time conducts his licensed business in an improper manner, the licensing authorities, after notice to the licensee and reasonable opportunity for a hearing, may upon satisfactory proof thereof suspend or revoke his license."

Section 2 of this chapter, which provides for the granting of licenses (which licenses expire on December thirty-first of each year, St. 1934, c. 171, § 1), also provides that the licensing authorities shall not be required to grant a license "if, in their opinion, the public good does not require it."

The determination of the question of whether the holder of a common victualler's license is conducting his business "in an improper manner" is largely a question of fact, to be determined by the licensing authorities in each case, after consideration of all the facts bearing upon the question. I cannot pass upon this question of fact. It is, however, my opinion that if the licensing authorities in the case referred to by you should determine, after hearing, that there were circumstances making it improper or against the public good for a common victualler to invite or permit the public to drink alcoholic beverages upon the premises covered by the license, such a finding would be sustained.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Civil Service — Disabled Veteran — Proofs of Disability.

A disabled veteran may present proof of his disability even after he has passed examinations or been classified in the public service, and so become entitled to the statutory preference.

April 29, 1935.

Hon. James M. Hurley, *Commissioner of Civil Service.*

Dear Sir: — You have advised me that, under the practice of your department, veterans of two classes who were in fact disabled and might, I assume, have fulfilled all the necessary requirements of G. L. (Ter. Ed.) c. 31, § 23, to establish their disability for purposes of preference in the civil service, have not been allowed to file claims for "disabled veterans' preference," and that your department has refused to enter such veterans on your records as "disabled veterans."

The two classes to whom you refer are, as you state: —

"1. Those persons who were permanent employees prior to the World War, obtained a leave of absence from their positions to participate in the World War, received ratings by the United States Government as disabled veterans, and were subsequently reinstated to their former positions.

2. Persons rated as disabled veterans by the United States Government and in the employ of a town which, since the passage of G. L. (Ter. Ed.) c. 31, § 23, has accepted the provisions of the Civil Service Law."

I gather from your letter that the refusal of your department extended to a declination of the right to present the evidence necessary under said section to establish the status of a "disabled veteran," and that your department was led to adopt such a course by reason of a conclusion of law that, because the veterans in the two classes mentioned had not had occasion to "pass examinations" since their employment after the World War, they could not, irrespective of what might be the facts, be regarded or classified by your department as "disabled veterans."

The first portion of G. L. (Ter. Ed.) c. 31, § 23, reads: —

"The names of veterans *who pass examinations* for *appointment* to any position classified under the civil service shall be placed upon the eligible lists in the order of their respective standing above the names of all other applicants, except that any such *veterans who* are disabled . . . shall be placed ahead of all other veterans on such eligible lists . . ."

The section contains detailed requirements as to the proof of disability which must be presented by veterans before they can be treated as "disabled veterans" and entitled to the terms of the sections peculiarly favorable to them, and it has been held in *McCabe* v. *Judge of the District Court*, 277 Mass. 55, that until such proof had actually been submitted to your department a veteran was not entitled to the preference of a disabled veteran. The court, however, did not say that such a veteran might not present such proof and be so classified at any time after his return from service and after the act became effective.

Merely because section 23 begins with the words "The names of veterans who pass examinations," does not indicate an intent by the Legislature that veterans who had already passed examinations and were in public service when section 23 became effective as to them might not present their claims and proofs and be thereafter classified as "disabled veterans."

The words "veterans who pass examinations" were merely intended to identify those veterans who by reason of successful examinations became entitled to the benefits of the Civil Service Act. The words are purely descriptive of a class, and have no special relation to those who pass in the future as distinguished from those who have successfully joined the same class in the past. The words were so used to describe veterans under the civil service system in the prior statutes, the last of which, Gen. St. 1919, c. 150, § 2, by amendment in St. 1922, c. 463, was altered to provide the exception in favor of disabled veterans as it stands now in the statute.

It follows that all present employees now classified as veterans by reason of their service and because they gained appointments under the civil service by virtue of some examinations of the civil service system should be afforded an opportunity to claim and file proof of such disability as will entitle them to be classified as "disabled veterans" under said section 23, and, having done so, they should be so classified by your department. They should not be deprived of their opportunity to secure classification which the court has said is essential to their receiving the intended preferential treatment.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages Control Commission — Local Licensing Board — License.

Prior to the actual issuance of a license it may be canceled, even after a vote granting it, by another vote of the same board.

MAY 1, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You state the following facts: —

On January 25, 1935, the board of selectmen of the town of Salisbury, the licensing authorities (G. L. [Ter. Ed.] c. 140, §§ 1 and 2), voted to grant to an applicant a common victualler's license, to expire December 31, 1935 (G. L. [Ter. Ed.] c. 140, § 4; St. 1934, c. 171, § 1). On that date a certificate evidencing such license was signed by the board and deposited with the town treasurer. On March 15th the then board of selectmen (only one of whom was a member of the board prior to March 12th) voted that said license be canceled. At this time the applicant had not paid the license fee or received the certificate. On March 28th the applicant called at the treasurer's house and, in the absence of the treasurer, paid the fee of five dollars (G. L. [Ter. Ed.] c. 140, § 2) to the treasurer's wife and received from her the certificate. On February 23rd the local licensing authorities purported to issue to the applicant a license to sell alcoholic beverages to be drunk on the premises covered by said common victualler's license.

On March 29th, your Commission, being under the impression that the person in question was the holder of a common victualler's license and was thereby eligible to be licensed to sell alcoholic beverages (G. L. [Ter. Ed.] c. 138, § 12), voted to approve the alcoholic beverages license (G. L. [Ter. Ed.] c. 138, § 12).

You request my opinion upon the following questions: —

"1. Whether the license was legally granted to the applicant in question by vote of the board of selectmen on January 25, 1935, giving the applicant the right to possession of the said license before payment of the fee therefor to the town treasurer.

2. Whether the vote of the new board of selectmen on March 15, 1935, as appeared by the records of the selectmen, purporting to cancel the common victualler's license voted by the former board of selectmen, actually terminated the license.

3. If the payment of the license fee of five dollars by the applicant to the wife of the town treasurer, the giving of a receipt for said sum by the treasurer's wife to the applicant, and the delivery to the applicant of the license itself signed by the former board of selectmen, gave to the said applicant a legal right and title to the common victualler's license, notwithstanding the vote of March 15, 1935, duly recorded on the records of the selectmen."

The mere vote of the board of selectmen on January 25, 1935, granting a common victualler's license was not tantamount to a license, and it did not give the proposed licensee any right, title or interest in the license for which she had applied. The selectmen, in acting as a licensing board, were not the agents or servants of the town, but were a statutory board created by law and selected by the Legislature as a convenient mode of carrying out an important governmental function. *McGinnis* v. *Medway*, 176 Mass. 67; *Brown* v. *Nahant*, 213 Mass. 271.

Relative to the issuance of a license for the sale of intoxicating liquor, it has been held that "the authority granted by the license arises upon the issuing of the written license, and not upon the vote granting it, or on the completion of the instrument by the signatures of the mayor and city clerk." *Commonwealth* v. *Welch*, 144 Mass. 356.

"We are of opinion that a license granted under the Pub. Sts. c. 100 is the paper issued to the licensee, and not the vote under which the paper is issued." *Commonwealth* v. *Cauley*, 150 Mass. 272, 275.

It is apparent, therefore, that the license could not become effective until it had been issued by delivery either to the person named therein as licensee or to his agent. Prior to that moment the license was merely executory and could, therefore, be canceled at the pleasure of the granting authority.

The licensee, however, claims it became effective when she paid the statutory fee and received the license from the wife of the town treasurer on March 28, 1935. It is apparent, however, from the facts stated in your communication that on March 15, 1935, the new board of selectmen which had been elected on March 12th voted to cancel the license which the preceding board of selectmen had voted to grant. If the action of the new board was effective, then, of course, the town treasurer was without any authority whatever to deliver to the licensee a license which had been previously canceled.

While your letter discloses a change in the personnel of the board of selectmen, it is settled law that such a statutory board has always been considered as a continuing body and that the new board had a right to continue and conclude the unfinished legislative functions undertaken by the preceding members of this board. *Taintor* v. *Mayor of Cambridge*, 192 Mass. 522; *Yeo* v. *City Council of Springfield*, 241 Mass. 340.

Where a licensing board had been removed subsequent to April first and an entirely new board appointed, then the latter board had the right to act upon an application filed on April first with the old board. Although the court afterwards decided that the removal of the old board was illegal, yet it was stated that the license granted by the new board "was good, at least so long as the new board was in office." It is clear that if the new board of selectmen could grant a license upon an application filed with the preceding board, it could act upon any other matters pertaining to the granting or refusal of such licenses, including the power of canceling a license which had never become effective. *Taber* v. *New Bedford*, 177 Mass. 197, 199.

The license in question, being entirely executory prior to the time it was received by the applicant, could be canceled by the licensing board at any time prior to its valid delivery to the licensee. If the new licensing board thought the interests of the public required such a cancellation, it undoubtedly had power to do so. If the old board had been continued in office, it likewise would have such authority and could without notice or opportunity of being heard cancel a license which had never been issued. If the old board thought it had made a mistake in the issuance of this license, it was free to cancel it before its issuance and the succeeding board had similar powers in the premises. *Waucantuck Mills* v. *Magee Carpet Co.*, 225 Mass. 31; *Rollins* v. *Salem*, 251 Mass. 468; *Jamnback* v. *Aamunkoitto Temperance Soc., Inc.*, 273 Mass. 45.

The provision of G. L. (Ter. Ed.) c. 140, § 9, for the revocation or suspension of a common victualler's license has no application to the present case. This section deals entirely with licenses which have become effective and are actually outstanding. In the case under consideration, at the time the license was delivered to the applicant it had no vitality, and, as a matter of fact, never became an effective license.

Whether the applicant knew on March 28th, at the time the license was delivered, that the licensing board had canceled this license on March 15, 1935, does not appear from your communication. The applicant's knowledge or lack of knowledge in this respect becomes immaterial.

It is unnecessary to determine the validity of votes of municipal boards relative to contractual rights and determine whether or not a vote once taken in this respect could be rescinded before any notice thereof had been given to the party affected because no contractual rights of the applicant are involved, as the rights of such a licensee never rise higher than a mere privilege or permission. No contractual or vested rights were involved or impaired by the cancellation of the license. *Burgess* v. *Mayor and Aldermen of Brockton*, 235 Mass. 95.

I am therefore of the opinion that the vote of January 25, 1935, to issue a common victualler's license was lawfully rescinded by vote of the selectmen on March 15, 1935, and that thereby the certificate of license delivered to the applicant on March 28, 1935, was of no force or effect.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Parole — Eligibility — Sentences.

A prisoner, sentenced for a crime committed while he is already serving an earlier sentence, will, unless the second sentence is ordered by the court to take effect "from and after" the expiration of the first sentence, be eligible for parole at the expiration of the minimum term under his second sentence.

May 2, 1935.

Hon. Arthur T. Lyman, *Commissioner of Correction.*

Dear Sir: — In effect you ask my opinion as to whether two sentences for criminal offenses, the later of which is for a crime committed while the prisoner is serving time under the earlier, are to be added together or whether the second sentence starts on the date of the mittimus in the later case, and how the applicable rule of law affects the working of the parole law.

G. L. (Ter. Ed.) c. 279, §§ 8 and 8A, read as follows: —

"Section 8. A convict upon whom two or more sentences to imprisonment are imposed may be fully committed upon all such sentences at the same time, and shall serve them in the order named in the mittimuses upon which he is committed; but when fine and imprisonment are named in one of the sentences the prisoner shall always be committed upon the term sentence first.

Section 8A. For the purpose only of determining the time of the taking effect of a sentence which is ordered to take effect from and after the expiration of a previous sentence, such previous sentence shall be deemed to have expired when a prisoner serving such previous sentence shall have been released therefrom by parole or otherwise. Nothing in this section shall be construed to alter or control any provision of section one hundred and thirty-one or one hundred and forty-nine of chapter one hundred and twenty-seven."

Unless a second sentence is ordered by the presiding judge to take effect "from and after" the expiration of an earlier sentence, it will start from the date of the mittimus issued with relation to such second sentence. Thus it will be served, for at least a part of its term, concurrently with the first sentence.

In relation to eligibility to parole under the terms of G. L. (Ter. Ed.) c. 127, § 133, the prisoner will be entitled to a permit to be at liberty, other conditions necessary therefor existing, when he has served a term equal to the aggregate of the minimum terms of the two sentences.

It is immaterial that the prisoner has already been granted a permit to be at liberty upon the attainment of the minimum prescribed portion of his first sentence and has been returned to his original place of confinement. He still has the right to "apply for a permit to be at liberty" "when he has served a term equal to the aggregate of the minimum terms of the" two sentences.

That, in the instance to which you direct my attention, will be at the expiration of the minimum term under his second sentence, since on the facts stated he has already passed the date of the expiration of the minimum term under his first sentence. The two sentences are served concurrently, though they are not necessarily coterminous.

Very truly yours,

Paul A. Dever, *Attorney General.*

Constitutional Law — Boston Elevated Railway Company — Powers of Trustees.

The Legislature cannot control the performance of the duty entrusted to the trustees of the Boston Elevated Railway Company to determine the character and extent of the service and facilities furnished, except in the legitimate exercise of the police power.

May 4, 1935.

House Committee on Ways and Means.

Gentlemen: — You have asked my opinion with relation to House Bill No. 1789, as amended, upon four questions.

House Bill No. 1789, as amended, reads: —

"Section 1. The Boston Elevated Railway Company is hereby directed to provide motor bus transportation from Cleary square in the Hyde Park district of the city of Boston to the Hyde Park-Dedham boundary line. The fare to be charged persons using the transportation facilities provided for hereunder between said terminals or intervening points shall not exceed five cents; provided, that persons transferring at said Cleary square, after having paid a fare of ten cents between said terminals or between said Cleary square and any other point on the system of said company, shall be entitled to the usual free transfer privileges.

Section 2. Said company, in providing transportation as required hereunder, is hereby exempted from the provisions of chapter one hundred and fifty-nine A of the General Laws, so far as they require the obtaining of a license for such transportation from the city council of said city of Boston and a certificate of public convenience therefor from the department of public utilities."

Your questions are: —

"1. In view of the provisions of Spec. St. 1918, c. 159, and amendments thereto, relating to the public management and operation of the properties of the Boston Elevated Railway Company, is it constitutionally competent for the General Court to direct said railway company to provide transportation as provided in said bill?

2. In view of said provisions, is it constitutionally competent for the General Court to regulate and fix fares of said railway company as provided in said bill?

3. Is it constitutionally competent for the General Court to authorize said railway company to operate motor vehicles for the carriage of persons for hire without obtaining a certificate of public convenience and necessity as required by G. L. (Ter. Ed.) c. 159A, so far as such operation affects any route or routes over which such transportation is being furnished by a carrier to whom such a certificate has been granted?

4. Would said bill, if enacted into law, be violative of any provision of the Constitution of the United States or of this Commonwealth?"

1 and 2. Spec. St. 1918, c. 159, entitled "An Act to provide for the public operation of the Boston Elevated Railway Company," provides in section 18 as follows: —

". . . None of the provisions of this act shall be construed to constitute a contract binding upon the commonwealth other than the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or operated

by the Boston Elevated Railway Company shall be managed and operated by the said trustees, and the provisions of section thirteen, which provisions shall constitute a contract binding upon the commonwealth. . . ."

Section 2 of said chapter 159 provides: —

"Said board of trustees, hereinafter called the trustees, shall manage and operate the Boston Elevated Railway Company hereinafter called the company, and the properties owned, leased or operated by it, for a period of ten years, commencing on the first day of the month next after their appointment and qualification, and, subject to the provisions of this act, shall take and have possession of said properties in behalf of the commonwealth during the period of public operation, and, for the purposes of this act, shall, except as is otherwise provided in this act have and may exercise all the rights and powers of said company and its directors, and, upon behalf of said company, shall receive and disburse its income and funds. They shall have the right to appoint and remove in their discretion the president, treasurer and clerk of the corporation, and all officers of the company other than the board of directors. *They shall have the right to regulate and fix fares, including the issue, granting and withdrawal of transfers, and the imposition of charges therefor, and shall determine the character and extent of the service and facilities to be furnished,* and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission.

In the management and operation of the said company and of the properties owned, leased or operated by it, as authorized by this act, the trustees and their *agents, servants and employees* shall be deemed to be acting as agents of the company and *not of the commonwealth,* and the company shall be liable for their acts and negligence in such management and operation to the same extent as if they were in the immediate employ of the company, but said trustees shall not be personally liable. A majority of the board shall constitute a quorum for the transaction of business, and the action of a majority of those present at any meeting shall be deemed the action of the trustees.

Nothing herein contained shall be held to affect the right of the commonwealth or any subdivision thereof to tax the company or its stockholders in the same manner and to the same extent as if the company had continued to manage and operate its own property."

My predecessors in the office of Attorney General have repeatedly held that the provisions in Spec. St. 1918, c. 159, relating to the right of the trustees to regulate and fix fares and to determine the character and extent of the services and facilities to be furnished constituted a contract between the Commonwealth and the company, which could not be impaired without violating U. S. Const., art. I, § 10, and that various bills which would impair such contractual rights would be unconstitutional if enacted into law. VI Op. Atty. Gen. 396; VII *ibid.* 11 and 331. See also V Op. Atty. Gen. 409. It has been specifically said in VII Op. Atty. Gen. 18, that the provisions of a bill establishing a five-cent fare were clearly in derogation of the grant of power under such contractual rights, and would, therefore, be unconstitutional unless such provisions were accepted by the parties to the contract through vote of stockholders of the railway. VI Op. Atty. Gen. 396, 398.

It has also been pointed out that the duty entrusted to the trustees to determine the character and extent of the service and facilities to be fur-

nished cannot be controlled by the Legislature except in the legitimate exercise of its power to secure the public safety, health and morals. VII Op. Atty. Gen. 11 and 331.

With these expressions of opinion by my predecessors in office I am in accord.

The same general view of the nature of the instant statute as a contract has been expressed by the Supreme Judicial Court in *Boston* v. *Treasurer and Receiver General*, 237 Mass. 403, 413.

I therefore answer your first two questions in the negative.

3. Your third question, being predicated upon the assumption that a bill, merely permissive in its terms, was before you for consideration, is hypothetical in character, since the measure which you have laid before me purports to be mandatory rather than permissive. Were it permissive, I could not well say that the mere fact that by its terms the Boston Elevated Railway Company is not required to obtain a license and a certificate of public convenience before providing motor bus transportation over the streets, as are other common carriers, would of itself render the measure, if enacted, unconstitutional. It may be that the unique mode of operating the Boston Elevated Railway Company by public trustees, under the peculiar provisions of Spec. St. 1918, c. 159, would be a substitute for the governmental oversight, given through license and certificate, which might justify the General Court in the exercise of a reasonable judgment in placing the Boston Elevated Railway Company, although only a single carrier, in a classification of its own which might fairly entitle it to relief from the regulations imposed upon other carriers operating under very different conditions.

4. With relation to the measure which you have submitted to me, however, I am of the opinion that, if enacted into law, it would be pronounced unconstitutional if it came before our courts for their consideration.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Bonds — Electric Companies — Consolidation — Savings Bank Investment.

MAY 6, 1935.

Hon. H. H. PIERCE, *Commissioner of Banks.*

DEAR SIR: — You request my opinion as to whether G. L. (Ter. Ed.) c. 168, § 54, cl. Sixth A (8), is to be construed as applicable to the bonds of the Androscoggin Electric Corporation.

Said section 54 provides for investment by savings banks in securities thereafter specified. Clause Sixth A refers to bonds of electric and gas companies as therein described, with provisos, included in which are, — "(1) The gross operating revenue of the corporation . . . shall be not less than one million dollars for its fiscal year immediately preceding" the time of the savings bank investment; "(4) For the period of five years immediately preceding the time of making any investment authorized by this clause, the officially reported net earnings available for interest charges of such corporation, as shown by its annual reports or other sworn statements to the municipal, state or federal authorities shall have been equal to at least twice the interest charges for the same period on the corporation's total outstanding funded debt"; and "(8) If, during any of the periods mentioned in this clause, such corporation has been consoli-

dated by purchase or otherwise, the aggregate operating figures of the corporations so consolidated, exclusive of inter-company charges, shall be sufficient for the purpose of this clause."

You state that the Androscoggin Electric Corporation was formed in February of the present year by the consolidation of three corporations; that the last fiscal year of each of these corporations ended December 31, 1934, and that reports for that year, as referred to in clause Sixth A (4), have been filed, as have reports for four or more preceding years. These last five reports show, as I understand it, net earnings of at least twice the interest charges as required by said subdivision (4). The gross operating revenue of none of the consolidated corporations for the last year amounted to a million dollars [clause Sixth A (1)], but the aggregate gross operating revenue is over that amount.

It would seem that it must have been the intent of subdivision (8) to authorize an investment under the circumstances here in question. The companies consolidated have met the requirements of subdivision (4) for a preceding five-year period. The bonds of any one of the consolidated companies would at the present time be an authorized investment, according to the reports of this five-year period, so far as subdivision (4) is concerned. The aggregate gross operating revenue of the companies now consolidated for the preceding year exceeds the amount specified in subdivision (1).

The purpose of subdivision (8) seems clear. Apart from it, no bonds issued by a consolidating company could become a legal investment until such consolidating company had itself done business for five years. The purpose of subdivision (8) is to avoid that result by providing that the requirements of the preceding subdivisions may be met by taking "the aggregate operating figures of the corporations so consolidated."

The difficulty here arises from the fact that subdivision (8), taken literally, refers only to a consolidation occurring "during any of the periods mentioned in this clause." You state that your department has construed the phrase "period of five years" as used in subdivision (4) as meaning fiscal years; that this period and the period of the preceding year, referred to in subdivision (1), which is expressly defined as "fiscal year," seem to be the only "periods mentioned" [subdivision (8)] in clause Sixth A; and that therefore your department has taken the position that subdivision (8) is inapplicable in the present case because the consolidation did not occur during one of the "periods mentioned."

According to the practice of your department, as I understand it, if the consolidation in the present case had occurred, say, in December, 1934, an investment in the bonds of the consolidated company would be authorized, provided the returns of the companies consolidated for the five fiscal years ending December 31, 1934, met the requirements of subdivision (4), for in that case the consolidation would have been made within one of the periods mentioned in clause Sixth A; and you raise no question but that that result would be proper. But so far as the security of the investment is concerned the situation here is the same as if the consolidation had occurred in 1934. It can hardly have been the intention of the statute that an investment should be authorized in one case and not in the other. There is no reasonable ground for a distinction. Unless the words of subdivision (8) absolutely require a different construction, that subdivision is not to be construed in a way which would be inconsistent with the legislative intent. In my opinion, the words of

subdivision (8) do not require such a construction. The "time of making any investment" is a time mentioned in subdivision (4). It is the time fixed by subdivision (4) for determining what reports are to be used. It may be said to mark the end of a period. Without doing undue violence to the words used in subdivision (8), they may be construed as applicable to the present case; and, in view of what I believe to be the plain intent of that subdivision, I so construe them.

Accordingly, it is my opinion that the fact that the consolidation here in question did not occur until the present year does not in itself make it impossible to establish the bonds as an authorized investment for savings banks at the present time.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages Control Commission — Local Licensing Board — License — Sundays.

The action of a local licensing board prohibiting all sales on Sundays is of no force.

MAY 15, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You state that the licensing commission of Somerville, with a view to preventing the sale of alcoholic beverages on Sunday by holders of common victualler's licenses, inserted in the form of applications for alcoholic beverages licenses for 1935, questions as to whether the applicant would "prefer" to make sales on Sunday from one P.M. until eleven P.M., and on week days only from eleven A.M. until eleven P.M., or, in the alternative, to make no sales on Sunday but instead to sell on week days from eight A.M. until midnight, or eleven forty-five P.M. on Saturday. Some of the applicants expressed in their applications a preference for one alternative and some for the other. None of the licenses issued, however, purported to impose as a term of the license the preference expressed in the application. The only condition expressed in the license was that it should be "subject to the laws of the Commonwealth . . . and the rules and regulations of the licensing authorities." Each licensee had been issued a common victualler's license for the year 1935, under the provisions of G. L. (Ter. Ed.) c. 140, § 2. These common victualler's licenses were unrestricted in terms, and presumably authorized the licensees to do business as common victuallers for seven days in the week. On January 2, 1935, all licensees were notified, as a result of a vote of the licensing authorities made on December 26, 1934, that no sales of alcoholic beverages should be made on Sundays. All the licenses had been issued prior to this notice of January 2, 1935, and, so far as appears, prior to the vote of December 26, 1934. Upon the protest of various licensees a public hearing upon the question of Sunday sales was held by the licensing authorities on March 11, 1935, and on that day the licensing authorities voted not to change their vote of December 26, 1934. The licensees were notified of this decision on March 12th. On March 25th some of these licensees petitioned the licensing authorities to permit them to sell alcoholic beverages on Sunday. These petitions were on that date denied; and some of these petitioners, who had also been objectors in the matter heard on March 11th, appealed on March 29th to your Commission.

You request my opinion upon the following questions: —

"1. Have the local licensing authorities the power to make regulations concerning the sale of alcoholic beverages by common victuallers, licensed to sell the same, by limiting the hours of sale to less than the minimum hours set forth in the fifth paragraph of G. L. (Ter. Ed.) c. 138, § 12, as amended?

2. Is this Sunday restriction of the sale of alcoholic beverages by common victuallers conducting restaurants, licensed for seven days in each week, and also licensed to sell alcoholic beverages to be drunk on the premises, without any restrictions stated in their beverages licenses as to the number of days in each week on which such alcoholic beverages may be sold in said restaurants, as hereinbefore set forth, in violation of the rights of the licensees under the said fifth paragraph of G. L. (Ter. Ed.) c. 138, § 12, as amended?

3. Did the six applicants hereinbefore named, by reason of their failure to file appeals within five days from January 2, 1935, the date of the notice issued by the Somerville commission, hereinbefore mentioned, waive their right to hearing before the Alcoholic Beverages Control Commission?

4. If your answer to question 3 is in the affirmative, did the applicants hereinbefore named have the right to appeal to the Alcoholic Beverages Control Commission on March 29, 1935, which was within five days after March 26, 1935, when they received notice of the denial of the petition hereinbefore mentioned?"

Section 12 of G. L. (Ter. Ed.) c. 138, as amended, provides in part: —

"The hours during which sales of such alcoholic beverages may be made by any licensee as aforesaid shall be fixed by the local licensing authorities either generally or specially for each licensee; provided, that no such sale shall be made on any day between the hours of two and eight o'clock ante meridian and that, except as provided in section thirty-three, no such licensee shall be barred from making such sales on any day after eleven o'clock ante meridian and before eleven o'clock post meridian, and that no tavern shall be kept open on any day after eleven o'clock post meridian."

Section 33, as amended, provides in part: —

"No holder of a tavern license shall sell any alcoholic beverages on Sundays, no other licensee under section twelve shall sell any such beverages on Sundays between the hours of two o'clock ante meridian and one o'clock post meridian. . . ."

Section 64 provides in part: —

"The licensing authorities after notice to the licensee and reasonable opportunity for him to be heard by them, may modify, suspend, revoke or cancel his license upon satisfactory proof that he has violated or permitted a violation of any condition thereof, or any law of the commonwealth."

Section 67 provides in part: —

"Any applicant for a license who is aggrieved by the action of the local licensing authorities in refusing to grant the same or by their failure to act within the period of thirty days limited by section sixteen B, or any one who is aggrieved by the action of such authorities in suspending, cancelling, revoking or declaring forfeited the same, may appeal therefrom to the commission within five days following notice of such action or the expiration of said period, and the decision of the commission shall be final: . . ."

The local licensing authorities have purported by vote to forbid Sunday sales. If a licensee fails to accede to that vote, the local licensing authorities may or may not attempt to revoke his license, upon the alleged ground that he has permitted a violation of a condition thereof (section 64). If they do revoke a license on the ground that the licensee has not complied with the vote, the licensee will then be "aggrieved by the action," and will then have a right of appeal to your Commission under section 67, and the question of the effect and validity of the vote will then be presented to your Commission. At present, however, that question is not before you. In fact, your communication does not disclose any real question lawfully before your Commission requiring its decision, because, as will hereafter appear, the action of the licensing board is not sufficient basis upon which to predicate an appeal even if it were seasonably taken.

It is apparent, however, that a decision upon the merits of the questions presented is desired by everybody, and, without intending to establish a precedent, we pass to a determination of those questions.

The licensing board is a statutory body possessing only the powers conferred upon it by law. Manifestly, this local board cannot act under the authority by law imposed upon it. Rules and regulations of a subordinate board beyond the sweep of an enabling act have no force or validity. *Commonwealth* v. *Maletsky*, 203 Mass. 241; *Commonwealth* v. *Hayden*, 211 Mass. 296; *Commonwealth* v. *McFarlane*, 257 Mass. 530.

The statute authorizes the sale of alcoholic beverages on Sundays by holders of restaurant licenses, except that no sale shall be made from two o'clock in the morning until one o'clock in the next afternoon. There is nothing else contained in our statutes restricting the hours during which sales by such licensees may be lawfully made. Restaurant licenses are held commonly by persons who are also the holders of common victualler's licenses, which permit them to conduct their places of business on every day, including Sunday. It is clearly the intent of the Legislature that restaurant licensees should be permitted to sell alcoholic beverages on Sundays, except during the hours above mentioned (section 33). The action of the licensing board prohibiting all sales by licensees on Sundays is not warranted by law and is, consequently, of no force or effect.

While it may be that a license amounts to only a privilege or permission to do something which might otherwise be unlawful, and while it is true that a license is neither a contract nor property in which a licensee has any vested interest (*Burgess* v. *Mayor and Aldermen of Brockton*, 235 Mass. 95, 100), yet it is also true that such a privilege granted and continued by virtue of a statute cannot be restricted or destroyed by a local regulation unless the power to do so is delegated to the local authorities. *Burke* v. *Holyoke Board of Health*, 219 Mass. 219, 221; *Greene* v. *Mayor of Fitchburg*, 219 Mass. 121; *Cawley* v. *Northern Waste Co.*, 239 Mass. 540.

The vote of the licensing board on December 26, 1934, did not constitute a refusal to grant a license or suspension, cancellation, revocation or forfeiture of an existing license, neither did the vote of March 25, 1935; consequently, there can be no appeal under section 67. The matters referred to are still within the jurisdiction of the licensing board, as the appeal is wholly ineffectual, and, consequently, there is no pending matter before your Commission. *Bowler* v. *Palmer*, 2 Gray, 553; *Morse* v. *O'Hara*, 247 Mass. 183.

I am therefore constrained to answer your first and second inquiries in

the negative, and also your third inquiry, on the ground that there was nothing that the licensees could waive. No answer to your fourth inquiry is necessary.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

South Essex Sewerage Board — City of Peabody — Member of Board.

MAY 16, 1935.

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

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

"In connection with the certification of district notes, the Director of Accounts is desirous of obtaining your opinion on the following question of law: —

St. 1925, c. 339, provides for the establishing of the South Essex Sewerage District. Section 2 of said act creates the South Essex Sewerage Board. Under the statute, this board now consists of 'the city engineer of Salem, the city engineer of Peabody and the commissioner of public works of Beverly,' together with a fourth member to represent the town of Danvers and a fifth member appointed by the Governor. (See also St. 1927, c. 36, § 2.)

Recently the city of Peabody abolished the office of city engineer and various other offices, and has created in their stead a department of public works. Will you kindly inform me as to the effect of this ordinance on the makeup of the South Essex Sewerage Board."

St. 1925, c. 339, § 2, reads, in its applicable part: —

"The city engineer of Salem, the city engineer of Peabody, the commissioner of public works of Beverly, the engineer acting as county engineer for the county of Essex, and the chief engineer of the department of public health of the commonwealth shall be members of said board, ex officiis."

The ordinance adopted by the city council of Peabody, which I assume has been properly enacted, abolishes the office of city engineer but creates a department of public works and gives to the commissioner thereof "all the powers" of, and the duty to perform all the obligations of, the former offices of "city engineer," among other offices. This being so, the position of member of the South Essex Sewerage Board, formerly filled by the "city engineer of Peabody," is now properly filled by the commissioner of the department of public works of that city.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Armory — Use for Nonmilitary Purposes — Game of Beano — License.

Before an armory may be used for nonmilitary purposes, in which a game of beano is carried on, a municipal license for the holding of such game must first be obtained under G. L. (Ter. Ed.) c. 271, § 22A.

May 16, 1935.

Brig. Gen. William I. Rose, *The Adjutant General.*

Dear Sir: — You have advised me that an armory is to be used by a military unit for certain nonmilitary purposes, under that part of G. L. (Ter. Ed.) c. 33, § 48 (*a*), which provides: —

"Military units stationed in an armory may, at any time when it is not in use for military purposes, use such armory without charge for social activities, or athletics, subject only to rules and regulations promulgated by the military custodian of such armory and approved by the governor and council."

You also state that the object is to raise funds for such unit, and that part of the social activities to be provided consists in the conducting of a game of beano.

You inquire whether, when a game of beano is so conducted in an armory, the proceeds of the charges for admission to, and/or participation in, such game being devoted entirely to a civic purpose, a license under G. L. (Ter. Ed.) c. 271, § 22A, as inserted by St. 1934, c. 371, must be obtained from municipal authorities for the conducting of such game.

It has been repeatedly held in opinions of my predecessors in office, in which I concur, that when persons, under the provisions of G. L. (Ter. Ed.) c. 33, §§ 48–50, are using armories for certain nonmilitary purposes authorized by said section 48, duly approved by designated military authorities of the Commonwealth, it is not necessary for them to obtain licenses from municipal authorities, even if the use of the armory includes such forms of entertainment as, if conducted elsewhere, would require such licenses from municipal authorities, under the terms of G. L. (Ter. Ed.) c. 140, §§ 181 and 182. See Attorney General's Report, 1933, p. 47, and opinions there cited.

The municipal licenses required by said chapter 140, sections 181 and 182, and those heretofore considered in this connection by Attorneys General, all relate, however, to things inherently lawful.

The game of beano, conducted as I understand it is to be in the instant case, namely, with a charge and prizes awarded by chance, is inherently unlawful, under the provisions of G. L. (Ter. Ed.), c. 271, § 7, with relation to lotteries.

By an amendment to G. L. (Ter. Ed.) c. 271, enacted by St. 1934, c. 371, it was provided that no one conducting such a game of beano should be prosecuted, provided (1) that the proceeds are devoted solely to certain purposes, among others a civic purpose, and (2) that the game be conducted under a license to be granted by municipal authorities, and upon such terms and conditions as such authorities may prescribe.

The first of these conditions is complied with in the instant case; unless the second (the municipal license) is also complied with, the persons conducting the game become liable to criminal prosecution. Without this municipal license, conducting a game of beano is a criminal offense. The license is of a different character than the licenses issued under said chapter 140, sections 180–182, for activities lawful in themselves. This particular license is a prerequisite to the prevention of prosecution for the game of beano, which is, as such, an illegal game.

St. 1934, c. 371, § 22A, reads as follows: —

"Nothing in this chapter shall authorize the prosecution, arrest or conviction of any person for conducting or promoting, or for allowing to be

conducted or promoted, a game of cards commonly called whist or bridge or the game commonly called beano, or substantially the same game under another name, in connection with which prizes are offered to be won by chance; provided, that the proceeds of the charges for admission to, and or participation in, such game are donated solely to charitable, civic, educational, fraternal or religious purposes; and provided, further, that said game called beano, or substantially the same game under another name, is conducted under a license hereby authorized to be granted by the mayor of the city or the selectmen of the town in which such game is to be conducted, and upon such terms and conditions as the mayor or selectmen may prescribe."

Use of an armory for the promotion of a game illegal in itself, for the conduct of which criminal prosecution may be commenced, is outside the enumerated various uses permitted by said chapter 33, section 48, which various uses must be assumed to have been intended by the Legislature to be lawful in themselves.

While the general licensing authority of municipalities, such as is described in said chapter 140, sections 181 and 182, does not extend over properties peculiarly within the control of the Commonwealth, it was not, however, the intent of the Legislature to permit the use of armories for any acts unlawful in themselves and subject to criminal prosecution against the promoters. The promoting or conducting of a game of beano is a use unlawful in itself, for which the promoter is liable to prosecution unless he has obtained a municipal license such as is described in said section 22A.

The principles of law applied to other forms of municipal licenses in relation to activities in armories, in the prior opinions to which I have referred, have no application to the license required by said section 22A, without which a game of beano may not be conducted in an armory, for the reasons which I have set forth.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Constitutional Law — Railroad — Eminent Domain — Public Purpose.

A certain bill providing for the taking of the bed and tracks of a railroad engaged in interstate carriage would be unconstitutional, if enacted.

MAY 20, 1935.

Hon. ALBERT F. BIGELOW, *Chairman, House Committee on Ways and Means.*

DEAR SIR: — Your Committee has requested my opinion as to the constitutionality, if enacted into law, of the following measure, House No. 1785:

"An Act authorizing the Acquisition of Certain Railroad Rights between the North and South Stations in Boston.

Whereas, The deferred operation of this act would tend to defeat its purpose, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

The department of public works is hereby authorized and directed to acquire by purchase or eminent domain all rights and interests in the railroad bed and tracks on the street level of Atlantic avenue and Commercial

street between the North and South stations in the city of Boston. Said department shall thereupon cause said tracks to be removed. All rights and interests acquired by the commonwealth hereunder shall be thereupon conveyed to the city of Boston."

I am advised that the railroad bed and tracks on the street level of Atlantic Avenue are those of the Union Freight Railroad Company. This railroad, through a series of leases, as I am informed, has since 1893 been operated by the New York, New Haven & Hartford Railroad Company and is in substance a part of the Boston terminal of the New York, New Haven & Hartford Railroad Company. It is used by the latter road in the course of interstate commerce.

The Union Freight Railroad Company was incorporated by St. 1873, c. 342, and its locations set forth therein, subject to amendment; and originally, and as most lately amended by St. 1930, c. 92, it had a location for single or double track for freight haulage by railroad, in such portions as may be necessary for its purpose, in Atlantic Avenue, among other streets. I am informed that the roadbed and tracks on Atlantic Avenue constitute a substantial part of its entire line. The method of operating the railroad under the present system of control, so far as it relates to interstate commerce, is described in *Boston Wool Trade Assoc.* v. *Director General*, 69 Interstate Com. Comm. Rep. 282, and the obligations and privileges of the railroad in its relation to State authorities in *Boston* v. *Union Freight R.R. Co.*, 181 Mass. 205; and *McDonald* v. *Union Freight R.R. Co.* 190 Mass. 123.

The entire subject of the regulation and operation of railroads engaged in interstate traffic has been taken over by the Federal government, under the Commerce Clause of the United States Constitution (U. S. Const. art. I, § 8), and is governed and controlled by U. S. C. A., Title 49, Interstate Commerce Act. Under section 1, paragraph 18 of Title 49, it is provided that no such carrier "shall abandon all or any portion of a line of railroad or the operation thereof unless and until there shall first have been obtained from the commission a certificate" of public convenience.

This being so, a State cannot, as would be done by the instant proposed measure, destroy a substantial part of the line of a railway carrier so as to render it difficult or impossible for it to carry out those duties which may devolve upon it as a part of the railroad system of the United States, and which it is required to perform by said Code, Title 49, pars. 1–41 (see *Kansas City So. Ry. Co.* v. *Kaw Valley Drainage Dist.* 233 U. S. 75, 78).

To take by eminent domain so great a part of the location of a railroad as is indicated in the instant measure is virtually to cripple or destroy it and to take away its franchise. A State may not so interfere with an instrument of interstate commerce.

Even if the rights and interests of the railroad in the bed and tracks on the street level of Atlantic Avenue may be acquired by purchase, under the bill, with the approval of the Interstate Commerce Commission, which approval would be an essential prerequisite of a purchase, the bill would still be unconstitutional in its present form, for it cannot be gathered therefrom that such rights and interests would be acquired and paid for to effectuate a public purpose, for which alone public money may be spent. Their subsequent conveyance, provided for in the bill, to the city of Boston could not well be taken as indicating any such public purpose, for a municipality has no power to make use of rights and interests which can be effectuated only by the operation of a railroad. The bill might in

this respect be clarified by a legislative declaration therein that the authorized purchase was for highway purposes, to make available the use of all of Atlantic Avenue in the city of Boston for the traveling public.

This measure as now drawn, if enacted into law, would not be constitutional under the provisions of either the Federal or State Constitutions.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Constitutional Law — Power of Legislature — Nuisance.

A proposed bill which declares that the use of property owned by two particular corporations is a nuisance, and provides for an abatement, would be unconstitutional if enacted into law.

JUNE 5, 1935.

Hon. ALBERT F. BIGELOW, *Chairman, House Committee on Ways and Means.*

DEAR SIR: — The House Committee on Ways and Means inquires whether House Bill No. 1803, if enacted into law, would be unconstitutional.

The Legislature is authorized by the Constitution (pt. 2d, c. I, § I, art. IV) "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances . . . as they shall judge to be for the good and welfare of this commonwealth."

Under this grant of authority many laws have been enacted protecting the health and safety of the people, especially in limiting the use of property in certain respects deemed to be injurious to the public. It is well established that the Legislature may within certain limits restrict the uses to which property may be put. *Sawyer* v. *Davis*, 136 Mass. 239; *Rideout* v. *Knox*, 148 Mass. 368, 372; *Miller* v. *Horton*, 152 Mass. 540, 546.

The limitations on the power of the General Court to determine and order the abatement of nuisances have been settled as each specific case has arisen, and definite limits for the exercise of such authority have never been fixed by our Supreme Court. *Bacon* v. *Boston*, 154 Mass. 100, 102; *Commonwealth* v. *Parks*, 155 Mass. 531.

The landowner, however, has certain rights incidental to his proprietary interests which must be respected and cannot be taken away without compensation. *Commonwealth* v. *Alger*, 7 Cush. 53, 85. *Lentell* v. *Boston & Worcester St. Ry. Co.*, 202 Mass. 115, 119.

The proposed legislation, however, in my opinion, is violative of the terms of the Federal and the State Constitution. It selects property owned by two corporations in a certain district, and not only attempts by a legislative fiat to adjudicate that the use made of the property constitutes a nuisance, but it attempts to go further and order the abatement of a nuisance in one of two ways. There is, however, no such authority in the Legislature to deal with real estate in the manner proposed. *Belmont* v. *New England Brick Co.*, 190 Mass. 442; *Durgin* v. *Minot*, 203 Mass. 26. Accordingly, I answer your question in the affirmative.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Constitutional Law — Workmen's Compensation — Compulsory Insurance.

A bill requiring that every policy insuring an employer against liability for injury to employees must contain insurance under the provisions of the Workmen's Compensation Law would not be unconstitutional, if enacted.

JUNE 6, 1935.

PHILIP SHERMAN, Esq., *Chairman, House Committee on Bills in the Third Reading.*

DEAR SIR: — You request my opinion as to the constitutionality of House Bill No. 1292, entitled "An Act to safeguard and extend the Workmen's Compensation Law by making void other employee insurance contracts."

This bill provides for inserting in G. L. (Ter. Ed.) c. 152, the Workmen's Compensation Law, a section, to be numbered 54, reading as follows: —

"Every contract or agreement hereafter entered into the purpose of which is to insure an employer in whole or in part against liability on account of injury or death of an employee, other than a domestic servant or a farm laborer, shall be void unless it also insures the payment of the compensation provided by the workmen's compensation law."

Under our Workmen's Compensation Law an employer is not compelled to take out workmen's compensation insurance. He has a right, if he so elects, to rely upon his defense in an action at law. *Opinion of the Justices*, 209 Mass. 607; *Young* v. *Duncan*, 218 Mass. 346; *Gillard's Case*, 244 Mass. 47, 54. He would, however, still have this right to elect under the proposed law. The bill in question seeks to restrict the kind of insurance that he may obtain, and to say to the employer that if he does become insured, then whatever contract of insurance he purchases shall contain therein the provisions of G. L. (Ter. Ed.) c. 152, our Workmen's Compensation Law.

The crucial objection to such legislation is to determine whether or not it unduly restricts the freedom of contract as guaranteed by both the State and the Federal Constitution.

The specific agreements mentioned in the bill are undoubtedly contracts of insurance, as defined by our law. G. L. (Ter. Ed.) c. 175, § 2. The Legislature has broad regulatory powers over insurance companies, either through the exercise of the police power or by virtue of granting charters to domestic companies or in prescribing the conditions upon which foreign companies are allowed to do business in this Commonwealth. Insurance business has always been considered as so invested with a public interest as to promote legislative control and supervision, within certain well-established limits. *New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190; *Opinion of the Justices*, 251 Mass. 569.

The ultimate aim of the proposed legislation might be more effectively accomplished if an amendment were added thereto prohibiting any insurance company authorized to do business in this Commonwealth from entering into any contract of insurance with any employer for the protection of the safety of his employees unless the policy afforded protection to such employees in accordance with our Workmen's Compensation Law.

The right to contract is a fundamental right resting upon constitutional guaranties, but it "is subject to such reasonable restraints as the common

good or the general welfare may require." *Adair* v. *United States*, 208 U. S. 161, 174.

The General Court, in the interests of promoting the public welfare by furnishing adequate relief to injured employees or to their dependents in case of death, and by requiring the assumption of loss due to personal injuries or death, to be paid by the employers, is authorized to pass such legislation as it may deem necessary to secure a more equitable adjustment of losses incurred through accidents in industry. In the exercise of the police power, the General Court undoubtedly has the right to eliminate common law defenses; to put the expense of loss due to accidents upon the employer; to prescribe a scale of damages to be paid to injured employees; to set up and maintain a commission to administer such a system of law; and to provide for an adequate system of insurance; and, as a practical matter, to make it more desirable for an employer to accept the Workmen's Compensation Law than to rely upon his rights under the common law.

We think the intent of the Massachusetts Legislature in framing our present Workmen's Compensation Law was to have but two classes of employers, — those who accepted the benefits of this act and those who did not. An elaborate system of insurance was provided for those who had accepted the act. There were no provisions therein for insurance against some risks and not against others. No scheme of partial coverage was promulgated. The employer either had insurance to the full extent mentioned in the compensation act or his rights were to be determined under the common law, as modified by the act.

We think it clear that the Legislature, for the reasons more fully discussed in the cases hereinafter cited, has the right to require an employer who voluntarily accepts the compensation act to furnish insurance in accordance with this act.

The Federal Employers' Liability Act contained a provision prohibiting the making of agreements by those engaged in interstate commerce which in any way limited the liability imposed upon the railroads by the act. In *Second Employers' Liability Cases*, 223 U. S. 1, 52, it was stated: —

"If Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it."

The pertinent principles governing the right conclusion of the question now propounded have been settled in many decisions of the United States Supreme Court, and it has been uniformly held that the Legislature has sufficient control over not only insurance but especially over the relations between employers and employees, particularly from the aspect of the public interest, and that it may impose certain burdens upon the employers for the benefit of the employees, and thus promote the common welfare. *Hawkins* v. *Bleakly*, 243 U. S. 210; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152; *Arizona Employers' Liability Cases*, 250 U. S. 400; *Cudahy Co.* v. *Parramore*, 263 U. S. 418.

The validity of the Workmen's Compensation Act of New York (L. 1913, ch. 816, now ch. 67 of the Consolidated Laws) was challenged upon numerous substantial grounds. That legislation contained a provision that "every contract or agreement of an employer the purpose of which is to indemnify him from loss or damage on account of the injury of an em-

ployee by accidental means, or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it shall also cover liability for the payment of the compensation provided by this chapter" (§ 54, cl. 4). There is a striking similarity between that clause and the phraseology of the proposed bill. The New York act was upheld by a well-reasoned opinion. While it is true that no special or specific attack was made upon the clause last cited, yet it is equally true that the entire act, including the clause in question, was sustained. Under such circumstances, it can hardly be said that the integrity of that clause was merely a question "lurking in the record." It is also difficult to conceive, in view of the eminence of counsel and the formidable character of the attack made, that anything worth while was overlooked. *New York Central R.R. Co.* v. *White*, 243 U. S. 188.

The Legislature has power to prescribe the standard form of insurance policies, *New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190, and may prescribe the extent of coverage and the risks included, *Opinion of the Justices*, 251 Mass. 569. We see no substantial difference between requiring compulsory insurance for the protection of travelers than we do in the right of the Legislature to protect employees and to prescribe a system of industrial insurance that will provide an adequate system of relief at the expense of industry and forbid them and their dependents from becoming public charges.

Accordingly, I am of the opinion that the proposed bill, if enacted into law, would not be unconstitutional.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Constitutional Law — Taxation — Taxes on Profits made from Real Property taken or bought by the Commonwealth.

A bill permitting the rate of taxation of profits derived from the taking or purchase of real property by the Commonwealth to be at a different rate from taxation of profits on other classes of property would not, if enacted into law, be unconstitutional.

JUNE 7, 1935.

PHILIP SHERMAN, Esq., *Chairman, House Committee on Bills in the Third Reading.*

DEAR SIR: — Your committee has asked my opinion as to the constitutionality, if enacted into law, of House Bill No. 2084, entitled "An Act relative to the income taxation of gains from certain transactions in real property," which reads as follows: —

"Chapter sixty-two of the General Laws is hereby amended by inserting after section seven, as appearing in the Tercentenary Edition, the following new section: — *Section 7A.* Gains accruing to a person from the taking by eminent domain or purchase by the commonwealth, or by any political subdivision thereof, of real property for public purposes, provided such person acquired the same by purchase within a period of one year prior to such taking or purchase, shall be taxed at the rate of seventy-five per cent. Income received under this section shall, in case such damages or price was paid by a county, city, town or district, be remitted by the state treasurer to such county, city, town or district; otherwise it shall be retained by the commonwealth."

A tax on income derived from real estate is undoubtedly a tax on real estate. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; *Opinion of the Justices*, 220 Mass. 613, 623, 624; *DeBlois* v. *Commissioner of Corporations and Taxation*, 276 Mass. 437, 439. All property taxes prior to the adoption of Mass. Const. Amend. XLIV were required to be proportional and reasonable, in accordance with the constitutional mandate (c. I, § I, art. IV) wherein "full power and authority are hereby given and granted" to the General Court "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within" the Commonwealth. *Opinion of the Justices*, 266 Mass. 583, 585. This provision required each citizen to contribute to the common burden in the ratio that the value of his property bore to the total value of all the property upon which the tax was laid. Such a basis for taxation was predicated upon the principle that the benefit which each person derives from the government has direct relation to the amount of property he possesses and enjoys under its sanction and protection. *Oliver* v. *Washington Mills*, 11 Allen, 268, 275; *Opinions of the Justices*, 195 Mass. 607, 613, and 220 Mass. 613, 618. A tax based upon one rate for realty and another rate for personalty, or which permitted different rates for personalty, was deemed to be violative of this constitutional mandate. *Opinion of the Justices*, 208 Mass. 616; *Perkins* v. *Westwood*, 226 Mass. 268.

Mass. Const. Amend. XLIV was adopted and ratified by the people in November, 1915. It provided that —

"Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property."

The previously existing limitation that property taxes should be proportional and reasonable was removed in so far as a proportional levy was involved. The amendment, however, substituted the requirement that the tax should be uniform instead of being proportional.

The tax, however, must still be reasonable. There are many who believe that awards in eminent domain cases are excessive in many instances and far above the real market value as determined by the various boards of assessors, which are bound under the sanctity of their official oath to fix "the fair cash value," which has been construed to be the fair market value. See *Massachusetts General Hospital* v. *Belmont*, 233 Mass. 190. Accordingly, the same identical standard of fair market value was the measure to be employed by both juries and assessors. Experience, however, shows that the valuations made by juries are usually higher than those fixed by assessors. It was probably with this thought in mind that the provision was made for tentative takings, so as to protect municipalities from this tendency of jurors. See St. 1929, c. 380. In the next instance, at least the Legislature has the right to determine the rate at which a tax is to be assessed, and its determination that the rate so fixed is a reasonable one is entitled to great weight with the Supreme Judicial Court, whose settled practice is to uphold the validity of a legislative act unless it is clear that it is contrary to constitutional provisions. *Commonwealth* v. *S. S. Kresge Co.*, 267 Mass. 145, 148; *Kneeland* v. *Emerton*, 280 Mass. 371, 383. However, there is

no place in our law for any confiscatory system of taxation or for "spoliation under the guise of exerting the power of taxing." *Dane* v. *Jackson*, 256 U. S. 589, 598.

With some hesitation, we think that the rate of seventy-five per cent, as provided by the proposed bill, may be deemed to be reasonable.

In the absence of any limiting statute, the grant of power to classify includes the right not only to select the subjects of taxation but to determine the basis upon which such classification shall be made. If the principle applied affords a reasonable and just ground for the division of persons and property and bears a fair and substantial relation to the object of the legislation, then such a taxing scheme is valid. Any classification resting on a real difference is sufficient. *Bell's Gap R.R.* v. *Pennsylvania*, 134 U. S. 232; *Michigan Central R.R. Co.* v. *Powers*, 201 U. S. 245; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146; *Tax Commissioners* v. *Jackson*, 283 U. S. 527.

If, however, such classification is capricious, fanciful and arbitrary, or not predicated on real, substantial distinctions, or if the taxing power is exercised in the spirit of prejudice or favoritism, then such a scheme is contrary to the Fourteenth Amendment to the United States Constitution and to the pertinent amendment to our State Constitution. *Missouri* v *Dockery*, 191 U. S. 165; *Cook* v. *Marshall County*, 196 U. S. 261, 274; *Kansas City So. Ry. Co.* v. *Road Improvement District*, 256 U. S. 658; *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535.

There is, however, a broader power of classification given to State Legislatures in matters of taxation than in many other fields of legislation. A strictly correct mathematical classification is practically impossible, although highly desirable, and the courts recognize that within reasonable bounds the Legislature may make those "discriminations which the best interests of society require." *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 331; *Keeney* v. *New York*, 222 U. S. 525; *Stebbins* v. *Riley*, 268 U. S. 137.

Mass. Const. Amend. XLIV limits the Legislature to a tax which is both reasonable and uniform. *Knights* v. *Treasurer and Receiver General*, 237 Mass. 493, 495.

This constitutional mandate requires that "such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property." The rate given in the proposed legislation is uniform and no inequality exists in that respect. *Opinion of the Justices*, 266 Mass. 583. In accordance with the amendment, an elaborate statutory system has been established, setting forth certain classifications of income taxable property with their respective rates of tax, and also deductions and exemptions. G. L. (Ter. Ed.) c. 62. This chapter, however, makes no provision taxing income derived from real estate, and no return is required to be filed in so far as rents are concerned. It is clear, however, that the word "income" is of sufficient significance to include not only rent but also any profits that may be acquired by a sale of the realty, *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 526, and that the Legislature, if it sees fit, might tax such income. If such procedure would result in double taxation, on the theory that a tax on income is really a tax on property, then the present bill could be readily amended by providing for a deduction from the tax due on an

income basis of the amount levied, assessed and collected upon a fair cash value of the property in accordance with G. L. (Ter. Ed.) cc. 59 and 60.

The instant amendment permits the rate fixed for incomes derived from property to be higher than those on incomes derived from other sources. Profits derived from the purchase or taking of real estate by the public may, we think, be reached for income tax purposes although no provision is made to tax the profits arising from voluntary sales to private individuals. Public necessity and convenience require the acquisition of private property for public purposes. The exigencies of the public requiring certain parcels of realty ought not to be commercialized. The profits of real estate operators in securing unilateral options, binding only on the owners of property which they believe will be taken, for the purpose of securing unconscionable profits through jury awards, should be curbed and terminated. The real occasion for the securing of such options is not merely the purchase of the real estate which, incidentally, the purchaser never intends to enjoy, but to secure a chance to bring a lawsuit for land damages. In fact, the latter is a predominating motive for securing such options in nearly every case. It is clear that the public welfare will be promoted by the elimination of those who speculate in such transactions to the great detriment of the public treasury.

There is no constitutional requirement that, if the State tax profits derived from property purchased or taken by the public, it must tax profits from all sales or transfers of real estate, including those made to private individuals. *Keeney* v. *New York*, 222 U. S. 525; *Citizens' Tel. Co.* v. *Fuller*, 229 U. S. 322, 332; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535.

The impartial application of the same amounts and methods, resulting in the law operating equally and uniformly upon all persons under similar circumstances, so that all members of the same class receive like treatment, satisfies the rule of equality in so far as taxation is concerned. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 160.

The present amendment was the result of a new theory prevailing in fixing another basis for taxation than upon the former principle of valuation of the property tax, and to substitute therefor a system that will place the burden upon the citizen to such extent in accordance with his ability to pay. *Opinion of the Justices*, 270 Mass. 593, 599, 600. If that principle is to be applied to the rate mentioned in the present bill, it then is apparent that there is no such disparity between the burden imposed and the benefits received so great as to amount to a palpable inequality or to indicate a classification not resting upon a rational basis.

The words of the amendment are not to be given an entire or restricted interpretation, but are to be understood in their common and ordinary signification, especially where, as here, we are concerned with the exercise of one of the great prerogatives of a sovereign power. *Raymer* v. *Tax Commissioner*, 239 Mass. 410; *Attorney General* v. *Methuen*, 236 Mass. 564, 573.

Even though the resulting tax may be both unequal and disproportionate, yet it is valid and permissible under the instant amendment if it is reasonable and uniform. *Knights* v. *Treasurer and Receiver General*, 237 Mass. 493, 495; *Opinion of the Justices*, 266 Mass. 583.

I am therefore of the opinion that the proposed bill, altered as above indicated, would not be unconstitutional if enacted into law.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Municipalities — Authority — Appropriations — Gratuities.

Municipalities have no power to appropriate and pay money as for gratuities.

JUNE 10, 1935.

Hon. JOSEPH W. BARTLETT, *Chairman, Emergency Finance Board.*

DEAR SIR: — You have requested my opinion relative to the validity of St. 1935, c. 130.

This act provides: —

"The city of Somerville may appropriate such sums, not exceeding, in the aggregate, fourteen thousand dollars, for use of the school savings bank of said city in paying to each depositor in such bank a sum equivalent to that part of the amount standing to his credit on the pass book issued to him by said city which was deposited by said school savings bank in the Somerville Institution for Savings on or before February second, nineteen hundred and thirty-two. All dividends received by or on behalf of said city on account of deposits made in said institutions for savings in the name of 'school savings bank city of Somerville' shall be paid forthwith into the treasury of said city."

The object of this legislation is apparently to save the school children of Somerville from any loss on their deposits made in the Somerville Institution for Savings, which is now in process of liquidation by the Commissioner of Banks, and to transfer any loss of these depositors to the city of Somerville. The situation presents a hardship to school children who can, undoubtedly, ill afford to bear any such loss in their deposits, no matter how meagre they might be, and will probably shake the confidence of these children in the lessons of thrift and economy which were evidently instilled into their minds by their teachers, and which resulted in their making the deposits in question. The case presents a real hardship and warrants genuine sympathy. The validity of the legislation, however, must be measured by a different standard.

It is familiar law that money raised by taxation constitutes a public fund, which can only be expended for public purposes. While there has been a tendency to include within the sweep of public purposes awards to certain persons who have rendered valuable and faithful public service, on the theory that such expenditure essentially promotes the public welfare and that aid to a particular individual is merely incidental, as "the public welfare alone must be the ground, as it is the only legal justification, for this kind of payment," *Opinions of the Justices*, 175 Mass. 599, 602, and 240 Mass. 616, yet, where the predominating purpose of the enactment demonstrates that the payments required to be made are not "anything else than 'mere gratuities or gifts to individuals,'" *Opinion of the Justices*, 211 Mass. 608, 615, or "where the only public advantage is such as may be incident and collateral to the relief of a private citizen," *Opinion of the Justices*, 175 Mass. 599, 602, 603, then it is clear that the General Court has no power to enact such legislation. "Municipalities have no power to appropriate money as gratuities to any persons, no matter how strongly public sympathy may be moved in their favor." *Whittaker* v. *Salem*, 216 Mass. 483; *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341.

Accordingly, I am of the opinion that St. 1935, c. 130, transcends the power of the General Court and is invalid.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages Control Commission — Licenses — Local Licensing Board — Appeal.

One not licensed as a common victualler cannot sustain an appeal from the refusal of a local licensing board to grant him a license to sell alcoholic beverages.

Only applicants for a license to sell alcoholic beverages have a right of appeal under G. L. (Ter. Ed.) c. 138, § 67, as amended.

JUNE 21, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You seek my opinion relative to the interpretation of certain provisions of G. L. (Ter. Ed.) c. 138 (as appearing in St. 1933, c. 376, § 2, as amended), and you ask two questions: —

"1. Does the wording of the first sentence of section 67 permit an applicant who does not possess a common victualler's license the right to appeal to this Commission for an alcoholic beverage license?

2. Does the wording which says, 'Any applicant for a license who is aggrieved by the action of the local licensing authorities in refusing to grant the same, etc.,' mean any license of any nature in connection either with the right to sell food as a common victualler or alcoholic beverages, or even entertainment?"

In connection with the foregoing questions you submit certain facts as pertinent to your inquiry. From an examination of the facts it appears that an appellant to your Commission, claiming to be aggrieved by the action of local licensing authorities, had made application in the early part of 1934 to the local licensing authorities for a license to sell wines and malt beverages at certain premises where he was at the time of his application duly licensed as a common victualler. This application for license to sell wines and malt beverages was denied by the local licensing authorities on April 12, 1934. On May 1, 1934, the appellant applied to the local licensing authorities for a renewal of his license as a common victualler. The local licensing authorities, apparently overlooking a statutory change with reference to the date of expiration of licenses of common victuallers, granted to your appellant a common victualler's license on June 4, 1934, which said license, under its express terms, was to extend to April 30, 1935. Under a change in the statutory law of the Commonwealth provision had been made that all licenses as common victuallers shall expire on the same date in each year, namely, December thirty-first (St. 1934, c. 171). On December 28, 1934, the appellant again applied for a license to sell wines and malt beverages. This application was denied by the local licensing authorities, the reason assigned by them for such denial being that the appellant had not advertised his application in a newspaper. Upon appeal to your Commission from the action of the local licensing authorities this appeal was denied on April 5, 1935, without prejudice, the reason assigned for such denial being the fact that the appellant had failed to advertise his application.

The business of being a common victualler is regulated and licensed under G. L. (Ter. Ed.) c. 140 (as amended by St. 1933, c. 92, and St. 1934, c. 171). Before the amendment by St. 1934, c. 171, licenses of common victuallers expired on April thirtieth of each year. Such licenses could be granted in other months than April, but the date of expiration in all cases would remain as April thirtieth next following the date of the granting of a license. G. L. (Ter. Ed.) c. 140, § 4. *Cheney* v. *Coughlin*, 201 Mass. 204.

Under the provisions of St. 1934, c. 171, amending G. L. (Ter. Ed.) c. 140, § 4, the date of expiration of all licenses of innholders and common victuallers was made coterminous with the date of expiration of all licenses for the sale of alcoholic beverages, namely, December thirty-first of each year. This act bore the emergency preamble and was approved by the Governor on April 27, 1934.

The words "common victualler" have been defined to mean the keeper of a restaurant or public eating house. "Because of the nature of the business, the keeper of such a place must be licensed by the proper authorities, and is required by statute at all times to be provided with 'suitable food for strangers and travellers,' and to have 'upon his premises the necessary implements and facilities for cooking, preparing and serving food for strangers and travellers.'" G. L. (Ter. Ed.) c. 140, §§ 2, 5 and 6. *Commonwealth* v. *Meckel*, 221 Mass. 70, 72.

G. L. (Ter. Ed.) c. 138 (St. 1933, c. 376, § 2), defines a restaurant as a "space, in a suitable building, leased or rented or owned by a person holding a duly issued and valid license as a common victualler under the provisions of said chapter one hundred and forty, and provided with adequate and sanitary kitchen and dining room equipment and capacity for preparing, cooking and serving suitable food for strangers, travelers and other patrons and customers, and in addition meeting and complying with all the requirements imposed upon common victuallers under said chapter one hundred and forty."

G. L. (Ter. Ed.) c. 138 (St. 1933, c. 376, § 2), provides: "*A common victualler duly licensed under chapter one hundred and forty to conduct a restaurant* . . . may be licensed by the local licensing authorities . . . to sell to travelers, strangers and other patrons and customers . . . such beverages to be served and drunk, in the case of a hotel or restaurant licensee," in dining rooms and other places designated within the compass of the statute.

On the facts stated by you in your communication the inference is drawn that when the applicant sought a license to sell wines and malt beverages, on December 28, 1934, he was duly licensed as a common victualler. That license, however, as common victualler expired by operation of law on December 31, 1934, and at the time of the appeal on January 2, 1935, and at the time your Commission denied his appeal on April 5, 1935, he was not entitled as a matter of law to a license to sell wines and malt beverages, because it appears that he was not licensed after December 31, 1934, as a common victualler.

It is clear from the foregoing that a common victualler licensed under G. L. (Ter. Ed.) c. 140, as amended, is one of a class to which a license may be granted under the sanction of G. L. (Ter. Ed.) c. 138, as amended, to sell alcoholic beverages. To be eligible to a license to sell alcoholic beverages in a restaurant, the applicant must show that he is duly licensed as a common victualler under the provisions of G. L. (Ter. Ed.) c. 140, as amended.

In view of all of the foregoing I answer your two questions as follows: —

Interpreting your first question as relating exclusively to the facts set forth in your communication, my opinion is that if an applicant for a license to sell alcoholic beverages in a restaurant was denied such a license by the local licensing authorities, and if upon his appeal to your Commission it appeared that such appellant was not licensed as a common victualler, the only course you could validly take would be to dismiss the appeal, as you would have no jurisdiction to act otherwise in the premises.

In answer to your second question, my opinion is that the words "any applicant for a license" must be interpreted to mean any applicant for a license to sell alcoholic beverages. Only applicants for licenses authorized by the terms of G. L. (Ter. Ed.) c. 138, as amended, come within the sweep of the language quoted from section 67 of that chapter.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages Control Commission — License — Bankruptcy — Assignee.

Liquor licenses do not constitute property passing to a trustee in bankruptcy.

Authority may be given to operate the business, until the end of the licensed period, to a receiver, trustee or assignee.

JULY 3, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You request an opinion on the following matters: —

"1. If bankruptcy proceedings should ensue, would the receiver or trustee in bankruptcy have the right to continue to conduct the licensed business under the license issued for such manufacture or sale of alcoholic beverages?

2. If the receiver or trustee in bankruptcy has no right to carry on the licensed business for the manufacture or sale of alcoholic beverages, or if such receiver or trustee chooses not to carry on the licensed business, what becomes of the license? Does it belong to the licensee and may it continue to be exercised by him, either on the licensed premises or, by virtue of an approved transfer, on some other premises?

3. If such licensee should make an assignment for the benefit of creditors, would the assignee for the benefit of creditors have the right to carry on the licensed business? If not, would the licensee still own the license, and might he continue to conduct the business under it, either by some arrangement on the licensed premises or by an approved transfer on some other premises?

4. Has the receiver or trustee in bankruptcy the right to continue the conduct of the business to the end of the license year, or must he dispose of the business and assets of the licensee as early as practicable in the winding up of the licensee's business?"

A license to sell intoxicating liquor is a mere privilege, to be enjoyed during the term mentioned in the license, providing that the conditions and restrictions therein contained are complied with. A liquor license is a mere personal privilege revocable at will or, as expressed in the enabling act, it is "a permit revocable at pleasure and without any assignment of reasons therefor" (G. L. [Ter. Ed.] c. 138, § 23, inserted by St. 1933, c. 376, as amended). Such a license continues only so long as the licensing authorities believe it is consistent with the public interests. They can be granted only to those found qualified to exercise the privilege therein conferred and who are found likely to observe the pertinent provisions of law. The inherent nature of such a grant does not render it an appropriate subject of traffic, barter or sale. In a sense, one of the essential elements of such a license is a certain degree of trust and confidence which is imposed by a public board upon the licensee, and the licensing authorities are given full power to deny such a permit to one who, in their opinion,

is not qualified to receive it or, after it is granted, to one who has shown that he is guilty of a breach of trust in violation of the terms of his license.

A liquor license is not so intrinsically connected with a business or the use of land that it can be said to become a part thereof, and, consequently, to pass as a transfer of the business or of the premises. *Quinn* v. *Middlesex Electric Light Co.*, 140 Mass. 109; *Lowell* v. *Archambault*, 189 Mass. 70, 72; *General Baking Co.* v. *Street Commissioners*, 242 Mass. 194; *Simon* v. *Meyer*, 261 Mass. 178, 183.

A liquor license being a mere personal privilege, issued because the licensee was found to be personally qualified, and subject to revocation if for any reason the person to whom it was granted was personally unable to continue in accordance with its terms, it is clear that such a privilege is neither assignable at common law nor transferable to a trustee in bankruptcy. *Commonwealth* v. *Lavery*, 188 Mass. 13, 14; *Kennedy* v. *Welch*, 196 Mass. 592, 595.

Strictly speaking, the personal representatives of a deceased licensee or his assignee or a trustee in bankruptcy can acquire no right, title or interest in a liquor license, as such.

Under former enactments, the licensing authorities in a few cities in this Commonwealth have permitted a transfer of the license to third persons and have, by their conduct, considered the license a salable asset. Such a usage in this State is referred to in the case of *Magullion* v. *Magee*, 241 Mass. 360, 367, where it appeared from the record that pocket licenses, so called, "were currently worth about $12,000." This practice upon the part of the licensing authorities to permit what is virtually a sale of the license by the trustee in bankruptcy has been before the Federal court on numerous occasions, wherein it has been stated as settled law that liquor licenses, having been authorized and issued under the police power of the State, do not constitute property passing to the trustee in bankruptcy; but where it appears that such a license has a recognized value for transfer purposes, and that such a transfer is permitted by the licensing authorities, then the trustee in bankruptcy can recover the transfer value of such a license. *Fisher* v. *Cushman*, 103 Fed. 860; *In re Beahn*, 212 Fed. 762.

Whether there is a present custom or usage on the part of the licensing authorities permitting a transfer of a liquor license under the present law, we do not know. There is, however, a provision in our license laws wherein the licensing authorities may increase the amount of the license fee where it appears in either probate or bankruptcy proceedings that the license heretofore granted had "acquired any monetary value in excess of the license fee" (§ 23). It may be that this provision was added on the assumption that the custom above referred to was to be continued under the present law. There is, however, another provision in the licensing act providing for the manufacture, keeping and sale of intoxicating liquor by a trustee in bankruptcy or by a common law assignee. This provision is found in G. L. (Ter. Ed.) c. 138, § 2 (as appearing in St. 1933, c. 376, as amended). This section was evidently passed upon the assumption that rights granted under a license were not transmissible or transferable.

I am therefore of opinion that the right to conduct the licensed business does not pass to the receiver or trustee in bankruptcy or to the common law assignee; and that such officers may be authorized, under the provision last above referred to, to continue the business, although in no case does the license pass as an asset of the estate. It would further seem that the license continues as a personal privilege of either the assignor or the

bankrupt, as the case may be, until the end of the licensed term, unless the licensing authorities may exercise the power imposed upon them by law and formally revoke the license.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Secretary of the Commonwealth — Corporation — Illegal Purpose — Charter.

A corporation formed for the purpose of acting for others in betting money on races is not entitled to the issuance of a charter.

JULY 19, 1935.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You request an opinion of me as to whether or not you are obliged to issue a charter for a corporation the purpose of which you state to be as follows: —

"To receive money as agent from any and all persons for the purpose of betting the same according to the instructions of said persons, and for a consideration to bet said money on behalf of the person depositing the same and as his agent, at any race course where betting may be legal, either within the Commonwealth or without the same, said betting within the Commonwealth to be conducted in accordance with the provisions of chapter 374, Acts of 1934, and any acts in amendment thereof; to receive any moneys won on said betting on behalf of said persons, to do all things which may be necessary or convenient for the purpose of carrying out the aforesaid; to buy, sell, rent, lease, hold or otherwise deal in any real estate reasonably incidental to the carrying out of the aforesaid purposes, and to do any other business which any corporation may be organized to do under the provisions of chapter 156 of the General Laws of the Commonwealth of Massachusetts."

The recent statute governing horse and dog racing in this Commonwealth expressly prohibits any form of gambling other than the so-called pari-mutuel or certificate method of wager, and, further, confines such wager to the place of the race meeting. This statute also makes the licensee of the meeting a custodian for the funds, and imposes upon him the duty to pay the winning patrons, after making certain specified deductions.

It is unnecessary to determine whether the operation of the proposed corporation would be contrary to the spirit or letter of our statutes governing horse and dog racing, because it is clear that the performance by a corporation of the aforesaid purposes, in the manner therein designated, would constitute a violation of G. L. (Ter. Ed.) c. 271, § 17, which definitely inhibits the doing by the corporation of the things above designated.

I am therefore of the opinion that you are not legally obliged to issue a charter to enable a corporation to carry out the above-proposed purposes.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages Control Commission — License — Population of a Town.

Selectmen are authorized to grant a seasonal license for the sale of intoxicating liquor, under G. L. (Ter. Ed.) c. 138, §§ 12 and 15, if the population of their town, as of July 10, 1935, is as large as specified in section 17 of said chapter 138.

JULY 24, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You inform me that on November 6, 1934, the citizens of Charlemont voted "no" on the question of authorizing the granting of a license for the sale of intoxicating liquor for the calendar years 1935 and 1936; and that, although the licensing authorities did not estimate prior to April 1, 1935, the temporary resident population as of July 10, 1935, they now desire to issue a seasonal license. You request an opinion whether such failure to make said estimate of the temporary population deprives the board of selectmen of authority to issue a seasonal license.

G. L. (Ter. Ed.) c. 138, § 17, as amended, in so far as now material, provides: —

"In any city or town which has an increased resident population during the summer months, the local licensing authorities may make an estimate prior to April first in any year of such temporary resident population as of July tenth following, and one additional license, under section twelve to be effective from April first to October thirty-first, only, may be granted for each unit of one thousand, or additional fraction thereof, of such population as so estimated, and one additional license under section fifteen to be effective from April first to October thirty-first, only, may be granted for each population unit of five thousand or additional fraction thereof, of such population as so estimated."

The selectmen of the town of Charlemont were authorized to hold a special town meeting in the current year to permit the inhabitants to vote anew on the question of issuing licenses for intoxicating liquors in the said town, and the result of the vote at the said special town meeting should have the same effect as if taken in the State election of the preceding November.

It should be noted, in the first place, that this act did not become effective sooner than May 23, 1935, and that the town, in the preceding November, voted not to grant licenses. There was prior to May 23, 1935, no occasion for making an estimate of what the temporary population would be on the following July tenth. Moreover, the act last mentioned expressly provided that the votes at the special town meeting, which could only, of course, be held subsequent to the effective date of the act, "shall have the same force and effect from and after said meeting as if taken at the last biennial state election."

Accordingly, the licensing authorities could not be reasonably expected to comply literally with the provisions of section 17 by making the estimate prior to April 1, 1935. The Legislature, however, did not intend that such an estimate should be made in the town of Charlemont at a time when the vote of November 6, 1934, was still binding on the town and when it was uncertain that any legislation would be enacted to permit a special town meeting. It is inconceivable that the Legislature intended to give authority to the board of selectmen of Charlemont to grant licenses for the sale of intoxicating liquors by an act which, on

account of the last-mentioned provisions of section 17, could never during 1935 become operative in that town.

Barrenness of accomplishment must never be imputed to the legislative branch of our government. The authority of the board of selectmen as the licensing authority of the town of Charlemont to grant licenses, including seasonal licenses, is predicated on the result of the vote of June 6, 1935, and the instant question now calling for decision must be decided as if this last-mentioned vote had been taken on November 6, 1934.

It is familiar law that the time within which an act is prescribed to be performed by a municipal officer or board is usually directory only, and that statutes defining the time of performance are ordinarily construed as not imposing any limitation upon the authority of such officer or board. Consequently, the performance of the act at a time other than that designated in the statute has been held to be valid. *Pond* v. *Negus*, 3 Mass. 230. *Williams* v. *School District*, 21 Pick. 75. *Russell* v. *Wellington*, 157 Mass. 100. *Rutter* v. *White*, 204 Mass. 59, 61. *Ashley* v. *Three Justices*, 228 Mass. 63. *Trustees, Andover Seminary* v. *Visitors, Phillips Academy*, 253 Mass. 256.

This rule of law has found frequent application in contested election cases, where the tendency of the court has been to declare the statutory provisions as being directory or permissive whenever reasonably possible to do so. In order not to disenfranchise a voter or to nullify the expressed will of the majority, likewise the vote of the town meeting of June 6, 1935, should be considered effective unless in violation of some mandatory provision of law. *Blackmer* v. *Hildreth*, 181 Mass. 29. *Ray* v. *Registrars of Voters of Ashland*, 221 Mass. 223. *Parrott* v. *Plunkett*, 268 Mass. 202. *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271.

The previous statutes governing the sale of intoxicating liquor provided that the licensing board "may, in April, grant such licenses, to take effect on the first day of May following." R. L. c. 100, § 12. It has been expressly decided that the exercise of authority in April was not a condition precedent to the validity of the issuance of a license, and that a license granted in May was effective. *Cheney* v. *Coughlin*, 201 Mass. 204.

In principle the case last cited seems to govern the present situation. Both section 17 of said chapter 138 and St. 1935, c. 281, must be construed together to form, if possible, one harmonious legislative program. The Legislature, in enacting chapter 281, must have had in mind the provisions of said section 17.

Accordingly, the time within which the board of selectmen, as the licensing authorities of the town of Charlemont, should make an estimate of the temporary population on the following July tenth is merely directory. In fact, they are better able now to make a more correct approximation of this temporary population than they were prior to April 1, 1935.

If the applicant is willing to now accept and pay for a seasonal license, which must expire October thirty-first, he cannot complain that he did not have the use of his license during the entire period from April 1, 1935.

I am therefore of the opinion that the selectmen of Charlemont are authorized to grant a seasonal license of the kind described in sections 12 and 15 of chapter 138, provided the estimated population of the town, as of July 10, 1935, is sufficiently large to meet the numerical requirements of said section 17.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Registration in Medicine — Applicant — Degree — Equivalent.

JULY 24, 1935.

Board of Registration in Medicine.

GENTLEMEN: — There being a vacancy in the position of Director of the Board of Registration in Medicine, your Board, through its secretary, has in substance asked me to advise you as to whether you may accept a certain document signed by the dean of the medical faculty of a German university, — to the effect that one who is an applicant for registration as a physician in Massachusetts has passed his examinations in said university and that on the basis of such examinations he would be entitled to a doctor's degree in medicine, but that under a recent law of Germany such applicant cannot be given the degree by said university because he is a "non-Aryan", — as the "equivalent" of such degree, as the word "equivalent" is used in G. L. (Ter. Ed.) c. 112, § 2, in the following portion: —

"Each applicant who shall furnish the board with satisfactory proof that . . . he has received the degree of doctor of medicine, or its equivalent, from a legally chartered medical school having the power to confer degrees in medicine, . . . shall be registered."

The words "its equivalent," as used in said section 2 as quoted above, refer to the medical degree and not to the characterization of the medical course as of "four years of thirty-two weeks each," made later in the section, and I am of the opinion that as a matter of law you may, if it accords with your judgment as to the facts, accept the said document, under the circumstances as to which you have advised me, as the equivalent of a degree of doctor of medicine.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Hunting — Cities and Towns — Regulation.

JULY 25, 1935.

Hon. SAMUEL A. YORK, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion on the following questions: —

"1. Can a city or town legally prohibit hunting within its limits, notwithstanding an open season prescribed by the Legislature?

2. Can a city or town place restrictions upon hunting within its limits, in addition to those provided in the State laws by the Legislature, in the nature of requiring written or oral permission from landowners or public officials?"

I answer both questions in the negative.

The several cities and towns are agencies of the government, largely under the control of the Legislature. The powers and duties of cities and towns, except so far as they are specially provided for in the Constitution, are created and defined by the Legislature. The Legislature has from time to time conferred upon cities and towns power to make by-laws for the direction and management of their prudential affairs, and for other well-defined purposes. See G. L. (Ter. Ed.) c. 40, § 21. The Legislature has from time to time also conferred upon cities and towns authority to make by-laws in addition to those authorized in said section 21 of chapter 40. It is unnecessary to enumerate them here. It is sufficient to say that the

Legislature has not conferred authority on cities and towns to regulate hunting within the Commonwealth or the subdivisions thereof.

The right to regulate hunting within the Commonwealth rests wholly in the Legislature. Any attempt by a city or town to regulate hunting would be beyond the scope of authority conferred on cities and towns by the Legislature.

Yours very truly,
PAUL A. DEVER, *Attorney General.*

Milk — Legal Standard — Solids — Fat.

Prosecutions may be made under G. L. (Ter. Ed.) c. 94, § 37, if milk be below the legal standard, either as to solids or fat.

JULY 31, 1935.

Hon. EDGAR L. GILLETT, *Commissioner of Agriculture.*

DEAR SIR: — You have asked my opinion on the following question, to wit: Whether prosecution may follow, under G. L. (Ter. Ed.) c. 94, § 37, in cases where milk is found to be below the legal standard for milk solids and milk fat separately, or whether, in order to prosecute, it must be found to be below the standard in both respects.

The word "and" when used in a criminal statute is construed as "or" when the spirit and reason of the law require and justify it. While the words are not strictly interchangeable, they are regarded as convertible if the sense so requires, even in a criminal statute, where strict construction usually prevails.

The purpose of the statute in question is to secure to the public milk attaining a certain standard of purity and strength. It is intended to protect the public from purchasing milk naturally deficient rather than milk which has been adulterated or milk from which cream has been removed.

To construe the word "and" as used in the conjunctive sense would be to defeat the purpose of the statute, as it would permit the sale of milk below the standard in solids provided it was up to the standard in fat, and vice versa.

In my opinion, the word "and" in this statute is used in the disjunctive sense, and, if milk is found to be deficient in either solids or fat, prosecution may follow.

Yours very truly,
PAUL A. DEVER, *Attorney General.*

Labor — Weekly Wages — Private Charitable Institutions.

Private charitable institutions, hospitals and banks come within the provisions of St. 1935, c. 350, relative to the payment of wages weekly.

AUG. 6, 1935.

Miss MARY E. MEEHAN, *Acting Commissioner of Labor and Industries.*

DEAR MADAM: — You have requested my opinion as to "whether employees in private charitable institutions, private hospitals and banks" come within the provisions of St. 1935, c. 350. I am of the opinion that they are included.

G. L. (Ter. Ed.) c. 149, § 148, as amended by St. 1932, c. 101, § 1, which is the section that the new statute supersedes, limits the applica-

tion of the law pertaining to the payment of weekly wages to certain designated industries. The changes in the new section are sweeping, and it now applies to all industries with the exception of agricultural work and domestic service. The provision applicable to the departments, officers, boards and commissions, employees, mechanics, workmen and laborers of the Commonwealth, providing for payment on other than a weekly basis when the employees themselves request in writing, is the only exception to the act. There is no provision exempting the institutions set forth in your communication; consequently, when St. 1935, c. 350, becomes effective it will be necessary for them to pay weekly wages.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Emergency Finance Board — Loans on Tax Titles — Commonwealth.

A loan to a municipality on a tax title, under St. 1933, c. 49, § 2, cannot be authorized until the collector's deed has been executed and recorded.

AUG. 7, 1935.

Emergency Finance Board.

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

"Whether the Emergency Finance Board can authorize a loan from the Commonwealth in a sum not exceeding the aggregate of the tax titles, taken or purchased in a city or town, recorded in their books as such, at a time when the tax collector's deeds have not been recorded with the registry of deeds."

I am of the opinion that your Board cannot authorize a loan under such conditions. The statute in question, St. 1933, c. 49, § 2, contains the following language: —

"and the board may, if in its judgment the financial affairs of such city or town warrant, grant its approval to the borrowing as aforesaid, of specified sums not at any time exceeding, in the aggregate, the total amount represented by tax titles taken or purchased by such city or town and held by it; . . ."

The determining factor is the construction of the words "and held by it." Had the Legislature intended to confer upon cities and towns power to borrow money at the time of the taking or at the time of the purchase, they could well have omitted the words "and held by it." I am of the opinion, however, that they contemplated something further to be done by the cities and towns. Titles based upon tax sales are closely scrutinized. Exact compliance with the provisions of the statute is necessary.

G. L. (Ter. Ed.) c. 60, § 45, provides that the deed of the collector of taxes shall not be valid unless recorded within sixty days after the sale. This provision of the statute is clear; it is mandatory; it requires that the deed must be recorded within sixty days after the auction sale, and the collector's deed does not convey title unless this requirement is complied with. See the case of *Wood* v. *Wilson*, 256 Mass. 340.

The acts necessary for the establishment of a good tax title in a municipality are many. It is unnecessary to enumerate them here. It is sufficient to say that the basis for the establishment of a good tax title is not complete until the collector's deed is recorded, and then only when

all other requirements of the statute are met with precision. A tax title is not held by the city or town until the collector's deed is duly executed and recorded, and, under the act, your Board cannot authorize a loan until this is done.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Sentence — Parole — Payment of Fine.

An inmate of the State Prison may be held in custody after he has been given a permit to be at liberty by the Board of Parole subject to the payment, in the manner authorized by G. L. (Ter. Ed.) c. 127, § 144, of a fine which was part of the original sentence.

AUG. 9, 1935.

Hon. ARTHUR T. LYMAN, *Commissioner of Correction.*

DEAR SIR: — You ask my opinion relative to the right of the warden of the State Prison to hold an inmate of the State Prison in custody after he was given a permit to be at liberty by the Board of Parole subject to the payment of a fine which had been imposed by the court as a part of his sentence. As I interpret the facts set forth in your communication they are as follows: On November 10, 1932, a defendant was sentenced, for the crime of abortion, in the Superior Court at Boston to a term of two and one-half to four years in State Prison and to pay a fine of two hundred and fifty dollars. On May 9, 1935, he was given a permit to be at liberty by the Board of Parole on condition that the fine of two hundred and fifty dollars be paid. The prisoner has no money with which to pay the fine. Three months after the date of his permit to be at liberty, he being still held in custody, he was brought before the Municipal Court of the City of Boston, under the provisions of G. L. (Ter. Ed.) c. 127, § 146, to be discharged if unable to pay the fine because of lack of means. The clerk of the court refused to present the matter to a justice of the court for action, on the ground that G. L. (Ter. Ed.) c. 127, § 146, had application only to prisoners confined in common jails and houses of correction, and that the court had no jurisdiction in the premises.

G. L. (Ter. Ed.) c. 272, § 19, under which the prisoner was sentenced to State Prison, provides that upon conviction of the crime of abortion, where the woman does not die in consequence thereof, the penalty shall be "by imprisonment in the state prison for not more than seven years and by a fine of not more than two thousand dollars." In the instant case the court imposed a sentence of not less than two and one-half years nor more than four years and a fine of two hundred and fifty dollars. This fine is a part of the sentence. It is not separable from it. In imposing sentence the court followed the requirements of the statute.

G. L. (Ter. Ed.) c. 127, § 144, provides: —

"A prisoner confined in a prison or place of confinement for non-payment of a fine or a fine and expenses shall be given a credit of fifty cents on such fine or fine and expenses for each day during which he shall be so confined, and shall be discharged at such time as the said credits, or such credits as have been given and money paid in addition thereto, shall equal the amount of the fine or the fine and expenses; and in such

case no further action shall be taken to enforce payment of said fine or fine and expenses."

G. L. (Ter. Ed.) c. 127, § 146, as amended by St. 1932, c. 221, concerning the discharge of poor prisoners who are unable to pay fines, by the clear import of its terms relates only to prisoners confined in common jails and houses of correction.

I am therefore of the opinion that so long as the fine remains unpaid the warden of the State Prison is required, under the law, to hold the inmate in custody subject to the provisions of G. L. (Ter. Ed.) c. 127, § 144, hereinbefore set forth.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Minimum Wage Commission — Authority — Public Employees — Private Employees.

Under G. L. (Ter. Ed.) c. 151, the Commission has no authority with relation to employees of political subdivisions in the public service, nor of institutions under public control.

AUG. 21, 1935.

Miss MARY E. MEEHAN, *Acting Commissioner of Labor and Industries.*

DEAR MADAM: — You inform me as to the creation of a wage board under the new chapter 151 of the General Laws, which was inserted by St. 1934, c. 308, and inquire whether it is "within the power and authority of the Minimum Wage Commission to approve and transmit to the Commissioner, the Commissioner in turn to include within the scope of a directory order establishing minimum fair wage rate for women and minors . . ., employees in hospitals or other institutions established and maintained by the State, county or municipality, or maintained in whole or in part by contributions from State, county or municipal funds or by public or private donations and contributions."

It has always been the law in this State that the Commonwealth can be impleaded in its own courts only in the manner and to the extent expressly prescribed in the statutes. *Nash* v. *Commonwealth*, 174 Mass. 335; *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137; *Glickman* v. *Commonwealth*, 244 Mass. 148. The chapter in question is utterly barren of the slightest indication of any legislative intent to include within its sweep employees of the Commonwealth.

Employees of counties, cities and towns are in the public service. Statutes governing employees in general have usually been construed as not to include public employees, and where the latter class was included the Legislature has done so by appropriate phraseology. Sometimes this has been accomplished by legislation pertaining only to public employees. See II Op. Atty. Gen. 175; VII *ibid.* 145; VIII *ibid.* 585.

Whether hospitals are supported by public or private donations and contributions is significant in determining the character of the institution. The pertinent inquiry always is as to whether or not a public board or a public official has the supervision and control of such an institution. If the management and administration is vested in a public board or a public official, then the institution is of a public nature, and its employees would be exempt from the provisions of the chapter in question. If, on the other

hand, the institution is under private administration and control, its employees would come within the sweep of the chapter in question. VII Op. Atty. Gen. 145.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Public Works Department — Structures in Tidewaters — Licenses — Repairs.

The Department of Public Works has authority to determine the safety of licensed structures in tidewaters, and to require that they do not become a menace to the public using them; but may not determine and require a specific manner of making repairs.

AUG. 21, 1935.

HON. WILLIAM F. CALLAHAN, *Commissioner of Public Works.*

DEAR SIR: — You request my opinion as to the authority of your department to require owners of licensed structures in tidewaters to keep the same in good and safe condition, and especially as to the power of your department to compel such owners to repair the damage to the pile foundations caused by the destructive action of marine borers, so called.

The proprietary interests in the locations of these structures was formerly the subject of frequent litigation, but the rights of private individuals and the general public have now been well established. Since the colonial ordinance of 1641–47, title of the owner of the uplands extends to the low-water mark, except in cases where the distance between high-water mark and low-water mark is more than one hundred rods, and, in such cases, then for a distance of one hundred rods from the high-water mark. The said ordinance, besides making the aforesaid grant of the flats seaward from the high-water mark to the above extent, also reserved to the Commonwealth an easement in the interests of the public for the purpose of navigation, fishing and fowling. *Commonwealth* v. *Alger*, 7 Cush. 53; *Butler* v. *Attorney General*, 195 Mass. 79; *Jubilee Yacht Club* v. *Gulf Refining Co.*, 245 Mass. 60.

The title of the littoral owner of the land between high-water mark and low-water mark is perfect, excepting only this dominant easement in the Commonwealth, by virtue of which the latter has extensive powers of regulation and control for the purpose of maintaining and enforcing this public easement. *Attorney General* v. *Woods*, 108 Mass. 436; *Attorney General* v. *Jamaica Pond Aqueduct Corp.*, 133 Mass. 361; *N. Ward Co.* v. *Street Commissioners*, 217 Mass. 381.

The legislative history of the supervision and control of the rights and interests of the general public in the foreshore has been so fully outlined and illustrated by an ample citation of authorities by my predecessors that it is now unnecessary to review the matter further. I Op. Atty. Gen., 418; IV *ibid.* 525.

In so far as the structures in question extend beyond low-water mark, or, in any case, beyond the established harbor line, then in neither case is there any private proprietary interest in the location because the complete title thereto is in the Commonwealth. "The waters and the land under them beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the

Legislature in these particulars has been treated as paramount to all private rights, and subject only to the power of the Government of the United States to act in the interest of interstate or foreign commerce." *Home for Aged Women* v. *Commonwealth*, 202 Mass. 422, 427.

Tidewaters constitute public waterways, and any structure not authorized by law and which obstructs or interferes with the dominant easement of the public constitutes a public nuisance. *Attorney General* v. *Woods*, 108 Mass. 436; *Fuller* v. *Andrew*, 230 Mass. 139.

If, because of the action of marine insects, the piling has become unsafe, your department is not required to await a collapse of the superstructure, but should, as soon as it appears that the destruction is imminent, proceed to abate a situation which imperils the public safety and actually constitutes a public nuisance. A decree preventing the threatened injury is the appropriate remedy. *Attorney General* v. *Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, 363; *Hotel & Railroad News Co.* v. *Clark*, 243 Mass. 317, 322.

A licensee is protected only when he maintains his premises or conducts his business in compliance with the terms and conditions of his license. *Murtha* v. *Lovewell*, 166 Mass. 391; *Strachan* v. *Beacon Oil Co.*, 251 Mass. 479. The authority of your department does not end with the approval of the plans and the location. It has ample regulatory power to see that the owner does not permit the structure to become so dilapidated as to constitute a menace to the use by the public of the adjacent tidewaters. "If the thing granted was afterwards maintained in a manner so unreasonable and improper as to create a nuisance, a person injuriously affected thereby would have a remedy at law or in equity." *Sawyer* v. *Boston Elevated Ry. Co.*, 243 Mass. 469, 471; *McCarthy* v. *Shaheen*, 264 Mass. 90.

You point out in your letter that cities and towns are not authorized to enact ordinances or by-laws regulating the construction of bridges, quays and wharves. This exemption appears in our present laws (G. L. [Ter. Ed.] c. 143, § 3) and has been carried through successive compilations of our statutes since the original enactment (St. 1872, c. 243). The reason for this exemption is clear. By St. 1866, c. 149, control over structures in tidewaters was granted to the Board of Harbor Commissioners, and, by St. 1872, c. 236, power to issue licenses for the erection of such structures was given to this board. Consequently, jurisdiction over such structures having been given to such a board, it was the legislative intent to exempt them from further control by cities and towns.

Your department has been given general care and supervision over the tidewaters and all structures therein, and is authorized to make such surveys, examinations and observations as it may deem necessary in the interests of the public welfare. It is manifest, from the power that is delegated to you, that if it appears that on account of the condition of any structure located in tidewaters a serious interference, in fact or imminently, results to the rights of the public thereon, you are authorized to take proceedings to eliminate such a situation. The failure to keep the premises in a safe condition would warrant a revocation by you of the license by your department, if such a license was granted subsequent to 1868, as provided for in G. L. (Ter. Ed.) c. 91, § 15. A remedy for forfeiture of the license, under the conditions therein mentioned, is provided for in section 16.

The Supreme Judicial Court has jurisdiction in equity upon an information filed by the Attorney General, as provided for in section 57. This

remedy, however, is merely cumulative, and the Attorney General would have a right to bring an information to protect and enforce the public interests. *Attorney General* v. *Woods*, 108 Mass. 436; *Attorney General* v. *Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, 363, 364.

In reply to your inquiry as to whether or not your department would have the right to order the owner of a wharf to make the same safe by adopting a specific method of repair, I wish to advise you that the only authority inherent in your department is to see that the premises are rendered safe, and that it is without power to determine the specific manner in which such repairs should be made. *Belmont* v. *New England Brick Co.*, 190 Mass. 442; *Durgin* v. *Minot*, 203 Mass. 26.

I am therefore of the opinion that your department has full authority to make a complete investigation to determine the stability and safety of any structure built over tidewaters; and that if the same is found unsafe and to constitute a threatening menace to the public in the beneficial use of the easement above mentioned, then you would have a right to proceed in the manner herein designated, or to report the facts to this department for the commencement and prosecution of appropriate proceedings.

The jurisdiction of the Commonwealth is subject to the control of the United States in the interests of interstate and foreign commerce, but there is nothing here decided contrary to the governing Federal laws. U. S. C. A., Title 33, §§ 403, 404, 406.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages Control Commission — Local Licensing Board — Appeal.

A motion to reconsider an unfavorable finding upon an application for a license, passed by a local licensing board more than five days after its original adverse finding, is void.

AUG. 29, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You inform me that the licensing board of the city of Medford, on July 12th, refused to issue an alcoholic beverage license, and forthwith notified the applicant; that this board, on August 13, 1935, passed a motion to reconsider its action taken on July 12th, and, on August 19th, the applicant filed an alleged appeal with your Commission. You request an opinion as to whether a valid and effective appeal has been taken to your Commission from the aforesaid action of the Medford licensing board.

The right to an appeal by one whose application for a liquor license has been denied by the local licensing authority is created, regulated and determined by the statute. The subject is devoid of any common law aspects. The Legislature furnished a remedy, recourse to which is predicated entirely upon taking the appropriate action within the time prescribed. The statute (G. L. [Ter. Ed.] c. 138, § 67) expressly provides that any applicant who is aggrieved by the action of the local licensing authorities "may appeal therefrom to the commission within five days." "Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations and the remedy are, therefore, to be treated as limitations of the right." *The Harrisburg*, 119 U. S. 199, 214; *McRae* v. *New York, New Haven & Hartford R.R. Co.*, 199 Mass. 418.

Furthermore, the statute having furnished a plain and adequate provision relating to taking and perfecting an appeal, no other or different proceeding is available to an appellant. The remedy thus provided is exclusive and not cumulative. *Boston* v. *Edison Elec. Ill. Co.*, 242 Mass. 305; *School Committee of Lowell* v. *Mayor of Lowell*, 265 Mass. 353.

Assuming, without deciding, that a vote granting an applicant leave to withdraw is a proper subject for reconsideration, *Mansfield* v. *O'Brien*, 271 Mass. 515, yet the board could not reconsider a matter which, by a lapse of time, had ripened into a final conclusion. The action of the licensing board on August 13th could not animate or vivify a matter which was then beyond any possible legal resuscitation. *Hack* v. *Nason*, 190 Mass. 346; *Riley* v. *Brusendorff*, 226 Mass. 310; *Thorndike, Petitioner*, 254 Mass. 256, 261.

The licensing board is without any further authority to act on the application in question, and the applicant has lost his right to secure a review by your Commission. The proceedings came to a final termination five days after the vote of the licensing authority granting leave to withdraw, and subsequent action by the licensing board is barren of any accomplishment.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Prisons — System of Compensation for Inmates — Discretion.

AUG. 30, 1935.

Hon. ARTHUR T. LYMAN, *Commissioner of Correction.*

DEAR SIR: — You request my opinion as to whether the provisions of G. L. (Ter. Ed.) c. 127, § 48A, being the wages to prisoners law, so called, require the establishment of the system therein enumerated in the different penal institutions specifically mentioned in the section.

It is clear, as the section itself expressly provides that "there may be established a system of compensation for its inmates," that the establishment of the system is directory, depending entirely upon the judgment and discretion of those in charge as to whether or not it would be advantageous or otherwise to exercise the authority conferred upon them by the last-mentioned section, and either establish or withhold the establishment of the system therein provided for.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

House of Correction — Prison Industries — Purchases.

Purchases made by masters of houses of correction on account of prison industries are not required to be made by advertising for competitive bids or otherwise complying with the provisions of G. L. (Ter. Ed.) c. 34, § 17.

SEPT. 3, 1935.

Hon. ARTHUR T. LYMAN, *Commissioner of Correction.*

DEAR SIR: — You request my opinion as to whether or not purchases made by masters of houses of correction on account of prison industries, as authorized by G. L. (Ter. Ed.) c. 127, § 66, must be made in accordance with G. L. (Ter. Ed.) c. 34, § 17.

Under the first section above mentioned, keepers and masters of houses of correction are empowered to purchase tools, implements and materials required for use in manufacturing in such institutions and to obtain necessary machinery to replace worn, damaged or destroyed machinery, provided such purchases are made "under the supervision of the commissioner, after estimates or requisitions, in such form as he shall require, are approved by him."

If this section stood alone, a strong contention could be made that the general authority therein conferred must be exercised in the specific manner designated in G. L. (Ter. Ed.) c. 34, § 17. *Adams* v. *County of Essex*, 205 Mass. 189; *Conners* v. *Lowell*, 246 Mass. 279. The section, however, does not stand alone, because it is supplemented and supported by G. L. (Ter. Ed.) c. 128, § 72, which provides: —

". . . Bills for tools, implements, machinery and materials purchased by, and the salaries of persons employed in, the jails and houses of correction under said sections shall be paid monthly by the county, upon schedules prepared and sworn to by the master or keeper and approved by the commissioner. The schedule of bills for tools, implements and machinery and of bills for materials and salaries shall be kept separate from each other and from the schedules of bills incurred for the maintenance of the prison, reformatory, jail or house of correction."

The Legislature could determine the method by which county expenditures may be incurred, verified and paid even if the arrangement prescribed is different from that usually employed in the administration of county finance. *County of Essex* v. *Newburyport*, 254 Mass. 232.

The two sections last cited comprise adequate provisions for securing the necessary tools, implements, materials and machinery, and must be considered as independent and distinct from legislation regulating the awarding of contracts by county commissioners, as set forth in G. L. (Ter. Ed.) c. 34, § 17. *Brooks* v. *Fitchburg & Leominster St. Ry. Co.*, 200 Mass. 8; *Decatur* v. *Auditor of Peabody*, 251 Mass. 82; *School Committee of Lowell* v. *Mayor of Lowell*, 265 Mass. 353.

I am therefore of the opinion that the purchase of the articles referred to in your communication may be accomplished without advertising for competitive bids or otherwise complying with the provisions of G. L. (Ter. Ed.) c. 34, § 17.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Metropolitan District Water Supply Commission — Expenditures — Governor and Council — Approval.

The right of the Commission to enter into contracts is subject to the limitation that amounts sufficient for the payment of the indebtedness incurred must be approved by the Governor and Council.

SEPT. 11, 1935.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — You advise me that at a recent meeting of the Governor and Executive Council the relation of the Governor and Council to the Metropolitan District Water Supply Commission was considered, especially in reference to St. 1926, c. 375, and St. 1927, c. 321, and that

it appeared that there was "some question as to whether or not it was necessary for the Metropolitan District Water Supply Commission to obtain the approval of the Governor and Council before determining on the expenditures of money for projects, for contracts, and for settlement of claims in carrying out the provisions of said acts." You request my opinion as to the powers and duties of the Governor and Council relative to such expenditures for the aforesaid purposes.

The Metropolitan District Water Supply Commission was established by St. 1926, c. 375, for the purpose of securing an additional water supply for the metropolitan water system, and for certain other cities and towns, by diverting into the Wachusett Reservoir the flood waters of the Ware River. The Commission was authorized to enter into contracts; to secure engineering, legal, clerical and other assistants; to take land and water rights by eminent domain; and to construct the necessary buildings, machinery, roads, conduits and aqueducts, and all other necessary appurtenances. This chapter, by section 8, specifically provides that —

"For the purpose of carrying out the provisions of this act, the commission may expend such amounts, not exceeding in the aggregate fifteen million dollars, including the sum required to be paid by the city of Worcester under section twelve, as may, from time to time, be approved by the governor and council. To meet such expenditures, the state treasurer shall, from time to time, on the request of the commission and subject to such approval, issue bonds of the commonwealth to an amount not exceeding the sum of fourteen million dollars, . . ."

By St. 1927, c. 321, additional provisions were made for further development of a water supply from the Swift River. General powers and duties, similar to those conferred upon the Commission by St. 1926, c. 375, were granted under the terms of this last-mentioned chapter.

In section 2 of said chapter 321 the Commission was expressly authorized to "construct as a part of the metropolitan water system such aqueducts, tunnels, dams, reservoirs and other works as in its opinion may be necessary for the additions, extensions and developments authorized by this act and all structures and appurtenances that in the opinion of the commission are desirable as incidental or complementary to such additions, extensions and developments."

In section 4 the Commission was empowered to take the necessary lands and water rights by eminent domain; and, by section 7, the Commission may "either before a taking or afterward make such settlements as it may deem for the best interests of the commonwealth with any person or corporation having a valid claim under this act."

Section 27 of this chapter contained the following provision: —

"For the purpose of carrying out the provisions of this act, the commission may expend such amounts not exceeding in the aggregate fifty million dollars, as may from time to time be approved by the governor and council. To meet such expenditures, the state treasurer shall, from time to time, on the request of the commission and subject to such approval, issue bonds of the commonwealth to an amount not exceeding the sum of fifty million dollars, which shall be a further addition to the loans authorized by section eight of chapter three hundred and seventy-five of the acts of nineteen hundred and twenty-six, and by section six of chapter one hundred and eleven of the acts of nineteen hundred and twenty-seven."

Obviously, the two sections upon which you desire an opinion are section 8 of St. 1926, c. 375, and section 27 of St. 1927, c. 321. The phraseology of both is similar, and it is apparent that the legislative intent in enacting each was identical.

The general authority thus conferred upon the Metropolitan District Water Supply Commission to carry out the provisions of both of these chapters, by making the necessary takings of lands and water rights and entering into contracts for the purpose of performing the work therein entrusted to it, was subject to the limitation that the expenditures thereby to be incurred must be approved by the Governor and Council.

The members of this Commission are a statutory board having only the powers, duties and obligations expressly conferred upon them by the enabling acts by which the board was established and is maintained, its functions defined and its aims and purposes enumerated, together with only such other authority as is reasonably necessary and incidental to the full performance of the duties prescribed. The members of the Commission are public officers, and are not agents or servants of the Commonwealth. *Adams* v. *County of Essex*, 205 Mass. 189; *Meader* v. *West Newbury*, 256 Mass. 37. The requirement of such approval as is enumerated in sections 11 and 27 is a condition precedent to the existence of any liability upon the part of the Commonwealth to pay those with whom the Commission has contracted. It is clear that the legislative aim in enacting both of these sections was to serve as a check to hasty or ill-advised action by a subordinate department, and to protect and safeguard public funds from unnecessary or unwarranted expenditures. "The manifest purpose of these statutes is to put a limitation upon the wide power which otherwise officers of the city would possess to make binding contracts with reference to city work." *Morse* v. *Boston*, 253 Mass. 247, 252. *Dyer* v. *Boston*, 272 Mass. 265, 274.

The provisions in question are similar to those frequently found in city charters, which require certain contracts entered into by any municipal department to be in writing and to be approved by the mayor. *United States Drainage & Irrigation Co.* v. *Medford*, 225 Mass. 467; *McGovern* v. *Boston*, 229 Mass. 394; *Bay State St. Ry. Co.* v. *Woburn*, 232 Mass. 201.

The legislative aim disclosed by the two sections in question is closely analogous to statutory provisions prohibiting the incurrence of a liability until a sufficient appropriation has been made therefor. *Adams* v. *County of Essex*, 205 Mass. 189; *Breckwood Real Estate Co.* v. *Springfield*, 258 Mass. 111; *Dyer* v. *Boston*, 272 Mass. 265. The nature of the duty to be performed by a body charged with the approval of the official act of another has been frequently set forth in the opinions of our court.

A city was held not liable for the fees of an architect who had prepared plans at the request of the school committee, where the city charter provided that the authority to erect schoolhouses was in the city council provided the plans therefor were first approved by the school committee. After pointing out that the authority to erect a schoolhouse was vested in the city council, the court said (*Simpson* v. *Marlborough*, 236 Mass. 210, 214): —

"The general obligation and the main power rests with that body. There is, however, the limitation that no final action can be taken until the plans have been 'approved' by the school committee and the city council notified thereof in such manner that it may be made matter of formal public record. That is the full sweep of power conferred upon the school committee and

the utmost extent of the limitation placed upon the otherwise general duty and authority of the city council. Approval implies favorable conviction manifested by affirmation concerning a specific matter submitted for decision. It does not import initiative. Approval ordinarily indicates the will to assent to an act done by someone else rather than the doing of that act. See, however, *Clarke* v. *Fall River*, 219 Mass. 580. It signifies the application of sound judgment to a proposition emanating from another source and submitted for investigation. It requires the exercise of faculties of criticism and discrimination. It denotes positive sanction. It does not mean original and inventive construction in the first instance. On the other hand, it is not a mere perfunctory act. It imposes no mean responsibility. It carries power and duty of an effective nature. It is the word used in both the State and Federal Constitutions, in the charters of many cities and in R. L. c. 26, § 9, to describe the assent required by the chief executive before acts of the legislative department become operative. *Galligan* v. *Leonard*, 204 Mass. 202. *McLean* v. *Holyoke*, 216 Mass. 62."

The approval of the Commissioner of Banks for an increase in the capital stock of a trust company, as provided for in G. L. (Ter. Ed.) c. 172, § 18, "implies the exercise of sound judgment, practical sagacity, wise discretion and final direct affirmative sanction." *Cunningham* v. *Commissioner of Banks*, 249 Mass. 401, 420. In *Brown* v. *Newburyport*, 209 Mass. 259, 266, it was held that a vote of the city council authorizing and directing the city treasurer, in anticipation of taxes, "to borrow from time to time with the approval of the committee on finance a sum or sums in the aggregate not exceeding $160,000" required the committee on finance to approve each and every loan before it could become a binding obligation upon the city. The characteristics of the nature of the duty thus imposed upon the finance commission and the requirements for its adequate and full performance were clearly set forth in these words: —

"This is no simple matter, but involves a high degree of skill in order to determine the time and conditions under which most favorable rates of interest and discount may be secured in the light of the actual financial necessities of the city. It does not manifest an intention to confer a perfunctory commission to be exercised once for all at the beginning of the year. That would be an idle ceremony, and would accomplish none of the results which the use of the language imports. The finance committee, as its name indicates and the ordinances of the defendant city provided, was the general legislative guardian of the financial affairs of the city. Approval, in this connection, means that the members of the finance committee, acting upon their official responsibilities and having in view the public welfare, shall investigate and sanction according to their own independent judgment, each separate borrowing made under the order. It implies reflection and sound business discretion as to each loan proposed. It did not confer a mere ministerial function, but imposed active and important prudential obligations."

A review of our decisions showing the essential qualifications of the conduct requisite to the due performance of a duty similar to that imposed upon the Governor and Council under the pertinent sections may be found in *Leroy* v. *Worcester St. Ry. Co.*, 287 Mass. 1.

This supervisory power resident in the Governor and Council cannot be held to be a direct interference with the powers conferred upon the Commission in the making of necessary contracts and in the adjustment and

settlement of land damages, *Goddard* v. *Lowell*, 179 Mass. 496, but merely regulates the methods which must be adopted and pursued to create a valid financial obligation against the Commonwealth. *United States Drainage & Irrigation Co.* v. *Medford*, 225 Mass. 467, 472.

The Governor and Council cannot either directly or indirectly usurp the prerogatives granted exclusively by the Legislature to the Commission. The public board entrusted with the duty of securing additional sources for a water supply is the Commission. That body is the only one that can make the necessary contracts, arising out of the performance of its public duties. No other officer or board has any authority whatever to contract in behalf of the Commonwealth on any matters already delegated to the sole jurisdiction of the Commission. In an analogous situation relating to a municipality, it was said that "the mayor's power to act is limited to contracts which originate with the departments, the proper discharge of whose administrative functions renders the contract advisable or necessary." *Commercial Wharf Corp.* v. *Boston*, 208 Mass. 482, 488. The right to approve is not the right to contract. *Fiske* v. *Worcester*, 219 Mass. 428.

It may not be necessary in order to secure genuine affirmative action on the part of the Governor and Council that every proposed project, contract or damage settlement should be presented with a great mass of detail, but, on the other hand, it is prerequisite that the matter should be submitted with all the essential facts, in order that the Governor and Council should intelligently understand and comprehend the purpose for which public funds are to be expended.

While there are instances where, in the absence of fraud, accident or mistake, a man is bound by action voluntarily taken, yet ignorance of the facts is an unsatisfactory basis upon which to predicate a binding obligation. But we are here dealing with the active administration of public funds by a public board. A vote by the inhabitants of a town, at a town meeting, in the absence of knowledge of the material facts is a mere nullity, *Brown* v. *Melrose*, 155 Mass. 587, and ratification without knowledge of the essential facts to which the vote relates is ineffectual, *Meader* v. *West Newbury*, 256 Mass. 37. The Governor and Council, therefore, in the actual exercise of the responsibility imposed upon them have the undoubted right to first satisfy themselves that they have before them all the salient features before concluding to grant or withhold their approval.

The duty of the Governor and Council is not merely one of ratification of some previous action taken by the Commission because the action of the Commission was not unauthorized, but such could not ripen into a legal obligation against the Commonwealth unless funds for the payment therefor had been made available by the approval of the Governor and Council. The direct and specific approval of any particular project, contract or land settlement is not required, but the approval of a certain amount to be expended will not be justified unless the body whose sanction is sought is convinced that the objects for which the expenditure is to be made are reasonable in amount, necessary in nature, and in furtherance of the public interest. The Governor and Council are not only charged with the obligation of securing funds for the use of the Commission, by an issue of bonds from time to time, subject to their approval, but the proceeds from the sale of bonds cannot be expended without similar approval.

The Commission is free to enter into contracts for the construction and

equipment of tunnels, aqueducts, reservoirs and other necessary works, for the settlement of damages arising from takings, and to have full charge and control over the various other matters entrusted to it, but always subject to the limitation that amounts sufficient for the payment of the indebtedness to be thereby incurred must be approved by the Governor and Council.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Wages — Weekly Payment — Employees — Salary.

St. 1935, c. 350, relative to the weekly payment of wages, includes within its scope employees receiving salaries as well as those paid wages, other than executive and managerial officers to whom has been delegated a measure of the power of the employing entity itself.

SEPT. 11, 1935.

Hon. EDWARD FISHER, *Acting Commissioner of Labor and Industries.*

DEAR SIR: — You ask my opinion as to the interpretation of St. 1935, c. 350, and you inquire whether under the first provision of the act "only persons earning wages, as distinguished from salaried employees, come within the scope of the first provision of the act."

St. 1935, c. 350, radically changed the pre-existing statutory law, and is intended to include within its scope large classes of employees engaged in working for others for compensation in various occupations. In the interpretation of this statute (St. 1935, c. 350) the word "wages" is not to be construed in a narrow sense, as inclusive only of the earnings of those who render manual or mechanical labor or services. The statute concerns and includes within its sweep "every person having employees in his service." The legislative intention is not to be determined by any arbitrary or fanciful distinction between the words "wages" and "salary." The statute deals in the main with the matter of frequent and regular payment of earnings by employers to employees, and has relation to that large class of workers who depend upon their earnings for their subsistence and maintenance. While the statute under consideration does not relate to nor include within its scope the compensation of public officers to whom has been delegated a measure of the sovereign power, nor the compensation of corporate officers or others in private enterprise to whom have been delegated like powers of executive and managerial functions, its plain intention is to bring about the more frequent and regular payment by employers to employees of the earnings of a large class who render personal services, whether in public or private employment. The plainly apparent object sought to be accomplished by the statute is not to be defeated by merely denominating the earnings of any class or classes of employees as "salary," nor by restricting the interpretation of the word "wages" as it appears in the statute. See *Duggan* v. *Bay State St. Ry. Co.*, 230 Mass. 370, 374, and cases cited.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Schools — Display of the Flag — Class Rooms.

The United States flag must be displayed in every schoolroom in which the daily sessions of the school are commenced.

SEPT. 13, 1935.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You state that it is the practice of many high schools for the pupils to meet in the assembly hall once each week for the opening exercises, and that on the other school days opening exercises are held by the respective classes in the various class rooms. You request an opinion of me as to whether this weekly meeting of the student body in the assembly hall, where the United States flag is displayed and saluted and the pledge of allegiance given, as prescribed by law, makes it unnecessary to have a flag displayed in each of the class rooms where the opening exercises are held on every day other than the day on which they are held in the assembly hall.

G. L. (Ter. Ed.) c. 71, § 69, as amended by St. 1935, c. 258, in so far as pertinent, provides that —

"A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held."

It also provides a penalty for failure to have a flag so displayed for five consecutive days.

The phraseology of the portion of chapter 258 above set forth is plain, direct and clear. It places a mandatory duty upon the school authorities to have a flag displayed in every schoolroom where the daily sessions commence, and the said provision is separate, apart and independent of the further provisions contained in the said chapter requiring the salute to the flag and the pledge of allegiance thereto. *Duggan* v. *Bay State St. Ry. Co.*, 230 Mass. 370, 374; *Dexter* v. *Dexter*, 283 Mass. 327, 330. I can only interpret the language as used by the Legislature in ascertaining the intent of the framers of the law, and it is manifest that the flag must be displayed in every schoolroom in which the daily sessions of the school are commenced.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — License — Partnership.

Upon the death of a member of a partnership, neither the individual surviving partners nor the representative of the deceased has power to transfer an interest in such license to another.

SEPT. 17, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You have asked my opinion upon the following matter of law: —

"Whether or not, where a license was issued to a partnership and one of the partners dies, the estate of the deceased partner has any right in the license?"

You state: —

"Our understanding of the law in the Commonwealth is that where one partner dies the surviving partner or partners close up the estate and have an accounting after liquidation. We do not think that the estate of a deceased partner has the right to transfer anything to a new partner who might desire to have a new name added to the license in place of the deceased partner."

Your understanding of the law relative to partnership in relation to liquor licenses, as you have set it forth, is substantially correct. I answer your question in the negative.

The death of a partner acts as a dissolution of the partnership (*Marlett* v. *Jackman*, 3 Allen, 287), except under unusual partnership agreements which explicitly provide for the continuation of the firm as such after the death of a partner. *Holcombe* v. *Commissioner of Corporations and Taxation*, 245 Mass. 353; *Stearns* v. *Brookline*, 219 Mass. 238.

Though the partnership be dissolved by death, there is a certain continuity of interest which exists long enough to cover the period during which the other partners are discharging their duty of winding up the affairs, and the partnership license would protect them under such circumstances. *United States* v. *Glab*, 99 U. S. 225; *St. Charles* v. *Hackman*, 133 Mo. 634.

The license, however, is the license of the partnership as such, and neither the individual partners nor their representatives after death have the power to assign or transfer any particular interest in such license to another.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Trustee of a Public Institution — Expenses — Reimbursement.

SEPT. 26, 1935.

His Excellency JAMES M. CURLEY, *Governor of the Commonwealth.*

SIR: — You inform me that one of the trustees of the Belchertown State School expended $13.68 for a substitute in her teaching position in the Springfield schools for three afternoons, in order to enable her to attend a meeting of the board of trustees, and now seeks reimbursement from the Commonwealth of the aforesaid amount. You request an opinion from me on the validity of her claim.

The governing statute (G. L. [Ter. Ed.] c. 19, § 6), relative to compensation of the trustees of this school, provides that "all the above trustees shall serve without compensation but shall be reimbursed for all expenses incurred in the performance of their duties."

The expenses that may be paid to trustees are specifically limited to those "incurred in the performance of their duties." Expenses for personal comfort and convenience, which have nothing to do with the performance of their duty as members of the board of trustees of this school, are beyond the scope of the statute. Any expense other than that incurred by a trustee in the course, and in consequence, of the discharge of his public duties cannot furnish the basis for a valid claim against the Commonwealth. In other words, the expense, to be allowable under the statute, must be incidental to the office itself, and not merely personal to an individual who happens to be a trustee. Official as distinguished from

personal expense is the guide and the rule of the statute. *Cook* v. *County of Norfolk*, 201 Mass. 257. *Heublein* v. *New Haven*, 75 Conn. 545. *Dixon* v. *Shaw*, 122 Okla. 211.

The claim in question arose from the fact that the trustee is a teacher, and the expense incurred in the employment by her of a substitute teacher, so as to enable her to attend meetings of the trustees, is too remote and collateral to the performance of the duties of the trustees to come within the official expenses the payment of which is sanctioned by the statute above cited.

I am therefore of the opinion that there is no warrant in law justifying the payment of the instant claim.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Teachers' Oath — Positions — Form — Time of Subscribing.

(1) A teacher occupying more than one position is required to subscribe to more than one oath.
(2) All teachers whose positions are not those of "professor" or "instructor" should describe themselves in the form to be subscribed merely as "teacher."
(3) No oath subscribed prior to October 1, 1935, is in compliance with St. 1935, c. 370.
(4) St. 1935, c. 370, has no application to teachers in a "riding school" or a "school for beauty culture."
(5) Temporary lecturers in schools or colleges, if they in fact teach, may be within the terms of St. 1935, c. 370.

SEPT. 27, 1935.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion upon the following questions concerning St. 1935, c. 370, in connection with various matters which have come before you for determination on your part in connection with your official duties.

"(1) The law provides that a professor, instructor, or teacher must take the oath to 'discharge faithfully the duties of the position.' There are cases when a person serves as a teacher in two or more institutions. Must he take and subscribe to a separate oath in connection with each of the positions which he fills?"

I answer your first question in the affirmative. The required oath is not limited to swearing allegiance to the Constitutions of the United States and the Commonwealth, but also applies to the faithful discharge of the duties of a particular position. It is required that a copy of the oath as subscribed shall be filed with the employer of the subscriber. It is apparent that it was the intent of the Legislature that as to each position an oath for the faithful performance of duties should be required as well as an oath to support the two Constitutions.

"(2) The oath, as established in the law, provides for inserting the title of the position. Is it sufficient that the person designate himself as professor, instructor or teacher, or should the position designated be that by which he is usually classified, such as head of the department, principal, lecturer, dean, etc."

I answer your second question in the affirmative. The General Court has, for the purposes of the instant statute, indicated an intention to mark out three classes of persons engaged in teaching, and no more. While all three classes might have been comprehended by the general word "teacher," the statute provides that when a member of the teaching profession is actually classified, by the institution which employs him, as a "professor" or as an "instructor," he shall so describe himself in taking and subscribing the required oath. Other titles or designations, except that of "teacher," are not specifically mentioned in the statute nor are they to be used under the terms of the act in connection with the oath. All teachers whose positions are not those of a "professor" or an "instructor" in the institution to which they are attached should describe themselves simply as "teacher."

"(3) I should like also to inquire what should be the attitude of the department with reference to cases where blanks filed indicate that the oath was taken prior to October 1, the effective date of the act. Should the department require that the oath be taken again after that date?"

No oath prescribed by the statute should be treated as complying with its terms unless it is taken subsequent to September 30, 1935. As a general rule an act of the Legislature speaks for the future and as of the time when it takes effect, and not of the time when it was passed or of any day before it becomes effective.

"(4) We have had several inquiries, one from a riding school and one from a school of beauty culture, asking if such institutions are required to file the oaths subscribed to by their various teachers. Does the law apply to all institutions designated as college or school, regardless of the type of instruction which is offered?"

I answer your fourth question in the negative. With regard to the specific instances mentioned in your query, the statute does not apply to a "riding school" nor to a "school of beauty culture."

"(5) It is customary in the institutions of higher learning for visiting professors to give one or more lectures at various times during the year; also, in the Division of University Extension in this department to employ a lecturer from outside the State, oftentimes for but one lecture in a series. In such cases, should such persons be classed as instructors and the oath required?"

This question is largely one of fact, which the Attorney General is not empowered to answer. For your guidance let me say that if the purpose or intent of the lecture or lectures given in any instance is that of imparting instruction to scholars, the lecturer employed by an institution of higher learning, as you state, would be a "professor, instructor or teacher" as the case might be, and "before entering upon the discharge of his duties" with the institution whose service he was "entering," as the quoted words are used in the instant statute, he should take and subscribe to the required oath.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Wholesalers and Importers — Warehouse — License.

Oct. 2, 1935.

Alcoholic Beverages Control Commission.

Gentlemen: — You have asked my opinion upon the following questions relative to the withdrawal, sale and delivery of alcoholic beverages from Federal bonded warehouses located in Massachusetts: —

"1. May a nonholder of a Massachusetts wholesaler's and importer's license withdraw alcoholic beverages which he has stored in a Federal bonded warehouse located in Massachusetts and sell or deliver the same to the holder of a Massachusetts wholesaler's and importer's license?

2. May a nonholder of a Massachusetts wholesaler's and importer's license store alcoholic beverages in a Federal bonded warehouse located in Massachusetts and withdraw such beverages for export sale or delivery to the holder of a proper license issued by the licensing authorities of another State?"

1. I answer your first question in the negative. I understand that my opinion is desired to aid you in giving information relative to the required performance of your duties to the Federal Collector of Customs. The Attorney General does not give opinions to officers of the United States, who are to be governed by the interpretations of applicable law by the United States Attorney General and the United States Attorneys, and the expression of my opinion to you in the instant matter is only for the purpose of guiding you in performing your duties in connection with certain duties in which you may have to act in some degree in conjunction or in co-operation with the Collector of Customs.

With relation to entry into or withdrawal from a "Federal bonded warehouse," to which you allude, the laws of the United States are controlling. Sales or deliveries in Massachusetts, however, subsequent to such withdrawal are governed by the laws of the Commonwealth. Such sales or deliveries within Massachusetts of alcoholic beverages are not permitted to be made by unlicensed persons. Under the laws of this Commonwealth, embodied in G. L. (Ter. Ed.) c. 138, as appearing in St. 1933, c. 376, § 2, and as subsequently amended, only a licensed manufacturer, wholesaler or importer having a special permit granted under section 20 of said chapter 138 may transport alcoholic beverages from a place of storage to a place of business. No person other than a licensed wholesaler, manufacturer or importer has authority to sell such alcoholic beverages to one in possession of a manufacturer's, wholesaler's or importer's license.

2. If the export sale or delivery to a duly licensed dealer in another State, to which you refer in your second question, be one consummated in the course of interstate commerce, as to which deposit in a "Federal bonded warehouse" be only a part and the transportation be by a common carrier operating in interstate commerce under Federal laws, there are no prohibitions, such as you inquire about, upon the depositor in relation to withdrawal and disposition by reason of the laws of this Commonwealth.

Very truly yours,
Paul A. Dever, *Attorney General.*

School — Flag Salute — Penalty.

Oct. 9, 1935.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — My opinion is desired upon the following matter: —

"I have been requested by school authorities to advise them as to whether or not a penalty may be invoked by the school committee or otherwise in the case of a pupil who refuses to salute the flag as implied in the provisions of G. L. (Ter. Ed.) c. 71, as amended."

G. L. (Ter. Ed.) c. 71, § 69, as amended by St. 1935, c. 258, reads: —

"The school committee shall provide for each schoolhouse under its control, which is not otherwise supplied, flags of the United States of silk or bunting not less than two feet long, such flags or bunting to be manufactured in the United States, and suitable apparatus for their display as hereinafter provided. A flag shall be displayed, weather permitting, on the school building or grounds on every school day and on every legal holiday or day proclaimed by the governor or the President of the United States for especial observance; provided, that on stormy school days, it shall be displayed inside the building. A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held. Each teacher shall cause the pupils under his charge to salute the flag and recite in unison with him at said opening exercises at least once each week the 'Pledge of Allegiance to the Flag'. Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars. Failure of the committee to equip a school as herein provided shall subject the members thereof to a like penalty."

The statute does not expressly make failure, neglect or refusal to salute the flag on the part of a pupil a criminal offense, and, consequently, provides no penalty for such failure, neglect or refusal on his part.

Failure, neglect or refusal by a pupil, when present at school, to salute the flag at the opening exercises on any school day, when properly directed or required so to do by a principal or a teacher having charge of him, may, however, warrant appropriate disciplinary measures against such pupil.

Very truly yours,
Paul A. Dever, *Attorney General.*

Soldier or Sailor — Eligibility for State Bonus — Discharge.

Oct. 10, 1935.

Hon. Charles F. Hurley, *Treasurer and Receiver General.*

Dear Sir: — You request an opinion relative to the eligibility of a holder of a "bad conduct" discharge from the United States Navy to the bonus provided for by Gen. St. 1919, c. 283. I advise you that, in my opinion, he is not entitled to such bonus.

A "bad conduct" discharge from the United States Navy is a dishonorable discharge, within the meaning of said act.

I quote as follows from the opinion of a former Attorney General (V Op. Atty. Gen. 406, 407), in which I fully concur: —

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

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

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

In my judgment, this provision, when read in the light of the purpose of the act as declared in section 1, must not be strictly construed as referring only to persons who receive discharges expressly declared by their terms to be dishonorable. It should, rather, in my judgment, be given a broader construction and be held to exclude from the benefits of the act all persons who did not receive an honorable discharge. It was the purpose of the statute, as declared in section 1, to recognize all services rendered in the army or navy by citizens of Massachusetts 'to the full extent of the demands made upon them and of their opportunity.' I cannot persuade myself that the services rendered by a man who so conducted himself as a member of the army of the United States that it became necessary to discharge him therefrom for misconduct were services of the character intended to be recognized. I am unwilling to assume that the General Court intended thus to reward any man who so failed to perform his duties that he was discharged for misconduct."

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Regulations — Licensed Premises — Device for Gambling.

OCT. 14, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You have written me as follows: —

"This Commission has been requested to give an opinion concerning the use of a rotor-table in establishments that are licensed to sell alcoholic beverages.

The table is glass-topped and is suitable for use as a serving table for beverages or food. It is also fitted up in the manner of so-called pin ball tables, wherein scores may be obtained, depending upon the pocket number the balls fall into. There is nothing printed on the instructions that calls for any prize, merely tells how a larger score can be obtained, depending upon the manner in which the balls are hit by the player.

It is claimed by those interested that it is a game of skill, and that the manner in which the driver of the ball is handled is entirely dependent upon the player.

We would like to have your opinion as to whether or not the use of these in licensed establishments is a violation of the Control Act or any of the regulations of said act."

The provisions of the regulations established by your Commission, particularly Nos. 19 and 20, forbid that any form of gambling be carried

on upon licensed premises, whether hotel, restaurant, tavern or club. This includes the playing of any game, either with or without a machine, in which (1) some form of consideration is paid by the player or players for the opportunity of taking part, (2) a return of something of value is given by the machine, the proprietor of the premises, or by some of the players themselves to the winner, and (3) the determination of the winner is effected by chance. Whether any particular game as played comes within the above description is to be determined by an application of the principles thereof to all the known facts concerning it.

The Attorney General does not pass upon questions of fact. The facts of which you have advised me, relative to the instant machine or game, are so meager as to give no opportunity for an expression of an opinion of law.

If the game played with the suggested device be one which is used for gambling by the players themselves, then, as so used, its presence in licensed premises is as much forbidden by your rules as if prizes and rewards based upon chance were paid out by the machine itself or its proprietor or the proprietor of the premises.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Narcotics — Licenses — Manufacturers and Wholesalers.

A manufacturer of narcotics who is also a wholesaler requires only one license.

OCT. 25, 1935.

DR. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion upon certain questions of law relative to the licensing of manufacturers and wholesalers of narcotic drugs under the provisions of G. L. (Ter. Ed.) c. 94, §§ 198A and 198B, as inserted by St. 1935, c. 412.

Your questions are: —

"1. Does a manufacturer who is also a wholesaler require one license or two licenses?"

I answer this question to the effect that he requires only one license. That this was intended by the General Court is made plain by section 201 of said chapter 94, as amended by St. 1935, c. 412, § 4, which provides, among other things, that "any licensee under sections one hundred and ninety-eight A and one hundred and ninety-eight B," together with certain other designated persons, "may sell a narcotic drug" to various particular institutions and classes of persons who together comprise all those who may properly buy to resell, and for certain other purposes. The right to sell to these buyers is given, as above stated, to "any licensee under sections one hundred and ninety-eight A and one hundred and ninety-eight B," and such licensee may be either a manufacturer or wholesaler, no distinction in this respect between the two being indicated by the statute.

"2. Does a wholesaler who operates two or more wholesale establishments in this Commonwealth require one license for each such establishment, or will one license to the wholesaler cover all the establishments from which he does a wholesale business?"

I answer this question to the effect that one license is all that is required by the said statute.

"3. Does a manufacturer who operates more than one factory require a license for each such factory?"

I answer this question to the effect that one license is sufficient.

"4. In one instance a manufacturing corporation is doing a wholesale business under another name, not incorporated, at the same address as that of the manufacturer. The manufacturer controls the wholesale distribution. Will it be necessary in this instance to license the manufacturer as such and to license the wholesaler as such, or will the manufacturer in addition be required to take out a wholesale license for selling to his subsidiary, who does a general wholesale business to the pharmaceutical trade?"

If the manufacturing corporation and the wholesaler are two distinct entities, they must each have a license under section 198A. In view of my answers to your other questions, I am not of the opinion that the manufacturer requires more than one license. The licensed manufacturer, however, may not sell to a person or organization not itself licensed under section 198A, except such be a registered pharmacist actively engaged in business as such, or a physician, dentist or veterinarian registered under the laws of the State where he resides, or an incorporated hospital, college or scientific institution.

In regard to your inquiry concerning manufacturers located without the Commonwealth, under the circumstances which you have described in your letter, you have no duty except to advise as to the facts and to co-operate with the Federal agencies charged with the enforcement of the laws of the United States pertaining to narcotic drugs, and to cause to be instituted appropriate prosecutions against any one not a licensee under sections 198A and 198B, and others specifically named in connection with them in said G. L. (Ter. Ed.) c. 94, § 198, who has narcotic drugs in his possession contrary to the provisions of said section 198.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Local Boards of Health — Licenses — Soft Drinks — Disposal of Fees.

OCT. 25, 1935.

Dr. HENRY D. CHADWICK, *Commissioner of Public Health.*

DEAR SIR: — You request my opinion with relation to fees for licenses to operate establishments for manufacturing or bottling of soft drinks. Local boards of health are required by G. L. (Ter. Ed.) c. 94, § 10B, as inserted by St. 1935, c. 441, to collect twenty dollars for such licenses and to transmit one-half thereof to your department.

The proper procedure for such local boards to pursue, with relation to such fees, is to deposit the whole of any such fee with the town treasurer, with a notation as to its source and a request that he forward forthwith one-half thereof to your department. This course meets with the approval of the Director of the Division of Accounts.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Vote of Municipality — Licenses.

Oct. 25, 1935.

Alcoholic Beverages Control Commission.

Gentlemen: — You have asked my opinion as follows: —

"Section 11A of the Liquor Control Act provides that upon the filing of a proper petition the following question shall be submitted to the voters of a city or town: 'Shall licenses be granted in this city (or town) for the sale therein of alcoholic beverages in taverns?' . . .

The Alcoholic Beverages Control Commission requests your opinion as to whether or not an affirmative vote on this question makes it mandatory upon the licensing authority of the city or town wherein such a vote is taken to issue tavern licenses for the sale of alcoholic beverages."

Said section 11A provides in part: —

"If a majority of the votes cast in such a city or town in answer to the question hereinbefore set forth are in the affirmative, such city or town shall be taken to have authorized the sale therein in taverns of such alcoholic beverages, if any, as are from time to time lawfully authorized to be sold in such city or town, subject in all respects to the provisions of this chapter, . . ."

After such an affirmative vote as you have described has been passed in a city or town, it becomes the duty of the local licensing authorities to consider all applications for tavern licenses which may be presented to it, and to issue such licenses thereon as in the exercise of their sound judgment may properly be granted, in the light of other applicable provisions of G. L. (Ter. Ed.) c. 138, as amended, more especially those of sections 12, 17 and 23.

The licensing authority may not arbitrarily refuse to issue any tavern licenses in such city or town.

Very truly yours,
Paul A. Dever, *Attorney General.*

Alcoholic Beverages — Local Licensing Authorities — Licenses — Time.

An applicant for a new "restaurant license" is prima facie entitled to renewal but not necessarily to a license for seven days a week; nor has he an appeal from a decision of a local board to permit a renewal for only six days a week.

Unexpired licenses may not be reduced from seven to six days a week.

Oct. 30, 1935.

Alcoholic Beverages Control Commission.

Gentlemen: — You ask my opinion upon four questions relative to G. L. (Ter. Ed.) c. 138, in which you have set forth the applicable provisions of said chapter.

"1. Does the provision which gives the local licensing authorities exclusive jurisdiction in the matter of determining whether a common victualler's license to sell alcoholic beverages is to be for secular days only or for all days of the week take precedence over the provision which gives the present holder of a seven days' license to sell such beverages a prima facie right to a renewal of that license provided he complies with the provisions of section 16A?"

I answer your question to the effect that a holder of a restaurant license has a prima facie right to the renewal of the restaurant license which he holds, but that he has no prima facie right to a renewal free from the limitation to six days' use. A restaurant license limited to six days a week is still of the same "class" as a restaurant license authorizing use for seven days a week, as the word "class" is used in section 16A of the said chapter, in the phrase "The holder of a license under section twelve or fifteen who applies . . . for a license of the same class for the next succeeding licensing period shall be prima facie entitled thereto . . ."

The applicant for a new restaurant license is prima facie entitled to a restaurant license, but he is not prima facie entitled to a restaurant license devoid of the restriction to six days.

"2. Has the holder of a license originally granted for the sale of alcoholic beverages on all days of the week a right of appeal to this Commission if his local licensing authorities, after issuance of the seven days' license, change the same to a six days' license?"

I answer your second question in the negative. The third sentence of the first paragraph of section 12 of chapter 138, which provides that the decision of the local licensing authorities as to the type of license which shall be issued to restaurants, whether for secular days or for all days of the week, shall be final, was inserted in the chapter as it originally stood, at the same time that section 67 thereof, covering appeals, was inserted in its amended form. The terms of said section 67 do not appear to specifically make acts of local licensing boards relative to imposing a six-day limitation upon restaurant licenses the subject of an appeal; and the provision of said section 12, as amended, that the action of the local board in regard to this particular matter shall be final, shows plainly the intent of the Legislature to manifest clearly that this specific action of the local board was not to be comprehended within any provisions for an appeal. Provision for such finality of determination by a board of the character of a local licensing authority is not an unconstitutional enactment (*Opinion of the Justices*, 251 Mass. 614).

"3. May a local licensing authority, without the approval of this Commission, change a license for the sale of alcoholic beverages on all days of the week to a license for the sale of such beverages on secular days only?

4. May a local licensing authority, without the approval of this Commission, change a license for the sale of alcoholic beverages on secular days only to a license for the sale of such beverages on all days of the week?"

As to your third and fourth questions, I find no authority vested by the statute in the local licensing boards to change an outstanding license containing the limitation to six days a week to an unlimited one, nor vice versa. In regard to a new application for a license, the local licensing boards have authority to alter the provisions of such license with relation to its use on nonsecular days without the approval of your Commission, subject, however, to the provision of said section 12 that the licensing of any applicant for a restaurant license is subject to the prior approval of your Commission. Such prior approval relates to the propriety of licensing a given applicant; that being determined, the question of whether such applicant for a restaurant license shall have a restricted or an unrestricted license rests solely with the local board.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Cider — Wholesaler — License.

A license is not required for the sale at wholesale, by the original makers, of cider having more than three per cent alcoholic content.

Oct. 30, 1935.

Alcoholic Beverages Control Commission.

Gentlemen: — You ask in effect whether or not a license is required for the sale at wholesale, by the original makers, of cider having more than three per cent alcoholic content.

I am of the opinion that under the provisions of G. L. (Ter. Ed.) c. 138, as amended, no such license is necessary.

Section 3 of said chapter 138, as amended by St. 1935, c. 440, § 3, reads: —

"This chapter shall not apply to the manufacture or storage of alcoholic beverages by a person for his own private use or to sales of cider at wholesale by the original makers thereof, or to sales of cider by farmers, not to be drunk on the premises, in quantities not exceeding in the aggregate the product of apples raised by them in the season of, or next preceding, such sales, or to sales of cider in any quantity by such farmers not to be drunk on the premises if such cider does not contain more than three per cent of alcohol by weight at sixty degrees Fahrenheit; nor shall this chapter apply to sales of cider by the original makers thereof other than such makers and farmers selling not to be drunk on the premises as aforesaid, if the cider does not contain more than three per cent alcohol as aforesaid, not to be drunk on the premises as aforesaid."

The proviso contained in this section, "if such cider does not contain more than three per cent of alcohol," applies only (1) to sales of cider by farmers in any quantity, not to be drunk on the premises, and (2) to sales of cider by the original makers, not to be drunk on the premises, but not at wholesale.

The proviso does not apply (1) to the manufacture of alcoholic beverages by a person for his own private use, nor (2) to sales of cider at wholesale by the original makers thereof, nor (3) to sales by farmers, not to be drunk on the premises, in a specified limited quantity.

Very truly yours,
Paul A. Dever, *Attorney General.*

Commissioner of Correction — Rules — Approval of Governor and Council.

Rules concerning marks and grades for prisoners in the Massachusetts Reformatory require the approval of the Governor and Council.

Oct. 30, 1935.

Hon. Arthur T. Lyman, *Commissioner of Correction.*

Dear Sir: — You advise me that you contemplate making a change in the present system of marks and grades provided for prisoners in the Massachusetts Reformatory, and you ask my opinion as to whether a new system promulgated by you would require the approval of the Governor and Council.

I answer your inquiry to the effect that it would require such approval. Under the provisions of St. 1884, c. 255, § 28, power was vested in the then Commissioners of Prisons to make —

"all necessary rules and regulations for the government and direction of the officers . . . for the discipline of the prisoners. . . . They shall make special provision for grading and classifying the prisoners and establish rules for dealing with them according to their behavior, industry in labor, and diligence in study. All rules and regulations adopted by the said commissioners shall be subject to the approval of the governor and council."

The system of marks and grades to which you allude, and as to which you desire to create a new system, is, obviously, "rules for dealing with" prisoners "according to their behavior, industry in labor, and diligence in study." The fact that this system is a part of the rules allegedly made under the provisions of section 28 is evidenced by the statement which you quote from the annual report of the superintendent of the reformatory in 1886: "The management and discipline of the prisoners is by a system of marks and grades. The grade rules were established by the Commissioners of Prisons with the approval of the Governor and Council."

Such a system as you indicate is properly part of the rules mentioned in the above quotation from said section 28. The power to make rules was then, as I have said, vested in the Commissioners of Prisons, subject to the approval of the Governor and Council.

By Gen. St. 1916, c. 241, § 1, the powers of the former Commissioners of Prisons were transferred to a Director of the Massachusetts Bureau of Prisons. These powers were not enlarged by said chapter, and the power to make rules, previously existing in the Commissioners of Prisons, was by this latter chapter vested in the new Director of Prisons, subject to the limitation that the Governor and Council should approve thereof.

By Gen. St. 1919, c. 350, §§ 82–85, the present Department of Correction was created, with the Commissioner as head, who was authorized to perform all the duties of the Director of the Massachusetts Bureau of Prisons. The powers and duties of the Director in relation to making rules were not enlarged or changed by this statute, which is now embodied in G. L. (Ter. Ed.) cc. 27 and 125. Hence, the power to make rules, such as you refer to, now exists with the present Commissioner, but subject to the approval of the Governor and Council.

Section 7 of said chapter 125 provides that the superintendent of the Massachusetts Reformatory shall from time to time suggest to the Commissioner, in writing, such alterations in the rules and regulations as he considers advisable. The power of the Commissioner to make rules is in no way limited by this section.

The power to make rules, however, is limited to the type of rule set forth in said section 28 of St. 1884, c. 255, and does not extend to making rules respecting the release of prisoners from the Massachusetts Reformatory. II Op. Atty. Gen. 90.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Municipality — Action of a Board — Two-thirds Vote.

NOV. 1, 1935.

Hon. JOSEPH W. BARTLETT, *Chairman, Emergency Finance Board.*

DEAR SIR: — Your Board has addressed to me a communication which reads in part: —

"The charter of the city of Chicopee calls for a board of aldermen consisting of seventeen members. The charter further provides that, on the resignation or death of any member after a certain date and before a certain period before election, the vacancy caused by the resignation or death of a member cannot be filled.

A public works project calling for a loan under St. 1935, c. 404, was before the board of aldermen of the city of Chicopee and acted upon by eleven votes in the affirmative. Prior to that time a member had resigned and his resignation had been accepted, and under the charter the vacancy could not be filled.

Question: Has the loan order been passed by a two-thirds vote?"

I answer your question in the negative.

St. 1933, c. 366, pt. I, § 2, as amended, provides that "any city . . . if authorized by a two thirds vote as defined in section one of chapter forty-four of the General Laws, . . . may engage in any public works project . . ."

G. L. (Ter. Ed.) c. 44, § 1, defines a two-thirds vote as follows: —

"In this chapter, unless the context otherwise requires, the following words shall have the following meanings:

'Revenue', receipts from taxes and income from all other sources.

'Director', director of accounts in the department of corporations and taxation.

'Majority vote' and 'two thirds vote', as applied to towns or districts, the vote of a majority or two thirds, respectively, of the voters present and voting at a meeting duly called, and, as applied to cities, the vote taken by yeas and nays of a majority or of two thirds, as the case may require, of all the members of each branch of the city government where there are two branches, or of all the members where there is a single branch of the city government, or of a majority or two thirds of the commissioners where the city government consists of a commission; and in every case subject to the approval of the mayor, where such approval is required by the charter of the city.

'Town' shall not include city."

The phrase "two thirds of all the members," as used in section 1, is to be construed as meaning two thirds of all the membership of the municipal body in question, as provided for in the statute which created the body. In the case of the board of aldermen of Chicopee, that number is seventeen. It is two thirds of the number seventeen which constitutes the required two-thirds vote for the approval of the project under the said definition of G. L. (Ter. Ed.) c. 44, § 1. The number constituting the whole membership as authorized by the city charter is not to be diminished, in reckoning the necessary two thirds, by vacancies in the membership. *Pollasky* v. *Schmid*, 128 Mich. 699; *Satterlee* v. *San Francisco*, 23 Cal. 314; Dillon on Municipal Corporations, 5th ed., vol. II, pp. 860–862, and cases there cited.

That this general principle of law, which has been established by many courts of authority throughout the United States, prevails in Massachusetts is to be gathered from the opinion in *Merrill* v. *Lowell*, 236 Mass. 463, 466–468.

Very truly yours,

Paul A. Dever, *Attorney General.*

Citizenship — Derivative Naturalization — Child — Parent.

Nov. 5, 1935.

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

Dear Sir: — You have asked my opinion as to the application of the United States Naturalization Law to two sets of facts.

Your first set of facts reads: —

"1. Mother naturalized in 1933; father never naturalized; minor child having resided in this country for five years. When did such child become a citizen?"

Prior to the enactment on May 24, 1934, of 48 U. S. Stat. 797, of an amendment to the U. S. Code, Title 8, § 8, naturalization of the mother only of a foreign-born minor did not give the latter citizenship under the provisions of said section 8 as they then stood. *In re Citizenship Status,* 25 Fed. (2d) 210.

After the passage of the amendment in 1934 said section 8 read as follows: —

"A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: Provided, That such naturalization or resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

Thereafter the naturalization of the mother as well as of the father conferred citizenship upon a minor child born abroad, and was retrospective in so far as it related to such a child. The citizenship of the child was not to commence until five years after the time such child "begins to reside permanently in the United States." This latter clause also has a retrospective aspect, and the five years mentioned are to be calculated from the time when the child first began actually to make his permanent residence in this country, whether such time was prior to the date of his mother's naturalization or afterwards.

The child mentioned in your first set of facts became a citizen on May 24, 1934, the five-year period of residence having been already accomplished.

Your second set of facts reads: —

"2. Mother naturalized in 1935; father never naturalized; minor child having resided in this country for five years. When does such child become a citizen?"

This child became a citizen upon the day of his mother's naturalization, his required period of residence having been fulfilled at the time when by her naturalization under the terms of the amended statute he was to be "deemed a citizen," subject to the proviso as to residence, which in this case has already been satisfied. In fulfilling the period of residence the actual presence of the child in the United States is to be looked to, and the residence of his alien father during such period is not to be imputed to him to defeat his acquisition of citizenship. *United States ex rel. Betty* v. *Day,* 23 Fed. (2d) 489; 277 U. S. 598.

Very truly yours,

Paul A. Dever, *Attorney General.*

Soldiers' Home — Employees — Forty-eight Hour Week Law.

Nov. 6, 1935.

Hon. Lawrence F. Quigley, *Superintendent, Soldiers' Home in Massachusetts.*

Dear Sir: — You have in effect requested my opinion as to your authority to appoint to certain positions two employees of the Soldiers' Home, in view of the provisions of G. L. (Ter. Ed.) c. 149, § 39, as recently amended by St. 1935, c. 444, commonly known as the Forty-eight Hour Week Law.

1. The facts as you present them to me in regard to the first of these employees, Miss S., are as follows: —

"Miss S. entered the training school in March, 1929. She served three years as pupil nurse. Upon completion of her term as pupil nurse she was employed as head nurse, and has worked continuously up to the present time. She has been a regular permanent employee on the pay roll since March, 1929.

The position we now seek to transfer Miss S. to is that of hospital supervisor, graduate nurse, and is a position created by the Forty-eight Hour Week Bill. Miss S. is to succeed Mrs. G., hospital supervisor, graduate nurse, in charge of the operating room, who will be transferred to night supervisor, under the classification of hospital supervisor, graduate nurse, as a result of the Forty-eight Hour Week Bill.

Miss S. is not a citizen."

Said section 39, as amended by St. 1935, c. 444, § 1, reads: —

"The hours of labor of laborers, workmen and mechanics, of ward attendants, ward nurses, industrial and occupational therapists and watchmen, and of employees in the kitchen, dining-room and domestic services, in state institutions, and of officers and instructors of state penal institutions, shall not exceed forty-eight in each week. Any person whose hours of labor are regulated by this section and whose presence is required at any such institution seven days a week shall be given at least four days off in each month, without loss of pay, in addition to the regular annual vacation. The words 'hours of labor' as used in this section shall not be deemed to include any period of time during which a person is in his living quarters wherever located although his presence there is required for the purpose of exercising a measure of supervision over patients or inmates through availability for duty during such time. This section shall not prevent the superintendent, warden, or executive officer from requiring the services of any person in any emergency where the health or safety of patients or inmates would otherwise be endangered, or in any extraordinary emergency, or in apprehending an escaped inmate, nor shall it apply to the hours of labor of any person whose position entitles him to family maintenance as a part of his compensation."

St. 1935, c. 444, § 2, provides: —

"Employment of additional persons by reason of the enactment of section one of this act shall be restricted to persons who are citizens of the commonwealth."

Inasmuch as you state that Miss S. is already in the employment of your institution and is only being promoted to take the place of another

employee, she cannot, in my opinion, be regarded as one of the "additional persons" mentioned in section 2 of said chapter 444.

2. The facts, as you present them to me in regard to the second of these employees, are as follows: —

Miss B. is not a citizen. She has had only temporary employment in your institution. You desire to transfer her to a permanent position, and I assume that her employment in such permanent position is made necessary by reason of the enactment of section 1 of said chapter 444.

I am of the opinion that, under all the facts as you have set them forth in your letter, Miss B. is a member of that class referred to in said section 2 of chapter 444 as "additional persons" whose employment is made necessary by reason of the enactment of said section 1, and, since she is not a citizen, she may not be given the proposed permanent position.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Federal Government — Acquisition of Land — Jurisdiction.

NOV. 19, 1935.

Hon. SAMUEL A. YORK, *Commissioner of Conservation.*

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

"Under date of July 13, 1935, the President and Trustees of Williams College deeded to the United States of America certain property for the use of the United States Forest Service as an experimental forest."

You ask my opinion upon the following questions of law: —

"1. May the United States of America or any agent thereof acquire real estate in the Commonwealth of Massachusetts without the consent of the General Court?

2. Or, in this specific case, can the United States of America accept a gift of real estate from the President and Trustees of Williams College for the purpose stated in the accompanying deed without an enabling statute?

3. If there is no constitutional barrier to the acceptance of this gift, may the United States of America acquire additional land by purchase, without specific authority?"

I answer your three questions in the affirmative.

The United States and its agents, if properly authorized by Federal legislation, may acquire for public purposes land within the boundaries of this Commonwealth, by purchase, gift or devise, without the express consent of the Commonwealth, but the Commonwealth is not thereby deprived of jurisdiction over the land, except that it may not interfere with the full use and enjoyment of the purposes for which the land was acquired. *Kohl* v. *United States*, 91 U. S. 367. *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U. S. 525; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 650; *Dickson* v. *United States*, 125 Mass. 311; *Divine* v. *Unaka Nat. Bank*, 125 Tenn. 98.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Manufacturer and Wholesaler — Retailer — Loan.

A manufacturer or wholesaler of alcoholic beverages may not guarantee the payment of a loan made by a third person to a retailer, under G. L. (Ter. Ed.) c. 138, § 25, as amended.

Nov. 21, 1935.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You have asked my opinion upon a question of law, in the following language: —

"Will you please advise us whether, in your opinion, a guaranty made by a brewing company in Massachusetts of a loan made by a finance company to a tavern keeper or other holder of a retail license, said loan to run for a period of ninety days or less, would be in violation of G. L. (Ter. Ed.) c. 138, § 25, as amended."

G. L. (Ter. Ed.) c. 138, § 25, as amended, reads as follows: —

"It shall be unlawful for any licensee under section twelve or fifteen to lend or borrow money or receive credit, directly or indirectly, to or from any manufacturer, wholesaler or importer of alcoholic beverages, and for any such manufacturer, wholesaler or importer to lend money or otherwise extend credit except in the usual course of business and for a period not exceeding ninety days, directly or indirectly, to any such licensee, or to acquire, retain or own, directly or indirectly, any interest in the business of any such licensee. The commission may revoke the license of any licensee who in its opinion is violating this section or participating in such a violation.

Nothing in this chapter shall prevent a person holding any interest in a business licensed under section nineteen from holding at the same time any interest in not more than one business licensed under section eighteen."

The preceding section is aimed to eliminate the abuses heretofore existing in the distribution and sale of intoxicating liquors. The instant section was the method adopted by the Legislature to prevent the control and supervision of the retail liquor business by wholesalers, importers and manufacturers. Commercial transactions between the retailer and wholesaler are restricted and limited, in order that the former shall not become so financially dependent upon the latter as to result in a practical transfer of the supervision and ownership of the retailer to the wholesaler.

The making of loans to and the receipt of credit, beyond the limits enumerated, by the retailer and the acquisition of any proprietary interest by the wholesaler in the retailer's business are expressly forbidden.

The giving of a guaranty in behalf of the retailer, whether in the form of a contract of guaranty or indemnity, or by endorsement, or as a surety, obligates the guarantor to make good the default of the guarantee. The effect of the usual guaranty is an extension of credit even though the obligation thus incurred is secondary or collateral to the promise of the guarantee to pay some third person. The default of the guarantee renders the guarantor liable to the creditor of the guarantee, and upon payment by the guarantor the latter becomes creditor of the guarantee, and is, therefore, entitled to be reimbursed for the amount expended.

I am therefore of the opinion that the giving of a guaranty of the pur-

port set forth in your letter, even though it may be for the term of less than ninety days, is illegal and contrary to the above-cited section.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Teachers' Oath — Duty of Commissioner of Education — Documents.

Nov. 25, 1935.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion upon certain questions relative to the oath required of teachers under St. 1935, c. 370.

"1. Shall he" (the Commissioner) "refuse to accept and file such documents as carry a statement or comment other than the oath as prescribed in the law?"

I answer your first question to the effect that you are not obliged to receive for filing under said chapter 370 any document which contains anything except the oath or affirmation in the language in which the same is set forth in said chapter 370, with the subscriber's name and the jurat necessarily accompanying it.

"2. After these documents have been filed in the department, should they be open to personal inspection by the general public?"

Although the precise language of said chapter 370 does not state that the documents containing the oaths or affirmations are to be "filed" by you, though requiring that they be "filed" with a superintendent of schools or a principal officer of an institution of learning and by him be "transmitted" to you, it appears to have been the intent of the Legislature by said chapter, as shown by the context, that such documents should be received and filed by you. That being so, after you have received them they become "public records," as those words are defined in G. L. (Ter. Ed.) c. 4, § 7, par. Twenty-sixth, and are subject to public inspection, under the terms of G. L. (Ter. Ed.) c. 66, § 10.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Teachers' Oath — Construction of Statute.

Nov. 26, 1935.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion upon the two following questions of law in relation to the so-called teachers' oath, provided for in St. 1935, c. 370.

"1. Do the words 'no professor, teacher, or instructor . . . shall be permitted,' which appear in section 1 of St. 1935, c. 370, refer to colleges not under the direct control of the Commonwealth?

2. Does the effect of the words 'no professor, teacher, or instructor . . . shall be permitted,' which appear only in section 1 of St. 1935, c. 370, carry over by implication into section 2?"

I answer both your questions in the affirmative.

Very truly yours,
PAUL A. DEVER, *Attorney General.*

Teachers' Oath — Federal Employment — School.

Nov. 27, 1935.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have written me as follows with relation to the so-called teachers' oath required by St. 1935, c. 370: —

". . . These are teachers who are employed in Massachusetts but whose services are directed and paid for by agencies of the Federal government. I should appreciate your giving me your opinion on the following questions:

1. Does a teacher engaged in an educational activity in a CCC camp, employed directly by the director of the camp, come within the provisions of said law?

2. Does a teacher employed in a CCC camp, hired directly by the Federal government and paid directly from the Federal government, come within said law?

3. Does a teacher employed by a local superintendent of schools under authority of the WPA, his salary being paid from funds allocated by the Federal government to the State, come within the provisions of said law?"

1. I answer your first question to the effect that the provisions of section 30A, inserted in G. L. (Ter. Ed.) c. 71 by said chapter 370, provide, in their applicable part, that —

"Every citizen of the United States entering service, on or after October first, nineteen hundred and thirty-five, as professor, instructor or teacher *at* any college, university, teachers' college, or public or private school, in the commonwealth shall, before entering upon the discharge of his duties, take and subscribe to, . . . the following oath or affirmation: . . ."

Section 2 of said chapter 370 provides, in its applicable part, that "Every citizen of the United States who, upon the effective date of this act, is in service as a professor, instructor or teacher *at* any college, university, teachers' college, or public or private school, in the commonwealth, shall," after October 1, 1935, subscribe to the oath or affirmation required by said section 30A.

Accordingly, if a teacher "engaged in an educational activity in a CCC camp" is in service at a college, university, teachers' college, or public or private school he comes within the provisions of said chapter 370 and must subscribe to the oath or affirmation.

Whether or not such a teacher is in service at a "school" or other institution mentioned in the statute is a question of fact, upon which I have no information nor upon which am I required to pass.

2. I answer your second question to the effect that it is immaterial whether or not a teacher is hired or paid by the Federal government. If he is in fact in service or about to enter service *at* a "school" or other institution of learning mentioned in the statute, in the Commonwealth, and is a citizen of the United States, he comes within the terms of said chapter 370 and is required to subscribe to the oath or affirmation.

3. I answer your third question in the affirmative upon the assumption that the teacher to whom you refer is in service or about to enter service *at* a public or private school.

Persons hired or paid by the Federal government, who perform duties in the Commonwealth outside of territory ceded to the United States, are

subject to laws of Massachusetts like the instant one, made in pursuance of the State's sovereign authority for governance throughout its jurisdiction under the police power. The agencies of the Federal government are not exempt from State control by regulations made under such police power except in so far as such regulations may interfere with or impair their efficiency in performing the functions through which they are designed to serve the Federal government. *Commonwealth* v. *Closson*, 229 Mass. 329; *Western Union Telegraph Co.* v. *New York*, 38 Fed. 552; *Western Union Telegraph Co.* v. *Foster*, 224 Mass. 365, 377; *Brodnax* v. *Missouri*, 219 U. S. 285; *Merchants Exchange* v. *Missouri*, 248 U. S. 365; *Savage* v. *Jones*, 225 U. S. 501, 533.

The provisions of chapter 370 are not in conflict with any provisions of the Federal Constitution or statutes, and do not tend to interfere with or impair the efficiency of Federal agencies or agents in performing such functions; therefore, such agents are bound by its provisions and in appropriate instances should take the prescribed oath or affirmation.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Teachers' Oath — Practice Teaching.

NOV. 30, 1935.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked me the following question relative to the provisions of St. 1935, c. 370, concerning the teachers' oath, so called: —

"I am writing to ask whether undergraduate students in State and private institutions, who are assigned practice teaching duties as a part of their training for teaching service, are required to take the oath or affirmation as required under St. 1935, c. 370, before entering on their duties in practice teaching."

I assume that one who engages in "practice teaching duties" necessarily, as a part of such duties, teaches. Consequently, he is a "teacher," within the meaning of that word as used in said chapter 370, and is required to take the designated oath or affirmation.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

OPINION UPON AN APPLICATION TO THE ATTORNEY GENERAL FOR LEAVE TO FILE AN INFORMATION IN THE NATURE OF QUO WARRANTO AGAINST THE GOVERNOR.

Quo Warranto — Governor — Oath of Office.

Taking of the prescribed oaths of office by the Governor from the Secretary of the Commonwealth, in the presence of the House of Representatives and of some members of the Senate, no President of the Senate having been seasonably chosen, places the Governor in full possession of all the powers incident to his office.

Whether he is *de facto* or *de jure* in the exercise of such powers is a question only of academic interest, for the determination of which in regard to a collateral matter the public welfare does not warrant the Attorney General in invoking the aid of the courts.

This is an application to the Attorney General for the filing by him of an information in the nature of quo warranto proceedings against His Excellency, Governor James M. Curley. The application is brought by William R. Scharton, Esquire, counsel for Abraham Faber, a convicted murderer now under sentence of death.

Faber's petition for a writ of certiorari was denied on June 3, 1935, by the Supreme Court of the United States. Subsequently, on the same day, a petition to enjoin the warden of the State Prison from carrying out the death penalty was denied in the United States District Court at Boston. Thereafter, on the same day, a hearing was held before the Attorney General upon the present application, at which hearing His Excellency the Governor was not present or represented.

The allegations contained in the information, permission to file which is now sought, are broad and sweeping. It is contended that Governor Curley has never taken the oath of office in the manner prescribed by article I of chapter VI of the Constitution, providing that "the said oaths . . . shall be taken and subscribed by the governor, . . . before the president of the senate, in the presence of the two houses of assembly"; that in fact the oath was administered to the Governor on January 3, 1935, by Frederic W. Cook, Secretary of the Commonwealth, in the presence of the members of the House of Representatives, but not in the presence of the Senate; that at no time subsequent was the oath of office administered to the Governor in accordance with the above-cited provision of our Constitution. It is, however, conceded by the petitioner that Governor Curley was duly elected Governor of the Commonwealth for the two-year term commencing January 3, 1935; that on that day and ever since he has actually held the office of Governor and has exercised all the authority by law conferred upon the incumbent of that high office. The sole ground for seeking the writ of quo warranto is the failure of the Governor to take the oath of office in the manner prescribed by the Constitution.

At the oral argument, made in support of the present application, the only ground upon which the petitioner claimed that he had been injured by the neglect of the Governor to take the oath of office from the President of the Senate in the presence of the Senate and the House is that there is no one at the present time qualified to receive a request for commutation of the sentence of death.

On February 26, 1935, the Superior Court of Norfolk County ordered that the death penalty be imposed upon Abraham Faber during the week

of April 28, 1935. Shortly before the last-mentioned date Mr. Seharton, accompanied by George Stanley Harvey, Esquire, counsel for other co-defendants, and the Attorney General appeared before His Excellency, Governor Curley. Counsel for the defendants requested a respite upon the ground that they desired an opportunity to file petitions for writs of certiorari with the Supreme Court of the United States, and that, as the time was too short after the final decision of the Supreme Judicial Court of Massachusetts within which to prepare and print a transcript of the record and to have the case docketed in Washington before the sentence of the court would be carried out, they desired a respite in order to enable them to file such petitions. Their request was granted by the Governor upon the express understanding that immediate steps would be taken to prepare and file such petitions, and, accordingly, the sentence of death was respited to May 4, 1935. Appeals were in fact entered in the Supreme Court at Washington prior to the last-mentioned date, but it appearing that it would be improbable that any decision would be made thereon by the court prior to June 3, 1935, a further request was made upon His Excellency, Governor Curley, by Maurice Palais, Esquire, an associate of Mr. Seharton, and by Mr. Harvey, counsel for the co-defendants. The Governor, after a hearing, determined that the ends of justice would be met by delaying the execution until the defendants could have an opportunity to secure the judgment of the United States Supreme Court on the questions which they had presented to it for determination, and, accordingly, a respite was granted to June 5, 1935.

It is indisputable that both of these respites were sought for and granted to Faber by applications made directly and personally to the present Governor, thereby recognizing that he was acting as chief executive of the Commonwealth. It is also indisputable that there was also sought the favorable approval of the Executive Council on the Governor's action. Faber was, therefore, the recipient of two acts of executive clemency in his behalf.

The fact that His Excellency the Governor, on January 3, 1935, took the prescribed oaths of office from the Secretary of the Commonwealth was a matter of general public discussion, and was not only prominently published by the newspapers but was also frequently mentioned on Inauguration Day by the various radio stations.

There was nothing shown in the hearing before me to indicate that both Faber and his counsel did not have full knowledge that the oaths were administered by the Secretary of the Commonwealth. Shortly after the oaths were administered they sought and secured executive clemency, and it is only now, when it is apparent that no further respites are to be granted by the Governor, that they have recourse to this unusual proceeding for the sole purpose of delaying the execution of sentence imposed upon Faber by a verdict which has been already twice upheld by our own Supreme Judicial Court, and which the Supreme Court at Washington on two occasions has considered of insufficient merit to warrant further proceedings.

If, as the petitioner now claims, his constitutional rights have been impaired, it was incumbent upon him seasonably to assert those rights. *Commonwealth* v. *Dascalakis*, 246 Mass. 12, 31; *Lebowitch, Petitioner*, 235 Mass. 357, 363.

The petitioner contends that he is deprived of a lawful opportunity of seeking commutation of his sentence. It is apparent that no substantial right of the petitioner in this respect has been impaired or invaded. In

the first place, it is clear, from the statements made by His Excellency on the occasion upon which each of the respites was granted, on the visit of George Stanley Harvey, Esquire, counsel for Faber's co-defendants, when he requested a further mental examination of his two clients, and at the conference of the Governor with the parents of Abraham Faber, when they sought further clemency, that no reasonable expectation can now be entertained of any further favorable action from His Excellency in behalf of this defendant. Within a day or two, in a letter to Mr. Harvey, the Governor stated that "Litigation must at some time come to an end. My honest conviction is that that point has been reached in these cases." The Governor's letter to Mr. Harvey further contained the statement that "there is nothing that would warrant me, as Governor, to further interfere with the execution of the sentences imposed upon them."

It is clear, therefore, that if such an application for commutation were now made His Excellency would not grant it, and that, in fact, he would not, and could not be compelled to, submit such an application to the Executive Council. *Juggins* v. *Executive Council,* 257 Mass. 386.

In the next place, it is obvious that the present Governor has full authority, as matter of law, to receive, reject or grant an application for clemency, with the advice and consent of the Council. In every respect, he has and possesses all the powers imposed by the Constitution and the law upon the chief executive of this Commonwealth, which he is lawfully authorized to exercise to the same extent and in the same manner as could any incumbent of the office of chief executive.

The petitioner concedes that the respective oaths of the tenor and purport set forth in the Constitution were actually taken and subscribed to by His Excellency on January 3, 1935. The only contention now made is that they should have been administered by the President of the Senate rather than by the Secretary of the Commonwealth, and that the oaths should have been taken in the presence of the House of Representatives and the Senate. It is apparent that the oath was taken in the presence of the House of Representatives and also in the presence of some members of the Senate. It is also apparent that there was no President of the Senate elected until several days subsequent to the inaugural of the Governor. The people of the Commonwealth had duly elected His Excellency as Governor of the Commonwealth of Massachusetts for a two-year term commencing January 3, 1935. Whether the business of the State should be suspended until the Senate had selected a President is unnecessary to decide.

The petitioner concedes further that since January 3, 1935, His Excellency has actually occupied the office of Governor; that he has exercised and performed duties pertaining thereto; that there is no other person who claims title to the office; that the right of the present Governor to continue to occupy the office is challenged on no ground other than that of failure to take the oath before both houses of the General Court, as above outlined.

It is settled law in this Commonwealth that the actions of an officer *de facto* are just as valid in every respect as if he were an officer *de jure.* That question in this State was settled nearly a century and a quarter ago when the Supreme Court, in the case of *Fowler* v. *Beebe,* 9 Mass. 231, decided that a defendant in a civil action could not raise the question that the service of a writ was made upon him by one who was not a deputy sheriff *de jure.* It appeared in that case that the deputy who served the writ was appointed by a sheriff who, the defendant sought

to show, was a mere sheriff *de facto*. It was held that the validity of the sheriff's title to office was a collateral issue and that the question could not be decided except in a direct proceeding against the sheriff. That case has never been overruled but has been followed and confirmed in all subsequent adjudications.

In *Commonwealth* v. *Kirby*, 2 Cush. 577, the defendant was indicted and convicted on a charge of an assault upon one Sanderson, a constable of the city of Cambridge, and sought by way of defense to raise the question that the warrant under which Sanderson was acting was issued by a justice of the peace, one Edwards, who was also a constable of the city, and, consequently, holding two incompatible offices, which the defendant claimed resulted in a vacation of his office as justice of the peace. The evidence to prove this contention was rightly excluded because, as remarked in the opinion —

"We are of opinion that Edwards, holding a commission as justice of the peace, and having been legally qualified to act as such, and continuing to act in that capacity with full powers, unless for the objection now taken, he would, as respecting third persons, be considered as a justice of the peace *de facto*, and his warrant would justify the officer to whom it was directed, in making service of the same."

In *Petersilea* v. *Stone*, 119 Mass. 465, the court held that the service of a writ upon a poor debtor by an officer who was at least an officer *de facto* constituted a proper service of the writ, and that the validity of such service could not be challenged in the subsequent poor debtor proceedings.

One Sheehan brought habeas corpus proceedings to be released from confinement in the Salem jail in execution of the sentence imposed upon him in a police court by a special justice for petty larceny, at a time when the special justice was also a member of the House of Representatives. The prisoner sought release on the theory that a special justice, by becoming a member of the House of Representatives, was no longer entitled to occupy his judicial position. The court refused to hear such evidence and dismissed the petitioner's writ. In the opinion of the court it was stated (*Thomas Sheehan's Case*, 122 Mass. 445): —

"Upon well settled principles, it would be inconsistent with the convenience and security of the public, and with a due regard to the rights of one acting in an official capacity under the color of, and belief in, lawful authority to do so, that the failure of his acts as a justice should be disputed, or the legal effect of his election and qualification as a representative be determined, in these proceedings to which he was not a party."

Although the question as to the validity of the acts of a special justice in sentencing Sheehan could not be inquired into at the instance of the prisoner, yet, seven months after the decision in that case, in proceedings brought against this judge to remove him from his position as such special justice, the court, in passing upon the validity of the demurrer, ruled that he was illegally holding his position as special justice of the police court. *Commonwealth* v. *Hawkes*, 123 Mass. 525.

In *Commonwealth* v. *Taber*, 123 Mass. 253, a defendant charged with the illegal keeping of intoxicating liquor attempted to question the eligibility of the judge of the district court to try him, on the ground that the judge was also the mayor of a city within his judicial district. The plea

of the defendant, setting forth this contention, was overruled. "As, upon the allegations of the plea, he was at least a judge *de facto*, his jurisdiction could not be controverted upon this ground, nor the question whether the two offices were incompatible be tried, in a proceeding to which he was not a party."

In *Commonwealth* v. *Wotton*, 201 Mass. 81, 84, the court said: —

"The difference and the only difference between an officer *de jure* and an officer *de facto* is that an officer *de jure* cannot be removed from his office in a proceeding instituted directly for that purpose and an officer *de facto* can be removed in such a proceeding. Until a *de facto* officer is removed in such a proceeding his acts are as valid as the acts of a *de jure* officer."

Manifestly, there is nothing in the contention raised by the petitioner that because the Governor, as he alleges, is only a *de facto* officer he is denied the opportunity of filing a petition for commutation of his death sentence. There can be no doubt whatever under the authorities above cited, and in accordance with the weight of authority in other jurisdictions, that the Governor was fully authorized to accept such an application, and that his action in rejecting or granting the same would be valid in all respects to the same extent as if he were a Governor *de jure*.

The rule prevailing in this Commonwealth is the rule prevailing in the Federal jurisdiction. *Cocke* v. *Halsey*, 16 Pet. 71; *McDowell* v. *United States*, 159 U. S. 596; *Norton* v. *Shelby County*, 118 U. S. 425; *Ball* v. *United States*, 140 U. S. 118.

The petitioner has no standing whatever to bring proceedings against the chief executive to require him to take the oath of office in the manner in which he contends the Constitution requires. *Rice* v. *The Governor*, 207 Mass. 577.

Even if the opportunity to seek commutation of a sentence can be considered higher than a mere personal privilege, and determined to be a matter of right, yet it is of such a nature that its refusal by the Governor is final and conclusive. Moreover, it always has been incumbent upon one who challenges the validity of an official act alleged contrary to the provisions of the Constitution to show that an injury, special and peculiar to himself, has thereby been incurred. It is clear, however, that, as a matter of law, his opportunity to seek, and if possible to secure, a commutation of sentence is separate, apart and in no way dependent upon whether the Governor is an official *de facto* or *de jure*. Under such circumstances, he has no right, in furtherance of any private interest, to raise the issue whether such an official is to be denominated in one class or the other. The enforcement of a private right must be based upon a private injury.

In *McGlue* v. *County Commissioners*, 225 Mass. 59, 60, it is stated: —

"It is only when some person invokes the aid of the judiciary in resisting the operation of such laws to the harm of his liberty, his rights or his property, that the objection of unconstitutionality can be raised. Only those who have a right affected can question the validity of an act. Strangers have no standing in the courts upon such matters. This is manifestly a sound principle. It is a part of the very fabric of our law. It was declared early by this court. It has been adhered to consistently. It has been adopted generally. It would be unfortunate if volunteers and strangers could institute at will proceedings to attack the constitutionality of public acts."

If, however, the petitioner is seeking as a private citizen "to enforce a public duty not due to the government as such" (*Attorney General* v. *Boston*, 123 Mass. 460, 469), or is attempting to vindicate a public right by seeking the performance of a public duty owed to the public as the real party in interest (*Cox* v. *Segee*, 206 Mass. 380), yet in all such cases it is essential upon a private citizen seeking to become a relator "to show that he is a citizen and as such interested in the execution of the laws." High, Ex. Leg. Rem. (3d. ed.) § 431, cited in *Brewster* v. *Sherman*, 195 Mass. 222, 224.

The Legislature, evidently recognizing the character of the writ in question, put the obligation upon the Attorney General of deciding whether or not the circumstances warranted resort to this extraordinary writ. The statute (G. L. [Ter. Ed.] c. 249, § 12) provides: —

"The supreme judicial court shall have jurisdiction of information in the nature of quo warranto filed by the attorney general against a person holding or claiming the right to hold an office or employment, the salary or compensation of which is payable by the commonwealth, a county, city or town."

It was never the intent of the law that this provision should be used as a further instrument of delay in the execution of criminal sentences or to furnish an additional weapon of defense for purposes of delay.

It has been uniformly held by my predecessors in office that the legality of the acts of a *de facto* officer is not subject to collateral attack. *Attorney General ex rel. Elisha Greenhood* v. *Erastus Worthington, Jr., et al.*, I Op. Atty. Gen. 617; *Attorney General* v. *Charles P. Curtis, Jr.*, II *ibid.* 632; *Attorney General ex rel. Samuel Kason* v. *Daniel J. Kiley*, II *ibid.* 635.

Attorney General Herbert Parker, in his opinion in the case of *Attorney General* v. *Charles P. Curtis, Jr.*, II Op. Atty. Gen. 632, states: —

"The petitioner in this case seeks to impeach the title of a judge whose jurisdiction he did not challenge while he was on trial. He was apparently contented until the respondent decided against him. In similar cases in England, where an act of Parliament (St. 9 Anne, c. 20) authorized applications to be made by private individuals to the court of King's Bench for an order directing the king's attorney to file an information, it has been frequently held that, when such applications were made by persons who had not objected to the regularity of the proceedings complained of until after defeat, the application would be denied. *Rex* v. *Dawes*, 4 Burrows, 2120; *King* v. *Parkyn*, 1 Barnewall & Adolphus, 652. To the same effect is *Dorsey* v. *Anslie*, 72 Ga. 460; *People* v. *Waite*, 70 Ill. 25."

It is obvious, therefore, regardless of the *de jure* or *de facto* status of His Excellency the Governor, that his official acts are valid. It is arguable that the constitutional provision concerning the taking of his oath of office is directory rather than mandatory, and that the clear decision of the electorate should be given expression rather than thwarted by a strict adherence to a prescribed mode of qualification. For every legal purpose the Governor is in full possession of all the powers incident to his office. The question as to whether he is *de facto* or *de jure* in the exercise of these powers is one only of academic interest, for the determination of which, in the exercise of the sound discretion of the office with which I am entrusted, the aid of the courts should not be invoked. The

right to institute proceedings of this character is one which should be used only with a view to furthering the public welfare.

No evidence was adduced at the hearing showing that any request was ever made upon His Excellency to subscribe to the oath of office before the President of the Senate and in the presence of both the Senate and the House. There is nothing whatever to show that if such a request were made it would not be complied with. No extraordinary writ should be sanctioned unless it is first demonstrated that a situation complained of cannot otherwise be easily remedied. The ordinary writ of injunction would not be granted in such circumstances. *Owen* v. *Field*, 12 Allen, 457, 458; *Labagnara* v. *Kane Furniture Co.*, 289 Mass. 52.

The present application is a product of the exigencies of the situation in which Faber now finds himself. No reflection whatever is intended upon counsel, skilled and experienced trial lawyer, who is endeavoring to use every legitimate method that an honorable member of the bar, with his ability and resourcefulness, would be expected to employ.

The Attorney General, however, cannot be expected to lend his aid in furthering delay of the execution of the sentence imposed after a lengthy trial, found by our Supreme Judicial Court to be free from error. Such action on my part would be inconsistent with the public interest.

Accordingly, the use of the name of the Attorney General is refused.

PAUL A. DEVER, *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.

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