The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1924
The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1924
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, 1924.

Very respectfully,

JAY R. BENTON,
Attorney General.
The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY GENERAL.
State House.

Attorney General.
JAY R. BENTON.

Assistant.
ALEXANDER LINCOLN.
JOSEPH E. WARNER.
LEWIS GOLDBERG.
A. CHESLEY YORK.
JAMES H. DEVLIN.
A. PERRY RICHARDS.
DAY KIMBALL.\(^1\)
ROGER CLAPP.
CHARLES F. LOVEJOY.\(^2\)
MELVILLE FULLER WESTON.\(^2\)

Chief Clerk.
LOUIS H. FREENESE.

Cashier.
HAROLD J. WELCH.

\(^1\) Resigned June 1, 1924.
\(^2\) Appointed June 1, 1924.
STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

<table>
<thead>
<tr>
<th>Appropriation for 1924</th>
<th>$100,000 00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appropriation for 1923, unexpended balance brought forward</td>
<td>6,069 84</td>
</tr>
<tr>
<td>Appropriation for small claims, St. 1924, c. 510</td>
<td>5,000 00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$111,069 84</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Expenditures</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>For salary of Attorney General</td>
<td>$5,000 00</td>
</tr>
<tr>
<td>For law library</td>
<td>599 95</td>
</tr>
<tr>
<td>For salaries of assistants</td>
<td>35,924 99</td>
</tr>
<tr>
<td>For clerks</td>
<td>7,470 00</td>
</tr>
<tr>
<td>For office stenographers</td>
<td>6,505 50</td>
</tr>
<tr>
<td>For telephone operator</td>
<td>910 00</td>
</tr>
<tr>
<td>For legal and special services and expenses</td>
<td>31,166 44</td>
</tr>
<tr>
<td>For office expenses and travel</td>
<td>3,264 78</td>
</tr>
<tr>
<td>For court expenses</td>
<td>11,596 10</td>
</tr>
<tr>
<td>For small claims</td>
<td>775 00</td>
</tr>
<tr>
<td><strong>Total expenditures</strong></td>
<td><strong>$106,512 76</strong></td>
</tr>
</tbody>
</table>
The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, Jan. 21, 1925.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my annual report.

The cases requiring the attention of this Department during 1924, to the number of 7,675, are tabulated below:

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate franchise tax cases</td>
<td>439</td>
</tr>
<tr>
<td>Extradition and interstate rendition</td>
<td>334</td>
</tr>
<tr>
<td>Grade crossings, petitions for abolition of</td>
<td>61</td>
</tr>
<tr>
<td>Indictments for murder</td>
<td>51</td>
</tr>
<tr>
<td>Inventories and appraisals</td>
<td>4</td>
</tr>
<tr>
<td>Land Court petitions</td>
<td>103</td>
</tr>
<tr>
<td>Land-damage cases arising from the taking of land by the Department of Public Works</td>
<td>49</td>
</tr>
<tr>
<td>Land-damage cases arising from the taking of land by the Metropolitan District Commission</td>
<td>18</td>
</tr>
<tr>
<td>Land-damage cases arising from the taking of land by the State House Building Commission</td>
<td>1</td>
</tr>
<tr>
<td>Land-damage cases arising from the taking of land by the Department of Mental Diseases</td>
<td>4</td>
</tr>
<tr>
<td>Land-damage cases arising from the taking of land by the Pilgrim Tercentenary Commission</td>
<td>1</td>
</tr>
<tr>
<td>Miscellaneous cases arising from the work of the above-named commissions</td>
<td>34</td>
</tr>
<tr>
<td>Miscellaneous cases</td>
<td>857</td>
</tr>
<tr>
<td>Petitions for instructions under inheritance tax laws</td>
<td>36</td>
</tr>
<tr>
<td>Public charitable trusts</td>
<td>187</td>
</tr>
<tr>
<td>Settlement cases for support of persons in State hospitals</td>
<td>73</td>
</tr>
<tr>
<td>All other cases for which the Department of Public Works was charged</td>
<td></td>
</tr>
<tr>
<td>Indictments for murder disposed of during the year 1924:</td>
<td></td>
</tr>
<tr>
<td>Berkshire County. — In charge of District Attorney Charles H. Wright: John Passo.</td>
<td></td>
</tr>
<tr>
<td>Bristol County. — In charge of District Attorney Stanley P. Hall: Frederick Brengton and John E. Kennedy.</td>
<td></td>
</tr>
<tr>
<td>Essex County. — In charge of District Attorney William G. Clark: Cyrille J. Vandenhecke.</td>
<td></td>
</tr>
<tr>
<td>Hampden County. — In charge of District Attorney Charles H. Wright: Mary C. Sullivan and Joseph Zygarowski.</td>
<td></td>
</tr>
<tr>
<td>Hampshire County. — In charge of District Attorney Thomas J. Hammond: John Greeczynski.</td>
<td></td>
</tr>
<tr>
<td>Middlesex County. — In charge of District Attorney Arthur K. Reading: Robert Lee Benson, John Hankala, John Joseph King, Jr., Thomas Lanzo, Nicola Lupo, Michael Palmieri, Lawrence Sullivan, Frank Wilcinski and Albert Williams.</td>
<td></td>
</tr>
<tr>
<td>Norfolk County. — In charge of District Attorney Harold P. Williams: Michael DeBernardis and Sebastiano DeCristoforo.</td>
<td></td>
</tr>
</tbody>
</table>

1 Committed to State hospital.
The following indictments for murder are pending:

**Berkshire County.** — In charge of District Attorney Charles H. Wright: Louis Mercier.

**Bristol County.** — In charge of District Attorney Stanley P. Hall: Mary Juszynska.

**Essex County.** — In charge of District Attorney William G. Clark: Vito Caruso.

**Hampden County.** — In charge of District Attorney Charles H. Wright: John H. Burns, Manual Pereira and Stanley Zelenski.

**Middlesex County.** — In charge of District Attorney Arthur K. Reading: Hallie Mowbray, Raymond Donle Thiery and Salvatore Vona.

**Norfolk County.** — In charge of District Attorney Harold P. Williams: Alfred W. Bedard, Harry Goldenberg, Celestino Madeiros and James F. Weeks; and Nicola Sacco and Bartolomeo Vanzetti.

**Plymouth County.** — In charge of District Attorney Harold P. Williams: Jose Julio Borges.

**Suffolk County.** — In charge of District Attorney Thomas C. O'Brien: Frank Festa and J. Thomas Gettigan.

**The Administration of Criminal Justice.**

By virtue of his statutory powers, the Attorney General has called conferences of the several District Attorneys during the year. The purpose of these meetings is to facilitate the work of the District Attorneys, and the conferences are very helpful to the Attorney General in the performance of his duty “to consult with and advise district attorneys in matters relating to their duties.” These meetings provide the best possible opportunity for consultation by the Attorney General and the members of his staff with the District Attorneys on questions that arise in the performance of official duties. The information gathered at these conferences saves a great amount of time and expense on the part of the District Attorneys as well as the Attorney General’s office, and enables them to perform their duties with greater efficiency and satisfaction.

At a conference held on March 8, last, there was a discussion of matters of general policy in the prosecution of cases under the so-called “Blue Sky” Law and the statutes relating to “bucketing.” The matter of enforcement of laws relative to the illegal sale of intoxicating liquors was also considered.

On September 27, last, there was a conference held at the office of the Chief Justice of the Superior Court in the Court House at Boston, at which subjects of a confidential character were considered.

At a conference held on December 6, last, the entire time was given to a discussion of proposed recommendations to be made to the General Court in the matter of needed changes in statutes having to do with the administration of the criminal law. Among others participating in the deliberations was Hon. Walter Perley Hall, Chief Justice of the Superior Court.

At the conclusion of our deliberations, it was unanimously voted to authorize me, on behalf of the District Attorneys, to make the following recommendations and suggestions:

**A. Increase of Penalty for Failure of Witnesses to attend.**

G. L., c. 233, § 5, provides that witnesses duly summoned and required to appear and testify, who fail to attend, may be punished by a fine of not more than $20. Failure of an important witness to appear at the trial of a criminal case may often imperil the successful prosecution of such case. The penalty for failure to attend when summoned should be sufficiently adequate to deter witnesses from refusing to appear. It is therefore recommended that the penalty for this offence be increased to a fine of not more than $300, or imprisonment for not more than three months, or both.

**B. Prosecutions for Desertion and Non-Support.**

G. L., c. 273, § 5, provides that in prosecutions for desertion and non-support the court may direct the defendant to pay to the probation officer certain sums
periodically for a term not exceeding two years and may release the defendant on
probation. It frequently happens that the defendant, after the court's order,
leaves the state but continues making payments for two years and then ceases.
The defendant cannot be brought back through the process of interstate rendition
because the court has exhausted its power under the original complaint, and, if a
second complaint is made, he is not a fugitive from justice, since the new charge is
based upon acts committed subsequent to his departure from the Commonwealth.
Yet it is obvious that the statute ought to be broad enough to compel him to sup-
port his family. I therefore recommend that the statute be amended so as to
extend the term during which the court may direct that payments be made to a
period considerably longer than two years.

C. Larceny of Property exceeding $2,000 in Value.

G. L., c. 266, § 30, provides for a penalty of not more than five years in State
Prison for larceny of property exceeding $100 in value. In a recent case a defendant
was convicted of larceny of a huge sum of money from a bank. The larceny wrecked
the bank and caused great suffering to many depositors, yet the maximum penalty
was only five years in State Prison, the same penalty which might have been im-
posed for larceny of property of $101 in value. While such cases may not often
arise, it is desirable that the statute should be so enlarged as to meet such a situ-
ation. It is recommended that the statute be amended so as to enable the court
to impose a sentence of not more than twenty years in State Prison for larceny of
property which exceeds $2,000 in value.

D. Reduction of Minimum Penalties in Certain Cases.
The District Attorneys recommend that legislation be enacted carrying out the
suggestion of the special commission relative to the criminal law to the effect that
a person convicted of any crime excepting treason or murder, punishable by im-
prisonment in State Prison, may be sentenced to imprisonment in a house of cor-
rection for not more than two and a half years. See Report of Special Commission
to Investigate the Criminal Law, House (1923) No. 224, pp. 5, 6, Append. "C".

Recommendations in Previous Report.
At the instance of the District Attorneys I resubmit certain recommendations
made in my previous report.

1. Conspiracy to commit a Felony.

Under existing law a conspiracy to commit a felony is merely a misde-meanor
and the maximum penalty therefor is imprisonment for two and a half years.
This applies even though the conspiracy be one to commit murder or some other
serious felony. It seems clear that a conspiracy to commit a felony ought to be
punished at least in the same manner and to the same extent as an attempt to
commit a felony. I recommend that legislation to this effect be enacted. See
Attorney General's Report, 1923, p. 11.

2. Bail in Criminal Proceedings.
The advisability of enacting legislation providing that the liability of a bail or
surety be a lien upon the real estate offered for his qualification so as to protect
the Commonwealth in its monetary rights ought to be considered. For the reasons
therefor see Attorney General's Report, 1923, p. 10.

3. Certifying the Entire Record and Testimony in Certain Criminal Cases.
I resubmit the recommendation relative to certifying to the Supreme Judicial
Court the entire record and transcript in cases involving homicide where the
presiding justice is of the opinion that there should be such certification. See
4. Report of the Department of Mental Diseases as Evidence in Criminal Cases.

At the request of the District Attorneys I renew my recommendation that the statute be amended by striking out the provision that the report of the Department of Mental Diseases be admissible as evidence of the mental condition of the accused. Under the law the Commonwealth may not constitutionally offer such report as evidence, but the defendant may. This is manifestly unfair. See Attorney General's Report, 1923, p. 11.

**Speedy Justice in Criminal Cases.**

I respectfully ask the prompt attention of the General Court to and careful consideration of any request that may be presented by any of the District Attorneys for additional assistants.

A leading member of the Chicago bar forcibly called attention to the crying need of the hour, when he stated that,—

The history of organized government demonstrates conclusively that the speedy trial of criminal cases and the swift and certain punishment of criminals promptly effect a reduction in the volume of crime. On the other hand, increased crime follows closely on the heels of delayed trials and deferred punishment. In short, crime increases or decreases in the proportion that punishment is swift and certain. If we wish to enjoy the benefits of protection of life and the preservation of property, for which government was primarily organized, it is imperative that cases arising under the criminal laws be speedily disposed of.

Statutory legislation throughout the country has had a tendency within the last quarter of a century to be in favor of the criminal. . . . There has been too much mollycoddling of the less than one third of one per cent of the population which is criminal.

Every District Attorney in Massachusetts should have a sufficient force of assistants to clear the dockets of the criminal court and to keep them clear.

**Assaults upon Police Officers.**

The prevention, prosecution and punishment of crime is one of the most serious and difficult problems of government. Our first line of defence against the vicious, criminal elements in our community is the police. It is the duty of all citizens to stand four square behind the police in their enforcement of the laws. Police officers are public officers under a public trust to preserve the public peace and to protect society. It is the police officer's duty to face danger with the same disregard of personal consequences as a soldier. His courage must be of the highest. As His Excellency the Governor said to you in his address two weeks ago, "The fact that a police officer is engaged in an occupation which is at times full of danger is no reason why we should sit calmly by and make no effort to further protect him in the performance of his duty."

I believe that it is in the interests of the public to call attention at this time to a type of crime that is prevalent, that is notorious and shameless, and which must be stopped. I refer to cases of assault and battery upon police officers in the performance of their duties. I requested from Police Commissioner Herbert A. Wilson of Boston a list of cases of this character, and I have in my possession an itemized statement, with names and dates, showing that from January 1, 1921, to November 30, 1924, there were, in the city of Boston alone, 443 cases of this kind.

This evil must be attacked. There should be a specific law relative to this crime against the public peace, with an adequate penalty, not only for the purpose of deterring assaults upon police officers, but also for the protection of the general public, since the protection of the former is essential to the safety of the latter. There must be speedy and unrelenting prosecution by the law officers, and, most important of all, we must have an aroused public opinion, because we never want to forget that the ultimate enforcement of the law rests upon the jury box.
Reinstatement of Disbarred Attorneys — Compensation of Counsel.

The responsibility, imposed a few years ago, of conducting disbarment proceedings or appointing unpaid counsel to conduct them, was removed from the Attorney General, upon his recommendation, by chapter 134 of the Acts of 1924. The act provides that hereafter, when a disbarment petition is filed, "the proceedings thereafter shall be conducted by an attorney to be designated by the court."

This statute does not expressly apply to petitions for discipline or for reinstatement of members of the bar who have been disbarred. It is clear that in these two classes of cases it is equally important that the court should have the power to designate an attorney to conduct the proceedings when a petition is filed. The law should be amended to make this possible.

In my last report I pointed out that attorneys who are designated by the court to conduct proceedings of this character should be properly compensated. Any question as to the power of so compensating attorneys should be cleared up at this time.

I therefore recommend that G. L., c. 221, § 40, as amended by chapter 134 of the Acts of 1924, be further amended so that said section shall read as follows:

Section 40. An attorney may be removed by the supreme judicial or superior court for deceit, mal-practice or other gross misconduct, and shall also be liable in damages to the person injured thereby, and to such other punishment as may be provided by law. Whenever a petition is filed for the removal or the discipline of an attorney, or for the reinstatement of a disbarred attorney, the proceedings thereafter shall be conducted by an attorney to be designated by the court. The compensation of an attorney so designated and the expenses of the inquiry and proceedings in either court shall be paid as in criminal prosecutions in the superior court.

Provincetown Tercentenary Commission.

When the Pilgrim Tercentenary Commission was established, with power to acquire land for its purposes in Plymouth, a plan was provided by Spec. St. 1919, c. 187, § 9, by which, upon the completion of the Commission's work, it might, with the approval of the Governor and Council, make provision for the future care and maintenance of land acquired and structures erected by the Commission, by contract with municipal bodies and private societies, so that the plans brought to completion by the Commission might not be frustrated after it had ceased to function. The Provincetown Tercentenary Commission was created by Gen. St. 1919, c. 366, to perform duties in Provincetown similar in many respects to those discharged by the Pilgrim Tercentenary Commission at Plymouth. Pursuant to the statute, the Provincetown Tercentenary Commission has created and carried out a scheme, by the acquisition of land and the erection of structures in Provincetown, suitable to the preservation of the points of historic interest at that place. The work of the Commission will fail to be of permanent value if provision is not made for entrusting the duty of the care and maintenance of the sites already owned and beautified by the Commission. No statute heretofore enacted has provided for the appointment of suitable bodies or authorities, State or otherwise, to take over this duty when the Commission ceases to exercise authority. Legislation looking to this end would seem to be advisable, as the active work of the Provincetown Tercentenary Commission is drawing to a close.

The Judicial Council.

The most important act of the last legislative session relating to the administration of justice was chapter 244, creating an advisory judicial council following the recommendation of the Judicature Commission and the Attorney General. This council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, and of the work accomplished, and the results produced by that system and its various parts, has been appointed as follows:

Hon. William C. Loring has been appointed by the Chief Justice of the Supreme Judicial Court to represent that court; Hon. Franklin G. Fessenden has been ap-
pointed by the Chief Justice of the Superior Court to represent that court; Hon. Charles T. Davis, the judge of the Land Court, represents that court.

His Excellency the Governor appointed from the Probate bench Hon. William M. Prest of the Suffolk Probate Court; from the District Court bench, Hon. Frank A. Milliken of New Bedford, chairman of the administrative committee of the district courts; and from the bar, Addison L. Greene, Esq., Frank W. Grinnell, Esq., Robert G. Dodge, Esq., and Hon. Frederick W. Mansfield.

On November 8 the new council met, and former Justice Loring was chosen chairman and Frank W. Grinnell, Esq., secretary. In view of the short time remaining of the calendar year, no report of the council was made to the Governor other than a formal report of organization. The council has held three other meetings and has under consideration the subject of references to masters for hearings on the merits in equity and other equity rules. The new council marks the beginning of a continuous constructive program for the improvement of our judicial system.

**DISTRICT COURT JUDGES IN THE SUPERIOR COURT.**

Another important step forward was taken when chapter 485 of the Acts of 1924 was enacted extending the jurisdiction of district court judges called to sit with juries in the Superior Court under chapter 469 of 1923 to include "any misdemeanor except conspiracy or libel"; and providing more adequate compensation for the judges thus sitting.

In the Boston Bar Bulletin for July, 1924, the following paragraph appeared in reference to this legislation:

An act was passed extending the jurisdiction to include all misdemeanors, except libel and conspiracy, and providing compensation for the judges dating back to January first. This means that the judges who sat between October and January have served without compensation and must accept the situation philosophically as the pressure of the economy argument was too strong. It is only fair, however, that they should have the satisfaction of knowing that they performed a great public service which is appreciated even though they were not paid. They helped to break the back of the worst monster in the judicial system, — the deliberate congestion of criminal cases in the Superior Court. It is a most successful experiment recommended by the Judicature Commission. Even including the back pay, for considerably less than the cost of one permanent Superior Court judge, the Commonwealth has had the services of about fifteen judges when and where needed for the business of the minor criminal offenses. More cases have been tried. Still more have produced pleas of "guilty" when trial was found to be imminent, and still more have not been appealed, so that in Suffolk County alone the number of appealed cases is reported to have dropped from five hundred or more to about three hundred or less a month.

**THE SPOT POND CASE.**

The Legislature, in 1912, passed an act permitting the town of Stoneham to file a petition in the Middlesex Superior Court for a determination of damages sustained by the town by reason of a taking in 1898 of Spot Pond by the Metropolitan Water Board under St. 1895, c. 488.

Suit was started in 1913, and commissioners, appointed in accordance with the statute, filed a report in the fall of 1922, in which they found that the town had suffered no damage, with an alternative finding that if, as a matter of law, the town had, on the date of the taking, the right to take water for the use of its inhabitants, then damage had been incurred to the amount of $188,000 and interest, which would approximate a total of $500,000.

This report was reviewed by a justice of the Superior Court, who ruled that, as a matter of law, on the facts as set forth, the town did not have the right to take water from Spot Pond on the date in question, and accepted the determination of the commissioners that the petitioner suffered no damage by reason of the taking.

The case was then reported to the Supreme Judicial Court and a final decision was handed down on May 21, last, which affirmed the order of the Superior Court accepting the determination by the commissioners that the town suffered no damage by reason of the taking of Spot Pond by the Commonwealth. The suit was thus terminated in favor of the Commonwealth. The case was an important one, preparation of which involved an exhaustive study of public records and court decisions, commencing with 1635, when the Colonial Assembly enlarged the territorial boundaries of Charlestown so as to include Spot Pond. Arthur E. Sea-
The Alpha Portland Cement Company cases were argued in October, last, before the Supreme Court of the United States by Assistant Attorney General Alexander Lincoln. These were suits for the recovery of excise taxes assessed under the Corporation Tax Law of Massachusetts against a foreign corporation doing business in Massachusetts, which concededly was purely interstate. The question whether this law in its application to corporations like the petitioner was constitutional was thus brought directly in issue. In the Supreme Judicial Court these taxes were sustained as valid (244 Mass. 530 and 248 Mass. 156) and the suits were then taken on writ of error to the Supreme Court of the United States. The cases have not yet been decided.

PORT DIFFERENTIAL INVESTIGATION.

This proceeding of investigation was instituted by the United States Shipping Board upon its own motion, following the filing of a complaint by the Port Utilities Commission of Charleston, S. C., and the Municipal Docks and Terminals of the Port of Jacksonville, Fla., attacking the ocean differentials from the South Atlantic ports, and a related complaint by the Norfolk Port Commission, of Norfolk, Va., seeking the establishment of differentials on certain commodities on which the ocean rates are now equalized. The Board’s investigation has been more comprehensive in scope than the formal complaints referred to, and brought into issue the propriety of the ocean rates from all the Atlantic and Gulf ports to the foreign countries designated in the order instituting the investigation.

As the ports of Massachusetts had an interest in the situation quite as vital as that of the southern ports, His Excellency the Governor, at the relation of Commissioner William F. Williams of the Department of Public Works, Division of Waterways and Public Lands, requested that the Attorney General attend a hearing and present arguments on behalf of the Commonwealth before the United States Shipping Board. The case was heard in Washington on November 25, last, and the Commonwealth was represented by Assistant Attorney General James H. Devlin, who stated that the position of the Commonwealth was that the Shipping Board should take no action which would result in further discrimination against the Port of Boston, and pointed out that Massachusetts had lost much of its port business on account of certain rail differentials. He further respectfully asked that the pending complaints be not acted on, and that nothing further be done in the matter of investigation until such time as Congress shall have referred the matter to some board or boards already existing or to be created, which would have the power to consider the entire subject-matter of rates, both rail and ocean.

INTERSTATE MOTOR BUS LINES.

The question to what extent motor busses engaged in carrying passengers between points outside the Commonwealth and cities and towns within its borders may be regulated by State and local authorities was presented to the Attorney General for his consideration, in an informal manner, by various local authorities. Conferences were held by the Attorney General with the representatives of various municipalities and with counsel for certain bus lines. Important questions of law as to the status of bus lines as carriers of passengers engaged in interstate commerce, and the effect of local regulation as an interference with interstate commerce, which must ultimately be determined by the Supreme Court of the United States, lie at the basis of any adequate discussion of the problems raised by a consideration of the regulation of this form of traffic by cities and towns, as well as by the Commonwealth.

Two suits arising in other jurisdictions were pending before the Supreme Court of the United States at Washington, Duke v. Michigan Public Utilities and Buck v.
Kuykendall. The decision of these cases bade fair to determine the basic questions of law involved in the regulation of the motor bus lines. An assistant attorney general attended the sittings of the Supreme Court at Washington for the purpose of conferring with counsel in these suits and hearing the cases argued.

An opinion has just been handed down by the Supreme Court in the first of the above-mentioned suits, which holds certain statutes of Michigan, intended to regulate so-called interstate carriers, to be unconstitutional, as an interference with interstate commerce. An opinion in the other suit is anticipated shortly, and the decisions in the two suits, read together, will in all probability establish the law which must be followed in the future in regulating interstate bus lines.

**GASOLINE.**

The gasoline investigation, begun during the previous year, has been continued during the year just past. The department has been in touch with the Attorneys General of the several States on various phases of the general problem. On March 14, 1924, your Attorney General, accompanied by Assistant Attorney General Lewis Goldberg, attended a conference of Attorneys General of the several States, held at Chicago and called by Attorney General Spillman of Nebraska pursuant to instructions given him at the prior conference. On July 7th your Attorney General, as a member of a sub-committee of Attorneys General, attended a conference in Philadelphia, and on July 9th a standing executive committee, of which your Attorney General is a member, held a conference on the gasoline situation in Washington with Hon. Harlan F. Stone, Attorney General of the United States.

In September Mr. Eugene C. Hultman, chairman of the Special Commission on the Necessaries of Life, called my attention to an alleged attempt in the western part of the Commonwealth to organize the retail dealers there for the purpose of raising and controlling the retail price of gasoline. I sent an Assistant Attorney General to Springfield to make an investigation, and, in consequence of his report, I requested the Chief Justice of the Superior Court to convene a special sitting of the Grand Jury for Hampden County to consider the evidence which had been gathered. Pursuant to the orders of the Chief Justice, the Grand Jury was convened at Springfield on October 15th and the evidence was presented under the direction of an Assistant Attorney General and an Assistant District Attorney of Hampden County. The Grand Jury after hearing evidence for some days returned an indictment charging three men with conspiracy in various counts to fix, control and unreasonably enhance the retail price of gasoline and unlawfully to restrain competition in that commodity. The Grand Jury deferred further action upon the evidence presented to its next regular sitting.

Your Attorney General has throughout received the full and efficient co-operation of the Special Commission on the Necessaries of Life.

**UNCLAIMED DEPOSITS IN SAVINGS BANKS.**

Acting under the provisions of G. L., c. 168, § 42, which provides that all amounts deposited with savings banks which have remained unclaimed for more than thirty years, credited to depositors who cannot be found and who have not made a deposit or withdrawal nor have had interest added upon their pass-books, and for which no claimant is known, shall, with the increase and proceeds thereof, be paid to the State Treasurer, the Attorney General, in June, 1924, began proceedings in the various Probate Courts for the collection thereof. Upon the reports submitted to him by the Commissioner of Banks it appeared that such unclaimed deposits, amounting in the aggregate to $167,263.30, were held by 123 savings banks.

The practice in the Probate Courts requires that a petition shall be filed with relation to each savings bank, and that publication of the order of notice upon such petition shall be published three times in a newspaper within the county, and in the County of Suffolk in two newspapers. Petitions were filed and publications made. The expense incurred for such publications amounted to $8,137.23. Before final decrees were made upon the respective petitions a very great number of depositors, or their heirs, who were apprised by the newspaper advertisements
P. D. 12.

of the existence of these deposits, came forward, established their claims and were paid by the banks, and the amounts so paid were deducted from the sums originally sought to be paid to the Treasurer. The amounts so recovered by depositors and their heirs, who learned of the existence of these unclaimed funds through the advertisements of the citations, amounted to $54,662.98.

The total sum paid to the State Treasurer by the savings banks upon final decrees obtained by the Attorney General in the Probate Courts, to date, is $72,549.11. About $2,000 is to be paid upon six petitions which are still pending.

A petition has not yet been brought against one of the savings banks in Suffolk County, which reports unclaimed deposits 20,056 in number, totalling $38,051.21. The expense of the two publications of the citation relative to this bank will be so large that a special appropriation should be made to meet it.

The New Liquor Statute.

At the election last November, chapter 370 of the Acts of 1923, being "An Act relative to intoxicating liquors and certain non-intoxicating beverages," was approved. Certain portions of this act were recommended in the annual report of 1922 on the unanimous request of the Attorney General, the Attorney General elect, district attorneys and district attorneys elect of the several districts of the Commonwealth.

Prior to the going into effect of the act last December, two conferences were held with all the members of the State constabulary, and these officers were fully advised as to their powers and duties under the act.

Taxation of Banking Institutions.

Under Res. 1924, c. 20, a special commission was appointed by the Governor to investigate the operation of the laws relative to the taxation of national banks, savings banks and trust companies and to make recommendations relative thereto.

During the past few months, upon the request of this commission, the department had given its aid and advice as to the legal effect of proposed legislation pending before it, and finally, on November 17, last, an opinion of some length was given upon questions of law relating to the powers of the General Court in the imposition of taxes upon national banking associations for their shares or property.

Public Charities.

One hundred and eighty-seven matters involving public charities have been considered by the department. Most of these cases have been before the court on the petition of trustees or executors asking for instructions as to their duties or for the construction of the will or other written instrument under which they acted. Many of the cases have been before the court on petition of trustees, where the particular object of the trust had ceased to exist, asking for authority to use the fund for a purpose similar to that expressed by the donor. The following cases have deserved the especial attention of the department:

Harriet M. Huntington, late of Boston, left a fund of over $60,000 to be held for ten years, if feasible, and then to be given "to the Hyde Park Medical Club or association for a hospital or towards supporting a convalescent home." Upon a petition by the executors for instructions, and against the opposition of the heirs and next of kin, who claimed that the trust had failed, the gift was established as a valid charitable trust, and accumulation for ten years in accordance with the terms of the will was ordered.

Rufus E. Lawrence, late of Chelsea, left the residue of his estate, amounting to approximately $200,000, to charity. The allowance of the will was unsuccessfully contested in the Probate Court. The case is still pending, and may go to the Supreme Judicial Court.

Among other pending matters involving important charitable bequests, in which an appearance has been entered, are the petition of the Trustees of the Public Library of the City of Boston relating to the trusts under the will of Josiah H. Benton; the matter of the probate of the will of Lotta M. Crabtree, late of Boston; and the case of Visitors of The Theological Institution of Phillips Academy in
Andover against Trustees of Andover Theological Seminary et al., now pending in the Supreme Judicial Court.

Another important pending matter is the Robert B. Brigham Hospital case. Under an order adopted by the city council of the city of Boston, the mayor was requested to ask the Attorney General to bring an information in equity for the purpose of procuring the proper execution of the public charity directed to be established under the will of Robert B. Brigham. It is claimed that the trust funds left by said Robert B. Brigham are being used in a way not specified in the will. The sole question is whether the terms of the will and the intent of the donor have been complied with. By reason of the importance of the case, several hearings before the Attorney General have been held, at which the city and the hospital were represented by counsel. One or two more hearings will be necessary. At the conclusion of the hearings the Attorney General will determine whether or not action should be taken as requested by the city.

INTERSTATE RENDITION.

There has been in recent years a steady and marked increase in the number of interstate rendition cases handled by this department. During the year 334 such cases were disposed of, an increase of 64 cases over the previous year's record, and approximately three times the number of interstate rendition cases handled by the department ten years ago. The cases disposed of involved all manner of crimes, from simple misdemeanors to murder. Fugitives from justice were brought back to Massachusetts from practically every part of the United States, and demand was made upon us for the return of fugitives from nearly every section of the country. It might well be noted that in not a single case has any requisition for the surrender of fugitives from the justice of Massachusetts been refused by Governors of other States upon the ground that the papers accompanying the requisition, and passed upon by this department, were not in proper form.

Hearings were held in 12 cases before Assistant Attorney General Lewis Goldberg, involving in some of them intricate and perplexing questions of law. At each of these hearings the alleged fugitive was represented by counsel, and in no case was the final decision of this department challenged in the courts.

PUBLIC ACCESS TO GREAT PONDS.

Under the provisions of St. 1923, c. 453, three petitions were received, each signed by more than ten citizens, setting forth that public necessity required a right of way for public access to certain great ponds within the Commonwealth, to wit, Long Pond in Blandford, Glen Echo Pond in Canton, and Little Pond in Sherborn, respectively.

Pursuant to the act, I designated Assistant Attorney General Lewis Goldberg to represent the Attorney General on the board.

Public hearings, which had been duly advertised, were held upon the first two petitions and evidence and arguments were heard. The joint board found that public necessity did not require a public right of way to Glen Echo Pond and so reported to the Legislature. The joint board found that there was public necessity for a right of way for public access to Long Pond in Blandford. A report containing the board's findings and recommendations has been filed with the General Court. This report makes definite recommendations as to the manner in which such rights of way should be taken, paid for and maintained, and, it is believed, proposes a reasonable and practical policy relative to future takings of rights of way for public access to great ponds.

The petition for a public right of way to Little Pond in Sherborn was received recently. A survey of the pond is now being made and a public hearing will be held speedily.

THE INVESTIGATION OF SMALL CLAIMS BY THE ATTORNEY GENERAL.

By chapter 395 of 1924, the Attorney General was called upon to investigate all claims against the Commonwealth presented to him, provided there is not any statutory authority whereby the claimant may prosecute his claim by suit, at law
or in equity, or any other mode of redress provided by law. The Attorney General is authorized to hold hearings, take evidence, administer oaths and issue subpoenas in making his investigation. Payments are to be made from the State treasury on his report of claims not exceeding $1,000. If he finds the claimant is entitled to more, he is to report to the Legislature.

The Legislature appropriated $2,000 for the compensation of an assistant to handle the small claims, but so far the regular staff has been able to take care of the additional work and it has not been necessary to use the appropriation. Three thousand dollars was appropriated for the balance of the year for the settlement of the claims, and to date fifteen claims have been presented, of which four claims, totalling in amount $1,379.46, have been allowed, five claims have been disallowed, and six claims are now pending.

DEPARTMENT OF THE ATTORNEY GENERAL.

The number of official opinions rendered by the department during the year was 133.

The collections of the department for the fiscal year amounted to $214,112.21.

One case was argued before the Supreme Court of the United States, and several hearings have been held before a special master appointed by that court. One case has been argued in the Circuit Court of Appeals for the First Circuit, four cases have been tried in the United States District Court, a hearing held in the United States Court of Claims, and a case argued before the United States Shipping Board. Fifteen cases have been argued before the Supreme Judicial Court of this Commonwealth, and there have been forty-six hearings and trials before a single justice of that court. There have been two appearances before sessions of the Grand Jury, one in Plymouth County and the other in Hampden County. There have been twenty-nine hearings and trials in the civil session of the Superior Court and twenty-two in the criminal session. Twenty-one cases have been tried in the probate courts of this State, and three cases prosecuted in the local district courts. The department has been in attendance at seventeen hearings before the Industrial Accident Board, and twelve hearings have been held in extradition cases.

Certain changes have been made in the personnel of the department during the year.

On June 1, last, Day Kimball, Esq., of Boston, who was appointed an Assistant Attorney General on February 1, 1923, resigned his office, which he had filled with commendable fidelity and conspicuous ability. Mr. Kimball has since been admitted to Gray's Inn of the Inns of Court at London, it being his purpose to become a barrister in the English courts.

On June 1, last, Charles F. Lovejoy, Esq., of Swampscoot, and Melville Fuller Weston, Esq., of Reading, were appointed Assistant Attorneys General.

On September 30, 1923, Albert Hurwitz, Esq., of Boston, was designated a Special Assistant Attorney General to aid the District Attorney for the Suffolk District in the preparation and trial of certain cases that were turned over to Mr. O'Brien in 1923. On May 1, last, Mr. Hurwitz resigned to take up other work. Mr. Hurwitz has rendered faithful service in connection with the prosecution of several important criminal cases.

On June 30, last, Frank W. Kanan, Esq., of Somerville, and Matthew W. Bullock, Esq., of Boston, were appointed Special Assistant Attorneys General to assist the Metropolitan District Commission in the legal work that will have to be done in connection with the construction of a northern route to accommodate traffic between Boston and the territory north and east, as provided for in chapter 489 of the Acts of 1924.

The table of matters requiring the attention of the office, printed on page 5, while showing a total of 7,675, nevertheless does not indicate adequately the amount of business transacted during the past year, for the reason that no record is made of consultations with State officers, departments, boards and commissions. It is becoming more and more the practice of officers in all departments of the State government to consult with this office. Many such consultations are held every day, and they occupy much of the time of the Attorney General and
the Assistant Attorneys General. The practice is advantageous, and the law department is brought into close touch with all the departments of the government of the Commonwealth by thus being called upon to give help and advice necessary in solving administrative and legal tangles.

In the administration of the Attorney General's office, the faithfulness, loyalty and devotion of every member of the department, which I deeply appreciate, have played a most important part.

I annex to this report such official opinions rendered during the current year as it is thought may be of interest and which may properly be made public at this time.

Respectfully submitted,

JAY R. BENTON,
Attorney General.
OPINIONS.

Structures in Great Ponds — License.

A license is not required for a structure built in the waters of a great pond unless it is below the natural high-water mark.

Hon. William F. Williams, Commissioner of Public Works.

Dear Sir: — You request my opinion whether a license is required for the erection of a structure in the waters of a great pond, the height of which has been raised several feet and the area of which has been increased by the lawful construction of a dam, the structure being above the natural high-water mark of the pond but below the maximum flow line caused by the dam.

G. L., c. 91, § 13, provides, in part:

"The division may license any person . . . to build and extend a wharf, pier or shore wall below high water mark in said river, or to build or extend a wharf, pier, dam, wall, road, bridge or other structure, or to drive piles, fill land or excavate in or over the waters of any great pond below natural high water mark, or at or upon any outlet thereof, upon such terms as the division prescribes; . . ."

Section 19 of the act provides, in part:

"Except as authorized by the general court and as provided in this chapter, no structure shall be built or extended, or piles driven or land filled, or other obstruction or encroachment made, in, over or upon the waters of any great pond below the natural high water mark; . . ."

The basis of this legislation is found in St. 1888, c. 318, § 4, which provides that a license may be issued to build a structure, etc., in any great pond "below high-water mark," and in St. 1888, c. 318, § 2, which provides that except as authorized in the act no structure, etc., shall be built in any great pond "below the high-water mark thereof."

In R. L., c. 96, §§ 15 and 18, which reënact St. 1888, c. 318, §§ 2 and 4, the word "natural" was inserted, so that the law then read and now reads "below the natural high-water mark." That the insertion of the word "natural" was deliberate and not accidental is shown by the fact that both G. L., c. 91, § 13, and R. L., c. 96, § 18, which provide for licenses for structures in great ponds below the natural high-water mark, also provide for licenses for structures in the Connecticut River "below high-water mark." The original statute with respect to licenses for structures in the Connecticut River (St. 1885, c. 344, § 3) read "below high-water mark," and this language has not been changed or amended. It is inconceivable that the Legislature, in enacting the sections referred to in the General Laws and Revised Laws, would, in the same sections, have inserted the word "natural" with respect to great ponds and have failed to make the insertion with respect to the Connecticut River unless the insertion was deliberate and designed to change the existing law.

I am therefore of the opinion that a license is not required for a structure built in the waters of a great pond unless it is below the natural high-water mark.

Very truly yours,

Jay R. Benton, Attorney General.

Savings Banks — Sale of Travelers' Checks and Letters of Credit.

A travelers' check or letter of credit is not a transmission of money or the equivalent thereof within the meaning of G. L., c. 168, § 33A.

Hon. Joseph C. Allen, Commissioner of Banks.

Dear Sir: — You request my opinion as to whether G. L., c 168, § 33A, should be so construed as to permit the sale of travelers' checks and letters of credit. Said section reads as follows: —
“Savings banks may, under regulations made by the commissioner, receive money for the purpose of transmitting the same, or equivalent thereof, to another state or country.”

In the broadest sense, and a sense often used by the courts, a letter of credit is any letter whereby the writer arranges for some other person to obtain credit. 35 Harvard Law Review, 542. Daniel on Negotiable Instruments, vol. 2, 6th ed. § 1790, says: —

“A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement, or accept bills drawn upon himself for the like amount.”


The primary purpose of the commercial letter of credit is to enable the shipper to receive his money upon shipment; to enable the buyer to postpone actual payment until the goods have been received and resold; to enable a bank to lend its credit and not its funds; to utilize the goods as security in the meantime.

A travelers' letter of credit is similar in principle to a commercial letter, but is made use of for facilitating a supply of money required by one going to a distance or abroad, and avoiding the risk and trouble of carrying specie or buying bills to a greater amount than may be required.

A letter of credit is not drawn against any fund; it is not payable absolutely but only in the event that the letter bearer may use it; it is optional with him. It is, as viewed from the standpoint of the bank, simply the lending of the bank's credit and not of its funds.

Travelers' checks are used almost exclusively by travelers. They are generally for specific sums, and are in fact letters of credit which a banking house gives a traveler, and which are made available on presentation to any of the agents or correspondents of the house in a long list of names, the names both of the places and of the agents in them being usually stated in the instrument itself. They may be cashed only upon being countersigned by the person to whom they were issued, and ordinarily only in the presence of the person to whom they are presented for payment. It is the counter-signature by which the holder is identified in a strange place. If they are lost they are refunded. Like letters of credit, they may not be used; that is optional with the holder. He may return unused ones and be reimbursed. The check is simply a promise of the bank to pay in the event that it is presented and properly countersigned. James Sullivan v. Wilhelm Kanuth, 220 N. Y. 216; Samburg v. American Express Co., 136 Mich. 639.

In my opinion, a travelers' check or letter of credit is not a transmission of money or the equivalent thereof, within the meaning of the statute.

Very truly yours,

JAY R. BENTON, Attorney General.

Abolition of Grade Crossings — Right of Towns to a Refund from the Commonwealth for Interest paid.

St. 1914, c. 18, § 1, did not take away, as to grade crossing debts incurred prior thereto, the right of a town under St. 1908, c. 390, § 2, to a refund from the Commonwealth of the excess of the amount of interest paid by the town over the actual cost to the Commonwealth for money borrowed for the abolition of grade crossings.

Hon. James Jackson, Treasurer and Receiver General.

Dear Sir: — You have brought to my attention a communication received by you from the treasurer and collector of taxes of the city of Somerville in regard to a claim of the city of Somerville for refund of interest on account of grade crossing debts.

You state that this claim is based upon the fact that the city of Somerville has paid interest at 4 per cent upon grade crossing debts incurred under St.
1908, c. 390, § 2, prior to the passage of St. 1914, c. 18, § 1, amounting in all to $18,774.95. This sum represents interest payments made since as well as before 1914, as the rate of 4 per cent was maintained unchanged even after 1914 as to all grade crossing debts incurred prior to that date. The city of Somerville now claims a refund, as provided for in St. 1908, c. 390, § 2, equal to the difference between the amount of interest at 4 per cent paid by it and "the actual interest cost to the Commonwealth for money borrowed for the abolition of grade crossings. . . ."

Upon the above facts you request my opinion as to whether the city of Somerville has a valid claim at this time for a refund of overpayment of interest, and if so, "to what date shall the interest be figured."

St. 1908, c. 390, § 2, reads, in part, as follows:—

"The court shall, from time to time, issue its decrees for payments on the part of the railroad corporation and on the part of any street railway company, not exceeding the amounts apportioned to them respectively by said auditor in his report, and for the payment by the commonwealth of a sum not exceeding the amounts apportioned to it and to the city or town; and such city or town shall repay to the commonwealth the amount apportioned to it, with interest thereon, payable annually at the rate of four per cent from the date of the acceptance of the report of the auditor. Such repayment of the principal shall be made annually in such amounts as the auditor of the commonwealth may designate; and the amount of payment designated for the year, with the interest due on the outstanding principal, shall be included by the treasurer and receiver general in the amount charged to such city or town, and shall be assessed upon it in the apportionment and assessment of its annual state tax. The treasurer and receiver general shall in each year notify such city or town of the amount of such assessment, which shall be paid by it into the treasury of the commonwealth as a part of, and at the time required for, the payment of its state tax. When the final assessment on a city or town has been paid by it, the treasurer and receiver general shall repay to it, in reduction of said final payment, the amount of interest, if any, which has been assessed to and paid by it in excess of the actual interest cost to the commonwealth for money borrowed for the abolition of grade crossings previous to the payment of said final assessment."

St. 1914, c. 18, § 1, reads, in part, as follows:—

"Section thirty-nine of Part I of chapter four hundred and sixty-three of the acts of the year nineteen hundred and six, as amended by section two of chapter three hundred and ninety of the acts of the year nineteen hundred and eight, is hereby further amended by striking out the words 'of four per cent,' in the thirty-fifth line, and inserting in place thereof the words:— of interest determined by the auditor of the commonwealth as approximately that paid by the commonwealth on the last money borrowed for the abolition of grade crossings,—and by striking out the last sentence, so as to read as follows:— Section 39. . . . The court shall, from time to time, issue its decrees for payments on the part of the railroad corporation and on the part of any street railway company, not exceeding the amounts apportioned to them respectively, by said auditor in his report, and for the payment by the commonwealth of a sum not exceeding the amounts apportioned to it and to the city or town; and such city or town shall repay to the commonwealth the amount apportioned to it, with interest thereon, payable annually at the rate of interest determined by the auditor of the commonwealth as approximately that paid by the commonwealth on the last money borrowed for the abolition of grade crossings, from the date of the acceptance of the report of the auditor. Such repayment of the principal shall be made annually in such amounts as the auditor of the commonwealth may designate; and the amount of payment designated for the year, with the interest due on the outstanding principal, shall be included by the treasurer and receiver general in the amount charged to such city or town, and shall be assessed upon it in the apportionment and assessment of its annual state tax. The treasurer and receiver general shall in each year notify such city or town of the amount of such assessment, which shall be paid by it into
the treasury of the commonwealth as a part of, and at the time required for, the payment of its state tax."

The effect of the amendment of 1914 was to repeal by implication so much of the former act as provided that the rate of interest to be paid by a city or town should be 4 per cent, and that the excess of interest paid over actual interest cost should finally be refunded. Wilson v. Head, 184 Mass. 515. The question is whether the amendment is applicable to grade crossing debts incurred prior to its enactment, on which interest was paid at the rate of 4 per cent not only before but after 1914.

Where a right to recover money is purely statutory it has been held to be extinguished by the repeal, without a saving clause, of that portion of the act which created it. Wilson v. Head, supra. There are analogous cases in the criminal law, Commonwealth v. Marshall, 11 Pick. 350. But the amendment we are considering struck out not only the right to repayment but also the requirement that the rate of interest to be paid should be 4 per cent. The substantial change made was to do away with the necessity of repayment by providing that the rate to be paid by the cities and towns should be determined by an approximation to that which the Commonwealth was obliged to pay. The natural inference is that the amendment was intended to apply only in cases where the rate of interest was to be determined as provided in the amendment, and was not intended to take away the right of refund where interest was paid under the prior statute at the flat 4 per cent rate.

Furthermore, it seems that the amending act has consistently in practice been construed by those charged with the duty of carrying its provisions into effect as applicable only to grade crossing debts incurred subsequent to its passage, since interest at the 4 per cent rate has uniformly been collected on debts which arose previously. This could only have been done on the theory that to such debts the amendment was not applicable. Commonwealth v. Parker, 2 Pick. 550, 557; Tyler v. Treasurer and Receiver General, 226 Mass. 306. It would seem, therefore, that the mutual obligations imposed upon the Commonwealth, on the one hand, and the towns, on the other, by St. 1908, c. 390, § 2, should be held to have survived the partial repeal of that act in 1914, provided this conclusion involves no violation of sound legal theory.

When the town's share of a given grade crossing assessment was paid by the State under the provisions of St. 1908, c. 390, § 2, there arose a definite obligation, contractual in its nature, which, if not a true contract, was at least one of those obligations created either by the common law, under the impulse of equitable principles, or by statute, which are grouped under the generic name of quasi contractual obligations. This quasi debt, if it may be so termed, contained within itself the definition of its own incidents, namely, the duration, interest rate and rebate feature provided for in the statute. The right to a refund was no less inherent in it than any other feature. In fact, strictly, the interest rate may be said to have been "4 per cent minus a certain unascertained future rebate," rather than simply "4 per cent." In the absence, at least, of any expression of legislative intent to the contrary, there seems no reason why such a quasi debt, being an existing, definite obligation, should not survive the repeal of the statute under which it originally arose.

In Steamship Co. v. Joliffe, 2 Wall. 450, the Supreme Court of the United States, in considering the right of a pilot to the compensation provided for in a statute that had been repealed after the performance of the services in question, said: —

"If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, ... The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract...."
The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.

And it is clear that the legislature did not intend by the repealing clause in the act of 1864, to impair the right to fees, which had arisen under the original act of 1861."

In my opinion, this language is applicable to the present case; and in view of what I have already stated I believe to be the proper inference of legislative intent to be drawn from St. 1914, c. 18, § 1, I am of the opinion that the city of Somerville has a valid claim at this time for a refund of overpayment of interest, and that the amount due should be figured to the date of the payment by the city of Somerville of the final assessment.

Very truly yours,

JAY R. BENTON, Attorney General.

Public Records — Certification of Copies — Secretary of the Commonwealth.

Under G. L., c. 9, § 11, the precise form in which copies of public records shall be certified is within the discretion of the certifying officer, but the copies must be full, exact and literal: authentication by seal is impliedly authorized.

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

Dear Sir: — You request my opinion as to whether you "have the right to certify, substantially in accordance with the form attached to your request, to a birth, marriage or death."

G. L., c. 46, deals with "Return and Registry of Births, Marriages and Deaths." Section 1 imposes upon each city or town clerk the duty "to receive or obtain and record" certain specified facts "relative to births, marriages and deaths in his town." Section 17 requires that certified copies of such records of births, marriages and deaths be transmitted periodically to the State Secretary. Section 18 reads: —

"The state secretary shall require . . . copies transmitted under the preceding section to be written in a legible hand."

Section 21 reads: —

"The state secretary shall cause the copies received by him for each year to be bound, with indexes thereto. He shall prepare from said copies such statistical tables as will be of practical utility, and make annual report thereof to the general court."

G. L., c. 66, deals with "Public Records." Public records are defined, in so far as is pertinent to the present inquiry, as follows: —

"Any written or printed book or paper . . . which any officer . . . of the commonwealth or of a county, city or town . . . is required to receive for filing." — G. L., c. 4, § 7, par. 26th.

Section 10 of G. L., c. 66, provides: —

"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision, and shall furnish copies thereof on payment of a reasonable fee.
Section 7 of G. L., c. 66, reads, in part, as follows:—

"The state secretary, clerks of the county commissioners and city or town clerks shall respectively have the custody of all other public records of the commonwealth or of their respective counties, cities or towns, if no other disposition of such records is made by law or ordinance, and shall certify copies thereof."

Finally, G. L., c. 9, § 11, provides:—

"The state secretary shall have the custody of the great seal of the commonwealth; and copies of records and papers in his department, certified by him and authenticated by said seal, shall be evidence like the originals."

It follows from the above:—

1. That the certified copies of the records of births, marriages and deaths filed pursuant to G. L., c. 46, with the State Secretary are public documents;
2. That he is authorized to "certify copies thereof"; and
3. That such copies, when authenticated by the great seal of the Commonwealth, "shall be evidence like the originals."

In my opinion, the phrase "shall certify copies thereof" means shall make or cause to be made a full, exact and literal copy of the record in his possession, and shall append thereto a statement to the effect that such document is in fact a full, exact and literal copy of the original record. It is unnecessary to determine whether the phrase also connotes, as an additional requirement, the authentication of the document by affixing thereunto the official seal of the certifying officer; that is, in the case of the State Secretary, the seal of the Commonwealth. See Hartford Fire Ins. Co. v. Becton & Terrell, 103 Tex. 236; 125 S. W. 883. In any event, such authentication is not only sanctioned by well-nigh universal practice, but is impliedly authorized by the provision in G. L., c. 9, § 11, quoted above, as to the effect of such authentication by the State Secretary.

Within the limits of the requirements set forth in the preceding paragraph, the precise form in which copies of public records shall be certified is within the discretion of the certifying officer. I see no reason to criticize adversely the form attached by you to your request, nor to doubt that you "have the right to certify, substantially in accordance with the form attached, to a birth, marriage or death." I accordingly answer your inquiry in the affirmative.

Very truly yours,

JAT R. BENTON, Attorney General.


The term "witness fee" applies to any sum of money paid to persons subject to compulsory process as compensation for testimony given at the trial of causes.

Expert witnesses may in all cases be compelled to appear and testify to such opinions as they may have. Such witnesses cannot be compelled to make a previous study of the case or of other testimony.

State police officers and officers and employees of the Commonwealth receiving regular compensation therefrom may not receive any compensation for testifying in a cause in which the Commonwealth is a party.

Such persons may receive from counties compensation for services which they are not by law compelled to render.

Such persons may not receive from the Commonwealth compensation for special services unless such services are performed outside of usual working hours and are not required in the performance of their duties.
Hon. William G. Clark, District Attorney for the Eastern District.

Dear Sir: — You request my opinion whether any of the persons designated in G. L., c. 262, § 56, when called by the Commonwealth to give an expert opinion in the trial of cases upon matters outside their regular duties, may receive an expert fee from the county.

G. L., c. 262, § 56, provides, in part: —

"A state police officer or an officer of the commonwealth whose salary is fixed by law, or any employee of the commonwealth receiving regular compensation therefrom, shall not be entitled to a witness fee before any court or trial justice in a cause in which the commonwealth is a party. . . ."

The act, in its scope and intent, is designed to prevent the payment of witness fees, when the Commonwealth is a party, to persons therein designated whose attendance and testimony at the trial of such causes can be secured by compulsory process. The term "witness fee," as there used, is not restricted to the statutory witness fee. It applies to any amount of money, whether less or more than the statutory fee, paid as compensation for, or in consideration of, testimony given at the trial of causes by persons who are subject to compulsory process. Any other construction would enable one to evade the law by the simple device of paying a sum in excess of the statutory witness fee.

The answer to your inquiry depends upon the question whether persons who have no knowledge of the facts pertaining to the issues of a case and who have had no connection with it, but who, by reason of their special knowledge and training, may give an expert opinion based upon hypothetical questions, can be compelled to appear and testify. If compulsory process may issue for such persons, then the amount paid them for testifying is a witness fee within the purview of G. L., c. 266, § 56, and the persons designated in that section may not lawfully receive any compensation for so testifying. If, however, experts may not be compelled to appear and give expert opinions, the compensation paid them is not a witness fee.

Authorities are divided upon the question whether experts, so called, are subject to compulsory process. Some of the earlier cases and some English cases hold that the special knowledge of a person is his property, which may not be taken from him without reasonable compensation, and that experts may therefore not be compelled to testify as to their opinions. See Webb v. Page, 1 Car. & K. 23 (Eng.); Clark v. Gill, 1 Kay & J. 19 (Eng.); Betts v. Clifford, Warwick Lent Assizes, 1858 (Eng.); Re Working Men's Mut. Soc., L. R., 21 Ch. Div. 831; In the Matter of Roelker, Fed. Cas. No. 11,995; United States v. Howe, Fed. Cas. No. 15,494a; Buchman v. State, 59 Ind. 1; Dills v. State, 59 Ind. 15. In Pennsylvania the rule seems to be that experts are subject to compulsory process in cases where the government is a party but not in causes between private litigants. Pa. Co. for Insurances v. Philadelphia, 262 Pa. 439. The weight of authority, however, inclines to the view that experts are treated like ordinary witnesses, that they can be compelled to appear in all cases and testify as to such opinions as they have, and that such compulsion is not a taking of their property. Barrus v. Planeuf, 166 Mass. 123, 124; Stevens v. Worcester, 196 Mass. 45, 56; Ex Parte Dement, 53 Ala. 39, 393; Finn v. Prairie County, 60 Ark. 204, 227; People v. Conte, 17 Cal. App. 771, 784; County Comm. v. Lee, 3 Colo. App. 177, 180; Dixon v. The State, 12 Ga. App. 17; Dixon v. People, 168 Ill. 179; O'Day v. Crabbe, 269 Ill. 123, 132; Burnett v. Freeman, 125 Mo. App. 683; State v. Bell, 212 Mo. 111, 126; State v. Teipner, 36 Minn. 535; Main v. Sherman Co., 74 Neb. 155; People v. Montgomery, 13 Abb. Pr. Rep. (N. S.) 207, 238; Summers v. State, 5 Tex. App. 365, 377; Philler v. Waukesha Co., 139 Wis. 211; Wignmore on Evidence (2nd ed.) Vol. IV, § 2203; Rogers on Expert Testimony (2nd ed.) § 188; 2 A. L. R. 1576.

In Stevens v. Worcester, 196 Mass. 45, 56, the court, in holding that a witness who had already testified to facts within his knowledge could be compelled to express an expert opinion, if he had one, said: —
The auditor rightly ruled that the witness Eddy, being upon the stand, could be required to express an opinion, if he had one, and that he could not be compelled to study the case or perform labor in order to qualify him to express an opinion. As the witness had formed an opinion which he had committed to a paper which he had with him on the stand, the requirement that he should take the paper in his hand and examine it, to refresh his recollection, was not different in substance or legal effect from a requirement that he should use his mental faculties in listening to a question and in reflecting upon it, in order to give a proper answer: ... It was not like a requirement that he should study a treatise on a scientific subject."

In Barrus v. Phaneuf, 166 Mass. 123, 124, 125, the court, strongly intimating that it had power to compel attendance of expert witnesses, said:—

"We should be slow to admit that the court would be without power to require the attendance of a professional or skilled witness, upon a summons duly served, and with payment of the statutory fees, although he was unacquainted with the facts, and could testify only to opinions; but such power would hardly be exercised unless, in the opinion of the court, it was necessary for the purposes of justice. ... Even in such case the court would probably be without the power to compel the witness to make a study of the case beforehand, or to pay attention to the body of evidence introduced by the parties with a view to forming an opinion thereon. It would seem that one who is summoned as an expert would perform all that the court could require of him if he should hold himself in readiness to be called upon to testify to such opinions as he might have, when his turn should come."

I am therefore of the opinion, in the light of the authorities, that in this Commonwealth professional or skilled witnesses may, in the trial of all causes, be compelled to appear and give their expert opinions, if they have any, even though they have no knowledge of the facts pertaining to the issues involved and have had no connection with the case. It follows that State police officers, officers of the Commonwealth whose salaries are fixed by law, and employees of the Commonwealth receiving regular compensation therefrom, may not receive any fee or compensation for testifying before any court or trial justice in a cause in which the Commonwealth is a party.

In many cases, however, the testimony of an expert would be valueless if his opinion were not based upon some study of the case beforehand or upon some previous examination or observation of the defendant. In many cases where the defence is based upon insanity the prosecuting officer requires the assistance of a psychiatrist in the preparation of the case and in the examination of witnesses. Though an expert can be compelled to testify to such opinions as he may have when he is called to the stand, he cannot be compelled to make any previous study of the case or to render any assistance or even to listen to other testimony. In cases, therefore, which require preparation or prior study, or where assistance other than the mere testimony of the witness is desired, officers and employees of the Commonwealth designated in G. L., c. 262, § 56, may receive from counties compensation for services which they are not by law compelled to render. Such compensation is not a "witness fee" within the meaning of the act.

Where such services are to be paid for from the treasury of the Commonwealth a different situation arises. G. L., c. 29, § 31, provides, in part, that "salaries payable by the commonwealth . . . shall be in full for all services rendered to the commonwealth by the persons to whom they are paid." That act prohibits a person, receiving a salary from the Commonwealth, from accepting any other compensation from the Commonwealth for any services rendered during the usual hours of employment in the salaried position which he occupies. Such person may not accept another salaried position from the Commonwealth, even though the work of the second office might be done outside of the usual hours of employment of the first office. See G. L., c. 30, § 21.

He may, however, receive from the Commonwealth additional compensation for special services performed outside of the usual working hours of his position.

Persons receiving salaries from the Commonwealth may, therefore, not receive any additional compensation from the treasury of the Commonwealth for special services rendered as experts, unless such services are performed outside of the usual working hours of their employment and are not required in the performance of the duties of the positions which they hold.

Very truly yours,

JAY R. BENTON, Attorney General.


Legislative power to secure the public safety, health and morals cannot be contracted away.

Certain bills, if enacted, would be unconstitutional, for reasons stated.

A bill forbidding the employment of aliens by the Boston Elevated Railway Company, if enacted, would be an infringement of liberty of contract and arbitrarily discriminatory, and would therefore be unconstitutional.

A bill requiring the Eastern Massachusetts Street Railway Company to maintain and keep in repair the portion of highways occupied by its tracks, if enacted, would be arbitrarily discriminatory, and therefore unconstitutional.

Jan. 25, 1924.

Hon. B. LORING YOUNG, Speaker of the House of Representatives.

Dear Sir: — On behalf of the committee on rules you have asked my opinion as to the constitutionality of several bills, now pending before the committee, relating to the Boston Elevated Railway Company or to the Eastern Massachusetts Street Railway Company.

In recent years the opinion of the Attorney General has on several occasions been required on questions concerning the constitutionality of proposed laws relating to the management and operation of those companies, and involving a consideration of the application and effect of Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188. See Attorney General’s Report, 1921, p. 140; ibid., 1922, p. 23; ibid., 1923, pp. 34 and 42. In these opinions the Attorney General ruled that the provisions in each of those statutes giving to the trustees the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished constituted contracts between the Commonwealth and the companies concerned which could not be impaired without violating their constitutional rights, and that a number of the bills submitted would, if enacted into law, be unconstitutional because they contained provisions which would directly impair the contractual rights given by the two special statutes of 1918.

With respect to Spec. St. 1918, c. 159, the court has held, in Boston v. Treasurer and Receiver General, 237 Mass. 403, 413, that the statute, having been accepted by the Boston Elevated Railway Company, constitutes a binding agreement between the company and the Commonwealth, according to its terms, and that it is constitutional. The court points out that the terms of the act are contractual in their nature, as is plain not only from the general scope of the act but from the express provision, in section 18, that “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, . . . shall constitute a contract binding upon the Commonwealth.”

But the right of the companies to insist that the contractual obligations of the Commonwealth with respect to the powers and duties of the trustees shall not be impaired by new legislation is not violated by the legitimate exercise of legislative power in securing the public safety, health and morals, since the

I will now state my opinion in regard to the specific bills which you have submitted.

1. Petition that the Boston Elevated Railway Company be prohibited from employing aliens while under the period of public management and control.

The bill accompanying the petition is as follows:—

"AN ACT FORBidding THE EMPLOYMENT OF ALIENS BY THE BOSTON ELEVATED RAILWAY COMPANY.

SECTION 1. No person shall be employed by the Boston Elevated Railway Company during the period while under the public management and control provided by chapter one hundred and fifty-nine of the Special Acts of nineteen hundred and eighteen, who is not a citizen of the United States.

SECTION 2. This act shall not apply to the employment of any alien who at the time of its passage is in the service of such company, provided that such alien makes the primary declaration of intention to become a citizen of the United States within ninety days thereafter."

The right to purchase or to sell labor is part of the liberty of contract protected by the Fourteenth Amendment to the Constitution of the United States, which cannot be interfered with by a State beyond the limits of reasonable regulation, in the exercise of its police power. The amendment protects the right of the employer as well as of the employee, and the employer is equally entitled to rely upon its provisions. Lohner v. New York, 198 U. S. 45, 53; Adair v. United States, 208 U. S. 161, 173-175; Coppage v. Kansas, 236 U. S. 1, 14; Adkins v. Children's Hospital, 261 U. S. 525, 545; Opinion of the Justices, 208 Mass. 619; Opinion of the Justices, 220 Mass. 627; Commonwealth v. Boston & Maine R.R., 222 Mass. 206; Boggi v. Perotti, 224 Mass. 152.

A statute prohibiting the employment of aliens in common occupations has been held to be repugnant to the Fourteenth Amendment, under which an alien who is lawfully an inhabitant of a State is entitled to the equal protection of its laws. Truax v. Raich, 239 U. S. 33; cf. Opinion of the Justices, 207 Mass. 601.

Statutes providing for the giving of preference to citizens of States and for discrimination against aliens in employment on public works by a State or a political subdivision thereof have been held to be constitutional, by application of the principle that a State, having control of its own affairs, has the right to prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipalities. Heim v. McCall, 239 U. S. 175, 191-193; Crane v. New York, 239 U. S. 195; Lee v. Lynn, 223 Mass. 109.

The Boston Elevated Railway Company, however, is not a governmental subdivision of the State; it is only a public service corporation. To such corporations the protection of the Fourteenth Amendment in respect to the employment of labor was extended in several of the cases cited above. It is my opinion that the proposed law, if enacted, would be unconstitutional because it would deprive the railway company, and aliens employed or seeking employment by it, of that liberty of contract with respect to labor, which is protected by the Fourteenth Amendment.

The proposed law, in my judgment, is objectionable, also, because it applies to the Boston Elevated Railway Company alone, and is arbitrarily discriminatory, and denies to that corporation the equal protection of the laws, in violation of the Fourteenth Amendment. Legislation applicable to a particular class will be sustained if a reasonable basis for the distinction can be found; but it will

The measure seems to be objectionable for the additional reason that it is an impairment of the company’s contractual right, given by Spec. St. 1918, c. 159, to have its property managed and operated by the trustees, not justified as a reasonable exercise of the power of the State to secure the health, morals or safety of its people. Proper management and operation of the road might be seriously interfered with by such a regulation. On this account, also, I must hold the proposed law to be unconstitutional.

2. Petition that the board of trustees of the Boston Elevated Railway Company be required to advertise for bids on certain contracts.

The bill accompanying the petition is as follows:

“AN ACT REQUIRING THE BOARD OF TRUSTEES OF THE BOSTON ELEVATED RAILWAY COMPANY TO PUBLICLY ADVERTISE FOR BIDS ON CERTAIN CONTRACTS.

The board of trustees of the Boston Elevated Railway Company shall advertise in two or more daily newspapers published in Boston for sealed proposals for all construction work or materials involving an expense of more than . . . dollars, stating the time and place for opening such proposals and reserving the right to reject any and all proposals. At the time and place advertised for the opening of proposals all bona fide bidders shall be admitted.”

Whether a general statute requiring street railway companies to advertise for bids for construction work or materials would be unconstitutional, as an unwarranted interference with the right of such corporations to make contracts and carry on their business, as formulated and defined in cases already cited, need not now be determined. See Prudential Ins. Co. v. Cheek, 259 U. S. 530. In my opinion, the proposed law would be unconstitutional because in its particular application to the Boston Elevated Railway Company it imposes upon that corporation a burden not borne by other corporations of a similar class, and therefore denies to it the equal protection of the laws; and also because such a provision would be in violation of the contractual right, with respect to the management and operation of the company’s property, established by Spec. St. 1918, c. 159.

3. Petition that the Boston Elevated Railway Company be directed to remove the subway entrances and exits at Scollay Square and Adams Square in the city of Boston.

The bill accompanying the petition is as follows:
"An Act to compel the Boston Elevated Railway Company to abolish the present entrances and exits to the Scollay Square and Adams Square subway stations.

The Boston elevated railway company is hereby directed to remove on or before January 1, 1925, the present subway entrances and exits at Scollay Square and Adams Square in the city of Boston."

This legislation is apparently proposed as an exercise of the power to enforce regulations to secure the public safety, which in other cases has been held valid. New York & New England R.R. Co. v. Bristol, 151 U. S. 556; Baltimore v. Baltimore Trust Co., 166 U. S. 673; New Orleans Gas Co. v. Drainage Commission, 197 U. S. 453; Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583; Denver & R. G. R.R. Co. v. Denver, 250 U. S. 241. Whether it is required for that reason is for the General Court to determine. If, however, the Boston Elevated Railway Company has no title or right in the premises giving it the power to remove the subway entrances and exits referred to in the bill, obviously it cannot be compelled by the Legislature to effect such removal. I had supposed that the title to these entrances and exits was in the city of Boston, and that the Boston Elevated Railway Company had no right which would entitle it to act. As to that question I am not sufficiently advised to give an authoritative opinion.

4. Petition that the Boston Elevated Railway Company be directed to maintain toilets in the stations of the company.

The bill accompanying the petition is as follows: —

"An Act directing the Boston Elevated Railway Company to maintain toilets in the stations of the company.

The Boston elevated railway company shall keep and maintain reasonable toilet facilities for both men and women on all stations maintained by said railway company which shall be kept open at all times, that said railway station is kept open, for the convenience of its patrons."

The questions presented by this bill are similar to those presented by the bill last considered. Some such provision may be supported as a health measure, the need for which may be found by the General Court to justify the regulation. Whether the company has sufficient control of the premises occupied by its stations to be able to carry out the requirements of the bill is a matter about which I am not advised. I would suggest, also, that the meaning of the word "station" is somewhat indefinite, and that it might be construed to extend to any structure maintained for the protection of passengers while waiting for the company's cars.

5. Petition that the Eastern Massachusetts Street Railway Company be compelled to maintain and keep in repair the portion of highways occupied by its tracks.

The bill accompanying the petition is as follows: —

"An Act to compel the Eastern Massachusetts Street Railway Company to maintain and keep in repair the portion of highways occupied by its tracks.

Section 1. During the period of public operation of the Eastern Massachusetts Street Railway Company under the provisions of chapter one hundred and eighty-eight of the Special Acts of nineteen hundred and eighteen and acts in amendment thereof and supplementary thereto, the Eastern Massachusetts Street Railway Company shall keep in repair to the satisfaction of the superintendent of streets, street commissioners, road commissioners or surveyors of highways, or the division of highways of the department of public works, in the case of state highways, or the metropolitan district commission, in the case of metropolitan boulevards, the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and
shall be liable for any loss or injury that any person may sustain by reason of the carelessness, negligence, management and use of its tracks.

SECTION 2. When a party upon the trial of an action recovers damages of the commonwealth or of a city or town for an injury caused to his person or property by a defect in a street, highway or bridge occupied by the tracks of said company, if said company is liable for such damages, and has had reasonable notice to defend the action, the commonwealth, city or town may recover of the said company, in addition to the damages, all costs of both plaintiff and defendant in the action.

SECTION 3. This act shall take effect upon its passage.”

My opinion was asked last year regarding the constitutionality of a measure, in some respects similar, relating to the Boston Elevated Railway Company. In response to that request I stated my opinion to be that the bill, if enacted into law, would be constitutional, and an act was passed (St. 1923, c. 358) substantially identical with the bill which was referred to me.

As I pointed out in that opinion, St. 1897, c. 500, amending the charter of the Boston Elevated Railway Company, contained in section 10 a provision, in substance, that for a period of twenty-five years the company should not be subjected to taxes or excises not then in fact imposed upon street railways, with an exception not now material, nor any other burden, duty or obligation not imposed by general law on all street railway companies, but during that period should pay taxes imposed by general law as if it were a street railway company, and also an additional tax; and this provision was always regarded as a contract between the State and the company. At the time this statute was enacted street railway companies were required to keep in repair the portions of streets and bridges occupied by their tracks; but in the following year, by St. 1898, c. 578 (see G. L., c. 63 §§ 61-66), that obligation was discontinued, and the companies were required instead to pay an additional excise tax for the benefit of municipalities in which they were operating, to be applied to the construction, repair and maintenance of public ways. The Boston Elevated Railway Company was excepted from the operation of the act, doubtless because of the contract contained in St. 1897, c. 500, § 10, relieving it, for the period named, of the burden of taxes imposed by subsequent legislation. The proposed law seemed to me to violate no right given or protected by Spec. St. 1918, c. 159, and to be otherwise free from constitutional objection, because it merely continued the obligation under which the Boston Elevated Railway Company had operated for many years, and continued, also, the exemption of that company from liability to pay those taxes which in the case of other companies had been substituted for the obligation to keep in repair.

The Eastern Massachusetts Street Railway Company was organized under Spec. St. 1918, c. 188, with all the powers and privileges of a street railway company organized under general laws, so far as applicable. Section 20 of said act provides, in part, as follows:

“...The new company, during the continuance of the war and for a period of two years thereafter, shall not be required, except with the express approval of the public service commission after a hearing, to pay any part of the expense of the construction, alteration, maintenance or repair of any street, highway or bridge or any structure maintained or placed therein or thereon, or of the abolition of any grade crossing or the removal of wires from the surface of any street or highway to an underground conduit or other receptacle, and shall not, without such approval, be required directly or indirectly to make any payment or incur any expense whatsoever for or in connection with the construction, alteration, maintenance or repair of any street, highway or bridge, or the abolition of any grade crossing or the removal of wires:...”

In my opinion of last year I stated my view to be that the law then under consideration violated no rights given or protected by Spec. St. 1918, c. 159. In my judgment, it is even more clear that the proposed law, as to which you have asked my opinion, violates no rights given or protected by Spec. St. 1918, c. 188. There is, however, a much more serious question whether the proposed law, if enacted, would not be so arbitrarily and unreasonably discriminatory
as to violate the company's constitutional rights. The Eastern Massachusetts Street Railway Company has always been and now is subject to the excise tax first laid by St. 1898, c. 578, the object of which is to recompense municipalities, either wholly or in part, for the expense of the construction, maintenance and repair of public ways through which their lines run. The bill does not purport to free the Eastern Massachusetts Street Railway Company from that burden; but that company is singled out as one which is to be required not only to pay the tax imposed for the purpose of providing funds for the repair of roads, as I have explained, but also to keep in repair a portion of those ways. Unless there is some reasonable basis for this discrimination the bill cannot be sustained. No reasonable ground is apparent to me. On the face of the bill as it appears before me I must therefore advise you that, in my opinion, it would be unconstitutional if enacted.

Very truly yours,

JAY R. BENTON, Attorney General.

Veteran — Settlement — "Actually resided."

Under St. 1922, c. 177, the place of settlement of a person inducted into the military forces of the United States under the Federal Selective Service Act is the place where he "actually resided" or was living at the time of his induction, as distinguished from the place of legal residence or domicile.

JAN. 25, 1924.

Mr. RICHARD R. FLYNN, Commissioner of State Aid and Pensions.

Dear Sir: — You request my opinion in regard to the legal settlement of a discharged veteran of the World War upon the basis of the following facts: A man who had a derivative settlement in Lynn, through his mother, moved with his family to Marlborough on December 29, 1915. In 1917 he deserted his family and went to West Springfield Street, Boston, to live. While living at 232 West Springfield Street, Boston, he enrolled for the draft and was inducted at Boston, July 22, 1918, giving at that time as his residence 573 Essex Street, Lynn, Mass. For three or four days prior to his induction he was visiting his brother in Lynn at that address. On July 18, 1918, four days prior to the date of his induction, he was living (according to the statement of the Marlborough overseers) in Boston. On November 23, 1918, he was honorably discharged from the service. His family have remained at all times in Marlborough.

On the basis of the above facts you request my opinion as to whether, under St. 1922, c. 177, he acquired a military settlement at:

(1) The place at which he was visiting his brother at the time of his induction into the military service, and which he gave as his residence at that time, i.e., Lynn; or
(2) The place of residence of his wife and children since 1915, i.e., Marlborough; or
(3) "The actual place of his residence at the time of enrollment for the draft and... from which he was inducted," i.e., Boston.

That portion of St. 1922, c. 177, applicable to the present situation reads as follows:

"Any person who was inducted into the military or naval forces of the United States under the federal selective service act, ... whether he served as a part of the quota of the commonwealth or not, ... shall be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment. ..."

The settlement of the soldier in question was, therefore, the "place where he actually resided in this commonwealth at the time of his induction." The question presented is as to the proper construction of the words "actually resided."

It is well settled that the word "resided," as used in statutes relative to the acquisition of a settlement in this Commonwealth, means "domiciled."
In my opinion, however, the phrase "actually resided" connotes something different from legal residence, in the strict sense of domicile.

The phrase "actually resided" first appears in the present connection in St. 1870, c. 392, § 3. St. 1865, c. 230, conferred a settlement upon a soldier who had been enlisted and mustered as a part of the quota of a town, who was an inhabitant of that town and had resided therein six months before his enlistment. St. 1868, c. 328, struck out the requirement that the soldier should have been a resident of the town for six months. St. 1870, c. 392, § 3, struck out the requirement that the soldier should have been an inhabitant of the town of whose quota he formed a part. Section 5 of the same act provided that any person who would otherwise be entitled to a settlement under the third section of the act, but who was not a part of the quota of any city or town, should, if he served as a part of the quota of the Commonwealth, "be deemed to have acquired a settlement in the city or town where he actually resided at the time of his enlistment." As is pointed out in Brockton v. Uxbridge, 138 Mass. 292, 296, in striking out the need for inhabitancy in the town of whose quota the soldier formed a part, section 3 of St. 1870, c. 392, proceeded upon the theory that the town received the benefit of his military services and should therefore bear the burden of his military settlement, even though he was not an inhabitant; that is, even though he was not legally domiciled in that town or, presumably, even within the Commonwealth. By similar reasoning the fifth section of the act may be presumed to have gone on the theory that if the Commonwealth received the benefit of his military services some town within the Commonwealth should bear the burden of his military settlement, even though he was legally domiciled outside of Massachusetts; and that the proper town upon which to impose this burden was the one in which the soldier had "actually resided" at the time of his enlistment.

In 1919 the Legislature inserted into the law as it then stood a provision in regard to the military settlement of soldiers inducted into the military service of the United States during the World War (Gen. St. 1919, c. 333, § 5). In so doing, the phrase "actually resided" was again employed. It is to be presumed that that phrase, as applied in the act of 1919 to soldiers inducted under the draft, had the same significance that it had in the existing law as applied to soldiers who voluntarily enlisted. The provision as to the settlement of soldiers inducted under the draft during the World War was re-enacted, with minor modifications, as G. L., c. 116, § 1, par. 5; and finally as St. 1922, c. 177. As has been stated above, it is the true meaning of the phrase "actually resided," in this act, that is the subject of the present inquiry.

In addition to the reason, supplied by a study of its legislative history, for believing that the phrase "actually resided" means something other than "was domiciled," that belief is supported by a number of cases which distinguish between the conception of "actual residence," on the one hand, and "legal residence" or "domicil," on the other. Bradley v. Frazer, 54 La. 289; Tipton v. Tipton, 87 Ky. 243; Fitzgerald v. Arel, 63 La. 104; In re Brannock, 131 Fed. 819; Michael v. Michael, 34 Tex. Civil App. 630. See, also, Martin v. Gardner, 240 Mass. 350, and cases cited at the foot of page 353.

In my opinion, "actually resided" is used in St. 1922, c. 177, in contrast, on the one hand, to legal residence, i.e., domicil; and on the other, to the situation suggested by such phrases as "temporarily sojourning," "merely visiting," etc., i.e., mere physical presence. It means the place in which at the time of his enlistment the soldier was actually living, in contradistinction to the place in which he merely happened to be; and apart from any question of his intentions as to the future.

Applying this interpretation of the phrase "actually resided" to the facts supplied by you, it seems clear that the soldier in question acquired a legal settlement in Boston at the time of his induction into the military service. The question is, of course, purely one of fact in each instance. Treating, however, as I must, the case put by you as one to be determined upon the facts as stated, no other conclusion seems possible in view of the statements that the
soldier "went to West Springfield Street, Boston, to live"; that "while living at 232 West Springfield Street, Boston, he enrolled for the draft and was inducted at Boston, July 22, 1918"; that he was merely "visiting his brother . . . in Lynn three or four days prior to his induction"; and that "Boston (was) the actual place of his residence at the time of enrollment for draft."

Very truly yours,

JAY R. BENTON, Attorney General.

Savings Banks — Dividends.

A savings bank is not required, even if its earnings are sufficient, to pay a regular dividend of five per cent.

Hon. JOSEPH C. ALLEN, Commissioner of Banks.

DEAR Sir: — You request my opinion on this question: Should not a savings bank be obliged to pay regular dividends out of current earnings for a period of twelve months, up to the five per cent limitation, before it can pay an extra dividend or permit the profit and loss and guaranty fund to exceed ten and one-quarter per cent?

G. L., c. 168, § 47, provides: —

"The income of such corporation, after deducting the reasonable expenses incurred in the management thereof, the taxes paid, and the amount set apart for the guaranty fund, shall be divided among its depositors, or their legal representatives, at times fixed by its by-laws, in the following manner: an ordinary dividend shall be declared every six months from income which has been earned, and which has been collected during the six months next preceding the date of the dividend, except that there may be appropriated from the earnings remaining undivided after declaration of the preceding semi-annual dividend an amount sufficient to declare an ordinary dividend at a rate not in excess thereof; but the total dividends declared during any twelve months shall not exceed the net income of the corporation actually collected during such period, except upon written approval of the commissioner. Dividends may be declared oftener than every six months as provided in section seventeen of chapter one hundred and sixty-seven. . . . Ordinary dividends shall not exceed the rate of five per cent a year. No ordinary dividend shall be declared or paid except as above provided. . . ."

G. L., c. 168, § 50, provides: —

"Whenever the guaranty fund and undivided net profits together amount to ten and one quarter per cent of the deposits after an ordinary dividend is declared, an extra dividend of not less than one quarter of one per cent shall be declared on all amounts which have been on deposit for the six months, or not less than one eighth of one per cent on all amounts which have been on deposit for the three months, preceding the date of such dividend, and such extra dividend shall be paid on the day on which the ordinary dividend is paid; but in no case shall the payment of an extra dividend as herein provided reduce the guaranty fund and undivided profits together to less than ten per cent of the deposits."

In my opinion, the meaning of these two sections, so far as pertinent to your inquiry, is as follows: A savings bank may not declare an "extra" dividend in addition to an "ordinary" dividend unless its guaranty fund plus its undivided net profits, after deducting the amount of the ordinary dividend, amounts at least to ten and one-quarter per cent, and exceeds ten per cent by at least the amount of the proposed extra dividend. In other words, a savings bank is not authorized to declare a one-half per cent extra dividend unless, after deducting the amount of the "ordinary" dividend declared by it, its guaranty fund plus undivided net profits equals ten and one-half per cent of its deposits.

There is nothing in the various changes and modifications of G. S., c. 57, § 147, and St. 1876, c. 203, §§ 14 and 16, which have resulted in G. L., c. 168,
§§ 47 and 50, nor in the present wording of that act, to suggest that a savings bank which, for example, in a given period has made a net profit of four and one-half per cent, and which has on hand its full five per cent guaranty fund and five per cent net profits in addition, is compelled to declare a four and one-half per cent "ordinary" dividend or is prohibited from declaring instead an "ordinary" dividend of four per cent followed by an "extra" dividend of one-half per cent.

I am therefore constrained to answer the question propounded by you in the negative.

Very truly yours,

JAY R. BENTON, Attorney General.

School Pupils — Transportation — Classification of Pupils entitled to Reduced Fare on Street Railways.

With the exception of pupils in private schools and colleges which furnish a more advanced form of education than the equivalent of a public high school course, and pupils of a single class conducted independently without reference to other groups or classes having a common management, pupils who attend the public schools or private schools whose curriculum is similarly limited and pupils of vocational schools subject to G. L., c. 74, are entitled to the special rate of fare on street or elevated railways provided by G. L., c. 161, § 108.

JAN. 31, 1924.

Dr. Payson Smith, Commissioner of Education.

DEAR SIR: — You request my opinion upon certain matters relating to the transportation of school pupils under the provisions of G. L., c. 161, § 108.

Under the provisions of the statutes prior to St. 1906, c. 479, the requirement of a half fare rate on street railways had been applied by the Legislature only as to pupils of the public schools. This was extended by the said chapter to include the pupils of private schools as well.

In the case of Commonwealth v. Connecticut Valley St. Ry. Co., 196 Mass. 309, decided in 1907, the Supreme Court construed the meaning of the word "pupils," as used in the statute of 1906, with relation to other provisions of the laws then in force, and determined that the meaning of the word "pupils," as used in the statute, with relation to public and private schools, was confined to the children and youths who attended the public day schools, including the high schools, set forth in R. L., c. 42, §§ 1, 2, 4 and 8 (now G. L., c. 71, §§ 1–5), and private schools which corresponded in their educational scope with such public day and high schools. Colleges, technical and professional schools of more advanced learning were said by the court not to be within the contemplation of the act.

The limitations upon the subjects to be taught in the most advanced of the public schools are set forth now in G. L., c. 71, §§ 1–5, substantially as they were at the time of the court’s decision as to R. L., c. 42, § 1, and only private schools whose curriculum is similarly limited come within the purview of G. L., c. 161, § 108. If a private secondary school furnishes no more advanced educational facilities than those which are substantially the equivalent of the training provided by the public high schools, its pupils will be entitled to the lower rate of fare set forth in the statute. The pupils of a college, which presumably furnishes a more advanced form of education than the equivalent of a high school course, will not be entitled to the lower rate of fare.

St. 1910, c. 567, added to the school pupils enumerated in preceding statutes, who were to be carried at a lower rate of fare than other passengers, those of "industrial day or evening schools organized under the provisions of chapter five hundred and five of the acts of the year nineteen hundred and six and acts in amendment thereof," and the present act has substituted for this latter designation that of pupils of "vocational schools subject to chapter seventy-four of the General Laws."

Chapter 74, under the heading "Vocational Schools," section 1, defines "vocational education" as "education of which the primary purpose is to fit
pupils for profitable employment." It further defines "agricultural education," "industrial education" and "household arts education" as forms of vocational education. It would follow, then, that a pupil in any school provided for by chapter 74 and devoted to agricultural, industrial or household arts education, was a pupil of a vocational school within the meaning of G. L., c. 161, § 108, and was entitled to the advantages of the requirement as to lower fares.

An "independent household arts school," provided for by chapter 74, is defined in the first section of the chapter as "a vocational school," and its pupils are likewise to be included in the terms of G. L., c. 161, § 108.

A "part time class," provided for by chapter 74, is defined by the first section of the chapter as "a vocational class in an industrial, agricultural or household arts school," and the pupils attending such a class are clearly entitled to the benefit of the reduced fare.

An "independent industrial, agricultural or household arts school," provided for by chapter 74, is defined in the first section as being for all the types of vocational training defined in the section, and its pupils are clearly within the terms of G. L., c. 161, § 108. The same considerations apply to an independent agricultural school mentioned in chapter 74.

Under the heading of "Vocational Schools," section 1 of chapter 74 defines "evening class," in an industrial school, a class giving instruction for pupils employed during the working day, and which, to be called vocational, must deal with and relate to the day employment. . . ." Even if the instruction which the pupil receives in the class is not, by reason of its failure to relate to the pupil’s day employment, such as to be called "vocational," nevertheless, as the class itself is conducted in an industrial school, a school which by the definitions of the statute is engaged in the general course of giving vocational education, the pupils may fairly be said to be pupils of a vocational school and so be entitled to the benefits of the statute.

A "practical art class," provided for by this chapter, is defined as "a separate day or a separate evening class in household and other practical arts." A "household arts education" has already been defined in the first section of the chapter as a form of vocational training, and if such practical art class be held in connection with one of the schools connected with the arts already referred to, the pupil is entitled to the benefit of the statute. If such a class, however, provided for by section 14 of chapter 74, be formed and conducted independently of any of the schools mentioned in the chapter, the attendants upon such classes can hardly be said to be "pupils of vocational schools," and in such case would not be entitled to the benefits of the statute. A single class conducted without reference to other groups or classes having a common management is not the equivalent of a "school."

Schools such as are mentioned in section 15 of chapter 74 would seem to fall within the classification of vocational schools if their primary purpose be to give education to fit pupils for profitable employment. If such be not the primary purpose of any one of such schools, then such school cannot be said to be a "vocational school" within the meaning of chapter 161, and its pupils would not be entitled to the lower fare.

These instances appear to cover the various kinds of schools and classes which may be formed or maintained under the provisions of chapter 74, with the exception of those schools which are expressly referred to by name in the statute and explicitly declared to be "vocational." As to the status of pupils of such schools, there can be no doubt but that they are entitled to the reduced fare.

With the exception of the two instances above noted, the various types of pupils comprehended by the act would seem to fall fairly under the designation of pupils of vocational schools, and as such to be entitled to the lower rate of fare.

Very truly yours,

J. AY R. BENTON, Attorney General.
Membership in a political committee belonging to a political party is not a public office, and may properly be regulated by the Legislature in the exercise of the police power.

A bill providing that State committees shall consist of one committeeman and one committeewoman from each senatorial district and a number of members at large, would be constitutional, if enacted.

FEB. 6, 1924.

Hon. George W. P. Babb, Chairman, Joint Committee on Election Laws.

Dear Sir:—I have the honor to acknowledge receipt of your communication in behalf of the joint committee on election laws, requesting my opinion whether or not House Bill No. 473, if enacted into law, would be constitutional.

Section 1 of the bill, which presents the constitutional question to which your inquiry relates, amends section 1 of G. L., c. 52, relative to political committees, by striking out, in the fifth line, the word "member" and inserting the words "committeeman and one committeewoman," so that the first paragraph will read as follows:—

"Each political party shall, at the primaries before each biennial state election, elect a state committee, the members of which shall hold office for two years from January first next following their election and until their successors shall have organized. Said committee shall consist of one committeeman and one committeewoman from each senatorial district, to be elected at the state primaries by plurality vote of the members of his party in the district, and such number of members at large as may be fixed by the committee, to be elected at the state convention."

By section 2 of the bill, G. L., c. 53, § 34, as amended, relative to the form of ballots to be used at primaries, is further amended by adding a provision that names of candidates for State committeemen and for State committeewomen shall be arranged alphabetically under separate designations.

If membership in a political committee were a public office we should be confronted at the outset by the grave constitutional question whether the provision requiring the election of one committeeman and one committeewoman from each senatorial district did not violate article IX of the Bill of Rights, by which it is declared that "all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." Since the adoption of the Nineteenth Amendment to the United States Constitution this provision assures to both men and women, otherwise qualified, an equal right to hold public office as well as to vote. "Now that the word 'male' as a limitation upon the right to vote has been eliminated from the Constitution of Massachusetts, and the suffrage is thrown open to all citizens, all express limitation upon eligibility for office founded upon sex, created or recognized by the Constitution, disappears." Opinion of the Justices, 240 Mass. 601, 608, 609. A requirement as to particular public offices, that they shall be filled according to a sex distinction, although resulting in a division of offices of a certain class between men and women equally, or by any method of apportionment, would seem to be wholly inconsistent with the rule thus enunciated; but as to this I am not called upon to express a formal opinion.

It is, however, settled that membership in a political committee belonging to a political party is not a public office. The duties of the position do not involve in their performance the exercise of any portion of the sovereign power. "The fact that the Legislature has deemed it expedient to regulate by statute the election and conduct of political committees does not make the office a public one. The members of them continue to be, as before, the officers of the party which elects them, and their duties are confined to matters pertaining to the party to which they belong, and which alone is interested in their proper performance." Attorney General v. Drohan, 169 Mass. 534, 536; V Op. Atty. Gen. 614.

The Constitutions both of the United States and of the Commonwealth con-
tain no mention of political parties or of political committees thereof. No peculiar constitutional safeguards surround such organizations or persons connected with them. The validity of legislation affecting them depends upon ordinary constitutional principles. Political committees may properly be regulated by the Legislature in the exercise of the police power; and any such regulation will be valid unless it trenches upon the political rights of voters secured by the Constitution of Massachusetts, or unless, because it is arbitrary or unreasonable, it offends against the fundamental constitutional guaranties of due process of law and equal protection of the laws, contained in the Fourteenth Amendment to the United States Constitution and corresponding provisions of our State Constitution. 


We come now to the specific question whether the provision that a State committee shall consist of one committeeman and one committeewoman from each senatorial district is unconstitutional.

The statute today provides for the election of one member from each senatorial district. The proposed law provides for the election of a committeeman and a committeewoman from each senatorial district. The regulation does not affect the right to hold public office or the right to vote for public officers. The distinction which it makes creates no political inequality, nor does it seem to interfere with the legal rights of any person in such a way as to deny to him the equal protection of the laws. An analogy may be found in laws requiring the separation of white and colored persons in matters unconnected with the right to hold public office or vote for public officers. Such laws, when the distinction is a reasonable one, in view of the purpose contemplated, have been held not to violate the Fourteenth Amendment, because it was not intended by that amendment to prohibit all distinctions based upon color. Plessy v. Ferguson, 163 U. S. 537, 544; Pace v. Alabama, 106 U. S. 583; Berea College v. Kentucky, 211 U. S. 45. See also, Civil Rights Cases, 109 U. S. 3. The proposed act provides for an equal proportion of men and women to be elected to the State committee from each senatorial district. This, it may be presumed, corresponds roughly to the proportion of men and women qualified to vote for delegates. It cannot be said as a matter of law, in my judgment, that if the Legislature, in its discretion, deems that it is expedient so to regulate by statute the election of political committees, this regulation would be arbitrary and unreasonable. My opinion, therefore, is that the bill, if enacted, would be constitutional.

Very truly yours,

Jay R. Benton, Attorney General.

State Armories — Armorers and Assistant Armorers — Appointment as Special Police.

There appears to be no provision of law authorizing the appointment of armorers and assistant armorers in State armories as special police officers.

Feb. 9, 1924.


Dear Sir: — You request my opinion “as to the method of procedure for securing the appointment of armorers and assistant armorers as special police
Insurance as P.D.

wealth respect the police Atty. are ment His specified shall refer by... make as special police officers in a given community depends upon the special act applicable to that community.

As a guide to an interpretation of some of the special acts relating to special police officers I refer to the legislation affecting the city of Boston. There the Police Commissioner may appoint special police officers only under St. 1898, c. 282, § 2, and amendments thereof, which provides: —

"Said board may, if it deems it expedient, on the application of any corporation or person that said board may deem responsible, appoint special police officers to serve without pay from said city, and the corporation or person applying for an appointment under this section shall be liable for the official misconduct of the officer appointed on such application, as for the torts of any servant or agent in the employ of such corporation or person."

The "corporation or person" referred to in the act is the corporation or person employing the individual sought to be appointed as a special police officer. It seems apparent that an armorer may not be appointed a special police officer in Boston, since the Commonwealth is neither a corporation nor a person, within the meaning of the act, and no officer of the Commonwealth can by such application impose any liability upon it for the armorer's misconduct.

As a further guide to a consideration of the effect of other special acts I refer also to St. 1898, c. 282, § 3. That section provides, in part: —

"Every special police officer appointed under the provisions of this act . . . shall have the power of police officers to preserve order and to enforce the laws and ordinances of the city in and about any park, public ground, place of amusement, place of public worship, wharf, manufactory or other locality specified in the application. . . ."

In the matter of making arrests a special police officer is confined strictly to the powers given by the statutes creating his position and relating thereto. Hull v. Boston & Maine R.R., 210 Mass. 159. Section 3 does not give a special police officer the full powers enjoyed by the regular police force of Boston. His powers thereunder are limited to the preservation of order and the enforcement of the laws and ordinances of the city. They could not, except with respect to the preservation of order, be exercised in armories, since armories are specifically placed under the care and control of officers of the Commonwealth and are not subject to local regulation. I Op. Atty. Gen. 290; II Op. Atty. Gen. 399; IV Op. Atty. Gen. 537.

I refrain from considering at this time what would be the respective powers of a special police officer and a commanding officer under G. L., c. 33, § 51. Such consideration may not be necessary under any existing law. I do not pass on the desirability of uniting civil and military authority in the same person, as that is beyond my province.

Very truly yours,

JAY R. BENTON, Attorney General.

Insurance — Right of Domestic Mutual Companies to transact Lawful Forms of Business in Addition to those specified in their Charters — Authority of Commissioner of Insurance.

The Commissioner of Insurance does not possess a discretion as to issuing or withholding an express license to a domestic mutual company to transact a lawful form of insurance business in addition to those specified in its charter and additional to those mentioned in G. L., c. 175, § 47. If the proposed form of insurance business is lawful, and the terms and conditions for its transaction, laid down by the Commissioner, are complied with, the company is entitled to such express license as a matter of right.
Hon. Wesley E. Monk, Commissioner of Insurance.

DEAR SIR: — You have asked my opinion whether you have discretion either to grant or to refuse a license to a domestic mutual company to transact the business of insuring against loss of use and occupancy caused by strikes and sabotage, which is a kind of business not specified in its charter or agreement of association and not included among the purposes for which an insurance company may be incorporated; or whether you are limited in your discretion to the determination of the terms and conditions under which such business shall be carried on.

G. L., c. 175, § 47, enumerates the kinds of business for the doing of which companies may be incorporated under the Massachusetts insurance law. Section 54 provides: —

"No domestic mutual company shall transact any other kind of business than is specified in its charter or agreement of association, except that it may in addition transact the kinds of business specified below by reference to the several clauses of section forty-seven, as follows:

(g) Any form of insurance not included in the provisions of section forty-seven; provided, that such form of insurance is not contrary to law and shall be transacted only upon express license of the commissioner and upon such terms and conditions as he may from time to time prescribe."

The question is whether the right given to a domestic mutual company by G. L., c. 175, § 54, (g), to transact, in addition to the kinds of business specified in its charter or agreement of association, "any form of insurance not included in the provisions of section forty-seven," is so limited by the proviso that it shall be transacted only upon express license of the Commissioner as to depend upon the exercise of the Commissioner's discretion whether he will grant or refuse a license, or whether the Commissioner's power is restricted to determining whether the proposed business is lawful and prescribing the terms and conditions under which such business may be transacted. In determining this question we must consider what authority was intended to be conferred on the Commissioner of Insurance by G. L., c. 175, § 54, (g).

The kinds of business which a domestic insurance company might be organized to do were prescribed by statute in 1872, and have been defined and limited since that time. The Legislature during this period always reserved to itself the power to pass on the advisability of the kinds of insurance that should be written, and enacted laws with appropriate restrictions. This policy was followed until 1920, at which time there were left but a few relatively unimportant kinds of insurance, with the result that the Legislature enacted a blanket clause, St. 1920, c. 327, § 2, now found in two places, to wit, G. L., c. 175, § 51, (g), and § 54, (g). To interpret these clauses as giving the Commissioner of Insurance an absolute discretion, from which no appeal may be taken, to determine what kinds of business insurance companies may transact would be saying that the Commissioner has complete authority to determine the extent of an insurance company's corporate powers. If it had been the intention of the Legislature to vest such an absolute discretion in the Commissioner, and to depart from its long-established policy, it would have said so in plain and unmistakable language. The language of the act seems to indicate a contrary intention. In my opinion, G. L., c. 175, § 54, (g), confers upon domestic mutual companies the right, subject to certain conditions, to transact any form of insurance not included in the provisions of section 47 which is not contrary to law, and this right may not be taken away from them by the Commissioner even in the exercise of a sound and reasonable discretion.

I am accordingly of the opinion that the Commissioner of Insurance has no discretion either to grant or to refuse a license for forms of insurance which are not contrary to law, and that his discretion is restricted to determining whether the proposed business is lawful and to prescribing the terms and conditions under which such business may be transacted.

Very truly yours,

J.AT R. BENTON, Attorney General.
The director of the Division of Plant Pest Control has no authority to abate a nuisance caused by the presence of gypsy or brown tail moths in land separated from a nursery by a public highway, but has such authority when the nuisance is caused by the presence of other serious insect pests.

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

Dear Sir: — You request my opinion whether the director of the Division of Plant Pest Control has any authority to act under G. L., c. 128, §§ 24 and 28, in a case where land immediately across the road from land occupied by a nursery is badly infested with injurious insects, especially gypsy moths. I assume that you use the word "nursery" as synonymous with a place "where nursery stock is grown."

G. L., c. 128, § 24, provides, in part, that "the director, either personally or through his assistants, may inspect any orchard, field, garden, roadside or other place where trees, shrubs or other plants exist, whether on public or private property, which he may know or have reason to suspect is infested with the San José scale or any serious insect pests or plant disease, when in his judgment such pests or disease are likely to cause loss to adjoining owners," and may take steps to abate the nuisance.

Section 28 of the act provides:

"Sections sixteen to twenty-seven, inclusive, twenty-nine and thirty, shall not apply to gypsy or brown tail moths in any stage of development except upon places where nursery stock is grown and upon property immediately adjoining the same."

The determination of your question depends upon the meaning of the words "adjoining" and "immediately adjoining" as used in the act. The prime meaning of the word "adjoining" is to lie next to or to be in contact with, excluding the idea of any intervening space. *Yard v. Ocean Beach Association*, 49 N. J. Eq. 306; *Century Dictionary; Standard Dictionary*. The word "adjoining" is, however, also used in the sense of adjacent, along, fronting, near, close by, and similar words. *Mathews v. Kimball*, 70 Ark. 451; *Alexander v. Big Rapids*, 76 Mich. 282; *Akers v. United New Jersey R.R.*, 43 N. J. L. 110; *Northern Pacific Ry. Co. v. Douglas County*, 145 Wis. 288. When the word is used in statutes relating to particular acts or circumstances the meaning must often be gathered from the context and the general intention of the particular statute in which it is used, and if property is the general subject of the enactment the situation and nature of the property sought to be included or excluded by the use of the word must be taken into account. *Spaulding v. Smith*, 162 Mass. 543; *Devoe v. Commonwealth*, 3 Met. 316; *St. Mary's Woolen Mfg. Co. v. Bradford Co.*, 14 Ohio C. Ct. 522; *State v. Downes*, 59 N. H. 320.

The substance of G. L., c. 128, § 24, first appeared in St. 1907, c. 321, § 4, which was made applicable to trees, shrubs or other plants "close by." The word "adjoining" appeared for the first time in St. 1909, c. 444, and was continued in the General Laws. The title of the 1909 act is, in part, "to provide for the protection of trees and shrubs from injurious insects and diseases." It seems clear both from the context and the title of the 1909 act that the Legislature did not intend to narrow the power conferred in the 1907 act, and that it used the word "adjoining" in the sense of "close by," as used in the 1907 statute. If the word "adjoining" in section 24 were given its primary meaning of "being in contact with," no effect could be given to the word "immediately" in section 28, yet it is plain that the Legislature did not regard the words "immediately adjoining," in section 28, as synonymous with "adjoining" in section 24.

Taking into consideration, therefore, the purpose sought to be accomplished and the intent of the Legislature as shown by the title of the act and by the use of the words "adjoining" and "immediately adjoining" in the same statute, I am of the opinion that the word "adjoining" as used in section 24 means adjacent, close by or near, and that the words "immediately adjoining"
as used in section 28 mean touching at some point. I am accordingly of the opinion that the director has authority, under G. L., c. 128, § 24, to take action with respect to plant disease or insect pests, other than gypsy or brown tail moths, when in his judgment the disease or pests are likely to cause loss to owners close by, even though the respective lands do not touch at any point, and that with respect to gypsy or brown tail moths he has no authority to act except upon places where nursery stock is grown or upon property immediately touching a nursery at some point.

You do not advise me as to the precise nature of the road which lies between the nursery and the infested land, but I assume that it is a public highway. Even though the fee of both owners may extend to the middle of the road and the nursery and the infested land thus legally touch one another, I am of the opinion that this is not the sort of contact contemplated by section 28. See Spaulding v. Smith, 162 Mass. 543.

Your question should therefore be answered in the negative so far as gypsy or brown tail moths are concerned, and in the affirmative with respect to other injurious insects.

Very truly yours,

JAY R. BENTON, Attorney General.

Forfeiture of Club Charter — Intoxicating Liquors — "Conviction."

A charter of a club may be declared void by the Secretary of the Commonwealth only after conviction of a person for exposing and keeping for sale or selling intoxicating liquor on the club premises.

Only a final judgment is such conviction.

A plea of guilty and the placing of the case on file does not constitute such conviction.

A charter of a club may not be declared void upon conviction for maintaining a common liquor nuisance.

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

Dear Sir: — You request my opinion whether, under the provisions of G. L., c. 138, § 76, you have authority to declare void the charter of a club described in G. L., c. 180, § 2, when its manager pleaded guilty to keeping and exposing intoxicating liquor for sale on the premises occupied by it and his case was placed on file, and he further pleaded guilty to maintaining a common liquor nuisance on its premises and was fined $100, which he paid.

G. L., c. 138, § 76, provides, in part: —

"If any person is convicted of exposing and keeping for sale or selling intoxicating liquor on the premises occupied by any club or organization described in section two of chapter one hundred and eighty . . . the selectmen of the town, or the aldermen of the city, in which such club or organization is situated, except Boston, and in Boston, the licensing board, shall immediately notify the state secretary, and he shall, upon receipt of such notice, declare the charter of said club void, . . ."

The term "conviction" has been used in two different senses in our statutes. In one use it signifies a plea of guilty or a finding by the jury that the defendant is guilty. In another use it signifies a final judgment and sentence of the court upon a verdict or confession of guilt. Attorney General v. Pelletier, 240 Mass. 264, 310; Munkley v. Hoyt, 179 Mass. 108, 109; Commonwealth v. Kiley, 150 Mass. 325, 326; Commonwealth v. Lockwood, 109 Mass. 323; Commonwealth v. Gorham, 99 Mass. 420, 422.

Where the statute provided that the conviction of a person licensed to sell intoxicating liquors shall of itself make the license void, the court, in holding that a final judgment was necessary, said, in Commonwealth v. Kiley, 150 Mass. 325, 326: —

"Under this provision, the effect of a conviction of the kind named is to deprive the defendant of a valuable right, without an opportunity for further trial or investigation. We are of opinion that nothing less than a final judgment,
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conclusively establishing guilt, will satisfy the meaning of the word 'conviction' as here used."


I am of the opinion that the instant case is governed by the rule laid down in Commonwealth v. Kiley, supra, and expressed in the opinions referred to, and that the charter of a corporation may be declared void under the provisions of G. L., c. 138, § 76, only after final judgment. The plea of guilty to the charge of keeping and exposing intoxicating liquors for sale and the placing of the case on file do not constitute a final judgment, and are not, in my opinion, a conviction within the meaning of section 76.

The corporation's manager pleaded guilty to maintaining a common liquor nuisance and paid a fine upon that plea. This constituted a final judgment, but is not one of the offenses enumerated in section 76 as a basis for declaring the charter of the club void. A person may be guilty of that offense without exposing and keeping for sale or selling intoxicating liquor. See G. L., c. 138, § 82.

I therefore advise you that you have no authority under G. L., c. 138, § 76, to declare the charter of the club void.

Very truly yours,

JAY R. BENTON, Attorney General.

Boston Elevated Railway Company — Public Control — Dividends "earned and paid."

Payments by the Commonwealth to the Boston Elevated Railway Company under Spec. St. 1918, c. 159, § 11, are to be treated as earnings in determining whether said railway company has "earned and paid" dividends within the meaning of G. L., c. 168, § 54, cl. 4th.

FEB. 20, 1924.

Hon. Henry C. Attwill, Chairman, Department of Public Utilities.

Dear Sir: — You ask to be advised whether or not the Boston Elevated Railway Company, in receiving the amounts due to it under the provisions of Spec. St. 1918, c. 159, and in paying therefrom and from its other receipts dividends to its stockholders, as provided by that act, has "earned and paid" such dividends, within the meaning of that phrase in G. L., c. 168, § 54, cl. 4th.

The first two paragraphs of G. L., c. 168, § 54, cl. 4th, read as follows: —

"Section 54. Deposits and the income derived therefrom shall be invested only as follows:

Fourth. In the bonds of any street railway company incorporated in this commonwealth, the railway of which is located wholly or in part therein, and which has earned and paid in dividends in cash an amount equal to at least five per cent upon all its outstanding capital stock in each of the five years last preceding the certification hereinafter provided for by the department of public utilities or its predecessors except the six months' period beginning July first and ending December thirty-first, nineteen hundred and sixteen. No such investment shall be made unless said company appears from returns made by it to the said department to have properly paid said dividends without impairment of assets or capital stock, and said department shall annually on or before June fifteenth certify and transmit to the commissioner a list of such street railway companies.

Dividends paid by way of rental to stockholders of a leased street railway company shall be deemed to have been earned and paid by said company within the meaning of this clause, provided that said company shall have annually earned, and properly paid in dividends in cash, without impairment of assets or capital stock, an amount equal to at least five per cent upon all its outstanding capital stock in each of the five fiscal years preceding the date of the lease thereof."
These two paragraphs of G. L., c. 168, § 54, cl. 4th, re-enacted, without alteration pertinent to the present inquiry, the first and second paragraphs of St. 1908, c. 59, cl. 5th. These, in turn, were based upon St. 1902, c. 483, §§ 1 and 2, which read as follows:—

"SECTION 1. In addition to the investments authorized by section twenty-six of chapter one hundred and thirteen of the Revised Laws, savings banks and institutions for savings may invest their deposits and the income derived therefrom in the bonds, approved by the board of commissioners of savings banks, as hereinafter provided for, of any street railway company incorporated in this Commonwealth, the railway of which is situated wholly or partly therein, and which has earned and paid annually for the five years last preceding the certification hereinafter provided for, of the board of railroad commissioners, dividends of not less than five per cent per annum upon all of its outstanding capital stock. In any case where two or more companies have been consolidated by purchase or otherwise during the five years prior to the certification aforesaid the payment severally from the earnings of each year of dividends equivalent in the aggregate to a dividend of five per cent upon the aggregate capital stocks of the several companies during the years preceding such consolidation, shall be sufficient for the purpose of this act. Dividends paid to the stockholders of the West End Street Railway Company by way of rental shall be deemed to have been earned and paid by said West End Street Railway Company within the meaning of this section.

SECTION 2. The board of railroad commissioners shall on or before the fifteenth day of January of each year transmit to the board of commissioners of savings banks a list of all street railway companies which appear from the returns made by said companies to have properly paid, without impairment of assets or capital stock, the dividends required by the preceding section."

Prior to 1902, bonds of street railway companies were not legal investments for savings banks.

The change in the phraseology of the original act, St. 1902, c. 483, §§ 1 and 2, which was made in 1908, followed the recommendation of a legislative committee appointed in 1907 and charged with the duty of suggesting changes in the existing savings bank law. On page 27 of the report of this committee (House Document No. 1280) there appears the following paragraph:—

"STREET RAILWAY BONDS.

The committee have recommended no change in the paragraph relating to investments in street railway bonds, but in conformity with the plan followed under the paragraph relating to railroad bonds, they have eliminated the name of the West End Street Railway from the present law, and have provided in general terms for the situation which required its mention."

Such expressions of legislative intent may be considered in construing the act to which they relate. Binns v. United States, 194 U. S. 486, 495; Holy Trinity Church v. United States, 143 U. S. 457, 464.

The precise legal effect upon the position of the Boston Elevated Railway Company of the so-called "control act" of 1908, Spec. St. 1918, c. 159, has not as yet been definitely determined. The important provisions of that act in regard to the payment of dividends by the Boston Elevated Railway Company are as follows:—

"SECTION 6. The trustees shall from time to time, in the manner hereinafter provided, fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service, which shall include operating expenses, taxes, rentals, interest on all indebtedness, such allowance as they may deem necessary or advisable, for depreciation of property and for obsolescence and losses in respect to property sold, destroyed, or abandoned, all other expenditures and charges which under the laws of the commonwealth now or hereafter in effect may be properly chargeable against income or surplus, fixed dividends on all preferred stock of the company from time to time outstanding, and dividends on
the common stock of the company from time to time outstanding at the rate of five per cent per annum on the par value thereof during the first two years, five and one half per cent per annum on the par value thereof during the next two years and six per cent per annum on the par value thereof during the balance of the period of public operation. Dividends upon the common shares shall be payable quarterly, but no dividends shall be paid upon such common shares in excess of the rates herein specified. The first payment shall be made at the expiration of six months from the commencement of public operation, and the total of the first three quarterly dividend payments shall be five per cent on the par value of the common stock.

SECTION 9. Whenever the income of the company is insufficient to meet the cost of the service as herein defined, the reserve fund shall be used as far as necessary to make up such deficiency, . . . .

SECTION 11. If, as of the last day of June in the year nineteen hundred and nineteen, or the last day of any December or June thereafter, the amount remaining in the reserve fund shall be insufficient to meet the deficiency mentioned in section nine, it shall be the duty of the trustees to notify the treasurer and receiver general of the commonwealth of the amount of such deficiency, less the amount, if any, in the reserve fund applicable thereto, and the commonwealth shall thereupon pay over to the company the amount so ascertained. Pending such payment it shall be the duty of the trustees to borrow such amount of money as may be necessary to enable them to make all payments, including dividend payments, as they become due. . . .

Spec. St. 1918, c. 159, amounted either to a lease of the railway property to the Commonwealth or to a contract for public operation upon stipulated terms. Boston v. Treasurer and Receiver General, 237 Mass. 403, 416. Probably the former view is the more satisfactory. Boston v. Jackson, 260 U. S. 309, 314. See, also, Opinion of the Justices, 231 Mass. 603; V Op. Atty. Gen. 320. In either case, however, in my opinion, the phrase “earned and paid,” in the first paragraph of G. L., c. 168, § 54, cl. 4th, quoted above, is broad enough to include both receipts from operation and payments, if any, by the Commonwealth under section 11 of the control act.

The word “earned” is not to be restricted to the dimes and nickels actually collected from passengers. Unquestionably it would include money received under advertising contracts and the like, or under leases of superfluous land or rolling stock. If payments by the Commonwealth under section 11 be regarded as receipts under a contract to make good possible deficiencies, they would seem, therefore, to be included within the meaning of the word “earned.” Nor does there seem any sound reason for so restricting that meaning as to exclude them, even though looked upon as rental from a lease of the entire system.

Two considerations fortify me in this conclusion. R. L., c. 113, § 26, to which St. 1902, c. 483, was in fact, though not in form, an amendment, permitted savings banks to invest in the bonds of railroad corporations which complied with certain requirements. The first paragraph of the third clause of that section was as follows: —

“Third, a. In the first mortgage bonds of a railroad company incorporated in any of the New England states and whose road is located wholly or in part in the same, whether such corporation is in possession of and is operating its own road or has leased it to another railroad corporation, and has earned and paid regular dividends of not less than three per cent per annum on all its issues of capital stock for the two years last preceding such investment.”

Originally (i.e., down to P. S., c. 116, § 20, cl. 3rd), this paragraph read: —

“In the first mortgage bonds of any railroad company . . . which is in pos-

session of and operating its own road, and has earned and paid regular dividends . . .”
Prior to 1902, however, it had been amended by St. 1889, c. 305, so as to include railroad corporations which "earned and paid regular dividends . . .," whether such corporation operated its own road or had leased it to another railroad corporation. The fact that, at the time of the adoption of St. 1902, c. 483, the law governing the legality of railroad bonds as savings bank investments had evolved to this point, indicates to my mind that the Legislature, in omitting in the first paragraph of that act any reference to the distinction between leased and operated street railways, intended the test of legality thereby established to apply equally to both.

My opinion is further fortified by the last sentence of St. 1902, c. 483, § 1 (now the second paragraph of G. L., c. 168, § 54, el. 4th), providing that "dividends paid to the stockholders of the West End Street Railway Company by way of rental shall be deemed to have been earned and paid by said West End Street Railway Company within the meaning of this section." The existence of this final sentence, which was added to the original act as an eleventh hour amendment, is explained by the fact that, under the provisions of the lease of the West End Street Railway to the Boston Elevated Railway Company, the Boston Elevated, on stipulated dates in each year, paid directly to the stockholders of the West End Street Railway Company certain stipulated sums per share held. See West End St. Ry. Co. v. Malley, 246 Fed. 625, 626. Under such an arrangement it might well have been open to question whether the West End Street Railway Company earned and paid any dividends whatsoever. The amendment was undoubtedly introduced to take care of that situation; and it is to that situation that we must look in interpreting the phrase "dividends paid by way of rental." in St. 1902, c. 483, and also, in view of the intention expressed in 1908 to effect no change in existing law, in interpreting that phrase in the second paragraph of G. L., c. 168, § 54, cl. 4th.

The fact, therefore, that the Legislature, in 1902, expressly included a particular leased line among those street railway companies to which St. 1902, c. 483, was applicable, not as an exception to a general rule excluding leased lines, but in order that that particular leased line should not be debarred from the privilege accorded to leased lines in general, because of the short cut method adopted by it for distributing to its stockholders the profits of its lease, seems to me a further indication of the legislative intent that the test of legality established should apply equally to leased and to operated lines. In fact, had St. 1902, c. 483, included operated lines only and excluded in general all leased lines, a provision extending to a particular leased line the privilege denied to all others might well have been open to serious constitutional objections.

It is true that the control act contemplates that the Boston Elevated Railway Company shall ultimately repay any money paid to it by the Commonwealth. It is to do so, however, only when, and if, its earnings from operation, in addition to covering all operating expenses and dividends, have built up a new surplus exceeding by thirty per cent or more the one million dollar reserve fund originally established. Spec. St. 1918, c. 159, § 11. This provision, therefore, is independent of the Commonwealth's obligation to meet possible deficiencies. It does not in any sense render a payment by the Commonwealth under section 11 a mere loan. Upon such a payment the Boston Elevated Railway Company does not become indebted to the Commonwealth for the amount paid over to it. True, at some future date the Boston Elevated Railway Company may be operating so successfully that it will be required by section 11 to reimburse the Commonwealth. But it is equally true that this desirable condition may never come to pass. Whether it does or not will depend upon the working of the law of demand and supply under new conditions of increased rates of fare. Despite the provision for possible future reimbursements, therefore, whether the consolidation act be looked upon as a lease or a contract, payments to the Boston Elevated Railway Company under section 11 properly may be regarded as money "earned" by it.

Accordingly, in my opinion, if the Boston Elevated Railway Company, pursuant to Spec. St. 1918, c. 159, has paid dividends of at least five per cent on all its outstanding capital stock in the years 1919 to 1923, inclusive, and if in each of these years its receipts, including therein both earnings by operation and
Vaccination — Unvaccinated Child — Admission to Public Schools — Proof of Vaccination.

Vaccination, in its statutory meaning, is the operation known as vaccination properly performed. A successful operation is not required to constitute vaccination.

An unvaccinated child, within the purview of the statute, is a child upon whom the operation known as vaccination has not been properly performed. Visible evidence that vaccination has been successfully performed is not a necessary requirement for the admission of a child to a public school. Proof that a child has been properly vaccinated may be required before admission to a public school.

Mere verbal changes in the revision of a statute do not alter its meaning.

FEB. 21, 1924.

Dr. Eugene R. Kelley, Commissioner of Public Health.

Dear Sir: — You have requested my opinion on the following questions: —

“(1) What constitutes vaccination within the meaning of G. L., c. 76, § 15? (2) Is it necessary, legally, to have visible evidence that vaccination has been successfully performed? (3) Inasmuch as the ‘Goodall’ method may or may not produce an immunity, would a certificate from a physician stating that he had vaccinated a child of school age by this method, admit the child as a vaccinated pupil to school?”

G. L., c. 76, § 15, provides, in part: —

“An unvaccinated child shall not be admitted to a public school except upon presentation of a certificate like the physician’s certificate required by section one hundred and eighty-three of chapter one hundred and eleven. . . .”

G. L., c. 111, § 183, is, in part, as follows: —

“... any child presenting a certificate, signed by a registered physician designated by the parent or guardian, that the physician has at the time of giving the certificate personally examined the child and that he is of the opinion that the physical condition of the child is such that his health will be endangered by vaccination, shall not, while such condition continues, be subject to the two preceding sections.”

Section 181 provides, in part: —

“Boards of health, if in their opinion it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants of their towns, and shall provide them with the means of free vaccination. . . .”

Section 182 provides for the vaccination of inmates of certain establishments and institutions.

The requirement that children must be vaccinated before they may be admitted to the public schools first appears in St. 1855, c. 414, § 2, which provides that “the school committee of the several towns and cities, shall not allow any child to be admitted to or connected with the public schools who has not been duly vaccinated.”

Section 4 of that chapter provided for the enforcement of re-vaccination in cities and towns when the public health required it, with the following proviso: —

“. . . provided, that none shall be required to be re-vaccinated who shall prove, to the satisfaction of said selectmen, or mayor and aldermen, that they have been successfully vaccinated, or re-vaccinated, within five years next preceding; . . .”
Section 5 of the act provided that inmates of certain establishments and institutions should be "properly" vaccinated.

The requirement making vaccination a condition precedent to the right of a child to attend the public schools was modified by St. 1898, c. 496, § 11, which added the words "except upon presentation of a certificate signed by a regular practising physician that such child is an unfit subject for vaccination." This excepting clause was changed from time to time thereafter until it reached its present form.

The primary definition of the word "vaccination" is "inoculation with vaccine, or the virus of cowpox, as a preventive of smallpox." Century Dictionary; New International Encyclopedia.

"Vaccination" is also defined as "a method of protective inoculation against smallpox, consisting in the intentional transference to the human being of the eruptive disease of cattle, called cowpox." Encyclopedia Britannica.

It is further defined as "a process of transmitting by inoculation a specific disease, known as vaccinia, cowpox or modified smallpox, from one susceptible reagent to another." Encyclopedia Americana.

The word "unvaccinated" is defined as "not vaccinated; specifically, having never been successfully vaccinated." Century Dictionary.

"Inoculation" is defined as "the introduction of a specific animal poison into the tissues by puncture or other contact with a wounded surface." Century Dictionary.

In Commonwealth v. Jacobson, 183 Mass. 242, the defendant made an offer of proof, of which, as appears from the record, the ninth proposition was as follows:—

"Ninth. That vaccination consists in inoculating the human system with a specific disease, known as cowpox, by means of the insertion into the human body—by incision and absorption—of various kinds of virus, commonly known as matter or pus, generally obtained from cowpox sores upon the bodies of calves (sometimes other animals) which have been infected with this disease for the purpose of generating this virus, pus or matter."

The court said, concerning this proposition, at page 246:—

"The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial."

The decision was affirmed and the above remark was quoted with approval in Jacobson v. Massachusetts, 197 U. S. 11, 23.

In Lee v. Marsh, 230 Penn. 351, the following definition was applied in construing a statute of Pennsylvania:—

"The ordinary and usual meaning of 'vaccination,' and the sense in which it must be supposed to have been used by the legislature, is inoculation with the virus of cowpox for the purpose of communicating that disease as a prophylactic against smallpox. It indicates an operation, and not a result. If a person should take cowpox by milking cows, or otherwise, or from other contact with the disease he could not be said to have been vaccinated. The operation is comparatively old, having been in use for over 100 years, and during that time has always consisted of inoculating the body, that is, grafting upon it the disease, by inserting the virus under the skin, and the test of its success has always been considered to be the appearance of the symptoms of the disease, including those which manifest themselves on the skin."

In the medical sense, an "unvaccinated" child is generally understood to mean either a child upon whom the operation known as vaccination has never been performed or upon whom it has been performed unsuccessfully.

It thus appears that the word "vaccinated," as generally used, may apply either to the operation itself, whether successful or not, or to the successful operation.

The meaning of the words "vaccinated" or "unvaccinated," as used in the statute, must be determined from the context, the general intention of the Legis-

The original act, St. 1855, c. 414, contains the words "vaccinated," "duly vaccinated," "successfully vaccinated," "properly vaccinated," and "re-vaccinated."

The word "duly" means "in a fit manner; properly; in accordance with what is required or suitable." Words and Phrases, vol. 3, p. 2259.

The terms of the act show that the Legislature understood and appreciated the double meaning of the word "vaccinated," and that vaccination did not furnish immunity for life but that re-vaccination might be required at times for the protection of public health. In some instances, I am informed, children, because of natural insusceptibility, can never be successfully vaccinated. An interpretation of the word "vaccinated" as "successfully vaccinated" would prevent such children from ever attending a public school.

Where the vaccine used is fresh and the operation is properly performed, vaccination, I am informed, will be unsuccessful in a comparatively small number of cases.

Taking all of the foregoing factors into consideration, I am of the opinion that the Legislature, by the use of the words "duly vaccinated," meant the operation known as vaccination properly performed, and did not mean the operation successfully performed.

The words "duly vaccinated" appeared in the statutes from 1855 to the Revised Laws of 1902, when in the codification the word "duly" was omitted. It is also omitted in the General Laws. The requirement of proper vaccination as a condition precedent to admission to a public school nevertheless continues. The general rule is well settled that mere verbal changes in the revision of a statute do not alter its meaning, and that the Legislature will not be presumed to have intended to alter the law unless their language plainly requires that construction. Commonwealth v. N. Y. C. & H. R. R.R. Co., 206 Mass. 417, 419; Great Barrington v. Gibbons, 199 Mass. 527, 529; Tilton v. Tilton, 196 Mass. 562, 564; Savage v. Shaw, 195 Mass. 571; Electric Welding Co. v. Prince, 195 Mass. 242, 259.

Neither the language of the Revised Laws nor of the General Laws requires a construction that the Legislature intended to alter the law.

I am therefore of the opinion that an "unvaccinated child," within the meaning of G. L., c. 76, § 15, is a child upon whom the operation known as vaccination has not been properly performed.

My answer to your second question is in the negative.

You state that recently a new method of vaccination has been introduced, known as the "Goodall" method, which consists of a hypodermic injection of the virus, leaving no evidence that the operation has been performed. Whether or not such method is vaccination properly performed is a question of fact which is not within my province to determine. The question whether in a given case a child has been properly vaccinated is a question of fact, as to which the proper authorities may require proof.

G. L., c. 76, § 15, states a condition precedent, the non-fulfilment of which is an absolute bar to the right of a child to attend the public schools. But this is not the only statutory provision under which school children may be required to be vaccinated for the protection of the public health. Under the provisions of G. L., c. 111, §§ 181 and 183, boards of health may require and enforce the vaccination and re-vaccination of all the inhabitants of their towns, with the proviso, already referred to, exempting the child presenting a physician's certificate. In addition to this provision there is also the provision in G. L., c. 76, § 5, as follows:

"Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe..."
It has been held that by virtue of this provision school committees may adopt regulations imposing further requirements with respect to vaccination. *Hammond v. Hyde Park*, 195 Mass. 29; *Spofford v. Carleton*, 238 Mass. 528. With respect to the character of such regulations the only requirement imposed by the statute is that they shall be "reasonable." Whether regulations prescribing methods of vaccination or the submission of proof of successful vaccination would be reasonable I do not undertake to determine.

Very truly yours,

JAY R. BENTON, Attorney General.

Elections — Presidential Primaries — Candidates for Delegates to National Party Conventions — Preferences.

A nomination paper of a candidate for delegate to a national party convention at a presidential primary sufficiently states the preference of the candidate in accordance with G. L., c. 53, § 68, if it bears the words "pledged to . . ."

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

MY DEAR SIR: — You request my opinion on a question arising out of the performance of your official duties in preparing the official ballot for use in the coming presidential primaries, at which delegates to the national conventions of political parties are to be elected.

G. L., c. 53, § 68, provides, in part, that —

"The ballot shall also contain a statement of the preference, if any, of each candidate for delegate as to a candidate for nomination for president, provided that such statement appears in his nomination papers; . . ."

You state that nomination papers are now in circulation bearing the words "pledged to . . ." You ask to be advised as to whether or not the use of the statement in this form is permissible.

The statement is unambiguous, and the words clearly and unmistakably indicate the candidate's preference and choice as to a candidate for nomination for president. In my judgment, the use of such a statement is, as a matter of law, permissible, and a candidate is entitled to have placed upon the ballot such a statement of his preference, upon his complying with the other provisions of said section 68. It is not necessary that the word "preference" shall be used upon a nomination paper if a "statement" unmistakably connoting the same meaning is used.

Yours very truly,

JAY R. BENTON, Attorney General.

Constitutional Law — Rearrangement of the Constitution — Adoption of Re-arranged Constitution.

Under the Constitution an amendment may be made by initiative petition, by legislative substitute and by legislative amendment.

The Legislature has no power to initiate a new or revised constitution. The proposed rearrangement of the Constitution is not an amendment but a revision, and cannot, under the Constitution, be submitted to the voters by the Legislature.

Joint Committee on Constitutional Law.

GENTLEMEN: — You have submitted to me Senate Resolve No. 54 of 1924, and have asked my opinion upon the following questions of law in relation thereto:

"1. Is it constitutionally competent for the General Court to act upon the 'Resolve to provide that the Rearrangement of the Constitution adopted by the voters in November, nineteen hundred and nineteen, amended to conform to existing law, shall be the Constitution of the Commonwealth' (Senate No. 54),
under the provisions of article XLVIII of the amendments to the Constitution or under any other provision of the Constitution?

2. Would the adoption of a revised or rearranged constitution be an amendment of the Constitution of the Commonwealth, within the meaning of article XLVIII of the amendments to said Constitution?

3. May a revised or rearranged constitution be constitutionally adopted in any other manner than through the instrumentality of a constitutional convention?"

It is the official duty of the Attorney General to advise a committee of the Legislature only with respect to such bills as may be actually pending before it. III Op. Atty. Gen. 111; Attorney General's Report, 1921, p. 140. Cf. G. L., c. 12, § 9. The justices of the Supreme Judicial Court, in rendering opinions under Mass. Const., pt. 2d, c. III, art. II, follow a similar rule. Opinions of the Justices, 122 Mass. 600; 226 Mass. 607, 612. Your first question relates directly to a measure pending before you, and hence requires full consideration. Your second and third questions are general in form, but you state that they are asked in connection with the pending resolve. For that reason, I shall treat them as incidental to the main inquiry in your first question.

Furthermore, I assume that your questions refer solely to the authority of the General Court under the existing Constitution and to the operation and effect of that instrument. In response to an inquiry concerning possible methods of amending the Constitution, the justices of the Supreme Judicial Court, in an opinion rendered in 1833 (Opinion of the Justices, 6 Cush. 573, 574), said:—

"The court do not understand, that it was the intention of the house of representatives, to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing constitution and laws of the commonwealth, and the rights and powers derived from and under them."

Accordingly, I discard from consideration all question of the validity of legislative action under altered constitutional conditions, or of the possible efficacy of unauthorized legislative action by virtue of hypothetical future happenings.

I also assume, from the form of your questions and the caption of the resolve, which purports to provide that the rearrangement "shall be the Constitution of the Commonwealth," that the very essence of the proposed measure is the substitution of a new for an existing constitution, and that the term "revised or rearranged constitution," as you use it, means such a substituted constitution.

What are the provisions in the existing Constitution for its amendment, revision or rearrangement?

In the Constitution originally adopted there are two references to possible changes. The first is in article VII of the Bill of Rights, providing that—

"Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it."

The second is in chapter VI, article X, of the Frame of Government, which provides that—

"In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary,"—the General Court in 1795 shall take steps for the calling of a constitutional convention to consider revising or amending the Constitution.
No convention was called in 1795, as directed by that provision, but in 1820 a convention was held which submitted to the people a number of amendments, of which nine were adopted, becoming the first nine articles of amendment to the Constitution. The ninth amendment provided for amendments to the Constitution, in the following terms:

“If, at any time hereafter, any specific and particular amendment or amendments to the constitution be proposed in the general court, and agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, such proposed amendment or amendments shall be entered on the journals of the two houses, with the yeas and nays taken thereon, and referred to the general court then next to be chosen, and shall be published; and if, in the general court next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, then it shall be the duty of the general court to submit such proposed amendment or amendments to the people; and if they shall be approved and ratified by a majority of the qualified voters voting thereon, at meetings legally warned and holden for that purpose, they shall become part of the constitution of this commonwealth.”

Articles X to XLIV, inclusive, of the amendments were adopted under the provisions for amendment made by article IX.

Another constitutional convention was held in 1853. This convention submitted to the people a revised constitution, which was rejected by them.

Articles XLV to LXVI, inclusive, of the amendments were submitted to the people by the Constitutional Convention of 1917, and were adopted at subsequent elections in 1917 and 1918. The forty-eighth amendment repealed the ninth amendment, substituting therefor provisions for amendment by initiative petition as well as by proposals introduced in the Legislature. The sixtieth-seventh and last amendment was submitted to the people under the provisions for amendment contained in the forty-eighth amendment, and was approved in 1922.

The forty-eighth amendment is known as the Initiative and Referendum Amendment. It begins with the following declaration of principle:

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

Then follow provisions which are grouped under three general headings: “The Initiative,” “The Referendum” and “General Provisions.” The provisions relating to constitutional amendments are contained under the heading “The Initiative.”

Subdivision II of that heading states the requirements with respect to the contents and mode of originating initiative petitions and their transmission to the General Court, providing that certain excluded matters specified in section 2 shall not be proposed by such a petition. Subdivision III, section 2, provides for the submission to the people of a legislative substitute for any measure introduced by initiative petition. The measures proposed by initiative petitions may be either constitutional amendments or laws.

Subdivision IV is entitled “Legislative Action on Proposed Constitutional Amendments.” The provisions of that subdivision are as follows:

“Section 1. Definition. — A proposal for amendment to the constitution introduced into the general court by initiative petition shall be designated an initiative amendment, and an amendment introduced by a member of either house shall be designated a legislative substitute or a legislative amendment.

Section 2. Joint Session. — If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed by not less than twenty-five thousand qualified voters, or if in case of a
proposals for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in June, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

SECTION 3. Amendment of Proposed Amendments.—A proposal for an amendment to the constitution introduced by initiative petition shall be voted upon in the form in which it was introduced, unless such amendment is amended by vote of three-fourths of the members voting thereon, in joint session, which vote shall be taken by call of the yeas and nays if called for by any member.

SECTION 4. Legislative Action.—Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and nays, which shall be entered upon the journals of the two houses; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner. At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

SECTION 5. Submission to the People.—If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.”

By subdivision VIII under the heading “General Provisions” article IX of the amendments to the Constitution is annulled.

By the terms of the provisions quoted above it will be seen that a constitutional amendment may be made in one of three ways,—(1) by initiative petition; (2) by legislative substitute; and (3) by legislative amendment. When the requirements governing the methods of proposal have been complied with, and when the amendment has been approved by the people in accordance with the provisions of section 5, “such amendment shall become part of the constitution.”

Aside from the provision in article VII of the Bill of Rights, declaring the right of the people to reform, alter or totally change their government, the only provisions contained in the existing Constitution for making changes therein are in the forty-eighth amendment. This amendment speaks only of amendments to the Constitution. If, then, a “revision” or a “rearrangement” of the Constitution means something different from an amendment, there is no provision in the forty-eighth amendment for such a change.

The meaning of the words “rearrangement” and “revision” received careful consideration in Opinion of the Justices, 233 Mass. 603, and in Loring v. Young, 239 Mass. 349. According to the views there expressed, “rearrangement” means a change in form without change in substance, while “revision” means a change in substance as well as form and contemplates the substitution of the new for the old. The word “amendment,” on the other hand, whatever else it may connote, at least implies that one thing is to be altered or added to by another. It presupposes an existing structure. Shields v. Barrow, 17 How. 130, 144; Gagnon v. United States, 193 U. S. 451, 457. It contemplates that, upon adoption, the thing so designated shall become a part of that pre-existing structure. An amendment is not a self-supporting entity. It must be an amendment to something. It is incapable of existing in vacuo.
Both a revision and a rearrangement which substitute a new constitution for the old are essentially different from an amendment. This was the conclusion of the justices in *Opinion of the Justices*, 233 Mass. 603, 609, and in both majority and minority opinions in *Loring v. Young*, 239 Mass. 349, 373, 375, 380, 400. In chapter VI, article X, of the original Constitution the words "revision" and "amendment" are used disjunctively, and in Gen. St. 1916, c. 98, relative to the calling and holding of a constitutional convention, the purpose of the proposed convention is stated to be "to revise, alter or amend the constitution of the commonwealth," and the delegates were authorized to "take into consideration the propriety and expediency of revising the present constitution of the commonwealth, or making alterations or amendments thereof."

I conclude, therefore, that the power to amend the Constitution is different from the power to establish a new constitution supersedes and replacing the old. The power to amend the Constitution is the power to add to or alter, but not to supersede. That the power conferred upon the General Court by the forty-eighth amendment to the Constitution is the power to initiate amendments to the Constitution, not to initiate a revision of that Constitution, seems to me beyond question. *Amendments* are to be submitted to the voters; and such amendments are to "become part of the Constitution if approved."

Senate Resolve No. 54 is entitled "Resolve to provide that the Rearrangement of the Constitution adopted by the voters in November, nineteen hundred and nineteen, amended to conform to existing law, shall be the Constitution of the Commonwealth"; and purports to propose "articles of amendment" providing that "the Constitution or form of government of the Commonwealth of Massachusetts, adopted in seventeen hundred and eighty, and the sixty-seven articles of amendment thereto, are hereby deemed and taken to be revised, altered and amended by the Rearrangement of the Constitution adopted by the voters at the State election in November, nineteen hundred and nineteen, which is hereby declared to be the Constitution of the Commonwealth of Massachusetts," with certain specified amendments thereto; and that "the Constitution or form of government for the Commonwealth of Massachusetts will then be as follows."

The court held in *Loring v. Young*, 239 Mass. 349, that the Rearrangement of the Constitution submitted to the voters in 1919 contained changes in substance as compared with the Constitution of 1780 and its amendments, that the Rearrangement, however, provided that in case of conflict the old Constitution and its amendments should prevail, that the voters did not intend to adopt a new form of government, and that, accordingly, the old Constitution and its amendments was still the fundamental law. It is this very Rearrangement, set out anew in Senate Resolve No. 54, with some amendments introducing further changes in substance, as to which my opinion is now required.

The proposed resolve is, in my opinion, open to the objection that it is a revision of the Constitution rather than an amendment. Such is the plain purpose of the provisions that the so-called "Rearrangement" is hereby declared to be the Constitution of the Commonwealth of Massachusetts" and that "the Constitution or form of government for the Commonwealth of Massachusetts will then be as follows." It proposes to substitute a new constitution for the old. In my opinion, therefore, this "Rearrangement" is not within the terms of the amending power as defined in the forty-eighth amendment.

As I have said, the Constitution provides no method for making changes in it, except as set out in the forty-eighth amendment, unless such provision is to be found in the seventh article of the Bill of Rights. By virtue of this declaration, the court has intimated that "the people of the Commonwealth have under the Constitution the right to alter their frame of government according to orderly methods as provided by law, and through the medium of an act of the Legislature," and that therefore the calling of a constitutional convention may be sanctioned by the Constitution. *Opinion of the Justices*, 226 Mass. 607, 610. See also *Opinion of the Justices*, 6 Cush. 573.

But this does not mean that the Legislature may initiate a revision of the Constitution. It has no inherent power to submit to the people for ratification a new constitution, nor can such a proceeding be supported either by custom or as an orderly method provided by law. See Jameson on Constitutional Con-
P.D. 12.

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The proposing of constitutional amendments or of new constitutions is hardly to be deemed a normal exercise of legislative function, authority for which may be sought and found in the general grant of legislative power under the Constitution. 1 Deb. Mass. Conv. 1820, pp. 405, 407. See Jameson on Constitutional Conventions, 4th ed., §§ 549 and 551. A suggestion has been made that the Legislature, in passing a legislative amendment, should be regarded as a constitutional convention, because the proposal must be acted upon in a joint session of the Legislature. But the distinction between a joint session of the Legislature and a constitutional convention is, to my mind, both clear and fundamental. A constitutional convention is perhaps the most solemn, deliberate and highest assembly which can be convened in this Commonwealth. Sproule v. Fredericks, 69 Miss. 898. Constitutional conventions have been held only three times since the adoption of the Constitution in 1780. Delegates are elected to a constitutional convention for the sole purpose of determining whether the Constitution shall be revised, altered or amended. Legislative sessions are held annually. Members of the Legislature are elected for the important purpose of enacting all manner of wholesome and reasonable laws for the general welfare of the people. It was never contemplated that the duties of the two bodies should be merged in the General Court, or that the Legislature, of its own initiative, should have the right to submit a new constitution to the people.

My answer to your first question is therefore in the negative. Reiterating, to avoid the possibility of misunderstanding, that I interpret your questions as referring to the existing Constitution and to the rights and powers derived therefrom, and that by a "revised or rearranged constitution" you mean a new constitution substituted in place of and superseding the constitution now in force, what I have already said covers your second and third questions.

Yours very truly,

JAY R. BENTON, Attorney General.

Constitutional Law — Taxation of Legacies and Successions —Uniting Interests passing to One Beneficiary.

A statute amending G. L., c. 65, § 1, as amended, so as to provide that all interests in property passing or accruing to the same beneficiary, by any of the methods therein specified, shall be united and treated as a single interest for the purpose of determining the tax thereunder, would be constitutional.

MARCH 22, 1924.

His Excellency CHANNING H. COX, Governor of the Commonwealth.

SIR: — You have transmitted to me for examination and report House Bill No. 146, entitled "An Act providing for uniting interests in connection with the taxation of legacies and successions" and reading as follows: —

"Section one of chapter sixty-five of the General Laws, as amended by chapter three hundred and forty-seven and by section one of chapter four hundred and three both of the acts of nineteen hundred and twenty-two, is hereby further amended by adding at the end thereof the following new paragraph: — All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

G. L., c. 65, § 1, as amended by St. 1922, c. 347 and c. 403, § 1, omitting the table of rates, is as follows: —

"All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth or any interest therein and all stock in any national bank situated in this commonwealth or in any
corporation organized under the laws of this commonwealth belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by laws regulating interstate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts."

The table of rates gives different percentages, from one per cent to twelve per cent, varying with the value of the property or interest and with the class of relationship.

This section imposes a legacy and succession tax on property and interests therein, subject to the limitations and exceptions therein provided, passing or accruing either (1) by will, or (2) by laws regulating intestate succession, or (3) by deed, grant or gift made in contemplation of the death of the grantor or donor, or (4) by deed, grant or gift made or intended to take effect in possession or enjoyment after his death, or (5) by survivorship in any form of joint ownership to which the decedent contributed.

In cases which have been before the court the Commissioner of Corporations and Taxation has assessed taxes on property and interests therein passing or accruing to a single person by more than one of the methods specified in section 1, treating the different interests as a whole for the purpose of determining the rate and amount of the tax and the exemption. In Marble v. Treasurer and Receiver General, 245 Mass. 504, taxes so assessed upon property passing under a will and an interest in joint savings bank deposits were held to be valid; and in Pratt v. Dean, 246 Mass. 300, taxes so assessed upon property passing by will and beneficial interests in trusts created during the testator's lifetime, taking effect in enjoyment after his death, were sustained by the court. In these cases the court intimates that the rule would be different in the case of an interest vesting in enjoyment or possession independently of the death of the donor or testator. Therefore, as the statute now stands it would be doubtful whether a gift made in contemplation of death could be united with property passing in the other ways described in section 1, for the purpose of assessing the tax thereunder. Apparently, also, it would be doubtful whether a future interest could be so united; although in Moors v. Treasurer and Receiver General, 237 Mass. 254, taxes which seem to have been assessed in that way were approved. The proposed amendment relieves the uncertainty and provides a uniform rule applicable to all the cases specified in section 1.

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

Very truly yours,

JAY R. BENTON, Attorney General.
P.D. 12.

Pilots — Suspension — Revocation of Commission — “Active Service.”

Under the statutes, a commissioner of pilots may suspend a pilot whom he finds to be guilty of misconduct, carelessness or neglect of duty, and he may revoke the pilot’s commission only with the concurrence of the trustees of the Boston Marine Society.

Under the rules and regulations for pilotage for the Fourth Pilot District a pilot holding a commission for service there may not be suspended except for misconduct, carelessness or neglect of duty.

Such a pilot, if not under suspension or leave of absence, is in active service, and should be assigned to pilotage duty.

APRIL 1, 1924.

Mr. D. Gardiner O’Keeffe, Deputy Commissioner of Pilots, Fourth Pilot District, Taunton, Mass.

Dear Sir: — You ask my opinion regarding the extent of your powers under St. 1923, c. 390, to suspend or revoke the commissions of pilots in your district and to assign them to duty.

St. 1923, c. 390, made many important changes in the previous law as to pilots, contained in G. L., c. 103. Section 1 of said chapter 390 strikes out the first fourteen sections of said chapter 103 and substitutes therefor six sections, which provide, among other things, in substance, for the division of the shore line of the Commonwealth into four districts, the appointment of commissioners and deputy commissioners of pilots therefor, the formulation of rules and regulations for pilotage and establishment of rates, the granting of commissions to pilots, their suspension, and the revocation of their commissions.

Under the previous law pilots, except for the harbor of Boston, might be removed only by the Governor and Council. G. L., c. 103, §§ 6–11, 13. This provision was changed by the statute of 1923. G. L., c. 103, § 3, as thus amended, is as follows:

“The commissioners, subject to the approval of the trustees of said society, shall formulate rules and regulations for pilotage and establish rates within their respective districts, . . . The commissioners also, in accordance with such rules and regulations, shall grant commissions as pilots for their districts or for special locations therein, to such persons as they consider competent; provided that for district one such persons shall first be approved by said trustees. The commissioners may, upon satisfactory evidence of his misconduct, carelessness or neglect of duty, suspend any such pilot until the next meeting of said trustees and may thereafter continue such suspension until the close of the next stated meeting of said trustees, but no longer for the same offense. If said trustees decide at either of said meetings that the commission of such pilot ought to be revoked, the commissioners may revoke it at any time after said decision is rendered and before it is reversed. The commissioners shall cause the laws and regulations for pilotage within their district to be duly observed and executed, and shall receive, hear and determine complaints by and against pilots for said district."

The society therein referred to is the Boston Marine Society, and the trustees are the trustees of that society.

On the subject of commissions of pilots St. 1923, c. 390, § 6, further provides:

“. . . But nothing herein contained shall affect the commissions of pilots of any kind, except that after this act takes effect they may be removed for the causes specified and in the manner provided in section three of said chapter one hundred and three, as amended by this act. . . .”

These provisions make it clear that the pilots in your district may be removed and their commissions revoked by the Commissioner in the way, and only in the way, provided by section 3, quoted above. The Commissioner may, upon satisfactory evidence of the misconduct, carelessness or neglect of duty of a pilot, suspend such pilot until the next meeting of the trustees of the
Boston Marine Society, and may continue such suspension thereafter until the close of the next stated meeting of the trustees. If the trustees decide at either of those meetings that the commission of the pilot ought to be revoked, the Commissioner may then revoke it. The Commissioner's power, therefore, is limited to suspending, in the first instance, a pilot whom he finds to be guilty of misconduct, carelessness or neglect of duty, and he may revoke the pilot's commission only after the trustees of the Boston Marine Society have decided that the commission ought to be revoked. He has no power to suspend a pilot except upon such a finding.

In the case of Lunt v. Davison, 104 Mass, 498, 502, the meaning of the words "misconduct, carelessness or neglect of duty," as used in a similar statute, was considered by the court, and the court said:

"The causes of removal are very general and indefinite,—'misconduct, carelessness or neglect of duty.' It is only requisite that the evidence of either of these should be satisfactory to the commissioners. From the nature of the case, this involves not merely the credibility and sufficiency of the proof of the facts relating to the conduct of the pilot, but also the question whether the facts so proved furnish satisfactory evidence of misconduct, carelessness or neglect of duty. The propriety of the conduct of a pilot, in the performance of his official duties, as observed by the commissioners or shown by evidence brought to them, can be judged of best by men having constant familiarity with the circumstances and requirements of the service. If from neglect, inattention, or any want of faithfulness, the service of a pilot should fall short of that which is due to the responsibilities of the position, we think the terms of the statute would authorize the commissioners to regard that deficiency as satisfactory evidence of carelessness or neglect of duty, although no specific act of misconduct should be alleged."

You have submitted to me a copy of rules and regulations for pilotage for the Fourth Pilot District, formulated and approved as required by said section 3. Rules 1, 23 and 24 are as follows:

"1. All pilots shall hold themselves in readiness for pilotage service at all times, provided, however, that the Commissioner may grant permission for leave of absence from such duty in his discretion.

23. All pilots in active service shall be assigned to pilotage duty by the Commissioner. The work shall be apportioned equally among said pilots, and all income from said pilotage, after deducting the necessary expenses incident to the work of pilotage, shall be equally divided among said pilots every thirty days.

24. Any pilot proven to have violated these regulations, or the state laws which accompany them, except for reasons which meet with approbation of the Commissioner, shall be liable to suspension."

The words "in active service," as used in rule 23 with reference to pilots, naturally designate all pilots not under suspension or leave of absence as provided by rule 1, and in the absence of information as to a different practical construction I so construe them. It is my judgment that a pilot holding a commission for service in your district may not be suspended by you except for misconduct, carelessness or neglect of duty, and that, since the passage of the statute of 1923 and the adoption of the rules and regulations, such a pilot, if he is not under suspension or leave of absence, is in active service within the meaning of those words as used in rule 23, and should be assigned by you to pilotage duty.

You also ask with respect to a pilot who has been out of active service in local waters for some period of time, whether you have the power to assign him to go along with another pilot of experience, and under his guidance, for a number of trips sufficient to enable him to familiarize himself with any changes which may have occurred in those waters since the time of his last service.

Rule 23 requires you to assign all pilots in active service to pilotage duty. The words "pilotage duty," as used in rule 23, plainly mean the duty of acting
as pilot for vessels entering or leaving the waters within the district. See State v. Turner, 34 Ore. 173; Macaehlan’s Law of Merchant Shipping, 6th ed., p. 207. For performing this service a pilot is entitled to receive pilotage fees. It is no part of the duty of a pilot either to instruct or to receive instruction from another pilot. The powers and duties of pilots and of the Commissioner are determined by the statutes and the rules and regulations, but they contain no provision for the instruction of pilots. I am therefore of the opinion that you have no power to assign the pilot you refer to to serve with and under the guidance of another pilot.

I do not, of course, intimate that the pilot you mention has no duty in the premises. He is by statute made liable for all damages accruing from his negligence, unskilfulness or unfaithfulness. G. L., c. 103, § 18. If, owing to absence, he has become unfamiliar with the waters in his district, it would seem a natural precaution that he should make himself familiar with them. This duty is well stated in Atlee v. Packet Co., 21 Wall. 389, 396, 397, as follows:

“In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year’s absence from the scene impairs his capacity, his skilled knowledge, very seriously in the course of a long voyage. He should make a few of the first ‘trips,’ as they are called, after his return, in company with other pilots more recently familiar with the river.”

Very truly yours,

JAY R. BENTON, Attorney General.

District Attorneys — Traveling Expenses — Other Expenses.

Except in Suffolk County, traveling expenses of district attorneys and assistant district attorneys, necessarily incurred in the performance of their official duties, are to be paid by the Commonwealth and not by the county. All other expenses necessarily incurred are to be paid by the county for the benefit of which they were contracted.

APRIL 7, 1924.


Dear Sir: — You request my opinion whether traveling expenses of district attorneys and assistant district attorneys are to be paid by the Commonwealth or by the county for the benefit of which they were contracted.

G. L., c. 12, § 23, provides:

“Except in the Suffolk district, district attorneys and assistant district attorneys shall receive for traveling expenses necessarily incurred in the performance of their official duties such sums as shall be approved by a justice of the superior court, to be paid by the commonwealth.”

Section 24 of the act provides:

“A district attorney, in the name of any county in his district, may contract such bills for stationery, experts, travel outside of the commonwealth by witnesses required by the commonwealth in the prosecution of cases, for necessary expenses incurred by officers under his direction in going outside of the commonwealth for the purpose of searching for or bringing back for trial persons under indictment in said county, and for such other expenses as may in his opinion be necessary for the proper conduct of his office in the investigation of or preparation and trial of criminal causes; and all such bills shall be paid by the county for the benefit of which they were contracted upon a certificate by the district attorney that they were necessarily incurred in the proper performance of his duty, and upon approval of the auditor of Suffolk county if the bills were incurred for said county, otherwise upon the approval of the county commissioners or of a justice of the superior court.”

The two sections must be read together. So read, they clearly differentiate between traveling expenses of district attorneys and assistant district attorneys and other expenses incurred by such officers. Accordingly, I am of the opinion that, except in Suffolk County, traveling expenses of district attorneys and
assistant district attorneys necessarily incurred in the performance of their official duties are to be paid by the Commonwealth and not by the county. All other expenses incurred by the district attorney, which in his opinion are necessary for the proper conduct of his office in the investigation of or preparation and trial of criminal causes, are to be paid by the county for the benefit of which they were contracted.

Very truly yours,

JAY R. BENTON, Attorney General.

Board of Registration in Pharmacy — Agent — Powers — Inspection of Drug Stores — Right to use Force — Taking of Samples.

The inspection of drug stores, which an agent of the Board of Registration in Pharmacy may make, must be reasonable, with a view to accomplishing the purpose of the statute.

Opening closets, pulling out drawers and examining the contents of cans, jugs and other containers is a reasonable mode of inspection.

Such agent may probably not use force to gain entry to a drug store for the purpose of making an inspection.

If peaceable entry is obtained, an inspection may probably be made against the owner's will.

Right to take samples is not incidental to or part of the right to inspect.

The agent of the Board of Registration in Pharmacy may not take samples without the consent of the person in charge of the store.

APRIL 8, 1924.

Department of Civil Service and Registration.

GENTLEMEN: — On behalf of the Board of Registration in Pharmacy you ask my opinion on questions of law relative to the powers of the agent of that board appointed under G. L., c. 13, § 25, as amended by St. 1922, c. 441. That act reads as follows: —

"The board (of registration in pharmacy) shall appoint and fix the compensation, with the approval of the governor and council, of an agent who shall be allowed his necessary traveling expenses. He shall inspect drug stores and make a daily report of his doings pertaining thereto, and report all violations of the laws relating to pharmacy."

Your first question is as follows: "Has the agent the power to open closets, pull out drawers, examine contents of cans, jugs and other containers in a drug store which he is engaged in inspecting?"

An inspection is "a strict or prying examination; a close or careful scrutiny; a critical examination; a formal or official inquiry by actual observation into the state, efficiency, safety, quality, etc., of something of special moment, as drugs." Century Dictionary; 32 C. J. 930.

In People v. Compagnie Générale Transatlantique, 107 U. S. 59, 62, the court said: —

"What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test."

An inspection may be very general or it may be very minute. 32 C. J. 930. The manner in which an inspection shall be made depends entirely upon the requirements of the statute and the nature of the merchandise to be inspected. 22 Cye. 1366. It must be reasonable, of such a nature as to be of value and must have a rational connection with the end to be accomplished. Commonwealth v. Moore, 214 Mass. 19.

The statute in question provides that an agent of the Board of Registration in Pharmacy shall inspect drug stores and report all violations of the laws relating to pharmacy. The language of the act is comprehensive; its object is to protect and promote public health. It is manifestly within the police power of the State. Commonwealth v. Moore, 214 Mass. 19; Commonwealth v. Wheeler,
Taking into consideration the foregoing factors, I am of the opinion that opening closets, pulling out drawers and examining the contents of cans, jugs and other containers is a reasonable mode of inspection. Accordingly, I am of the opinion that your first question should be answered in the affirmative.

The agent may, however, probably not use force to gain entry to a drug store for the purpose of making an inspection. The cases sustaining the right of officers authorized by statute to make entry for the purpose of inspection refer to peaceable entry. They do not hold that entry may be made by force against the will of the owner or occupant. Whether such entry would be lawful is left in doubt. See Attorney General's Report, 1921, p. 279. If, however, peaceable entry to the drug store has been obtained, the court seems to intimate that an inspection can be made even against the will of the owner. Commonwealth v. Smith, 141 Mass. 135, 139. This question, however, is not free from doubt.

Your second question is as follows: "Can the agent take a sample of suspected illegal liquor for analysis, for presentation as evidence before the Board of Registration in Pharmacy, without the consent of the person in charge at the store?"

The right to take samples is not, in the absence of express authority, incidental to or part of the right to inspect. In Commonwealth v. Smith, 141 Mass. 135, 139, the court said:—

"The right to take samples of milk against the will of the owner can only be justified by an act of the Legislature regulating a business which otherwise might become injurious to the community."

This right cannot be extended beyond its express scope. Dunn v. Lowe, 203 Mass. 516; Commonwealth v. Smith, 141 Mass. 135, 139. Wherever in this Commonwealth samples may be taken by inspectors, the right has been expressly conferred by statute. G. L., c. 94, § 304, specifically provides for the furnishing of samples of drugs to an officer or agent of the Department of Public Health upon tender of the value thereof.

G. L., c. 13, § 25, as amended, does not authorize the taking of samples. I am therefore of the opinion that, in the absence of specific authorization, the agent of the board may not take samples, and that your second question should be answered in the negative.

Very truly yours,

Jay R. Benton, Attorney General.

Plumbers—Apprentice—Journeyman—Probationary License.

A person learning the business of plumbing may not lawfully be sent out to do the work of a journeyman plumber unless he is registered or has been licensed as required by G. L., c. 142, § 3, except that a person who has worked as an apprentice or under a verbal agreement for instruction, for not less than three years, and has complied with the requirements of G. L., c. 142, § 4, may have issued to him a probationary license under which he may be sent out to do the work of a journeyman.

April 8, 1924.

State Examiners of Plumbers.

Gentlemen:—You request my opinion on questions of law arising out of R. L., c. 103, § 9, and St. 1909, c. 536, § 2.

The Revised Laws were supplanted by the General Laws, which took effect from and after December 31, 1920. G. L., c. 282, expressly repeals both R. L., c. 103, § 9, and St. 1909, c. 536, § 2. It is clear that it would serve no useful purpose to discuss questions of law involving the interpretation of statutes that have been repealed. I am, however, going to take the liberty of discussing the questions raised by you in the light of the provisions of the statutes that exist today in our General Laws.
Your first question, revised, would read as follows: Does G. L., c. 142, § 14, prohibit an apprentice or learner from working without a license?

 Said section 14 reads as follows:—

“Sections one to sixteen, inclusive, shall apply to all persons learning the business of plumbing when they are sent out to do the work of a journeyman.”

Therefore, section 3 of said chapter 142 applies to persons learning the business of plumbing when they are sent out to do the work of a journeyman plumber. Said section 3 prohibits any person from engaging in the business of working as a journeyman plumber unless he is lawfully registered or has been licensed by the examiners, as provided in this chapter; so that, answering your first question, a person learning the business of plumbing may not be sent out to do the work of a journeyman plumber unless he is lawfully registered or has been licensed.

Your second question, revised, would read as follows: Does the probationary license, as described in and issued under G. L., c. 142, § 4, fill any gap left in G. L., c. 142, § 14?

So far as is pertinent to your inquiry said section 4 reads as follows:—

“The examiners may, without payment of any fee, issue a probationary license in force for six months to a person who, having worked as an apprentice, or under a verbal agreement for instruction, for not less than three years, presents an application therefor with the signed endorsement of his employer agreeing to be responsible for all work done under the license and to have the licensee, at the expiration of the license, present himself for examination as a journeyman.”

Consequently, as the law stands today, a person, having worked as an apprentice or under a verbal agreement for instruction, for not less than three years, and complying with the other requirements set forth above, may have issued to him a probationary license under which he may be sent out to do the work of a journeyman.

Yours very truly,

Jay R. Benton, Attorney General.

Metropolitan Police Officer—Expenses as Witness—Reimbursement.

A metropolitan police officer who attends as a witness in a criminal case at a place other than his residence, and whose attendance is not in the performance of the duties for which he is paid a salary, is entitled to a witness fee.

In all other cases, with certain minor exceptions, the expenses of such officer, necessarily and actually disbursed by him for testifying in a criminal case in the Superior Court, should be paid by the county. If the case is tried in a district court or before a trial justice, such expenses should be paid by the town where the crime was committed.

Metropolitan District Commission.

Gentlemen: You request my opinion whether a metropolitan district police officer who, by the order of the district attorney, appeared as a witness in the Superior Court held at Brockton at the trial of a person charged with crime, and who incurred expenses in so appearing, is entitled to be reimbursed by the county where the trial was held.

G. L., c. 262, § 50, provides, in part:—

“No . . . police officer who receives a salary or an allowance by the day or hour from the commonwealth or from a county, city or town shall, except as otherwise hereinafter provided, be paid any fee or extra compensation . . . for testifying as a witness in a criminal case during the time for which he received such salary or allowance; . . . but his expenses, necessarily and actually incurred, and actually disbursed by him in a criminal case tried in the superior court, shall, except as provided in section fifty-two, be paid by the county where the trial is held . . .”
Section 52 provides:

"Except in Suffolk county, the fees and expenses of officers in the apprehension, trial or commitment of a person arrested or tried as a tramp or vagrant shall be paid by the county where the offence was committed."

Section 53 provides, in part, as follows:

"Any officer named in section fifty who attends as a witness at a place other than his residence shall, instead of his expenses, be allowed the witness fee in the court or before the trial justice where he testifies. . . ."

In my opinion, a metropolitan district police officer is included in the class of persons enumerated in section 50. Sections 56 and 57 have no application to such officer.

In construing R. L., c. 204, §§ 42 and 44, now G. L., c. 262, §§ 50 and 53, above referred to, the court said, in Sackett v. Sanborn, 205 Mass. 110, 112:

"The object of the statute is to provide that officers who receive compensation for their services by salary or otherwise, and attend court in the discharge of duties which they are thus paid to perform, shall not receive further compensation by way of witness fees, but that any expenses necessarily and actually incurred or disbursed by them in the performance of such duties in attending court in criminal cases shall be reimbursed to them. If they attend court, but not in the performance of the duties for which they are paid, at a place other than their residence, then, . . . instead of their expenses they are to be allowed witness fees."

I am accordingly of the opinion that if a metropolitan district police officer attends as a witness at a place other than his residence, and his attendance is not in the performance of the duties for which he is paid a salary or allowance, he is entitled to a witness fee in the court or before the trial justice where he testifies. In all other cases, with the exception of the cases referred to in G. L., c. 262, § 52, the expenses of such officer, necessarily and actually incurred and actually disbursed by him for testifying as a witness in a criminal case tried in the Superior Court, should be paid by the county where the trial is held; and if the case is tried in a district court or before a trial justice, such expenses should be paid by the town where the crime was committed.

Very truly yours,

JAY R. BENTON, Attorney General.

Constitutional Law — Undertakers — Licenses — Registered Embalmers.

A statute limiting the issuance of undertakers' licenses to registered embalmers would be unconstitutional.

The presumption of constitutionality does not attach to a bill not yet enacted into law.

APRIL 10, 1924.

Mr. Prince H. TIRRELL, Chairman, House Committee on Bills in the Third Reading.

Dear Sir: — You request my opinion as to whether House Bill No. 615, with certain changes indicated by you, would be constitutional if enacted into law.

House Bill No. 615 is entitled "An Act to require undertakers to be registered embalmers," and, with the changes specified in your letter, would read as follows:

"Chapter one hundred and fourteen of the General Laws is hereby amended by striking out section forty-nine and inserting in place thereof the following: —

Section 49. Boards of health shall annually, on or before May first, license a suitable number of undertakers who can read and write the English language and who shall be registered embalmers. Such license shall be issued upon such terms and conditions as the board of health may prescribe, and may be revoked at any time by the board if its terms or conditions or any requirements of law relative thereto have been violated by the undertaker. An undertaker so licensed
may act in any town. Nothing herein contained shall prevent such board from granting a license to any person licensed as an undertaker prior to June first, nineteen hundred and twenty-four."

In Wyeth v. Board of Health of the City of Cambridge, 200 Mass. 474, decided in 1909, the Supreme Court held that a regulation of the Board of Registration in Embalming, requiring all undertakers to be licensed embalmers, was unconstitutional, and that the refusal of the respondents to grant to an applicant a license as an undertaker, solely upon the ground that the applicant was not a licensed embalmer, was an invasion of a constitutional immunity, to redress which a writ of mandamus would issue. In the course of the opinion Knowlton, C. J., speaking for the court, said:

"We can see no such connection between requiring all undertakers to be licensed embalmers and the promotion of the public health as to bring the making of this regulation by the board of registration in embalming, or the refusal of a license by the board of health on account of the regulation within the exercise of the police power by the State. If such a regulation had been made by an act of the Legislature, with all the strong presumptions of constitutionality which attach to legislative action, we should hesitate to affirm the constitutionality of the act. But action by such a board, under mere general authority to make rules and regulations, does not carry with it these strong presumptions. We consider this action without foundation in law or reason, and in violation of the constitutional rights of our citizens.

A statute of New York, which provided, among other things, that no person should engage in the business of undertaking unless he had been duly licensed as an embalmer, was held unconstitutional by a unanimous decision in the appellate division of the Supreme Court of that State. People v. Ringe, 125 App. Div. (N. Y.) 592."

In the face of so clear an intimation of the opinion of the Supreme Court there appears little room for speculation in the present case. Further, the "strong presumptions of constitutionality which attach to legislative action," referred to in the opinion, are inapplicable to a bill not yet enacted into law. The presumption is justified by the belief that the enactment of a law presupposes that the Legislature, in the light of its own knowledge and of the best legal advice available to it, has determined that authority to pass such a law is included within the powers delegated to it by the Constitution. To invoke the presumption during the consideration of a proposed enactment would be to destroy the very foundation upon which that presumption rests.

I am accordingly constrained to advise you that, in my opinion, House Bill No. 615, with the changes specified by you, if enacted into law would be unconstitutional.

Yours very truly,

JAY R. BENTON, Attorney General.

Highways — State Highways — Layout.

Under St. 1922, c. 501, as amended by St. 1923, c. 481, providing for the laying out and construction, by the Division of Highways, of a highway in the city of Revere, the city cannot be required to make the layout, and no part of the cost may be assessed upon the county.

A way does not become a State highway, under G. L., c. 61, until it has been "laid out and taken charge of" by the division in behalf of the Commonwealth.

Since St. 1922, c. 501, as amended, does not require the division to take charge of the proposed highway, it was not intended to provide that the highway should be a State highway.

April 14, 1924.

Hon. William F. Williams, Commissioner of Public Works.

Dear Sir: — You request my opinion as to the proper procedure in laying out the highway authorized by St. 1922, c. 501; and put the three following questions: —
P.D. 12.

"1. Shall it be laid out as a State highway under the provisions of G. L., c. 81?

2. May the division require the city of Revere to make the layout?

3. If laid out as a State highway, can 25 per cent of the cost be assessed upon the county, under the provisions of G. L., c. 81, § 9, as amended by St. 1921, c. 112, § 2, and St. 1923, c. 362, § 63?"

St. 1922, c. 501, as amended by St. 1923, c. 481, reads as follows: —

"SECTION 1. The division of highways of the department of public works is hereby authorized and directed to lay out and construct a highway in the city of Revere beginning at the Malden line on or near the present way leading from Revere to that part of the city of Malden known as Linden and extending to Broadway in said city of Revere. The route of such layout and construction may be along existing public or private ways or over private land; provided that no work shall be done on the construction of said highway until satisfactory releases have been obtained from the owners for all land to be used for said highway without expense and that the city of Malden shall have made the necessary appropriations and undertaken the construction of connections satisfactory to said division, said connection in Malden to run from the Revere line through Linden square, Beach and Salem streets and over private land to the Newburyport Turnpike.

SECTION 2. For the purposes of this act, the division may expend a sum not exceeding one hundred thousand dollars. Of the total amount expended, one half shall be assessed upon the metropolitan parks district and the balance shall be paid by the commonwealth from item number six hundred and thirty-one of the general appropriation act of the current year."

Section 2 was superseded by St. 1923, c. 494, item 623 b, which provides as follows: —

"For the construction of a highway in the city of Revere, as authorized by chapter five hundred and one of the acts of nineteen hundred and twenty-two, as amended by chapter four hundred and eighty-one of the acts of the present year, at a cost not exceeding one hundred thousand dollars, one half of which shall be assessed upon the metropolitan parks district, and the balance of fifty thousand dollars shall be paid from Motor Vehicle Fees Fund . . . . . . . . . . $50,000 00"

G. L., c. 81, entitled "State Highways," provides, in sections 4 to 12, inclusive, for the laying out of State highways by petition by county commissioners, aldermen or selectmen to the Division of Highways, determination by the division that public necessity and convenience require that the proposed way should be laid out and taken charge of by the Commonwealth, and the filing of a plan and certificate showing that the division has laid out and taken charge of the way in accordance with the plan. Provisions prescribing the method to be followed are contained in sections 4 and 5 as follows: —

"SECTION 4. If county commissioners, aldermen or selectmen adjudge that public necessity and convenience require that the commonwealth lay out and take charge of a new or existing way as a highway in whole or in part, in their county, city or town, they may apply, by a written petition, to the division, requesting that said way be laid out and taken charge of by the commonwealth.

SECTION 5. If the division determines that public necessity and convenience require that such way should be laid out or be taken charge of by the commonwealth, it shall file in the office of the county commissioners for the county where the way is situated a certified copy of a plan thereof, a copy of the petition thereof, and a certified copy of a certificate that it has laid out and taken charge of said way in accordance with said plan, and shall file in the office of the clerk of such town a copy of the plan showing the location of the portion lying in each town and a copy of the certificate that it has laid out and taken charge of said highway in accordance with said plan . . . . ."

Section 5 provides that "thereafter said way shall be a State highway, and shall be constructed by the division at the expense of the Commonwealth."
Section 24 provides as follows:—

“The division may, whenever any money is appropriated by the general court for its use in the construction or improvement of any particular way, expend such money in constructing or improving the whole or such part of said way as it deems best, either upon the location of the existing way or upon any new location that may be established by the county commissioners or the selectmen, and no part of the way so improved shall thereby become a state highway or be maintained as such. The division may, however, lay out the whole or any part of any such way as a state highway.”

Section 13 provides that “state highways shall be maintained and kept in good repair and condition by the division at the expense of the Commonwealth,” and section 18 provides that “the Commonwealth shall be liable for injuries sustained by persons while traveling on state highways, if the same are caused by defects within the limits of the constructed traveled roadway, in the manner and subject to the limitations, conditions and restrictions specified in sections fifteen, eighteen and nineteen of chapter eighty-four,” with certain exceptions therein specified. G. L., c. 84, § 1, provides that “highways and town ways shall, unless otherwise provided, be kept in repair at the expense of the town in which they are situated”; and section 15 provides that the “county, city, town or person by law obliged to repair the same” shall be liable in damages for injuries from defects therein.

In view of the plain provisions in St. 1922, c. 501, as amended, authorizing and directing the Division of Highways to lay out and construct the highway in question, and providing for payment of the cost of construction, one-half by the metropolitan parks district and the balance from the motor vehicle fees fund, it is my opinion that the division may not require the city of Revere to make the layout, and that no part of the cost may be assessed upon the county. I therefore answer your second and third questions in the negative.

Your first question, whether the highway shall be laid out as a State highway under the provisions of G. L., c. 81, depends upon the proper construction of St. 1922, c. 501, as amended, in the light of general statutory provisions. The answer requires consideration of the legislative intention with respect to the burden of maintenance and liability for injuries due to defects—whether it was intended that those obligations should be borne by the Commonwealth or by the local communities. If the former, then clearly the way is to be laid out as a State highway; otherwise not.

The direction to the division is “to lay out and construct a highway, etc.” The highway is not designated as a State highway, and the statute contains no direction to the division requiring it to take charge of the highway. In those respects the statute differs from other statutes providing for the construction of other particular highways. See, for example, St. 1907, c. 574, providing that “the Massachusetts highway commission shall lay out, take charge of and construct as a state highway” a part of Washington Street in the West Roxbury district of Boston. The words “lay out,” when used in statutes with reference to highways, mean locating and establishing a new highway. The imposition upon certain public authorities of the duty of laying out a highway does not necessarily carry with it the right of control by them and the further duty of maintaining that way when laid out and constructed. Foster v. Park Commissioners, 133 Mass. 321, 329, 333; Leahy v. Street Commissioners, 209 Mass. 316, 317. For that reason the words “take charge of” are used in G. L., c. 61, in conjunction with “lay out,” and a way does not become a State highway under that chapter until it has been “laid out and taken charge of” by the division in behalf of the Commonwealth. I Op. Atty. Gen. 284.

It is my opinion that the Legislature, in providing that the division shall lay out and construct the proposed highway, did not intend to require the division also to take charge of and maintain the highways or to impose on the Commonwealth liability for injuries from defects therein, and that therefore it did not intend to provide that the highway so laid out and constructed should be a State highway. I therefore answer your first question in the negative.

Very truly yours,

JAY R. BENTON, Attorney General.
State laws requiring inspection of property intended for domestic use, passed for the protection of the public health, morals or safety, or to guard the public from fraud, are not open to attack as in contravention of the commerce clause of the Constitution of the United States unless they directly discriminate against interstate commerce or are inconsistent with Federal legislation under the commerce clause.

A statute providing that no cattle which react to the tuberculin test shall be shipped into the Commonwealth would be in direct conflict with national legislation contained in the Act of February 2, 1903, c. 349, § 1 (32 Stat. 791), and would therefore be invalid.

April 16, 1924.

House Committee on Bills in the Third Reading.

GENTLEMEN: — You have asked my opinion as to the constitutionality of House Bill No. 352, entitled “An Act to prevent the shipment into the Commonwealth of diseased cattle.” The bill provides for the amendment of G. L., c. 129, § 27, by adding at the end thereof the following: —

“No cattle to be used for dairy purposes shall be shipped into the Commonwealth unless such cattle have been given a tuberculin test, and declared to be free from dangerous diseases, by a competent veterinary surgeon, approved by the director. No cattle which react to the tuberculin test shall be shipped into the commonwealth.”

The proposed law, if valid, evidently must be supported as a proper exercise of the State police power. If it is invalid, the objection to it must be that it is an unlawful interference with interstate commerce. State laws requiring inspection of property intended for domestic use, passed for the protection of the public health, morals or safety, or to guard the public from fraud, are not open to attack as in contravention of the commerce clause of the Constitution of the United States unless they directly discriminate against interstate commerce or are inconsistent with Federal legislation under the commerce clause. Plumley v. Massachusetts, 155 U. S. 461; Patapsco Guano Co. v. North Carolina, 171 U. S. 345; Savage v. Jones, 225 U. S. 501.

The United States Supreme Court has held unconstitutional a statute restraining the importation of cattle into a State in such a way as to prevent the bringing in of cattle which are healthy as well as those that are diseased, on the ground that such legislation was in conflict with the commerce clause. Railroad Co. v. Husen, 95 U. S. 465. So, also, statutes in the guise of inspection laws employed to exclude the products and merchandise of other States have been held unconstitutional because they discriminated against interstate commerce. Minnesota v. Barber, 136 U. S. 313; Voight v. Wright, 141 U. S. 62. On the other hand, it has held that a statute prohibiting transportation of cattle into a State without inspection by State or national officials was constitutional, such legislation not being in conflict with any act of Congress. Reid v. Colorado, 187 U. S. 137; Asbell v. Kansas, 209 U. S. 251.

I am of the opinion that the proposed law is in conflict with national legislation, to which it must yield. In the Act of February 2, 1903, c. 349, § 1 (32 Stat. 791), it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or other livestock and found them free from infectious, contagious or communicable disease, “such animals, so inspected and certified, may be shipped, driven, or transported . . . into . . . any State or Territory . . . without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.” Concerning this very statute the court said, in Asbell v. Kansas, supra, 258: —

“There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield.”

The provision in the proposed law that “no cattle which react to the tuberculin test shall be shipped into the commonwealth” appears to be in direct conflict with this provision.
In my opinion, therefore, the bill would not be valid if enacted, because of the superior authority of the Federal statute.

Very truly yours,

JAY R. BENTON, Attorney General.

Hunting and Fishing — Certificate of Registration — Violation of Fish and Game Laws.

Every certificate to hunt, trap and fish issued under G. L., c. 131, §§ 3–14, as amended, becomes void upon the conviction of the holder thereof of any violation of the fish and game laws, and no such certificate may be given to any person so convicted during the period of one year from the date of his conviction.

APRIL 17, 1924.

HON. WILLIAM A. L. BAZELEY, COMMISSIONER OF CONSERVATION.

DEAR SIR: — You request my opinion on the following questions relative to the granting and revocation of fishing and hunting certificates: —

"1. Under G. L., c. 131, § 14, would a person convicted of any violation of any section or any provision of a section of G. L., cc. 130 and 131, forfeit any fishing or hunting certificate he may possess?

2. Would a conviction of a violation of a fish law or of a game law prevent a person from securing both a hunting and a fishing certificate during the period of one year following the conviction?

3. Would a person who did not hold either a hunting or a fishing certificate and who was convicted of a violation of any provision of chapters 130 and 131 forfeit his right to secure a certificate for a period of one year from the date of his conviction?"

G. L., c. 131, §§ 3–14, as amended by St. 1921, c. 467, provide for three classes of certificates of registration, namely, a combination certificate to hunt, trap and fish, a certificate to hunt and trap, and a certificate to fish. Section 14, as amended by St. 1921, c. 467, § 8, provides, in part: —

"... Every certificate issued under sections three to fourteen, inclusive, held by any person convicted of a violation of the fish and game laws or of any provision of said sections, shall be void, and shall immediately be surrendered to the officer securing such conviction. The officer shall forthwith forward the certificates to the director, who shall cancel the same, and notify the clerk issuing them of the cancellation thereof. No person shall be given a certificate under authority of said sections during the period of one year from the date of his conviction as aforesaid. Any such certificate issued to a person within one year of his conviction as aforesaid shall be void, and shall be surrendered on demand of any officer authorized to enforce the fish and game laws. ..."

It is plain that under the statute every certificate issued under G. L., c. 131, §§ 3–14, as amended, becomes void upon the conviction of the holder thereof of any violation of the fish and game laws, and that no certificate of any class may under these sections be given to any person so convicted during the period of one year from the date of his conviction.

I am accordingly of the opinion that all of your questions should be answered in the affirmative.

Very truly yours,

JAY R. BENTON, Attorney General.

Tuberculosis Hospitals — Apportionment of Cost.

In providing for an apportionment of the cost of a public undertaking among cities and towns or other political subdivisions of the Commonwealth benefited thereby, and also in shifting the burden thereof, the Legislature has a large measure of discretion, the exercise of which is not subject to judicial control, on constitutional grounds, unless it is purely arbitrary.
A statute changing the previous law by including in the district served by the Essex County Tuberculosis Hospital cities previously exempted, and requiring them to bear a part of the burden of the cost of its construction and maintenance, apportioned in a way which, under all the circumstances, would be fair and reasonable, would be constitutional.

May 5, 1924.

To the Honorable Senate.

Gentlemen: — You have submitted to me Senate Bill No. 468, entitled "An Act to enlarge the present tuberculosis hospital district within the county of Essex and to apportion certain costs incident thereto," and have requested my opinion on the following questions relative to said bill: —

"(1) Inasmuch as the cities in Essex county now exempt from the provisions of sections seventy-eight to ninety of chapter one hundred and eleven of the General Laws have a majority of the registered voters who elect the trustees of the tuberculosis hospital for said county, does not such control constitute said cities actual parties in interest with respect to the financial cost and administration of said hospital?

(2) Has the General Court the constitutional right to add to the Essex county tuberculosis hospital district, established under said sections seventy-eight to ninety, said cities now exempt, in the manner provided in the bill printed as Senate document number four hundred and sixty-eight?"

Sections 78 to 90, inclusive, of G. L., c. 111, as amended by St. 1922, c. 393, contain provisions requiring the county commissioners of certain counties, including Essex, to provide tuberculosis hospitals for cities and towns having a population of less than fifty thousand which do not already have adequate hospital provision. It is provided that the county commissioners, subject to the approval of the Department of Public Health, shall erect one or more hospitals, with an exception in the case of counties having a total population of less than fifty thousand; that they shall apportion the cost to the several towns liable, in accordance with their valuation used in assessing county taxes; that they shall also apportion the cost of maintenance of such hospitals in the same manner; that all sums collected shall be paid into the county treasury; and that the county commissioners shall be trustees of the hospitals so erected. Section 91 provides: —

"Cities having more than fifty thousand inhabitants, and also cities and towns having less than fifty thousand inhabitants and already possessing and continuing to furnish adequate tuberculosis hospital provision, shall be exempt from the provisions of sections seventy-eight to ninety, inclusive."

St. 1923, c. 429, entitled "An Act authorizing the apportionment of the expense incurred by the county of Essex for a tuberculosis hospital within said county," contains provisions relative to the apportionment of expenses already incurred and the total cost of the tuberculosis hospital constructed in the county of Essex under the provisions of G. L., c. 111, §§ 78–91, inclusive, to the cities and towns in said county, except the cities of Haverhill, Lawrence, Lynn, Newburyport and Salem, and the collection of sums so apportioned in conformity with the corresponding provisions in said chapter.

By your first question I understand you intend to ask whether, under existing law, the cities in Essex County now exempt are under any liability for the cost of construction and maintenance of the tuberculosis hospital for Essex County. Since the statutes referred to impose the whole burden of construction and maintenance on the remaining cities and towns, for the benefit of whose inhabitants the hospital was erected, and expressly exempt the five cities enumerated, I see no ground upon which it can be said that the exempted cities are under any obligation whatever in the matter. I therefore answer your first question in the negative.

The fundamental inquiry presented by your second question is whether a part of the cost of construction and maintenance of the tuberculosis hospital for Essex County may be assessed upon the five cities in said county exempted by the provisions of previous enactments.
In providing for an apportionment of the cost of a public undertaking among cities and towns or other political subdivisions of the Commonwealth benefited thereby, and also in shifting the burden thereof, the Legislature has a large measure of discretion, the exercise of which is not subject to judicial control, on constitutional grounds, unless it is purely arbitrary. It is not essential that the burden should be imposed in proportion to the benefits received. The expense may properly be assessed with regard to other considerations as well, such as population, extent of territory and ability to bear the burden. The subject was carefully reviewed in Opinion of the Justices, 234 Mass. 612, in which the justices advised the Senate that in their opinion a statute changing a previous apportionment of the cost of the bridge across the Connecticut River between Springfield and West Springfield, confirmed by final decree of court, and providing for a new apportionment among the county and certain towns therein by fixed percentages, would be constitutional. See also Norwich v. County Commissioners, 13 Pick. 60; Scituate v. Weymouth, 108 Mass. 128; Agawam v. Hampden, 130 Mass. 528; Kingman, petitioner, 153 Mass. 566; Kingman, petitioner, 170 Mass. 111; Boston, petitioner, 221 Mass. 468.

It is my opinion that a statute changing the previous law by including in the district served by the Essex County tuberculosis hospital the five cities previously exempted, and requiring them to bear a part of the burden of the cost of its construction and maintenance, apportioned in a way which, under all the circumstances, would be fair and reasonable, would be constitutional. Without information as to the basis of the assessments on the five cities provided by the bill, the amounts already assessed to and collected from the remaining cities and towns, the comparative valuations of all cities and towns in the county, the extent and condition of hospital facilities now provided by the five cities, and other pertinent facts, I cannot answer more definitely your question whether the bill as drawn would be constitutional.

Very truly yours,

JAY R. BENTON, Attorney General.

Insurance — Accident Insurance — Group Policies.

Group or blanket policies against loss resulting from accidental injuries are not authorized under the provisions of the statutes, except such as are within the provisions of G. L., c. 175, §§ 110 and 133, as amended.

May 5, 1924.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have asked my opinion upon three questions relative to accident insurance, two of them concerning forms of policies which you have attached to your letter.

Your questions are as follows: —

"1. May the commissioner lawfully approve either or both of these forms as complying with G. L., c. 175, §§ 108 and 109?"

"2. May a company lawfully issue these forms of policies, assuming that they each contain the provisions required by said section 108?"

"3. Do the provisions of said section 108 require or contemplate the issuance of individual policies to individual insureds?"

The forms of policies which you have transmitted plainly come within the type of policy known as the "group" policy, which in certain of its forms is sometimes referred to as a "general" or "blanket" policy, as in G. L., c. 175, § 110. The apparent purpose of each of these forms of policies transmitted is to insure a group of persons, as and while they are members of a designated club or association, against loss resulting from accidental injuries. In each form it is recited that the required premium is paid by the club or association, and that the members of the club or association at any given time, whose names appear in a schedule of members attached to the policy, are the insureds. Persons ceasing to be members cease to be insured, and new members may be added to the schedule. From the nature of the insurance itself it is manifest that the club or association is not a beneficiary and secures for itself no pro-
tection under the policy. It is plain that the relation of employer and em-
ployees does not exist between the club, in the one instance, and the association, in the other, and their respective members.

G. L., c. 175, § 3, provides that—

"No company shall make a contract of insurance upon or relative to any property or interests or lives in the commonwealth, . . . except as authorized by this chapter or chapters one hundred and seventy-six and one hundred and seventy-seven."

There is no specific authority given by chapter 175 to issue any general, blanket or group policy other than group life insurance policies, defined by G. L., c. 175, § 133, as amended by St. 1921, c. 141, and those mentioned in G. L., c. 175, § 110, as amended by St. 1921, c. 136. The forms of policies under consideration do not come within the terms of either of these last mentioned enactments, whose provisions relate to groups in which the relation of employer and employees exists as between the one paying the premium and the insureds.

In my opinion, general, blanket or group accident insurance policies of the character of those transmitted with your letter may not be lawfully written, in view of the wording of G. L., c. 175, § 3, and of the fact that there is no specific statutory authorization for such forms of policies.

I therefore answer your first two questions in the negative. I answer your third question to the effect that G. L., c. 175, § 108, construed in connection with the said chapter as a whole, requires and contemplates the issuance of individual policies to individual insureds as opposed to general, blanket or group policies.

Very truly yours,

JAY R. BENTON, Attorney General.

Inspector of Animals—Nomination—Approval by Director of Animal Industry—Board of Selectmen—Term of Office.

No nominee for the position of inspector of animals can be appointed until approved by the Director of Animal Industry.

A nomination made by a board of selectmen may be withdrawn by a new board of selectmen and another nominee named if no action has in the meantime been taken by the Director of Animal Industry with respect to the first nomination.

A former appointee holds over and can legally perform the duties of inspector of animals until the approval by the Director of Animal Industry of one nominated as his successor.

May 9, 1924.


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

"In the town of Bedford the regular annual election of a member of the board of selectmen took place during the first week in March. A man by the name of Kelley was said to have been elected by two votes. A recount was asked for and the election for selectman was declared a tie.

On March 22 the board of selectmen, under G. L., c. 129, § 15, sent in the nomination of Dr. Chester L. Blakely as inspector of animals for the year ending March 31, 1925. This nomination, however, did not bear the signature of the newly elected (?) Kelley, but did bear the name of Duane F. Carpenter, whom Kelley (if elected) was to succeed.

The Director of Animal Industry was interviewed by a representative of the losing side at the regular town election, whose candidate was Claude A. Palmer, and was asked to hold up the matter of approval of the nomination of Dr. Blakely.

The Director of Animal Industry desires an opinion by the Attorney General as to whether this nomination of Dr. Blakely is properly before him for action. A special town election was held March 31, 1924, and Kelley was defeated by Claude A. Palmer by six votes. Directly thereafter, on March 31, a meeting of the new board of selectmen was held, and a majority of the board, Palmer
and another, drafted a letter to the director nominating as inspector of animals Dr. Immanuel Pfeiffer.

The Director of Animal Industry desires the opinion of the Attorney General as to whether this nomination of Dr. Immanuel Pfeiffer to the position of inspector of animals is properly before him for action.

If in the opinion of the Attorney General both nominations are properly before the director for action, does the decision rest with him as to which nomination shall be approved, assuming that, in his opinion, both nominees possess the proper qualifications for the position?

The opinion of the Attorney General is requested as to whether, in case no action is taken by the director, the appointee of last year (1923) holds over, and can he legally perform the duties of the position?"

G. L., c. 129, § 15, provides as follows: —

"The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon."

Under this section no nominee can be appointed until approved by the Director of Animal Industry. Under the facts submitted by you it does not appear that the director approved or took any action respecting the nomination of Dr. Chester L. Blakely as inspector of animals, which nomination was forwarded to the director on March 22, 1924. Subsequently, on March 31, 1924, a meeting of the new board of selectmen was held and a majority of said board drafted and forwarded to the Director of Animal Industry a communication wherein it is stated that the director is "respectfully requested to disregard the nomination of Dr. Chester L. Blakely of Lexington, as made on or about March 22, 1924, and to consider instead the appointment of Dr. Immanuel Pfeiffer."

Where an authority is conferred on a board in relation to public business it may be exercised by a majority and all need not join. Codman v. Crocker, 203 Mass. 146; Cooley v. O'Connor, 12 Wall. 391.

The board of selectmen is a continuing body, and, as such, acted within its rights when it withdrew a nomination which had not been acted upon and substituted therefor a new nomination. It accordingly follows that the nomination of March 31st is the nomination now before the Director of Animal Industry for his approval or disapproval, and I so answer your first, second and third questions.

The general rule is that, unless otherwise provided, an officer continues to hold office until the appointment or election and qualification of his successor. See G. L., c. 41, § 2. Boston v. Sears, 22 Pick. 122, 130. In accordance with this rule I am of the opinion that the appointee of last year (1923) holds over and can legally perform the duties of the position of inspector of animals until the approval of a nominee by the Director of Animal Industry, and I so answer your fourth and last question.

Yours very truly,

JAY R. BENTON, Attorney General.

Hawkers and Pedlers — License — Alien.

A local ordinance or regulation providing for the licensing of hawkers and pedlers of fish, fruit and vegetables, passed under authority of G. L., c. 101, § 17, is void if it purported to authorize the granting of a license to an alien who has not declared his intention of becoming a citizen of the United States.

MAY 13, 1924.

Hon. E. Leroy Sweetser, Commissioner of Labor and Industries.

Dear Sir: — You have requested my opinion as to whether or not a licensing board or other officer of any city where there is an ordinance or regulation
providing for the licensing of hawkers and pedlers of fish, fruits and vegetables, may grant such a license to an alien who has not declared his intention of becoming a citizen of the United States.

First, I think I ought to point out that the Attorney General does not give authoritative opinions to municipal officers, it having been held many times that they are not entitled to such an opinion, and therefore are not bound by it. There was some intimation that this opinion concerned a local situation in New Bedford; but I am proceeding upon the ground that the question is asked because the information is necessary in the discharge of the duties of the Division of Standards under G. L., c. 101, and particularly section 92.

Coming now to your specific question. G. L., c. 101, § 17, is based upon R. L., c. 65, § 15. This section of the Revised Laws was the subject of numerous amendments. In 1916, as a result of Gen. St. 1916, c. 242, § 3, the pertinent provisions read as follows:

"Cities and towns may by ordinance or by by-law, not inconsistent with the provisions of this chapter, regulate the sale and exposing for sale by hawkers and pedlers of said articles without the payment of any fee, and may affix penalties for the violation of such regulations. Cities and towns may require hawkers and pedlers of fish, fruit and vegetables to be licensed, provided that the license fee does not exceed that prescribed by section nineteen of this chapter, as amended, for a license embracing the same territorial limits."

The next amendment, Gen. St. 1918, c. 257, § 261, changed the form of this part of section 15 so as to read as follows:

"Cities and towns may by ordinance or by-law, not inconsistent with the provisions of this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and pedlers, of said articles without the payment of any fee; may in like manner require hawkers and pedlers of fish, fruit and vegetables to be licensed, provided, that the license fee does not exceed that prescribed by section nineteen of this chapter, and acts in amendment thereof and in addition thereto, for a license embracing the same territorial limits; and also may in like manner affix penalties for the violation of such regulations, ordinances and by-laws."

The final change to date was by St. 1923, c. 285. The pertinent provision of the statute with which we are now concerned reads as follows:

"The aldermen or selectmen may by regulations, not inconsistent with this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and pedlers, of said articles without the payment of any fee; may in like manner require hawkers and pedlers of fish, fruit and vegetables to be licensed except as otherwise provided, and may make regulations governing the same, provided that the license fee does not exceed that prescribed by section twenty-two for a license embracing the same territorial limits; and may in like manner affix penalties for violations of such regulations not to exceed the sum of twenty dollars for each such violation. A hawker and pedler of fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two."

The insertion by this amendment of the phrase "in like manner" discloses, in my opinion, a legislative intent that the aldermen or selectmen may require hawkers and pedlers of fish, fruit and vegetables to be licensed, etc., only by regulations not inconsistent with the other provisions of G. L., c. 101. G. L., c. 101, § 22, clearly indicates an intention that hawkers and pedlers shall be licensed to sell fish, fruit and vegetables only if they are citizens of the United States or have declared an intention to become citizens of the United States. I am therefore of the opinion that a city ordinance which purported to authorize the granting of a hawker's and pedler's license for the sale of fish, fruit and vegetables to an alien who had not declared his intention of becoming a citizen of the United States would exceed the authority granted by G. L., c. 101, § 17, and would be void.

A further practical argument in favor of this view is found in the last sentence of G. L., c. 101, § 17, which provides that "a hawker and pedler of
fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two." This provision was added by an amendment subsequent to Gen. St. 1918, c. 257, § 261, quoted above, and I do not, therefore, rest my opinion upon it. It would, however, seem a further indication of a legislative intent that only those hawkers and pedlers who could be licensed under section 22 should be eligible for a license under section 17.

Very truly yours,

JAY R. BENTON, Attorney General.

Eminent Domain — Extent of Taking — Fixtures.

Floats used by a yacht club, and not attached to the land otherwise than by moorings, are personal property, and are not included in a taking of realty.

MAY 19, 1924.

HON. JAMES A. BAILEY, Commissioner, Metropolitan District Commission.

Dear Sir: — You have asked my opinion as to whether certain floats, formerly the property of the Savin Hill Yacht Club, were at the time of the taking of land of the Savin Hill Yacht Club by the Board of Metropolitan Park Commissioners, on or about December 23, 1914, real or personal property.

A taking was made by the board, recorded in Suffolk Deeds, book 3856, page 241, of "all lands and rights in land, all easements, privileges and appurtenances of every name and nature thereto belonging," among other parcels, of "land and lands of the Savin Hill Yacht Club" (bounded and described) "and flats above or under water in Dorchester Bay and Savin Hill Cove and creeks and streams flowing into said cove."

I am informed that at the time of the taking there was a building on the land, firmly affixed to the soil, with an elevated platform leading from the building, which was used as a yacht club, to a runway, which in turn led to the floats in question. The upper end of the runway was affixed to the platform and its lower end rested upon the float nearest shore, but was not affixed thereto otherwise than by its weight. The floats in question, of which there were several, during the season when sailing for pleasure was practicable, floated on the surface of the water and were kept from drifting away or out of alignment by chains, which were run through rings or holes made for the purpose in the floats and were then fastened to piles driven into the mud in a line extending out from the shore. The floats were not attached to these piles by any rigid connections. They rose and fell with the tide. They were the ordinary type of float used for landings for small boats, and were capable of being towed from place to place, and might be used in connection with other landing places. They were easily unloosed from their moorings to the piles. During the seasons when sailing near the club was not practicable they were often unmoored from the pilings and dragged upon the beach, where they were left without any permanent fixation to the land until again required for use, when they were once more placed in the water and moored to the piles. I am also informed that these floats, when detached from their moorings, can be sold and used by purchasers in other places of a similar character to which they can be towed.

If these floats had been so attached to the land by the previous owners of the soil as to become fixtures, they would have become real property as between the Commonwealth and the Yacht Club, and title to them would be vested in the Commonwealth under the terms of the taking.

In determining whether articles which in their original condition were personal property, as were these floats, have become fixtures, a variety of tests have to be taken into consideration. These tests, as between vendor and vendee of the land upon which the property is situated, and for the purpose of determining the question here involved, wherein the Commonwealth and the Yacht Club are to be treated substantially as vendor and vendee, have been laid down by our courts as follows: The nature of the article, the object, the effect and the mode of its annexation. Smith v. Bay State Savings Bank, 202 Mass. 482; Houle v. Abramson, 210 Mass. 83. Neither of these tests is of itself sufficient.

The floats in question are, in their general nature, personally. They are
capable of being moved from place to place and of being used effectively in other locations than this particular estate. Their bulk is not an insuperable obstacle to their transportation by land, and they can easily be moved by water. There is nothing about their general form or design which tends to show any particular object or motive in the minds of the owners relative to a particular or unusual relation between them and the realty with which they were connected, nor were they of such a character or construction as to have in themselves any peculiar relation to the surrounding land which might enhance its value or usefulness more than any other articles of a similar type. They were not annexed to the piles or to the land in any manner or by any means which prevented them from being easily separated therefrom.

Taking all these facts into consideration, I am of the opinion that the floats at the time of the taking were not fixtures in such a sense that they had become part of the realty, and that they were personal property, title to which remained in the owner notwithstanding the taking.

Very truly yours,

JAY R. BENTON, Attorney General.

Labor — Children — Regulation of Employment.

The provisions of G. L., c. 149, §§ 61, 62 and 65, regulating the employment of minors, are applicable to minors when employed in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops, unless such employment is in the course of receiving manual training or industrial education in an approved school, under G. L., c. 149, § 85.

A child between the ages of fourteen and sixteen employed in any such establishment is required by G. L., c. 149, § 86, to secure a special certificate.

MAY 27, 1924.

Hon. E. LEROY SWEETSER, Commissioner of Labor and Industries.

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

"1. Do the regulations relating to hours of employment and night work for minors under sixteen apply to such minors when employed in a co-operating factory, manufacturing, mechanical or mercantile establishment or workshop; or may such minors be employed in such establishments for more than eight hours in any one day or for more than forty-eight hours in any one week?

2. May such minors be employed in co-operating establishments at the occupations and processes listed in G. L., c. 149, §§ 61 and 62, as prohibited employments for minors under sixteen years of age and minors under eighteen years of age?"

Provisions regulating the employment of children of various ages are contained in G. L., c. 149, §§ 60 to 83, inclusive, some of which were amended by St. 1921, c. 351 and 410. Special reference should be made to the following sections:

Section 60, as amended by St. 1921, c. 410, § 2, prohibits the employment of minors under fourteen in any factory, workshop, manufacturing, mechanical or mercantile establishment or in certain specified occupations, and regulates their hours of labor.

Sections 61 and 62 prohibit the employment of minors under sixteen and eighteen, respectively, in certain specified hazardous occupations.

Section 65, as amended by St. 1921, c. 351, § 1, and c. 410, § 3, regulates the hours of labor of children under sixteen. It is as follows:

"No person shall employ a minor under sixteen or permit him to work in, about or in connection with any establishment or occupation named in section sixty, or for which an employment certificate is required, for more than six days in any one week, or more than forty-eight hours in any one week, or more than eight hours in any one day, or, except as provided in section sixty-nine, before half past six o'clock in the morning, or after six o'clock in the evening. The time spent by such a minor in a continuation school or course of instruction as
required by section twenty-two of chapter seventy-one shall be reckoned as a part of the time he is permitted to work.”

Section 69, as amended by St. 1921, c. 410, § 1, regulates the employment of children in so-called street trades.

Section 85 contains certain limitations upon the application of sections 60 to 83, inclusive. It is as follows:

“Sections sixty to eighty-three, inclusive, shall not apply to the juvenile reformatories, other than the Massachusetts reformatory, or prevent minors of any age from receiving manual training or industrial education in or in connection with any school which has duly been approved by the school committee or by the department of education.”

Section 86, as amended by St. 1921, c. 351, § 2, requires employees of children between fourteen and sixteen in any factory, workshop, manufacturing, mechanical or mercantile establishment, or in any industrial employment, to procure and keep employment certificates, with the following proviso:

“... provided, that pupils in co-operative courses in public schools may be employed by any co-operating factory, manufacturing, mechanical or mercantile establishment or workshop, or any employment as defined in section one, upon securing from the superintendent of schools a special certificate covering this type of employment. ...”

It requires also special certificates covering the employment of children between fourteen and sixteen in private domestic service or service on farms.

The inquiry made by your questions is: How far do section 85 and the proviso in section 86 limit the application of the preceding sections?

The proviso in section 86, in my opinion, is merely an exception to the preceding provision in that section. It relates to the employment of pupils in co-operative courses in public schools. The term “co-operative courses” is defined in G. L., c. 149, § 1, as meaning “courses approved as such by the department of education and conducted in public schools where technical or related instruction is given in conjunction with practical experience by employment in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops.” Such pupils may be so employed upon securing a special certificate instead of the employment certificate otherwise required.

Section 85 contains two different provisions with respect to sections 60 to 83, inclusive: first, that they shall not apply to juvenile reformatories other than the Massachusetts Reformatory; and secondly, that they shall not “prevent minors of any age from receiving manual training or industrial education in or in connection with any school which has duly been approved by the school committee or by the department of education.” I interpret this to mean that courses of instruction in manual training or industrial education may be given in approved schools although they involve employments and hours of labor which are contrary to the provisions of sections 60, 61, 62 or 65, and that schools giving courses of instruction inconsistent with the terms of those sections may be approved by the school committee or by the Department of Education. Of course, the statutory regulations are not to be lightly disregarded; they should be followed as far as possible consistently with the educational object sought to be achieved.

It may be suggested that so far as concerns sections 60 and 65, section 85 is impliedly repealed by St. 1921, c. 410. That act amended G. L., c. 149, § 69, by adding a provision permitting boys over twelve to engage in certain street trades under certain circumstances. It also amended G. L., c. 149, §§ 60 and 65, in substance, by inserting the words “except as provided in section sixty-nine” before certain substantive provisions of those sections. In my opinion, the Legislature did not mean, by expressing this exception, to exclude the exception expressed in section 85. They observed a possible inconsistency between section 69, with which they were principally dealing, and some portions of sections 60 and 65; and so they provided that in case of conflict section 69 should prevail.

My answer to your questions, specifically, is that the regulations of sections
61, 62 and 65 are applicable to minors when employed in co-operating factories, manufacturing, mechanical or mercantile establishments or workshops, unless such employment is in the course of receiving manual training or industrial education in connection with an approved school, under G. L., c. 149, § 85. In that case those regulations will not prevent the giving of such instruction to minors of any age. A child between fourteen and sixteen employed in any such establishment is required by section 86 to secure a special certificate covering that type of employment.

Very truly yours,

Jay R. Benton, Attorney General.

Insurance — Laundry Insurance — Bond — Rebate.

A foreign insurance company not authorized to transact the kinds of business specified in the first, second or eighth clauses of G. L., c. 175, § 47, cannot insure a laundry company against hazards necessarily incidental to such kinds of business, but may, under section 105, execute, as surety, a bond to protect the customers against the default of the laundry company to pay losses from such hazards.

A retention of a portion of the service charge made by the laundry company for the payment of premiums does not, under certain circumstances, constitute an unlawful rebate.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have requested my opinion upon certain questions relative to a transaction between an insurance company and a laundry company.

The facts connected with this transaction, as set forth in your letter, differ materially from those which existed in two cases concerning transactions between insurance companies and laundry companies upon which I rendered opinions to your department on June 29, 1923. You state in your letter: —

“Some further question is now raised as to the legality of the proposition presently employed by this company. This company is a foreign insurance company licensed to transact in this Commonwealth the classes of business specified in the fourth, fifth, sixth, seventh and twelfth clauses of section 47 of said chapter 175. It cannot, under sections 51 and 152 of said chapter, lawfully transact the kinds of business specified in the first, second or eighth clauses of said section 47.

The laundry company enters into an agreement with the insurance company. The laundry company executes as principal what purports to be a bond, which is also executed by the insurance company as surety, guaranteeing the performance of said agreement.

It appears from a letter written on behalf of the insurance company that the agreement is apparently intended to cover loss or damage caused by fire, stealing, burglary or, in fact, any hazard.

The particular laundry company referred to in the documents attached to my letter, I am informed, retains fifty per cent of the premiums which it collects, remitting the balance to the insurance company. Twenty per cent of the premiums retained by this laundry company is for a reserve fund out of which it may pay claims of its customers, not exceeding $100. The remainder it retains ostensibly for other costs. It apparently makes no express written contract with its clients, but collects from them one cent for each bundle of laundry and specifically charges said sum to the client upon its bill.

I respectfully request your opinion on the following questions:

(1) Is the said agreement one which the insurance company may lawfully make under said chapter 175?

(2) Is the said agreement or bond in effect a contract of insurance made by this insurance company against loss or damage by fire or any of the other hazards specified in the first, second or eighth clause of said section 47?

(3) Does said agreement or bond constitute an insurance contract by this

May 27, 1924.
insurance company against the hazards specified in more than one of the clauses of said section 47, and is it, therefore, contrary to section 52 of said chapter 175?

(4) If the preceding question is answered in the affirmative, may the commissioner lawfully approve said agreement or said bond under said section 52?

(5) Is the said bond an obligation upon which the said insurance company may lawfully act as surety under section 105 of said chapter 175?

(6) Does the allowance to a laundryman by the insurance company of a portion of the premiums collected by him constitute a rebate in violation of sections 182 to 184 of said chapter 175, (a) if used in whole or in part by the laundryman to pay claims of his customers; (b) if used in part to pay such claims and in part to defray expenses in connection with the operation of the plan; and (c) if retained entirely by the laundryman for his personal use?

In the case presented by your letter and the documents annexed thereto it appears that a surety bond in which a laundry company is named as principal and certain of its customers severally appear to be obligees, with an insurance company designated as surety, has been executed by the laundry company and the insurance company. In this bond it is recited that the laundry company has voluntarily waived its legal defenses to any claim of its customers for any bundle of laundry delivered to the laundry company and not returned by it in like good order, ordinary laundry wear excepted, and that the laundry company is desirous of giving further assurance to its customers that their claims will be promptly adjusted. The laundry company binds itself, to each of its customers who shall pay a service charge, that it will pay promptly, as liquidated damages, to any one of them in settlement of any claim made by any of them for any bundle delivered to the laundry company and not returned in like good order, ordinary laundry wear excepted, as that in which it was received, the fair value of the goods; provided that the claim is not in excess of a stated amount and is made within thirty days. And the insurance company obligates itself to pay to any of such customers the amount so due upon any claims against the laundry company, in the event that the laundry company fails to make payment.

I am informed that the laundry company sends to each of its customers a slip, of which the following is a copy:

"A New Service

Do you know that a laundry is not legally responsible for the customer's goods unless the laundry is proven negligent? While we try to use all reasonable care, accidents do happen from many causes, causing substantial loss. We prefer to adjust such matters promptly and to avoid the delay, friction and expense of litigation, in order to give our customers the most complete service. We, therefore, voluntarily waive our legal defenses to any claim made for any bundle delivered to us and not returned in like good order, ordinary laundry wear excepted, and we have taken a surety company bond to secure prompt payment to you, as liquidated damages in settlement of any such claim, the fair value of the goods, but not exceeding twenty times the laundry charge.

The charge for this service is one cent per bundle to defray the expense of the service and of the surety company bond. We will arrange for this service with our next delivery."

It is to be noted that in this slip the laundry company states:

"We, therefore, voluntarily waive our legal defenses to any claim made for any bundle delivered to us and not returned in like good order . . . and we have taken a surety company bond to secure prompt payment to you, as liquidated damages in settlement of any such claim, the fair value of the goods, but not exceeding twenty times the laundry charge."

Concurrently with the execution of the bond the insurance company and the laundry company execute an "agreement." Clause 8 of this agreement reads as follows:

"The laundry may settle, and charge to the account of the corporation, claims other than those enumerated in paragraph 3 above; provided that settle-
P. D. 12.

mements so made and charged shall not exceed 10% per 100 bundles, delivered or returned to customers, in any calendar month, except with the consent of the corporation. If and when such settlements for any calendar month exceed 10¢ per 100 bundles, the corporation will pay the excess.

The laundry shall promptly furnish to the corporation such information as may be required by it in reference to claims paid or filed, and the corporation shall have the option of adjusting the pending claim direct with the customer.

In event claim for any one or more of several bundles, resulting from any one event, be settled for less than the maximum limit per bundle fixed in paragraph 2, the difference may be applied to settlement for the other bundles for which the laundry deems it necessary to pay more than the agreed limit; provided that the maximum liability of the corporation be not thereby increased.”

The purport and intent of the agreement are to provide for the payment to the laundry company by the insurance company of the amount of all losses which the former may sustain by reason of damage to the contents of the laundry bundles of its customers while in its possession. The agreement permits the adjustment and payment of claims in the first instance by the laundry company, but reserves to the insurance company the right, at its option, of making any particular adjustment with the customer direct. The agreement is in effect a policy of insurance by the insurance company against loss which the laundry company may sustain by damage from all causes or hazards to the property of its customers, of which it is the bailee. The liability of the insurance company upon this agreement is in addition to its liability as surety upon the bond, and is of a different character. The voluntary waiver by the laundry company of defenses, and acceptance of a certain mode for the purpose of determining liquidated damages, does not affect the nature of its agreement with the insurance company. Upon its bond the insurance company is liable to the laundry company’s claimants upon the default of the laundry company in paying their just claim for damages. Upon the agreement the insurance company is liable to the laundry company for the amount of the latter’s losses upon such claims.

You inform me in your letter that this insurance company cannot lawfully transact the kind of business specified in the first, second, or eighth clauses of G. L., c. 175, § 47. The agreement which the insurance company enters into with the laundry company is in effect a contract of insurance against losses to property in the possession of the laundry company from any and all causes or hazards. Many of such causes or hazards, against which the agreement purports to protect the laundry company, are those specifically mentioned in the first, second and eighth clauses of section 47. As business relative to insurance against such causes cannot lawfully be transacted by this insurance company, this agreement, which purports to insure against damage from such causes, among others, is not one which this company may lawfully make. I therefore answer your first question in the negative.

I answer your second question, so far as it relates to the agreement, in the affirmative, but in the negative as it relates to the bond.

I answer your third question, in so far as it relates to the agreement, in the affirmative, and, in so far as it relates to the bond, in the negative.

I answer your fourth question to the effect that the bond is not a contract of insurance and does not require the approval of the Commissioner under the provisions of G. L., c. 175, § 52. So far as your question relates to the agreement, I answer that in its present form, for the reason that it covers losses from causes as to which this insurance company is not authorized to transact business, the Commissioner may not lawfully approve it.

I answer your fifth question in the affirmative.

Construing the terms of the particular agreement now before me, I am of the opinion that the retention of money arising from the service charge mentioned in paragraph 4 of the agreement by the laundry company does not constitute a rebate in violation of G. L., c. 175, §§ 182 to 184, under any of the conditions mentioned in your question as (a), (b) and (c). A particular arrangement not provided for in the agreement, by which a particular assured was permitted to retain a portion of the premium mentioned in paragraph 7 for any purpose
other than the payment of claims upon which the insurance company was to indemnify the laundry company, would be unlawful under the terms of sections 182 to 184.

Very truly yours,

JAY R. BENTON, Attorney General.

Insurance — Investment of Funds of Domestic Life Companies — Securities of Equipment Trusts.

G. L., c. 175, § 66, does not prohibit a domestic life insurance company from investing one-quarter of its reserve in the notes of an equipment trust not a corporation, the owners of whose stock or evidences of indebtedness may be liable to an assessment except for taxes.

Section 66 does not prohibit a domestic life company from investing three-quarters of its reserve in equipment trust notes which comply with paragraph 6 of section 63, nor does it forbid investment of one-quarter of the reserve in an unincorporated business or its securities, provided that such investment be secured by collateral.

MAY 27, 1924.

Hon. WESLEY E. MONK, Commissioner of Insurance.

DEAR SIR:—You have asked my opinion regarding various matters connected with the investment of certain funds of domestic life insurance companies under G. L., c. 175, as amended.

Your first question is:

"Does G. L., c. 175, § 66, as amended, prohibit any domestic life company from investing one-quarter of its reserve in equipment trust notes not complying with the provisions of paragraph 6 of section 63?"

St. 1923, c. 297, amends G. L., c. 175, as previously amended by St. 1921, c. 215, by striking out sections 63 and 66 and inserting in place thereof two new sections, numbered 63 and 66, respectively.

Section 63 now provides, in part:

"The capital of any domestic company, other than life, and three fourths of the reserve of any domestic stock or mutual life company, shall be invested only as follows: . . ."

6. In the notes of any equipment trust created in behalf of any railroad coming within the terms of paragraph four or five, provided that the plan of such trust, in case of any railroad coming within the terms of paragraph four, includes an initial cash payment of at least twenty-five per cent, and, in case of any railroad coming within the terms of paragraph five, of at least forty per cent, and that such notes mature not later than fifteen years from the date of issue."

Section 66, as now amended, provides, in part:

"Except as hereinbefore authorized, no domestic life company shall invest any of its funds in any unincorporated business or enterprise or in the stocks or evidence of indebtedness of any corporation the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes, nor shall such life company invest any of its funds in its own stock or in the stock of any other company. No such company shall invest in, acquire or hold directly or indirectly more than ten per cent of the capital stock of any corporation, nor shall more than ten per cent of its capital and surplus be invested in the stock of any one corporation. No such company shall subscribe to or participate in any underwriting of the purchase or sale of securities or property, or enter into any transaction for such purchase or sale on account of said company jointly with any other person nor shall any such company enter into any agreement to withhold from sale any of its property, but the disposition of its property shall be at all times within the control of its board of directors.

Nothing in this section or in section sixty-three shall prevent such company from investing or loaning any funds, not required to be invested as provided
in section sixty-three, in any manner that the directors may determine; provided, that such funds shall not be invested in the purchase of stock or evidence of indebtedness prohibited by the preceding paragraph, and provided that no loan of such funds shall be made to an individual or firm unless it is secured by collateral security."

The manner in which a domestic life insurance company shall deal with the investment of three-fourths of its reserve is governed by said sections 63 and 66. The manner in which it shall deal with the remaining one-fourth of its reserve is governed by the second paragraph of said section 66. As regards the investment of one-fourth of its reserve, the directors are free to make any reasonable investments, subject only to prohibitions against investment in stocks or evidence of indebtedness forbidden by the first paragraph of section 66, and unsecured loans to individuals. The second paragraph of section 66 does not contain any prohibition against the purchase of notes of equipment trusts not complying with the provisions of paragraphs 4 or 5 of section 63. The second paragraph of section 66, by reference to the first paragraph, does contain a direct prohibition against the investment of any funds of such a company "in the stocks or evidence of indebtedness of any corporation the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes." This prohibition is binding upon the directors of the company as to their investment of the one-fourth part of the reserve under consideration.

I therefore answer your question to the effect that, if an equipment trust is not a corporation, the owners of whose stock or evidences of indebtedness may be liable to an assessment except for taxes, then the provisions of section 66 do not prohibit a domestic life insurance company from investing one-quarter of its reserve in the notes of such an equipment trust.

Your second question is as follows:—

"Does said section 66 permit a domestic life company to invest three-quarters of its reserve in equipment trust notes which comply with the provisions of said paragraph 6, (a) if the trustee is not a corporation, and (b) if the trustee is a corporation?"

The investment of three-quarters of the reserve of a domestic life insurance company is governed primarily by section 63. Section 66 sets forth certain prohibitions relative to the investment of the funds of domestic life insurance companies, but these prohibitions are effective only if preceding sections of the chapter have not authorized the acts which the terms of section 66 purport to prohibit. Section 66 begins with the words "except as hereinbefore authorized." Section 63 specifically authorizes, in paragraph 6, the notes of equipment trusts which comply with the provisions therein set forth for investment of three-fourths of the reserve of a domestic life insurance company, and makes no limitation relative to such investment based upon the trustee being a corporation or unincorporated.

The prohibition contained in section 66, concerning investments in unincorporated enterprises, does not apply to investments in the equipment trusts mentioned in section 63, because as to these the investment has, in the language of section 66, "hereinbefore been authorized." Accordingly, I answer your question, both as to subsections (a) and (b), in the affirmative.

Your third question is as follows:—

"Does said section 66 prohibit a domestic life company from investing one-quarter of its reserve in any unincorporated business or enterprise or in any securities excepting stocks or evidence of indebtedness of any corporation, the owners or holders of which stock or evidence of indebtedness may in any event be or become liable on account thereof to any assessment except for taxes?"

I answer this question in the negative, adding that section 66 forbids the making of a loan to a firm or individual without securing such loan by collateral security.

Your fourth question is as follows:—
"Is a domestic life insurance company owning notes or certificates of an equipment trust described in paragraph 6 of said section 63 a creditor of the trust?"

The word "certificates" is not used in section 63. In the ordinary acceptance of the word, a "note" is a promise to pay money, which creates as between the maker and the payee the relation of debtor and creditor.

I am informed that these equipment trust notes are commonly called, also, participation certificates, and that in the form in which they are sometimes issued they are in reality certificates of part ownership in physical property, the title to which is held by the trustee for the benefit of all the owners of such certificates. When so issued they are not in the nature of promises to pay to the holder by the trust, and the relation of creditor and debtor does not exist. Whether or not the holder of one of these notes or certificates issued by an equipment trust in any given instance can be termed a creditor of the trust, depends upon the form and wording of the instrument which is purchased from the trust.

Very truly yours,

JAY R. BENTON, Attorney General.


The cash value of, "a single premium deferred annuity policy," called a "deferred income bond," to be paid at the death of the insured, is to be computed under the provisions of G. L., c. 175, §§ 132 and 142.

Hon. Wesley E. Monk, Commissioner of Insurance.

DEAR SIR: — You have asked my opinion relative to certain provisions of "a single premium deferred annuity policy." In your letter you state:

"One of our domestic life companies has submitted to this department for approval a single premium deferred annuity policy which the company has designated "deferred income bond," which contains a provision that: 'In case the said bondholder should die before the......day of......one thousand nine hundred and ......, no income payment will be made under this contract, but if the contract is in force at the death of the bondholder, the cash value of this contract at the end of the contract year in which death occurs, less any indebtedness to the company hereunder, shall, upon receipt of due proof of such death, be paid to the executors or administrators of the bondholder, unless otherwise provided.'

On a policy of this kind with a single premium of $1,000, the cash value of the policy at the end of thirty years is $2,680, the additional $1,680 representing accumulated interest on the original single premium of $1,000.

In view of the fact that the statute requires annuity policies to contain in substance all of the provisions required of life and endowment policies unless the refund on the death of the annuitant is limited to a 'sum not exceeding the premiums paid thereon,' I desire your opinion as to whether or not the statute permits such refund to include any or all of the interest accretions from said premiums.

If the words 'any sum not exceeding the premiums paid thereon' are construed as including interest accretions, what is the maximum rate of interest which should be allowed. (See G. L., c. 175, § 9.)"

It is apparent from the terms of the policy as set forth in your communication that the payee, at the death of the insured, would receive the cash value of the policy at the end of the year in which the death occurs, and that this cash value would be greater than the amount of the premium paid for the policy. The policy is therefore not one of the annuity or endowment policies which, under the terms of G. L., c. 175, § 132, are excepted from the general requirement that policies shall not be issued unless they contain in substance the provisions of section 132, clauses 8 to 12, so far as applicable to single premium contracts. The words "sum not exceeding the premiums paid thereon," limiting
the class of policies which are not required to contain the other provisions of
the statute, do not include in their connotation accretions by way of interest
to such premiums, but are limited to the amount of the actual premiums paid.
What the payee will receive on this policy is stated to be “the cash value of this
contract at the end of the contract year.” As the policy must contain the other
provisions of section 132, the cash value of the policy which is to be paid at the
death will be computed as indicated therein and in the general mode of making
such computations as set forth in section 142. The reserve of the insurance
company may not be unduly entrenched upon for the benefit of policy holders
of this particular contract by a mode of computing cash value or reckoning
interest, which shall be peculiarly favorable to them, and so work a diminution
of the funds to the detriment of other classes of insureds.

In view of the opinion which I have expressed herein, the question contained
in the last paragraph of your letter does not require a further answer.

Very truly yours,

JAY R. BENTON, Attorney General.

State Retirement System — Salary or Wages.

Extra compensation for special services out of office hours is not “salary,”
within the meaning of G. L., c. 30, § 21.

Under G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, additional com-
penation for discontinuous employment out of office hours is not “salary
or wages,” and should not be considered in computing a pension payable
under G. L., c. 32, § 5, par. (2) C (b).

JUNE 2, 1924.

Hon. JAMES JACKSON, Chairman, State Board of Retirement.

Dear Sir: — You have requested my opinion as to the meaning of the words
“salary or wages,” defined by G. L., c. 32, § 1, as amended by St. 1922, c. 341,
§ 1, as applied to the case stated by your letter. You state that a member
of the State Retirement Association created by G. L., c. 32, who has been em-
ployed continuously since November 28, 1902, in the Department of Conserva-
tion, Division of Animal Industry, must now be retired from the service on
account of age. You further state that the member, in addition to the regular
salary received by him from the Department of Conservation, acted as a member
of three separate boards of civil service examiners, as provided by G. L., c. 13,
§ 6, and received for this additional service, as compensation for marking the
examination papers, a sum amounting to $500 or $600 per year. Upon the basis
of these facts you ask whether such compensation received by the member, in
addition to the amount paid him for the work performed in regular office hours
as an employee of the Department of Conservation, should be deemed by you
“salary or wages” in determining the amount of pension payable under G. L.,
c. 32, § 5, par. (2) c (b). You further ask whether similar compensation
received by an employee of one department from a department other than the
one in which he is required to give full time should be considered irregular com-
penation and not subject to annuity deductions.

G. L., c. 32, § 1, as amended by St. 1922, c. 341, § 1, defines the words “salary
or wages” as follows: —

“‘Salary or wages,’ cash received for regular services together with such
allowance for other compensation not paid in cash as may be hereinafter pro-
vided.”

Section 4 of G. L., c. 32, provides for the creation of an annuity and pension
fund from deposits by members and contributions by the Commonwealth. Sec-
tion 5 provides for the administration of annuity and pension funds by the
payment to members, upon retirement, of annuities from employees’ deposits
[par. (2) B], and pensions derived from contributions by the Commonwealth
[par. (2) C]. These pensions are divided into two classes, — (a) pensions based
upon service subsequent to June 1, 1912, and (b) pensions based upon service
prior to that date.

G. L., c. 32, § 5, par. (2) C (b), provides, in part, as follows: —
"Pensions based upon prior service. Any member of the association who reaches the age of sixty and has been in the continuous service of the commonwealth for fifteen years or more immediately preceding and then or thereafter retires or is retired, and any member who completes thirty-five years of continuous service and then or thereafter retires or is retired, shall receive, in addition to the annuity and pension provided for by paragraphs (2) B and (2) C (a) of this section, an extra pension for life as large as the amount of the annuity and pension to which he might have acquired a claim if the retirement system had been in operation at the time when he entered the service of the commonwealth, and if accordingly he had paid regular contributions from that date to June first, nineteen hundred and twelve, at the same rate as that first adopted by the board, and if such deductions had been accumulated with regular interest."

In order to compute the pension to which a retiring member is entitled, in accordance with the above provision, it is accordingly necessary to estimate the amount of the annuity and pension to which, if the retirement system had been in operation at the time when he entered the service of the Commonwealth, he might have acquired a claim under the provisions of paragraph (2) B and (2) C (a) of section 5.

Paragraph (2) C (a) of section 5 provides that a retiring member shall receive a pension equivalent to the annuity to which he is entitled under paragraph (2) B; and paragraph (2) B provides as follows:—

"Annuities from Employees' Deposits.—Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for fifteen years immediately preceding and then or thereafter retires or is retired, . . . shall receive an annuity to which the sum of his deposits under section four (2) A, with such interest as shall have been earned thereon, shall entitle him, . . ."

It follows that the amount both of pensions based upon subsequent service and of pensions based upon prior service depends upon the size of the annuity from employees' deposits, to which the retiring member is entitled under section 5, paragraph (2) B; and that the size of this annuity, in turn, depends upon the amount of the deposits which the member was required to make by section 4, paragraph (2) A.

Section 4, paragraph (2) A, reads as follows:—

"Deposits by Members.—Each member shall deposit in this fund from his salary or wages, as often as the same are payable, not less than one nor more than five per cent thereof, . . ."

The question asked by you resolves itself, therefore, into an inquiry as to the meaning of the phrase "from his salary or wages" in the above provision.

Had G. L. c. 32, contained no definition of the phrase "salary or wages," I am of the opinion that that phrase would not include such additional and irregular compensation for special work, performed out of regular office hours, as that set forth by you in your letter. It has been determined by this department repeatedly that such extra compensation for special services out of office hours is not "salary," within the meaning of G. L. c. 30, § 21, which provides that no person shall at the same time receive more than one salary from the treasury of the Commonwealth. See II Op. Atty. Gen. 21 and 309; V Op. Atty. Gen. 697, 699. As stated in the last opinion cited above, the word "salary" is normally limited to "compensation established on an annual or periodical basis and paid usually in instalments, at stated intervals, upon the stipulated per annum compensation."

In any event, the definition of "salary or wages" introduced into the act by the amendment of 1923 would seem conclusive on this point. In my opinion, additional compensation for discontinuous employment out of office hours cannot be considered "cash received for regular services"; and it is, I think, obvious that the last phrase of the definition, "together with such allowance for other compensation not paid in cash as may be hereinafter provided," has no application to the case put by you.
I am accordingly of the opinion that upon the facts stated in your letter additional compensation of the kind in question would not be subject to annuity deductions under G. L., c. 32, § 4, par. (2) A; and should therefore, of course, not be considered in computing a pension payable under section 5, paragraph (2) C (b). I therefore answer your first question in the negative, and your second question also in the negative so far as it is applicable to the case which you have presented.

Very truly yours,

JAY R. BENTON, Attorney General.

State Retirement Association — Membership — Age.

The State Board of Retirement would not be justified in retiring a person who purported to join the association after June 1, 1912, at the supposed age of fifty-three years but who, in fact, at that time had passed the age of fifty-five years, such person not being a member of the association, and accordingly not entitled to retirement.

JUNE 3, 1924.

Hon. James Jackson, Chairman, State Board of Retirement.

Dear Sir: — You have requested my opinion as to whether G. L., c. 32, § 2, par. (1), qualifies St. 1911, c. 532, § 3, par. (2), so that the board would be justified in retiring a person who purported to join the association in 1912 at the supposed age of fifty-three years, but who, in fact, at that time had passed the age of fifty-five years. I assume that the person in question was not in the service of the Commonwealth on or prior to June 1, 1912, which is referred to as the date on which the State Retirement Association was established. G. L., c. 32, § 2, par. (1).

G. L., c. 32, § 2, par. (1), reads as follows: —

“All persons who are now members of the state retirement association established on June first, nineteen hundred and twelve, shall be members thereof.”

St. 1911, c. 532, § 3, par. (2), reads as follows: —

“All employees who enter the service of the commonwealth after the date when the retirement system is established, except persons who have already passed the age of fifty-five years, shall upon completing thirty days of service become thereby members of the association. Persons over fifty-five years of age who enter the service of the commonwealth after the establishment of the retirement system shall not be allowed to become members of the association, and no such employee shall remain in the service of the commonwealth after reaching the age of seventy years.”

G. L., c. 32, § 2, par. (1), corresponds to and is substituted for St. 1911, c. 532, § 3, par. (1). This latter section reads as follows: —

“All employees of the commonwealth, on the date when the retirement system is established, may become members of the association. On the expiration of thirty days from said date every such employee shall be considered to have elected to become, and shall thereby become, a member, unless he shall have within that period, sent notice in writing to the state insurance commissioner that he does not wish to join the association.”

The difference in phraseology is due to the fact that in 1911 the association had not come into existence, whereas, at the time when the General Laws were drafted the association was established. There seems to be nothing in G. L., c. 32, § 2, par. (1), which can be construed as indicating an intent to change in any way the qualifications of membership in the association; or to confirm membership in any who may previously have been improperly regarded as members.

I am of the opinion that G. L., c. 32, § 2, par. (1), does not make the person referred to a member of the association and thereby entitled to retirement under G. L., c. 32, § 2, par. (9), as amended.

Yours very truly,

JAY R. BENTON, Attorney General.
Constitutional Law — Theatres — Regulation of Resale of Tickets.

Dealers in the resale of tickets to places of amusement may be required to be licensed. The original price of such tickets may be required to be printed upon the face thereof. The resale price of such tickets may be restricted to an advance of not over fifty cents above the original price.

June 5, 1924.

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

Sir: — I have the honor to acknowledge the submission to me for examination and report of Senate Bill No. 510, entitled “An Act to regulate the sale and resale of tickets to theatres and other places of public amusement, as a matter affected with a public interest, in order to prevent fraud, extortion and other abuses.”

Proposed legislation, having marked fundamental similarities to the provisions embodied in this bill, has been at various times before this office for examination, and it has been the uniform opinion of my predecessors in office that those various items of legislation were unconstitutional. Opinions to this effect are found in III Op. Atty. Gen. 491; IV Op. Atty. Gen. 519; Attorney General’s Report, 1922, p. 72.

It will perhaps not be serviceable, in view of the recent opinion of the justices of the Supreme Judicial Court, to consider in detail whether the present bill can be distinguished as to its constitutionality from those earlier proposed measures.

By Senate order under date of March 28, 1924, in connection with the consideration of House Bill No. 1038, the opinion of the justices of the Supreme Judicial Court was required upon a series of questions bearing upon the validity of regulations of ticket speculation. The opinion of the justices in response to that order is found in 247 Mass. 583. It answers in the affirmative subdivisions (A), (C), (D), (E) and (F) of question (1), and in the negative subdivision (B), and continues

“Although we do not observe any unconstitutional provision in the proposed bill, we respectfully ask to be excused from answering question (2) touching its constitutionality in all its provisions.”

A textual comparison of the present bill with House Bill No. 1038, as then submitted to the consideration of the justices, does not disclose the addition of any provisions which affect adversely the constitutionality of the bill. On the contrary, certain features of House Bill No. 1038 have been eliminated; perhaps the most significant elimination, from the point of view of constitutionality, is that which makes the proposed section 185 (A) of chapter 140 of the General Laws, as found in the present bill, deal only with the business of reselling tickets, whereas the corresponding section in House Bill No. 1038 dealt also with any and every resale, however casual.

The proposed section 182 (A), as found in the present bill, seems clearly covered as to its constitutionality by the answer made by the justices to question 1 (A). Sections 185 (A), (B), (C), (E), and some aspects of (F), as found in the present bill, are similarly covered by the answer made by the justices to questions 1 (C) and 1 (D). Any claim that the statute as now drawn gives to the Commissioner of Public Safety powers so broadly expressed as to be conceivably susceptible to abuse through arbitrary action is probably answered by Douglas v. Noble, 261 U. S. 165. Section 185 (D) and some aspects of section 185 (F) are similarly covered by the answer of the justices to question 1 (F). Section 185 (G) in the present bill does not seem to establish any unreasonable classifications.

The Court of Appeals of New York, in People v. Weller, 237 N. Y. 316, has also held constitutional a statute of that State quite similar to the present bill. The court points out the fact that theatres and other places of amusement are in numerous aspects the unquestioned subject of police power regulation,
that there are certain tendencies to monopoly occurring in the business of reselling tickets, and that the business of speculating in theatre tickets is one "through which the general public is compelled to pay a group of men for services which, at least in part, are not desired by the public." The reasoning of the justices in the opinion rendered to the Senate relies largely upon the ground that "the maintenance of theatres and other places of amusement is for the use of the public and affected with a public interest."

The three main features of the statute are the requirement of printing the price on the tickets, the licensing of dealers in tickets, and the restricting of the profits which such dealers may make upon resales. If the price-fixing aspect should be taken as the central feature of the statute, the other provisions would be reasonably calculated to aid in its enforcement, and might be constitutional for that reason, if for no other, if the price-fixing provision is constitutional. Assuming, however, that these three main divisions of the bill are separable, there would still probably be little difficulty in holding constitutional the parts relating to the printing of the price and to licensing, as measures for the prevention of frauds.

The constitutionality of fixing the resale price is intrinsically a much more doubtful question, upon which differences of opinion are not merely likely but inevitable. I feel constrained, in the light of the opinion of the justices referred to above, to say that the proposed bill will, if enacted, be constitutional.

I would respectfully call attention to the form of proposed section 185 (G). As that section now stands, the words "the six preceding sections" would seem to mean the six sections preceding section 152 (A) of chapter 140 of the General Laws; whereas, it is plain that the reference was meant to be to the six sections, 185 (A) to (F), inclusive, which in the proposed bill immediately precede section 185 (G). There might also be some question as to what terms are modified and governed by the words "religious, educational or charitable," which immediately precede the words "institutions, societies or organizations or civic leagues or organizations not organized for profit, etc." I would suggest that by eliminating the two commas which follow, respectively, the words "religious" and "institutions," and by inserting a comma between the word "organizations" and the words "or civic leagues," the probable intention of this provision would be more clearly expressed.

Very truly yours,

JAY R. BENTON, Attorney General.

Constitutional Law — Ratification of Proposed Amendment to the Federal Constitution — Submission to the People for an Expression of Opinion.

An act to ascertain the opinion of the people of the Commonwealth as to the desirability of ratifying a proposed amendment to the Constitution of the United States, by submitting the question to the voters at a State election, would be constitutional.

JUNE 5, 1924.

His Excellency CHANNING H. COX, Governor of the Commonwealth.

SIR: — You have submitted to me for examination and report House Bill No. 1828, entitled "An Act to ascertain the opinion of the people of the Commonwealth as to the ratification of the proposed amendment to the Constitution of the United States empowering the Congress to limit, regulate and prohibit the labor of persons under eighteen years of age."

This proposed act provides, in substance, that for the purpose of ascertaining the opinion of the people of the Commonwealth as to the desirability of ratifying the proposed amendment to the Constitution of the United States, referred to in the title, there shall be placed upon the ballot to be used at the biennial State election in the current year the question: "Is it desirable that the General Court ratify the following proposed amendment to the Constitution of the United States?" — the terms of the proposed amendment being then set out; that the votes upon said question shall be received and counted; that the Governor shall make known the result; and that a statement of the result shall be submitted to the General Court during the first week of the session in the year 1925.
By St. 1920, c. 560, entitled "An Act to provide for ascertaining the opinion of the people as to proposed amendments to the Federal Constitution," it was provided that "if a proposed amendment to the Federal Constitution is duly submitted to the General Court, as provided in article five of the Constitution of the United States, and is not ratified at the session at which it is submitted," the question whether such ratification is desirable shall be submitted to all the voters of the Commonwealth at a subsequent State election. It may be a matter of some doubt whether or not the proposed amendment to which the pending bill relates has yet been duly submitted to the General Court, within the terms of that statute; but that question is immaterial to the present discussion. The only question is whether the proposed measure in any respect violates any provision of either the State or the Federal Constitution.

The Supreme Court of the United States has held that a requirement in a State constitution that the question of ratification of a proposed amendment to the Constitution of the United States should be referred by a referendum to the electors of the State for ratification was inconsistent with the Constitution of the United States. Hawke v. Smith, No. 1, 253 U. S. 221; Hawke v. Smith, No. 2, 253 U. S. 231; Leser v. Garnett, 258 U. S. 130, 137. But the distinction between the requirement held unconstitutional by the United States Supreme Court and the provision in the proposed act is fundamental. The provision which the Supreme Court declared to be unconstitutional attempted to give the people power to pass finally upon the question of ratification, substituting the electors of the State for the Legislature as the ratifying body. The proposed act, however, seeks only to obtain the opinion of the electors as a preliminary to subsequent independent action by the Legislature itself. In my opinion, therefore, the proposed act is in no respect in violation of the United States Constitution.

There remains the question whether any provision of the Constitution of Massachusetts is violated by this act. A similar question was considered in an opinion rendered by me under date of April 26, 1923, to the committee on bills in the third reading of the House of Representatives, by whom my opinion was requested as to the constitutionality of a bill entitled "An Act to ascertain the will of the people of Massachusetts with reference to the Eighteenth Amendment to the Constitution of the United States and the enforcement thereof." Attorney General's Report, 1923, p. 86. In that opinion I expressed the view that the proposed act there in question was within the power given to the Legislature by Mass. Const., e. I, § 1, art. IV, "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions not repugnant or contrary to the constitution, as they shall judge to be for the good and welfare of the Commonwealth"; that the spending of public money for printing the questions referred to in the act and tabulating the returns of votes was an expenditure for a public purpose; and that the proposed bill, if enacted, would not be repugnant or contrary to the Constitution, and would be constitutional. For the same reasons it is my opinion that the bill now before me, if enacted, would not be violative of any provision of the State Constitution.

Yours very truly,

JAY R. BENTON, Attorney General.

Eligibility of a Member of the General Court to Other Employment by the Commonwealth — Salary.

A member of the General Court is not eligible for other employment by the Commonwealth if his compensation for such other employment is "salary," or if such other employment in any way infringes upon the duties of the member as a legislator.

June 9, 1924.

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

Dear Sir: — You have asked my opinion as to "whether a member of the General Court is eligible, during the term for which he was elected, for tem-
porary employment on matters relating to primaries and elections in the Department of the Secretary of the Commonwealth.”

G. L., c. 30, § 21, provides: —

“A person shall not at the same time receive more than one salary from the treasury of the Commonwealth.”

Since there can be no doubt that the compensation received by a member of the Legislature is “salary,” it follows that a member of the Legislature can receive no compensation from your department if such compensation would properly be described as “salary.”

Whether a particular compensation is or is not to be termed “salary” is sometimes a troublesome question. I am not sufficiently advised as to the form and nature of the compensation to be paid by your department to express an opinion as to whether it should be termed “salary” or not. The following quotation sets forth the general considerations bearing on the question (V Op. Atty. Gen. 699): —

“‘Salary’ . . . is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called ‘piece work’ basis, and are more frequently subject to deductions for loss of time.”

Even if it be clear that the compensation to be paid by your department is not salary, there is still another question to be considered. In return for the salary paid by the Commonwealth to a member of the General Court the Commonwealth is entitled to so much of the member’s time and effort as is requisite for the performance of his duties. In order, therefore, that a member of the General Court should be employed in your department, it should be clear that the work required would in no way interfere with his duties as a member of the General Court. The work required by your department would have to be in the nature of overtime work. See II Op. Atty. Gen. 309; V Op. Atty. Gen. 697. This is a question of fact which you would have to determine, in the exercise of sound discretion.

In order, therefore, to make the employment suggested, you would have to determine, first, that the compensation to be paid would not be “salary”; and, secondly, that the work to be performed would be in the nature of overtime work and would in no way infringe upon the member’s duties as a legislator.

Very truly yours,

JAY R. BENTON, Attorney General.

Gasoline — State Fire Marshal — Powers — Appeal — “Person Aggrieved” — Revocation of Permits — Street Commissioners of Boston.

The use of land for the keeping, storage and sale of gasoline, in the absence of a restrictive statute, is lawful.

The powers of the State Fire Marshal, being purely statutory, can be exercised only in accordance with the statute.

If the State Fire Marshal delegates his power to grant licenses or permits, and the delegated officer acts thereunder, the Fire Marshal has no power to hear and determine the question except on appeal by a “person aggrieved.”

A “person aggrieved” is one whose personal or property rights are or may be adversely affected in a special manner by the action of the licensing authority.

A person whose rights may be affected only in so far as he is a member of the general public, and only to the same extent as other members of the public, is not a “person aggrieved.”

The State Fire Marshal may revoke any permit, but such revocation cannot be made arbitrarily.

The street commissioners of Boston have no authority to issue permits to store, handle or sell gasoline except as the State Fire Marshal delegates such authority to the board.
Dear Sir: — You request my opinion whether the State Fire Marshal has jurisdiction to pass upon the action or order of the board of aldermen of Chelsea granting a license for the storage of gasoline, under power duly delegated by the State Fire Marshal, on an appeal, which does not recite, or in which the evidence, after hearing, does not disclose, the appellant to be a person aggrieved by reason of any special personal or property right injuriously affected by said action or order.

G. L., c. 148, § 30, provides, in part: —

"The marshal shall have within the metropolitan district the powers given by section ten, . . . to license persons or premises, or to grant permits for, . . . the keeping, storage, use, . . . sale, handling . . . of . . . crude petroleum or any of its products . . ."  

Section 31, as amended by St. 1921, c. 485, § 5, provides: —

"The marshal may delegate the granting and issuing of any licenses or permits authorized by sections thirty to fifty-one, inclusive, . . . to the head of the fire department or to any other designated officer in any city or town in the metropolitan district. . . . Any such permit may be revoked by the marshal or by the officer designated to grant it."

Acting under this section the Fire Marshal delegated the granting and issuing of licenses in Chelsea to the board of aldermen of that city.

Section 28 provides that "the metropolitan district shall include . . . Chelsea." Section 45 provides: —

"The marshal shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons acting or purporting to act under his authority, done or made or purporting to be done or made under the provisions of sections thirty to fifty-one, inclusive, and shall make all necessary and proper orders thereon. Any person aggrieved by any such action of the head of a fire department or other person may appeal to the marshal."

The use of land for the keeping, storage and sale of gasoline, in the absence of a restrictive statute, is lawful. The statute under which licenses or permits for such purposes are required and granted is a regulation of the right of ownership in land.

In General Baking Co. v. Street Commissioners, 242 Mass. 194, 196, the court said: —

"The building of a garage, when there is no restrictive statute, is a lawful improvement of land. When limitation upon that right is imposed, it is reasonable to presume a purpose by the Legislature that the landowner be furnished by the terms of the law with necessary information touching all the restrictions under which he must act. When permission is obtained, the landowner reasonably may infer that, so long as he complies with the requirements under which the privilege has been granted, he may claim protection until further legislation impairs his rights."

It follows that the restrictions placed upon the use of land for such purposes must not be broader in scope than the statute authorizes. The powers of the State Fire Marshal, being purely statutory, can be exercised only in accordance with the statute. Welch v. Swasey, 193 Mass. 364, 376; Commonwealth v. Maletsky, 203 Mass. 241; Goldstein v. Conner, 212 Mass. 57; Kilgour v. Gratto, 224 Mass. 78; Wright v. Lyons, 224 Mass. 167, 168; Commonwealth v. McCarthy, 225 Mass. 192, 195; Commonwealth v. Atlas, 244 Mass. 78, 82. The statute prescribes only two methods of action by the Fire Marshal upon the question of such licenses or permits. He may pass on the question himself, in the first instance, or he may delegate the authority to a local officer, and hear and determine appeals from the action of such officer made by any person aggrieved. If the Fire Marshal delegates the power to grant licenses or permits, and the
delegated officer acts in a specific instance, the Fire Marshal has exhausted his power to pass upon the matter as an original question, and his only power then is to hear and determine an appeal from the action of the delegated officer, when made by a person aggrieved.

I am not unmindful of a contrary opinion given by my predecessor, to the effect that the Fire Marshal may pass upon the question as if no delegation had been made. See Attorney General’s Report, 1921, pp. 319, 321. That opinion, however, was rendered prior to the opinion of the Supreme Judicial Court in General Baking Co. v. Street Commissioners, 242 Mass. 194. I cannot, therefore, concur with the opinion of my predecessor. In my opinion, the Fire Marshal, in the case you present, has no authority to pass upon the question of granting the license. He should, however, hear and determine the appeal, if properly made.

The right of appeal is, by section 45, given only to persons “aggrieved” by the action of the board of aldermen, and not to others. A person aggrieved, within the purview of the statute, is one whose personal or property rights are or may be adversely affected in a special manner by the action of the board. Wiggin v. Swett, 6 Met. 194, 197; Wesson v. Washburn Iron Co., 13 Allen, 95, 101; Pierce v. Gould, 143 Mass. 234; Norton v. Shore Line Electric Ry. Co., 84 Conn. 24, 33. A person whose rights may be affected only in so far as he is a member of the general public, and only to the same extent as other members of the general public, is not a person “aggrieved,” within the meaning of the act. Wesson v. Washburn Iron Co., supra.

The appeal from the action of the board of aldermen was not made by a person who was specially affected in his personal or property rights. I am accordingly of the opinion that there is no lawful appeal pending, and that you have no authority to pass upon the action of the board of aldermen.


You further request my opinion as to whether the State Fire Marshal has jurisdiction to review and to overrule, on appeal, the decision of the board of street commissioners of the city of Boston, without regard to the provisions of St. 1907, c. 584, in granting a license to store gasoline in an underground tank and a license to install a pump permanently at the curb of the sidewalk in a public street, said board having been delegated by the State Fire Marshal with power to grant licenses or permits for the keeping, storage and sale of gasoline.

St. 1907, c. 584, is an act relative to the use of the public streets of the city of Boston for the storage and sale of merchandise. By the provisions of G. L., c. 148, § 30, the Fire Marshal is given authority to regulate the storage, keeping, use, sale and handling of gasoline in the metropolitan district, which includes Boston. The street commissioners of Boston have no authority to issue permits for such purposes except as the Fire Marshal delegates such authority to the board. Foss v. Weeler, 242 Mass. 277, 279; Attorney General’s Report, 1922, p. 202; V Op. Atty. Gen. 718.

The board of street commissioners, in granting a permit to store, use and sell gasoline, acted solely by virtue of the authority delegated to it by the Fire Marshal under the provisions of G. L., c. 148, § 31, as amended by St. 1921, c. 485, § 45. Under the provisions of section 45 an appeal from the action of the board may be made to the Fire Marshal by any person aggrieved. The powers of the Fire Marshal in this respect are in nowise affected by St. 1907, c. 584. If an appeal from the action of the board has been made by a person aggrieved by such action, it is the duty of the Fire Marshal to hear and determine such appeal, without regard to St. 1907, c. 584.

Very truly yours,

JAY R. BENTON, Attorney General.
State Constitution — Blue Book.

Mass. Const., pt. 2nd, c. VI, art. XI, does not require that the constitution be printed in the Blue Book.

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

Dear Sir: — You request my opinion as to whether or not the provisions of Mass. Const., pt. 2nd, c. VI, art. XI, require that you shall print the Constitution in the Blue Book, notwithstanding the provisions of St. 1924, c. 462. In my opinion, you are not required to do so.

The provision of the Constitution to which you refer reads as follows: —

"This form of government shall be enrolled on parchment and deposited in the secretary's office, and be a part of the laws of the land — and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of the said laws."

It is my opinion that the editions referred to are books which purport to contain all the statutes of the Commonwealth, and not books containing only the laws of one or more sessions.

At the time of the adoption of the Constitution it was the custom to publish the laws of each session by annexing them as part of an existing book of laws, until a book became of sufficient bulk to make it desirable that a new book be started. One book, entitled "Massachusetts Perpetual Laws," contained all the laws passed from 1692 to 1774. A book of a similarly comprehensive nature was, no doubt, referred to by the phrase "the book containing the laws of this commonwealth," as used in article XI above cited.

My opinion that article XI does not refer to a publication of the acts passed at a particular session is confirmed by the practice followed after the adoption of the Constitution.

For many years after the adoption of the Constitution it was the unvarying practice not to include the Constitution in the publication of the laws of one or more sessions. The inclusion of the Constitution in such books as purported to comprise all the then existing laws forms no exception. (See Laws, Oct., 1780, to Jan., 1783; Perpetual Laws of the Commonwealth, 1780–1789; General Laws to 1822; Revised Statutes, 1836.)

Apparently the first Blue Book in which the Constitution was printed was for the year 1855. The Constitution was printed at the end of the Blue Books for the years 1855, 1856 and 1857. It was not included in the Blue Book for 1858. It was prefixed to the Blue Book for 1859.

The various resolves under which the acts were published prior to the General Statutes (1860) made no provision for printing the Constitution. (See Res. Jan. 20, 1803; Res. Jan. 16, 1812; Res. 1839, c. 83.)

G. S. (1860), c. 3, § 1, provided for the printing of the Constitution and other matter with the acts and resolves of each session. In the report of the commissioners on revision of the statutes, published in 1888, the commissioners state in a note to chapter 3, section 1, that they have therein provided for the publication of the acts and resolves of each session, "with such other matter as it has been the custom to publish with them." The custom of publishing the Constitution seems not to have been of long standing.

The statutory requirement for printing the Constitution as part of the Blue Book, which has existed since the General Statutes of 1860 (see G. L., c. 5, § 2), has been repealed by St. 1924, c. 462; and there seems to be no other provision making this requirement.

Very truly yours,

Jay R. Benton, Attorney General.


Department Order No. 35 of the Department of Conservation, Division of Animal Industry, created a valid quarantine of the premises of the Brighton Stock Yards Company in Brighton.
Quarantine is a proper means of enforcing the power of inspection and examination. The tuberculin test may be applied without the owner's consent to imported cattle and to domestic cattle reported tuberculous on physical examination by a veterinary.

Quarantine stations established under G. L., c. 129, § 8, are experimental stations for the study of animal diseases.

Quarantine stations in Brighton, Watertown and Somerville, G. L., c. 129, § 32, are general quarantines to facilitate inspection, and the tuberculin test may be used upon cattle in such stations without the owner's consent.

Prior to St. 1924, c. 156, the sale of tuberculous animals was unrestrained, except that the owner must provide with certain information; after St. 1924, c. 156, sale or other disposition by the owner, except for immediate slaughter, is forbidden.

JUNE 25, 1924.


Dear Sir: — The questions which you have referred to me, relative to the quarantining of the Brighton Stock Yards and to the use of tuberculin in testing cattle on those premises, are predicated on the following facts:—

That there is maintained at the Brighton Stock Yards a large distributing centre for cattle, at which a weekly market is held for trading in dairy animals; that some of these cattle are brought from without the State, and that others of them are in the course of a purely intrastate movement; that an important part of the work of your department in controlling the spread of disease consists of determining whether all such cattle, or such of them as to which it may legally be done, are affected with tuberculosis; and that the only certain method of determining the presence or absence of tuberculosis is the use of the tuberculin test.

1. You ask whether the Brighton Stock Yards, as a "premises," are legally under quarantine by Department Order No. 35, approved in Council April 3, 1918. This order provides, in section 2, that "the premises of the Brighton Stock Yards Company in Brighton, within the city of Boston, ... are hereby declared to be quarantine stations, and no animals are to be released therefrom except by permission of the Director of Animal Industry or an agent of the division."

Under G. L., c. 129, § 2, the Director of Animal Industry is authorized to — "make and enforce reasonable orders, rules and regulations relative to ... prevention, suppression and extirpation of contagious diseases of domestic animals; the inspection, examination, quarantine, care and treatment or destruction of domestic animals affected with or which have been exposed to contagious disease, ... No rules or regulations shall take effect until approved by the governor and council."

Under G. L., c. 129, § 7, plenary power is given to the director or his agents or an inspector to make examinations or to inspect animals or the places where they are kept. Under section 11, as amended by St. 1922, c. 353, the director or one of his agents, upon determination that a domestic animal is affected with a contagious disease, may, if he is of opinion that the public good so requires, cause the diseased animal to be isolated or killed.

I am of the opinion that a rule establishing a quarantine about such a place as the Brighton Stock Yards, where the director and his aids have an unquestioned right to exercise their power of inspection and examination on the premises, is not an unreasonable method of facilitating such examination or inspection, and is therefore warranted under G. L., c. 129, § 2. The same view would apply to the provision requiring that no animals be released from the quarantined premises except by permission of the director or of one of his agents. I am not, of course, dealing with any case of possible arbitrary action under such a ruling. The Brighton Stock Yards, therefore, can be said to be legally under quarantine by Department Order No. 35. It should be pointed out, however, that this consequence is deduced from the department
order by assuming that the words "quarantine stations" were not used by the director in the narrow sense in which they are used in G. L., c. 129, § 8, which section is further discussed below.

2. You ask whether, if the Brighton Stock Yards are legally under quarantine, the Director of Animal Industry has authority, under G. L., c. 129, § 32, to order that any and all cattle thereon be tested with tuberculin for the purpose of determining whether or not they are affected with tuberculosis. Section 32 prohibits the use of tuberculin as a diagnostic agent for the detection of tuberculosis in domestic animals except upon cattle brought into the Commonwealth, upon cattle "in quarantine stations at Brighton, Watertown and Somerville," upon any animal in any other part of the Commonwealth where the written consent of the owner or person in possession is obtained, and upon animals which have been reported as tuberculous upon physical examination by a competent veterinary surgeon. Clearly, this statute gives the right to use the tuberculin test without the owner's consent upon all foreign cattle coming into the Commonwealth and upon any domestic cattle which have been reported tuberculous upon physical examination by a veterinary. There is more difficulty as to the meaning of the words "in quarantine stations at Brighton, Watertown and Somerville."

G. L., c. 129, § 8, provides that the director may establish "hospitals or quarantine stations, with proper accommodations, wherein, under prescribed regulations, animals selected by him may be confined and treated for the purpose of determining the characteristics of a specific contagion and the methods by which it may be disseminated or destroyed."

In this section the words "quarantine stations" appear for the only time in G. L., c. 129, except as in section 32 quoted above. They are clearly used in section 8 with a narrow significance, as experimental stations where selected animals may be kept under observation and treatment in order to enable the department to acquire additional knowledge about the problems with which it has to deal. It is a natural construction to assume that the words "quarantine stations" in section 32 were used with the same significance which they plainly have in the only other place where they appear in the chapter. Such a construction would have a rational background, for the Legislature might well have intended to except cattle in such stations from the operation of section 32, so that the experimental work might not be hampered by inability to use tuberculin. The effect of this construction would be that tuberculin could not be used upon Massachusetts cattle brought to the Brighton Stock Yards unless with the owner's consent, or except after they are reported as tuberculous by a veterinary; unless in some portion of the Brighton Stock Yards which may have been properly established as a hospital or quarantine station, as those terms are narrowly used in section 8.

The foregoing would seem a proper interpretation if G. L., c. 129, be divorced from its historical background. It seems to me, however, although it is not free from doubt, that the way in which these statutes have grown indicates that the Legislature intended to use the words "quarantine stations" with a different significance in section 32 from that with which those words are used in section 8. The discussion in the following two paragraphs will show the grounds for this conclusion.

By St. 1860, c. 221, § 3, the power was originally created to "provide for the establishment of a hospital or quarantine in some suitable place or places, with proper accommodations of buildings, land, etc., wherein may be detained any cattle by them selected, so that said cattle so infected or exposed may be there treated by such scientific practitioners of the healing art as may be appointed to treat the same." The substance of this provision, although altered somewhat in the numerous acts which intervene between St. 1860 and G. L., c. 129, § 8, has not varied materially for our present purposes. In P. S., c. 90, § 14, the words "a hospital or quarantine" are still found. In St. 1887, c. 252, § 11, the words are "hospitals or quarantines." These words are also in St. 1894, c. 491, § 41. In St. 1899, c. 408, § 6, are found for the first time the words "hospitals or quarantine stations." These words remain unchanged in G. L., c. 129, § 8. There seems no reason to believe that any substantial meaning
is to be attached to the change from the term “quarantines” to the term “quarantine stations,” or that the term “quarantine stations,” as first used in the statute of 1899 or as now found in section 8, was intended to have any very technical significance.

The history of G. L., c. 129, § 32, followed a somewhat similar course. In the original statute of 1895, chapter 496, section 14, the use of tuberculin is prohibited except (among other exceptions) as to “all cattle held in quarantine at Brighton, Watertown and Somerville.” In St. 1896, c. 276, the same words are found. In St. 1897, c. 165, the words are “to all cattle at Brighton, Watertown and Somerville,” the words “held in quarantine” being deliberately stricken out. St. 1899, c. 408, § 42, uses words similar to those in the preceding statute. Similarly, in R. L., c. 90, § 31, and in St. 1903, c. 322. The present change was made in the report of the commissioners consolidating and revising the General Laws, and there are no annotations in the report to explain the change.

I am therefore of the opinion that G. L., c. 129, § 32, authorizes the use of tuberculin in tests made upon Massachusetts cattle brought upon the premises at Brighton, which are designated as “quarantine stations,” in the sense in which those words are used in that section and in which I have assumed them to be used in Department Order No. 35.

3. You ask whether, if the test shows animals to be diseased, the director can prohibit their sale at these premises. G. L., c. 129, § 33A. If the director does not see fit to take advantage of the provisions of G. L., c. 129, § 11, authorizing the killing of animals found upon examination to be affected with contagious disease, the only alternative regulation is found in section 33A (St. 1922, c. 137). This latter section provides, in substance, for the marking of the animal for identification, by a metal tag, and that any person who sells, exchanges or otherwise disposes of an animal which to his knowledge has reacted to a tuberculin test shall furnish the person to whom he disposes of the animal with a true copy of the record of the test or a written statement of the fact of such reaction.

St. 1924, c. 156, strikes out section 33A of G. L., c. 129, as amended, and substitutes a provision that the reacting animal shall be tagged for identification, and that no person shall dispose of an animal which has reacted to a tuberculin test except for the purpose of immediate slaughter. This latter statute, however, which was approved March 28, 1924, is not yet in effect. It would seem that while section 33A remains in effect the only alternatives which the director has are to have the animal killed under his own authority or to permit its owner to dispose of it in any way that he pleases, subject to the duty to inform any transferee of the condition of the animal. The director cannot in any direct fashion prohibit the sale at the premises of such animals. When St. 1924, c. 156, shall be in effect the director will still have the former option of having the animal killed, under section 11, or he may permit the owner or possessor to return it to his own premises; but any sale or other disposition by the owner or possessor, except for the purpose of immediate slaughter, will be prohibited.

Yours very truly,
JAY R. BENTON, Attorney General.

Retail Drug Store — Registration and Permit — Peddling Patent Medicines and Drug Sundries.

A registered pharmacist who maintains no fixed place of business but travels about selling patent medicines and drug sundries from an automobile truck, on the side of which is a sign containing his name and the words, “Registered Pharmacist. Everything in the Drug Line,” is not conducting a “store” within the meaning of G. L., c. 112, § 38, as amended by St. 1921, c. 318, and accordingly is not required to obtain a permit as therein provided.

It seems that such a person would require a license for hawkers and pedlers under G. L., c. 101.
June 25, 1924.

Board of Registration in Pharmacy.

Gentlemen:—You ask my opinion as to whether G. L., c. 112, § 38, as amended, is violated by a registered pharmacist who maintains no fixed place of business, but who, without a permit under said section, travels about selling patent medicines and drug sundries from an automobile truck owned by him, on the side of which is a sign containing his name and the words "Registered Pharmacist. Everything in the Drug Line."

G. L., c. 112, § 38, as amended by St. 1921, c. 318, reads as follows:—

"No store shall be kept open for the transaction of the retail drug business, or be advertised or represented, by means of any sign, or otherwise, as transacting such business, unless it is registered with, and a permit therefor has been issued by, the board, as provided in the following section. The permit shall be exposed in a conspicuous place in the store for which it is issued."

If it be assumed, as a matter of fact, that the articles sold are of a kind which makes their sale "drug business" within the definition of G. L., c. 112, §§ 35 and 37, still section 38, above quoted, by its terms requires a permit only for a "store"; and, in my opinion, a court would not construe said section 38 as covering the transaction in question. See Commonwealth v. McMonagle, 1 Mass. 517; Hittinger v. Westford, 135 Mass. 258; Barron v. Boston, 187 Mass. 168.

I might suggest that the man to whom you refer would seem to require a license for hawkers and pedlers under G. L., c. 101.

Yours very truly,

Jay R. Benton, Attorney General.

Public Schools—Department of Education—State Reimbursement—School Buildings and Equipment.

The Department of Education is empowered to withhold State reimbursement due to a town under G. L., c. 70, pt. II, when such town neglects to furnish its school buildings with all or any of the forms of equipment required by law.

July 18, 1924.

Dr. Payson Smith, Commissioner of Education.

Dear Sir:—You ask my opinion in the following language:—

"I desire your opinion as to whether, under the statutes quoted above, the department is directed to withhold the State reimbursement due any town under G. L., c. 70, pt. II, in case the town neglects to furnish its school buildings with such heating, lighting, ventilating, seating and sanitary facilities as in the opinion of the department are necessary for the comfort and health of the pupils."

The provisions of the statutes to which you refer in the earlier part of your communication are G. L., c. 71, § 68, and G. L., c. 70, § 17.

I am of the opinion that the provisions of these two statutes give your department the power to withhold State reimbursement due to a town under G. L., c. 70, pt. II, when such town neglects to furnish its school buildings with all or any of the forms of equipment specifically mentioned in your letter. Such forms of equipment in proper quantities or amount are necessary to the reasonable comfort of pupils; the laws relating to public schools already referred to make it incumbent upon towns or school committees to provide them. Failure to provide them is a failure to comply with a part of the laws relating to public schools. Your department is charged with the duty of withholding the said funds when all the laws relating to public schools have not been complied with. Compliance must be of such a character as to satisfy your department, in the exercise of its reasonable judgment, that the provisions of the public school laws have been fulfilled.

Yours very truly,

Jay R. Benton, Attorney General.
A lease by the Board of Harbor and Land Commissioners to the Boston Fish Market Corporation of parts of the Commonwealth flats, under R. L., c. 96, § 3, gives to the lessee every right which it would have had if the lessor had been a person or private corporation.

A covenant in a lease that the lessee will not, without the consent of the lessor first obtained in writing, assign the lease is not a covenant against under-letting, and will not be violated by the making of a sublease of a portion of the premises.

Under the lease referred to, the lessee has the right to sublet a portion of the premises for the storage of fuel oil and gasoline.

July 24, 1924.

HONORABLE WILLIAM F. WILLIAMS, Commissioner of Public Works.

Dear Sir: — You have asked me to advise you whether the Boston Fish Market Corporation, being the lessee of the property known as the Fish Pier in South Boston, has a right under the lease to sublease any portion of the premises to another corporation for the establishment and operation of fuel oil and gasoline storage.

The lease was executed September 24, 1910, between the Commonwealth of Massachusetts, acting by its Board of Harbor and Land Commissioners, as lessor, and the Boston Fish Market Corporation, as lessee. By it certain parts of the Commonwealth flats at South Boston, as therein bounded and described, were demised and leased to the corporation. The lease contains, among other covenants, the following covenant by the lessee:

"And the said lessee further covenants and promises with and to the said lessor that it or others having its estate in the premises will not, without the consent of the lessor first obtained in writing, assign this lease, nor make nor allow to be made any unlawful or improper use of the leased premises."

This lease was executed by the Harbor and Land Commissioners under the authority of R. L., c. 96, § 3, which contains the provision that —

". . . . It (the Board of Harbor and Land Commissioners) may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, for such periods and upon such terms as it shall deem best . . . ."

In Boston Fish Market Corp. v. Boston, 224 Mass. 31, this very lease was under consideration, and the court said: —

"The plaintiff is the lessee of the land for which it has been taxed within the meaning of the statute. It is described as 'lessee' throughout the indenture under which it holds possession. That indenture is in the form of a lease. It is aptly phrased to create the relation of lessor and lessee. The harbor and land commission had the power to execute a lease. R. L., c. 96, § 3."

In Cotting v. Commonwealth, 205 Mass. 523, it was held that under R. L., c. 96, § 3, the Board of Harbor and Land Commissioners had the power to make a deed of a parcel of land included in the Commonwealth flats with covenants of seisin, against incumbrances, of right to convey and of warranty.

It is my opinion that the lessee under this lease acquired every right which it would have had if the lessor had been a person or private corporation and not the State.

There is no express restriction in the lease limiting the purposes for which the leased property may be used, unless such restriction is found in the part already quoted. The covenant that the lessee will not make nor allow to be made any unlawful or improper use of the leased premises I regard as intended to describe such use as offends against some law, regulation or ordinance. In my opinion, it does not cover the use mentioned in your letter.

The covenant that the lessee will not, without the consent of the lessor first
obtained in writing, assign the lease is not a covenant against underletting and will not be violated by the making of a sublease of a portion of the premises. The authority for this proposition seems clear. Crusoe v. Bugby, 3 Wils. 234; Jackson v. Silvernail, 15 Johns. (N. Y.) 278; Jackson v. Harrison, 17 Johns. (N. Y.) 66; Den v. Post, 25 N. J. L. 285; Hargrave v. King, 40 N. C. 430; Cross v. Bouck, 175 Cal. 253; Taylor, Landlord and Tenant, § 403; 24 Cyc. 974. On the question whether a covenant not to underlet forbids an assignment the authority is divided. See Greenway v. Adams, 12 Ves. Jr. 395, and Den v. Post, supra, in the affirmative, and Field v. Mills, 33 N. J. L. 254, in the negative. It seems to have been assumed in some Massachusetts cases that a covenant not to underlet forbids an assignment. Blake v. Sanderson, 1 Gray, 332; Shattuck v. Lovejoy, 8 Gray, 204; Bemis v. Wilder, 100 Mass. 446; see Hall, Massachusetts Landlord and Tenant, § 26. But whatever may be the scope of a covenant not to underlet, the rule that a covenant not to assign is not broken by a sublease seems to be clearly established.

I must advise you, therefore, that there seems to be no legal objection to the making of a lease by the Boston Fish Market Corporation of a portion of the Fish Pier to another corporation for the establishment and operation of fuel oil and gasoline storage.

Very truly yours,

JAY R. BENTON, Attorney General.

Domicil — Change of Domicil of Minor Child.

The domicil of an infant whose father has died and whose mother has married again does not change with the mother's change of domicil, even though he accompany his mother to the new place of abode. A widowed mother who has remarried cannot change the domicil of her minor child to another State, although she is also guardian by court appointment. If such a mother were also testamentary guardian, it seems that she would have power to change the domicil of her minor child.

JULY 28, 1924.


Dear Sir: — You request my opinion upon the following questions of domicil:

"Has a widowed mother who, with her minor child, has been domiciled in one State, and who remarryes and takes the child to live with her in the home of her second husband, located in another State, the power to change the domicil of such minor child in each of the following cases, assuming that she intends to keep the child with her in her new home?

1. When she is acting as a natural guardian only, not having received a court appointment as guardian?

2. When she is acting as a guardian with custody of the child by appointment of a court but not in accordance with the terms of a will?

3. When she is acting as a guardian of the child having been appointed by a court under the terms of the will of its deceased father?"

Generally speaking, an infant, unless emancipated, has a derivative domicil. His domicil at birth is that of his father, and changes with his father's change of domicil, whether father and child dwell together or apart. This rule results from the relation of the father as the head of the family, whose domicil draws after it that of his wife and minor children. Upon the death of the father the mother usually becomes the head of the family, and therefore it would seem that the domicil of her minor children should follows hers, at least so long as she remains a widow. The rule has frequently been stated without qualification that under such circumstances the domicil of an infant follows that of his mother. Potinger v. Wightman, 3 Meriv. 67; Dedham v. Natieck, 16 Mass. 135; Lamar v. Micou, 112 U. S. 452, 470. In other cases, however, the view has been held that the domicil of an infant under such circumstances does not necessarily follow that of the mother but depends upon her intention as shown by the facts
of the case, and particularly the fact of the infant's actual residence with or apart from his mother. Brown v. Lynch, 2 Bradf. (N. Y.) 214; In re Beaumont, (1893) 3 Ch. 150, 155; Dickey on Domicil, pp. 98, 99. Whatever may be the law in this State upon that question, it seems clearly enough settled that the domicile of an infant does not follow that of his mother upon her second marriage and consequent change of domicile, but that the infant retains his previous domicile even though he accompany his mother to the new place of abode. Freetown v. Taunton, 16 Mass. 52; Lamar v. Micou, 112 U. S. 452, 470, 471; School Directors v. James, 2 Watts. & S. 568; Johnson v. Copeland, 35 Ala. 521; Mears v. Sinclair, 1 W. Va. 185; Jacobs, Law of Domicil, § 244. There is some authority to the contrary. Wheeler v. Hollis, 19 Tex. 522; In re Beaumont, (1893) 3 Ch. 490, 497. I do not, however, regard these cases as controlling in view of the decisions expressly to the contrary in cases cited above. I therefore answer your first question in the negative.

The question to what extent a guardian has the power to change the domicile of his minor ward is a complicated one, involving distinctions which must be borne in mind and considerable conflict of authority. It is clear that a minor ward does not take the domicile of his guardian as a matter of law. School Directors v. James, 2 Watts. & S. 568; Jacobs, Law of Domicil, § 256. It is clear, also, that a guardian having the custody of a minor ward by appointment of a court has the power to change the ward's domicile from one county to another within the State — his municipal domicile as it is called. Holyoke v. Haskins, 5 Pick. 20; Kirkland v. Whately, 4 Allen, 462; Lamar v. Micou, 112 U. S. 452, 472; Ex parte Bartlett, 4 Bradf. (N. Y.) 221; Jacobs, Law of Domicil, §§ 257, 260. On the other hand, it has been said to be very doubtful whether a guardian not the natural or testamentary guardian of a minor ward can change the ward's domicile to another State. Lamar v. Micou, 112 U. S. 452, 472; Daniel v. Hill, 52 Ala. 430, 435; Jacobs, Law of Domicil, §§ 260, 263. Pedan v. Robb's Adm'r, 8 Ohio, 227, and Townsend v. Kendall, 4 Minn. 412, holding the contrary, seem not to be well considered. If a guardian not a natural guardian cannot change the domicile of his ward under those circumstances, and if a widowed mother upon her remarriage cannot change the domicile of her minor child, it is my opinion that such a mother, although she is also guardian by court appointment, cannot affect her child's domicile. I therefore answer your second question in the negative.

A testamentary guardian of a minor ward, appointed by the will of the ward's father, seems to be accorded greater power over his ward's domicile. In that respect such a guardian seems to be regarded as standing to a considerable extent in the shoes of the father himself, although still the domicile of the ward does not follow that of the guardian as a derivative domicile. In White v. Howard, 52 Barb. 294, 318, the domicile of an infant was held to have been changed by the appointment by his father of a testamentary guardian residing in another State, and a direction in the will that the infant should reside in that State under the care of the guardian during minority. The suggestion is made in Lamar v. Micou, 112 U. S. 452, 471, that "a testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had." It was held in Delaware, L. & W. R. Co. v. Petrowsky, 250 Fed. 554, 563 (C. C. A., 2nd Cir.), that "a testamentary guardian nominated by the father has the same control over the ward's domicile that the father had, and may in good faith change it either from one State to another State or from one county to another county in the same State." On the other hand, in Mears v. Sinclair, 1 W. Va. 185, the mother, whose change of domicile upon her second marriage was held not to change the domicile of her infant, was also his testamentary guardian. See Jacobs, Law of Domicil, §§ 260, 263.

It is impossible to answer your third question with any degree of certainty. My advice upon that point is that it seems slightly more probable that under the circumstances assumed by you the mother has the power to change the domicile of her minor child.

Very truly yours,

JAY R. BENTON, Attorney General.
Burial Expenses for Persons dying from Certain Contagious Diseases — Overseers of the Poor — Local Boards of Health.

Where a local board of health has acted in a case involving a contagious disease deemed to be dangerous to the public health and reportable under G. L., c. 111, such board shall retain exclusive control of each such case until it is fully terminated. The responsibility of the board of health is not terminated by the death of a patient suffering from such disease, but necessarily includes the duty of supervising and providing for the proper burial of the patient.

EUGENE R. KELLEY, M.D., Commissioner of Public Health.

Dear Sir: — You request my opinion as to whether local overseers of the poor or local boards of health are charged with the duty of payment of burial expenses for persons dying from the following contagious diseases: Actinomycosis, measles, tetanus, trichinosis, tuberculosis, typhoid fever, varicella and whooping cough.

You state that a local board of health has voted that it does not consider these diseases “contagious after death,” and that the overseers of the poor are, accordingly, the ones to whom to apply for burial if the family is without means to provide therefor.

G. L., c. 111, provides that the Department of Public Health shall define what diseases shall be deemed to be dangerous to the public health, and outlines the duties of local boards of health with respect to such diseases. Section 32 of said chapter provides:

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

This department has, accordingly, ruled in an opinion of my predecessor Hon. J. Weston Allen, dated March 23, 1922, that in any case involving a disease which the Department of Public Health has declared to be dangerous to the public health and which, accordingly, is to be reported under G. L., c. 111, § 112, and a local board of health has acted in the matter, such local board of health shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.

While it is true that in general the duty of providing for the decent burial of deceased persons without means is imposed upon the overseers of the poor (see G. L., c. 117, §§ 14 and 17), nevertheless, the legislative intent appears to be clear that where a local board of health has acted in a case involving a contagious disease deemed to be dangerous to the public health and reportable under the provisions of G. L., c. 111, such board of health shall retain exclusive control of each such case until it is fully terminated. Having in mind the purpose of the statute and the dangers to be safeguarded in the interest of the public health, I am of the opinion that the responsibility of the board of health is not terminated by the death of such a patient while suffering from such disease, but that such responsibility necessarily includes the duty of supervising and providing for the proper burial of the patient, and I so answer your inquiry.

Very truly yours,

JAY R. BENTON, Attorney General.

Metropolitan District Commission — Repair of Bridge — Care and Control — Harvard Bridge.

Under St. 1924, c. 442, providing for the repair of the Harvard Bridge, the Metropolitan District Commission was constituted a public agency for the specific purpose of repairing the bridge, and the bridge was placed under the care and control of the Commission from and after the time of the completion of the work.

While the work of repairing said bridge is proceeding, the board of commissioners appointed under St. 1898, c. 467, and not the Commission, is
responsible for the policing, control and maintenance of portions of the bridge kept open for public travel, and the cities of Boston and Cambridge, and not the Commonwealth, are liable under that statute for damages to persons traveling on the bridge, arising out of any defect or want of repair.

Aug. 4, 1924.

Metropolitan District Commission.

Gentlemen:—You ask my opinion upon certain questions arising under St. 1924, c. 442, providing for the repair of the bridge in Massachusetts Avenue across Charles River Basin, known as the Harvard Bridge. By section 1 of this statute the Metropolitan District Commission is authorized and directed to strengthen, repave and repair the bridge and to alter the draw span therein, for which purposes it is authorized to expend not exceeding $600,000. Sections 2, 3 and 4 provide for the payment and assessment of expenses. Section 5 is as follows:—

“When the work herein authorized shall have been completed, said bridge shall be maintained as a public highway and, so far as consistent with such purpose, the metropolitan district commission shall have over the same all the powers and authority and be subject to the liability now conferred and imposed upon said commission in respect to the care, control and maintenance of roadways and boulevards under its care and control, and the cost of maintenance of said bridge and approaches shall be paid as a part of the cost of maintenance of boulevards by said commission.”

You state that the Metropolitan District Commission proposes to repair a part of the bridge at a time, allowing public travel to continue on the rest of the bridge not under repair, and that when the statute was passed the bridge was policed and maintained under St. 1898, c. 467, by a board of two commissioners, one appointed by the mayor of Boston and one by the mayor of Cambridge, and all damages recovered by reason of any defect or want of repair therein were paid by said cities equally.

You ask my opinion on the following questions:—

“First, whether the board of commissioners of the Boston and Cambridge bridges, appointed by the cities of Boston and Cambridge under the act of 1898, or the Metropolitan District Commission is responsible for the policing, control and maintenance of the portions of the bridge kept open for public travel during the prosecution of the work required by the act of 1924, and whether liability for damages to persons traveling on the bridge, arising out of any defect or want of repair in such traveled portions, would rest upon the cities of Boston and Cambridge or upon the Commonwealth; second, if the obligation of policing, maintenance and repair of the traveled portions during the progress of the work rests upon the Metropolitan District Commission, whether the Commission may spend money out of the appropriation made by the act of 1924 for the purpose of policing, lighting and temporary repairs of the traveled portions of the bridge; third, whether the Commission, prior to the completion of the work, has authority to grant the petition of the Boston Elevated Railway Company for a double-track street railway location on the bridge, as an alteration of and in addition to its existing location granted originally by the cities of Boston and Cambridge; fourth, if the Commonwealth is liable for maintenance of the part of the bridge used for public travel during the progress of the work, whether, under authority of St. 1923, c. 358, it may require the Boston Elevated Railway Company to pay the cost of paving and other surface material on the portions of the bridge occupied by its tracks; and, fifth, if there is liability on the part of the Commonwealth for damages due to defects in the surface of parts of the bridge left open to public travel, what action the Commission may take to safeguard the interests of the Commonwealth.”

In my opinion, section 5 deals exclusively with the period subsequent to the completion of the work of repair. Apparently the purpose of the Legislature was, first, to constitute the Metropolitan District Commission merely a public
agency for the specific purpose of repairing the bridge during that period, imposing upon it no responsibility for the control and maintenance of the bridge until the repairs were finished, and secondly, to place the bridge under the care and control of the Commission from and after the time when the work was completed. At any rate, this seems to be the plain meaning of the statute. I must advise you, therefore, in answer to your first question, that the board of commissioners appointed under St. 1898, c. 467, is responsible for the policing, control and maintenance of the portions of the bridge kept open for public travel while the work of repair is proceeding, and that the cities of Boston and Cambridge, and not the Commonwealth, are liable under that statute for damages to persons traveling on the bridge, arising out of any defect or want of repair in such traveled portions. This constitutes a sufficient answer to your second, fourth and fifth questions.

As to your third question, it is my opinion that the Commission cannot grant a location to take effect prior to the completion of the work, but I see no objection to action on the petition before that time.

Very truly yours,

JAY R. BENTON, Attorney General.


A power of attorney-in-fact to execute a bail bond upon behalf of a surety company for the benefit of the holder of the power is not itself a contract of insurance or suretyship, but its exercise will result in the formation of a contract of suretyship. The seller of such a power must be a licensed resident agent of the surety company who issues it, under G. L., c. 175, § 157.

A bond executed by the holder of the power requires the seal of the surety company.

The propriety of the acceptance of a bail bond so executed by the holder of the power, for his own benefit, is a subject for judicial determination.

AUG. 4, 1924.

Mr. ARTHUR E. LINNELL, First Deputy and Acting Commissioner of Insurance.

DEAR SIR: — You have directed my attention to a "power of attorney-in-fact for the execution of bail bonds," which you state is being sold in this State by a foreign insurance company. I assume from the tenor of your letter that the company is authorized to do the kinds of business referred to in G. L., c. 175, § 105, more particularly the business of acting as surety on bail bonds required in criminal proceedings, and I assume that the actual sales of these powers of attorney are made by individual persons not officers of the company.

The questions upon which you ask my opinion are as follows: —

1. Does a person who, for compensation, sells these powers of attorney on behalf of this surety company need to be licensed, either as an agent of the company, as provided in section 163 of G. L., c. 175, or as an insurance broker, as provided in section 166 of said chapter?

2. If a person named as attorney-in-fact in such power of attorney executes a bond in a criminal case by himself as principal and on behalf of the surety company as surety, and, as I am informed is the fact, the corporate seal of the company is not affixed thereto: — (a) Does the lack of the seal invalidate the bond? (b) Does failure to affix the seal constitute a criminal offence?

3. Does section 157 of said chapter apply to bonds executed by corporate surety companies as surety in favor of the Commonwealth or an obligee resident therein?

4. If the preceding question is answered in the affirmative, is a bond executed in this Commonwealth on behalf of the said company as surety, by a person resident in another State, pursuant to such a power of attorney, issued in violation of said section 157, such person not being a licensed resident agent of the company?
P.D. 12.

5. Does the fact that the person named in the power of attorney executes the bond as principal and as agent, on behalf of the surety company as surety, impair the obligation?

6. Is it discretionary, under section 105 of said chapter, for a magistrate authorized to take bail in a criminal case; (a) To decline to approve a bond executed by such a company; and (b) To decline to recognize such a power of attorney?

The document which you submit with your letter is a power of attorney, the terms of which, in brief, authorize the holder (who, as you inform me, is a purchaser of the document) to act as an attorney-in-fact for the company, to execute and deliver, in its behalf as surety, any bond bond not exceeding five thousand dollars, which may be required by any magistrate as bail or security for the purchaser's own personal appearance before a court, in the event of his having been arrested for any offence committed against the laws relative to the operation of motor vehicles of any of the States of the Union, including offences which may have resulted in injury to persons or damage to property, both as regards misdemeanors and felonies. A copy of a by-law of the company, which is printed on the back of the power of attorney and made a part thereof by reference, provides for the appointment of attorneys-in-fact with the power already referred to herein, namely, the power to execute bail bonds, insuring to their own benefit, on behalf of the company as surety, and provides that when so executed by the attorneys-in-fact such bonds shall be binding upon the company "as if signed by the president and sealed and attested by the secretary."

This document which you have submitted to me is not itself, when delivered, a contract of suretyship, but constitutes in effect a contract to enter into such a contract of suretyship upon the occurrence of certain designated circumstances and the exercise of the power of attorney by the purchaser of the document, who has by his purchase a power coupled with an interest. The sale of the document or power of attorney is the first step in a transaction which brings the company and its customer together into a contractual relationship which, upon the occurrence of a certain hazard, will result at the will of the purchaser in the formation of a contract of suretyship and the execution of a bail bond by the purchaser and the company for the benefit of the former. The sale of the document by some person who acts for the company has no other purpose, aside from the immediate receipt of money by the company from the purchaser, than the formation of the contract of suretyship concurrent with the making of the bond upon the happening of the designated event which is the hazard to be guarded against.

1. The document under consideration is not a contract of insurance. In relation to the making of bonds upon which this company becomes liable as a surety, under G. L., c. 175, § 107, it is, as a foreign company, subject to the other provisions of chapter 175 so far as such provisions are applicable, and agents and brokers are likewise subject to such provisions so far as applicable in connection with bonds upon which the company becomes surety. Of such provisions are those in sections 162 to 166 of chapter 175 which require licenses for agents and brokers who solicit business in, or act in the negotiation of, contracts such as are made by this company, including the negotiation of bonds on which the company is to act as surety.

Although the actual document under consideration which is sold by persons on behalf of the company is not, as has been pointed out, a contract of insurance or of suretyship nor a bond, nevertheless it may lead, and is intended to lead, directly, in the event of the happening of certain occurrences, to the making of a bond upon which the company will act as surety for the benefit of the purchaser. The company receives from the purchaser of the power of attorney a valuable consideration in money for giving him the right to make the company a surety on a bail bond which he may elect to execute for his own benefit upon the happening of a certain contingency. The sale of the power of attorney and the subsequent making of the bond are in effect both parts of a single transaction — the negotiating and making of a bond by the company as surety. The person who actually sells the document or power of attorney is the one
who brings the purchaser to the company and the one who brings him to the formation of a contract of suretyship with the company upon the happening of certain contemplated conditions outside the sphere of control of the one who sells the power. The negotiations which lead to the sale of the power of attorney are presumably made upon the suggestion and solicitation of the person who is the actual seller of the document. He is the one who comes in contact with the purchaser and produces for the benefit of the company an actual buyer of its power of attorney, for whom the company may eventually, and as the result of the sale of the power, make a bond. Bringing the parties together with a view to their making a contract is of the essence of the service performed by an agent or broker. See I Op. Atty. Gen. 74; Pratt v. Burdon, 168 Mass. 596.

The act of the person who sells the document is always, in anticipation of the parties and sometimes in reality, the act of one who is a cause of the company's making a bond. If such bond is made it is, from the viewpoint of one who deals in the company's documents, made by means of the act of the seller of the power of attorney. Even if the bond is not subsequently made, through failure of the purchaser to exercise his power, yet the person who sold the power of attorney has brought the company and the purchaser together in a contract which obligates the company, under certain conditions, to make a bond. Such a seller should, in my opinion, be held to come within the terms of G. L., c. 175, § 157, and should therefore be a licensed resident agent of the company.

I accordingly answer your first question to the effect that "a person who, for compensation, sells these powers of attorney" should be licensed as an agent of the company, under the provisions of G. L., c. 175, § 163, and should be a resident of the Commonwealth. I am of the opinion that section 166 of said chapter, concerning brokers, is not applicable under the terms of section 107 to a person who himself sells these powers of attorney for the benefit of the company, which powers, as I have said, form a part of a transaction calculated to result in the making of a bond by the insurance company.

2. G. L., c. 155, § 6, provides that a corporation may have a corporate seal, which it may alter at pleasure. G. L., c. 175, § 105, in relation to the execution of bail bonds by a company of the character of the one issuing the power of attorney under consideration, requires that the bond executed by the company shall be "sealed with its corporate seal." G. L., c. 4, § 7, cl. 29th, provides:

"If the seal of a court . . . or corporation is required by law to be affixed to a paper, the word 'seal' shall mean either an impression of the official seal upon the paper or an impression on a wafer or wax affixed thereto."

"Official seal," as used in the foregoing section, as applied to a corporation, means a corporate seal adopted by a corporation. The manner of adopting or altering a corporate seal by a foreign insurance corporation, such as the one issuing this power of attorney, is governed by the law of the place of incorporation, but it is evident from the by-law of this corporation, made a part of the power of attorney by reference and printed on the back thereof, that this corporation has a corporate seal and that the effect of the by-law is not to alter the seal but at most to waive the requirement of the fixation of such seal to bail bonds executed by its attorneys-in-fact, and to adopt in place thereof any seal placed upon the bond by its attorneys-in-fact as and for the seal of the corporation. In the absence of the statutory provisions above noted, it might be that the affixing of any seal to the bond by the attorney-in-fact on behalf of the corporation would be a sufficient sealing of the bond. The terms of our statutes, however, cannot be controlled by the by-law of the company, and these statutes require the affixing to the bond of the corporate seal of the company, either in the form of an impression of the seal upon the paper or in the form of an affixation to the document of a wafer or wax bearing an impression of the company's seal.

I answer your second question, in relation to division (a), in the affirmative. It is to be noted, however, that if such a bond had an ordinary seal affixed to it by the attorney-in-fact, though not a corporate seal, and was actually approved by a court, justice or other magistrate, despite the fact that the instru-
Yours very truly,

JAY R. BENTON, Attorney General.


A participating policy of a foreign life insurance company containing the four options for distributing annual dividends, as provided for in G. L., c. 175, § 140, may also contain a fifth option, called the accelerative endowment plan.

The enumeration of four options in G. L., c. 175, § 140, does not, as matter of law, exclude the insertion of additional options in a life endowment or annuity policy relative to the application of the annual dividend.

It is for the Commissioner of Insurance to determine whether the provisions relative to annual participation in the surplus of the company are "more favorable to the insured or his beneficiary" than those defined by the statute.
Mr. William O. Richardson, Second Deputy and Acting Commissioner of Insurance.

Dear Sir:—You inform me that there is pending in your department the matter of the approval or disapproval of forms of accelerative endowment policies issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey. I therefore give consideration to the question as to whether or not that company is writing insurance contrary to the provisions of G. L., c. 175, § 140.

G. L., c. 175, § 132, provides, in part, as follows:—

"No policy of life or endowment insurance and no annuity or pure endowment policy shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, unless before the expiration of said thirty days he shall have approved the form of the policy in writing, nor if the commissioner notifies the company in writing, within said thirty days, that in his opinion the form of the policy does not comply with the laws of the commonwealth, specifying his reasons therefor, provided that such action of the commissioner shall be subject to review by the supreme judicial court; nor shall such policy, except policies of industrial insurance, on which the premiums are payable monthly or oftener, and except annuity or pure endowment policies, whether or not they embody an agreement to refund to the estate of the holder upon his death or to a specified payee any sum not exceeding the premiums paid thereon, be so issued or delivered unless it contains in substance the following:

5. A provision that the policy shall participate in the surplus of the company annually, beginning not later than the end of the third policy year.

A policy shall be deemed to contain any such provision in substance when in the opinion of the commissioner the provision is stated in terms more favorable to the insured or his beneficiary than are herein set forth."

G. L., c. 175, § 140, provides, in part, as follows:—

"... A foreign life company which does not provide in every participating policy hereafter issued or delivered in the commonwealth that the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise, either by payment in cash of the amount apportioned to a policy, or by its application to the payment of premiums or to the purchase of paid up additions, or for the accumulation of the amounts from time to time apportioned, said accumulations to be subject to withdrawal by the policy holder, shall not be permitted to do new business within the commonwealth."

The policy of the Mutual Benefit Life Insurance Company contains the following provision as to annual dividends:—

"Upon payment of the second year's Premium and at the end of the second and each subsequent Policy year, while this Policy is in force, and at the end of each complete year of Extended Insurance, this Policy or such Extended Insurance will be credited with such Dividends, including the portion of the divisible surplus accruing thereon, as may be apportioned by the Directors. Dividends thus credited, except in the case of Extended Insurance, may be applied in reduction of Premiums, or upon the Addition, Accumulation, or Accelerative Endowment plan. These options will be available each year, except that Dividends cannot be applied upon any one of said three plans while there is outstanding any credit arising from the application of Dividends upon either of the other two plans. If no other option be selected, Dividends will be paid in cash. The stipulated payments under Settlement Option A or B, or the Instalments certainly payable under Settlement Option C, will be
increased by such Annual Dividends as may be apportioned by the Directors, beginning one year after the maturity of the Policy, but such Dividends will be payable only in cash.

Under the Accelerative Endowment plan Dividends are applied at Net Single Premium Rates to the conversion of the Policy into a specified Endowment, the term of which will be gradually shortened. Upon evidence of insurability satisfactory to the Company this Policy may be restored to the original plan and the Reserve thus released withdrawn in cash, provided the security of any outstanding loan shall not be impaired."

Inspection of the policy discloses that it contains the four options defined in section 140, together with what purports to be a fifth option, which is called by the company the accelerative endowment plan.

This plan is, that instead of using dividends in reduction of the annual premiums the insured may, at his discretion, pay his premiums in full in cash, the annual dividends being applied to convert the policy into an endowment policy and to shorten the endowment term without increasing the annual premiums. The company then agrees to pay the sum insured when the policy-holder shall have attained a certain age, or at his previous death, instead of at death only. As each dividend is ascertained and applied the company issues a definite agreement to pay the policy at a specified date.

The accelerative endowment agreement reads as follows:—

"The current dividend having been applied on the Accelerative Endowment plan, it is hereby agreed that:
If this policy be continued in force for its present amount until the Paid-up Option date shown on the face of this receipt and be then surrendered duly receipted, the Company will issue in exchange a Paid-up Participating Policy for the amount of this Policy and will also pay in cash the amount then payable. The Paid-up Policy will be subject to any outstanding indebtedness to the Company on this Policy and will be payable only at death.
Or, if the above option be not exercised and this Policy be continued in force for its present amount until the Maturity date shown on the face of this receipt and the Insured be then living and if the Policy be then surrendered duly receipted the Company will pay the amount stated as then payable less any outstanding indebtedness to the Company on this Policy."

The precise question is whether the addition of this so-called accelerative endowment option to the four options defined in section 140 is in violation of that section.

1. Pursuant to Resolves of 1906, c. 11, the Governor appointed a commission to recodify the insurance laws of this Commonwealth. As this commission was appointed shortly after the so-called Armstrong investigation of life insurance companies in the State of New York, it may be inferred that one reason for the passage of the aforesaid resolve was the evils disclosed by that investigation. One of these evils, which was the subject of investigation in New York, Massachusetts and Illinois, was a plan by which policy-holders were induced to defer payment of dividends upon their several policies for a series of years, in exchange for the promise of the company to divide such portion of the resulting fund as might be determined by the company to be applicable among the "persistent survivors" alive at the end of the deferred period. The Massachusetts commission, in its report made in June, 1906, outlined at length the evils of this deferred dividend, or tontine, plan, which was in essence a gamble rather than a plan of insurance.

By St. 1907, c. 576, the Legislature enacted a law entitled "An Act to recodify, revise and amend the laws relative to insurance, other than fraternal and assessment." It may be inferred that the Legislature availed itself of the information contained in the report of the committee appointed under Resolves of 1906, c. 11. G. L., c. 175, § 132, is a re-enactment of St. 1907, c. 576, § 75, and amendments thereof, while G. L., c. 175, § 140, is a re-enactment of St. 1907, c. 576, § 76, and amendments thereof.
It may be urged with considerable force that when the Legislature, by St. 1907, c. 576, § 76 (now G. L., c. 175, § 140), enumerated four methods by which the annual dividend may be annually applied, it excluded all other modes by implication. It is a familiar rule of statutory construction that an express provision excludes that which is not expressed or reasonably implied from that which is expressed. But all rules of statutory construction are simply guides designed to aid in ascertaining the legislative intent, which are not to be blindly applied or pressed to a dryly logical conclusion. No rule of construction can prevail against that intent if it can be ascertained. For the reasons hereafter set forth, I have reached the conclusion that the above rule of construction is inapplicable.

St. 1907, c. 576, § 75, now G. L., c. 175, § 132, enumerates ten provisions which must be included "in substance" in life, annuity and endowment policies. Clause 5 of that section provides:

"A provision that the policy shall participate in the surplus of the company annually, beginning not later than the end of the third policy year."

It seems plain that St. 1907, c. 576, § 76, now G. L., c. 175, § 140, is intended to state in greater detail the obligation imposed by said clause 5. It is significant, however, that clause 5 simply requires that "the policy shall participate in the surplus of the company annually." The quoted clause of section 140 requires that the policy must provide that "the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise, . . ." As a matter of grammar the words "and not otherwise" modify the word "annually" rather than the modes of distribution thereafter enumerated. If the Legislature intended that the enumeration should exclude all other methods not enumerated, it would have been easy to have so provided by express words. Under these circumstances, the fact that the words "and not otherwise" are so restrained as to modify the word "annually" acquires significance, especially when section 140 is read with section 132, clause 5.

In *Aetna Life Ins. Co. v. Hardison*, 199 Mass. 181, the insurance company brought a petition under St. 1907, c. 576, § 75, to review the action of the then insurance commissioner in rejecting certain proposed policies of insurance upon the ground that they did not comply with the requirements of that section, which is now G. L., c. 175, § 132. In the course of that opinion the court said, by Knowlton, C.J., at page 187:

"Another question is whether the provisions which, in substance, must be inserted in the policy, must appear in a form substantially identical with that given in the statute, or whether it is enough if they contain everything, in meaning and legal effect, that the statute prescribes, and at the same time include other things relating to the same subject, no one of which impairs the force of that which is prescribed for the benefit of the insured. Inasmuch as the ten provisions referred to and the other prescribed parts of the policy were intended for the protection of the policy holder, we are of opinion that, if they are contained in substance in the policy, their form may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied, and are left undiminished by that which is added."

In *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, which was a similar petition, the court said, by Knowlton, C.J., at page 194:

"No departure from the exact provisions required by the statute should be permitted, unless it is too plain for doubt that the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision."

Reading these cases together, it seems plain that sections 132 and 140 do not prescribe a standard form for life, annuity and endowment policies, even to the extent which was provided in the case of fire policies by section 99. On the contrary, they prescribe a minimum standard below which life, annuity and endowment policies must not fall, no matter in what words such policies may
be expressed. This view is confirmed by the following clause, which was added to section 132 at the time of the revision:

"A policy shall be deemed to contain any such provision in substance when in the opinion of the commissioner the provision is stated in terms more favorable to the insured or his beneficiary than are herein set forth."

I am therefore constrained to the opinion that the quoted enumeration in G. L., c. 175, § 140, does not, as matter of law, exclude the insertion of additional options in a life, endowment or annuity policy relative to the application of the annual dividend.

2. Assuming that additional options relative to the application of the annual dividend may be inserted in a life, annuity or endowment policy, the next question is as to how the validity of such additional options shall be determined. G. L., c. 175, § 132, requires that such policies shall be submitted to the Commissioner in order that he may determine whether in his opinion they comply with the law, but subject to review by the Supreme Judicial Court. Aetna Life Ins. Co. v. Hardison, supra; New York Life Ins. Co. v. Hardison, supra; Metropolitan Life Ins. Co. v. Insurance Commissioner, 208 Mass. 386; Metropolitan Life Ins. Co. v. Insurance Commissioner, 220 Mass. 52; see also Curtis v. New York Life Ins. Co., 217 Mass. 47. While the authority so exercised by the Commissioner is administrative rather than judicial, the determination of the questions involved, both of law and fact, devolves upon him in the first instance. New York Life Ins. Co. v. Hardison, supra. That procedure should be followed in the instant case. The precise issue to be determined is whether the provisions of the instant policy, relative to annual participation in the surplus of the company, are "more favorable to the insured or his beneficiary" than those defined by the statute.

3. I understand that the policies issued in the past by the company have been submitted to and approved by your department. Even if, upon reconsideration of the same question upon a policy newly submitted under section 132, you should reach the conclusion that certain policies had been erroneously approved in the past, the issue of such policies, in the past, in reliance upon such approval, ought not, in my opinion, to exclude the company from doing "new business" within the meaning of section 140. If, however, the company should persist in issuing in the future a policy in a form disapproved by you, upon the ground that it did not comply with section 140, and such disapproval should be sustained upon review by the Supreme Judicial Court, the company should then be excluded from doing "new business" within the Commonwealth.

Yours very truly,

Jay R. Benton, Attorney General.

Insurance — Broker — Advance Payment of Premiums for Customers.

The extension of credit to customers by a broker for the amount of premium payments advanced by him is not a violation of G. L., c. 175, §§ 182-184.

Aug. 5, 1924.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have asked my opinion as to the legality of a certain course of action which an insurance broker proposes to take in connection with placing or negotiating policies of insurance. I understand that the broker proposes to follow the course of action noted in your letter with all his customers, both those with whom he has been accustomed to deal and those with whom he may do business in the future, and intends to make it known among persons interested in obtaining policies of insurance that those who desire to place orders for insurance policies with him may avail themselves of the benefits of his proposed mode of transacting business. You state in your letter:

"A certain broker proposes to agree with his clients to advance their premiums to the company issuing their policies, which he negotiates, and the clients agree to reimburse the broker for such advances in monthly instalments with an interest charge."
I respectfully request your opinion on the following questions:

1. On the facts premised, is there, as a matter of law, any violation of G. L., c. 175, §§ 182–184?

2. Does such agreement, as a matter of law, amount to allowing 'a valuable consideration or inducement not specified in the policy,' within the meaning of said sections, (a) if interest is charged and collected on the deferred payments, and (b) if interest is not so charged and collected?"

G. L., c. 175, §§ 182–184, are as follows:

"Section 182. No company, no officer or agent thereof and no insurance broker shall pay or allow, or offer to pay or allow, in connection with placing or negotiating any policy of insurance or any annuity or pure endowment contract or the continuance or renewal thereof, any valuable consideration or inducement not specified in the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon; or shall give, sell or purchase, or offer to give, sell or purchase, anything of value whatsoever not specified in the policy; or shall give, sell, negotiate, deliver, issue, or authorize to issue or offer to give, sell, negotiate, deliver, issue, or authorize to issue any policy of workmen's compensation insurance at a rate less than that approved by the commissioner. No such company, officer, agent or broker shall at any time pay or allow, or offer to pay or allow, any rebate of any premium paid or payable on any policy of insurance or any annuity or pure endowment contract.

Section 183. No person shall receive or accept from any company or officer or agent thereof, or any insurance broker, or any other person, any such rebate of premium paid or payable on the policy or contract, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement not specified in the policy or contract or any policy of workmen's compensation insurance at a rate less than that approved by the commissioner. No person shall be excused from testifying, or from producing any books, papers, contracts, agreements or documents at the trial of any other person charged with violating any provision of this and the preceding section, on the ground that such testimony or evidence may tend to inculminate himself; but no person shall be prosecuted for any act concerning which he shall be compelled so to testify or produce evidence, documentary or otherwise, except for perjury committed in so testifying.

Section 184. The two preceding sections shall apply to all kinds of insurance, including contracts of corporate suretyship, except those specified in the second clause of section forty-seven, as to which they shall apply only to insurance against loss or damage to motor vehicles, their fittings and contents and against loss or damage caused by teams, automobiles or other vehicles, excepting rolling stock of railways, as provided in said second clause. The said sections shall not prohibit any company from paying a commission to another company or to any person who is duly licensed as an insurance agent of such company or as an insurance broker and who holds himself out and carries on business in good faith as such, or prohibit any such person or any company from receiving a commission in respect to any policy under which he or it is insured, or in respect to any annuity or pure endowment contract held by him; nor shall said sections apply to (1) a distribution, without special favor or advantage, by mutual companies to policy holders of savings, earnings or surplus without specification thereof in the policy, or (2) the furnishing to the insured of information or advice by any company, officer, agent or broker with regard to any risk for the purpose of reducing the liability of loss, or (3) the payment or allowance to the insured of a return premium or a cash surrender or other value upon cancellation, lapse or surrender of a policy."

These sections are penal in their nature, and render both the broker and the insurer who violate their provisions liable to the punishment provided for in section 194, but under the terms of section 193 the contract of insurance is not made invalid by the violation of these sections by the broker and the insurer.

The primary purpose of sections 182 to 184 is, as stated in opinions of former Attorneys General, to prevent discriminations between individuals of
the same class who may be applicants for insurance (IV Op. Atty. Gen. 503; V Op. Atty. Gen. 543), and to eliminate the evils of the practice of rebating, which is in itself a form of such discrimination. The performance of certain specific acts is also forbidden by the statute, and among its terms is a prohibition against paying or allowing, or offering to pay or allow, "any valuable consideration or inducement" not specified in the policy in connection with placing or negotiating any policy of insurance. In the earlier forms in which this enactment appeared brokers were not included in the list of those falling within the terms of the prohibitions of section 182, but they were added to the list by St. 1908, c. 511, and have been retained therein ever since.

The essential problem presented by the terms of your communication calls for a determination as to whether or not the extension of credit to customers by a broker who advances money to pay premiums is a "valuable consideration or inducement" within the meaning of the statute, when the policy contains no provision relative to extension of credit.

To allow credit to another in relation to the purchase of something desired might, in common parlance, be called a valuable consideration for the purchase of the desired thing. Escape from the necessity for immediate payment in cash is perhaps, in a popular sense, a desirable or valuable state. Forbearance to sue upon a debt due may even be a sufficient consideration for the formation of a contract; but the customer, upon the state of facts presented by your letter, is placed by the action of the broker in the position of a debtor,—he is bound to pay the sum advanced in a manner and at a time fixed by agreement. He is not discharged from the obligation to pay the premium on his policy. He may even, under certain arrangements, be bound to pay the amount with interest. The customer's fundamental financial position is in no way bettered by the extension of credit. He has not in reality received a consideration or inducement of value.

The broker's offer is open to all, the other policy-holders are not affected as the cash is paid into the treasury of the company, and other brokers may pursue the same course with their customers; so that the evil of discrimination among individuals of the same class, at which the statute is primarily aimed, is not induced by the broker's proposed course of action.

It is a matter of common knowledge that the business of selling insurance, like other businesses of similar magnitude and complexity, is carried on under a system whereby credits are extended to customers by agents and brokers. Immediate or advance payment of money to be applied upon premiums or renewal charges is not customarily required by agents or brokers from their regular customers, but by a system of bookkeeping the customers' payments are taken care of as they fall due and bills for such amounts sent to them and their accounts debited with corresponding sums on the books of the agents or brokers. The relation of debtor and creditor is then established between the agents or brokers and the respective customers. An entirely different situation would exist under such circumstances, and would exist under the facts outlined in your letter, if the agent or broker were to pay the amount of the premium without charging it to the customer and without creating the relation of debtor and creditor. The pursuance of the latter course would clearly fall within the prohibition of the statute; the customer would then receive virtually a gift of the amount involved in the payment of the first premium, his financial position would experience a gain with no corresponding obligation, and he would receive "a valuable consideration or inducement" in connection with negotiating the policy.

The acceptance of an interest-bearing note by the agent of an insurance company, who in turn became responsible, either by payment or by a debit in mutual accounts, to the company for the amount of the premium, has been treated by courts in other States as if it involved no breach of prohibitions in statutes not dissimilar to those in our own. Ellis v. Anderson, 49 Pa. Sup. Ct. 245; Northern Assurance Co. v. Meyer, 194 Mich. 371. The giving of credit for a premium on a temporary policy by agents has been treated by our Supreme Court as proper, and the fact that it was the general custom in regard to such policies to give credit was recognized by the court. Baker v. Commercial Union
Assurance Co., 162 Mass. 358. Unless the provisions of the sections of the statute under discussion forbid it, there is no impropriety in the broker paying the premium for the insured and making mutually agreeable arrangements with the latter for the repayment of the amount to him. Wheeler v. Watertown Fire Ins. Co., 131 Mass. 1.

In view of the foregoing considerations, I am of the opinion that the payment or the promise of payment of a premium by the broker, upon the understanding that the amount thereof shall be repaid to him by the customer, upon terms mutually agreed upon, is not, as a matter of law, "a valuable consideration or inducement" within the meaning of the sections of the statute under consideration.

I accordingly answer your first question and your second question, in both its parts, in the negative.

Very truly yours,

Jay R. Benton, Attorney General.

Elevators — Inspection of Elevators in Private Residences.

The provisions of G. L., c. 143, §§ 62-71, apply to the inspection, installation and operation of elevators in private residences.

Aug. 5, 1924.


Dear Sir: — You have asked my opinion regarding the application of certain sections of the General Laws to elevators in private residences. Your request is as follows: —

"I would respectfully request your opinion as to whether the provisions of the law relative to the installation and operation of elevators, as contained in G. L., c. 143, §§ 62-71, inclusive, apply to such installation and operation in private residences."

The first provision of our statutes regarding protection of the public relative to elevators is contained in St. 1877, c. 214, § 2, and is specifically limited to manufacturing establishments. The statute is entitled "An Act relating to the inspection of factories and public buildings." This section is inserted in substance in P. S., c. 104, § 14, in a statute entitled "Of the inspection of buildings." By St. 1882, c. 208, P. S., c. 104, was amended in an act entitled "An Act relating to the inspection of buildings," by adding after the word "factory" the words "mercantile or public buildings," and by adding a clause relative to a safety device for elevators, so as to enlarge to that extent the terms of the earlier statutes. The building laws were codified in St. 1894, c. 481, and the provisions of P. S., c. 104, § 14, as enlarged by St. 1882, c. 208, were placed in sections 41 and 42, but there the extent of the provisions relating to the protection of the public in relation to elevators was still distinctly limited to elevators in factories and mercantile or public buildings. St. 1901, c. 439, enlarged the number of protective appliances required by law on elevators but, properly construed, did not increase the previously enumerated classes of elevators to which these provisions were applicable. St. 1894, c. 481, §§ 41 and 42, as enlarged, were embodied in R. L., c. 104, §§ 27 and 28, in a chapter entitled "Of the inspection of buildings." As therein set forth neither section contains in words the specific limitation to "factory, mercantile or public building," but there is nothing in the language used in these provisions which, read in the light of the history of the legislation on the subject, can be said to have enlarged the classes of buildings to the elevators of which they were applicable. See Rippucci v. Commonwealth Construction Co., 190 Mass. 518.

In 1913 the Legislature passed an act, chapter 806, entitled "An Act relative to the installation, alteration and inspection of elevators and to the appointment of a board of elevator regulations." This act provides a mode for the supervision of the construction of elevators, with authority for such supervision in various officials designated with relation to the geographical location of such elevators, and by its phraseology, repeatedly used, appears to be applicable to "all" elevators, irrespective of the character of the buildings in which
they may be respectively placed. It provides for the appointment of a board of elevator regulations, with power to frame regulations of a wide variety relative to "all elevators," and provides penalties for breach of such regulations. The sections of the Revised Laws previously referred to as embodying substantially the terms and the implied limitations are specifically repealed, together with other sections relative to the operation of elevators, contained in various statutes. The act of 1913 is now contained, virtually in its entirety, in G. L., c. 143, §§ 62-71. Said chapter 143 is entitled "Inspection and regulation of, and licenses for, buildings, elevators and cinematographs."

I am of the opinion that St. 1913, c. 806, was applicable to all elevators, and that its provisions show that it was the intention of the Legislature to enlarge the classes of elevators subject to regulation beyond the classes in specified kinds of buildings, to which the restrictions had been limited by previous statutes; and that the provisions of St. 1913, c. 806, as now embodied in G. L., c. 143, §§ 62-71, apply to elevators in private residences as well as to those of other kinds of buildings. An elevator, as a matter of common knowledge, is a machine of such a character that unless properly constructed, installed and maintained it may be a source of great danger to persons using it, and it is of such a character as to make regulations looking to its safety in private residences within the power of the Legislature to enact.

Very truly yours,

JAY R. BENTON, Attorney General.

**Education — Pecuniary Interest in School Books — Principal of State Normal School.**

G. L., c. 15, § 5, providing that certain "agents, clerks and other assistants" appointed by the Commissioner of Education shall have no pecuniary interest in any school book used in public schools, does not apply to a principal of a State normal school.

Aug. 5, 1924.

**Dr. Payson Smith, Commissioner of Education.**

**Dear Sir:** — You request my opinion as to whether the provision contained in G. L., c. 15, § 5, in regard to certain appointees of the board having a pecuniary interest in the publication or sale of textbooks, applies to a principal of a State normal school.

That part of G. L., c. 15, § 5, to which you refer reads as follows: —

"... Except in the case of the teachers' retirement board, the division of public libraries, the division of the blind and institutions under the department, the commissioner may appoint such agents, clerks and other assistants as the work of the department may require, may assign them to divisions, transfer and remove them and fix their compensation, but none of such employees shall have any direct or indirect pecuniary interest in the publication or sale of any textbook or school book, or article of school supply used in the public schools of the commonwealth. . . ."

The provision contained in this section in regard to pecuniary interest in textbooks applies solely to appointees under that section. The provision originated in St. 1896, c. 429, and applied to "agents," such as might be appointed by the board "to visit the several cities and towns," within P. S. c. 41, § 9. See R. L., c. 39, § 9. The provision as it appears in G. L., c. 15, § 5, applies to such "agents, clerks and other assistants" as may be appointed by the board under said section 5. The principal of a State normal school is not properly described by the words above quoted, nor is he appointed under said section 5, but rather under G. L., c. 73.

I am therefore of the opinion that the provisions of G. L., c. 15, § 5, to which you refer, do not apply to a principal of a State normal school.

Yours very truly,

JAY R. BENTON, Attorney General.
Taxation — Income Tax — Gain received by Appointee under General Power.

No estate is vested in the person appointed by the donee of a general power until the appointment is made.

A gain from the sale of securities received by trustees to whom property was appointed under a general power must be determined on the basis of its value at the time the property passed to them.

Aug. 5, 1924.


Dear Sir: — You ask my opinion as to the proper interpretation of G. L., c. 62, § 5 (c), in its application to certain facts stated by you as follows: —

"Under the will of A, who died in 1889, a resident of Boston, the residue of his property is divided into shares, one of which shares was left to trustees to hold and pay the income therefrom to B for life and upon B's death to pay over the principal of the trust to such persons as B should appoint by his will. B died in June, 1921, a resident of Massachusetts, and by his will appointed the property to the trustees to hold for the benefit of two persons, C and D, one of whom was a resident of Massachusetts and the other a non-resident of Massachusetts.

During the year 1923 the trustees sold certain securities constituting a part of the principal of the trust, and the question is, upon what 'cost' the gain or loss from the sale is to be determined."

G. L., c. 62, § 5, cl. (c), as amended by St. 1921, c. 376, and by St. 1922, c. 449, and § 7, in part, are as follows: —

"Section 5. Income of the following classes received by any inhabitant of the commonwealth during the preceding calendar year shall be taxed as follows: .......

(c) The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum. Any trustee or other fiduciary may charge any taxes paid under this paragraph against principal in any accounting which he makes as such trustee. If, in any exchange of shares upon the reorganization of one or more corporations or of one or more partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, the new shares received in exchange for the shares surrendered represent the same interest in the same assets, no gain or loss shall be deemed to accrue from the transaction until a sale or further exchange of such new shares is made.

Section 7. .... In determining gains or losses realized from sale of capital assets, the basis of determination, in case of property owned on January first, nineteen hundred and sixteen, shall be the value on that date, and in case of property acquired thereafter, the value on the date when it is acquired."

In Bingham v. Commissioner of Corporations and Taxation, 249 Mass. 79, the complainants, as executors, had sold securities in the estate at a price greater than their cost to the testator but less than their value at the time of his death, and a tax had been levied on the gain over the cost to the testator, which the court held was invalid and should be abated. That case is essentially different from the case which you state. The court there held that the passing of the testator's property to the executors was a new acquisition by them, and that therefore any increase in value prior to that time was not a gain realized by them when the securities were sold. The case you put raises the different question whether gains received from purchases and sales of intangible personal property by an appointee under a general power are to be measured by the difference between the sale price and the value at the time the power was granted, or by the difference between the sale price and the value at the time the power was exercised.
P.D. 12.

But while the decision in Bingham v. Commissioner of Corporations and Taxation is not an authority which is decisive of the question under discussion, the opinion contains an expression of views as to the nature of income which throws considerable light on that question. Concerning the meaning of the word "income," as used in the income tax law, Chief Justice Rugg says as follows:

"The word 'income' as used in these sections may be said to include the true increase in amount of wealth which comes to a person during a stated period of time. It imports an actual gain. It is based on the practical conception that additional property has come to the taxpayer out of which some contribution is exacted and can be paid for the support of government. Income indicates increase of wealth in hand out of which money may be taken to satisfy the enforced pecuniary contributions levied to help bear the public expenses. It does not comprehend increase in the value of capital investment discernible only by estimation and not otherwise. It refers simply to an increase in value realized by sales or conversion of capital assets."

It is a general principal that appointed property passes to the appointee under a power of appointment not from the donee of the power but from the donor. As the court said in Walker v. Treasurer and Receiver General, 221 Mass. 600, 602:

"The power is a deputation of the donee to act for the donor in disposing of the donor's property. Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power."

So it was held that under the succession tax law the decedent whose estate was liable to taxation was the donor of a power of appointment rather than the donee. Emmons v. Shaw, 171 Mass. 410. See, also, Walker v. Treasurer and Receiver General, 221 Mass. 600; Hill v. Treasurer and Receiver General, 229 Mass. 474; Minot v. Paine, 230 Mass. 514. But after the passage of St. 1909, c. 527, § 8 (G. L., c. 65, § 2), providing for the taxation under the succession tax law of property passing by the exercise of a power of appointment, in certain cases, as property belonging to the donee of the power and disposed of by him, it was held in Minot v. Treasurer and Receiver General, 207 Mass. 588, that such a provision was within the constitutional power of the Legislature. In the opinion in that case the court said on the subject, pages 590 to 592, as follows:

"It generally has been held that a title derived through a power of appointment in a will or deed is to be taken as coming from the donor of the power, rather than from the donee. But in many particulars the donee is often more directly responsible for the possession and enjoyment of the beneficiary than the donor.

The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. . . . After a will or deed containing such a power has taken effect and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposition of a tax. . . . The tax is imposed as of the time when the succession in possession and enjoyment occurs through the happening of the event that determines it."

Clearly, no estate is vested in the person appointed by the donee of a general power until the appointment is made. Applying to this situation the words of Chief Justice Rugg quoted above, there can be no true increase in the amount
of wealth which comes to an appointee under a general power, by a sale of the appointed property, from any increase in value of the property before his appointment. Prior to the time of his appointment the property has not passed to him in possession or enjoyment. Prior to that time there was nothing from which he could derive any actual gain.

The fact that in the case you state the trustees to whom the property was appointed happened to be the same persons who previously held it makes no difference. After the appointment they held it by a different title. It is my opinion that the trustees have derived no gain from any increase in value of the securities subsequently sold by them prior to the time of their appointment, and that any gain received by them must be determined on the basis of its value when it passed to them by virtue of the appointment.

Very truly yours,

Jay R. Benton, Attorney General.


A school cannot be partly private and be the object of an expenditure of public funds.

The Punchard Free School in Andover is, on the facts, a public school. A school may be in receipt of private aid without losing its public character. Under G. L., c. 70, pt. I, a town may be reimbursed with respect of only those teachers' salaries which are in fact paid by the town.

Aug. 6, 1924.

Dr. Payson Smith, Commissioner of Education.

Dear Sir: — In connection with the duties of your department in carrying out the provisions of G. L., c. 70, pt. I, you have asked my opinion about the status of the Punchard Free School in Andover, and whether or not the Commonwealth may under that chapter allow reimbursement to the town of Andover on salaries paid to teachers in this school.

By will proved in 1850 Benjamin H. Punchard gave fifty thousand dollars to the town of Andover "for the purpose of founding a free school." The will provided for the expenditure of some of the fund in the purchase of buildings and for the maintenance of the school out of the income of the balance. There were detailed provisions for the selection of trustees, who were to manage the school. There were certain restrictions upon the way in which the school should be conducted. The trustees of the school were made a corporation by St. 1851, c. 7, with powers and duties appropriate for the administration of the trust created by the Punchard will. In 1868 the schoolhouse which was built by the trustees was destroyed by fire, and a statute of 1869, chapter 396, authorizing the town to appropriate funds to aid the trustees in erecting a new schoolhouse and to raise annually a further sum to aid in defraying the school expenses, gave rise to the decision in Jenkins v. Andover, 103 Mass. 94. The court held the statute unconstitutional, as violating what was then the eighteenth article of amendment of the Massachusetts Constitution. The court pointed out that the appropriation was clearly an appropriation intended for the support of public and common schools; that equally clearly the Punchard School, being under the control of the trustees, was not a school "conducted according to law, under the order and superintendence of the authorities of the town." "It would be inconsistent with the terms of the will to give them any such control." Ibid., p. 102. Between the time of Jenkins v. Andover and the present there has intervened a period of transition in which the power of control and the responsibility of maintenance have gradually shifted away from the trustees and toward the town. Whether or not the respective courses of the town and of the trustees during this period were valid is not now a necessary inquiry.

Your letters, and those which you have presented to me as embodying the present state of facts, disclose a situation wholly different from that of 1869. You state that today the town owns the grounds and the buildings and equipment, furnishes all the text books and supplies, pays the janitor's salary, pays
the salary of nine teachers and of all special teachers connected with the school, and pays twelve-seventeenths of the salary of the principal; that it appropriates for the school nearly thirty-one thousand dollars a year; and that the trustees of the Punchard Fund now contribute some thirty-four hundred dollars a year, paying five-seventeenths of the principal's salary and the whole of the salary of one teacher. In one place you state that technically the trustees have the power to reject or retain this teacher, but that it has been the custom for many years to act upon the recommendation of the principal and the superintendent of schools. You state nothing indicating any present power of control by the trustees of the Punchard fund except this "technical power."

In the letter presented by your department as a résumé of the facts concerning control as they now pertain, it is said that "all supervision, organization, and administration of the school are entirely in the hands of the superintendent and principal"; and further, that if the trustees should "take any action not in accordance with the will of the school committee, all responsibilities of administration would probably be assumed by the committee." Summarizing, you have described a condition of complete public ownership and public control.

1. You ask: "Under our present Constitution is it possible for a school to be part private and part public?" Without overlooking the fact that the standing of a public school, as such, is not impaired by the mere receipt of contributions to support from private quarters (see Jenkins v. Andover, supra, at page 99), or the fact that, conceivably, a public school can be operated in conjunction with a private school in such fashion as together to perform the practical function of a single educational unit (see Dickey v. Trustees of Putnam Free School, 197 Mass. 468; Attorney General's Report, 1922, p. 75, at 77), it is possible, nevertheless, to answer your question with a categorical negative so far as pertains to the administration of G. L., c. 70, pt. I. The relevant language of Mass. Const. Amend. XLVI is as follows:—

"All moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding... any... school... which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both..."

It is perfectly clear that a school cannot be partly under private management and at the same time participate in public character to a sufficient extent to be the object of the expenditure of public funds.

2. You ask whether the Punchard School can "be considered under the law a public high school." In respect of the meaning which these words have in connection with your third question it is my opinion that the town of Andover is maintaining in fact a public high school. On the facts stated, the town is maintaining for the purpose of secondary education a complete plant and equipment and a substantial staff of teachers, all at the town's expense and under the town's control and management. If the relation of the trustees to the town be simply that of a contributor to the support of the school, whether by the furnishing of money which may be used in paying the salary of a teacher and part of the salary of the principal, or by the furnishing, as it were, of a prepaid teacher and prepaid five-seventeenths of a principal, the school, as maintained by the town, is none the less a public school, therefore. Jenkins v. Andover, supra, at p. 99. It is apparently not a fact that (cf. Dickey v. Trustees of Putnam Free School, supra) the trustees are maintaining a separate school with a teaching staff as above, which is, however, co-operating with the public school. The circumstance that the Department of Education, under G. L., c. 71, § 4, has exempted the town of Andover from maintaining a high school is not inconsistent with the fact that the town seems, nevertheless,
to be in substance maintaining such an institution. Only the existence of some power of control in the trustees could challenge the validity of these conclusions.

3. You ask whether the Commonwealth, under G. L., c. 70, pt. 1, can allow reimbursement to the town of Andover on salaries paid any teacher employed to teach in the Punchard School. The answer to this question is governed by the constitutional provision already quoted. So far as ownership of the school is thereby made a prerequisite to the allowing of such reimbursement, the condition is fulfilled upon the facts stated. The prerequisite of the fact of complete public control by the appropriate local officers seems also to be satisfied by the circumstances upon which this opinion is predicated. Upon the face of your letter there seems to remain no power of control in the trustees over what probably constitutes a complete educational unit. If so, the facts of this case are as strong as those upon which was based I Op. Atty. Gen. 427. They are quite distinguishable, on the other hand, from the facts upon which was found II Op. Atty. Gen. 75, where the school in question was an incorporated academy under the ultimate direction of a supervising board of three persons, of whom only one was appointed by the school committee of the town, one by the trustees of the academy, who were wholly independent of the town's authority, and one by the two other members just mentioned. The reimbursement authorized by G. L., c. 70, pt. 1, and acts in amendment thereof, may, therefore, be paid, so far as its terms permit, with respect of the nine teachers who are paid wholly by the town, and with respect of the principal also in so far as the salary paid him by the town corresponds to the provisions of G. L., c. 70, § 2, as amended by St. 1921, c. 420, § 1, relating to the minimum salaries against which reimbursement shall be allowed. No reimbursement is permissible on account of the teacher who is wholly paid by the trustees. This latter conclusion is reached without necessarily deciding the correct legal interpretation to be placed upon the arrangement by which this teacher is furnished, for the short reason that G. L., c. 70, pt. 1, contemplates part reimbursement for only such salaries as are paid by the town.

Very truly yours,

JAY R. BENTON, Attorney General.

State Prison—Concurrent Sentences—Aggregate of the Minimum Terms.

The court, in imposing several sentences to the State Prison, may order that they be served concurrently.

The aggregate of the minimum terms of several concurrent sentences is the largest minimum term.

AUG. 14, 1924.

Hon. Sanford Bates, Commissioner of Correction.

Dear Sir:—You request my opinion as to the effect of a provision in a sentence to the State Prison that it "run concurrently" with another sentence referred to.

"In the absence of a statute to the contrary, if it is not stated in either of two or more sentences imposed at the same time that the imprisonment under any one of them shall take effect at the expiration of the others, the periods of time named will run concurrently and the punishments will be executed simultaneously." 16 C. J., p. 1374. See also Kirkman v. McCloughry, 152 Fed. 255; Kite v. Commonwealth, 11 Met. 581.

St. 1884, c. 265 (G. L., c. 279, § 8), provided that commitment may be made on two or more sentences at the same time, and that "such sentences shall be served in the order named in the mittimuses."

St. 1897, c. 294, § 1 (last part of G. L., c. 279, § 24), provided that an additional sentence imposed under St. 1895, c. 504, providing for the imposition of maximum and minimum sentences (first part of G. L., c. 279, § 24), "shall take effect upon the expiration of the minimum term of the preceding sentence."

The purpose of these two acts (St. 1884, c. 265, and St. 1897, c. 294, § 1) was to change the common law that where there was no direction to the contrary sentences should run concurrently. These acts were not intended to
restrict the power of the courts to impose a sentence to run concurrently with another sentence. The provision contained in St. 1897, c. 294, § 1 (last part of G. L., c. 279, § 24), has been repealed by St. 1924, c. 152, and St. 1924, c. 165, was enacted, to the effect that when a sentence is ordered to take effect "from and after the expiration" of a previous sentence such previous sentence shall be deemed to have expired when the prisoner is released therefrom by parole or otherwise. Even if it were thought that the statutes did restrict the power of the courts to order a sentence to run concurrently, yet if the court should insert such a provision in a sentence it is difficult to see how the sentence can be enforced as an unqualified one.

If the court imposes several sentences and orders that they be served concurrently, "the aggregate of the minimum terms of the several sentences," under G. L., c. 127, §§ 131 and 133, is the longest minimum term. Thus, if two sentences, one three to five years and another six to eight years, were imposed to run concurrently, the aggregate of the minimum terms of the two sentences would be six years.

I am therefore of the opinion that the court, in imposing several sentences to State Prison, may, in its discretion, order that they be served concurrently and that the aggregate of the minimum terms of several concurrent sentences is the longest minimum term.

Very truly yours,

JAY R. BENTON, Attorney General.

State Police — Power under Volstead Act — Power conferred on State Officers by Congress.

State police officers, as such, have no authority or power to act under the National Prohibition Act.

The police, however, as private citizens may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens.

While Congress may confer power upon State officers which the latter may, in their discretion, exercise, unless prohibited by State legislation, Congress cannot compel them to act.

Gen. ALFRED F. FOOTE, Commissioner of Public Safety.

DEAR SIR: — You request my opinion whether under section 26 of the Volstead Act, so called, members of the State Police are given authority to seize vehicles in which intoxicating liquors are being transported and to arrest the person in charge thereof.

The Act of October 28, 1919, c. 85, title II, § 26, called the "National Prohibition Act," provides, in part, as follows: —

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. . . ."

The act is a Federal statute, relates to a violation of Federal law and confers drastic power of seizure of private property and arrest of persons without warrant. State officers of the law, as such, have no power under the act unless section 26, by the use of the words "any officer of the law," confers such power upon them. It is not to be lightly presumed that Congress has conferred such extensive powers upon the innumerable thousands of officers of the law of all the States of the Union, over whose appointment it has no control and whose actions it cannot govern. In my opinion, the statute should not be construed as conferring these powers upon the officers of the independent sovereign States unless the context of the act clearly warrants such interpretation.
Section 2 of the act confers powers and imposes duties upon certain Federal officers, and authorizes the officers enumerated in U. S. Rev. Stat., § 1014, to issue search warrants. The officers there enumerated, among others, are certain registrars "of any State." Section 22 of the act specifically confers power to bring action to enjoin a liquor nuisance, as defined in the act, upon the "prosecuting attorney of any State or any subdivision thereof." It thus appears that when Congress intended to confer power under the act upon State officers it specifically referred to officers of a State.

Section 26, which refers to "any officer of the law," in the very next line refers to a "violation of the law." The latter, without question, refers exclusively to a violation of the Federal law. It would be a strain upon language to interpret the words "the law" as State or Federal law, when used in connection with the words "officer of the law," and in the next line of the section to interpret "the law" merely as Federal law.

Moreover, the section imposes a duty upon the officers of the law to seize and arrest. It is well established that while Congress may confer power upon State officers, which the latter may exercise or not in their discretion, unless prohibited by State legislation, Congress cannot lawfully compel them to act. *Goulis v. Judge of District Court*, 246 Mass. 1; *United States v. Jones*, 109 U. S. 513, 519; *Robertson v. Baldwin*, 165 U. S. 275; *Dallemagne v. Moisan*, 197 U. S. 169. Even if the statute specifically empowered members of the State police to act, they could refrain from exercising the powers so granted if they so desired.

Section 28 of the act provides:

"The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States."

This section grants protection only to officers of the United States. It is difficult to suppose that Congress, by section 26, conferred power upon State officers of the law and deliberately excluded them by section 28 from the protection afforded to officers of the United States. It therefore seems to me that Congress, by the use of the words "any officer of the law," in section 26 of the act, conferred power only on Federal officers and did not authorize State officers to act thereunder. See to the same effect an opinion of the Attorney General of Maryland to the Police Commissioner of Baltimore, dated August 5, 1920.

I am accordingly of the opinion that members of the State police, as such, have no authority or power to act under the National Prohibition Act. The police, however, are private citizens also, and, as such, may exercise such powers in apprehending violators of the Federal law as are shared by them in common with all other citizens.

Very truly yours,

JAY R. BENTON, Attorney General.

Metropolitan Police — Civil Service — Promotion.

The power temporarily to assign officers of the police force to duties of a higher rank is necessarily included in the power of the Metropolitan District Commission to organize its police force.

A temporary assignment of such officer to duties commonly pertaining to an office of a higher grade does not constitute a promotion, within the purview of the civil service laws.

Aug. 27, 1924.

Metropolitan District Commission.

GENTLEMEN: — You request my opinion as to whether the vote of the Commission that "until further orders Captain Spencer G. Hawkins be in charge and command of police matters in all divisions" constitutes a promotion within
the meaning of G. L., c. 31. You state that the Commission has not made Captain Hawkins acting superintendent, has given him no additional salary and still designates him as captain.

Under St. 1922, c. 406, the Commission was specifically authorized to appoint, and did appoint, Herbert W. West as superintendent of police. Mr. West recently died, and the above vote was presumably passed to meet the emergency. The vote, by its very terms, assigns Captain Hawkins to certain duties only “until further orders.” The case, therefore, is merely one where a captain of police has been temporarily assigned to other duties involving greater powers.

The power temporarily to assign officers of the police force to duties of a higher rank is necessarily included in the power of the Commission to organize its police force. G. L., c. 28. A temporary assignment of such officer to duties commonly pertaining to an office of a higher grade does not constitute a promotion within the purview of the civil service laws. On the assumption, therefore, that the assignment is merely temporary, I am of the opinion that the vote passed by the Commission does not constitute such promotion. I do not pass upon the question which would arise if a permanent assignment were to be made.

Very truly yours,

Jay R. Benton, Attorney General.

Back Bay Lands — Equitable Restrictions.

The restrictions in deeds from the Commonwealth against use for “any mechanical or manufacturing purposes” do not forbid the use of premises for offices or stores.

Aug. 27, 1924.

Hon. William F. Williams, Commissioner of Public Works.

Dear Sir: — You have asked my opinion whether the use of a building to be erected at 7 and 9 Newbury Street, Boston, for offices and a store would violate the following restriction found in the original deed from the Commonwealth to the early predecessors in title of the present owner: —

“This conveyance is made upon the following stipulations and agreement: That any building erected on the premises shall be at least three stories high for the main part thereof, and shall not, in any event, be used for a stable, or for any mechanical or manufacturing purposes.”

Some of the history of the transactions by which the Commonwealth became the proprietor, and later the grantor to numerous grantees of parcels, of a large tract of land in what is commonly called the Back Bay, is found in Wilson v. Massachusetts Institute of Technology, 188 Mass. 565, 568 et seq.; see also Allen v. Mass. Bonding & Insurance Co., 248 Mass. 378. It discloses a general and, at the time, well understood intent that this section of Boston should be given over in general to a residential district of a high standard. To that end the restriction in question, together with other restrictions, was inserted in the deeds of all the lots on the northerly side of Newbury Street from Arlington Street to Berkeley Street. The effect of this restriction is to be measured, however, by the language actually and deliberately used, under the usual rules of construction of deeds, including specifically the rule that “in case of doubt a clause creating an equitable restriction is to be construed against the grantor and in favor of the grantee’s right not to have his land restricted.”


Had the Commonwealth seen fit to do so, it might have given only deeds which restricted the grantees to the building of dwelling houses and the usual out-buildings, and to the use of the premises only for the purposes of private dwellings. Such restrictions are common and well known. Had it seen fit to do so, it might have given only deeds which confined the grantees to uses not “detrimental to the use of the surrounding locality for dwelling houses.” See, for example, Noyes v. Cushing, 209 Mass. 123, 125. Numerous other types of restrictions might be mentioned, and it must be assumed that the Common-
wealth, through its representatives, deliberately selected that variety which it deemed best suited to its purposes. It chose, in fact, to govern the type of buildings by imposing certain architecturallimitations, and to govern the use of them by stating two categories of forbidden uses,—“mechanical or manufacturing.” The language of Noyes v. Cushing, supra, at p. 125, seems apt and conclusive,—

“...in the absence of anything...limiting the buildings to be erected to dwelling houses we do not see how the restrictions can be so construed.”

See, also, Carr v. Riley, 198 Mass. 70. Cf., further, the guarded language of the court in Allen v. Mass. Bonding & Insurance Co., supra, at p. 383:

“It is plain that there was on the part of the Commonwealth a general scheme of real estate development of considerable magnitude as to the Back Bay district. It covered a large area. It was designed to create an attractive neighborhood given over in general to residential uses. ...”

In the ordinary understanding of language these two words, “mechanical” and “manufacturing,” do not describe the activities of a store or of business offices. No Massachusetts decision has been found which, upon any context or state of affairs, has undertaken to stretch them to such a length. The use for offices or a store might well come within the designation of “mercantile,” a term plainly understood by the court in Carr v. Riley, supra, at p. 75, to be of different scope from the words “manufacturing” or “mechanical.” But that term, although used in certain other deeds from the Commonwealth of Back Bay land, was omitted from the deeds of land upon the north side of Newbury Street. This fact is noted by the court in Allen v. Mass. Bonding & Insurance Co., supra, at p. 381. The decision in Bacon v. Sandberg, 179 Mass. 396, is that the fact that some of the deeds there in question contained the words “trade or manufacture,” while others contained the words “manufacturing or mechanical,” did not preclude the various restrictions inuring to the benefit of the several grantees as part of a general scheme; it is not to be understood as a decision that the two groups of words were identical in scope.

I must therefore say to you that the use of the premises at 7 and 9 Newbury Street for offices or a store is not, upon the facts stated, forbidden by the quoted restriction. I am not, of course, purporting to pass upon whether every conceivable use to which the tenant of a store or of an office could put his premises would be valid. It is enough at the present time to say that the proposed general uses for offices or a store are not prohibited. The validity of particular uses would have to be considered when they actually arise.

Yours very truly,

JAY R. BENTON, Attorney General.

Registrar of Motor Vehicles — Revocation of License — New License — Appeal to Division of Highways — "Conviction."

The power of the Registrar of Motor Vehicles to issue and revoke licenses to operate motor vehicles is statutory, and can be exercised only in accordance with the statute.

After the license of a person, convicted of operating a motor vehicle while under the influence of intoxicating liquor, has been revoked, the registrar has no power to issue a new license prior to the expiration of the time fixed by statute.

The power of the Division of Highways to entertain appeals from the registrar's decisions is confined to cases where the registrar may exercise his discretion.

No appeal lies from the refusal of the registrar to issue a new license after a revocation and prior to the expiration of the statutory period.

The placing of a case on file, upon the payment of costs, after a plea of "not guilty" does not constitute a "conviction."

Such action constitutes an "acquittal" within the purview of G. L., c. 90, § 24.
P.D. 12.

Aug. 28, 1924.

Hon. William F. Williams, Commissioner of Public Works.

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

"1. Under the provisions of G. L., c. 90, § 24, when a person is convicted of operating a motor vehicle while under the influence of liquor, and the court record of such conviction is sent to the Registrar of Motor Vehicles without a recommendation, and the license is then revoked in accordance with the section, has the registrar the right to rescind action and restore the license at any time before the expiration of said license, if the court submits a recommendation after the revocation?"

G. L., c. 90, § 24, contains the following provision:—

"... A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event and shall, unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal from the judgment shall operate to stay the revocation of the license. ... The registrar in his discretion may issue a new license to any person acquitted in the appellate court, or after an investigation or upon hearing may issue a new license to a person convicted in any court; provided, that no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction...."

The power of the Registrar of Motor Vehicles to issue and revoke licenses to operate motor vehicles is purely statutory, and can be exercised only in accordance with the statute. He cannot in any respect transcend the authority thus given. Commonwealth v. Maletsky, 203 Mass. 241; Goldstein v. Conner, 212 Mass. 57; Kilgour v. Gratto, 224 Mass. 78; Wright v. Lyons, 224 Mass. 167, 168; Commonwealth v. McCarthy, 225 Mass. 192, 195; Commonwealth v. Atlas, 244 Mass. 78; Conners v. Lowell, 246 Mass. 279. The statute specifically prescribes the conditions under which a new license may be issued after a revocation. Once revoked, a license may be issued only in the manner thus prescribed. I am accordingly of the opinion that your first question should be answered in the negative.

2. Your second question is as follows:—

"If the court, in the case above mentioned, submitted a recommendation that the license be not revoked as provided for in the statute, and the registrar refused at the time to accept such recommendation and revoked the license, would the registrar have the right to rescind his action at a later date and accept the recommendation and then restore the license?"

I assume that your question refers to the restoration of a license prior to the expiration of the time prescribed by the statute. It follows from what I have said in answer to your first question that the answer to your second question is "No."

3. Your third question reads:—

"Should the registrar decline to issue a license to a person convicted of operating a motor vehicle while under the influence of liquor, under either of the situations covered by questions 1 and 2, can the Division of Highways, under section 28, upon an appeal by a person aggrieved by such ruling or decision of the registrar, order said ruling or decision to be affirmed, modified or annulled?"

The power of the Division of Highways to entertain appeals from the rulings or decisions of the registrar is entirely statutory. It is plain that this power is confined to consideration, upon proper appeal, of rulings and decisions of the registrar only in cases where the registrar may exercise his discretion. No appeal may be made in cases where the registrar has no discretion as to his action. Since the registrar has no discretion as to his action in the situations
covered by the first and second questions, no appeal from his refusal to issue a new license in such cases will lie. The third question should, therefore, be answered in the negative.

4. Your fourth question is as follows:—

"On May 31, 1921, A was convicted of operating a motor vehicle while under the influence of liquor and was fined $100. On August 19th he was again convicted of operating a motor vehicle while under the influence of liquor and sentenced to six months in the house of correction, from which sentence he appealed. After numerous continuances, on April 29, 1924, he was tried in the Superior Court and the jury disagreed. On that same day the district attorney and the counsel for A agreed that the case should be placed on file upon the payment of $100 as expenses. Under the statute, of course, the registrar has no power to restore the license until five years from the date of the final conviction. Was the latest action of placing on file, after a plea of not guilty and the payment of $100 as expenses, a conviction, from which the five years should date, or was it an acquittal, which would enable the registrar to restore the license?"

G. L., c. 90, § 24, contains the provision that,—

"no new license shall be issued by the registrar to any person convicted of operating a motor vehicle while under the influence of intoxicating liquor until one year after the date of final conviction, if for a first offence, or five years after any subsequent conviction."

The effect of an entry that a case be "placed on file" is that it is indefinitely continued. Commonwealth v. Maloney, 145 Mass. 205, 210. Such disposition can be made only by order of the court. Attorney General v. Tufts, 239 Mass. 458, 537. Formerly it was perhaps the practice to make such order only after conviction by trial or on plea of guilty. Marks v. Wentworth, 199 Mass. 44, 45. In that event, the defendant remained liable for sentence at any time. Marks v. Wentworth, 199 Mass. 44, 45. Apparently it has become the practice, if justice seems to require it, to enter such order without a verdict and although the plea is not guilty. Attorney General v. Tufts, 239 Mass. 458, 537. It appears that the plea of not guilty was not withdrawn in the case referred to in your question. Clearly, the accused has not been "convicted" in the Superior Court.

The question remains whether the accused has been "acquitted," within the meaning of that word as used in G. L., c. 90, § 24. If the word "acquitted" is construed technically, it may be urged that it is as clear that the accused in the case referred to has not been "acquitted" as it is that he has not been "convicted." The case has been indefinitely continued. I am of the opinion, however, that the word "acquitted," as used in the statute in question, should be given a broader and less technical meaning; and that the word "acquitted," as there used, was intended to cover the case supposed. Unless the disposition of the case supposed is an acquittal, the statute makes no provision whatever as to the operator's right to a license. The disposition of a case by placing it on file is in substance intended as a final disposition of the case. When made, as here, upon stipulation that the accused pay costs, it amounts in effect to an arrangement with the accused, approved by the court, that it shall be a final disposition. Commonwealth v. Maloney, 145 Mass. 205, 210. It was common practice at the time when the provisions of G. L., c. 90, § 24, were first enacted (1916) to make what is in substance final disposition of cases in this way. This same section enacts in its later provisions that, except as therein provided, no prosecution for a second offence shall be "placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings." Placing a case on file is thus referred to as a mode by which it is "disposed of"; and is further recognized as a proper mode of disposing of a prosecution for a first offence under the section, and also for a second offence, provided the requirements stated are complied with. I assume that these requirements were complied with in the case referred to.

The statute should not be so construed as to leave no provision whatever as to
the license rights of an operator whose case has been disposed of by placing it on file; and yet this result would seem to follow unless the word "acquitted" be construed as broad enough to cover such a disposition. An opinion has been rendered by a former Attorney General to the effect that an entry of nolle prosequi is an acquittal within the meaning of the act. V Op. Atty. Gen. 385. Placing a case on file has the additional element of being the act of the court. Commonwealth v. Tufts, 239 Mass. 458, 537. I am therefore of the opinion that, under the facts stated in your fourth question, there was an acquittal within the meaning of that statute.

Very truly yours,

JAY R. BENTON, Attorney General.

Legislative Printing — Clerks of the House and Senate.

All House and Senate bills and all documents intended for presentation to the General Court by any member or member-elect may be printed under the direction of the Clerks of the House and Senate, respectively. The statutes and the rules of the General Court provide for the printing by the Clerks of certain other documents.

SEPT. 10, 1924.

Mr. William H. Sanger, Clerk of the Senate; Mr. James W. Kimball, Clerk of the House of Representatives.

GENTLEMEN: — You have orally requested my opinion relative to your authority to contract for legislative printing.

St. 1923, c. 362, § 5, as amended by St. 1923, c. 493, which places State printing, with certain exceptions, under the supervision of the Division of Personnel and Standardization and provides that the Commission on Administration and Finance may make contracts for printing for State departments, specifically provides that the act shall not apply to legislative printing. The authority to contract for legislative printing is, therefore, not affected by that statute.

G. L., c. 5, § 10, provides that one thousand copies of the journals of the Senate and of the House of Representatives shall be printed annually under the direction of the Clerks thereof. St. 1924, c. 492, § 3, provides that the Clerks of both branches of the Legislature shall prepare and print the manual of the General Court. G. L., c. 5, § 12, provides that the joint committee on rules of the General Court shall publish during each regular session of the General Court bulletins of committee hearings. Section 5 of that chapter provides that the joint committee on rules shall prepare and print, from time to time during the legislative session, a cumulative index of all acts and resolves passed.

There is no statute which specifically refers to the printing of bills.

Rule 28 of the rules of the House of Representatives, as amended on May 25, 1923, in part provides: —

"Recommendations and special reports of state officials, departments, commissions and boards, reports of special committees and commissions, bills and resolutions introduced on leave or accompanying petitions, recommendations and reports, and resolutions, shall be printed under the direction of the Clerk, who also may cause to be printed, with the approval of the Speaker, other documents filed as herein provided."

Rule 42 of the rules of the House provides, in part, that "bills shall be printed or written in a legible hand." Rule 42 should be read in the light of Rule 28. I am accordingly of the opinion that all House bills, in accordance with the rules, should be printed under the direction of the Clerk of the House until some provision to the contrary is made by the Legislature or by the House.

Rule 13 of the joint rules, as amended on May 25, 1923, provides: —

"Papers intended for presentation to the General Court by any member or member-elect shall be deposited with the Clerk of the branch to which the member belongs or has been elected; ...
Papers so deposited and referred previously to the convening of the General Court shall be printed in advance, conformably to the rules and usages of the Senate or House. . . A bulletin of matters so referred shall be printed, under the direction of the Clerks of the two branches, as of the first day of the session."

While the rule does not specifically authorize the Clerks of the respective branches of the Legislature to print such papers, it does not provide for printing in accordance with the rules and usages of the Senate or House. In the past, bills have been printed under the direction of the respective Clerks. The House rules so provide with respect to House bills. Rule 20 of the rules of the Senate specifically provides that when the President orders bills and resolves to be printed, they shall be printed under the direction of the Clerk. In the absence of any provision to the contrary, and in view of the parliamentary practice, usage and rules, I am of the opinion that the Clerks of the House and Senate, respectively, under Rule 13, may cause to be printed, in advance of the convening of the General Court, all papers referred to in that rule.

Very truly yours,

JAY R. BENTON, Attorney General.

Elections — Primaries — Candidates for County Commissioner.

Under G. L., c. 54, § 157, providing for the election of two county commissioners for certain counties, not more than one of whom shall be from the same city or town, a candidate who has received at the primaries a smaller number of votes than another candidate of the same party from the same town cannot be a nominee, although he has received the second largest number of votes.

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

Dear Sir: — You state that at the recent primaries the total vote cast for Republican candidates for nomination as county commissioners of Barnstable County, where two are to be elected, was as follows:

John D. W. Bodfish, of Barnstable . . . 1945
Frank G. Thatcher, of Barnstable . . . 1887
Benjamin F. Bourne, of Bourne . . . 1769
Arthur Underwood, of Falmouth . . . 1127

In connection with your preparation of the ballots you ask my advice as to who are the Republican nominees.

G. L., c. 54, § 158, provides for the election of county commissioners. It is provided that "at the biennial state election in nineteen hundred and twenty-four, and in every fourth year thereafter, there shall be chosen . . . by the voters of each of the other counties (i.e., excepting Middlesex, Suffolk and Nantucket) . . . two county commissioners for the county; . . ." It is further provided as follows:—

"Not more than one of the county commissioners and associate commissioners shall be chosen from the same city or town. If two persons residing in the same city or town shall appear to have been chosen to said offices, only the person receiving the larger number of votes shall be declared elected; but if they shall receive an equal number of votes, no person shall be declared elected. If a person residing in a city or town where a county commissioner or an associate commissioner who is to remain in office also resides, shall appear to have been chosen, he shall not be declared elected. If the person is not declared elected by reason of the above provisions, the person receiving the next highest number of votes for the office, and who resides in another city or town, shall be declared elected."

G. L., c. 53, contains provisions relative to primaries. Section 1 provides, in part, as follows:—

"At any primary, caucus or convention held under this chapter, each party having the right to participate in or hold the same may nominate as many
candidates for each office for which it has the right to make nominations therein as there are persons to be elected to that office, and no more. . .”

Section 24 provides:—

“Primaries shall be subject to all laws relating to elections and corrupt practices therein, so far as applicable and except as otherwise provided in this chapter and in chapters fifty-four, fifty-five and fifty-six.”

If the Republican nominees for the office of county commissioner for the County of Barnstable are held to be the two persons who received the highest number of votes, then, by virtue of G. L., c. 54, § 158, there will be only one Republican nominee who can be elected. Such a result would, in my opinion, be inconsistent with the provisions of G. L., c. 53, § 1, which authorize each party to nominate as many candidates for each office as there are persons to be elected to that office, and no more. In my judgment, this section must be interpreted to mean that the candidates who may be nominated are persons who are capable under the law of being elected, and that each party has a right to nominate as many as of such candidates for any office therein described as there are persons to be elected to such office. I am confirmed in this opinion by the provisions of G. L., c. 53, § 24, quoted above, which, in my opinion, require a consideration of the provisions of G. L., c. 54, § 158, in connection with the proper interpretation of G. L., c. 53, § 1.

I therefore advise you that, in the case you have stated, the two persons who are entitled to the Republican nomination for the office of county commissioner of Barnstable County are John D. W. Bodfish and Benjamin F. Bourne.

Very truly yours,

JAY R. BENTON, Attorney General.

Probation Officers — Retirement.

The classes of probation officers entitled or required to be retired under G. L., c. 32, §§ 75 and 76, defined.
The classes of probation officers who must be retired upon reaching the age of seventy years defined.

Oct. 9, 1924.

 Commission on Probation.

GENTLEMEN:— You have asked my opinion upon the following questions relating to the interpretation of G. L., c. 32, §§ 75 and 76.

“(1) What classes of probation officers are entitled or required to be retired under the provisions of G. L., c. 32, §§ 75 and 76?

(2) Whether all probation officers are required to be retired upon reaching the age of seventy years?

(3) Whether a probation officer, upon reaching the age of seventy years, having served less than twenty years, is required to be retired?

(4) Whether, if in your opinion a probation officer is required to retire upon reaching the age of seventy years, not having served twenty years, he is entitled to the pension prescribed in section 76?”

The original statute providing for pensions for probation officers was St. 1912, c. 723. Sections 1 and 2 of this statute were as follows:—

“SECTION 1. Any probation officer or assistant probation officer whose whole time is given to the duties of his office shall, at his or her request, be retired from active service and placed upon a pension roll by the court upon which it is his duty to attend, with the approval of the county commissioners of the county in which the court is situated; provided, that he is certified in writing by a physician designated by such court to be permanently disabled, mentally or physically, for further service by reason of injuries or illness sustained or incurred through no fault of his in the actual performance of his duty as such officer. Any probation or assistant probation officer whose whole time is given to his duties as such officer and who has faithfully performed his duties
as such officer for not less than twenty consecutive years, and who is not less than sixty years of age, shall also be retired under the provisions of this act at his or her request without the aforesaid certification.

Section 2. Every person retired under the provisions of this act shall receive an annual pension equal to one half of the compensation received by him at the time of his retirement, this amount to be paid by the county employing him, or, if he is employed by more than one county, then by the counties by which his salary is paid, and in the same proportion. It shall be the duty of every county to appropriate annually the sums required for this purpose."

This statute provided only for retirement at the option of the probation officer or assistant probation officer who should become entitled to retirement under its terms. Except as such an officer should choose to take advantage of the provisions of the statute, his tenure of office remained, as theretofore, governed by the provisions of those contemporary statutes which were the predecessors of what is now G. L., c. 276, § 83. That is to say, he held office during the pleasure of the court which appointed him.

St. 1916, c. 225, introduced the first provision for compulsory retirement. Section 1 thereof read as follows:—

"Any probation officer of any court who shall be eligible to a pension for twenty years' service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nineteen hundred and twelve, shall hereafter be retired upon attaining the age of seventy years."

It is quite plain upon the face of this enactment that the only probation officers as to whom retirement became mandatory were those who, because of their twenty years' continuous full-time service, should become entitled to pensions upon retirement and who should attain the age of seventy years.

G. L., c. 32, §§ 75 and 76, are now as follows:—

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

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

The first and second sentences of section 75 have not been materially altered from the form in which they appear in the statute of 1912. In the second sentence the words "such probation officer or assistant probation officer" are substituted for the words "probation or assistant probation officer whose whole time is given to his duties as such officer," the view of the Legislature having apparently been that the omitted description could be incorporated by the use of the word "such," which would refer back to the words in the first sentence of section 75—"whose whole time is given to the duties of his office." The third sentence of section 75 is plainly intended to be a condensation of the statute of 1916. The word "such" in this sentence was expected to serve as a substitute for the description found in St. 1916, c. 225—"who shall be eligible to a pension for twenty years' service under the provisions of section one of chapter seven hundred and twenty-three of the acts of the year nine-
teen hundred and twelve.” It therefore refers to the sort of officer who is described in the second sentence of section 75 as “such probation officer or assistant probation officer who has faithfully performed his duties for not less than twenty consecutive years.”

It does not appear with any convincing force that the Legislature, by the various elisions in section 75, intended to alter the pre-existing law. The reaching of this conclusion is aided by the familiar principle “of statutory construction, that mere verbal changes in the revision of a statute do not alter its meaning and are construed as a continuation of the previous law.” Main v. County of Plymouth, 223 Mass. 66, 69. Savage v. Shaw, 195 Mass. 571. Derinza’s Case, 229 Mass. 435, 442. Olilia v. Huikari, 237 Mass. 54, 56. I therefore answer your questions as follows:

As to the first: that the probation officers who are entitled to be retired under section 75 are those whose whole time is given to the duties of their office, and who have either been certified in writing by a physician, designated by the court upon which they attend, to be permanently disabled, mentally or physically, for further service, by reason of injuries or illness sustained or incurred through no fault of theirs, in the actual performance of their duty as such officers, and whose retirements have been approved by the county commissioners of the county in which the court is situated, or who have faithfully performed their duties for not less than twenty consecutive years and who are over the age of sixty years; that those probation officers are required to be retired, under the provisions of section 75, who, having reached the age of seventy, are then entitled, by virtue of having given their full-time service for not less than twenty consecutive years, to receive upon retirement the pension provided by section 76, or who, being over the age of seventy years, have, subsequently to reaching that age, become entitled, for the same reasons, to receive upon retirement such a pension.

As to the second: that only such probation officers are required to be retired upon reaching the age of seventy years as are characterized as subject to such compulsory retirement in my answer to your first question.

As to the third: that a probation officer who, upon reaching the age of seventy years, has served less than twenty years is not required to be retired.

As to the fourth: that it is rendered immaterial by the answer given to the previous questions.

Yours very truly,

Jay R. Benton, Attorney General.

Taxation — Board of Appeal.

Under G. L., c. 58, § 27, as amended by St. 1922, c. 382, providing that the Commissioner of Corporations and Taxation, with the approval of the Attorney General, may abate certain taxes, in cases where they shall appear to have been illegally exacted, excessive or unwarranted, and that the decision of the Commissioner and Attorney General shall be final, no appeal lies to the Board of Appeal from the refusal of the Commissioner to grant relief under that provision.

Nov. 2, 1924.

Board of Appeal.

Gentlemen: — My opinion is asked whether an appeal lies to the Board of Appeal from the refusal of the Commissioner of Corporations and Taxation to grant relief under the provisions of G. L., c. 58, § 27, as amended by St. 1922, c. 382, to an applicant for abatement of income taxes. Said section 27, as amended, is, in part, as follows: —

“If it shall appear that an income tax, a legacy and succession tax, or a tax or excise upon a corporation, foreign or domestic, was in whole or in part illegally assessed or levied, or was excessive or unwarranted, the commissioner may, with the approval of the attorney general, issue a certificate that the party aggrieved by such tax or excise is entitled to an abatement, stating the amount thereof. If the tax or excise has been paid, the state treasurer shall pay the
amount thus certified in such manner as the certificate shall provide, without any appropriation therefor by the general court. No certificate for the abatement of any tax or excise shall be issued under this section unless application therefor is made to the commissioner within two years after the date of the bill for said tax or excise, or for an amount exceeding the sum which in equity and good conscience ought to be abated under all the circumstances of the case. . . . The decision of the commissioner and attorney general shall be final. . . . This section shall be in addition to and not in modification of any other remedies.”

Provision is made in G. L., c. 62, § 43, for application to the Commissioner for abatement of an income tax, and in section 45 for appeal to the Board of Appeal upon the refusal of the Commissioner to abate such tax under section 43. There is no other provision in the statutes for appeal to the Board of Appeal from an assessment of an income tax, unless such provision is to be found in G. L., c. 58, § 27.

I understand that the application to the Commissioner for an abatement was made not under G. L., c. 62, § 43, but under G. L., c. 58, § 27, as amended. That section contains an express provision to the effect that “the decision of the commissioner and attorney general shall be final.”

In my opinion, it is clear that no appeal lies to the Board of Appeal from the refusal of the Commissioner to grant relief under that section, and that the board is without jurisdiction in the matter.

Very truly yours,

JAY R. BENTON, Attorney General.

**Drainage Law — Financial Improvement.**

A reclamation district organized under St. 1923, c. 457, under an arrangement whereby the expense of the improvement is to be apportioned between the district and the county, may not issue bonds for the purpose of financing the county’s share of the undertaking, with the understanding that the district shall subsequently be reimbursed.

Nov. 7, 1924.

DR. ARTHUR W. GILBERT, Commissioner of Agriculture.

Dear Sir: — You state that plans have been made for construction work required for the proper drainage of the Green Harbor district, the expense of which is to be apportioned between the reclamation district at Green Harbor and the county commissioners of Plymouth County, that the county has no money available from its appropriation of the current year to pay its share of the expense, and that it has been suggested that the project should be funded by issuing bonds of the district, to which the county’s share of the expense is to be repaid as soon as the money is made available by appropriation. You ask my opinion whether such a procedure is permissible.

You state that the district is organized under St. 1923, c. 457, and St. 1924, c. 93. St. 1923, c. 457, provides for the organization of reclamation districts, repealing earlier law on that subject. It is amended by St. 1924, c. 93, in respects not here material.

Provisions for financing proposed improvements in reclamation districts are contained in sections 9 and 10 of the 1923 statute. These sections are, in part, as follows: —

“Section 9. As soon as possible after the estimate of the expense of the proposed improvements has been made by the commissioners and reported to the board, said commissioners shall request the clerk to call a meeting of the district for the purpose of deciding upon a method of financing such improvements. If the district so votes the commissioners shall petition the county commissioners of the county where the greater part of the land lies, annexing a certified copy of the petition under section five and of the determination of the board thereon, and a statement of the estimated expense of the proposed improvements and shall request the county commissioners to vote to pay in the first instance the total expense involved in making the improvements ap-
P.D. 12.

proved by the board, and the said county commissioners may so vote. To
defray any expense incurred by said county commissioners under such vote,
the county treasurer, with the approval of the county commissioners, may issue
bonds or notes of the county to an amount not exceeding such expense, payable
in such period, not exceeding twenty-five years from their dates of issue, as
the county commissioners may determine. . . . Payments on account of
principal and interest shall be made by the county and repaid to the county
by the district.

Section 10. The district may, instead of instructing the commissioners to
petition the county commissioners as provided in the preceding section, vote
to finance the expense of the improvements in accordance with any one of the
three methods hereinafter specified. (1) If all the members of the district agree,
the district may raise by assessments upon the proprietors or by voluntary
contributions and deposit with the state treasurer the total sum required to
meet the estimated expense of the improvements. Such deposits shall be held by
the state treasurer to the credit of the district, and payments shall be made
therefrom as provided in section fourteen. (2) The district may pay the whole
expense of the improvements from time to time as the work is performed and
for this purpose may incur debt for a temporary loan in anticipation of the
collection of assessments from the members of the district during the calendar
year in which said debt is incurred or during the next succeeding calendar year.
(3) The district may incur debt to the amount necessary to pay the estimated
expense of the proposed improvements and may issue therefor notes or bonds,
and may, if the board approves, issue notes or bonds on the condition that the
first payment on account of the principal shall be deferred for a period of not
more than five years from the date of issue of such notes or bonds and that
the whole amount of such debt shall be payable within a period of not more
than twenty-five years after such notes or bonds are issued."

The proposed plan for financing the construction evidently is the third
method specified in section 10. The phrase "the estimated expense of the
proposed improvements" evidently refers to the estimate of the expense of the
proposed improvements, which by section 9 is to be made by the district
commissioners and reported to the board before any method of financing the
improvements is decided upon. I do not understand that any such estimate
has yet been prepared; but I must assume that the estimate, when made, will be
an estimate of the expense of improvements for which the district will be finally
responsible, and that it will not include other costs not to be properly charge-
able to the district.

In my opinion, bonds of the district may not be issued for the purpose of
financing the county's share of the undertaking, with the understanding that the
district is to be repaid by the county when funds are made available.

Very truly yours,

JAY R. BENTON, Attorney General.

Board of Appeal — Delegation of Duties.

The duties of the State Treasurer and State Auditor as members of the Board
of Appeal constituted by G. L., c. 6, § 21, are official duties, and during
their illness, absence or other disability may be performed by their respec-
tive deputies, in accordance with G. L., c. 10, § 5, and c. 11, § 2.

Nov. 8, 1924.

Board of Appeal.

GENTLEMEN: — You have asked my opinion as to the authority of the State
Treasurer and the State Auditor, respectively, to delegate the performance of
their duties as members of the Board of Appeal to their deputies or to other
persons, and as to the authority of such deputies to perform such duties during
the illness, absence or other disability of the State Treasurer or the State
Auditor.

The Board of Appeal is constituted by G. L., c. 6, § 21, which is as follows: —
"The state treasurer, the state auditor and a member of the council designated by the governor, shall constitute the board of appeal from decisions of the commissioner of corporations and taxation."

G. L., c. 10, § 5, provides, in part, as follows: —

"The state treasurer may, with the consent of the governor and council, appoint, and may for cause with such consent remove, a first and a second deputy treasurer, shall prescribe their respective duties, and, with the approval of the governor and council, shall determine their salaries. During the illness, absence or other disability of the treasurer, his official duties shall be performed by the said deputies in the order of seniority. . . ."

G. L., c. 11, § 2, provides for the appointment by the State Auditor of a first deputy auditor, in the following terms: —

"He shall, with the consent of the governor and council, appoint a first deputy auditor, at a salary to be fixed by the auditor, with the approval of the governor and council, who shall perform such duties as may be assigned to him by the auditor and who may be removed by him for cause at any time, with the consent of the governor and council. If, by reason of sickness, absence or other cause, the auditor is temporarily unable to perform the duties of his office, the first deputy shall perform the same until such disability ceases. In the event of a vacancy in the office of auditor, the first deputy shall be continued in office and shall perform all statutory duties of the auditor until an auditor shall be duly qualified. . . ."

The office of second deputy auditor, for which provision is made in G. L., c. 11, § 3, was abolished by St. 1922, c. 545, § 27.

The duties which the Board of Appeal constituted by G. L., c. 6, § 21, is called upon by the statutes to perform, are, in my judgment, official duties. It is therefore my opinion that during the illness, absence or other disability of the State Treasurer or the State Auditor the duties of those officers, respectively, as members of the Board of Appeal may be performed by their deputies, in accordance with the provisions of G. L., c. 10, § 5, and c. 11, § 2, respectively. I am of the opinion that neither the State Treasurer nor the State Auditor has any power to delegate the performance of his duties as a member of the Board of Appeal in any other manner than is provided by the statutory enactments above referred to.

Very truly yours,

JAY R. BENTON, Attorney General.

Statements of Political Expenses — Filing.

Statements of political expenses required by G. L., c. 55, §§ 16 and 17, should not be accepted for filing prior to the last day for filing nominations, in the case of nomination expenses, nor prior to the election, in the case of election expenses.

Nov. 10, 1924.

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

Dear Sir: — You request my opinion as to whether statements of political expenses, required by G. L., c. 55, §§ 16 and 17, may properly be accepted for filing by your office prior to the beginning of the periods referred to in said sections as the periods within which such statements shall be filed.

Section 16 is as follows: —

"Every candidate for nomination to a public office shall, within seven days after the last day for filing nominations for that office, and every candidate for election to a public office shall within fourteen days after the election held to fill the office, file a statement setting forth each sum of money and thing of value expended, contributed, or promised by him, for the purpose of securing or in any way affecting his nomination or election to the office, and the name of the person or political committee to whom the payment, contribution or promise was made and the date thereof, or, if nothing has been contributed, expended or promised by him, a statement to that effect."
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Section 17 provides that —

"The treasurer of every political committee ... shall, within thirty days after such election, file a statement . . . ."

Inasmuch as the statements required of candidates for election and of treasurers of political committees must cover the entire period preceding election, any statement filed prior to election is, obviously, incomplete. Although the practical objection to the acceptance of statements of candidates for nomination prior to the last day for filing nominations may not be so serious, I am of the opinion that here, too, statements submitted to your office prior to the date fixed by the statute should not be accepted.

Yours very truly,

JAY R. BENTON, Attorney General.

Police Officer — Expenses of serving Warrant — Payment.

The expenses of a police officer, necessarily incurred in the service of a warrant or capias in a criminal case tried in a district court, should be paid by the clerk of the district court.

Nov. 11, 1924.


Dear Sir: — You request my opinion as to whether expenses incurred by a police officer in connection with the service of a warrant are included in the "fees and expenses of officers" which are to be paid by clerks of district courts under the provisions of G. L., c. 218, § 47.

G. L., c. 262, § 21, provides that an officer serving a precept in criminal cases shall be allowed "the actual, reasonable and necessary expenses incurred in going or returning with the prisoner . . . and if he uses the . . . conveyance of another person, he shall be allowed the amount actually expended by him therefor." The officer must certify that the use was necessary and that he paid the amount stated.

G. L., c. 262, § 50, provides that although no officer who receives a salary or an allowance by the day or hour shall be paid any fee or extra compensation for official services performed by him in any criminal case, yet "his expenses, necessarily and actually incurred, and actually disbursed by him, . . . in a criminal case tried in a district court," shall be paid by the town where the crime was committed.

G. L., c. 218, § 47, provides that clerks of district courts "shall" pay "the fees and expenses of officers entitled thereto from the funds in their hands payable to the city or town liable for the payment of such fees and expenses." The expenses herein referred to are the expenses described in G. L., c. 262, §§ 21 and 50. See St. 1890, c. 440, § 8. These include expenses necessarily and actually incurred in the service of a warrant or capias, as well as of other precepts.

In my opinion, therefore, the expenses to which you refer are properly paid by clerks of district courts under G. L., c. 218, § 47.

Very truly yours,

JAY R. BENTON, Attorney General.


The business of security guarantee insurance is not a form of the insurance business authorized by G. L., c. 175.

Nov. 11, 1924.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have requested my opinion upon certain questions as they relate to the following facts set forth in your letter:

"The Investors Guaranty Corporation of New England is a domestic business corporation formed under the provisions of G. L., c. 156. Among the purposes for which it was organized are the following: —
'To examine and guarantee the validity and legality of bonds or other evidences of indebtedness of any private or public corporation; to guarantee the payment of real estate mortgages, also payment of investment bonds and notes secured by mortgage or otherwise, or unsecured, including the payment of interest thereon at a fixed rate per annum; to undertake in whole or in part the liabilities of any person, firm or corporation.'

This corporation desires to begin the transaction of business, and the question has been raised as to whether or not any of the aforesaid purposes constitute the business of insurance under G. L., c. 175.'

The questions which you propound are these:—

1. Is there any distinction between a contract of guaranty and a contract of insurance where the guarantor receives a consideration for his guaranty?

2. Do any of the aforesaid purposes purport to permit this corporation to engage in the business of insurance as defined by section 2 of said chapter 175?

3. If the preceding question is answered in the affirmative, are those provisions of this charter which purport to permit the transaction of insurance invalid and of no effect because the corporation was not organized under section 49 of said chapter 175?

4. If the second question is answered in the affirmative, do any of the purposes above specified constitute credit insurance as set forth in the tenth clause of section 47 of said chapter 175?

5. If the second question is answered in the affirmative, do any of the purposes above set forth constitute title insurance as set forth in the eleventh clause of said section 47?

6. May the Commissioner lawfully grant a certificate to said corporation under section 32 of said chapter, provided its capital is sufficient: (a) If question 4 is answered affirmatively and questions 3 and 5 in the negative? (b) If question 5 is answered in the affirmative and questions 3 and 4 in the negative?

7. Is this corporation, in view of the provisions of its charter above specified, governed by the provisions of G. L., c. 173 and 174?'

1. I answer your first question in the affirmative. There are various contracts of guaranty which are not contracts of insurance. A contract of guaranty of such a character is considered in Attorney General's Report, 1921, p. 11.

I am of the opinion that the word "guarantee," as used in the first clause of the purposes of organization, as above set forth, has its primary signification, and relates to a guarantee by the company of the correctness of its examination into the legality and validity of bonds and other evidences of indebtedness which it makes for its customers, and that the word as used in this clause does not connote "indemnification" to the customer for the loss which he might sustain by the repudiation or non-payment of the evidences of indebtedness. This being so, no power to make contracts of insurance is conferred by the first clause.

2. I answer your second question in the affirmative. The word "guarantee" is often used in a broad sense, including in its scope other contracts than those of pure guaranty, and I am of the opinion that the word "guarantee," as used in the second clause of the purposes of incorporation, in the phrase "to guarantee the payment of," has the broad meaning, and as there used connotes "indemnification" of the owner of the securities whose payment may be "guaranteed" as to the loss which he may sustain by reason of the failure of the makers of such securities to fulfill their obligations to him. As thus used, a power to make contracts of insurance purports to be created in the corporation with relation to the various forms of hazard indicated in the second clause. The carrying into effect of this power will result in the formation of contracts of insurance of the type commonly known as "guaranty insurance," and more specifically as "security guaranty insurance."

This form of insurance is one recognized in many jurisdictions, and in some is made by statute specifically one of the kinds of insurance business which may be transacted within a given State, as, for example, in New York.

The term "guaranty insurance" is not used with any hard and fast meaning,
and has been said to be generic in its scope and signification. *People v. Potts*, 264 Ill. 522. It includes various kinds of insurance, and among them the payment of losses sustained by the holders of evidences of indebtedness (*People v. Rose*, 174 Ill. 310; *1 Joyce, Insurance*, § 12), including the payment of losses sustained by the holders of debentures [*Finley v. Mexican Inv. Corp.* (1897), 1 Q. B. 517; *Shaw v. Royce* (1911), 1 Ch. 138; *In re Law Guarantee Soc. v. Munich Re-Ins. Co.* (1912), 1 Ch. 138], and losses by mortgagees (*Penn. Co. v. Central Trust*, 255 Pa. 322).

The contemplated agreement to indemnify, which is signified by the words “guarantee the payment of” in the purposes of incorporation before me, is intended to protect the party purchasing mortgages, bonds and other evidences of indebtedness, with whom such agreement may be made, against loss resulting from a designated hazard connected with such securities and evidences of indebtedness, and falls within the definition of contracts of insurance set forth in G. L., c. 175, § 2.

3. In answer to your third question, I am of the opinion that the provisions of section 49 of chapter 175 must be followed with relation to the organization of corporations formed for any of the purposes mentioned in such chapter. The purpose of carrying on the business of guaranty insurance, as provided for by the articles of incorporation of the company under discussion, is not one of the purposes mentioned in such chapter. It could not therefore lawfully be formed for the purpose of carrying on such kind of insurance business under section 49, nor can it lawfully carry on such business irrespective of the manner in which it was actually formed, by reason of the prohibitions of section 3.

4. I answer your fourth question in the negative. Although “credit insurance,” the subject of clause 10 of section 47 of chapter 175, is a form of guaranty insurance, the purposes of the corporation under discussion do not purport to empower it to transact all of the numerous kinds of insurance business which fall under the general head of guaranty insurance, but purport to authorize it to do business only as to those kinds of guaranty insurance enumerated in the purposes. Credit insurance relates to the coverage of debts due merchants from customers (*People v. Mercantile Credit Co.*, 166 N. Y. 416; *Strouse v. American Credit Ins. Co.*, 91 Md. 244; *Joyce Insurance*, § 12), and the language of clause 10 of section 47 does not extend the meaning of credit insurance beyond its usual signification. In this connection it is to be noted, as casting light upon the intention of the Legislature to give to the words “the business commonly known as credit insurance or guaranty,” in section 47, clause 10, only the usual meaning given to “credit insurance,” which confines it to the coverage of debts due merchants from customers, that this clause was originally enacted by St. 1896, c. 447, immediately after the opinion of the Supreme Court in *Claslin v. United States Credit System Co.*, 165 Mass. 501, wherein the court had held that no authority was given by previously existing statutes to incorporate companies “to insure mercantile credits or accounts.” The wording of the purposes does not show an intent to empower the corporation to engage in this subsidiary branch of guaranty insurance.

5. I answer your fifth question in the negative. The powers which the second clause of the purposes of organization purports to give to the company do not come within the enumerated purposes of clause 11 of section 47, commonly known as “title insurance.” The guarantee of payment of mortgages referred to in the second clause of the purposes of organization does not relate to “any mortgage held or sold by the insurer,” as do provisions of clause 11 of section 47, but refers to loss through the non-payment of mortgages with which the insuring company has no connection. The guarantee does not run specifically against loss by reason of encumbrances or defective titles but relates more particularly to loss by reason of non-payment from any cause. The powers given in the first clause of the purposes do not relate to those commonly exercised in the business of title insurance, as such, nor do they fall within those enumerated in clause 11.

The third clause of the purposes of organization purports to give the power “to undertake the liabilities of any person, firm or corporation.” The word “undertake” has, among other meanings, that of “guarantee.” Such a power
is a broad one, but it does not give authority to the corporation to hold or sell mortgages or to carry out the other purposes mentioned in clause 11 of section 47, nor does it give authority to engage in the business of credit insurance, within the meaning of clause 10.

6. In relation to your sixth question, I am of the opinion that the purposes of incorporation do not give power to the corporation to engage in either the business of credit insurance or that of title insurance, as defined by clauses 10 and 11 of section 47, respectively, as I have previously indicated, but that the powers given by the purposes of incorporation purport to give to the corporation power to engage in the business of guaranty insurance, so called, in so far as that form of insurance relates to securities of various sorts. This form of the insurance business is not one of the kinds which are authorized by the provisions of chapter 175, so that the Commissioner may not lawfully grant a certificate to the said corporation under section 32 of chapter 175.

7. I answer your seventh question in the negative.

Yours very truly,

JAY R. BENTON, Attorney General.

Commissioner of Agriculture—Inspection of Apples—Interstate Commerce.
The Commissioner of Agriculture has the right to inspect apples during the process of packing in this Commonwealth notwithstanding a declared intention by the owner to ship such apples to points outside of the Commonwealth.

Nov. 13, 1924.

DR. ARTHUR W. GILBERT, Commissioner of Agriculture.

Dear Sir:—You request my opinion as to whether the Commissioner of Agriculture has the right to inspect apples during the process of packing in this Commonwealth, in spite of a declared intention on the part of the owner or packer to ship them outside of the State.

G. L., c. 94, §§ 110 and 114, read as follows:—

"SECTION 110. The commissioner of agriculture shall make and may modify rules and regulations for enforcing sections one hundred to one hundred and seven, inclusive, one hundred and nine and one hundred and twelve, and shall, either in person or by his assistant, have free access at all reasonable hours to each building or other place where apples are packed, stored, sold, or offered or exposed for sale. He may also, in person or by his assistant, open each box, barrel or other container, and upon tendering the market price may take samples therefrom.

"SECTION 114. Apples shipped in the course of interstate commerce and packed and branded in accordance with the act of congress approved August third, nineteen hundred and twelve, and known as 'The United States Apple Grading Law,' shall be exempt from sections one hundred and one to one hundred and seven, inclusive, one hundred and nine, one hundred and ten, one hundred and twelve and one hundred and thirteen.'"

Apples which are in the process of being packed have not been "shipped in the course of interstate commerce," and therefore section 114 is inapplicable. Nor, in my opinion, apart from the provisions of section 114, is inspection, under section 110, of apples in the process of being packed an interference with interstate commerce, which does not begin until the goods "commence their final movement for transportation from the State of their origin to that of their destination." Coe v. Errol, 116 U. S. 517, 525; Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134, 150.

Yours very truly,

JAY R. BENTON, Attorney General.
Landlord and Tenant — Lease by Parol — Lessor — Contract to furnish Water, Heat, Light, etc.

St. 1920, c. 555, § 1, imposing a penalty upon any "lesser" who wilfully fails to perform an obligation to furnish water, heat, light, etc., applies to tenancies created by parol as well as by writing.

Nov. 17, 1924.

Mr. Eugene C. Hultman, Chairman, Commission on the Necessaries of Life.

Dear Sir: — You request my opinion as to whether St. 1920, c. 555, applies "to tenants at will as well as to tenants under lease."

I assume that you refer to a distinction between a tenancy created by parol and a tenancy created by an instrument in writing. A tenancy at will may be created by an instrument in writing. Murray v. Cherrington, 99 Mass. 229.

St. 1920, c. 555, § 1, reads as follows: —

"Any lessor of any building, or part thereof, who is required by the terms, expressed or implied, of any contract or lease to furnish water, heat, light, power, elevator service or telephone service to any occupant of the building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service or telephone service at any time when the same is necessary to the proper or customary use of the building, or part thereof, or any lessor who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months."

The word "lease," although often used as referring to the written instrument by which a tenancy is created, is also used, in the law, with reference to the letting or creation of a tenancy. This is its primary meaning. In this sense a lease may be made by parol as well as by writing, and although it is provided under G. L., c. 183, § 3, that a lease by parol "shall have the force and effect of an estate at will only," this provision does not make it any the less a lease. Elliott v. Stone, 1 Gray, 571, 574. For example, also, in R. S., c. 60, § 26, the term "such lease" is used in reference to the preceding words — "all estates at will."

There is still less reason for restricting the meaning of the word "lesser" to one who lets by an instrument in writing; and, in my opinion, this word, as used in St. 1920, c. 555, is not to be so construed.

Yours very truly,

Jay R. Benton, Attorney General.

Constitutional Law — Taxation of National Banks and Other Moneyed Capital.

A tax on national bank shares at a rate uniform throughout the Commonwealth would not, in conjunction with the present system of local taxation, be constitutional under pt. 2d, c. 1, § 1, art. IV, of the Massachusetts Constitution.

Similarly of a corresponding uniform tax upon "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks."

A tax upon such competing moneyed capital at the local property tax rate, with the exclusion of such capital from the Massachusetts income tax, would not offend against the Federal Constitution, nor, though more doubtfully, against Mass. Const. Amend. XLIV.

A tax upon the income of mercantile, manufacturing and business corporations, either as an excise or as an income tax under Mass. Const. Amend. XLIV, would be constitutional; but if imposed under that amendment, it must conform to its limitations.

A tax upon the income of national banks and other financial corporations at a rate lower than that upon the income of mercantile, manufacturing and business corporations would be constitutional, at least if imposed as an excise.
A tax upon the income of national banks under U. S. Rev. Stat., § 5219, cl. 1 (e), need not be at the same rate as the tax upon competing moneyed capital of individuals or copartnerships.

Nov. 17, 1924.

Mr. Charles A. Morris, Chairman, Special Commission on the Taxation of Certain Banking Institutions.

DEAR SIR:—In connection with the performance of the duties imposed upon your Commission by chapter 20 of the Resolves of 1924, you have asked my opinion upon certain questions of law relating to the powers of the General Court in the imposition of taxes upon national banking associations or their shares or property. Before taking up the specific questions a brief preliminary discussion will be helpful.

By Mass. Const., pt. 2d, c. 1, § 1, art. IV, the General Court is empowered "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

Until the adoption of the income tax amendment in 1915 this clause contained the sole grant of power to levy taxes contained in our Constitution. It will be noted that it authorizes two main classes of taxes, namely: first, property taxes, which are required to be proportional and reasonable; and second, duties and excises, which are merely required to be reasonable.

Mass. Const. Amend. XLIV is as follows:—

"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 general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. Any class of property the income from which is taxed under the provisions of this article may be exempted from the imposition and levying of proportional and reasonable assessments, rates and taxes as at present authorized by the constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises."

This amendment authorizes the imposition of an income tax under certain specific conditions and limitations. It permits the selection of certain classes of property; the imposition of an income tax upon the income of such property, and the exclusion of any class of property thus taxed upon its income from the proportional taxes authorized by the original Constitution. It requires, however, "that the tax shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property." Thus, this amendment, subject to certain express conditions and limitations, has modified the requirement of the original Constitution that property taxes shall be proportional. Except as thus modified this requirement still remains in full force.

The Fourteenth Amendment to the Constitution of the United States provides that no "state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

It is well settled that this limitation does not require equality in taxation, but merely such reasonable classification in the application of tax laws that the result shall not be so unfair and unequal as to amount to an arbitrary taking of property under the guise of taxation. Thus, this provision imposes little if any limitation beyond that of our own Constitution requiring that both property taxes and excises shall be reasonable.

The most important Federal limitation upon the power to tax national banks grows out of their character as instrumentalities of the Federal government, created by it for the performance of certain of its governmental functions. It is a fundamental limitation, implied from the nature of our government,
that the States can impose no tax upon these banks as such instrumentalities or with reference to their shares as the property of the shareholders which will to any extent impair the efficiency of the banks as Federal agencies. For this reason, when the national banking system was first established in 1863, Congress expressly defined the extent to which the States should be permitted to tax the property or shares of these banks. It is settled beyond question that no tax imposed by States upon national banks, their property or their shares, is valid which does not comply with the limitations imposed by this act of Congress. As a result of recent discussions of the matter of national bank taxation, this provision, which has long appeared as section 5219 of the Revised Statutes of the United States, was amended by an act of Congress which became effective March 4, 1923. This act is as follows:—

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such associations, provided the following conditions are complied with:

1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the others.
   (b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.
   (c) In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits.
   (d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares or the net income as above provided of any national banking association owned by non-residents of any State, or the dividends on such shares owned by such non-residents, shall be taxed in the taxing district where the association is located and not elsewhere; and such associations shall make return of such income and pay the tax thereon as agent of such non-resident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section."

The result is that any legislation which you may suggest for the future taxation of national banks, their property or their shares must comply with the requirements of U. S. Rev. Stat., § 5219, as amended. For a further discussion of U. S. Rev. Stat., § 5219, of its history and meaning, of the situation which brought about this amendment, and of the recent litigation in Massachusetts concerning bank taxation, I refer you to a communication dated April 12, 1923, sent by me to the House of Representatives in response to an order passed by it, which communication was printed as House Document No. 1441 of that year. Attorney General's Report, 1923, p. 85.
I proceed to the discussion of your specific questions. The first three questions may be considered together. They are as follows:

"(1) Can the General Court, in the manner permitted under clause 1 (b) of section 5219 of the United States Revised Statutes, pass a law which will impose a tax upon the shares of national banks at a uniform rate throughout the Commonwealth?

(2) If your answer to the previous question is in the affirmative, can such uniform rate be fixed at a rate which is lower than the tax on real and personal property in the city or town in which the national bank is located?

(3) If your answers to questions 1 and 2 are in the affirmative, could the same rate of taxation that would be applied to national banks by such a contemplated statute be imposed upon "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks?"

These questions appear to assume a compliance with the limitations imposed by U. S. Rev. Stat., § 5219, as amended, which, as I have stated, is a necessary prerequisite. The tax suggested is a property tax imposed under the tax powers of the original Massachusetts Constitution upon the shares of national banks as the property of their shareholders. Accordingly, the question is whether such a tax would comply with the proportional requirement of that Constitution.

I interpret these questions as suggesting no fundamental changes in the general policy of the Commonwealth of levying and imposing all taxes upon real estate and upon personal property, not subject to the income tax, by the cities and towns of the Commonwealth at the rates made necessary by the local requirements. These questions appear merely to suggest the selection of two classes of personal property, namely: shares in national banks and "other moneyed capital in the hands of individual citizens coming into competition with the business of national banks," and the taxation of the same either by the Commonwealth or by the cities and towns at a uniform rate throughout the Commonwealth, determined by some method entirely different from the manner in which local tax rates are determined, and differing substantially from the local rates in the municipality where each bank whose shares are thus taxed is located. It is plain that such a tax would not be valid even though the rates adopted were lower than the rate of taxation on real and personal property in any town in which any national bank was located. It contemplates the taxation of two classes of property upon their capital value as property, at a different rate from the tax of the same character imposed upon real estate and other classes of personal property subjected to this form of taxation. Such a tax would plainly not be proportional. Portland Bank v. Apthorp, 12 Mass. 252; Oliver v. Washington Mills, 11 Allen, 268; Cheshire v. County Commissioners, 118 Mass. 386; Perkins v. Westwood. 226 Mass. 268; see, also, Opinions of the Justices, 195 Mass. 607, and 220 Mass. 613.

It has been suggested that, as the taxation of national bank shares is limited by a Federal restriction lying entirely outside of the Massachusetts Constitution, the proportional requirement of that Constitution would be satisfied if the General Court adopted a method of taxing bank shares which did not violate the limitations imposed by the act of Congress, and at the same time approached as nearly as possible to a proportional tax without actually being such a tax under our Constitution as an independent instrument.

In my judgment, no such question can now arise, since the Federal statute, as now amended, plainly permits a tax upon bank shares which shall be unquestionably proportional by authorizing the inclusion of those shares in the general local property tax, provided only all other competing moneyed capital is also so included.

It follows that each of these questions must be answered in the negative. Your fourth question is as follows:

"(4) Would it be repugnant to the provisions of the Federal or the Massachusetts Constitution to impose a tax on 'moneyed capital in the hands of individual citizens coming into competition with national banks' at the local
property tax rate, and exclude such capital in the hands of individuals from the tax now imposed upon the income therefrom under the provisions of the income tax law?"

In my judgment, such a tax would not be repugnant to the Federal Constitution for it could not be said to be based upon a classification so unreasonable and arbitrary as to amount to a confiscation of property.

The sole question is whether such a method of taxation would comply with the requirements of Mass. Const. Amend. XLIV. "Moneyed capital in the hands of individual citizens coming into competition with national banks" is now subject to an income tax imposed under this amendment, and is exempt from the local property tax. The suggestion is that this class of property be taken out of this income tax and be put back under the local property tax, subject to the proportional requirement, where it was before the adoption of the income tax law in 1916.

The income tax amendment permits that a tax levied under its authority may be "at different rates upon income derived from different classes of property." But it requires that such a tax "shall be levied at a uniform rate throughout the Commonwealth upon incomes derived from the same classes of property." Obviously, moneyed capital employed in the banking business is invested in notes, bonds and money at interest, which classes of property are taxed under the income tax law when owned by citizens generally. The result would be that property of this general character, when representing an investment of banking capital, would be subject to a property tax at the local rate, and when owned by citizens in general not engaged in the banking business would be taxed upon its income only. Whether or not this is permissible depends upon the sort of classification which Mass. Const. Amend. XLIV permits. Does it require that classification to be based upon the fundamental character of the property itself or may the use to which property is put be a basis of classification in the imposition of taxes under this amendment? If classification based upon the character of the property itself is required, your question must be answered in the affirmative. If classification based upon use is permitted, the tax which the question suggests would seem to be permissible. The Supreme Judicial Court has held that this amendment is to be construed broadly as a grant of an important tax power by the people to the General Court. Tax Commissioner v. Putnam, 227 Mass. 522. But it has not as yet had occasion to deal with any question relating to the character of the classification permitted by the amendment. Presumably, if a tax such as this question proposes is put in force, an attack upon its validity will be promptly made in the courts. It is not possible to advise, in view of the absence of authority upon this matter, how such litigation is likely to result. My own judgment is, however, that Mass. Const. Amend. XLIV permits classification of property based upon the use to which it is put or the general character of the business in which it is employed, and that a tax of the nature suggested by your question is thus authorized by the amendment.

Your fifth question is as follows: —

"(5) Can the General Court, under the Massachusetts Constitution, impose a tax upon the income of mercantile, manufacturing and business corporations?"

I answer this question in the affirmative. By G. L., c. 63, §§ 30-52, inclusive, an excise tax is now imposed upon such domestic corporations, based in part upon the value of their corporate excess and in part upon their net incomes; and a similar tax is imposed upon such foreign corporations, based in part upon the value of their corporate excess employed within the Commonwealth and in part upon their net incomes derived from business carried on within the Commonwealth. This has been sustained as a valid exercise of the power conferred by the Massachusetts Constitution to impose reasonable excises. Eaton, Crane & Pike Co. v. Commonwealth, 237 Mass. 523. There is no doubt that such an excise would be equally valid if the corporate excess feature were eliminated and it were based entirely upon net income earned within the Commonwealth.

It would also be well within the power of the General Court to impose a tax
upon the income of such corporations, whether derived from the property owned by them or otherwise, under the provisions of Mass. Const. Amend. XLIV. Such a tax, however, would be, in the main and perhaps entirely, a property tax and not an excise imposed upon a corporate franchise or upon the privilege of doing business within the Commonwealth. To be valid it must, of course, comply with the conditions and limitations contained in that amendment. If different rates were adopted for the income of corporate property from those applied in the taxation of the property of individual inhabitants, difficult questions as to the validity of such a classification would at once arise. As your question can readily be answered in the affirmative by a reference to the power to levy excises, there seems to be no occasion for discussing this last-mentioned phase of the matter further at the present time.

Your sixth question is as follows:—

"(6) Would it be repugnant to the Massachusetts and the Federal Constitution for the General Court to pass a law which would establish a rate of taxation on the income of national banks and other financial corporations which was lower than the rate or burden of taxation imposed upon mercantile, manufacturing, and business corporations?"

The only limitation imposed upon such a tax by the Federal Constitution or growing out of the nature of the Federal government is that arising from the fact that national banks are instrumentalities of the Federal government and thus beyond the reach of any State taxation which to any extent impairs their efficiency as Federal agencies. Prior to the amendment to U. S. Rev. Stat., § 5219, which became effective March 4, 1923, a valid tax could not be imposed upon the income of a national bank. *Owensboro National Bank v. Owensboro*, 173 U. S. 664.

As amended, however, that section authorizes the States "to tax the income of such associations" upon the condition that,—

"In case of a tax on the net income of an association, the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon the net income of mercantile, manufacturing, and business corporations doing business within its limits."

I have no doubt that a tax upon the income of a national bank which complies with this limitation is valid. The Federal statute, as thus amended, is a conclusive determination by Congress that a tax upon the income of a national bank thus limited will not foster unfriendly competition against them or in any manner impair their efficiency as Federal agencies.

It is also unimportant, in my judgment, whether a tax upon the income of national banks, which otherwise complies with this limitation, is regarded and imposed by a State as an excise or as a property tax. The purpose of U. S. Rev. Stat., § 5219, both in its original form and as amended, was merely to protect the banks from tax burdens which, when compared with the similar burdens imposed upon their competitors, would create and foster an unequal and unfriendly competition. *Mercantile Bank v. New York*, 121 U. S. 138; *Merchants' National Bank v. Richmond*, 256 U. S. 635.

In determining questions which have come before it under this Federal statute the Supreme Court of the United States has always regarded the burden and the effect of the tax. It has paid little attention to mere matters of form. In my judgment, section 5219, as amended, authorizes the imposition by a State of any form of tax upon or measured by the income of a national bank permitted by its Constitution, provided the specific limitations mentioned in the section are observed. So far as the Federal law is concerned, therefore, the General Court may impose a tax upon the income of national banks either under its general power to levy excises or under the power granted by Mass. Const. Amend. XLIV to impose income taxes.

In my judgment, the carrying on of business within the Commonwealth by a national bank, under its corporate franchise and subject to the protection of our laws, is a proper object of an excise, even under the somewhat narrower
rule stated by our court in *Gleason v. McKay*, 134 Mass. 419, and *O'Keeffe v. Somerville*, 190 Mass. 110, to the effect that no valid excise can be imposed upon the exercise of a natural right. Of course, it is true that, unlike the foreign corporation, a national bank cannot be excluded from the Commonwealth. Nor can regulations be imposed upon its methods of business which would interfere with the performance of its governmental functions. Yet, as is pointed out in *Greves v. Shaw*, 173 Mass. 205, 208, such banks are, by the Federal statutes creating them, given a definite local status. They are in fact exercising their corporate franchises here, and their business is subject to all the general laws of the Commonwealth which do not conflict with any specific Federal statute or impair their efficiency as Federal agencies. As decided in the last-mentioned case, their shares are within the jurisdiction of the Commonwealth as property for the purpose of descent and distribution and also for the purposes of a legacy and succession tax, even when owned by non-residents of the Commonwealth. Thus, in many respects they partake of the nature of domestic corporations rather than that of foreign corporations. The position of these banks is somewhat analogous to that of foreign corporations carrying on within the Commonwealth a business consisting solely of interstate commerce. Such corporations cannot be excluded from the State, but our court has held that even though their business is solely interstate commerce it is a proper object, under our Constitution, for the imposition of an excise. *Alpha Portland Cement Co. v. Commonwealth*, 244 Mass. 530.

In my judgment, therefore, an excise tax measured by a specific percentage of the net income of national banks and other financial corporations would be valid both under the Federal and State Constitutions, provided the limitations of U. S. Rev. Stat., § 5219, cl. 1 (c), were observed, and the tax was not at a higher rate than that assessed upon other financial corporations or than the highest rate assessed upon mercantile, manufacturing and business corporations doing business within the State.

In view of the conclusions just stated, it seems unnecessary to discuss further whether a tax such as is suggested could be validly imposed under Mass. Const. Amend. XLIV. As already stated, the Federal statute, in its amended form, is broad enough to permit either an excise or a property tax. The difficulty would come in attempting to frame a tax under the amendment, of the character suggested by your question, which would not run counter to the limitations of the amendment requiring income of all property of the same class to be taxed at a uniform rate throughout the Commonwealth. There seems to be no occasion for considering the difficult questions of classifications which would thus arise, when the desired result can be reached, without raising those questions, under the power to levy excises. With these reservations the answer to your sixth question is therefore in the negative.

Your seventh question is as follows:

"(7) If a tax is imposed upon the income of national banks under the provisions of clause 1 (c) of said section 5219 of the Federal statutes, would it be necessary, to conform to the provisions of said section, to impose a tax at the same rate upon other moneyed capital in the hands of individuals or partnerships coming into competition with national banks?"

The answer to this question is in the negative. U. S. Rev. Stat., § 5219, as amended, permits the States to choose one, but only one, of three methods of taxation, namely: a tax upon the shares as property; an income tax upon the dividends derived from the shares; or a tax upon the income of the bank. If the tax upon the shares is chosen, then the limitation stated in clause 1 (b) becomes effective, and the tax must not be at a greater rate than is assessed upon other moneyed capital as defined in that clause. If an income tax upon the dividends is chosen, the only limitation is that imposed by clause 1 (d), that the tax shall not be at a greater rate than is assessed upon the income of other moneyed capital. If, on the other hand, as your question assumes, a tax is imposed upon the income of the bank itself, then the only limitation is that imposed by clause 1 (c), namely: "that the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the
Insurance — Contracts of Insurance — Service Contracts.

A contract to render services to the owner of an automobile, and to reimburse him for a portion of all expenditures for towing, is not a contract of insurance.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have asked my opinion as to whether a certain form of contract, called "Service Contract A," which is made with its customers by the Liberty Automobile Service League, Inc., constitutes a contract of insurance under the provisions of G. L., c. 175, § 2.

Under the provisions of the contract, a copy of which you have submitted with your letter, the League agrees, for a stated consideration paid by the other party to the contract, to "furnish and render unto him the following services:"

"(1) The association will represent said owner in the adjustment of any claim or controversy whatsoever relative to the use, maintenance and operation of said automobile.

(2) The association will help members in the financing and purchasing of new or second hand cars and list their machines for sale or exchange.

(3) The association maintains a purchasing department for the benefit of its members, furnishing them with tires and accessories at a substantial discount.

(4) Call the nearest garage available and have your car towed in. Get a receipted bill and the association will reimburse you, maximum five dollars. Mail us a receipted bill giving membership number, motor number and make of car.

(5) The influence and co-operation of the association will be used in all movements pertaining to the improvement of highways and the betterment of automobile conditions."

With the exception of the fourth, the foregoing agreements made by the League are contracts to render service, and are not contracts of insurance. Each of these agreements lacks the distinguishing feature of payment of loss or reimbursement which is essential to the formation of a contract of insurance under the provisions of our statutes. A long line of opinions by my predecessors in office has recognized the distinction between contracts to render service and contracts of insurance, and the principles of law involved therein are set forth and the earlier opinions of the Attorneys General are cited in Attorney General's Report, 1921, p. 143. The decisions to which you refer, Physicians' Defense Co. v. O'Brien, 100 Minn. 490, and Physicians' Defense Co. v. Cooper, 199 Fed. 576, do not recognize the line of distinction between the two classes of contracts that has been the basis of the opinions of former Attorneys General of this Commonwealth, are in conflict with decisions of courts of last resort in other jurisdictions, and are not authoritative in this Commonwealth.

The fourth agreement made by the League in this "Service Contract," which relates to towing, although providing for reimbursement of expense incurred by the other party to the contract, to the extent of five dollars, is not a contract of insurance. In the terms in which it is drawn the element of hazard or risk is absent. The reimbursement which is to take place is not predicated upon the happening of any accident or of any casualty or of any specific event. The other party to the contract may at any time, for any reason whatsoever, elect to have his car towed, and may thereafter collect five dollars from the League. That loss which is to be reimbursed should be caused by occurrences outside the direct control of the parties to the contract, is of the essence of insurance.
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The contract contains also a statement under the heading "Additional Services," as follows:

"The Liberty Automobile Service League, a voluntary association of automobile owners, has retained counsel to render legal services to the association in advice and counsel as requested, and to render legal services to the individual members of the association when retained directly by such members or any of them, for a period of 2 years."

Then follows a detailed statement of services to be included.

This is merely a statement that the League has retained counsel whose services will be available to members if employed by them. The seventh clause thereunder, providing that the association will furnish to its members a $5,000 bail bond, is not in itself a contract of insurance.

I am of the opinion that the instrument called "Service Contract A" is not a contract of insurance.

Very truly yours,

JAY R. BENTON, Attorney General.

Teachers' Retirement Association — Membership.

Supervisors of adult alien education, employed under G. L., c. 69, § 9, are not teachers employed in a public day school, within the meaning of the teachers' retirement law.

Nov. 18, 1924.

DR. PAYSON SMITH, Commissioner of Education.

Dear Sir: — You request my opinion as to whether the teachers' retirement law, G. L., c. 32, §§ 6-19, applies to supervisors of adult alien education. These supervisors are employed under the provisions of G. L., c. 69, § 9, which is as follows:

"The department, with the co-operation of any town applying therefor, may provide for such instruction in the use of English for adults unable to speak, read or write the same, and in the fundamental principles of government and other subjects adapted to fit for American citizenship, as shall jointly be approved by the local school committee and the department. Schools and classes established therefor may be held in public school buildings, in industrial establishments or in such other places as may be approved in like manner. Teachers and supervisors employed therein by a town shall be chosen and their compensation fixed by the school committee, subject to the approval of the department."

The word "teacher" as used in G. L., c. 32, § 7, providing for membership in the Teachers' Retirement Association, is defined in section 6 of that chapter as "any teacher, principal, supervisor or superintendent employed by a school committee or board of trustees in a public day school in the commonwealth."

"Public school" is defined in this same section (as amended by St. 1924, c. 281) as "any day school conducted in the commonwealth under the superintendence of a duly elected school committee, also any day school conducted under sections one to thirty-seven, inclusive, of chapter seventy-four."

I am of the opinion that supervisors of adult alien education cannot be said to be employed in "a public day school" within the meaning of this provision. The question seems to have been settled by the opinion of my predecessor holding that schools and classes maintained under Gen. St. 1919, c. 295 (continued in G. L., c. 69, § 9), are not public schools. In this opinion it is said (V Op. Atty. Gen. 573):

"The phrase 'public schools,' as used in the Constitution and the laws of this Commonwealth, has acquired a common and well-settled meaning. It refers and is limited to schools which form a part of the general system of education for the children of the Commonwealth, and which are the kind of schools that cities and towns are by statute required to maintain as a part of our system of common education (R. L., c. 42, § 1), and that children of legal school age are obliged to attend (R. L., c. 44, § 1)."
Schools or classes established and maintained for the instruction of voluntary pupils in certain specified branches of education, which do not form a part of the general system of education which the law requires cities and towns to maintain, are not included within the meaning of said term."

I see no reason to question the soundness of this opinion. It follows that a supervisor employed for the purpose of giving instruction in such schools and classes under G. L. c. 69, § 9, is not a teacher employed in a public day school in the Commonwealth, within the meaning of the teachers’ retirement law.

Yours very truly,

JAY R. BENTON, Attorney General.

Insurance — Broker’s License — Fee.

An applicant for an insurance broker’s license is not exempt from payment of a fee because of previous service as a woman nurse in the United States Army.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You request my opinion as to whether a certain applicant for an insurance broker’s license under G. L. c. 175, § 167A, a new section enacted by St. 1924, c. 450, is exempt from paying the fee prescribed by sections 166 and 167, on the ground that the applicant, whom I assume from the use of the word “she” in your letter to be a woman, served as a nurse in the United States Army during the World War.

The certificate which you state has been filed with you, for the purpose of establishing such exemption, recites that the applicant “was called into service of the United States, February 18, 1918, as a nurse in the United States Army, from civil life and assigned to Base Hospital, Camp Devens, Massachusetts.”

The statute relative to the proposed exemption reads as follows:—

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

In my opinion, the language of this statute is not applicable to female nurses who have served in the Army of the United States. The words used in the statute designating those entitled to exemption are “any soldier, sailor or marine.” These words do not describe women nurses. There are no phrases used in this statute which would enlarge the usual meaning of these words so as to include women nurses, such as have been used in other statutes relative to the status of “veterans” or of persons who “voluntarily enlisted” in the military service. Gen. St. 1918, c. 92; G. L. c. 31, § 21.

The ordinary meaning attached to the word “soldier,” as used in relation to the forces of the United States Army, is that of an enlisted man. Enlistment is of the essence of the status of such a soldier. In re Grimley, 137 U. S. 147. As was pointed out in an opinion by one of my predecessors in office (V Op. Atty. Gen. 471), women nurses are not “enlisted” in the United States Army in the ordinary technical sense of the term. Under the Federal statutes and the practice of the War Department, they do not acquire the status of soldiers (U. S. Comp. Stat. 1918, Title XIV, §§ 1831–3). In the absence from the statute under consideration of definitive phrases enlarging the ordinary meaning of the word “soldier,” it must be taken in its usual sense, which does not connote a woman nurse.

Very truly yours,

JAY R. BENTON, Attorney General.
Department of Public Works — Authority to sell Certain Land belonging to the Commonwealth.

The Department of Public Works, as the successor of the Commission on Waterways and Public Lands, which succeeded the Board of Harbor and Land Commissioners, is not authorized to sell and convey land of the Commonwealth in the absence of specific authority from the Legislature.

Hon. William F. Williams, Commissioner of Public Works.

Dear Sir: — You request my opinion as to the right of the Department of Public Works to sell a certain lot of land without specific authority from the Legislature.

It appears that under the provisions of St. 1898, c. 469, and St. 1899, c. 447, the Board of Harbor and Land Commissioners constructed jetties at the entrance to Green Harbor in the town of Marshfield. In connection with the construction of the southerly jetty the lot of land in question, measuring one hundred feet on the beach and fifty feet on the adjoining property, was purchased by the Commonwealth for $250, in order to secure access to the inshore end of this jetty. The Commonwealth received a warranty deed under date of September 3, 1898, which has been duly recorded in the Plymouth County registry of deeds. Said deed contains a provision that no building shall be erected upon the lot.

The Board of Harbor and Land Commissioners was abolished by Gen. St. 1916, c. 288, and all the rights, powers, duties and obligations conferred and imposed by law on said board were thereby transferred to the Commission on Waterways and Public Lands, which was created by said act. By Gen. St. 1919, c. 350, § 111, the Commission on Waterways and Public Lands was in turn abolished and all the rights, powers, duties and obligations of said Commission were thereby transferred to the Department of Public Works, which was established by said act and which was thereby made the lawful successor of said Commission. By section 113 it was provided that the Department of Public Works shall be organized in two divisions, namely, a Division of Highways and a Division of Waterways and Public Lands. The duties of said Division of Waterways and Public Lands relative to Commonwealth lands are set forth in G. L., c. 91, § 2, which provides as follows:

"The division shall, except as otherwise provided, have charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth, and shall, as far as practicable, ascertain the location, extent and description of such lands; investigate the title of the commonwealth thereto; ascertain what parts thereof have been granted by the commonwealth; the conditions, if any, on which such grants were made, and whether said conditions have been complied with; what portions have been encroached on, and the rights and remedies of the commonwealth relative thereto; prevent further encroachments and trespasses; ascertain what portions of such lands may be leased, sold or improved with benefit to the commonwealth and without injury to navigation or to the rights of riparian owners; and may lease the same. It may sell and convey, or lease, any of the islands owned by the commonwealth in the great ponds. It may make contracts for the improvement, filling, sale, use or other disposition of the lands at and near South Boston known as the Commonwealth flats, may lease any portion thereof with or without improvements thereon, may regulate the taking of material from the harbor and fix the lines thereon for filling said lands. All conveyances and contracts, and all leases for more than five years, made under this section shall be subject to the approval of the governor and council."

In an opinion of one of my predecessors, Hon. Herbert Parker, to the Board of Harbor and Land Commissioners, dated March 23, 1904 (II Op. Atty. Gen. 479), it was decided that the Board of Harbor and Land Commissioners was not authorized to sell and convey certain land of the Commonwealth, and that if such a sale were desirable competent authority must be secured to effect it.
Inasmuch as the Division of Waterways and Public Lands of the Department of Public Works is the successor of the Board of Harbor and Land Commissioners, the reasons set forth in said opinion apply with equal weight to the present instance.

Where the Legislature desires a department to exercise its discretion to dispose of lands of the Commonwealth no longer needed, it grants that power in specific terms. In the absence of such granted power, it is my opinion that your Department cannot sell the land in question without specific authority from the Legislature.

Very truly yours,

JAY R. BENTON, Attorney General.

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