The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year ending November 30, 1928
ATTORNEY GENERAL'S REPORT, NOV. 30, 1928

ERRATA

Page 9:
5th line from top of page,—figures 24 should be omitted.
3d ¶, 2d line,—$1000 should read $3000.
3d ¶, 3d line,—c. 256 should read c. 257.
3d ¶, 3d line,—St. 1924, c. 57, § 1,—should be included within the parentheses.

Page 10: 4th ¶, 2d line,—1921 should read 1922.
Page 14: 3d ¶, 9th line,—c. 185 should read c. 125.
The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1928
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, 1928.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.
The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
State House.

Attorney General.
JOSEPH E. WARNER.¹

(ARTHUR K. READING.²)

Assistants.
FRANKLIN DELANO PUTNAM.
JOSEPH E. WARNER.³
ROGER CLAPP.
CHARLES F. LOVEJOY.
SAMUEL H. LEWIS.⁴
RALPH W. STEARNS.⁴
EMMA FALL SCHOFIELD.
GERALD J. CALLAHAN.
JAMES S. EASTHAM.
R. AMMI CUTTER.
VINCENT J. ZEO.⁵
EDWARD T. SIMONEAU.⁶
STEPHEN D. BACIGALUPO.⁶
GEORGE B. LOURIE.⁶

Chief Clerk.
LOUIS H. FRESESE.

Cashier.
HAROLD J. WELCH.

¹ Chosen by Legislature to fill vacancy June 13, 1928.
² Resigned June 6, 1928.
³ Sworn in as Attorney General June 14, 1928.
⁴ Resigned July 14, 1928.
⁵ Resigned July 21, 1928.
⁶ Appointed August 8, 1928.
### STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>General appropriation for 1928</td>
<td>$104,000</td>
</tr>
<tr>
<td>Appropriation for small claims</td>
<td>$ 5,000</td>
</tr>
<tr>
<td>Publication of opinions of the Attorneys General</td>
<td>$ 5,000</td>
</tr>
<tr>
<td>Supplemental appropriation</td>
<td>$ 17,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$131,000</strong></td>
</tr>
</tbody>
</table>

#### Expenditures.

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>For salary of Attorney General</td>
<td>$ 7,822</td>
</tr>
<tr>
<td>For law library</td>
<td>$  590</td>
</tr>
<tr>
<td>For salaries of assistants</td>
<td>$45,704</td>
</tr>
<tr>
<td>For clerks</td>
<td>$10,528</td>
</tr>
<tr>
<td>For office stenographers</td>
<td>$  7,913</td>
</tr>
<tr>
<td>For telephone operator</td>
<td>$  1,228</td>
</tr>
<tr>
<td>For legal and special services</td>
<td>$20,307</td>
</tr>
<tr>
<td>For office expenses and travel</td>
<td>$  5,034</td>
</tr>
<tr>
<td>For court expenses</td>
<td>$  2,136</td>
</tr>
<tr>
<td>For small claims</td>
<td>$  2,502</td>
</tr>
<tr>
<td>Publication of opinions</td>
<td>$  3,921</td>
</tr>
<tr>
<td><strong>Total expenditures</strong></td>
<td><strong>$107,689</strong></td>
</tr>
</tbody>
</table>
To the Honorable Senate and House of Representatives.

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

The cases requiring the attention of this Department during the year ending November 30, 1928, to the number of 8,450 are tabulated below:

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate franchise tax cases</td>
<td>544</td>
</tr>
<tr>
<td>Extradition and interstate rendition</td>
<td>298</td>
</tr>
<tr>
<td>Grade crossings, petitions for abolition of</td>
<td>55</td>
</tr>
<tr>
<td>Land Court petitions</td>
<td>101</td>
</tr>
<tr>
<td>Land-damage cases arising from the taking of land:</td>
<td></td>
</tr>
<tr>
<td>Department of Public Works</td>
<td>64</td>
</tr>
<tr>
<td>Metropolitan District Commission</td>
<td>62</td>
</tr>
<tr>
<td>Department of Mental Diseases</td>
<td>8</td>
</tr>
<tr>
<td>Department of Conservation</td>
<td>1</td>
</tr>
<tr>
<td>Department of Public Health</td>
<td>3</td>
</tr>
<tr>
<td>Department of Correction</td>
<td>2</td>
</tr>
<tr>
<td>Miscellaneous cases</td>
<td>957</td>
</tr>
<tr>
<td>Petitions for instructions under inheritance tax laws</td>
<td>55</td>
</tr>
<tr>
<td>Public charitable trusts</td>
<td>241</td>
</tr>
<tr>
<td>Settlement cases for support of persons in State hospitals</td>
<td>57</td>
</tr>
<tr>
<td>All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth</td>
<td>5,960</td>
</tr>
</tbody>
</table>

Indictments for murder:

- Disposed of                                      | 30     |
- Now pending                                      | 12     | 42
CAPITAL CASES.

_Bristol County._ — In charge of District Attorney William C. Crossley:
Disposed of — Napoleon Pelletier and Elmer K. Pierce.
Pending — Henri LeBrun.

_Essex County._ — In charge of District Attorney William G. Clark:
Disposed of — James Kamanis and Vincent Laurette.
Pending — George Metaxatos and George Elmer Harrison Taylor.

_Hampden County._ — In charge of District Attorney Charles R. Clason:
Disposed of — Morris Levine.

_Hampshire County._ — In charge of District Attorney Charles Fairhurst:
Disposed of — Joseph Parent.

_Middlesex County._ — In charge of District Attorney Robert T. Bushnell.
Pending — Frederick Hinman Knowlton, Jr.

_Norfolk County._ — In charge of District Attorney Winfield M. Wilbar:
Disposed of — Carmine F. Corbi, Stephen Hoppe, John Tartar, Clement Teti, and Guiseppi Truglie.

_Suffolk County._ — In charge of District Attorney William J. Foley:
Pending — Gangi Cero, Mary E. Fitzgibbons, Harry Lamb, Walter Perry,¹ Antonio Selvitella, Charles Trippi, and Ung Hong Yeu.

_Worcester County._ — In charge of District Attorney Charles B. Rugg:
Disposed of — Nathan Desatnick, Charles Graves, and Louis Pasakinski.
Pending — John Kroll.¹

¹ Committed to State hospital.
I. THE ADMINISTRATION OF CRIMINAL JUSTICE SUPERVISED BY THE ATTORNEY GENERAL.

The entire burden of the suppression of crime may not be laid upon the judicial machinery of the Commonwealth. Suppression of crime has a multitude of angles, and the district attorney's office is immediately concerned with but a single one of them, namely, prosecution after commission.

The prevention of crime concerns itself with research as to the causes of crime, the bases of supply, the foment of the criminal class; the effect of heredity, environment, poverty, education, religious training, and, last but not least, the attitude of the community toward crime and the criminal. These are sociological fields.

Detection and apprehension of crime primarily lie with the police arm. The betterment and development of crime detection, through adoption of scientific methods, and of all apprehension service, through co-operation, lies with the police forces. In this respect the State and Metropolitan Police commendably exemplify progressive and constructive systematization. Efficiency of local municipal departments presumes a certain degree of sovereign unification, which local pride can ill afford to overlook, as the common need is that of a commonwealth.

Correction of crime and of the criminal is a penal problem. Schools of thought reach various conclusions as to modes of its accomplishment. One group contends that incarceration effects no reform; does not serve as a deterrent; that it is a barbaric survival of revenge, and, engendering an "anti-social" attitude, hardens the very offender. Another group contends that, without incarceration, there is little stigma; that mere money penalty ill suffices. Still another group contends that the criminal is merely mentally diseased and should be treated, and, possibly, restored to health through mental hospitalization. Still another group contends that inflexible severity yields the only suitable remedy as a stern and forbidding spectre against the commission of all crime. Another asserts that the greater the severity the less the likelihood of conviction by a jury. Still another group contends that there should be a Procrustean standardization of penal punishment applicable irrespective of condition or circumstance. In juxtaposition to this latter group still another contends that power of individualization by the court for tempering justice with mercy should be paramount and absolute.

I cite this diversity of opinion on the part of that element of the
public studiously inclined to offer a solution of this one aspect of crime suppression alone, while vociferous call is addressed to prosecuting officers to stamp out crime. It is apparent that results may not be obtained through casual or spasmodic opinions or isolated cases. Time alone, enabling legislation chastened by the wisdom of the most profound public sentiment, based upon intensive and comprehensive study of all phases, may effect cures harmonious to the body politic.

The present obstacle to speedy prosecution is the congestion of cases listed for trial. The Judicial Council, after mature deliberation, has submitted certain findings well worthy of consideration. In some of these recommendations I concur, to wit:

1. For the avoidance of delay in the execution of sentences in capital cases, by the saving of exceptions at hearings on motions for new trial and repeated recourse to the Supreme Judicial Court; the recommendation for the broadening of the functions of the Supreme Judicial Court on appeals so that it may pass upon the whole case, order new trial if interest of justice requires, and stay execution of any imposed sentence of death pending final determination of any judicial question. (3d Rep., p. 77.)

2. For the relief of congestion of jury trial cases of persons under indictment for crime, the recommendation for voluntary waiving by the accused of jury trial in other than capital cases. (1st Rep., p. 21.)

3. For the relief of congestion of criminal cases in the district courts, the recommendation for the elimination of court appearances of offenders in certain petty motor vehicle offenses. (4th Rep., p. 37.)

Recommendations of District Attorneys.

The recommendations of district attorneys, in which I concur, are as follows:

1. That duration of the provisions of St. 1923, c. 469, as amended by St. 1928, c. 353, for disposition of certain criminal cases by judges of district courts sitting in the Superior Court be extended to December 31, 1930.

2. That the cases, in the trial and disposition of which district court judges sitting in the Superior Court have powers and duties of the judges of the Superior Court, include all cases within the criminal jurisdiction of the district courts. St. 1923, c. 469, § 1, as amended by St. 1924, c. 485, § 1, restricts the jurisdiction of district court judges sitting in the Superior Court to “any misdemeanors except conspiracy or libel;” whereas G. L., c. 218, § 26, defining the original jurisdiction of the district court judges, includes “felonies punishable in the state
prison for not more than five years.” It seems inconsistent to preclude a judge of the district court sitting in the Superior Court from jurisdiction of cases over which he has power to make final disposition in his own court concurrent with the Superior Court. As it is now, prosecutions for violation of G. L., c. 272, §§ 7, 14, 24, or proceedings for forfeiture, may not be had by district attorneys before district court judges sitting in the Superior Court.

3. That district court judges sitting in the Superior Court have power of the Superior Court judges in all cases of forfeiture.

District court judges sitting in the Superior Court now have power to decree forfeitures of the value of the property not exceeding $1,000 (G. L., c. 256, §§ 3, 7; c. 218, § 19). There seems to be no good reason to preclude district court judges from hearing and disposing of all forfeitures, for the reason that such courts, hearing the violation of the law whereby property was seized, could make decisions appropriately as to the forfeitures regardless of the value.

4. That in recovery on recognizance district attorneys may sue and bid in real estate for the county.

5. That St. 1928, c. 333, relative to commitment of defective delinquents and drug addicts, be amended. This act, amending G. L., c. 123, § 113, as amended by St. 1921, c. 270, and St. 1922, c. 535, § 7, provides for application by a district attorney for commitment as a defective delinquent of a defendant committable to State prison, reformatory, etc., for any offense “not punishable by death or imprisonment for life.” There are many offenses punishable by life imprisonment other than murder in the second degree. The district attorneys believe that the benefits of this chapter, if not extended to all offenses punishable by life imprisonment, should be extended to offenses other than murder in the second degree.

6. Abolishing the crime of accessory before the fact; that G. L., c. 274, §§ 2 and 3, be repealed, and that there be substituted therefor a short section making accessories before the fact triable and punishable as principal felons.

7. That the penalty for larceny be increased. The maximum penalty today for larceny of any sums in excess of $100, whether $101 or $1,001, is five years in State Prison. There should be a heavier penalty for larceny of larger sums.

8. That in bail cases, where real estate is surety, a certificate be recorded in the registry of deeds creating a lien on the same.

9. That G. L., c. 12, be amended, enabling district attorneys to secure advance moneys for travel and expenses outside of the
State. Expedition in securing evidence and return of fugitives would thereby be facilitated.

10. That, in criminal cases, if no agreement is reached by a jury before nine o'clock in the evening, the court may permit suspension of deliberations and provide suitable accommodations for the jury for the night.

By reason of doubt as to jurisdiction in automobile cases, trial justices hold offenders for the grand jury, thus necessitating indictment and the loss of time of a district attorney for more important cases. Consideration of clarification of their jurisdiction by specific inclusion of automobile offenses is suggested.

A professional bondsman is defined in G. L., c. 276, § 61B (inserted by St. 1921, c. 463, § 2, amended by St. 1926, c. 340, § 1), as “any person becoming bail or surety in a criminal case after having become bail or surety in criminal cases on more than three separate occasions in any twelve months’ period.” Surety companies are excepted. A probation officer in the Superior Court or district court may come within this description. The appointment of probation officers as sureties for bail is of aid to the courts, as well as to the community, for control of persons pending trial and disposition. I recommend that probation officers be also excepted.

II. ADMINISTRATION OF CIVIL BUSINESS CONDUCTED BY THE ATTORNEY GENERAL.

Cases of Interest wherein the Attorney General appears for the Commonwealth.

A. CASES PENDING NOVEMBER 30, 1928.

(a) INTERSTATE CONTROVERSY.

Connecticut v. Massachusetts.

St. 1926, c. 375, and St. 1927, c. 321, authorized the diversion of a portion of the waters of the Swift and Ware rivers from the watershed of the Connecticut River for the purpose of providing a water supply for the Metropolitan District, and authorized the Metropolitan District Water Supply Commission, created thereby, to expend a sum not to exceed $65,000,000.

The supply of good water for the city of Boston and surrounding communities is not adequate, and unless it is augmented a very serious and acute shortage will result in the near future. The effect of the diversion is to abstract from the Connecticut River watershed a small quantity of water which otherwise would flow into that river through our own Commonwealth and thence into Connecticut.
The State of Connecticut, alleging that the flow of the river will be so diminished by the diversion as to cause injury to that State and to the citizens thereof, instituted suit against this Commonwealth in the Supreme Court of the United States, seeking to enjoin the diversion. An answer was filed by this Commonwealth and the case is now pending in court.

Bentley W. Warren, Esq., was appointed Special Assistant Attorney General to conduct the case for the Commonwealth of Massachusetts, and is being assisted by two of the regular Assistant Attorneys General. The issues of law and of fact are complicated and detailed. It is sufficient, however, to state that the interests of this Commonwealth in this case are of the greatest consequence and are being carefully and fully protected.

(b) Rate Cases.

1. Electric Light Rates.

Rates for electric lighting as fixed by the Department of Public Utilities have been attacked as confiscatory. Sherman L. Whipple, Esq., was appointed a Special Assistant Attorney General to conduct the trial of these cases in support of the rates so fixed.

In the first of the cases, brought by the Worcester Electric Light Company, the evidence presented before a special master has been closed, and the case awaits the filing of his report.

In the second case, brought by the Cambridge Electric Light Company, hearings before a master are now in progress.

2. Automobile Compulsory Insurance Rate Cases.

Owing to the resignation of the Commissioner of Insurance on September 1, 1928, litigation resulted as to what, if any, rates for such insurance were to apply for the year 1929. Various proceedings were brought to try out this question and were argued on behalf of the Acting Commissioner of Insurance by this Department before the Full Bench of the Supreme Judicial Court. The decision of the court resulted in a set of rates being promulgated in November by the then Acting Commissioner. Various petitions for review of these rates as they have been established are now pending in the Supreme Judicial Court.

(c) Billboard Cases.

The billboard litigation is a consolidation of various bills in equity brought by the General Outdoor Advertising Company, Inc., and nineteen other outdoor advertising companies in Massachusetts against the
Commissioners of Public Works. The case involving the Chevrolet sign on Beacon Hill was added to the billboard cases in 1927. These cases are being heard before a master, and the complainants' case has been practically completed. The record is assuming large proportions, there being to date 4,724 pages of transcript of evidence, with over 1,300 exhibits.

(d) Tax Cases.

There are now pending in the Supreme Judicial Court two important questions affecting taxation:

(1) Whether a receipt in full given by the Commissioner of Corporations and Taxation prevents the Commissioner from later making an additional assessment where the net estate of a Massachusetts decedent is increased, due to a rebate of a Federal estate tax previously allowed as a deduction by the Commissioner in computing the Massachusetts inheritance tax; and

(2) The constitutionality of the Massachusetts succession tax in its application to a trust inter vivos, executed before the enactment of the taxing statute, where the trust is to take effect in possession or enjoyment after death.

B. CASES DECIDED DURING THE YEAR.

1. IN THE SUPREME COURT OF THE UNITED STATES.

(a) Tax Cases.

During the past year the Supreme Court of the United States has on three occasions considered questions argued by this Department involving the constitutionality of tax statutes of this Commonwealth or of the application of those statutes in particular instances.

In Saltonstall v. Saltonstall, decided February 20, 1928, the Supreme Court affirmed the decision of the Supreme Judicial Court of Massachusetts reported in 256 Mass. 519, wherein it was held that the tax authorized by the Massachusetts legacy tax statute is an excise tax upon the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property, and that the tax could be imposed upon an interest accruing to beneficiaries after the enactment of the tax statute upon an interest created by a revocable trust indenture executed prior to the passage of the tax statute.

Long v. Rockwood, decided May 14, 1928, affirmed the decision of the Supreme Judicial Court in the case of Rockwood v. Commissioner of Corporations, 257 Mass. 572. In that case the Commissioner of Corporations and Taxation had taxed income in the nature of patent
royalties received by the complainant, a resident of the Commonwealth. The complainant paid the tax and successfully sued to recover it, contending that income received in the form of royalties for the use of patents issued to him by the United States was not taxable inasmuch as it was income from a Federal instrumentality. Four justices dissented.

*National Leather Co. v. Massachusetts*, decided May 28, 1928, upheld an excise tax assessed, under the provisions of G. L., c. 63, upon a foreign corporation for the privilege of carrying on business in Massachusetts, and held that the Commissioner of Corporations and Taxation properly included, in computing the "corporate excess employed within the Commonwealth" certain shares owned by the taxpayer corporation in other foreign corporations also doing business in Massachusetts. As a result of this favorable decision the validity of a very large number of taxes under the present corporation excise statute has been assured.

2. **In the Supreme Judicial Court.**

(a) *Tax Cases.*

There have also been several important tax decisions rendered by the Supreme Judicial Court. The provisions of our income tax law with respect to the taxation of certain dividends in liquidation of foreign corporations were construed favorably to the contentions of the Commonwealth in *Boston Safe Deposit & Trust Co. v. Commissioner of Corporations and Taxation*, 262 Mass. 1.

In *Whipple v. Commissioner of Corporations and Taxation*, it was held that, upon the facts set forth in that case, losses incurred in the operation of a farm, conducted in a manner found by the trial court to be businesslike, might be deducted from business income under the Massachusetts income tax statute (G. L., c. 62, §§ 5, 6).

The case of *Macallen Co. v. Commonwealth* upheld the validity of the net income measure of the corporate excise imposed under G. L., c. 63, § 32 and § 30 (as amended by St. 1925, c. 353, § 1A). Under that act income received by domestic corporations from Federal government bonds is included as a portion of the gross income of such corporations for the purpose of computing net income within the meaning of the act. This holding that the 1925 amendment of our corporation excise statute is constitutional will, if upheld by the Supreme Court of the United States, result in continuing the more equitable distribution of the burden of the corporation excise intended when that amendment was passed. An appeal has been taken by the taxpayer to the
Supreme Court of the United States, which will probably be argued some time in the spring.

The validity of the minimum excise tax upon domestic business corporations whose profits are derived principally from the manufacture, ownership, or use of real estate or tangible personal property, was upheld by the Supreme Judicial Court in *Essex Theatres Co. v. Commonwealth*.

**(b) The “Padlock” Case.**

Under the provisions of St. 1928, c. 125, equity proceedings, seeking to close certain premises by permanent injunction, were initiated in the Superior Court for Middlesex County. The district attorney for the Northern District, Mr. Bushnell, with commendable energy, proceeded to take advantage of the provisions of this new act shortly after it became effective, but, before the hearing could be had, the owner of the premises, which the district attorney sought to close, filed a petition for a writ of prohibition, seeking to prevent the Justices of the Superior Court from hearing the petitions on the ground that St. 1928, c. 185, was unconstitutional. The Department appeared for the Justices. On dismissal of the petition, the owner of the premises took the case to the Full Bench of the Supreme Judicial Court upon a bill of exceptions. The exceptions were overruled, the court holding that the statute was in all respects constitutional. *Reale v. Judges of the Superior Court*, Mass. Adv. Sh. (1928) 1917.

A decision upholding the constitutionality of the Padlock Law so soon after its passage is exceedingly helpful. It makes the application of the law easier and tends to prevent frivolous appeals on constitutional grounds.

At page 1921, however, Mr. Justice Pierce uses the following language:

One part of a building may be used in such manner as to make it a nuisance without affecting the legal character of the other part. *Commonwealth v. Donovan*, 16 Gray, 18. A legal variance would result if an indictment charged the keeping of a certain building for the illegal sale and illegal keeping of intoxicating liquor, if the proof was that one of several tenants in the same building occupied and kept that tenement for that purpose. *Commonwealth v. McCaughey*, 9 Gray, 296. And a like rule is applicable to proceedings under said § 16A.

From this and other language of the court, it is arguable that section 16A authorizes a judge sitting in equity to “padlock” only such portions of a building as may be shown to be used for the sale of intoxicating liquor, if the evidence does not go to the extent of proving either 

(a) that the whole building was used and occupied by the person main-
taining the nuisance, or (b) that the whole building constituted a nuisance because all of it was used for the sale of intoxicating liquor; and that, consequently, though one portion of the building be padlocked, the keeper of the nuisance may at once proceed to use another portion of the building for illegal purposes. Without passing on the question whether such a narrow construction of section 16A would be taken by a court, the act might appropriately be amended in order that no doubt may exist as to power of the court.

III. DEPARTMENTAL SERVICES.

1. Settlement of Small Claims against the Commonwealth.

Since the period covered by my predecessor's last annual report 28 claims have been presented against the Commonwealth under St. 1924, c. 395.

18 were approved, with a total expenditure of $2,045.
3 were referred to the Legislature under the terms of the statute.
4 were rejected.
2 were withdrawn by the claimants.
1 is still pending.

Sixty per cent of these claims was for damages occasioned by the operation of State automobiles.

2. Petitions for Abolition of Grade Crossings.

The State, the city or town, and the railroad company are jointly interested in the abolition of the grade crossing, — menace to life and limb and thief of time. The burden of expense is borne only in part by the railroad and by the locality, 10 to 30 per cent coming from the State.

Today an abolition is a local problem, and its success is dependent upon local zeal irrespective of the part it plays in the general scheme, either from the standpoint of traffic or the burden of general taxation. Plans, both old and new, are being projected, now that the effect of war conditions upon finance of the railroads — primary cause for deferring action — is diminishing. Of the $5,000,000 authorized to be expended by the Commonwealth for the abolition of grade crossings under the provisions of St. 1906, c. 463, § 42, approximately only $435,000 is unapplied and available for projects already initiated or proposed. The broad provisions for comprehensive survey by the Department of Public Works for State highway construction worked successfully.
It might be well to have each proposition of abolition submitted to the Department of Public Works as well as to the Department of Public Utilities for its report or approval, so that it may square with a general scheme of development for the general benefit.

3. Interstate Rendition and Extradition.

After the Governor of this Commonwealth has granted the request of a Governor of another State for the rendition of an alleged fugitive from justice, and has issued a warrant calling for such rendition, it occasionally happens that, solely for the purpose of delaying the trial of the criminal prosecution for which the fugitive is wanted in another State, a petition for a writ of habeas corpus is filed by the alleged fugitive in the Supreme Judicial Court raising issues of fact and law which have already been carefully considered by the Governor or by this Department under the authority of G. L., c. 276, § 12. A hearing upon such a writ may be had with reasonable promptness before a single justice of the Supreme Judicial Court. If, however, the case is taken to the Full Court upon report or for review in some other manner, a very considerable time may elapse before the Full Court renders its opinion. Inasmuch as a Federal question is frequently involved in such cases, resort may be had, even after the opinion of the Full Court, either to the Supreme Court of the United States by appeal, or by the filing of another writ of habeas corpus in the Federal District Court. It thus may happen that an undue time may pass between the arrest of the fugitive and his rendition to a sister State seeking to prosecute him for some serious offense within that jurisdiction. In my opinion, provision should be made by amendment of G. L., c. 276, § 14, and by amendment of the pertinent sections of G. L., c. 248, so that review of the decision of the single justice as to whether or not a writ of habeas corpus should be granted should be given by the Full Court more expeditiously than is possible at present. One method of expediting such hearings before the Full Court would permit argument of report or exceptions upon typed record in manner similar to that now provided for capital cases and other felonies by St. 1925, c. 279, and St. 1926, c. 329. In any event, provision should be made for the advancement of such cases upon the docket of the Full Court on the same basis as criminal appeals. The Supreme Judicial Court, in the absence of such provision in the statutes, has on at least one occasion made an order advancing such a case as a matter of discretion.

Presumably a fugitive will receive a fair trial before a properly con-
stituted judicial body in the demanding State, and that trial, in the interest of justice, should not be delayed unduly by dilatory proceedings in the courts of this Commonwealth.

I suggest that this matter be referred to the Judicial Council for consideration and recommendation.

4. Matters Concerning Public Administration.

During the past year the Department has kept in close touch with public administrators handling estates throughout the Commonwealth, in which estates this Department might, either on its own account or on behalf of the Treasurer and Receiver General, have an interest by way of possible escheat of the assets of the estate, or otherwise.

These administrators are frequently placed in the position of passing upon claims against the estate made by persons who have referred the estate for administration to the public administrator. Perhaps a system of rotation could be worked out, involving reference by the court of estates to administrators, assuring all administrators in a county of an equal share and relieving them from embarrassment in passing on claims presented against an estate by the very person giving them the case. The situation is one difficult to reach directly by legislation. Regulation may be effected through extension of rule-making powers of the Probate Court.

There is some evidence of a growing practice by attorneys, other than public administrators, of conducting searches for heirs in large estates in which administration has already been taken out by public administrators. Upon the discovery of heirs, or alleged heirs, the attorney conducting this search then petitions, in his own name or in the name of some nominee, for administration in behalf of the alleged heirs. Under the present statute (G. L., c. 194, § 7) no notice need be given to the public administrator who has already been appointed, to the Treasurer and Receiver General, or to the Attorney General, all of whom are certainly persons interested, for one reason or another, in the administration of the estate.

I recommend that notice of petitions by alleged heirs to the public administrator concerned and to the Treasurer and Receiver General be required, and that it be made discretionary with the Probate Court to permit the public administrator already handling the estate to continue to do so if such continuance of service would best meet the public interest and the welfare of the estate.

The alleged heirs in such instances are almost invariably persons of small means, frequently residing abroad and ignorant of our laws.
Upon giving some Massachusetts attorney a power of attorney to handle the administration for them, they usually are not aware of the fact that taking the administration out of the hands of the public administrator will result in financial loss to them. Usually there is no gain to the public or to the alleged heir in having the estate removed from the hands of the public administrator. The gentlemen now occupying the positions of public administrators throughout the Commonwealth are fitted to handle these estates to the advantage of all concerned, and may well be permitted, subject to judicial discretion, to complete the administration of estates in which they have been appointed as fiduciaries where the interest of the state and of the public will be thereby served. Moreover, the authenticity of some such claims of heirship is exceedingly doubtful. I suggest a provision calling for investigation by the public administrator of all claims in which the probate court may find there is reasonable cause to believe that the claimant is not in fact an heir of the decedent. To prevent fraudulent claims of heirship by non-residents in cases where public administration has not been taken out prior to the bringing of a petition in behalf of the alleged heirs, provision should be made for notice in writing to the Treasurer and Receiver General of the pendency of all petitions for administration brought by an alleged widow, surviving husband or next of kin not resident within the Commonwealth.

5. Supervision of Charitable Trusts.

This has involved the examination of all petitions in Massachusetts courts relative to the application of the *cy-pres* doctrine to charitable bequests; of all petitions by charities for permission to sell property subject to a trust; to dissolve and transfer assets to another corporation upon the same charitable purposes; examination of accounts of trustees; rendition of assistance to the court in the matter of appointment of new trustees for charitable purposes; participation in litigation affecting any bequests to Massachusetts charities.


Of the many petitions the one affecting the greatest number of persons was that brought at the relation of the Acting Commissioner of Insurance under the provisions of G. L., c. 175, § 6, as amended, against the Car Owners Mutual Liability Insurance Company, as to which the Acting Commissioner was satisfied that its condition was one of insolvency. The matter was promptly heard in the Supreme Judicial Court,
and after a report by a master a permanent injunction was issued restraining the company from doing business, and receivers were appointed to settle its affairs and to protect the interests of its 40,000 policy holders and of its numerous creditors.

7. Appearance in Industrial Accident Cases and Approval of Contracts and Titles.

The Department has represented the Commonwealth at 21 hearings before the Industrial Accident Board and at 8 conferences in cases arising under the Workmen’s Compensation Act (G. L., c. 152), providing for compensation to laborers, workmen and mechanics, as well as foremen, subforemen and inspectors, employed by the Commonwealth, who receive personal injuries arising out of and in the course of their employment.

The Department also prepared or passed upon 461 contracts as to form; and 25 leases, 3 easements and 115 deeds as to legal form and title.

Of proceedings against the Commonwealth under the provisions of G. L., c. 258, there are pending 15 in contract.

8. Special Reports to the Legislature.

As to Release by the Commonwealth of Restrictions on Newbury Street, Boston.

Of several reports rendered by the Department, that most immediately affecting the Commonwealth relates to the advisability of a release by the Commonwealth of its interest in certain restrictions, which restrictions might tend to prevent the widening by the city of Boston of Newbury Street. A public hearing was held thereon, and after due consideration, this Department recommended that no steps be taken by the Commonwealth at this time to release its interests in such restrictions. The Back Bay district, as laid out by the Commonwealth of Massachusetts in about 1850, was originally intended as a highly desirable residential district, and any move at this time on the part of the Commonwealth which would in any way detract from the desirability of that district for such purposes is deemed unwise and ill-timed.


Opinions which may be of interest are annexed to the Report.
10. Federal Relations.

The Act of Congress of March 28, 1928, declared that "the people of all the zones," established by the Radio Act of 1927, "are entitled to equality of radio broadcasting service," and directed the Federal Radio Commission to make "a fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone, according to population." The Attorney General appeared before the Commission at Washington in opposition to an assignment of reduced wave length to station WNAC, which assignment, by reason of practical loss of service of such station through reduction, appeared to be discriminatory to the people and to the State. The Attorney General co-operated with the Attorney General of New York in opposition to an assignment of curtailed operating time to station WGY in New York State, serving the people of our western counties.

IV. GENERAL OBSERVATIONS.

1. Authority of the Attorney General to Settle Cases.

I recommend that legislation be enacted empowering the Attorney General to settle all cases actually entered in court upon whatever terms may seem to him most advantageous to the Commonwealth. Considerable doubt exists at present as to the extent of his authority in this respect.


In order to prevent the tying up of money of the contractor held by the Commonwealth, and because of the inability of the Commonwealth to close its accounts as a result of non-enforcement of claims filed by claimants, and in order to prevent similar consequences to counties, cities and towns from non-enforcement of claims against contracts, I recommend an amendment to G. L., c. 30, § 39, as amended by St. 1922, c. 416 (relating to the filing of claims against contracts for public works being constructed or repaired by the Commonwealth), and an amendment to G. L., c. 149, § 29 (relating to the filing of claims against public works contracts of counties, cities and towns), so that a definite time (six months) may be stipulated within which the claimants must bring a petition in equity to enforce their claims or intervene in a peti-
tion already filed. G. L., c. 30, § 39, also provides that claimants shall file claims within sixty days after "the completion of the work," whereas G. L., c. 149, § 29, provides that claimants shall file their claims within sixty days after "the last day the claimant ceases to perform labor or to furnish labor and materials." I recommend that G. L., c. 30, § 39, be further so amended. St. 1922, c. 416, provided that claims may be filed for "materials employed" in the construction or repairing of public works as well as for "materials used." There was, however, no similar amendment of G. L., c. 149, § 29, relating to claims filed under county, city or town contracts. I recommend, therefore, such an amendment.

3. Clarification and Unification of all Proceedings relating to Children and Domestic Relations.

As it is now, the district court, municipal court, superior civil court, superior criminal court and probate court may make findings and decrees relating to the same matters. A case of a neglected child is civil; the complaint against its parents, however, is criminal; and the adjudications, on appeal, may be contrary.

A woman deserted by her husband, needing separation or support for herself and her children, now alternates between the criminal courts and the probate court. I stress the urgency for unification of all domestic relation proceedings under a single jurisdiction.

I concur in the recommendation of the Judicial Council that private conversations between husband and wife in cases of domestic relations be admitted. (2d Rep., p. 116.)

Revision of statutes relating to or affecting the welfare and protection of children should be made. Provisions for social investigation of all petitions for adoption; for jurisdiction and supervision by the Department of Public Welfare of all illegitimate children for the establishment of paternity and obtainment of security for support; and supervision of certain others to sixteen years of age, might well be considered.

For the preparation of subsequent legislation, I recommend the appointment of a commission which shall make a thorough study of all these matters.

4. Clarification of Laws relating to Plumbing.

The provision of G. L., c. 142, dealing with the supervision of plumbing, give rise to controversy. They do not have general application throughout the entire Commonwealth. A new examination is manda-
tory on failure to apply for renewal of license on or before May 1. There is uncertainty as to the right of a corporation and partnership legally to engage in the plumbing business. The practice with respect to granting permits to master and journeymen plumbers in cities and towns is not uniform. I recommend study by such commission or board as the General Court may designate for report and recommendations.

5. Recording Automobile Conditional Sales to Avoid Futile Litigation.

I recommend that legislation be enacted requiring that conditional sales of motor vehicles be recorded with the registrar of motor vehicles. It is impossible at the present time to ascertain whether or not a motor vehicle is held on a conditional sale, and great inconvenience and considerable litigation result from disputes with reference to ownership, sales, attachments and liens. The expense in the handling of such recording would be small and could be amply covered by requiring a small recording fee. The result would be that any person interested could find in one central office information which would minimize to a very considerable degree unnecessary loss and litigation.


G. L., c. 131, § 58, as amended by St. 1923, c. 99, § 3, and St. 1925, c. 334, penalizes the killing, by poisoning, of a "quadruped" only. Thus the owners of hens, geese and ducks are not protected. I recommend extension of these provisions to include fowl as well as quadrupeds.

7. Date of Meeting of Presidential Electors.

The Congress of the United States, by the act of May 29, 1928, c. 859, § 1, 45 Stat., provided that —

The electors of president and vice-president of each state shall meet and give their votes on the first Wednesday in January next following their appointment at such place in each state as the legislature of such state shall direct.

This statute is inconsistent with G. L., c. 54, § 14S, which provides that —

The persons chosen as presidential electors shall meet at the state house on the Saturday preceding the second Monday in January succeeding their election.

While the manner of choosing, electing or appointing electors of President and Vice-President is left for the several States to prescribe,
yet the Congress of the United States has ample power to prescribe the day on which those electors shall in their several States meet and vote.

Therefore, I recommend that our State statute be made to conform to the Act of Congress by striking out in the first sentence of G. L., c. 54, § 148, the words "Saturday preceding the second Monday" and inserting in place thereof the words "first Wednesday."

8. Literary and Dramatic Censorship.

There has been adverse criticism throughout the country of the methods in Massachusetts of censoring literary and dramatic productions. The effective control of such productions rests either in those local authorities who license theatrical productions, or in such public-spirited citizens as may seek to curb the sale of books which offend them, by criminal prosecution of book sellers.

The pertinent statutes with respect to theatrical productions are G. L., c. 140, § 181, § 182, as amended by St. 1926, c. 299, § 2, § 182A, §§ 183A–C, §§ 185A–G, dealing generally with the licensing of theatrical performances by the local authorities; G. L., c. 143, §§ 35–38, and § 52, dealing with the inspection and regulation of buildings used for theatrical entertainments (pertinent here because revocation of licenses to use buildings as theatres has been used as a method of preventing theatrical exhibitions which the local authorities have not desired to prevent by the direct means provided under chapter 140); and G. L., c. 272, § 32, making it a criminal offense to participate in, or aid in, the production of an obscene or offensive theatrical performance or exhibition.

With respect to books, — G. L., c. 272, § 28, making the sale, printing or distribution of matter containing obscene, indecent, or impure language a criminal offense, is the controlling statute. At the last session of the General Court three bills were introduced looking to the amendment of the last-named section. (See 1928 House Documents Nos. 59, 577 and 680.) All of these bills were referred to the Committee on Legal Affairs, which reported "leave to withdraw" (House Journal (1928) 522), which report was accepted (House Journal (1928) 534, 541).

Regulation of the sale of objectionable books is, therefore, left to the criminal law and to the preventive effect of threat of prosecution; regulation of dramatic production, to the action of local authorities principally. A theatrical producer or a publisher has no way of discovering in advance whether performance or book will meet any local standard of propriety. A book seller must either remove a questionable
book from his shelves or deliberately make a sale, for which he knows he will be prosecuted, in the hope of an acquittal. Even acquittal of the particular sale prosecuted is no assurance of acquittal on a prosecution for subsequent sale heard by a different judge or in a different court. On the other hand, books and plays, in fact equally or more questionable, may be sold, or produced, failing disapproval or notice of action of subordinate local authorities, through inadvertence, lack of appreciation, or otherwise. It is obvious that this system leaves a matter which seriously affects the whole community to private enterprise and haphazard and spasmodic public prosecution, resulting in the inconsistency of contemporaneous suppression in one locality and sanction in another. There are many groups interested in any new legislation on these subjects, which affect the press, publishers, librarians, authors, theatrical producers, the clergy, persons engaged in education, labor and the legal profession, among others. An unpaid commission representing all of these groups, the duty of which would be to study the situation and report to the Legislature, might well frame a sound and satisfactory scheme for a more rational censorship.


I concur in the recommendation of the Judicial Council for revision of the form of the writ and summons that its content may be as intelligible to the layman as to the lawyer (2d Rep., pp. 37, 112), and for the elimination of the fiction of the chip attachment (2d Rep., pp. 43, 113).

To facilitate determination of cases by avoidance of delay of counsel as to agreement on condensed narrative of transcript of evidence, I concur in the recommendations enabling recitation of evidence in bills of exceptions in question and answer form (2d Rep., p. 35).

To relieve congestion in the Superior Court, I concur in its recommendation of increase in the jurisdiction and limits of the district courts in civil cases (1st Rep., p. 47), and that cases growing out of the same accident, when brought in different counties, may be transferred to be tried together (4th Rep., p. 43).

10. Automobile Litigation.

The administrative problem affecting the Superior Court jury trials is the congestion of civil and criminal cases. Congestion in the civil jury list seems to arise from automobile cases clogging the list, to the prejudice of other causes. The automobile and its laws are account-
able for the inevitably increasing class of such causes. Relief must be
had either by the use of other agencies for determination of this class
of causes or by shifting other burdens from the Superior Court and
discouraging needless litigation. Much can be done in supplemental
relief by the State, or cities and towns, through traffic commissions
and public improvements, and by organizations genuinely engaged in
the promotion of the public safety, for the prevention of accidents.
The valuable analysis of the Judicial Council suggests various pos-
sible forms of relief.

11. Alleged Fraudulent Practices of Attorneys and Physicians in Auto-
mobile Compulsory Insurance Cases.

Early in 1928 the then Commissioner of Insurance stated publicly
that he was informed that fraud in automobile compulsory insurance
claims existed which necessarily had a very serious relation to the cost
of liability rates. It was eminently proper that the law officer of the
Commonwealth should examine the premises which would support so
grave a charge, and to that end I conferred with the Commissioner
before and since his resignation, and also with such parties as I had
reason to believe might have special knowledge of the alleged fraudu-
 lent practices. A very determined effort was made on my part to
secure evidence upon which the above public statements were based.
But not only was no evidence submitted by or subsequently obtain-
able from the aforesaid Commissioner, but even the “leads” suggested
were of no immediate value. Anxious as I was to correct such abuses
if they existed, I was presented with only the flimsiest of hearsay to
support the statements made by him.

Yet this same vague allegation has focused the attention of this
Department upon the possibility of irregularity. The investigation is
not completed, and must of necessity take a considerable time. If
violation of the law is disclosed, prosecution will follow. But indict-
ment or complaint will not be made until there is dependable evidence.
The investigation involves an examination into all the facts of hun-
dreds of accident cases. It has, however, proceeded sufficiently far to
make it apparent to me that there is no occasion to initiate or to
attempt to initiate any general inquiry into the conduct of the bar of
this Commonwealth, such as was conducted in New York and in other
cities. I am of the opinion that disciplinary action toward such attor-
neys as may be disclosed to have committed fraudulent practices can
be initiated in the courts in the customary manner rather than through
a wholesale investigation of the bar. It would be a great aid to the
investigation which I am making if additional power were given to
the Department of the Attorney General, as requested in the following
paragraph.

The obligation is generally attributed to the Department of the
Attorney General to conduct investigation of matters concerning the
public peace, public safety and the public welfare, if at any time it
appears to him that the laws are being violated. At present, however,
he has no power in any independent inquiry to summon witnesses and
to examine them under oath. He should have that power, subject to
the same provisions, respecting the obligation of a witness to testify
and the right of a witness to refuse to testify, which govern the giving
of testimony in the courts of the Commonwealth. Obviously, no ex-
haustive investigation designed to remedy any arising or existing evils
can be conducted by the Attorney General unless he has such power.
I recommend enabling legislation.

There are approximately 7,000 attorneys in Massachusetts. The pro-
fession has gained popularity as a calling during the past generation,
about 400 becoming eligible thereto annually. Virtually the principal
qualification is the passing of the examination established by the Board
of Bar Examiners. It is doubtful if any other standard is workable.
In the large membership of the bar, not unlike other professions, or
even trades, there is an irresponsible element. While, to be sure, this
element is but a fraction of the whole, it appears to be increasing. The
fraud and misconduct of this minority gravely reflects upon the general
reputation of the whole bar, and indirectly lessens the public respect
for the judicial system. Necessary house cleaning should be the con-
cern of the various organizations of the bar throughout the State. If
work of this nature is not commenced, and pushed to conclusion, and de-
cent amelioration supplied, it is not unlikely that that portion of the
public which has been defrauded and imposed upon may demand and
obtain some drastic relief not wholly just to the great reputable ma-
ajority. For the present it seems better to leave the voluntary cure of
the malignant ulcers with the various bar associations.

14. Qualifications for Admission to the Bar.
The ground of complaint against the unscrupulous minority of the
Massachusetts bar does not come from any cultural deficiencies, but
from basic unmorality. Until this basic lack of morality is supplied, no requirement of qualification by culture will afford a guarantee of rectitude. Education, however exalted, does not fulfill its mission unless it inculcates an unadulterated respect for the fundamental law and government of our country. Ill equipped, indeed, is that student, though he be rich with degrees, who leaves his alma mater poor from lack of respect for the Constitution which, under his oath as a member of the bar, he must swear to honor and uphold. (G. L., c. 221, § 38.) The inculcation of old-fashioned ethics, from early childhood on, will do a great deal to endow the bar of the future with that high regard in which the profession was held by the generation passing away.

15. Disbarment of Attorneys.

There has been widespread public dissatisfaction with the present procedure of disbarment of attorneys. The present law provides that an attorney may be removed by the Supreme Judicial or the Superior Court, and that whenever a petition is filed for the removal of an attorney the proceedings thereafter shall be conducted by an attorney to be designated by the court. Under the present system proceedings are usually commenced by the various bar associations. While theoretically any private citizen may commence such proceedings, action by any other than a regularly constituted body is impracticable. A private citizen himself has not the knowledge, the time, nor the inclination to commence disbarment proceedings. Individual attorneys will not commence such proceedings at the instigation of a private individual because of their natural disinclination to proceed against another attorney, and also because of the existence of a certain professional code and spirit which deters one lawyer from proceeding against another.

The present method of proceedings instituted by bar associations has proven inefficient and ineffectual. Very few proceedings are commenced, and actions which are commenced drag indefinitely.

A change is vitally necessary. Various methods have from time to time been suggested, — reference to the Attorney General; establishment of bar counsel in each county. Neither agency meets the situation. I suggest that a paid commission of three or more attorneys be appointed by the Governor for a term of years, who shall not be permitted to engage in the practice of the law, with duties and powers of investigation and prosecution of cases of "deceit, malpractice or other gross misconduct."
16. Limitation upon Practice in Criminal Cases by Special Justices.

I urge attention to the recommendation, made in former years, that special justices of municipal and district courts be prohibited from practising in their own courts in criminal cases whether as prosecuting officers or as defendants' attorneys. The justice and the clerk or assistant clerk of a court are now prohibited from engagement in any criminal action pending in or previously examined or tried in the court. Special justices as well should be prohibited.

The appearance of special justices as counsel for complainant or defendant in criminal actions pending before their courts arouses in the public mind a certain element of distrust, in that close association of the judges may influence decisions. However unfounded, the practice is detrimental to the confidence of the people in an impartial judicial system.


A problem that little comes to the attention of the public at large is that relating to the unfortunate drug addict. Today, if he seeks cure, his sole avenue of relief through the agency of this State is a commitment which puts him in the light of a criminal, as many of these unfortunates are without the means to avail themselves of private sanitarium treatment. I suggest, in the cause of humanity, that some legal avenue be opened which will grant them institutional relief apart from criminal process. If by these means it is possible to restore to normal health these unfortunates, the contribution that this element makes to crime is bound to be diminished.

18. Regulation of "Overnight Camps."

"Overnight" camps are springing up all over the State. Aside from regulation for public health by provision for their inspection, and for disposition of waste matter, regulation by licenses to owners, requiring records of lodgers, would afford information for identification of persons. G. L., c. 40, § 21, cl. 1st (enabling towns to enact by-laws relative to the conduct of such business), if availed of by all towns, might be sufficient, but general legislation applicable to all camps may well be considered.

19. Regulation of the Sale of Securities.

By Resolves of 1928, c. 29, the Board of Bank Incorporation and the Department of Public Utilities, acting jointly, were directed to investigate a number of proposals for amendment to the laws regulating the sale of securities. The members of the two departments
under date of December 5, 1928, filed a report, with drafts of suggested legislation attached thereto. The recommendations contained in the report if adopted would cause no radical changes in the substantive law governing the sale of securities, but would unquestionably so organize the Department of Public Utilities that it would be enabled to enforce existing law much more effectively. I believe that the recommendation of the two Boards that a Securities Division be established in the Department of Public Utilities should be adopted. Only by constant supervision and by vigilant inspection can the activities of fraudulent stock dealers and salesmen be curbed. Without a well-trained group of energetic investigators, inspectors and accountants under a director of real executive ability, sound business sense and experience, successful work in checking the losses to the public caused by unscrupulous promoters and stock salesmen may not be expected.

The present Sale of Securities Act, I believe, has never been given a fair test in its present form, for the proper means to enforce it energetically have hitherto never been (and are not now) at the disposal of the Department of Public Utilities. It may well be that the present unhealthy situation with respect to the sale of securities is based on too little and ineffective enforcement rather than on too little legislation.

The suggestion in the Report of the Attorney General for the year ending November 30, 1927 (at pp. 17-21, 29-31), with respect to reforms in the enforcement of the law governing the sale of securities, that the enforcement of these laws be concentrated in the Department of the Attorney General, was rejected by the 1928 General Court, and was not referred for consideration to the recess commission consisting of the Department of Public Utilities and the Board of Bank Incorporation. The Department of the Attorney General has under the present law no duties and virtually no powers with respect to infringements of the Sale of Securities Act, except in cases referred to the Attorney General by the Department of Public Utilities, or in cases where a crime has been committed, which latter group of cases is primarily within the scope of the duties of the several district attorneys. I support the recommendation of the recess commission principally because it has some tendency to centralize the duty of enforcement of these important laws, although I am still inclined to believe that the recommendation will eventually prove to be less satisfactory than the plan of placing the responsibility for the enforcement of these laws in this Department, following the practice adopted in New York most successfully.
Many complaints of losses are received from subscribers to so-called "tipster sheets" or "investment services." The Sale of Securities Act should in explicit language make the sales and distribution of investment services and information subject to the supervision of the Department of Public Utilities. Certainly persons issuing or distributing such services or "tipster sheets" should be required to register as brokers under G. L., c. 110A, and the Department of Public Utilities should have power to revoke the registration of such persons for cause.

CONCLUSION.

The foregoing report does not, and, indeed, cannot, cover in detail all the multifold and various activities of this Department which seldom come to the public attention, save such as may be featured in the press and so become of popular interest. Service in all the courts of the Commonwealth and in the Federal courts, rendition of advice to the executive and legislative branches of government and to the departments and their subordinate divisions is routine, but, nevertheless, often attended with major consequences to every man, woman and child in the Commonwealth.

Respectfully submitted,

Joseph E. Warner,
Attorney General.
OPINIONS.

Board of Examiners of Plumbers — Licenses — Rules.¹

If the holder of a license as a master plumber does not renew it on or before May 1st in any year, a renewal thereof may not issue subsequently.

The approval of rules of the Board by the Department of Public Health is essential to their validity, but the rules may be revised without such approval, upon petition of a local board of health.

A master plumber's license may not be loaned to another by the person to whom it is issued.

A duly licensed journeyman plumber may engage in the plumbing business if he does not employ other journeyman plumbers to assist him.

A corporation may not have as one of its employees, for the purpose of enabling it to receive plumbing permits, a master plumber.

Mr. William F. Craig, Director of Registration.

Dear Sir: — 1. You have asked my opinion as to whether it is illegal for the Board of Examiners of Plumbers to issue a renewal license on May 2nd, and if so, whether another examination is required.

G. L., c. 142, § 6, provides: —

"Licenses shall be issued for one year and may be renewed annually on or before May first upon payment of the required fee."

A license under the above chapter is a permit to engage in the plumbing business only during the term of the license (which must be for one year) and renewals thereof. There is no authority permitting an extension of the original license except in so far as the statute states that it may be renewed annually on or before May 1st upon payment of the required fee. * If the holder of the license does not renew it on or before that date, it is my opinion that the Board may not issue a renewal thereof subsequent to that date.

I am further of the opinion that if a person holding a license under this chapter and the amendments thereto does not procure a renewal thereof on or before May 1st, he must be treated as a new applicant and submit to the same requirements and examinations as a person who has never had a license.

2. In the third question of your letter you ask whether or not St. 1909, c. 536, § 2, has been repealed, whereby it is not necessary to have the approval of the State Board of Health (now the Department of Public Health) of such rules as are made by the Examiners under the authority of that section.

This section has been repealed by G. L., c. 282. G. L., c. 142, § 4, however, provides: —

"The examiners may make such rules as they deem necessary for the proper performance of their duties, which shall take effect when approved by the department of public health."

In my opinion, therefore, the approval by the Department of Public Health is necessary to the validity of any rule made by the Examiners.

¹ This opinion was unintentionally omitted from the report for the year 1927, and by reason of its importance is printed in this report.
3. In the sixth question of your letter you ask whether or not a master plumber's license can be loaned to another to conduct a plumbing business, and if not, how this practice can be stopped.

A master plumber's license is a permit issued by the State Examiners of Plumbers authorizing the licensee to engage in the business of a master plumber. Such license is issued only to applicants who successfully pass an examination as prescribed by G. L., c. 142, § 4. Public safety and health require that only such persons as are competent to perform the work secure a license, and obviously it can be exercised only by those persons who meet the standard and requirements of the Examiners. It is the clear intent of the Legislature that such a permit or license shall be used and exercised only by the licensee, and shall not be loaned or in any way transferred to another person. Unless this were so, the very evils and perils which the Legislature sought to avert by subjecting the applicant to an examination before granting him a license would still persist. I am of the opinion, therefore, that a master plumber's license may not be loaned to another to conduct a plumbing business.

As to how this practice, if it is prevalent, can be stopped, I respectfully suggest that this is a matter for your department to regulate and control. It seems to have the character and aspect of an administrative problem rather than of a legal problem, and I do not believe that it is within the scope of this Department to make recommendations or suggestions of this character.

4. In the seventh question of your letter you ask whether or not a journeyman plumber may engage in the business of plumbing and advertise as such.

I am of the opinion that a duly licensed journeyman plumber may engage in the business of plumbing to the extent that he has the right to work for himself and to take contracts for, or to do by his own labor, plumbing on buildings, but under the statutes he has no right to employ other journeyman plumbers to assist him in doing such work. Commonwealth v. McCarthy, 225 Mass. 192. I am of the opinion that he may lawfully advertise to the same extent that he may perform.

5. In the eighth question of your letter you ask whether a corporation or company can employ a master plumber to enable it to receive plumbing permits.

R. L., c. 103, §§ 1 and 2, provided for the issuance of such a license to a corporation, and stated that a license issued to the manager of a corporation was sufficient compliance with that chapter. R. L., c. 103, §§ 1 and 2, are expressly repealed by G. L., c. 282. The present law, G. L., c. 142, makes no provision for a license to a corporation except in so far as the word "person" applies to corporations as well as to individuals. That part of R. L., c. 103, which provides that a license issued to a manager of a corporation satisfies the requirements of the chapter is also omitted from G. L., c. 142. These omissions are significant in that the present act not only fails to provide for the issuing of a license to a corporation but also fails to indicate what member of the corporation shall take the examination and receive the license.

There is, therefore, no method under the present law whereby a corporation may engage in the plumbing business, and it follows, in my opinion, that a corporation may not have as one of its employees a master plumber for the purpose of enabling it to receive plumbing permits.

6. In the twelfth question of your letter you ask whether your Board can change or amend plumbing rules made under the provisions of St.
1909, c. 536, § 5, and if so, whether they must be approved by any one.

St. 1909, c. 536, § 5, was repealed by G. L., c. 282. G. L., c. 142, § 8, provides:

"Upon petition of the board of health of any town which has not prescribed regulations relative to plumbing under section thirteen or corresponding provisions of earlier laws, the examiners shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing work within such town, which rules, when approved by the department of public health and accepted by the said board of health and published once a week for three consecutive weeks in some newspaper published in said town, shall have the force of law. Such rules may be revised by the examiners upon the petition of the board of health."

Under this section it is clear that the Examiners may revise the rules described therein, and it is my opinion that the approval of the Department of Public Health is not necessary to such revision. The approval of the Department of Public Health is necessary to such rules as are formulated by the Examiners, but as to such rules as are revised no approval is necessary.

It may be difficult in some cases to determine whether a purported revision is in fact a revision of an existing rule or a formulating of a new rule, but each case as it arises must be governed and determined by the particular circumstances surrounding it.

Very truly yours,
ARTHUR K. READING, Attorney General.

Change of Name — Birth Records — Town Clerk.

A record of birth may not be amended by a town clerk so as to insert in place of the person's name, as originally recorded, a new name which he has become entitled to use by virtue of a decree of a Probate Court.

DEC. 22, 1927.

HON. FREDERIC W. COOK, Secretary of the Commonwealth.

DEAR Sir: — You have asked my opinion as to whether a record of birth, which was correctly recorded some time ago, may be amended or changed so as to insert therein the person's new name, which was properly changed by a decree of the Probate Court. The pertinent provisions of law are as follows:

G. L., c. 46, § 5, provides:

"When necessary to supply deficiencies in the birth records, he (the town clerk) may enter therein any written information obtained by him but he shall not change facts already recorded except as provided in section thirteen or except to correct errors in copying from notices, reports or certificates on file in his office."

G. L., c. 46, § 13, as amended by St. 1925, c. 281, § 2, provides:

"If the record relating to a birth, marriage or death does not contain all the required facts, or if it is claimed that the facts are not correctly stated therein, the town clerk shall receive an affidavit containing the facts required for record, if made by a person required by law to furnish the information for the original record, or, at the discretion of the town
clerk, by credible persons having knowledge of the case. . . . He shall file any affidavit submitted under this section and record it in a separate book kept therefor, with the name and residence of the deponent and the date of the original record, and shall thereupon draw a line through any incorrect statement, or statements, sought to be amended in the original record, without erasing them, shall enter upon the original record the facts required to correct, amend or supplement the same and forthwith, if a copy of the record has been sent to the state secretary, shall forward to the state secretary a certified copy of the corrected, amended or supplemented record upon blanks to be provided by him, and the state secretary shall thereupon correct, amend or supplement the record in his office."

Section 5, quoted above, specifically states that the town clerk shall not change facts already recorded. This statement is modified by providing for two exceptions; one of these is not pertinent to the present case and the other provides for a change only in accordance with section 13. As section 13 is an exception to the general rule, it must be construed strictly.

Section 13 provided only for such amendments or changes as were necessary to render the facts recorded therein correct at the time of the recording, and, in my opinion, did not contemplate that subsequent events, such as a change of name, should be entered into the record by way of correction or amendment. This section was amended by St. 1925, c. 281, § 2, by providing for the amendment of the record in cases where illegitimate children were subsequently legitimatized so that the record would read as if the person had been born to its parents in lawful wedlock. No provision was made as to amending the record in cases where the name as recorded was subsequently changed. The law governing this question, therefore, stands as it did prior to this amendment, and it is my opinion that the change of name may not be entered upon the record. In this connection I call your attention to an opinion rendered to you on September 25, 1922, by former Attorney General J. Weston Allen (VI Op. Atty. Gen. 619).

Very truly yours,

ARTHUR K. READING, Attorney General.

Probate Courts — Petitions for Administration de Bonis non with the Will annexed — Fees.

Upon a petition for administration de bonis non with the will annexed no entry fee should be required if a fee has already been paid upon an original petition or if an original petition was entered prior to the effective date of St. 1926, c. 363.

DEC. 29, 1927.

HON. WILLIAM S. YOUNGMAN, Treasurer and Receiver General.

DEAR SIR: — You have asked my opinion whether a fee is collectible by registers of probate under St. 1926, c. 363, § 2, (1) upon a petition for administration de bonis non with the will annexed in a case where a fee has already been paid at the entry of the petition for the probate of the will, and (2) upon a petition for administration de bonis non in an estate where the original petition for administration was filed before the said statute was passed, so that this subsequent petition is incidental to a proceeding upon which no fee was required to be paid.
P.D. 12.

In my opinion, no fee should be charged upon either of these petitions. It is of no consequence that the original petition in an estate was filed before the said statute was passed. The purpose of the statute was to charge a fee upon certain kinds of petitions filed after the effective date of the statute. There is no retroactive provision as to petitions filed before the statute was passed.

The relevant portion of G. L., c. 262, § 40, as amended by St. 1926, c. 363, § 2, is as follows:

"The fees of registers of probate and insolvency, payable in advance by the petitioner or libellant, shall be as follows:

For the entry of a petition for the probate of a will, for administration on the estate of a person deceased intestate, and, except when the petition is certified by the register or assistant register to be incidental to proceedings already pending in the same county, for the entry of a petition for the appointment of a special administrator, conservator, trustee, receiver of the estate of an absentee, or of a guardian . . . three dollars."

A petition for administration de bonis non with the will annexed is clearly not within the provisions of this statute. It is plain that a petition for administration de bonis non with the will annexed is not a petition for the probate of a will, but presupposes a prior and successful petition for probate. It is equally clear that it is not a petition for administration on the estate of a person deceased intestate, but presupposes the existence of a valid will. The first petition regarding which you ask my opinion is therefore not subject to a fee, because it is not within the words of the statute.

The answer to your second inquiry is more difficult. A petition for administration de bonis non is clearly within the literal wording of the statute, to wit, "for administration on the estate of a person deceased intestate." It is my opinion, however, that the fee in question was intended to be charged only upon original petitions for probate and original petitions for administration. The intent of the statute, as shown by its exclusion of a petition for administration de bonis non with the will annexed, and by its exception when the petition in certain proceedings is certified by the register to be incidental to proceedings already pending in the same county, seems pretty clearly to be to exclude all except original petitions, on an analogy to entry fees in our other courts.

Very truly yours,

Arthur K. Reading, Attorney General.

District Attorney for the Northern District — Special Assistants.

A justice of the Superior Court may not appoint a special assistant district attorney for the Northern District if there be an assistant district attorney in office.

Jan. 25, 1928.

Hon. Robert T. Bushnell, District Attorney for the Northern District.

Dear Sir: — You request my opinion upon the following question: "Can a justice of the Superior Court, upon the request of the District Attorney for the Northern District, appoint a special assistant district attorney under the provisions of G. L., c. 12, § 18, when there are regular assistants in office?"
G. L., c. 12, § 18, reads as follows: —

"If there is no assistant district attorney, the court may allow a reasonable sum, payable from the county treasury, for the services of a clerk to aid the district attorney; and in the northern, eastern, middle and southeastern districts, the court may appoint, for the sitting at which the appointment is made, a competent person to act as an assistant to the district attorney and his compensation, not exceeding six hundred dollars in one year, shall be paid from the county treasury."

In the recent case of Commonwealth v. Sacco, 255 Mass. 369, 444, the court held that there can be no appointment of a special assistant district attorney if there be in office an assistant district attorney who has been duly appointed.

The restriction applies only in the case of appointments in the Northern, Eastern, Middle and Southeastern districts.

I therefore answer your question in the negative.

Very truly yours,

ARTHUR K. READING, Attorney General.

Board of Retirement — Death of Employee — Widow’s Pension.

If the Board of Retirement finds as a fact that work performed by an employee of the Commonwealth was done in the performance of his duties, and that such work contributed to his death, it may award a pension to his widow.

FEB. 3, 1928.

Board of Retirement.

GENTLEMEN: — You have asked my opinion as to two questions in reference to certain facts which are briefly summarized herein: —

An employee of the Metropolitan Sewerage Division, who was suffering from organic valvular disease of the heart, was engaged in carrying a heavy pipe, with the aid of another man, from one room at the East Boston Pumping Station to the basement thereof. Immediately after reaching the basement he dropped to the floor and shortly thereafter died, the death certificate giving as the cause of his death organic valvular heart disease. Nothing unusual occurred while the employee was engaged in this work, nor was there anything requiring extra exertion on his part.

Your questions are as follows: —

"1. Would it be proper and according to the facts in this case to rule that there were no ‘injuries’ according to paragraph (9) or (10) but that death resulted from a pre-existing ordinary disability of heart disease?

2. Has our Board the legal authority to find that the acceleration of a pre-existing disability of heart disease, without any accidental force being present, but nevertheless causing death in the course of employment, is sufficient ‘injuries’ for the compensation to be awarded to the widow under paragraph (10) of section 2?”

As the answer to each question deals directly with the answer to the other, both are considered together.

The pertinent law is contained in G. L., c. 32, § 2, par. (10), as amended by St. 1921, c. 487, § 5, and is as follows: —

"If any member is found by the board to have died from injuries received while in the discharge of his duty, and leaves a widow, or if no
widow any child or children under the age of sixteen, a pension equal to the retirement allowance to which such member would have been entitled under paragraph (9) had he been permanently incapacitated shall be paid to such widow so long as she remains unmarried, or for the benefit of such child or children so long as he or any one of them continues under the age of sixteen. A person receiving a pension under this paragraph shall not receive from the commonwealth any other sum by way of annuity, pension or compensation."

Paragraph (9), referred to herein, does not affect the action of the Board in this case except in so far as the amount of the pension is concerned, and it follows that the provisions of paragraph (9), to the effect that the injuries must be sustained through no fault of the employee, are not applicable in death cases under paragraph (10).

The mere fact that the employee had been suffering from heart trouble for some time prior to his death does not of itself take his case out of the provisions of the act. Even if he was so suffering, his widow is entitled to the pension if his death was accelerated or hastened by the work done. Under decisions of the Supreme Judicial Court in somewhat similar cases it has been decided that lifting and other physical effort which causes death to a person afflicted with heart trouble may be an "injury" if it in any way is a contributing cause of the death, and even though it would not have caused death except for the defective heart condition. Brightman's Case, 220 Mass. 17; Fisher's Case, 220 Mass. 581. Nor, in my opinion, is it of importance that the work in which the employee was engaged was not unusual or of the type requiring extra exertion. If the work was done in the performance of his duties and if it contributed to his death, the Board may well find that the employee died from injuries received while in the discharge of his duty. Whether or not the work done by the employee in this case was a contributing cause of death is a fact to be found by the Board, and if the Board finds that it was such a cause, the widow is entitled to the pension. This, in my opinion, is the whole crux of the case, and it is the duty of the Board, upon all the evidence, to ascertain this fact.

Specifically referring to your first question, I repeat that you can find that there were no injuries, within the meaning of the act, only if upon all the evidence the work done did not contribute to the employee's death, and this is a question of fact which must be determined by the Board.

Assuming the facts stated in your second question to be true, I answer it in the affirmative.

Very truly yours,
ARTHUR K. READING, Attorney General.

Constitutional Law — Municipalities — Shellfish.

Municipalities may be authorized by the Legislature to establish plants for the purifying of shellfish taken therein.

House Committee on Bills in the Third Reading.  

GENTLEMEN: — You have asked my opinion as to the constitutionality of House Bill No. 945, which is as follows: —

"A city or town may establish and maintain a plant for the purpose of purifying shellfish taken in such city or town. Such plant shall be
established and maintained under the direction of the mayor or board of selectmen or a person designated by said mayor or board. Said mayor or board shall also establish fees sufficient to cover the cost of maintaining and operating the plant, which shall be collected for service rendered thereby."

It is true that ordinarily cities and towns may not engage in a private business, even though such business would be of advantage to its inhabitants. The present act, however, to my mind, obviously contemplates a public purpose, as it is closely connected with the important public purpose of protecting the health of the public. It is a well-known fact that shellfish may constitute a serious menace to the health and well-being of a community, and any reasonable measure contemplated to check or eliminate this menace is consistent with the power of the Legislature. I therefore advise you that, in my opinion, the law, if enacted, will be constitutional.

Very truly yours,
Arthur K. Reading, Attorney General.

Municipalities — Employees — Vacations.

Action by a city council, under Gen. St. 1915, c. 60, is a prerequisite to the right of a municipal laborer to receive a vacation by virtue of said statute.

A municipal laborer is entitled to a vacation, under the provisions of St. 1914, c. 217, and St. 1927, c. 131, only while he is upon the pay roll.

Feb. 8, 1928.

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

Dear Sir: — You have asked my opinion upon the following questions:

1. In the case of a city or town which accepted St. 1914, c. 217, is a laborer who is otherwise qualified as required by statute, entitled to a vacation if the city council has taken no action under Gen. St. 1915, c. 60?

2. Is a laborer who worked thirty-two weeks in the aggregate during the preceding calendar year, and who is discharged at some period in the ensuing year before he has received his vacation, entitled to a vacation?

3. Is a laborer who has worked thirty-two weeks in the aggregate in the course of a calendar year, and who is discharged on the last day of that year, entitled to a vacation in the ensuing year?

4. The act provides that the Department of Labor and Industries shall have all the necessary powers to enforce this statute. Since no penalty is provided for violations of the statute and no prosecution can be instituted against the person violating the statute, what other powers has the Department of Labor and Industries to enforce this law?"

1. In answer to your first question, I am of the opinion that a laborer who is employed by a city and who is otherwise qualified is not entitled to a vacation under this chapter unless the city council has taken the action described therein. St. 1914, c. 217, provided as follows: —

"Section 1. All persons classified as laborers, or doing the work of laborers, and regularly employed by cities or towns for more than one year, shall be granted a vacation of not less than two weeks during each year of their employment, without loss of pay."
Section 2. This act shall be submitted to the voters of each of the cities and towns of the commonwealth at the next annual state election for their acceptance or rejection, and shall take effect in any city or town upon its acceptance by a majority of the voters voting thereon in the affirmative.”

This statute was affected by Gen. St. 1915, c. 60, which provided as follows: —

"Any city in which a majority of the voters at the last state election voted to accept the provisions of chapter two hundred and seventeen of the acts of the year nineteen hundred and fourteen, may by vote of the city council, approved by the mayor, or by vote of the commission in any city under a commission form of government, require the heads of the executive departments to grant a vacation of two weeks without loss of pay to any person regularly employed by such city who is classified as a common laborer, skilled laborer, mechanic or craftsman in the labor service, as classified by the civil service commission, under regulations established by said commission for cities to which the labor rules adopted by the civil service commission are or may become applicable. If such vacations are authorized, they shall be granted by the heads of the executive departments, and shall begin at such times as in the opinion of the heads of the executive departments will cause the least interference with the performance of the regular work of the city."

There were several other acts, between this latter act and the effective date of the General Laws, affecting this question. The General Laws repealed all of these acts but one, and that one was in substance reënacted by the General Laws. Several changes, not affecting the answer to your first question, were made subsequently, culminating in St. 1927, c. 131, which provides as follows: —

"In any town which accepted chapter two hundred and seventeen of the acts of nineteen hundred and fourteen, all persons classified as laborers, or doing the work of laborers, regularly employed by such town, shall be granted a vacation of not less than two weeks during each year of their employment, without loss of pay. In any city which accepted said chapter the city council may determine that a vacation of two weeks without loss of pay shall be granted to every person regularly employed by such city as a common laborer, skilled laborer, mechanic or craftsman. If such vacations are authorized, they shall be granted by the heads of the executive departments of the city at such times as in their opinion will cause the least interference with the performance of the regular work of the city. A person shall be deemed to be regularly employed, within the meaning of this section, if he has actually worked for the city or town for thirty-two weeks in the aggregate during the preceding calendar year. The department of labor and industries shall enforce this section, and shall have all necessary powers therefor."

Under this act it follows that in cities the city council must act before a laborer is entitled to any vacation. This has been the law at all times since the effective date of Gen. St. 1915, c. 60. In towns no action by the selectmen or any other body ever has been or is now necessary. A laborer employed by a town is entitled to his vacation, if otherwise qualified, without any action on the part of the selectmen.

2. As to your second question, I am of the opinion that a laborer who
worked thirty-two weeks in the aggregate in the preceding calendar year, and who is discharged at some period in the ensuing year before he has received his vacation, is not entitled to a vacation. The word "vacation" implies a period of rest between periods of employment, and may not properly be used in reference to a period of rest after employment ceases. It contemplates that a person should be employed at the time it commences. The act states that a person shall be deemed to be regularly employed, within the meaning of the section, if he has actually worked for the city or town for thirty-two weeks in the aggregate during the preceding calendar year. This, however, does not mean that a person qualifies for a vacation even though he is not at the time in the employ of the city or town. The definition purports to define the word "regularly" only, leaving the word "employed" to its ordinary commonsense meaning. Any other construction of the act would be unreasonable and not in accord with the intent of the Legislature.

The above is obviously true with reference to a town which has accepted the provisions of St. 1914, c. 217. St. 1927, c. 131, states that in such a town laborers shall be granted a vacation "during each year of their employment." These words tend to indicate that the person must be employed at the time the vacation is to commence. It is further to be noted that in both cities and towns the vacation is to be given "without loss of pay." These words also imply that the person to whom the vacation is given is on the pay roll at the time the vacation commences. If this were not so, the money paid would be in the nature of a bonus or gift rather than pay.

If a man is discharged arbitrarily, for the sole purpose of depriving him of a vacation, it may well be that the above statement of the law would not be applicable, and I express no opinion as to the law covering such a case.

3. What has been said in reference to the second question applies also to your third question.

4. No penalty is provided for violation of St. 1927, c. 131. The duties prescribed by the act fall upon officers of cities and towns, and in most cases these men will conform to the law even though no penalty is prescribed. In my opinion, a petition for mandamus could be successfully maintained by the person entitled to the vacation, in the event that his rights under this chapter were denied or abridged. Under the principle laid down in Attorney General v. Apportionment Commissioners, 224 Mass. 598, it is possible that the Attorney General might institute a petition for mandamus to vindicate the public right, on the theory that rights conferred by this act benefit not only the laborer but also indirectly inure to the benefit of the public at large.

Very truly yours,

ARTHUR K. READING, Attorney General.

Sewer — Massachusetts Reformatory — Apportionment of Expense.

St. 1913, c. 138, as amended, requires the Commonwealth to pay a part of the expense of the Concord sewerage system, with which the Massachusetts Reformatory is authorized to connect its sewers.

HON. SANFORD BATES, Commissioner of Correction.

Feb. 10, 1928.

Dear Sir: — You request my opinion on the following questions relative to the expense of construction of the main sewer line from Concord to Concord Junction: —
P.D. 12.

“1. Is the statute of 1895 still in effect?
2. To what extent was it modified by the law of 1906 authorizing an alternative sewerage system at the Massachusetts Reformatory?
3. Was the 1895 law revived by the trivial amendments passed in 1913?
4. To what extent is the Commonwealth obligated under the law, as it now stands, to contribute to the expense of this improvement, the Commonwealth’s share of which, it is stated, will be in the vicinity of $50,000?”

I assume, although you do not so state in your letter, that the main sewer line in question was constructed by the town of Concord under the authority of St. 1895, c. 151. This act authorized but did not require the town of Concord to construct and maintain a sewerage system, provided the act was accepted by vote of the town within three years. I am advised that it was so accepted.

The act further provided that whenever the said system should be established the sewers of the Massachusetts Reformatory and other property of the Commonwealth in Concord should be connected with the main sewer line of the town.

The statute in question, not having been definitely limited in time by its terms or expressly repealed by any subsequent act of the Legislature, has been effective and in force since its passage. I accordingly answer your first question in the affirmative.

Resolves of 1906, c. 49, merely authorized the expenditure of a certain sum in order to provide additional means for the disposal of sewage at the Massachusetts Reformatory. It makes no specific reference to St. 1895, c. 151, and is not inconsistent with it. It therefore does not, either specifically or by implication, modify the latter statute, although the results achieved by works established under it may be a factor to be considered in ascertaining the extent of any obligation on the part of the Commonwealth to compensate the town of Concord for the use of the latter’s sewage disposal facilities.

St. 1913, c. 138, amending St. 1895, c. 151, § 8, indicates the intent of the Legislature to treat the earlier act as still in force at that time. The slight verbal changes made by the amendment of the earlier statute do not alter its manifest purpose. Under the law the Commonwealth is obligated to pay for the privileges conferred and benefits received such part or percentage of the construction cost and operating expense of the Concord sewerage system established under St. 1913, c. 138, as amended, as may be agreed upon with the said town, and, in the event of failure to reach an agreement, such compensation is to be determined by three commissioners to be appointed by the Supreme Judicial Court.

Yours very truly,

ARTHUR K. READING, Attorney General.

Motor Vehicles — Registration — Non-Residents.

A person living in another State, who works regularly as an employee in a factory within the Commonwealth for a period of more than thirty days in the year, is not a non-resident, as that term is defined in G. L., c. 90, § 1.

FEB. 10, 1928.

HON. WILLIAM F. WILLIAMS, Commissioner of Public Works.

DEAR SIR: — You have asked my opinion relative to the meaning of a clause of G. L., c. 90, § 1, in the following language: —
"Under the provisions of G. L., c. 90, § 1, a 'non-resident' is defined as 'any resident of any state or country who has no regular place of abode or business in the commonwealth for a period of more than thirty days in the year.' Along the border of our State many residents of other States own automobiles properly registered in the States in which they live, which they operate every day or practically every day into the State of Massachusetts to places where they are employed. For instance, many of them come from Rhode Island to their place of employment in the jewelry factories in Attleboro.

In such cases is the factory where the resident of the other State works a place of business within the definition above quoted in G. L., c. 90, § 1?"

I am of the opinion that if a person living in another State works regularly as an employee in a factory within the Commonwealth for a period of more than thirty days in the year he is not a "non-resident" within the terms of the definition set forth in said section 1.

Whether or not in any given instance such employment is regular and in excess of the prescribed period is primarily a question of fact, for the determination of your Department or some division or officer thereof.

The word "business" and the phrase "place of business," when used in statutory enactments, may have, respectively, more than one meaning, depending largely upon the context and the purpose and design of the statutes wherein they occur, as the latter throw light upon the legislative intent in employing the words. In its general or broadest sense the word "business" denotes the employment or occupation in which a person is engaged to procure a living, and that irrespective of whether such person be in the service of another or not. Goddard v. Chaffee, 2 Allen, 395. Such general meaning should be given to the word as used in the phrase "place of business" unless the context or the design of the statute wherein it occurs indicates that the word is to be interpreted in a more restricted sense, so as to exclude "trade or calling" or "place of employment," as embraced within the use of the word "business" or "place of business," respectively. Hanley v. Eastern S.S. Corp., 221 Mass. 125 (and cases there cited); Collector of Taxes v. New England Trust Co., 221 Mass. 384.

One of the purposes or designs of the instant statute, in regard to the registration of motor vehicles and the licensing of operators thereof, appears to be to require such registration and licensing of all vehicles and operators, respectively, as will render their regulation and identification easy of accomplishment by registration and licensing through the officials of this Commonwealth. Certain exceptions to the strict requirements of the general law in this respect are afforded to owners of vehicles registered or persons licensed in other States, obviously upon the theory that such vehicles and such persons will not be upon the roads of the Commonwealth to the same extent as cars owned by residents or operators who are residents. A person who has a regular place of business in the Commonwealth, in the sense that he has a place where he carries on a trade for hire, is not likely to use the roads of Massachusetts less than one who has a place for the transaction of a business which is something other than a trade or calling. The intent or design of G. L., c. 90, furnishes no ground for asserting that the phrase "place of business," in the clause under consideration, was intended by the Legislature to be interpreted in its narrow sense, so as to exclude places wherein a trade, employment
or calling was regularly practiced by an individual, thereby permitting such individual to be deemed a “non-resident” and within the exceptions to the general design of the law.

Those persons who are to have the benefit of the exceptions from the general law in this respect are entitled “non-residents,” and the meaning of “non-residents,” for the purpose of the statute, is carefully defined. The definition should be construed so as to give effect to the general design of the statute, which is Massachusetts registration and licensing for cars and operators. By the terms of the definition, owners and operators who come regularly into this State are, by reason of their presumably frequent use of our roads, excluded from the class of “non-resident.” Presumable frequency of the use of our roads appears to be the test as to those residents of other States who may avail themselves of the privilege of exception from the general law as to local registration and license. The form of business which a person regularly carries on at a place within the Commonwealth would seem to bear no relation to the frequency of his use of our roads. There appears to be no good reason for differentiating in this respect between a class of persons whose regular business, carried on at a definite place in the Commonwealth, is a trade or calling and those whose business, carried on likewise at such a definite place, is of another type. Both classes may, and probably will, use our roads to the same extent in coming to and returning from their work to a place of abode outside Massachusetts. I do not think that the Legislature, in making this definition, intended to place in one class the man who labors at a bench or in a counting room and in another the man who works in his own executive office, and to make exceptions to the general law applicable to one and not to the other.

Very truly yours,

Arthur K. Reading, Attorney General.

Department of Public Health — Water Supply — Hearing.

The Department of Public Health has no authority to reopen a hearing held under G. L., c. 40, § 41, after it has given its approval to a proposed taking for water supply thereunder.

Feb. 14, 1928.

Dr. George H. Bigelow, Commissioner of Public Health.

Dear Sir: — You have asked my opinion as to whether the Department of Public Health has authority to reopen a hearing held under the provisions of G. L., c. 40, § 41, after it has given its approval, subsequent to such hearing, to the purchase or taking of land by a city for a source of water supply; and whether or not, if it has such authority, it must grant such a rehearing.

In regard to the particular matter before you, as to which your question is propounded, you advise me that the owner of land involved in the proposed taking was notified of the hearing and that a period of three months was given him, upon his request for delay, in which to appear and state his objections, which he did not do; that the hearing was duly held and notice of approval of the purchase or taking formally conveyed to the interested city, which thereafter did in fact take land in accordance with such approval; that subsequent to such taking the said owner filed with you a petition for a rehearing.
I am not aware of any provision of the statutes which specifically authorizes a rehearing of the matters brought before your Department under G. L., c. 40, § 41; and after its approval has been acted upon by a municipality and a taking made in reliance thereon, it has not, in my opinion, authority to rehear such matters.

Very truly yours,

ARTHUR K. READING, Attorney General.

County Accounts — Deputy Sheriff — Fees.

Fees of a deputy sheriff who is a salaried chief of police may be allowed for services outside the town in which he serves as such chief.

FEB. 15, 1928.


DEAR Sir: — You request my opinion as to whether, under the provisions of G. L., c. 262, § 50, as amended by St. 1922, c. 377, § 1, forbidding extra payments for "official services performed in any criminal case" to "a deputy sheriff, city marshal or other police officer who receives a salary," an item in certain county accounts for allowance of payment of fees to a deputy sheriff, not the recipient of a salary or allowance in payment for services therefor, who is a salaried chief of police of a town, for serving criminal process in and for towns which maintain no regular police department, for violations of law therein, is proper for approval by the Director of Accounts.

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

"No . . . deputy sheriff, . . . city marshal or other 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 official services performed by him in any criminal case; . . . or for testifying as a witness in a criminal case during the time for which he receives such salary or allowance; . . . but his expenses, necessarily and actually incurred, and actually disbursed by him . . . shall . . . be paid . . . in a criminal case tried in a district court . . . by the town where the crime was committed."

The statute first recites seriatim the officials, by title, to whom its provisions, purposing prevention of receipt by salaried officers of double compensation for the same working time, and prohibition of their interest in fees, are applicable. Incumbency of office, receipt of salary or allowance and performance of an official service in any criminal case, by any one of the officials recited, are the circumstances by which the provisions operate, in any given case, to preclude extra payment for "official services." Though the "official services" include any and all services in any criminal case incident to the services required of any one of the officers, they relate to those services, performed by any one of the officials recited, which are incident and peculiar to the services required of such official in the capacity for which he receives a salary or a daily or hourly allowance.

In my opinion, the receipt of a salary for official services as a chief of police of a town, by a person who is also a deputy sheriff, does not, under the circumstances you recite, preclude payment of fees to such person
for official services as a deputy sheriff in serving criminal process in and for other towns for violations of law therein, and you are therefore advised that the item as to which you inquire is a proper one for approval by the Director of Accounts.

Yours very truly,

ARTHUR K. READING, Attorney General.

County Treasurer — County Tuberculosis Hospital Treasurer — Salary.

A county treasurer serving as treasurer of a county tuberculosis hospital may receive compensation for the work of both offices, in the absence of a statute making the duties of the latter position part of those of the former.

FEB. 17, 1928.

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

DEAR SIR: — You request my opinion whether a county treasurer, in the event he serves as treasurer of a county tuberculosis hospital by appointment of the county commissioners, may receive compensation for such service in addition to his salary as county treasurer.

G. L., c. 35, § 4, establishes the basis of salaries payable to treasurers of certain counties "in full for all services performed by them."

The services, obviously, are those required to be performed by an encumbent as part of or incident to duties as a treasurer of a county, as prescribed by statute.

G. L., c. 111, § 81, as amended by St. 1924, c. 500, § 2, provides for the erection of hospitals in counties by county commissioners for hospital care of certain persons in certain municipalities in the counties. Sections 83 and 85 provide for apportionment and collection of amount for erection and maintenance of the same from the municipalities served.

Such municipalities comprise districts as entities separate from the counties. A hospital so erected for such service to municipalities is therefore a county district hospital. The treasurer of such a hospital is therefore not an employee of the county, as such. Peck's Case, 250 Mass. 261, 268.

G. L., c. 111, § 87, authorizes appointment by the county commissioners of officers and employees necessary for the proper conduct of said hospitals.

In the absence of any statute requiring treasurership of a county district tuberculosis hospital as part of the duties of a county treasurer, as such, in any particular county, the services of the former are not included in the services of a county treasurer, for the performance of all of which G. L., c. 35, § 4, prescribes a salary in full, and, in the event that the county commissioners appoint a county treasurer to serve as treasurer of such a hospital, he may, in my opinion, receive compensation therefore in addition to his salary as county treasurer.

Yours very truly,

ARTHUR K. READING, Attorney General.
Insurance — Title Insurance Company — Commissioner of Insurance.

The Commissioner of Insurance, in reviewing the articles of a proposed title insurance company, may consider with relation thereto the purposes of the corporation in the light of G. L., c. 175, § 47, cl. 11th.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have requested my opinion upon several questions relative to the incorporation of a title insurance company, and have set forth the statement of the purposes for which such company is formed, as contained in its articles of organization submitted to you for your approval.

Your questions are as follows: —

"1. May the Commissioner in reviewing said articles consider the purposes contained in the second to fifth paragraphs above quoted?

2. May the Commissioner under said section 49 lawfully approve the purposes set forth in the second, third, fourth or fifth paragraphs above quoted?

3. Do the provisions of said section 49 restrict the purposes to be set forth in the articles of a domestic insurance company to those contained in one or more of the several clauses of section 47 of said chapter, and may the Commissioner lawfully refuse to approve articles containing any purposes other than those set forth in said section 47 as aforesaid?

4. May a domestic insurance company formed to transact business under said clause eleventh exercise all of the powers specified in the said second to fifth paragraphs, and if not, what powers of those so specified may it exercise?"

1. I answer your first question in the affirmative.

A distinction is to be drawn between the purposes and the powers of a corporation. G. L., c. 175, § 47, cl. 11th, sets forth the only lawful purposes for which a corporation of the character indicated by the instant articles of organization may be organized. A corporation organized for such purposes has by implication of law certain powers necessary or convenient to enable it to carry out such purposes. Paragraphs two to five of the articles of organization submitted to you do not purport to set forth any other purposes than those to which such a corporation is limited by the stated statutory clause. Such paragraphs merely purport to define the powers which the corporation may exercise in effectuating such purposes. The incorporators may not by the inclusion, in such defined powers, of powers not necessary or convenient to the carrying out of its designated purposes, but calculated, if exercised, to add to such purposes, evade the limitations of clause 11th and create an organization virtually having purposes additional to those allowed by the statute. The Commissioner is therefore bound to examine all the paragraphs of the articles of organization, with a view to determining whether the powers of the corporation, as therein set forth, are in excess of those which may properly be exercised by a company which may be formed only to effectuate the limited purposes designated in said clause 11th.

Moreover, G. L., c. 175, § 49, as amended, provides: —

"The company shall be formed in the manner described in and be subject to section nine of chapter one hundred and fifty-five, and sec-
tions six and eight to twelve, inclusive, of chapter one hundred and fifty-six . . .

... the articles of organization . . . shall, with the records and by-laws of the company, be submitted to the commissioner" (of insurance) "instead of to the commissioner of corporations and taxation, and he shall have the powers and perform the duties relative thereto specified in section eleven of said chapter one hundred and fifty-six."

G. L., c. 156, § 6, to which the formation of the corporation is to be subject, provides that the agreement of association shall state, among other matters, —

"(h) Any other lawful provisions for the conduct and regulation of the business of the corporation, for its voluntary dissolution, or for limiting, defining or regulating the powers of the corporation, or of its directors or stockholders, or of any class of stockholders."

Under this statutory provision the incorporators have a right in their articles of organization to set forth provisions which define the powers of the corporation. This they have done in paragraphs two to five, as set forth in your communication.

The duties and powers with relation to the articles of organization which are vested in the Commissioner of Corporations and Taxation by G. L., c. 156, § 11, and which by virtue of G. L., c. 175, § 49, the Commissioner of Insurance is to exercise with relation to the corporation now under consideration, are as follows: —

"The articles of organization, the agreement of association, and the record of the first meeting of the incorporators, including the by-laws, shall be submitted to the commissioner, who shall examine them and who may require such amendment thereof or such additional information as he deems necessary. If he finds that the provisions of law relative to the organization of the corporation have been complied with, he shall endorse his approval on the articles. Thereupon, the articles shall, upon payment of the fee provided by section fifty-three, be filed in the office of the state secretary, who shall cause them and the endorsement thereon to be recorded."

Since the incorporators may set forth in their articles of organization such definitions of the powers of the corporation as they may deem best to provide for specifically, it becomes the duty of the Commissioner of Insurance, exercising similar powers to those given to the Commissioner of Corporations and Taxation in other instances, to examine the articles to determine whether such provisions by way of definition are lawful.

2. I answer your second question in the affirmative with relation to the provisions as to the powers of the corporation. No purposes additional to those set forth in the first paragraph of the articles, as quoted in your letter, appear in the following paragraphs of the articles. I do not perceive any powers defined in such latter paragraphs which are either not incidental to or unconnected with the carrying out of the purposes of the corporation, which purposes are set forth in the articles in the language of clause 11th of section 47 of the statute. The powers set forth are so defined with relation to applicable statutory enactments that it cannot be said that the provisions of law relative to the organization of the corporation have not been complied with.
3. I answer both inquiries contained in your third question, as written, in the affirmative.

Section 49 is to be read in connection with section 47, and as complementary and not in opposition thereto. See VII Op. Atty. Gen. 532, 536.

4. I answer your fourth question to the effect that, with relation to the specific case to which you have directed my attention, all the powers as they are defined in the particular articles of organization laid before me may be exercised by this corporation to which they pertain, when its formation has been duly completed.

Very truly yours,
Arthur K. Reading, Attorney General.


A mutual liability insurance company may agree to pay, and may disburse, to policyholders whose policies have expired a share in the profits, such as may be fairly allocated to them for the time during which their policies were in force.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have advised me to the effect that a domestic mutual insurance company doing business under G. L., c. 175, § 47, cl. 6th, as amended, issuing "motor vehicle liability policies" solely, and subject to the provisions of G. L., c. 175, § 80, as amended —

"proposes to issue to persons insured by it during the year 1927, a certificate entitled 'Participating Dividend Warrant' which reads: —

'(Name of Company.)

No. ——

This is to certify that John Doe, a policyholder or member for the year 1927, and continuously thereafter; of the Insurance Company, will be entitled upon surrender of this certificate (when called for surrender by the Board of Directors of such Company) to such dividend, if any, as may be declared by the Board of Directors but in no event to be in excess of 20% of the insurance premium paid by such policyholder or member in the year 1927 — the same to be payable out of the profits or earnings of such Company declared on business written during such policy year.

This certificate is transferable only at the home office of the Company in such manner and at such times as shall be determined by the Board of Directors.

The purpose of this certificate is to meet competition in that this company has not declared a dividend to persons insured by it during 1927."

You have asked my opinion upon the following questions relative to the foregoing facts: —

"1. May a mutual company lawfully issue a certificate in the form above set forth?

2. Do the words 'may by vote fix and determine the percentages of dividend . . . to be paid on expiring policies,' occurring in said section 80, permit a company to declare and pay dividends on policies which have expired in contradistinction to policies which have not expired, at the time the declaration is made, or more specifically, may a company,
v.g., lawfully declare and pay, in 1930, a dividend in respect to a policy which expired on December 31, 1927?"

1. I answer your first question in the affirmative. It has been the policy of this Commonwealth, as evidenced by a long line of enactments, to provide for the payment to holders of policies in mutual insurance companies of such share in the profits of those companies as might fairly be allocated to them for the time in which their policies were in force. It is made clear by the language of the statutes that they are not to be deprived of such benefits by the expiration of their policies. Doubtless, in the absence of such enactments, it might have been said that only such persons as continued to hold effective policies in a mutual company could be entitled to participate in its benefits or be liable for any part of its losses. Zinn v. Germantown etc. Ins. Co., 132 Wis. 86. Liability to assessment for loss for a designated period after policy lapsing has been placed upon those insured in mutual companies by a series of statutes, now embodied in G. L., c. 175, § 83.

G. L., c. 175, § 80, provides that the directors may fix the percentages of dividends "from time to time." Even if it be assumed that the duty of the directors requires them to make such fixation during each calendar year, the fact that they have not done so in regard to any particular year does not deprive the policyholder of the right which is given by the statute to participate in any dividend which may be declared as of the year in which his policy expired. A declaration of a deferred dividend applicable to a preceding year, deferred perhaps because impossible of ascertainment at an earlier date, or for any other reason, is not specifically forbidden by the statute, and I perceive nothing inherently illegal in it.

The certificate or "warrant" to which you have called my attention does not appear to me to create any liability upon the insurance company which did not previously exist. It seems to be a mere declaration that the company will fulfill its obligation to the holder of a 1927 policy with relation to any portion of a dividend for such year, when and if the same be properly fixed and determined, which might rightly be allocated to him.

I note that the certificate refers to the policyholder of 1927 as one "continuously thereafter" a policyholder or member of the company. It is obvious that if a dividend for 1927 be declared at a later period, all persons whose policies expired in that year would be equally entitled to their proportion of the benefit thereof, irrespective of whether or not they continued to be members of the company, by virtue of the provisions of said section 80. As the so-called warrant does not, as I have said, give rise to new obligations on the part of the company as to policyholders of 1927, the delivery of the warrant, even with this particular clause therein, to continuing members only does not give to the latter any special favor or advantage in the dividends or any other valuable consideration not open to non-continuing policyholders, and for that reason cannot be said to be in violation of G. L., c. 175, §§ 181–185.

2. I assume that the dividend which you refer to in your second question is one which might properly have been declared in 1927 if it had been possible at that time to make the necessary computations, and upon that assumption I answer your second question in the affirmative.

Very truly yours,

ARTHUR K. READING, Attorney General.
Money applicable only to death fund purposes may not lawfully be diverted to the payment of expenses.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have laid before me the following facts:—

"A certain fraternal society is licensed to transact business in this Commonwealth under the provisions of G. L., c. 176. During the year 1926, its board of directors allocated to the expense fund of the society the sum of $100,000 out of the interest and dividends paid to the society on all of the stocks and bonds owned by it. This sum was, therefore, apparently taken from the accretions of the death fund of the society.

The society contends that it has a right to use any portion of the accretions to its death fund in excess of three and one-half per cent, the rate of interest assumption on its reserve, because its by-laws so provide.".

You have asked my opinion upon the two following questions as they relate to the foregoing facts:—

"1. Did the transfer of the said fund of $100,000 constitute a violation of G. L., c. 176, § 14?
2. May a society lawfully provide in its by-laws that the accretions to its death fund in excess of the interest assumption on its reserve may be used for expenses?"

G. L., c. 176, § 14, with relation to a fraternal benefit society, provides:—

"Every provision of the by-laws of the society for payment by members of such society, in whatever form made, shall distinctly state the purposes of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses."

The legislative intent as expressed in this section is plain. It is to the effect that none of the accretions which have in fact actually enured to the mortuary or disability funds shall be used for expenses. It is immaterial that the society by its by-laws may have established some other rule as to the accretions. It is immaterial that the society may have provided for using more than a designated percentage of the accretions for expenses. "Net accretions" to the fund, as those words are used in the instant statute, do not mean such sums as the society may itself determine to leave in its death fund from the profits thereof. It is immaterial whether the sums which the society has determined to leave in its death fund are, in the judgment of the society or in fact, sufficient to secure its actuarial solvency or to provide an adequate reserve. The Legislature has determined that all such sums must be left in the death fund. No other measure of the necessary size of the death fund can be substituted for that adopted by the Legislature, namely, the payments of the members plus the actual or net accretions.

If it be of importance to consider the meaning of the words "net accretions" as distinguished from gross accretions, the same is made clear in that part of the opinion of the Supreme Judicial Court in Catholic Order of Foresters v. Commissioner of Insurance, 256 Mass. 502, wherein certain
peculiar expenditures from the gross receipts of the death fund were held to be properly chargeable as against such fund itself, "as in effect a payment of death claims" rather than payable as expenses, within the ordinary use of that word, from the expense fund. In such case the difference between the total of accretions and the authorized payment would clearly be net accretions, within the meaning of the statute.

The words "net accretions" do not mean that portion of the total accretions of the mortuary fund which the society has itself under a by-law permitted to be added to the fund. This society, by means of its by-laws, has attempted by a colorable division of the money paid by the members for mortuary purposes into different funds to divert to the payment of expenses sums applicable only to death fund uses, in much the same manner as did the plaintiff in the case of Catholic Order of Foresters v. Commissioner of Insurance, supra,—a practice held there improper by the court.

I answer your first question in the affirmative and your second in the negative.

Very truly yours,

ARTHUR K. READING, Attorney General.

Constitutional Law — Contracts between Certain Employers and Employees.

A proposed statute prohibiting the making of contracts for the purchase of stock, between employers and employees engaged in hand labor or machine operation, would not, if enacted, be constitutional.

FEB. 29, 1928.

HON. J. BRADFORD DAVIS, Senate Chairman, Committee on Labor and Industries.

DEAR SIR:— Your committee has asked my opinion as to the constitutionality of Senate Bill No. 131 and House Bill No. 673, if enacted into law.

The purpose of both the proposed measures appears to be to prohibit the making of certain contracts between employers and employees, and between those who are about to enter into such relationship to each other. By their terms the proposed measures relate only to such employees as engage in hand labor or machine operation.

It is not clear whether section 1 of this act is intended to require all contracts therein included to be in writing, or whether it merely intends to require copies of such contracts as may be in writing to be delivered to employee or prospective employee. This matter should be clarified by amendment. The answer to the first question hereinafter set forth is based upon the assumption that the first section does not compel such contracts to be in writing, but intends to affect only such contracts as may be in writing.

Such provisions of these bills, set forth in their first sections, respectively, as are intended to require the giving of signed copies of written agreements which have been entered into with relation to terms of employment to the contracting employee, are, in my opinion, constitutional, as a valid exercise of the police power in a field wherein fraudulent practices may not unreasonably be determined by the Legislature to be likely of occurrence, even though the requirements are limited to a particular class of contracting parties.
The provisions of the proposed measures, such as are embodied in the second sections thereof, respectively, declare null and void contracts of employment which in effect require purchase of the capital stock of the employer by the employee. The provisions obviously are intended to apply only to corporations, on the one hand, and are specifically limited by their terms to workers who perform hand labor or operate machines, on the other. The bills as drawn not only implanted prohibit the requirement of purchase of stock as a prerequisite to the obtaining or retaining of employment, which might conceivably be regarded as such a coercive measure on the part of an employing corporation as to warrant legislative enactment to protect the workman, but go much farther and render void contracts made between those as to whom the relation of employer and employee actually exists, relative to performance of the designated forms of labor, if such contracts contain as a condition or consideration the purchase of stock by the employee.

It is not a matter of common knowledge that the purchase of stock in corporations by their employees is contrary to the public welfare. The practice is not an uncommon one and it is not impossible that it may be of benefit to employees. It is not plain that hand laborers and machine operators form a special group as to which such forms of contract may not be beneficial. To single out this particular class of workmen and to deny to them and their employers the right to make binding contracts of this character does not, on its face, appear to be a reasonable mode of classification, but, rather, to be an arbitrary one. There is nothing in the phraseology of the bills which tends to show that the subject matter of the enactment bears a relation to any of the forms of public welfare for the protection of which contracts may be the subject of regulation by the police power inherent in the Legislature.

Much the same considerations are applicable to the third sections of the proposed bills. It may well be that some provisions of employment contracts "restricting the liberty of action" of the designated classes of employees are void under our existing laws. It does not necessarily follow, however, that provisions restricting the liberty of former employees in all forms of action are necessarily so oppressive and subversive of the general good of the community as to permit an interference with the right of contract by the Legislature under the guise of the police power. It is not apparent that the conditions of employment with regard to the special class of employers who may desire the benefits of such contracts, namely, those hiring hand laborers or machine operators, is such as to make their classification as a particular group which may not make contracts permitted to others a reasonable rather than an arbitrary one.

The character of the business to which this legislation relates appears to be a private one, not one necessarily charged with a public use. The Legislature, however, even in relation to business not charged with a public use, may to some extent regulate contracts between employer and employee in order to protect the safety, health, morals or, in a limited sense, the general welfare of the public, but unless the public welfare is so adversely affected the Legislature has no authority, under the guise of the police power or otherwise, to prescribe the conditions or regulate the contracts under which labor shall be performed by men of full age. Opinion of the Justices, 163 Mass. 589; V Op. Att'y. Gen. 484; Holcombe v. Creamer, 231 Mass. 99; Opinion of the Justices, 220 Mass. 627; Commonwealth v. Boston & Maine R.R., 222 Mass. 206; Bogni v. Perotti,
P.D. 12.

224 Mass. 152, 157; Commonwealth v. Strauss, 191 Mass. 545, 550-1; and cases cited in the foregoing.

For the foregoing considerations I am constrained to advise you that, in my opinion, the bills to which you have directed my attention would not, if enacted, be constitutional.

Very truly yours,
Arthur K. Reading, Attorney General.

Municipality — Fire Department — Fire Chief.

A chief of a fire department of a town, who makes the duties of his office his vocation, is a permanent member of such department, within the meaning of G. L., c. 32, § 85; and the provisions of said section, once accepted by a town, apply after the town has become a city.

March 1, 1928.

Hon. Thomas R. Bateman, Chairman, House Committee on Bills in the Third Reading.

Dear Sir: — You have asked my opinion upon two questions involved in your consideration of Senate Bill No. 237, entitled "An Act relative to the retirement and pensioning of the chief of the fire department of the city of Gardner."

Your questions are these: —

"(1) Is the chief of the fire department of a town which has accepted the provisions of G. L., c. 32, § 85, or corresponding provisions of earlier laws, who holds said office under civil service or other form of unlimited tenure or by election or appointment for a stated term, a 'permanent member of the fire department,' within the meaning of said section 85?

(2) Do the provisions of said section 85, if accepted by a town, continue to apply to permanent members of its fire department after it has become a city?"

1. The words "permanent member of the fire department" or "permanent fireman," as used in our statutes for many years, have a somewhat technical meaning. They connote a man whose occupation is that of a fireman attached to some regularly constituted fire-fighting department, in contradistinction to a "call" fireman, who, though a member of such a department, renders his service to it only upon specific calls therefor, and who does not make fire fighting his vocation. As used in legislative enactments in this Commonwealth the word "permanent," as applied to a fireman, denotes nothing as to his tenure of office, with relation to its being unlimited or limited, or to the manner in which he is chosen for such office. The application of the words "permanent" and "call" to describe two different types of firemen, classified according to the mode in which they render service, is to be seen throughout G. L., c. 48, as amended, and a similar meaning is to be given to the words as used in G. L., c. 32, as amended.

A chief of a fire department appointed under the provisions of G. L., c. 48, § 42, would appear to be intended by the Legislature to be a "permanent fireman," from the very nature of the duties which he is called upon to perform. In any given instance it would appear to be a question of fact as to whether a particular fireman was to be deemed a permanent or a call member of a department, the determination of that fact depend-
ing solely upon a consideration of the character of the service which he was obliged to render and in no way upon the manner of his appointment or the term of his office. A chief of a fire department who was not required to perform the duties of such office merely upon specific "call" would be a permanent member of his department and affected by all pension laws pertaining to permanent members, irrespective of the fact that he was subject to appointment at stated intervals by the municipal authorities," in the language of Senate Bill No. 237. See Moffatt v. Lowell, 215 Mass. 92.

Accordingly, I answer your first question in the affirmative, assuming that a chief of a fire department, as a matter of fact, makes the duties of his office his vocation. See IV Op. Atty. Gen. 151; V ibid. 469.

2. I answer your second question in the affirmative.

The provisions of G. L., c. 32, § 85, relative to pensions for firemen in towns, are identical in purpose and intent with those of G. L., c. 32, § 80, which applies to firemen in cities. Although the establishment by a city of a system of pensions for firemen is dependent upon its acceptance by vote of a city council, nevertheless, the same system, in effect, has, under the terms of your question, already been accepted by the municipal body, which is now a city. To hold that mere change in the form of government nullifies the effect of the adoption of the system by the town would be to place a strained construction upon two sections of the same chapter which accomplish identical results. Minor details with reference to the carrying out of the system, which necessarily involve changes therein, such as the performance of the duties of the old town officials by the corresponding new city officers, do not render the old system in opposition to the powers, rights and duties of the city as such. The city succeeds the town, and it and its officials are to carry out the obligations of the old body in so far as these are not in opposition to the new city charter. See Codman v. Crocker, 203 Mass. 146, 149; Higginson v. Turner, 171 Mass. 586, 591; Hill v. Boston, 122 Mass. 344, 357. A change in the form of government of a community does not ipso facto abrogate pre-existing law applicable thereto. An act of incorporation does not necessarily annul the rights and privileges of a town; it rather confers on the town a new name with additional powers. Commonwealth v. Worcester, 3 Pick. 462, 474.

Moreover, it is expressly provided by our statutes as follows: —

"Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in the acts relating thereto. Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities." (G. L., c. 40, § 1.)

"Except as otherwise provided by law, city councils shall have the powers of towns; boards of aldermen shall have the powers, perform the duties and be subject to the liabilities of selectmen, except with respect to appointments, and the mayor shall have the powers, perform the duties and be subject to the liabilities of selectmen with respect to appointments, but all his appointments shall be subject to confirmation and rejection by the aldermen, and upon the rejection of a person so appointed the mayor shall within one month thereafter make another appointment. In cities having a single legislative board other than a board of aldermen,
such board shall, so far as appropriate and not inconsistent with the express provisions of any general or special law, have the powers, perform the duties and be subject to the liabilities of the board of aldermen.”

(G. L., c. 39, § 1.)

Very truly yours,
Arthur K. Reading, Attorney General.

Department of Conservation — Venue of Prosecution — Game Laws.

A person who, after killing a pheasant, fails to make a report to the Department, as required by its rules and regulations, may be prosecuted in Suffolk County irrespective of the place of such killing.

March 1, 1928.


Dear Sir: — You have asked my opinion as to the local jurisdiction in which a person who has failed to make a report to your Department within twenty-four hours after killing a pheasant may be prosecuted. You have not submitted a copy of the rules and regulations which you advise me require such a report, but I assume, for the purposes of this opinion, that they are in proper form and have such effect by law that failure to comply with their terms in the respect indicated authorizes a criminal prosecution and the imposition of a penalty.

The precise point which you raise relative to the venue of such a prosecution has not been passed upon by the Supreme Judicial Court of this Commonwealth, and its ultimate determination is one for judicial decision. I am of the opinion, however, that proper venue for prosecution of the offense which you have described is in the County of Suffolk, irrespective of the situs of the killing or the residence of its perpetrator. Crimes of omission are ordinarily regarded as committed at the place where the required act should have been performed, and the courts at such place have jurisdiction of the offender even if he has not been personally present at any time therein. The general principle has been stated by the Supreme Court of Indiana, in State v. Yocum, 182 Ind. 481, as follows:

"Personal presence is not an indispensable element in the locality of crime. A neglect to do an act is punishable in the county where the act should have been done. . . . As a general rule, an offense which involves an act of commission is committed where the act is done, while an offense involving an act of omission is committed where the act should have been done."

This principle has been applied to cases involving neglect to support or abandonment of a wife or children, the offense in such instances being treated as having been committed at the place where the dependents were when failure to support or to maintain existed as a fact, even though the husband or father was not in the same judicial jurisdiction as the dependents. State v. Dvoracek, 140 Iowa, 266; Cleveland v. State, 7 Ga. App. 622; State v. Yocum, supra; In re Price, 168 Mich. 527; People v. Quigley, 134 N. Y. S. 953. It is also significant that the Supreme Judicial Court has sub silentio passed upon a similar situation in the case of Commonwealth v. Acker, 197 Mass. 91.

So a failure by a railroad corporation, having its usual place of business in one county, to construct a station, as required by law, in another
county has been held to give jurisdiction to the courts of the latter county, in which the prescribed act should have been performed. *Louisiana etc. Ry. Co. v. State*, 85 Ark. 12.

So the venue of an indictment charging embezzlement for failure to account has been held properly laid in the county where the defendant's duty required him to account. *People v. Davis*, 269 Ill. 256.

So the prosecution of a corporation for failure to place the word "incorporated" after its name in an advertisement, in violation of a statute, was held properly to be in the county where the corporation had its place of business and not in the county where it published the advertisement in a local newspaper. *Paracamph Co. v. Commonwealth*, 33 Ky. Law Rep. 981; *Commonwealth v. Nebo Cons. Coal & Coking Co.*, 141 Ky. 493.

Under your regulations, as you have described them in your letter, the killer of a pheasant was required to make a written report to the office of your Department in the State House at Boston. The failure to make the report at such place where it was due, within a certain time, constitutes such an omission as will give jurisdiction to the courts sitting in Suffolk County for the determination of criminal cases. The offense might be prosecuted by indictment in the Superior Court or by information in the Municipal Court of the City of Boston.

Very truly yours,

Arthur K. Reading, Attorney General.

*Notaries Public — Justices of the Peace — Commissions — Expirations.*

Commissions of notaries public and justices of the peace appointed on February 29, 1928, for the term of seven years, expire on February 28, 1935.

March 7, 1928.

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

Dear Sir: — You inquire whether commissions of notaries public and justices of the peace who were appointed on February 29, 1928, for the term of seven years, would expire on February 28 or March 1, 1935. It is my opinion that such commissions will expire on February 28, 1935.

Very truly yours,

Arthur K. Reading, Attorney General.

*Metropolitan District Water Supply Commission — Power to acquire Real Property owned by a Town.*

The Commission, under St. 1927, c. 321, may acquire by purchase lands owned by a town, but it may not enter into an agreement for purchase of lands owned by a town under a plan for compensation by which the Commonwealth will become the debtor of the town for a period of unlimited duration.

March 13, 1928.

*Metropolitan District Water Supply Commission.*

Gentlemen: — You request my opinion on two questions relating to proposed action by your Commission in pursuance of its duties and powers as expressed in St. 1927, c. 321. Sections 4 and 12 of said act, to which reference is hereby made, are not herein quoted because of their length.
The first question upon which you request my opinion is whether or not the Commission, in behalf of the Commonwealth, may acquire certain land and buildings owned by the town of Dana in its corporate capacity.

I assume from your request that the takings contemplated are reasonable and necessary for the successful and proper completion of the project authorized by St. 1927, c. 321. The language of section 4 is clearly broad and inclusive enough to authorize the purchase of lands or of any interest therein owned by the town of Dana in its corporate capacity. That the powers of the Commission extend thus far is also clearly shown by the fact that section 12 gives a specific remedy at law for a taking of such property. In view of the broad authorization of acquisition by purchase, contained in section 4, it cannot be said that the remedy by suit, contained in section 12, is the exclusive method by which compensation for the taking of such lands may be obtained. In my opinion, section 4 of the act authorizes the acquisition by purchase of the lands in question. Your attention is also called to the inclusive provisions of section 7 of said act.

The second question upon which my opinion is required is whether the Commission may enter into an agreement for the purchase of certain buildings in the town of Dana under a contract the terms of which are substantially those set forth in a memorandum accompanying your request. In substance, the memorandum of the contract proposes compensation for the taking of certain specified property of and in the town of Dana by —

(a) an agreement of the Commonwealth to take over and assume the payment of certain notes made by the town of Dana;

(b) an agreement that the Commonwealth shall permit the town to have the free use of the buildings taken, until the said buildings must actually be removed by the Commission for the execution of the Swift River project; and

(c) the establishment by the Commonwealth of a credit balance in the State treasury in favor of the town of Dana, against which the town may draw, in certain specified amounts, and upon the unpaid amount of which balance the Commonwealth shall pay to the town, semi-annually, interest at the rate of five per cent per annum.

The contract is not described with sufficient accuracy or in such detail in the memorandum attached to your request as to enable me to pass finally upon the validity of its provisions in detail. Upon broad, general principles I am, however, of the opinion that the agreements described in paragraphs (a) and (b), being in substance the equivalent of the present payment of compensation in money or the grant of privileges in diminution of damages, are valid and within the general authority of the Commission as set forth in St. 1927, c. 321, § 4, and by the express terms of section 7, which gives the Commission the broadest possible powers of settlement. Said section 7 provides as follows: —

"The commission may either before a taking or afterward make such settlements as it may deem for the best interests of the commonwealth with any person or corporation having a valid claim under this act."

Whether or not the provision for a credit balance in favor of the town of Dana, described above in paragraph (c), is a proper exercise of the power of purchase under the provisions of St. 1927, c. 321, §§ 4 and 7, is a more difficult question. If the portion of the contract establishing this credit balance provides merely for the postponement of the payment of the principal sum to be paid by way of settlement, I am of the opinion
that the provision is proper. The powers of the Commission with respect to purchases of land are at all places in St. 1927, c. 321, of the broadest possible scope, leaving to the Commission free play for the exercise of a sound discretion. I am of the opinion that the broad powers given to the Commission to make settlements include not only the power to settle a taking claim by the spot payment of the principal sum of damages, but also, with the assent of the landowner, to pay the principal sum of damages at a future day or to make the payment of such principal sum subject to such reasonable conditions as may be agreed upon by the parties to the settlement.

On the other hand, if the provisions for the establishment of a credit balance in favor of the town of Dana are intended to constitute the Commission or the Treasurer and Receivers General either a trustee for the town or, in substance, a borrower from the town, I am of the opinion that such provisions are not reasonable conditions of a settlement contract under section 7, quoted above. The suggested provision for the payment of interest would indicate that the Commonwealth was planning formally to become the debtor of the town under a contract unlimited in duration. Such a provision, in my opinion, is beyond the powers of the Commission, since it is inconsistent with the general practice of settlement of land taking controversies, in force when the General Court enacted St. 1927, c. 321, in that it does not provide for payment for the taking by a form of compensation which is either a liquidated amount or the substantial equivalent of a liquidated sum of money.

In rendering this opinion, because of the fact that no specific contract is submitted to me in final form for approval, I express only my opinion as to the general powers of the Commission with respect to certain phases of contracts such as that described indefinitely in the memorandum accompanying the request for an opinion.

Very truly yours,
ARTHUR K. READING, Attorney General.

Department of Mental Diseases — Support of Inmates of State Hospitals — Statute of Limitations.

St. 1926, c. 281, does not operate to remove the bar of the statute of limitations fixed by G. L., c. 260, § 2, with relation to causes of action to recover for the support of inmates of State hospitals which accrued at least six years before the effective date of said St. 1926, c. 281.

MARCH 17, 1928.

DR. GEORGE M. KLINE, Commissioner of Mental Diseases.

DEAR SIR: — You have asked my opinion as to whether the provisions of St. 1926, c. 281, amending G. L., c. 260, by adding to the latter a clause which permits actions to recover for the support of inmates in State institutions to be brought within twenty years next after the cause of action accrues, are to be construed as retroactive.

Prior to the enactment of said St. 1926, c. 281, such actions, like other actions of contract, might be commenced only within a period of six years from the time they accrued. G. L., c. 260, §§ 2 and 18.

The construction of a legislative measure as retroactive, so as to remove the bar of a statute of limitations which has heretofore, by its force through
the passage of time, vested persons with a legal defense, is not favored by the courts of the Commonwealth. Although there may be forms of remedies, lost by operation of a statute imposing limitations upon the time in which they may be instituted, that the Legislature may revive (Dunbar v. Boston & Providence R.R. Corpn., 181 Mass. 383, 386; Danforth v. Groton Water Co., 178 Mass. 472), yet in the absence of specific language in a statute, which in effect removes the bar of a statute of limitations, indicating a legislative intent that the measure should have a retroactive effect, such a statute is not to be interpreted so as to permit the bringing of actions upon causes which have already been barred by the passage of time, under the terms of an earlier enactment. Wright v. Oakley, 5 Met. 400; Bigelow v. Bemis, 2 Allen, 496; Kinsman v. Cambridge, 121 Mass. 558; Garfield v. Bemis, 2 Allen, 445; Bucher v. Fitchburg R.R. Co., 131 Mass. 156.

The language of St. 1926, c. 281, does not necessarily import that it is to act retroactively, and I advise you that it does not operate to remove the bar of the statute of limitations as fixed by G. L., c. 206, § 2, with relation to such causes of action as had accrued at least six years before the effective date of said St. 1926, c. 281.

Very truly yours,
Arthur K. Reading, Attorney General.

Motor Vehicles — Registration — Applications.

The Registrar of Motor Vehicles may, in the exercise of a reasonable discretion, waive answers to certain questions on applications for registration of motor vehicles.

March 29, 1928.

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

Dear Sir: — You have requested my opinion as to the right of the Registrar of Motor Vehicles to waive answers to certain questions on applications for registration of motor vehicles.

I am of the opinion that the Registrar may, in the exercise of a reasonable discretion, waive answers to any questions which may be contained on a printed form of application, such as you have annexed to your letter, provided that all the information which is specifically required by G. L., c. 90, § 2, to be contained in such an application is in fact set forth therein.

Very truly yours,
Arthur K. Reading, Attorney General.

Department of Conservation — Permit — Fishing.

No official has power to authorize the taking of fish by the use of torches.

April 2, 1928.


Dear Sir: — You have asked my opinion as to whether or not the Director of the Division of Fisheries and Game, or any other official of the Department of Conservation, has the right to exercise the rights conferred by St. 1913, c. 519, upon the Commissioners of Fisheries and Game. Said chapter 519 provides as follows:

"Section 1. It shall be unlawful for any person to display torches or other light designed or used for the purpose of taking herring in so much
of the waters of Boston harbor as lies within the limits of the city of Boston inside of a line drawn from Moon Island to Point Shirey: provided, however, that the commissioners on fisheries and game may grant permits for the display of torches or other lights for the purpose aforesaid, but only on the waters aforesaid, with such restrictions as in their judgment will prevent the same from constituting a nuisance; and said commissioners may at any time revoke any such permit."

Section 2 provides a penalty for the violation of section 1. This chapter has never been repealed or amended.

Gen. St. 1919, c. 350, § 43, provided, in part, as follows: —

"The director of the division of fisheries and game shall exercise the functions of the board of commissioners on fisheries and game under chapter ninety-one of the Revised Laws and acts in amendment thereof and in addition thereto."

This section, which stated that the Director of the Division of Fisheries and Game should exercise all the powers of the Commissioners on Fisheries and Game, was expressly repealed by G. L., c. 282. There is no re-enactment of said section 43 to be found in the General Laws or in the laws passed subsequent thereto, nor am I able to find any existing law which confers upon the Director or upon any other person the authority to issue the permits specified in said chapter 519.

It follows that in the present state of the law it is contrary to law to use a torch in the manner and place specified in said chapter 519, and that no person or department has power or authority to issue permits for this purpose.

Very truly yours,
Arthur K. Reading, Attorney General.


A proposed statute to remove restrictions on land on Newbury Street, Boston, would be constitutional if it purported to release only rights of the Commonwealth therein.

April 10, 1928.

Senate Committee on Ways and Means.

Gentlemen: — You have asked my opinion as to the legality and propriety of legislation relative to removing certain restrictions on land on Newbury Street in Boston, as contained in Senate Bill No. 234. Said bill provides as follows: —

"For the purpose of enabling the city of Boston to widen Newbury street between Arlington street and Massachusetts avenue in said city, the commonwealth hereby releases any lands situated on said street from the operation and effect of any restriction or stipulation imposed by it or for its benefit which would prevent said lands from being used for highway, street and sidewalk purposes."

In 1850 the Back Bay district, which includes that part of Newbury Street described in the bill, was owned by the Commonwealth. The Commonwealth filled in the land, which consisted of tidal flats, laid out streets and lots, and sold the lots to various purchasers. These sales covered the period between 1857 and 1879. The deeds by which the lots on Newbury Street were conveyed contained, among others, a restric-
tion to the effect that buildings thereon should be set back twenty-two feet from the street, and this is the restriction which the present bill seeks to release.

The sale of the lots in the Back Bay district, including those on Newbury Street, together with the restrictions thereon, was in furtherance of a general scheme for the development of a desirable residential district, and, consequently, each purchaser of a lot acquired the right to compel the observance by all other purchasers of the restrictions common to all the lots. This right, being appurtenant to the land, passed to the heirs and assigns of the original purchasers. It is to be noted that the thirty-year limitation imposed by G. L., c. 184, § 23, upon the duration of such restrictions does not apply in this case, as the statute makes an exception if the restrictions were imposed prior to its passage or if they are imposed in a deed given by the Commonwealth.

It should be clearly stated in the bill that the release of the restriction is subject to the rights, if there be any, of parties other than the Commonwealth. The Commonwealth cannot by its own act release the rights of other property owners in the Back Bay district (Allen v. Mass. Bonding & Ins. Co., 248 Mass. 378), and, as stated above, these owners unquestionably have the right to compel the observance of the restrictions. If the character of the neighborhood affected by the restrictions has so changed as to render the restrictions useless and of no avail, then, under the principle laid down in the case of Jackson v. Stevenson, 156 Mass. 496, the restrictions would cease to operate or to have any legal effect. The determination of this question is for the courts, in appropriate proceedings, and may not be determined by the Legislature. In the case of Allen v. Mass. Bonding & Ins. Co., supra, at page 385, decided in 1924, the court said:

"When the extent of the area included within the scheme of Back Bay development is considered, plainly the general character of the district has not been changed."

It is further suggested that the bill clearly state that nothing therein contained shall be construed to operate as a release by the Commonwealth for any purpose other than that set forth in the bill.

The result is that the bill would be constitutional if it purports to release only the rights of the Commonwealth, but if it purports to affect rights of other persons it is invalid. As suggested above, the insertion of a clause to the effect that the release is subject to the rights, if there be any, of parties other than the Commonwealth, will render the bill valid.

Very truly yours,

ARTHUR K. READING, Attorney General.

Insurance — Group Insurance — Massachusetts Agricultural College.

Neither the Massachusetts Agricultural College nor its board of trustees is the employer of its professional staff, within the meaning of G. L., c. 175, § 133.

Hon. Wesley E. Monk, Commissioner of Insurance. APRIL 10, 1928.

Dear Sir: You have asked my opinion upon the following question: Is the Massachusetts Agricultural College or its board of trustees the "employer" of the members of the professional staff of said college, within the purview of G. L., c. 175, § 133?
G. L., c. 175, § 133, as amended by St. 1921, c. 141, defines group life insurance, and reads as follows:—

"Group life insurance is hereby defined to be that form of life insurance covering not less than fifty employees, with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, or by duration of service in which case no employee shall be excluded if he has been for one year or more in the employ of the person taking out the policy, for amounts of insurance based upon some plan precluding individual selection, and for the benefit of persons other than the employer: provided, that when the premium is to be paid by the employer and employee jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per cent of such employees may be so insured; or not less than forty per cent if each employee belonging to the insured group has been medically examined and found acceptable for ordinary insurance by an individual policy."

The Massachusetts Agricultural College was incorporated by St. 1863, c. 220. By Gen. St. 1918, c. 262, the corporation was dissolved, and it was provided that the college should be maintained under the same name as a State institution.

Section 5 of said chapter 262 provided:—

"All employees of the institution shall be considered state employees, but shall not be subject to the civil service laws and regulations."

G. L., c. 15, § 19, provides that the trustees of the college shall serve in the Department of Education.

G. L., c. 15, § 4, provided that the Commissioner of Education should be the executive and administrative head of said Department, but by an amendment of said section 4 (St. 1926, c. 322) it was further provided that nothing in said chapter 15 shall be construed as affecting the powers and duties of the trustees of the college as set forth in G. L., c. 75.

G. L., c. 75, § 13, provides, in part:—

"The trustees shall elect the president, necessary professors, tutors, instructors and other officers of the college and fix their salaries and define the duties and tenure of office."

Similar provisions relative to salaries of various employees of the Commonwealth in other departments and institutions are to be found in the General Laws.

In the codification of the General Laws said section 5 of Gen. St. 1918, c. 262, was not embodied in G. L., c. 75, as were some of the sections of the former statute. The salaries of the professional staff of said college are paid in full by appropriations made by the Legislature annually, except as to some of such staff who, I am advised, receive at least a part of their salaries from the Federal government. The salaries paid by the Commonwealth, though fixed by the trustees, are subject to rules and regulations of the Division of Personnel of the Department of Administration and Finance. St. 1923, c. 362, §§ 45, 48 and 52. Such of the staff as receive part of their pay from Federal sources have been said to be joint employees of the Commonwealth and the Federal government,
and those whose salaries are paid solely by the Commonwealth to be employees of the latter. VI Op. Atty. Gen. 105.

In view of the language of Gen. St. 1918, c. 262, § 5, it cannot well be said that the board of trustees of the college or the college occupies the position of employer as regards the professional staff of the college. No special powers have been given by the statutes to the trustees which would tend to indicate, even in the absence of said section 5, that they occupied any relation to persons serving under them which is not the relation held toward persons similarly placed by the heads of other divisions, boards and institutions of the Commonwealth. Such relation is not that of employer and employee. The Commonwealth holds that relation to all persons in its service, irrespective of which of its many divisions, boards or institutions exercises immediate control over them.

The word "employer" as used in G. L., c. 175, § 133, with relation to group insurance has no peculiar significance which would make it possible to construe it as applicable to any department, division, board or institution created by the Commonwealth which is not in fact or law the employer of the persons who work under its immediate supervision.

Accordingly, I answer your question in the negative.

Very truly yours,

Arthur K. Reading, Attorney General.

Constitutional Law — Mayors of Cities — Removal.

A proposed statute authorizing the removal of mayors by a judicial determination would not be unconstitutional.

April 18, 1928.

Gentlemen: — You have asked my opinion as to the constitutionality of House Bill No. 1183, entitled "An Act providing for the removal of mayors of cities by the justices of the Supreme Judicial Court in certain cases," which provides as follows: —

"Section four of chapter two hundred and eleven of the General Laws is hereby amended by striking out, in the seventh line, the word 'or' and inserting in place thereof a comma and by inserting after the word 'attorney' in the same line the words: — or mayor of a city, — so as to read as follows: — Section 4. A majority of the justices may, if in their judgment the public good so requires, remove from office a clerk of the courts or of their own court; and if sufficient cause is shown therefor and it appears that the public good so requires, may, upon a bill, petition or other process, upon a summary hearing or otherwise, remove a clerk of the superior court in Suffolk county, or of a district court, a county commissioner, sheriff, register of probate and insolvency, district attorney or mayor of a city."

The cases of Attorney General v. Tufts, 239 Mass. 458, and Attorney General v. Pelletier, 240 Mass. 264, were brought under said section 4. It was there held that district attorneys were not "officers of the Commonwealth," within the meaning of Mass. Const., pt. 2nd, c. I, § II, art. VIII.

Mass. Const., pt. 2nd, c. I, § III, art. VI, provides as follows: —

"The house of representatives shall be the grand inquest of this com-
monwealth; and all impeachments made by them shall be heard and tried by the senate."

Chapter I, section II, article VIII, provides: —

"The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladministration in their offices."

If a mayor is an officer of the Commonwealth within the meaning of this section he may be removed by impeachment only, and the Legislature may not provide for his removal in any other manner. In Attorney General v. Tufts, supra, at page 479, the court, quoting from Opinion of the Justices, 167 Mass. 599, said: —

"On the one hand, it seems to us that the various officers of cities or towns do not fall within the class of officers of the Commonwealth, in the sense in which these words are used in this provision of the Constitution. . . . It seems to us that the better construction of the constitutional provision is that the county commissioners are not subject to impeachment as officers of the Commonwealth."

There seems to be no reason to doubt that the court would apply any other law to the office of mayor of a city. It follows, in my opinion, that a mayor is not an officer of the Commonwealth, within the meaning of the constitutional provision, and that there is no objection to the bill under the section of the Constitution set forth above.

There is no conflict with article XXX of the Declaration of Rights. The jurisdiction given to the court is purely judicial in character and establishes a procedure constitutionally appropriate for judicial determination.

Other constitutional objections to this law, in so far as district attorneys are concerned, were considered and disposed of in the decisions in the two cases above cited, and I am of the opinion that the principles of law there laid down are applicable to the office of mayor as well as to the office of district attorney.

Very truly yours,

ARTHUR K. READING, Attorney General.

Registrar of Motor Vehicles — Revocation of License — Judicial Recommendation.

A recommendation that the license of an operator of a motor vehicle be not suspended by the Registrar, if communicated to him by a court before actual revocation, though after transmission of a report of a conviction, may be acted upon by the Registrar; but if received by him after the license has been in fact revoked, it is without effect in connection with such revocation.

MAY 4, 1928.

Hon. WILLIAM F. WILLIAMS, Commissioner of Public Works.

DEAR SIR: — You have asked my opinion concerning the correct interpretation of a portion of G. L., c. 90, § 24, as amended, as it relates to the two following questions: —

"1. Can a recommendation of the court referred to above be accepted after the receipt of the court record in the case referred to?
2. Can such a recommendation of the court be accepted after the Registrar has revoked the license of the party referred to in the recommendation?"

G. L., c. 90, § 24, as amended, defines certain offenses in connection with the operation of motor vehicles, and establishes penalties therefor. It then sets forth the following provision, as to which in your letter you direct my attention:—

"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."

It is obvious from the language of the statute that it is mandatory upon the Registrar to revoke the license of a person convicted under the statute immediately upon receipt of the designated report of conviction. It is conceivable that between the time of the Registrar's receipt of such report and his revocation of the license the statutory recommendation might be received by him. There is no specific requirement of the statute that the report and the recommendation shall be transmitted as one document or even simultaneously. In the event of such an unusual occurrence as the receipt of the recommendation after the transmission of the report but before the actual revocation, the Registrar could not well refuse to accept the recommendation, and might act in accordance therewith.

There is no specific provision of the statutes relative to the duties of the Registrar in relation to the acceptance of a recommendation. It is immaterial whether he does or does not physically accept the recommendation. If a recommendation reaches the Registrar after he has performed the duty of immediately revoking a license upon notice of conviction, he has completed the act required of him, the license stands revoked and the subsequently received recommendation is without effect, as the contemplated act has already been accomplished.

The Registrar, however, has power under the same section, in his discretion, in accordance with certain statutory regulations, to issue new licenses to persons who have been convicted, and it may well be that a recommendation of a court or magistrate which purported to be made under the statutory provision referred to in your letter, although received too late to be considered in relation to the revocation of the license, would aid the Registrar in making a decision as to the propriety of issuing a new license.

The foregoing statements of my opinion as to the law answer both your questions fully.

Very truly yours,

ARTHUR K. READING, Attorney General.

Taxation — Corporations — Change in Federal Net Income — Interest on Abatement of Tax with Respect to Such Change.

After the effective date of St. 1927, c. 148, a corporation receiving an abatement of an excise assessed under G. L., c. 63, § 32, as amended, is entitled to interest upon the amount of tax refunded, where the refund is based upon a reduction in Federal net income.

Dear Sir: — You request my opinion as to your duty upon the following facts: Prior to the date upon which St. 1927, c. 148, became effective, a domestic business corporation seasonably reported, in compliance with G. L., c. 63, § 36, a reduction in its net income for a previous calendar year, as determined by the Federal taxing authorities. Subsequently, after the date upon which St. 1927, c. 148, became effective, you certified to the Treasurer and Receiver General that the corporation had overpaid its excise tax for the year following the calendar year above mentioned by an amount equal to the tax due upon the difference between the amount of net income originally returned by the corporation to the Federal government for the calendar year in question and the amount of net income upon which the Federal government finally assessed a tax for that year. You did not, however, certify to the Treasurer and Receiver General that the corporation was entitled to a repayment of the amount of the tax thus overpaid, with interest from the date of payment to the date of repayment of the tax overpaid. If the provisions of St. 1927, c. 148, apply to this repayment, then the corporation is entitled to a repayment of the overpaid tax with interest for the period above mentioned.

G. L., c. 63, § 36, prior to the effective date of St. 1927, c. 148, read as follows:

“If the assessment made by the federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the federal government, any part of such tax is refunded, the corporation, within ten days after the receipt of such notice of said fact, shall make return on oath to the commissioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the federal government upon the latest determination by it of the proper tax, and of the facts giving rise to the difference. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the state treasurer shall, upon certification of the commissioner, repay within thirty days such difference without any further statutory appropriation therefor.”

St. 1927, c. 148, reads:

“Chapter sixty-three of the General Laws is hereby amended by striking out section thirty-six and inserting in place thereof the following: — Section 36. If the assessment made by the federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the federal government, any part of such tax is refunded, the corporation, within seventy days after the receipt of notice of said fact, shall make return on oath to the commiss-
sioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the federal government upon the latest determination by it of the proper tax, and of the facts giving rise to the difference; provided that in case the corporation appeals from a decision of the commissioner of internal revenue or from a decision of the United States board of tax appeals, the return required by this section shall be made within thirty days after notice of the final determination on such appeal. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax with interest at six per cent from October twentieth of the year in which the original return of the corporation was due to be filed. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the state treasurer shall, upon certification of the commissioner, repay within thirty days such difference with interest at the rate of six per cent from the date of the overpayment without any further statutory appropriation therefor. The provisions of this section shall not be construed to authorize the commissioner to make any assessment, the time for making which has by law expired, except assessment, with interest as aforesaid, of such amount of additional tax as is incident to the increase in federal net income, nor to authorize refund in excess of the amount of tax paid with respect to the difference in net income determined by the federal reduction, with interest as aforesaid.”

The statute (St. 1927, c. 148) does not clearly indicate whether it was intended to apply to proceedings pending at the time of its effective date or merely to those Federal tax refunds reported to the Commissioner after the date when the amendment became operative. Some indications there are in the statute itself that the amendment was intended to apply to all overpayments certified and all assessments made (where the Federal net income taxed was increased by the Federal taxing authorities) after the date when the statute became effective. Both from the sentence dealing with additional assessments and from the sentence dealing with refunds of overpayments it must be deduced that the obligation to pay interest, imposed upon the taxpayer and upon the Treasurer and Receiver General, respectively, arises upon the date of assessment or the date of certification of the overpayment by the Commissioner rather than at the earlier date upon which the Federal change is reported to the Commissioner. If this be so, then, unless the imposition of a duty to pay interest changes some substantive right of the taxpayer, the amendment would apply to all cases where the date of assessment or the date of certification followed the effective date of St. 1927, c. 148.

It is familiar law that statutes relating to remedy and procedure apply to pending cases equally with those arising after their enactment. Hollingsworth & Vose Co. v. Recorder of the Land Court, 262 Mass. 45, and cases cited. See Bogian v. Commissioner of Corporations and Taxation, 248 Mass. 545, 548. Where, however, a statute regulates the substantive rights of the parties, a retroactive construction of that statute is avoided by the courts; and the statute will not be held applicable to cases pending. Paraboschi v. Shaw, 258 Mass. 531, 533, and cases cited, especially Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, 3–5, where the authorities are reviewed at length.

The determination of the question involved in this case depends on
an analysis of the nature of a provision for the payment of interest in a statute otherwise solely remedial. Does such a provision change the substantive rights of the parties or is it merely remedial in its nature?

In Tremont & Suffolk Mills v. Lowell, 165 Mass. 265, the statute there construed provided that “in every judgment which shall hereafter be rendered for the amount of an abatement of taxes” under St. 1890, c. 127, “there shall be included all charges and also interest on the amount of the abatement made from the date of payment of the tax.” It was held that the statute, because of its precise language, applied to judgments rendered after the effective date of the statute. The court does not decide whether a provision for interest is purely remedial or whether it affects substantive rights, for the opinion closes with the following words (at pp. 266–267):

“As the only parties against whom such judgments can be rendered are municipal corporations, no question of vested rights arises, and no contention is made by the respondent that it was not within the power of the Legislature to enact that interest should be allowed in pending cases.”

The decision thus plainly is not conclusive of the present discussion, and no case closer to the situation presented for consideration has been found in the Massachusetts reports. Resort, therefore, must be had to general principles. It has been stated that “the general rule at law is that interest is allowed upon the ground of contract either expressed or implied for its payment, or by way of damages where money is detained, or for breach in the performance of a contract where some duty has been violated.” (Mr. Justice Braley in Goldman v. Worcester, 236 Mass. 319, 320, 321.) Interest, if payable by the Treasurer and Receiver General upon the facts now under consideration, is payable because of the statutory provision which imposes an obligation to pay interest “by way of damages where money” due for taxes has been wrongfully detained. There is, of course, no contractual basis to the interest obligation, if any such obligation there be. The obligation, therefore, is in a real sense distinct from the primary tax liability of the taxpayer or the obligation of the State to repay excessive taxes. It is in the nature of compensation for the delay in withholding money the use of which the Commonwealth should have had for a period of years, in the case of an underpayment by the taxpayer; and in the case of an overpayment of taxes, the interest, if allowed, is to compensate the taxpayer for the wrongful detention of his money by the Commonwealth. The overcollection of the tax is one wrong; the withholding of the money is a separate and distinct wrong. The gravamen of the taxpayer’s complaint is the overassessment of the tax, with its subsequent collection; the injury done to him by depriving him of the use of his money is but an incidental consequence of the overcollection. Similarly, interest upon taxes unpaid by the taxpayer is based upon a liability separate from the original liability to pay taxes, and it has been held permissible, under the Federal Constitution, for a State to provide that taxes which have already become delinquent shall bear interest from the time the delinquency began. League v. Texas, 184 U. S. 156, 161.

The language of that case indicates that interest, although not precisely on the same basis as court costs as an incident to the remedy provided for the collection of overdue taxes, is in its nature remedial rather than a part of the substantive tax obligation itself. This view is alike
consistent with the language and general nature of St. 1927, c. 148, and with the result in the decision in *Tremont & Suffolk Mills v. Lowell, supra*. I am of the opinion, therefore, that the provision in St. 1927, c. 148, for the payment of interest is purely remedial, as are the other provisions of the section, and that the section applies to all abatements and repayments certified to the Treasurer and Receiver General after the date when the section, as amended, became effective.

One further consideration leads me to this conclusion. By St. 1927, c. 148, G. L., c. 63, § 36, as it then stood, was stricken out and a new section inserted in its place. After the effective date of St. 1927, c. 148, the Commissioner was authorized to certify that tax repayments were due only in accordance with the provisions of the section as thus amended, calling for the repayment of excessive taxes, *with interest*. In a similar situation, the Federal courts have held that interest is computed to the date of the authorization of the tax refund, that, even as to pending petitions for refund, the statute in force at the date of the authorization of the refund controls the allowance of interest, and that only under that statute are the officials of the Government authorized to act. *Blair v. Birkenstock*, 271 U. S. 348, 350–1, affirming S. C. 6 Fed. (2d) 679 (Ct. of Ap. D. C.).

I advise you, therefore, that you should certify to the Treasurer and Receiver General that interest is due, from the date of overpayment to the date of refund of the overpayment, upon the amount of the refund in the case which you stated to me in asking my opinion.

Very truly yours,

ARTHUR K. READING, Attorney General.

*Inspector of Animals—Appointment—Continuance in Office until Appointment of Successor.*

An inspector of animals, appointed under G. L., c. 129, §§ 15 and 16, holds over, after the expiration of his term, until his successor is appointed.

MAY 7, 1928.


Dear Sir:—You have asked my opinion as to whether or not a duly appointed inspector of animals, who was not reappointed in March as required under G. L., c. 129, § 15, holds over until a successor has been appointed. Said section 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."

Section 16 of said chapter 129 provides as follows:—

"A town shall, for each refusal or neglect of its officers to comply with the requirements of the preceding section, forfeit not more than five hundred dollars. The director may appoint one or more inspectors for such town, and may remove an inspector who refuses or neglects to be sworn or who, in the opinion of the director, does not properly perform the
duties of his office and may appoint another inspector for the residue of his term."

Section 15 places an affirmative duty upon mayors and selectmen to nominate inspectors, and provides that the nominee shall not be appointed until approved by the Director of Animal Industry. If an inspector is duly appointed, it is my opinion that, for the purposes of carrying out the duties assigned by law to him, he holds office until his successor is appointed. It could not be the intent of the Legislature that the important duties assigned to this officer should not be carried out if it should happen that no new appointment was made. It is true that section 16 gives to the Director the power to appoint one or more inspectors for such city or town as fails to comply with section 15, but unless and until this is done, it is my opinion that the old officer can legally perform the functions of the office.

It may well be that such officer who holds over is not entitled to compensation, but, for the purposes of performing the duties of his office, his powers are of the same dignity as if he had been duly nominated and appointed.

This question is not free from doubt, but all uncertainty would be removed if the statute provided that the inspector should hold office until a successor was duly appointed.

Very truly yours,

ARTHUR K. READING, Attorney General.

Taxation — Foreign Banking Associations and Corporations — Constitutional Law — Foreign Banks as Fiduciaries.

No provision of the existing statute law of this Commonwealth imposes an excise upon foreign banking corporations or associations doing business within this Commonwealth as fiduciaries, as authorized by St. 1928, c. 128, with respect to the doing of such business.

MAY 12, 1928.


Dear Sir:— You request my opinion as to whether you have the power, under the provisions of St. 1928, c. 128, and the provisions of G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, to impose an excise tax upon such foreign banking associations and corporations as obtain a certificate under the provisions of St. 1928, c. 128, with respect to the activities of such associations and corporations under the authority of such a certificate.

St. 1928, c. 128, § 1, reads, in part, as follows: —

"Chapter one hundred and sixty-seven of the General Laws is hereby amended by inserting after section forty-five the following new section: —

Section 45A. The board of bank incorporation may, subject to such conditions as the commissioner may prescribe, grant to a banking association or corporation whose principal office is in another state, a certificate authorizing it to act in a fiduciary capacity under the provisions, so far as applicable, of sections fifty-two to fifty-nine, inclusive, of chapter one hundred and seventy-two; . . . Any such banking association or corporation holding a certificate as aforesaid and appointed a fiduciary shall be subject to the provisions of general law with respect to the appointment
of agents by foreign fiduciaries and to the same taxes, obligations and penalties, with respect to its activities as such fiduciary and the activities of itself and the property held by it in its fiduciary capacity, as like associations or corporations having their principal office in this commonwealth, and no such certificate shall be issued to any such banking association or corporation until it has filed with the said board of bank incorporation an agreement in writing in which it binds itself to perform said obligations and pay any such taxes and penalties as aforesaid as may be levied or imposed upon it in this commonwealth."

G. L., c. 63, § 2, as amended by St. 1925, c. 343, § 1, reads as follows: —

"Every bank shall pay annually a tax measured by its net income, as defined in section one, at the rate assessed upon other financial corporations; provided, that such rate shall not be higher than the highest of the rates assessed under this chapter upon mercantile, manufacturing and business corporations doing business in the commonwealth. The commissioner shall determine the rate on or before July first of each year after giving a hearing thereon and shall seasonably notify the banks of his determination. Appeal by a bank from the determination of the commissioner may be taken to the board of appeal from decisions of the commissioner of corporations and taxation, in sections five and six called the board of appeal, within ten days after the giving of such notice."

The provisions of this section refer back to the definitions of "bank" and "net income" as contained in G. L., c. 63, § 1, as amended by St. 1925, c. 343, § 1, which section reads, in part, as follows: —

"'Bank', Any bank, banking association or trust company doing business within the commonwealth, whether of issue or not, existing by authority of the United States or of a foreign country, or of any law of the commonwealth not contained in chapters one hundred and sixty-eight to one hundred and seventy-one, inclusive, and chapters one hundred and seventy-three and one hundred and seventy-four.

'Net income', The net income for the taxable year as required to be returned by the bank to the federal government under the federal revenue act applicable for the period, adding thereto any net losses, as defined in said federal revenue act, that have been deducted and all interest and dividends not so required to be returned as net income except dividends on shares of stock of corporations organized under the laws of the commonwealth and dividends in liquidation paid from capital."

It is obvious that G. L., c. 63, § 2, as thus amended, does not afford any authority to tax a "banking association or corporation whose principal office is in another state," apart from the language of St. 1928, c. 128, § 1, subjecting such banking corporation "to the same taxes . . . with respect to . . . the activities of itself . . . as like associations . . . having their principal office in this commonwealth." "Bank" is defined in G. L., c. 63, § 1, as thus amended, in such a way as to exclude trust companies organized under the laws of other States, and the tax in G. L., c. 63, § 2, as thus amended, is limited to a tax on "banks" as thus defined in section 1. Furthermore, even if these corporations holding certificates be held to be included within the provisions of the tax imposed by section 2, the only tax imposed by that section is an excise with respect to the whole "net income" of the bank, as defined in section 1 of the chapter. Clearly, such a tax, measured by net income wherever earned, upon for-
eign trust companies doing only an incidental portion of their whole
business within the Commonwealth would be unconstitutional. See
Southern Ry. Co. v. Kentucky, 274 U. S. 76; cf. Bass, Ratcliff & Gretton,

The Legislature cannot be presumed to have intended to enact an
obviously unconstitutional tax statute, and the purposes of the General
Court must be gathered in part from the powers possessed by it. Eaton,
Crane & Pike Co. v. Commonwealth, 237 Mass. 523, 527. No provision of
G. L., c. 63, authorizes the Commissioner of Corporations and Taxation
to allocate the net income of any bank taxed under section 2 of the chap-
ter in such a way as to determine the proportion of the net income at-
tributable to corporate activities within Massachusetts and to assess a
tax only with respect to such allocated net income—an excuse which
would probably avoid constitutional pitfalls. In the absence of statutory
provision for such allocation, you, as Commissioner of Corporations
and Taxation, cannot assess a valid excise with respect to the income
earned in Massachusetts of foreign trust companies holding a certificate
under St. 1928, c. 128. It is well settled that tax laws are to be construed
strictly, and that the power to tax must be conferred in unequivocal
terms and cannot be extended by implication. Union St. Ry. Co. v.
New Bedford, 253 Mass. 314, 317; Moulton v. Commissioner of Corpora-
tions and Taxation, 243 Mass. 129, 130.

The language of St. 1928, c. 128, § 1, in and of itself imposes no tax
and merely subjects foreign banks acting under a certificate granted under
the chapter to the taxes imposed upon similar banks having their principal
office in Massachusetts, with respect to their activities. The state of
the law at the time of the passage of St. 1928, c. 128, was such that there
was no tax imposed on those banks acting as fiduciaries and having their
principal office in Massachusetts which could constitutionally be im-
posed upon foreign companies acting under a certificate under St. 1928,
c. 128, and I can see no warrant in law, as the statutes are now framed,
for the imposition of an excise upon such foreign companies.

It may be suggested that the language of St. 1928, c. 128, in no event
contemplated the imposition of any excise or tax upon banks operating
under certificates granted pursuant to that act with respect to the ac-
tivities of those banks or measured by the profits made by those banks
from their Massachusetts business. The distinction made in St. 1928,
c. 128, § 1, between the “activities as such fiduciary” and the “activities
of itself” would indicate a legislative intent to subject these banks not
only to the taxes payable by the bank as a fiduciary on behalf of the
beneficiaries of their trusts or upon property held by them as trustees, but
also to the payment of taxes on their own behalf for such privileges as
they might exercise within Massachusetts. It is a general canon of stat-
utory construction not to regard any word found in a statute as super-
fluous or redundant, but to give each word some meaning. Kennedy v.
Commissioner of Corporations and Taxation, 256 Mass. 426, 429.

Very truly yours,

ARTHUR K. READING, Attorney General.
Notary Public — Appointment — Age.

The appointment of a notary public who is a minor is not necessarily invalid.

MAY 14, 1928.

His Excellency ALVAN T. FULLER, Governor of the Commonwealth.

Sir: — Your Excellency has asked whether an appointment previously made, by a former Governor, of a woman twenty years of age as a notary public was valid, and as to whether the official acts of such appointee are themselves valid.

Neither the Constitution nor the statutes of the Commonwealth contain any provisions as to the age which a man or woman must have attained in order to be eligible to appointment as a notary public.

The origin, history and duties of the office of notary public are considered at length in Opinion of the Justices, 150 Mass. 586. The duties of such office have not substantially changed in character since the date of such opinion. The office still remains, as pointed out by the justices, not judicial in character. Since said opinion was rendered, by virtue of Mass. Const. Amend. LVII women have been made eligible to appointment as notaries public.

It is a general principle of the common law that minors, though not eligible to offices which are judicial in character, may be eligible to offices which are ministerial, requiring skill and diligence in their administration rather than experience or the exercise of grave discretion. Golding's Petition, 57 N. H. 146; Moore v. Graves, 3 N. H. 408; State v. Dillon, 1 Head (Tenn.), 389. The office of notary public is of the latter type. It has been held that a minor may be validly appointed to the office. United States v. Bixby, 9 Fed. 78.

Accordingly, I advise you that the appointment of the notary public concerning whom you inquire in your letter was not invalid because of her age at the date of appointment, and that her acts done by virtue of such appointment are not invalidated by reason of the fact that she was less than twenty-one years old at the time of her appointment.

Very truly yours,

ARTHUR K. READING, Attorney General.

Municipal Employee — Blasting — Permit — Bond.

An employee of a municipality, engaged in the work of blasting carried on by such municipality, is not required to have a permit or to furnish a bond.

MAY 19, 1928.

Gen. ALFRED F. FOOTE, Commissioner of Public Safety.

Dear Sir: — You have asked my opinion as to whether an employee of a city or town can be required to give a bond, under G. L., c. 148, § 24, before receiving a permit under said section to do blasting for the city or town which employs him, and you have set forth certain facts relative to experience in the past in connection with a blasting operation.

G. L., c. 148, § 24, is as follows: —

"Before the issue of a permit to use an explosive in the blasting of rock or any other substance as prescribed by the department, the applicant for the permit shall file with the clerk of the city or town where the
blasting is to be done a bond running to the city or town, with sureties approved by the treasurer thereof, for such penal sum, not exceeding ten thousand dollars, as the marshal or the officer granting the permit shall determine to be necessary in order to cover the risk of damage that might ensue from the blasting; provided, that the marshal or the officer granting the permit may determine that a single and blanket bond in a penal sum not exceeding fifteen thousand dollars is sufficient to cover the risk of damage from all blasting operations of the applicant, either under the permit so issued or under future permits to use explosives in blasting operations. The bond shall be conditioned upon the payment of any loss, damage or injury resulting to persons or property by reason of the use or keeping of said explosive."

It is the apparent intention of the Legislature, as expressed in the language of said section 24, that under rules and regulations made by your department, under G. L., c. 148, § 10, a permit should be required as a prerequisite to blasting. It is obvious, however, that if a municipality is itself, through its own agents, as distinguished from public officers elected or appointed by the city or town to perform statutory duties with relation to the ways, about to perform the work of blasting, the provisions of said section 24 are not applicable to such municipality. The provisions of said section 24 do not apply to a municipality; for a municipality, like an individual, cannot be both the obligor and the oblige of a bond. It follows, then, that from the language of said section 24 it must be held that it was not the intent of the Legislature that the provisions for a permit and a bond as prerequisite to blasting should apply to a municipality performing such an act through its own agents.

It has been said by our Supreme Judicial Court that if a municipality "has chosen to take the work of repairing or constructing a street or bridge out of the charge of the officers designated by law, and itself to assume direct control of the work, it may be held liable for the negligence of the servants or agents whom it employs for that purpose." Haley v. Boston, 191 Mass. 291; and see cases there cited.

It may well have been felt by the Legislature that when liability for blasting might rest upon a municipality, as such, the financial stability of such a body furnished ample security for the payment of damages which might be incurred, without the necessity of a bond with sureties further to ensure payment thereof; and it is not contemplated by said section 24 that a permit shall be issued to, or a bond exacted from, a mere employee of a municipality when blasting is in fact being carried on by the latter.

Very truly yours,

ARTHUR K. READING, Attorney General.

Municipalities — City Clerk — Appointment and Removal.

A city clerk is not the head of a department, under G. L., c. 43, §§ 60 and 61.

A city clerk under Plan A, G. L., c. 43, may not be removed in the manner set forth in section 18 of said chapter.

May 21, 1928.

Hon. Fred D. Griggs, House Chairman, Committee on Cities.

Dear Sir: — The Committee on Cities has, by a letter from you, requested my opinion as to whether, under Plan B for the government
of cities, set forth in G. L., c. 43, the city clerk is to be regarded as a head of a department subject to appointment and removal by the mayor, subject to confirmation in the first instance by the city council, and in the second by the approval of a majority of the council.

You have not advised me as to any measure before you for your consideration as to which your question is addressed, but I assume that your inquiry is made to me for the purpose of aiding you in the consideration of some legislative matter.

G. L., c. 43, sets forth several plans or forms of charters for city government. Whichever plan may be accepted by a municipality is intended to be complete in itself, but its particular provisions are governed and controlled by certain sections of the chapter which are common to all the plans and operative upon all. Cunningham v. Mayor of Cambridge, 222 Mass. 574, 577. Section 18 is such a section common to all the plans, and operative as to Plan B.

With relation to the office of city clerk section 18 provides:—

"3. The council shall, by a majority vote, elect a city clerk to hold office for three years and until his successor is qualified. He shall have such powers and perform such duties as the council may prescribe, in addition to such duties as may be prescribed by law. He shall keep the records of the meetings of the council.

The person holding the office of city clerk at the time when any of the plans set forth in this chapter has been adopted by such city shall continue to hold office for the term for which he was elected and until his successor is qualified."

These provisions as to the election of a city clerk are controlling and are not abrogated by sections 60 and 61, relative to appointments and removal of heads of departments. The office of city clerk was not intended by the Legislature to be comprehended by the term "heads of departments," as those words are used in said sections 60 and 61.

You have also asked my opinion relative to the appointment and removal of city clerks under Plan A, G. L., c. 43, §§ 52 and 54. These sections, like sections 60 and 61, do not change the effect of said section 18, and city clerks are not to be appointed and removed in the manner set forth in sections 52 and 54. That the intention of the Legislature was to provide a specific mode for the appointment of city clerks, applicable in all instances, irrespective of the manner provided for the appointment and removal of other officials under the four charter plans, is further indicated by section 54, which requires that the notice of removal of a head of a department by the mayor shall be filed with the city clerk, and that the official so removed may file an answer to the reasons for his removal, set forth by the mayor, with the city clerk. Such a provision is obviously inconsistent with a legislative intent that the provisions of said section 18, relative to the city clerk, should be nullified by later sections of the same chapter in which it occurs.

Very truly yours,

Arthur K. Reading, Attorney General.
Corporations — Securities — Default.

Under G. L., c. 174, § 10, neither the seller’s commissions nor his overhead expense shall be charged against the purchaser of a corporate security.

Hon. Roy A. Hovey, Commissioner of Banks.

Dear Sir: — You have asked my opinion as to whether the words “amount paid by said corporation on account thereof,” as used in G. L., c. 174, § 10, should be construed to include payments by way of commissions to a salesman or should be limited to payments made to a bond or certificate holder.

The material part of G. L., c. 174, § 10, reads as follows: —

“Every corporation subject to this chapter shall provide in every bond, certificate or contract issued by it that, after one fourth of the total amount of instalments therein required has been paid and in any event after instalments for two full years have been paid thereon, in case of default in the payment of any subsequent instalment a paid-up bond shall be given to the holder of said bond, certificate or contract of not less than the full amount paid thereon less any amount paid by said corporation on account thereof, said paid-up bond to mature at the same date as the original bond, certificate or contract.”

The intention of the Legislature as expressed in this section, read in conjunction with the provisions of the entire chapter, is that the holder of a security, in case of default in his payments thereon, shall receive a paid-up bond equal to the difference in amount between the sum of his payments and the purchase price of the security which he had intended to buy. It was not contemplated that the seller’s commissions nor any part of the latter’s overhead or other expense should be passed on to the purchaser.

Very truly yours,

Arthur K. Reading, Attorney General.

Betterments — Land devoted to a Public Use.

Under St. 1925, c. 330, as amended, betterments relative to the Southern Artery may not be assessed against the United States Housing Corporation.

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

Dear Sir: — You have informed me that the Department of Public Works, under St. 1925, c. 330, as amended by St. 1926, c. 369, assessed betterments in connection with the construction of the Southern Artery, so called, among other parcels, upon three lots standing in the name of the United States Housing Corporation, and have asked me to advise you as to the powers of the Department relative to the assessments upon said three lots. I assume from the wording of your letter that title to said three lots was in the said corporation at the time of the making of the assessment.

By said St. 1925, c. 330, as amended by St. 1926, c. 369, § 2, the Division of Highways of the Department of Public Works was authorized
to take by eminent domain, under G. L., c. 79, lands deemed necessary for the purpose of carrying out the purpose of the statute by the construction of the said Southern Artery, and was required to assess betterments therefor under the provisions of G. L., c. 80; and it was further provided that "no awards and payments shall be made because of any taking of cemetery land or of any other land devoted to a public use, except as required by the Constitution, and no betterments shall be assessed on any such land."

Land belonging to the United States Housing Corporation is land devoted to a public use. It is immaterial whether such devotion to a public use arises from Federal or State law. The words as employed in the instant statute apply in either event. That land acquired by the United States Housing Corporation is for a public use is manifest from the Act of Congress, 40 Stat. (U. S.) 550, authorizing the acquisition of land for housing in connection with the prosecution of the World War, and from the Act of Congress, 40 Stat. (U. S.) 595, authorizing the creation of a corporation to hold such land, and from the formation of the United States Housing Corporation to carry out such purpose. See United States v. City of New Brunswick, 1 Fed. (2d) 741, and Same v. Same, 11 Fed. (2d) 476.

It is not necessary to enter upon a consideration of the nature of such a corporation as an agency of the Federal government, nor the extent of its immunity from taxation upon its property in the form of betterment assessments by a State. See M'Culloch v. Maryland, 4 Wheat. 316; Clallam County v. United States, 263 U. S. 341; Lee v. Osceola etc. Improvement District, 268 U. S. 643; United States v. City of New Brunswick, supra. The provisions of the instant statute itself do not authorize the imposition of such an assessment as has been made upon the three parcels of land belonging to the United States Housing Corporation.

Very truly yours,

ARTHUR K. READING, Attorney General.

Constitutional Law — Pardon — Parole.

The Governor may pardon a prisoner and the Board of Parole may issue a permit to be at liberty to a prisoner, but neither will necessarily free him from the form of restraint specified in the second sentence of G. L., c. 111, § 121.

MAY 24, 1928.

Hon. FRANK A. BROOKS, Chairman, Board of Parole.

DEAR SIR: — You have transmitted to me the following communication:

"A man was sentenced on March 24, 1922, to serve eighteen to twenty years at the Massachusetts State Prison for manslaughter. On May 10, 1926, he was transferred to the Prison Camp and Hospital, as he was found to be suffering from tuberculosis.

May I have a ruling as to whether or not it would be possible, under G. L., c. 111, § 121, for His Excellency the Governor to grant a pardon or the Board of Parole to release a man on parole when he had served two-thirds of his minimum sentence, if the disease is active."

The Governor, in the exercise of the power vested in him by the Constitution (pt. 2nd, c. II, § 1, art. VIII), may pardon the prisoner to whom
you refer. If the pardon is unconditional it will operate so as to cause "the expiration of his sentence," within the meaning of G. L., c. 111, § 121, forthwith. Attorney General's Report, 1927, p. 123. Likewise, under the statutory authority of G. L., c. 127, §§ 128–131, as amended, the Board of Parole has authority to act and may grant a special permit to be at liberty to the said prisoner at the time indicated in your communication. When such a permit has been issued, the date of its becoming effective may also be construed as "the expiration of sentence," within the meaning of said section 121. The confinement of the prisoner in the Prison Camp and Hospital, under G. L., c. 127, § 109, does not withdraw him from the jurisdiction of the Board, vested in it by G. L., c. 125, § 7, and specifically made applicable to inmates of the Prison Camp and Hospital by G. L., c. 127, §§ 128 and 129, as would a commitment of a prisoner to a State hospital for the insane (see V Op. Atty. Gen. 141), nor does such confinement prevent the exercise of the power of pardon by the Governor, as does a commitment to a State hospital of one found not guilty of murder on account of insanity (see V Op. Atty. Gen. 591).

Nevertheless, the granting of a pardon or the issuance of a permit to be at liberty may not operate of itself to free a prisoner, such as you have described, from the form of restraint specified in the second sentence of said G. L., c. 111, § 121. This restraint is not imposed as a punishment nor because of the existence of any effective sentence of a court, but solely as a means of protecting the general public health. The determination of the necessity for its imposition and the length thereof are placed by the Legislature in the sound discretion of the attending physician of the institution where the prisoner has been confined.

Said section 121, in substantially the form in which it stands today but not including pulmonary tuberculosis, which was added by St. 1920, c. 306, was enacted by St. 1891, c. 420, which antedated the original enactment of G. L., c. 127, § 129, in so far as it relates to paroles for inmates at the Prison Camp and Hospital, by St. 1904, c. 243, and St. 1906, c. 243, and antedates G. L., c. 125, § 39, concerning the Prison Camp and Hospital, in its original form, St. 1898, c. 393. It does not appear that any of the statutes relative to parole contemplate the working of a repeal of the provisions of restraint for persons suffering from diseases set forth in G. L., c. 111, § 121. Since the provisions relative to such restraint, in the second sentence of said section 121, are not operative until after the expiration of sentence, it is obvious that a pardon, which may be said to cause a sentence to expire, does not have the further effect of preventing the enforcement of the restraint made necessary by disease.

The provisions of G. L., c. 111, § 121, have been on our statute books in substantially their present form for over thirty-five years. It does not appear that their constitutionality has been questioned. They purport to be such an interference with the liberty of a certain class of persons as may be justified as a health measure under the general doctrine of the police power inherent in the sovereign, and in the absence of authoritative judicial decision to the contrary should be regarded as binding by all executive and administrative officials.

Very truly yours,

Arthur K. Reading, Attorney General.

Membership in a benefit association is not a condition pertaining to employment, under G. L., c. 175, § 133, as amended, which makes possible the insurance of the members of such an association in a policy of group insurance to the exclusion of fellow employees not members.

May 24, 1928.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have stated in a communication to me as follows: —

"It has come to my attention that certain policies of group life insurance have been issued to employers in this Commonwealth covering the lives of such of their employees as are members of a mutual or fraternal benefit association composed of their employees and operated for their benefit."

And you have asked my opinion upon the following question relative thereto:

"Is membership in such a mutual or fraternal benefit association 'a condition pertaining to the employment,' within the meaning of G. L., c. 175, § 133, or may a life insurance company lawfully issue such a policy insuring only such employees as belong to such an association?"

I answer your question in the negative. It is plain from the terms of G. L., c. 175, § 133, as amended, that the legislative intent was that all employees of a given employer, or at least all those engaged in the same general type or kind of work for such employer, should constitute a distinct group for the purpose of receiving the benefits of insurance. It is possible that there may be conditions growing out of the employment, such as locality or time of work, which may likewise permit the formation of distinct groups for the purpose of insurance. Nevertheless, membership in a benefit association is not one of "the conditions of employment," as those words are used in said section 133, even though membership in such association is limited to employees of the employer seeking group life insurance. To create a special group within a larger class, all of whose members work under the same conditions actually pertaining to their employment, merely because the members of such special group belong to an association to which the other individuals of the class are not admitted, would be an unreasonable discrimination against such latter individuals. The fact that membership in such an association is limited to the employees of the one seeking group insurance does not of itself make such membership one of "the conditions pertaining to the employment" in any but such an indirect sense as not to be within the ordinary meaning of the words used in the statute.

Very truly yours,

Arthur K. Reading, Attorney General.

Insurance — Life Policies — Incontestability — Date of Issue.

The words "date of issue," as used in G. L., c. 175, §§ 132-134, describe a time which may in part be fixed by agreement of insurer and insured.

May 28, 1928.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have called my attention to certain facts and to certain provisions of the statutes relating to insurance policies, in these words: —
"G. L., c. 175, §§ 132 and 134, provide that life insurance policies issued in the Commonwealth shall contain certain provisions, including a provision that the policy shall be incontestable after two years from its 'date of issue.'

A certain life insurance company has filed a form of policy under said section 134 which contains the aforesaid provision, together with a stipulation that the date of issue of the policy is the date of the execution thereof set forth in the teste clause."

You have asked my opinion upon the following questions of law: —

"1. What date is meant by the words 'date of issue' as used in said sections 132 and 134?

2. May the insured and insurer agree that the date of the execution thereof or any other date is the 'date of issue' of a life insurance policy, or may the parties lawfully define in such a policy what is meant by the words 'date of issue' as used in said sections 132 and 134?"

I am of the opinion that the words "'date of issue,'" as used in G. L., c. 175, §§ 132 and 134, as amended, were not intended by the Legislature to have the meaning of a certain, fixed, invariable point in the series of actions which go to the complete formation of contracts of life insurance, without regard to all the circumstances surrounding the making of any particular contract and excluding the expressed intention of the parties concerning the time of such issue, which intention constitutes one of the surrounding circumstances. The Legislature has determined that the "'date of issue'" of a policy shall be taken as the time from which the period of two years before the policy becomes incontestable is to be reckoned, but it has not defined the precise meaning of the words "'date of issue.'" The words themselves, as used with relation to a policy of life insurance, are ambiguous. They are susceptible of several meanings. They do describe a point in the negotiation of a policy which exists with relation to each policy written, but which may vary in its position among the several actions included in the negotiations with the circumstances surrounding the making of any particular contract. The expressed intention of the parties as to the point in such series of actions which shall be, as between themselves, the "'date of issue'" of the policy is an important, if not a determinative, circumstance in fixing what is such date of issue as regards a particular policy. It follows that the parties to the contract may make clear by written expression of agreement, in connection with the policy, what is their intention as to the point among the contractual negotiations which they intend to constitute the "'date of issue.'" Such expressed intention will govern the determination of what was in fact the date of issue of a particular policy, provided that such intention does not run so wholly counter to the other circumstances surrounding the making of the contract as to indicate that the expression of intention is merely colorable and not an indication of the real intention.

It is clear that there are at least three points in the negotiation of a policy which may be agreed upon as the "'date of issue'" of the policy by the contracting parties, namely: The time of delivery and acceptance; the time of preparation and signing of the instrument by the officers of the insurance company, irrespective of the date of delivery to the assured; and the date inserted in the policy purporting to be the date of the instrument itself. Which one of these is the date of issue of any particular policy is to be determined by the intent of the parties, as that can be
gained from all the circumstances surrounding the making of the contract, including any actual expression of intention by the insurer and the insured. As to whether there are other meanings which may properly be attached to the words "date of issue," when interpreted in the light of all the surrounding circumstances, I express no opinion in the present absence of authoritative expression of judicial opinion in relation thereto.

The Supreme Judicial Court of this Commonwealth has said with relation to the word "issue," in Coleman v. New England Mutual Life Ins. Co., 236 Mass. 552, 554,—

"Ordinarily by the 'issue' of an insurance policy is meant its delivery and acceptance whereby it comes into full effect and operation as a binding mutual obligation. . . . Sometimes it is used in the sense of the preparation and signing of the instrument by the officers, as distinguished from its delivery to the insured."

The Supreme Court of the United States, in a case decided since the opinion in Coleman v. New England Mutual Life Ins. Co., supra, Mutual Life Ins. Co. of New York v. Hurni Packing Co., 263 U. S. 167, has held that the words "date of issue," as used in a policy of life insurance, with relation to incontestability arising two years after the date of issue, may mean the actual date inserted in the written policy, when such date was intended by the parties to have such meaning, whether such date so inserted refers to the actual time of the execution of the instrument, to the time of its actual delivery or to neither. See also: Russ v. Great Southern Life Ins. Co., 6 Fed. (2d) 940; New York Life Ins. Co. v. Renault, 11 Fed. (2d) 281; Great Southern Life Ins. Co. v. Russ, 14 Fed. (2d) 27; Northern Life Ins. Co. v. Schwartz, 19 Fed. (2d) 142.

Since a determination must be made of the intent of the parties as to what shall be, in any specific instance, the "date of issue" of a policy, in connection with all the circumstances surrounding the making of the contract, in order to decide what is the "date of issue" of such policy, with a view to establishing when the period of its incontestability begins, I know of no principle of law nor of any statutory provision which forbids or renders contrary to public policy an insertion of an agreement as to what shall be taken to be "the date of issue," showing the intent of the parties with relation thereto, in the policy itself.

Very truly yours,

ARTHUR K. READING, Attorney General.


Rate making for policies of fire insurance may be undertaken by the Legislature.

JUNE 2, 1928.

Hon. John C. Hull, Speaker, House of Representatives.

Dear Sir: — On behalf of the House of Representatives you have asked my opinion "as to the constitutional right of the Commonwealth to determine or to supervise classifications of the risks and the rates to be made and charged therefor by fire insurance companies transacting business in this Commonwealth," in connection with the consideration of a resolve pending before the General Court, which provides "for a study by a special commission relative to the classification of risks and
the rates to be made and charged therefor by fire insurance companies in this Commonwealth."

The constitutionality of rate making and classification as to fire insurance by a State Legislature appears to have been established under the Federal Constitution by the decision of the Supreme Court of the United States. German Alliance Ins. Co. v. Lewis, 233 U. S. 389.

The Supreme Judicial Court of Massachusetts has said, in Opinion of the Justices, 251 Mass. 569, 610, that the conclusion reached in said decision "is equally sound under the Constitution of the Commonwealth."

Moreover, the Supreme Judicial Court of this Commonwealth has upheld the power of the Legislature to fix rates and classifications in connection with automobile liability insurance. Opinion of the Justices, 251 Mass. 569.

The exercise of the power to fix rates and classifications, either by the Legislature itself or by public officials to whom the authority is delegated by the General Court, must be governed by certain fundamental principles which to some degree limit the extent of the power. No rate may be established which is not sufficient to yield a fair net return on the reasonable value of the property used or invested for doing the business. Rates and classifications, when established, are subject to review by the judicial branch of the government, for the purpose of determining whether they are unjust, unreasonable and confiscatory, judged by the standard of a fair net return. Provision for such review by the courts must be embodied in any act of legislation which purports to fix rates and classifications. Opinion of the Justices, supra.

Subject to the limitations which I have outlined, the Legislature has the power, under the Constitution of the Commonwealth, to determine classifications of the risks and the rates to be made and charged therefor for fire insurance companies transacting business in this Commonwealth in respect to property within Massachusetts.

Very truly yours,

ARTHUR K. READING, Attorney General.

Department of Agriculture — Division of Ornithology — Publications.

The Department of Agriculture has not the authority to purchase matter for publications under Resolves of 1921, chapter 5, and later resolves. The work necessary for such publications should be prepared by the Division of Ornithology itself.

JUNE 20, 1928.

Dr. Arthur W. Gilbert, Commissioner of Agriculture.

DEAR Sir: — You have asked my opinion "as to whether a contract entered into by and between the Commonwealth of Massachusetts, by its Commissioner of Agriculture, and Mr. Edward H. Forbush, for the purchase of a certain manuscript of facts relative to the birds of the Commonwealth, would be in conflict with the provisions of existing laws of this Commonwealth."

You advise me that Mr. Forbush was formerly Director of the Division of Ornithology, and was retired from the service on April 23, 1928, having then reached the age of seventy years; that he has a manuscript compiled by him over a considerable period of time, which you state to be his own property; and that such manuscript is necessary to supple-
ment the work of the present personnel of said Division in completing the third volume of a report on birds, authorized to be made by the Resolves of 1921, chapter 5, which reads as follows:

"RESOLVE PROVIDING FOR THE PREPARATION AND PUBLICATION OF A REPORT ON THE BIRDS OF MASSACHUSETTS.

Resolved, That the department of agriculture is hereby authorized, subject to such appropriations as may be made, to prepare a report on the birds of the commonwealth, including the facts ascertained by the director of the division of ornithology regarding the economic value, geographical distribution and life history of such birds."

The printing of said third volume of the report provided for in 1921 has been authorized by the Resolves of 1927, chapter 25, and by the Resolves of 1928, chapter 13, and appropriations for such printing and for distribution have been made.

These resolves undoubtedly give an implied authority to the Department of Agriculture to make contracts necessary for and incidental to the printing and distribution of the volumes of the report.

It does not appear from the terms of the resolve of 1921 that the Legislature intended to give authority for the purchase of manuscript or other literary material from individuals unconnected with the public service, to be embodied in the report. It seems rather to have been the intent of the Legislature, as expressed in the provisions of the resolve of 1921, that the preparation of the report was to be done by persons in the service of the Commonwealth and that the report was to contain an account of data ascertained by the Director of the Division of Ornithology in his official capacity, without extra cost therefor. If, as you say, the manuscript now in the hands of the former Director is his personal property and the Commonwealth is not entitled to the information contained in it, I am of the opinion that there is no authority vested in any one by the existing legislation to purchase or to contract for the purchase of the same. The General Court might by appropriate action extend the powers of the Department of Agriculture so as to permit it to contract for the purchase of manuscript or data from private individuals, but at the present time the Department does not appear to possess such authority.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

Taxation — Corporations — Change in Federal Net Income — Interest on Additional Assessment of Excise with Respect to Such Change.

After the effective date of St. 1927, c. 148, an additional assessment of an excise laid in accordance with G. L., c. 63, §§ 32 and 36, as amended, should include an assessment of interest where such assessment is based upon an increase in Federal net income.

JUNE 22, 1928.


Dear Sir: — You request my opinion with respect to the following situation: A corporation has reported, in accordance with the provisions of G. L., c. 63, § 36, a change made by the Federal government in the amount of its net income as returned to the Federal taxing authorities.
This change was made prior to the effective date of St. 1927, c. 148. No assessment with respect to the increased amount of net income was made by you in accordance with the provisions of G. L., c. 63, § 36, prior to the effective date of St. 1927, c. 148. Two questions now arise:

1. In making an assessment with respect to such increased net income after the effective date of St. 1927, c. 148, can interest be included in the assessment upon the additional amount of tax incident to the increase in Federal net income?

2. Assuming that you have already made an assessment without interest since the effective date of St. 1927, c. 148, with respect to the increase in Federal net income, is it now possible for you to make an additional assessment of the interest due upon that amount at the rate of six per cent from October twentieth of the year in which the original return of the net income in question was due to be filed by the corporation?

Reference is made to the reasoning contained in the opinion furnished by this office under date of May 5, 1928, in which you were advised that refunds made pursuant to G. L., c. 63, § 36, carry interest if certified subsequent to the date when St. 1927, c. 148, became effective, although the change was made and notice thereof given prior to that date. The reasoning of that opinion would lead to the conclusion, in answer to the first question raised above, that in making an assessment with respect to the increase in Federal net income you may include interest, as provided by St. 1927, c. 148. The decision in League v. Texas, 184 U. S. 156, 161, et seq., shows clearly that there is no objection under the Federal Constitution to such an assessment. I can see no other objection to such an assessment.

I must also advise you that it is your duty to assess interest upon the taxes assessed by you since the effective date of St. 1927, c. 148, with respect to increases in Federal net income reported prior to the effective date of St. 1927, c. 148, where you have neglected to include interest in the original assessment. I can see no objection to making such additional assessment within a reasonable time after the original assessment incident to the increase in Federal net income has been made.

G. L., c. 63, § 36, as amended by St. 1927, c. 148, places no limitation upon the time within which an assessment with respect to an increase in Federal net income must be made, and no limitation exists other than that contained in G. L., c. 63, § 45, as amended by St. 1922, c. 520, § 7. It is not necessary to decide, for the purpose of this opinion, whether that section limits in any degree the assessment provisions of section 36, as amended. I have been unable to discover any statutory prohibition upon the correction of an assessment by the Commissioner within a reasonable time after the assessment is made under the provisions of section 36, and in the absence of such prohibition and in view of the affirmative direction of section 36 to assess the tax due with interest, I feel that interest should be assessed.

Very truly yours,

JOSEPH E. WARNER, Attorney General.
Schools — Pupils — Free Transportation — State Forest Reservation.

A pupil of the public schools living in a State forest reservation is entitled to free transportation by the town within which he resides.

June 23, 1928.

Dr. Payson Smith, Commissioner of Education.

Dear Sir: — You have asked my opinion upon the question as to whether children of school age, residing within the limits of a town upon land purchased by the Commonwealth and held by it as a State forest reservation, are entitled to the benefits of the provisions of law, embodied in G. L., c. 71, § 68, for free transportation to an appropriate town public school situated more than two miles from their place of residence.

By the terms of G. L., c. 76, § 1, as amended, a child of school age, with certain designated exceptions, is required to attend a public school of the town in which he “resides,” and under G. L., c. 71, § 68, his transportation to such school by such town, if the child lives more than two miles from the school where such attendance should be given, may be required of the town by the Department of Education.

Although a child may live upon the land of a State forest reservation, it cannot be said that he does not by reason of that fact reside in the town within the boundaries of which that part of such reservation lies whereon his place of abode is fixed.

There is no specific provision of the statutes which purports to withdraw from persons living on State forest reservations the rights which they otherwise possess in connection with the public school system as residents of the towns within whose bounds they reside. The Legislature has not by direct terms, nor by implication from any statutory enactment, so withdrawn the lands of the State forests from identification with the respective towns wherein they lie as to deprive those living in such forest reservations of the common right of access to the schools in the general public school system of the Commonwealth.

The power now vested in the said Department by G. L., c. 71, § 68, renders the opinion of the Supreme Judicial Court in Davis v. Chilmark, 199 Mass. 112, inapplicable to the situation which you have called to my attention in your letter, and earlier opinions of such court with relation to children residing upon land used by the Federal government are likewise inapplicable (Newcomb v. Rockport, 183 Mass. 74, and cases there cited); and the opinion of one of my predecessors in office (V Op. Atty. Gen. 435) is not inconsistent with the view which I have expressed.

Accordingly, I am of the opinion that children of school age living upon land within a State forest reservation are entitled to free transportation by a town to a public school more than two miles away in precisely the same degree and to the same extent as are other children of like age and similarly situated living within a town but not upon a State reservation.

Very truly yours,

Joseph E. Warner, Attorney General.
Savings Banks — Investments — Bank Stock.

A savings bank may not invest more than $100,000 of its funds in the purchase of bank stock, irrespective of the par value of such stock.

June 25, 1928.

Hon. Roy A. Hovey, Commissioner of Banks.

Dear Sir: — You have asked my opinion with reference to the interpretation of G. L., c. 168, § 54, cl. 7th, which authorizes investment of the funds of savings banks in the following language: —

"In the stock of a banking association located in the New England states and incorporated under the authority of the United States, or in the stock of a trust company incorporated under the laws of and doing business within this commonwealth, but such corporation shall not hold, both by way of investment and as security for loans, more than twenty per cent of its deposits in the stock of such associations or companies, nor in any one such association or company more than three per cent of its deposits in, nor more than one hundred thousand dollars nor more than one quarter of the capital stock of, such association or company."

The particular inquiry which you make of me in relation to the interpretation of the foregoing statutory provisions is as follows: —

"The question upon which I respectfully request your opinion is whether the $100,000 limitation has reference to the amount of funds which may be used to purchase and invest in bank stock or whether it refers to the par value of the stock so invested in."

In the earliest statute dealing with the investment of the funds of savings institutions in bank stock no specific limitation was placed upon the amount of its funds which a savings institution might so invest, although a designated limit was placed upon the amount of the stock of any one bank which such an institution might acquire, the obvious purpose of the legislation being to prevent a savings institution from acquiring the control of a bank of another. These provisions of limitation originating with St. 1834, c. 190, § 7, have been continuously retained in other acts dealing with the general subject, beginning with R. S., c. 36, § 78, and are now embodied in the last clause of the instant statute, G. L., c. 168, § 54, cl. 7th, by the words "nor more than one quarter of the capital stock of, such association or company."

By St. 1855, c. 294, a limitation was first placed upon the amount of its own funds which a savings institution might invest in the stock of any other corporation. This provision has come down through re-enactment in a series of statutes until it is now set forth in the instant statute in the following words: —

"But such corporation shall not hold, both by way of investment and as security for loans, more than twenty per cent of its deposits in the stock of such associations or companies, nor in any one such association or company more than three per cent of its deposits in, nor more than one hundred thousand dollars."

The attempt to codify in a single sentence both the limitations as to the amount which might be invested in bank stock and the amount of bank stock which might be acquired gives rise to a certain apparent
confusion in the reading of said clause 7th. The meaning of the clause, however, is clear when the sources of the two kinds of limitations therein referred to are set forth, one as in said St. 1834, c. 190, § 7, and the other as in said St. 1855, c. 294, which latter enactment reads as follows:—

"Sect. 1. No savings bank in this Commonwealth shall be allowed to invest more than ten per cent. of its deposits, nor, in case such percentage amounts to one hundred thousand dollars, more than one hundred thousand dollars of its deposits, in the capital stock of any one corporation.

Sect. 2. Any savings bank in this Commonwealth that may have invested a larger amount of its deposits than is expressed in the foregoing section, in the capital stock of any one corporation, shall reduce the same to the limits in said section named within twelve months after the passage of this act."

Both the limitations upon the amount of money which might be invested and the amount of stock in any one institution which might be acquired were first combined in a single section in St. 1863, c. 175, § 2, in the following terms:—

"No savings bank or institution for savings shall hold both by way of investment and as security for loans, more than one-half of the capital stock of any corporation, nor invest more than ten per cent. of its deposits, and not to exceed one hundred thousand dollars in the capital stock of any corporation."

That the words "stock of any corporation," as used in St. 1855, c. 294, and in St. 1863, c. 175, had been interpreted to include bank stock, although the latter was not designated by name in the earlier acts, is made plain by the provisions of St. 1863, c. 234, entitled "An Act in relation to savings banks and institutions for savings holding bank stock," which read:—

"Savings banks and institutions for savings holding stock in banks which may become banking associations, under the provisions of section sixty-one of the act of congress, entitled 'An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof,' may continue to hold such stock in such banking associations."

The limitations both as to amount of money which might be invested and the amount of stock in any bank which might be acquired were codified in a single clause of St. 1876, c. 203, § 9. By the phraseology of chapter 203 the intent of the Legislature with relation to the two forms of limitations and the intent that not over $100,000 of the funds of a savings bank should be invested in the stock of any other bank are made plain, and when read with due consideration of its relation to this statute of 1876 the meaning of the terms of the instant statute, G. L., c. 168, § 54, cl. 7th, becomes clear.

St. 1876, c. 203, § 9, reads, in part, as follows with relation to the deposits of savings banks:—

"All such deposits and the income derived therefrom . . . shall be invested only as follows:—

Fourth. In the stock of any bank incorporated under the authority of this state; or the stock of any banking association located in this state,
and incorporated under the authority of the United States; or on the notes of any citizen of this state with a pledge as collateral of any of the aforesaid securities at no more than eighty per cent. of the market value and not exceeding the par value thereof: provided, however, that such corporation shall not hold, both by way of investment and as security for loans, more than one-quarter of the capital stock of any one bank or banking association, nor invest more than ten per cent of its deposits, nor more than one hundred thousand dollars, in the capital stock of any such bank or association. Savings banks may deposit on call in such banks or banking associations, and receive interest for the same, sums not to exceed twenty per cent of the amount deposited in said savings banks."

In view of the sequence of legislation which has been outlined, it appears reasonably obvious that the instant statute prohibits the investment of more than $100,000 of the funds of a savings bank in the stock of any one other banking association. It is immaterial whether or not such bank stock at any given time sells above its par value. The test of the legality of the investment in this respect is not the market value or other value of the bank stock purchased but the amount of money which has been expended from the funds of a savings bank for its acquisition. An actual expenditure of more than $100,000 of the funds of a savings bank may not be made for the purchase of stock of a single bank.

Accordingly, I answer your question to the effect that the $100,000 limitation, which originally was enacted with the apparent intention on the part of the Legislature to secure wide diversity in the investment of savings bank funds, has reference to the amount of funds which may be used to purchase the stock of any bank, and does not refer to the par value of the bank stock the acquisition of which is sought as an investment.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

State Forests — Improved Land — Fencing.

The provisions of G. L., c. 49, relative to fences are not applicable to lands of the Commonwealth.

JUNE 25, 1928.


Dear Sir: — You have in a recent communication advised me of the following facts: —

“There are now under title of the Commonwealth over 100,000 acres of forest land, having many miles of exterior boundaries, the major portions of which are along land privately owned and used by several of the owners for pasturage or other farm activities.

In the administration of the State forest areas the Department activities consist of plantings, thinnings, improvement cuttings and other forms of forestry practice that tend to produce a desirable tree crop on any given area, but no pasturage is permitted.”

In connection with these facts you have asked my opinion upon certain questions of law, in the following language: —

“The purpose of this letter is to ask if, in your opinion, the areas upon which the above-mentioned activities are carried on each year constitute
improved land, within the meaning of G. L., c. 49, § 3; and if so, is the Commonwealth liable to pay one-half of the cost of maintaining boundary fences; and also I should like to know if, where no improvement work of any kind is carried on on State forest areas, the Commonwealth must pay one-half of the cost of maintaining boundary fences against land that is improved by the adjoining owner."

The provisions of G. L., c. 49, §§ 1–20, relative to fences have in their essential terms existed in substantially their present form for many years, most of them from 1785 or earlier. They do not purport to be applicable to lands held by the sovereign, and I am not aware of any judicial decision in which they have been construed as being so applicable. There does not appear to be any statute by which the Commonwealth has specifically made the provisions of said chapter 49 effective as to lands held by it. In the absence of consent upon the part of the Commonwealth to subject lands held by it in its sovereign capacity to the authority of local fence viewers, it cannot be said that such authority can be exercised with respect to its lands.

It does not appear, from an examination of the various statutes relative to the acquisition of forest land by the Commonwealth, that it takes or holds such lands in any other capacity than as the sovereign for purposes appertaining to the general public welfare, although in dealing with such lands it may possibly from time to time act in making a contract with relation thereto outside "the plane of its sovereignty." Boston Molasses Co. v. Commonwealth, 193 Mass. 387.

Any claim which may exist in relation to neglect to fence, under G. L., c. 49, accrues as a result of prior action and determination by fence viewers, and though such claim may properly be considered as an obligation which is enforced as if it were ex contractu, though it arises ex lege, so that it would be of the class of claims for which recovery may be had against the Commonwealth under G. L., c. 258 (Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28), nevertheless, since the proceedings of the fence viewers are essential to the creation of the claim and are at least quasi judicial in character, the Commonwealth cannot be made a party or subject to such proceedings in the absence of express consent on its part, and therefore such claims cannot come into being as against it.

Inasmuch as I am of the opinion that the provisions of G. L., c. 49, relative to fences, are not applicable to lands of the Commonwealth, it becomes unnecessary for me to answer your questions relative to the precise nature of duties and obligations relative to fences as set forth in said chapter.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

Department of Public Health — Shellfish — Importations.

The Department of Public Health is not required by G. L., c. 130, as amended, to take any action relative to shellfish imported from foreign countries.

JUNE 25, 1928.

Dr. GEORGE H. BIGELOW, Commissioner of Public Health.

DEAR SIR: — You have asked my opinion relative to an interpretation of G. L., c. 130, as amended by St. 1928, c. 269, by the following question: —
“Will you kindly inform me what action, if any, this Department must take regarding shellfish imported into Massachusetts from other countries?”

I am of the opinion that section 144A of G. L., c. 130, which was added by St. 1928, c. 269, was not intended by the Legislature to apply to foreign countries, but that the words “grounds outside the Commonwealth,” referred to therein, are limited in their application to the territory of States of the Union. The statute refers to “the state where such grounds are situated,” and the intent of the Legislature that section 144A shall be applicable only as to the jurisdictions comprised within the United States is made apparent by the context, by the tenor of the other sections of G. L., c. 130, relative to shellfish, and by the reference in section 144A to “interstate commerce” in shellfish.

It is recognized by judicial opinions that the interpretation of the word “state” in statutes, as meaning only a State of the Union, where the context does not preclude it, is proper. Houston etc. R.R. v. Inmon, 63 Tex. Civ. App. 556; Wynne v. United States, 217 U. S. 234; Eidman v. Martinez, 184 U. S. 578; People v. Black, 122 Cal. 73; Employers’ Liability Ass. Co. v. Commissioner of Insurance, 64 Mich. 614.

I therefore answer your question to the effect that your Department is not required by section 144A to take any action regarding shellfish coming to Massachusetts from foreign countries.

Very truly yours,

Joseph E. Warner, Attorney General.

Department of Education — Commissioner — Conveyance of Land.

The Commissioner of Education has authority, under certain conditions, to convey land to a town.

June 25, 1928.

Dr. Payson Smith, Commissioner of Education.

Dear Sir: — You have requested my opinion as to whether the Department of Education is authorized to transfer a certain parcel of land in its control to the town of Framingham for highway purposes.

The provisions of St. 1927, c. 135, as they amend G. L., c. 30, § 44, by the addition of a new section, are as follows: —

“Section 44A. A commissioner or head of a state department having control of any land of the commonwealth may, in the name of the commonwealth and subject to the approval of the governor and council, sell and convey to any county, city or town, or transfer to the control of another state department, so much of such land as may be necessary for the laying out or relocation of any highway.”

From the terms of this statute it is apparent that the Commissioner of Education rather than the Department has authority to sell and convey land in the control of the Department to a town for the purpose of laying out or relocating any highway. The words “sell and convey” would seem to indicate an intention that a real consideration should pass from the town to the Commonwealth, equivalent to the fair market value of the land transferred; and the conveyance is subject to the approval of the Governor and Council, and such approval would include necessarily an approval of the amount of the consideration.
The form of conveyance by the town should be so drawn as to set forth that the conveyance is not for highway purposes generally but for the purpose of laying out or relocating a highway, whichever it may be, specifying the highway, and should also contain the amount of the actual consideration.

Having these matters in mind and acting in accordance with these suggestions, I am of the opinion that you have authority, with the approval of the Governor and Council, to sell and convey to the town of Framingham the land in control of the Department of Education concerning which you have inquired.

Very truly yours,

Joseph E. Warner, Attorney General.

Witness — Summons in Adjoining State — Forfeiture.

The Commonwealth is entitled to receive the fine or forfeiture laid upon a witness summoned to give testimony in an adjoining State, under G. L., c. 233, §§ 12 and 13, for failure to obey a duly issued process.

July 20, 1928.

Hon. Robert T. Bushnell, District Attorney for the Northern District.

Dear Sir: — You have written me as follows: —

"A witness is duly summoned by the State of New York in full compliance with G. L., c. 233, §§ 12 and 13. The witness fails to appear, and at the request of the New York authorities proceedings are instituted by me, as District Attorney, in the district court of the witness' residence. The court orders the maximum amount of $300 paid as a forfeiture, under the statute. This money is paid to the clerk of the district court.

The New York authorities request reimbursement out of this forfeiture for the amount paid the witness, and expenses. The general question on which I require an opinion is as to whether the proceedings for forfeiture, although in the name of the Commonwealth of Massachusetts, are undertaken on behalf of the summoning State, so that all or any part of the amount of the forfeiture should be paid over to that State."

You request my opinion upon the following questions relative to the facts which you have set forth as above: —

"Should the amount of the forfeiture be paid over by the clerk of the district court to the District Attorney for disposition?"

(a) If not, what disposition should the district court clerk make of the payment?

(b) If so, should the District Attorney pay over all or any part thereof to the representative of the summoning State, and if a part, to what department of the government should the balance be paid?"

I am of the opinion that the entire amount of the forfeiture ordered by the court should be paid over, on receipt thereof by the clerk of the district court, to the town in which the witness was when process was served upon him. In this instance the inference from the statements in your communication would indicate that it was the town of his residence.

The original form of the act, now embodied in G. L., c. 233, § 13, is St. 1873, c. 319, and reads: —
"SECTION 1. If the clerk of any court of record in any state adjoining to this Commonwealth, shall certify that a criminal prosecution is pending in such court, and that a person residing in this Commonwealth is supposed to be a material witness therein, any justice of the peace for the county in which such witness may reside, shall, on receipt of such certificate, issue a summons requiring such witness to appear, and testify at the court in which such cause is pending.

SECTION 2. If the person on whom such summons is served, and to whom is paid or tendered double the fees allowed by law for travel and attendance of witnesses in the supreme judicial court of this Commonwealth, besides double travelling expenses for the whole distance out and home by the ordinary travelled route, shall neglect without a reasonable excuse, to attend as a witness at the court in such summons mentioned, he shall forfeit a sum not exceeding three hundred dollars for the use of the Commonwealth."

The provision contained therein relative to the forfeiture being "for the use of the Commonwealth" was omitted in the codification of the Public Statutes, but the latter contained a provision relative to fines and forfeitures generally, providing that the same should be paid to the counties.

P. S., c. 217, § 1, provides:—

"All fines and forfeitures recovered in criminal prosecutions or exacted as a punishment for any offence or for the violation or neglect of any duty imposed by statute, and all sums recovered on forfeited recognizances, shall, where no other provision is especially made by law, be paid to the respective counties."

By St. 1890, c. 440, § 5, it was provided that fines and forfeitures paid in any district court, where no other provision is made by law, were to be paid to the city or town in which the offense was committed. The terms of said St. 1890, c. 440, § 5, are now contained in G. L., c. 280, § 2. G. L., c. 233, §§ 12 and 13, which provide for the instant form of forfeiture, are silent as to whom it shall be paid. It follows, then, that in virtue of said G. L., c. 280, § 2, it should be paid to the town where the offense was committed.

It is obvious that the Commonwealth, which has succeeded to the rights of the Crown to receive fines, and forfeitures equivalent thereto, as is the one under consideration, may by its Legislature provide for payment thereof to one of its subdivisions, and I am of the opinion that, in the absence of statutory provision therefor, such a forfeiture may not be apportioned by the court or paid to any one other than the Commonwealth or such other governmental agency as is specially designated, — in this instance the town where the offense was committed. Bryant v. Rich's Grill, 216 Mass. 344; Nelson v. Ewell, 2 Swan (Tenn.), 271.

The offense of refusing to appear and be sworn as a witness when prosecuted under a criminal complaint has been said, with relation to venue, to be committed at the place named in the subpoena where the testimony was to be given. State v. Scott, 89 N. J. L. 726; State v. Brewer, 89 N. J. L. 658; State v. Brewer, 87 N. J. L. 75.

It is manifest, however, that this rule does not apply to the offense which is the subject matter of G. L., c. 233, §§ 12 and 13. The offense there described appears rather to be one against the dignity of the Commonwealth, in disregarding the process issued by a justice of the peace
within the Commonwealth directing the one named therein to perform an act outside the Commonwealth. The venue accordingly appears, as by the law of the particular case which you have called to my attention, to be that of the local district wherein the defendant resides. It would follow that the town where the offense was committed would be the town, within said district, in which the defendant resided when process was served upon him, and hence that such town would be entitled to the amount of the forfeiture, or fine, as the former might with equal propriety have been called in the statute.

There is nothing in G. L., c. 233, §§ 12 and 13, as is evident when read in connection with St. 1873, c. 319, which indicates an intent to divest the Commonwealth of its right to receive the fine or forfeiture in question in favor of a foreign sovereign.

I answer your first question in the negative.

(a) I answer this question to the effect that the district court clerk should pay over the amount of the forfeiture to the town in which the defendant had his residence at the time when the witness' summons was served upon him.

(b) In view of the foregoing, this question requires no answer.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

Metropolitan District Commission — Easements — Acquisition.

The Metropolitan District Commission became vested with an easement formerly acquired by the city of Boston by adverse use in Beacon Street, Brookline.

Metropolitan District Commission.

GENTLEMEN: — You request my opinion as to the right of the Commission to maintain water pipes laid in land owned by one Korkland abutting upon Beacon Street in Brookline. The land in question was formerly part of Beacon Street as then located, and the pipes were originally laid therein by the city of Boston, acting under legislative authority (St. 1880, c. 126). In 1887 the part of the way in question was discontinued by action of the town, under authority of St. 1887, c. 18, and apparently, in 1889 or shortly thereafter, the town gave a deed of this land to Korkland's predecessor in title.

In my opinion, the right of the city of Boston to maintain the pipes in the land in question ceased when the use of that land as a public way was discontinued. It is doubtful whether the Legislature could preserve the water pipe easement after the easement of travel, of which it was an incident, was discontinued; but however that may be, no legislative intent is here disclosed to attempt such a result. See Natick Gas Light Co. v. Natick, 175 Mass. 246; New England Tel. & Tel. Co. v. Boston Terminal Co., 182 Mass. 397; Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566.

It would seem, however, that the city had acquired by adverse use a right to maintain the pipes in the Korkland land. The discontinuance was in 1887 and the conveyance by the town, if that is material, was probably no later than 1890.

Assuming that the city of Boston had acquired the easement by adverse use, you suggest a further question as to whether the Metropolitan
Water and Sewerage Board succeeded to that right. That Board, by
St. 1912, c. 694, was authorized to take "the main water supply pipes
belonging to the city of Boston located in the town of Brookline." Al-
though nothing is said as to taking the easement to maintain those pipes,
such authority would no doubt be inferred. The taking by the Board
from the city was of the pipe line through Beacon Street, as said street
is now "or was formerly" laid out, and includes all the "property and
rights acquired by the city of Boston by taking or purchase and now owned
by it in connection with the said pipes." The word "purchase" includes
acquisition of title by prescription. 23 Am. & Eng. Ency. L., 2d ed.,
p. 463, citing cases; Wharton's Law Lex. 8715.

In my opinion, therefore, the Board became vested with any easement
that the city had acquired.

Yours very truly,

JOSEPH E. WARNER, Attorney General.

Insurance — Insured — Medical Examination.

A beneficiary under a contract of life insurance is not subject to the
provisions of G. L., c. 175, § 123, relative to medical examination,
even if by the terms of the policy he may in certain contingencies
become one of the insurer's risks.

Hon. Wesley E. Monk, Commissioner of Insurance.

Dear Sir: — You have set forth certain facts and have asked my
opinion with relation to the application to them of G. L., c. 175, § 123,
as amended, as follows: —

"G. L., c. 175, § 123, as amended, provides, with exceptions not ma-
terial to this request, that no life insurance company shall issue a policy
of life insurance without having given the 'insured' a prescribed medical
examination.

A certain life company doing business in this State proposes to issue a
policy of insurance on the life of a minor. The father is named as bene-
ficiary in the policy, the proceeds thereof being payable to him upon the
death of the minor. The application for the policy is signed by the father,
who is the contracting party with the company.

The policy contains the following provisions: —

'The Company will waive payment of all subsequent premiums on this
policy, continuing the insurance in full force and effect, the same as if
premiums were being duly paid, if . . . John Doe . . . (father of the
minor insured), hereinafter referred to as the Applicant, becomes totally
and permanently disabled as hereinafter defined, or in event of the death
of the Applicant, provided such disability or death occurs prior to the
anniversary of this policy on which the age of the Insured at nearest
birthday is twenty-one years and prior to the anniversary of the policy
on which the age of the Applicant at nearest birthday is sixty years,
subject to the conditions stated herein. Such waiver shall commence
with the premium due on the anniversary of this policy following the
receipt of due proof of such disability or death.'

The foregoing facts raise the following question, upon which I respect-
fully request your opinion: Is the applicant and beneficiary an 'insured'
within the meaning of said section 123?"
One pertinent portion of G. L., c. 175, § 123, as amended, reads as follows:—

"No life company shall, except as herein and in sections one hundred and thirty-three and one hundred and thirty-four provided, issue any policy or policies of life or endowment insurance upon a life within the commonwealth without having within ninety days prior thereto made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner; provided that an inspection by a competent person of a group of employees and their environment may be substituted for such medical examination in case of a policy of group life insurance as defined in section one hundred and thirty-three."

I am of the opinion that the word "insured," as used in G. L., c. 175, § 123, as amended, refers only to the individual to whom a policy is issued insuring his life, and has no reference to the beneficiary of such policy, even though such policy contains contractual provisions, as in the instant matter to which you have called my attention, which may be said to constitute a contract of insurance with the beneficiary, within the meaning of G. L., c. 175, § 2. Such contract of insurance with the beneficiary is subsidiary to the principal contract of life insurance made between the company and the person on whose life the policy is written. Although the word "insured" has had more than one meaning attached to it in the opinions of courts, under various circumstances, I am unaware of any instance in this Commonwealth in which the word, as used in a policy of life insurance, has been interpreted by the Supreme Judicial Court as meaning any one other than the person upon whose life a policy has been written, irrespective of who might be the applicant and beneficiary of such policy. The word as commonly used in connection with life insurance refers to an individual whose life is the principal subject of a policy.

G. L., c. 175, § 123, as amended, in substantially the same form as it stands today with relation to those parts applicable to the question before me, was enacted by St. 1895, c. 366. It contained the same words as occur in the present statute—"prescribed medical examination of the insured." I am advised that in 1895 such a clause, with relation to a beneficiary of a life insurance contract, as appears in the matter which you have called to my attention was unknown in the writing of life policies; that it is uncommon even at the present time; and has never before been presented for the approval of the Commissioner of Insurance in this Commonwealth.

From these considerations it appears that the intention of the Legislature, as expressed in the wording of the instant statute, was to provide for a medical examination of the individual whose life constituted the main subject matter of the policy, and did not extend to providing for such an examination of any other person, irrespective of any contractual relations which might arise under the policy between the company and such other person.

One reason which may have actuated the Legislature to require prescribed medical examinations of insureds is the advisability of restraining to some extent the writing of extra-hazardous risks by life insurance companies. If the same reason applies to the acceptance of beneficiaries who become risks of a company to an extent less than the face of the policy, the Legislature might by appropriate and unequivocal language
provide that such beneficiaries should in like manner be required to submit to a medical examination, but such a requirement cannot be read into the law in the absence of an expression of legislative intent in this regard.

Accordingly I answer your question in the negative.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

Department of Correction — Massachusetts Reformatory — Authority to build a Dam.

A dam may be built upon a brook as to which the Commonwealth is a riparian owner, by its officials, subject to the rights of upper riparian owners.

Hon. Sanford Bates, Commissioner of Correction.

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

"1. May the Massachusetts Reformatory build a dam across Nashoba Brook, which runs through the property of the Commonwealth, the dam to be so arranged that at all times except during the ice-cutting season the level of the water would remain as at present, and during the ice-cutting season the water level would be raised by flashboards?

2. May the reformatory officials cause the water to be raised so that the meadows of other owners would be flooded to an extent no greater than at times of normal spring high-water level?"

The erection of a dam such as you have described, for the purpose of cutting ice, would constitute a reasonable use of the waters of Nashoba Brook by the Commonwealth as a riparian owner. The rights of riparian owners are stated at length in Taft v. Bridgeton Worsted Co., 237 Mass. 385, 388–389; S. C., 246 Mass. 444. See also Collins Mfg. Co. v. Wickwire Co., 14 Fed. (2d) 871; Isbell v. Greylock Mills, 231 Mass. 233; Stratton v. Mount Hermon Boys' School, 216 Mass. 83; Roach v. Sturdy, 250 Mass. 357.

Briefly summarized, a riparian owner has the right to make a reasonable use of water as it passes through his land, having due regard to the correlative rights of other riparian owners above and below. I call your attention to the requirements of G. L., c. 130, §§ 17–19, with respect to fishways, which should be complied with in the erection of a dam, in so far as applicable.

1. Assuming that the officials in charge of the said reformatory have been duly authorized by the Department of Correction to make use, for the designated purpose, of land of the Commonwealth under their control, I answer your first question in the affirmative upon the facts which you have set forth.

2. An answer to your second question must necessarily depend upon the extent to which lands of upper riparian owners are overflowed by the raising of the dam during ice-cutting seasons. Small and trivial flowage of such lands would be regarded as injuries not meriting compensation, under the doctrine laid down in the cases of Stratton v. Mount
Hermon Boys' School, supra, and Isbell v. Greylock Mills, supra. Any flowage, however, which perceptibly prevented an upper riparian owner from having the normal use of any of his property during the season of ice cutting would be an infringement of his property rights, for which he would be entitled to compensation.

Cases decided under the Mill Act, now G. L., c. 253, are not applicable to the situation which you describe.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

Insurance — Industrial Life Policy — Surrender Value.

Prior to 1908 it was unlawful to make a contract for a surrender value of an industrial policy to be payable otherwise than in money. Subsequent to 1908 and prior to the effective date of St. 1928, c. 205, such a contract might have been lawfully made, but it may not be so made since the enactment of said St. 1928, c. 205.

SEPT. 14, 1928.

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

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

"1. Was it lawful for a domestic life insurance company and a person insured under an industrial life policy described in R. L., c. 118, § 76, and issued while said section was in force, to agree, prior to the effective date of St. 1907, c. 576, § 80, that the surrender value of such policy should be applied to the purchase of extended term insurance instead of being paid in cash as set forth in said section 76?

2. Was it lawful for such a life company and the insured under such a policy described in R. L., c. 118, § 76, and issued while said section was in effect, to agree, subsequent to the effective date of St. 1907, c. 576, § 80, and prior to the effective date of St. 1928, c. 205, that the surrender value of such policy be applied as aforesaid instead of being paid in cash as set forth in said section 76?

3. Was it lawful for such a company and the insured under such a policy described in St. 1907, c. 576, § 80, and issued while said section was in effect as to industrial life policies, to agree, prior to the effective date of St. 1928, c. 205, that the surrender value of such policy should be applied as aforesaid instead of being paid in cash as provided in said section 80?

4. Is it lawful for such a company and a person insured under such a policy described in R. L., c. 118, § 76, or in St. 1907, c. 576, § 80, and issued while either of said sections was in effect, to agree, subsequent to the effective date of St. 1928, c. 205, that the surrender value be applied as aforesaid instead of being paid in cash as set forth in said section 76 or 80?"

1. I answer your first question in the negative. The last sentence of R. L., c. 118, § 76, reads as follows: —

"Any condition or stipulation in the policy or elsewhere which is contrary to the provisions of this section, and any waiver of such provisions by the insured, shall be void."
This provision rendered it unlawful for the insurer and the insured to enter into such an agreement as you describe in your question.

2. I answer your second question in the negative. In whatever respect St. 1907, c. 576, § 80, may be said to have changed the law with relation to agreements made subsequent to the effective date thereof, concerning the manner of payment of the amount of the surrender value of policies of industrial insurance, yet said statute, in section 79, provided:—

“All policies issued prior to the first day of January in the year nineteen hundred and eight by any domestic life insurance company shall be subject to the provisions of law limiting forfeiture which were applicable and in force at the date of their issue.”

It is therefore plain that the same statutory prohibition applied to industrial policies which were issued before 1908 as had applied prior to the said statute of 1907, and the same considerations which impelled me to answer your first question in the negative require a like answer to your second question.

3. I answer your third question in the affirmative. The statute of 1907 specifically repealed R. L., c. 118, § 76 (St. 1907, c. 576, §§ 80 and 122), and substituted for it a new enactment embodied in said section 80, which did not contain a provision similar to that found in the last sentence of R. L., c. 118, § 76, and quoted above. In the absence of such a provision there existed no statutory regulation which forbade the making of an agreement between the insurer and the insured as to the manner in which the fixed amount payable as cash surrender value might be applied for the benefit of the insured.

4. I answer your fourth question in the negative. The provisions of St. 1928, c. 205, as they amend G. L., c. 175, § 22, by the addition of section 22B, now specifically forbid the making of such an agreement as is outlined in your question. Said section 22B reads:

“No company and no officer, agent or employee thereof, and no insurance broker, shall make, issue or deliver any policy of insurance or any annuity or pure endowment contract, or make or procure the making of, solicit or accept any oral or written agreement containing a waiver or a provision for a waiver by an applicant for, or the insured under or holder of, any such policy or contract, of any provision of this chapter except as expressly authorized thereby. Any such agreement, waiver or provision shall be void. Whoever violates this section shall forfeit not less than one hundred nor more than five hundred dollars.”

The provision of St. 1907, c. 576, § 80, that the cash surrender value of industrial policies “shall in all cases be payable in cash” is now to be found in G. L., c. 175, § 145, relative to industrial policies issued before December 31, 1911, and the said provisions of St. 1907, c. 576, § 79, as they relate to policies of life insurance issued before 1908 are now embodied in G. L., c. 175, § 143. Both said sections 143 and 145 of G. L., c. 175, are now affected by the prohibitions of section 22B.

Very truly yours,

JOSEPH E. WARNER, Attorney General.
State Fire Marshal — Permit — Blasting Operations — Civil Suit.

The State Fire Marshal should proceed to act upon an appeal from an order granting a permit for blasting, even though a suit for damages resulting from blasting is pending against the one to whom such permit has been awarded.

Mr. George C. Neal, State Fire Marshal.

Dear Sir: — You have informed me that an appeal has been filed with you by certain persons claiming to have been aggrieved by the granting of a permit by the fire commissioner of Boston to the Rowe Contracting Company, permitting said company to engage in blasting operations at its quarry in West Roxbury. You also state that a suit for damages is pending in the courts against the Rowe Contracting Company by one of the applicants. You ask whether you should take any action on the appeal while the civil suit is pending.

In my opinion, you should take such action in the premises as you may deem proper, disregarding the pendency of a civil suit. This, of course, is based upon the assumption that an appeal by a person aggrieved is properly pending before you. Under G. L., c. 148, § 45, no appeal may be taken except by a “person aggrieved.”

As a public officer your duty is set forth in the statute, and the pendency or outcome of a civil suit for damages does not in any way conclude the questions which you must decide. It is obvious that for any one of a number of reasons the court might find for the defendant in a civil suit for damages, and at the same time it might clearly be your duty to refuse to issue a permit or, upon appeal, to reverse the finding of the fire commissioner. The function of the court in a civil case is to determine whether or not, upon the evidence then and there presented, the particular plaintiff has sustained an injury for which the law provides relief. Your function is to determine, upon all the facts which come to your knowledge, whether or not, in the best interests of the public safety, a permit should issue.

While it is true that an appeal may not be filed except by a “person aggrieved,” nevertheless, assuming such an appeal to have been properly filed, I am of the opinion that your duty is to determine the matter in the light of the safety of the general public and not confine yourself to questions involving simply the appellant himself. Even though certain portions of the evidence presented in the court and of the facts upon which your decision must be based are identical, nevertheless, your field of inquiry is necessarily much broader than that of the court, and it is probable, and consistent, that your decision would properly be based upon facts which in any particular lawsuit would not be competent.

Very truly yours,

Joseph E. Warner, Attorney General.

Questions of Public Policy — Submission to Voters — Legislative Resolutions.

A question as to whether representatives in the General Court from a district shall be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit
for ratification the repeal of an amendment to the Constitution of the United States may be a question of public policy under G. L., c. 53, § 19, as amended.

Oct. 4, 1928.

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

Dear Sir:—You have informed me that an application, signed by two hundred and twenty-four voters, asking for the submission of the following question to the voters of the Ninth Worcester Representative District, was filed with you on September 4th of the current year:—

“Shall the representatives in the General Court from the 9th Worcester Representative District be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit for ratification the repeal of the Eighteenth Amendment to the Federal Constitution?”

You have asked me to determine whether or not the above question is one of public policy. If it is such a question, it must be placed upon the ballot in a form deemed by the Secretary of the Commonwealth and the Attorney General to be simple, unequivocal and adequate. If it is not a question of public policy, it may not be placed upon the ballot.

The statute under which the application is made is found in G. L., c. 53, § 19, as amended by St. 1925, c. 97, which provides as follows:—

“On an application signed by twelve hundred voters in any senatorial district, or by two hundred voters in any representative district, asking for the submission to the voters of that senatorial or representative district of any question of instructions to the senator or representatives from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this and the two following sections the state secretary shall place such question on the official ballot to be used in that senatorial or representative district at the next state election.”

The precise object sought by the application is the submission to the voters of the district of the question as to whether or not the representatives in that district shall be instructed to vote for resolutions requesting the President and Congress of the United States to take steps to submit for ratification the repeal of the Eighteenth Amendment to the Federal Constitution. It may be assumed that if such resolutions are not sanctioned or recognized by law the question presented cannot be one of public policy.

It is true that even if the representatives carry out the instructions, and that a joint resolution of both branches of the General Court or a resolution of the House of Representatives is sent to Congress and to the President, requesting them to take steps toward the repeal of the Eighteenth Amendment, yet there is no duty upon the part of the President or of Congress to obey or follow out the request. But the mere fact that there is no binding obligation upon Congress or the President to follow out a resolution of the representatives in the General Court does not necessarily mean that such resolution is not sanctioned or recognized.
by law. Such a resolution cannot properly be said to be a nullity. It may well have persuasive force, irrespective of its lack of a compelling authority.

It may be assumed that such action on the part of the representatives as is sought by the question is not a “law.” If the Legislature, or either branch thereof, voted to follow out the instructions, it would not be subject to the referendum, for the reason that it is not a “law.” See Opinion of the Justices, 262 Mass. 603.

But the power of the Legislature is not confined to the making of laws. Mass. Const., pt. 2nd, c. I, § I, art. IV, provides that the General Court may from time to time “make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth.” Such a resolution as that sought by the petition under consideration seems clearly to come within this broad and inclusive ground. “Orders . . . directions and instructions” include the right on the part of the Legislature to request Congress to take action on a public matter such as that under consideration. The language used is broad and comprehensive and it cannot be that the framers of the Constitution were in this article using synonymous terms. Further, it has long been the custom of the Legislature, by joint or separate action, to memorialize Congress on matters which it has deemed important. The joint rules and the rules of each branch of the General Court recognize this right and provide in great detail for the method of introducing, voting and signing this type of resolution or memorial. The same rule as to quorum governs action of this type as governs the enactment of a law. The right of a representative body to memorialize and to adopt resolutions is inherent in any parliamentary body, and the fact that this right has been exercised from the earliest days of the Legislature is strong evidence that it possesses that right. The application under consideration here involves instructions to the representatives from a district of the Commonwealth of Massachusetts to do something which they, as such representatives, may legally do.

There is no attempt here to instruct the representatives to perform any act which is a part of the machinery of amending the Federal Constitution. The voters here are not requesting that their representatives petition Congress to call a convention to amend the Federal Constitution, and no question is here involved, therefore, as to whether instruction to vote in such a case would conflict with provisions of the United States Constitution. The result is that the action by the representatives requested by the voters is confined to matters within the sovereignty of the Commonwealth of Massachusetts.

The words “public policy” should be construed broadly. These words, as used in this statute, are not limited or qualified in any way, and therefore it seems to have been the intent of the Legislature that no restricted meaning should be given to them. Opinion of the Justices, 262 Mass. 603, 605. The people of each representative or senatorial district are vitally interested and concerned in the question whether an amendment to the Constitution of the United States shall continue in force or be repealed.

An opinion of former Attorney General Benton, given to the Secretary of the Commonwealth on September 9, 1926 (not published), was to the effect that the Secretary might determine that a question of instruc-
tions to the representatives of a district to vote for a resolution requesting
the President and the Senate of the United States to take steps to bring
the United States into full co-operation with the League of Nations was a
question of public policy, within the meaning of G. L., c. 53, § 19, as
amended by St. 1925, c. 97, and such question was duly placed upon
the ballot.

I therefore advise you that, in my opinion, the question presented
upon the instant application is one of public policy, and therefore may
be placed upon the ballot at the coming election.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

Department of Public Health — Drainage — Hearing.

Under St. 1888, c. 309, it is not mandatory that the Department of Pub-
lic Health shall give hearings upon the approval of drainage systems.

Oct. 4, 1928.

DR. GEORGE H. BIGELOW, Commissioner of Public Health.

DEAR SIR: — You have asked my opinion as to whether you are
required to give a public hearing at the request of the officials of a street
railway company relative to your approval of a proposed system of
drainage constructed under St. 1888, c. 309.

Section 9 of said statute, to which you have directed my attention,
reads, in its pertinent parts, as follows: —

"Such system of drainage, before its construction, shall be subject to
approval by the state board of health, who may modify and amend the
same if desirable, and may give public hearings thereon before approving
it, if need be. In case of the violation of any of the provisions of this
act, or the creation of a nuisance, appeal may be had to the state board
of health, who may order the abatement of any nuisance, if in their judg-
ment there is cause therefor."

It is obvious that the provision for approval of the system of drainage
by your Department is for the purpose of protecting the public health
in connection with the general scheme of drainage contemplated. It
may well be doubted if the approval of a system of drainage by you
requires you to consider the mode of carrying on the work involved in
the construction of the system otherwise than as it relates to the public
health. In any event, the giving of public hearings is not mandatory
upon the Department but is left to its discretion.

Yours very truly,

JOSEPH E. WARNER, Attorney General.

Department of Public Health — Regulations — Public Places.

The Department of Public Health may not, under G. L., c. 111, § 8, make
regulations regarding the use of common drinking cups and towels
in parts of buildings which are in fact private places.

Oct. 5, 1928.

DR. GEORGE H. BIGELOW, Commissioner of Public Health.

DEAR SIR: — You have submitted to me regulations, made by the
Department of Public Health under G. L., c. 111, § 8, which prohibit the
use of a common drinking cup and a common towel in various designated public places, vehicles and buildings. You particularly direct my attention to those parts of the regulations which prohibit a common drinking cup "in any part of any factory, market, office building, or store of any kind which is open to the general public," and request my opinion as to whether you have authority to amend the regulation by striking out the words "which is open to the general public" in that phrase of the regulations above quoted.

I am of the opinion that you have not such authority.

G. L., c. 111, § 8, is as follows:

"In order to prevent the spread of communicable diseases, the department may prohibit in hotels and in such public places, vehicles or buildings as it may designate the providing of a common drinking cup or a common towel, and may establish rules and regulations for this purpose. Whoever violates any such rule or regulation shall be punished by a fine of not more than twenty-five dollars."

It is plain that the intent of the Legislature, as disclosed by the words of said section 8, was to prevent the use of a common drinking cup or common towel in places to which the public has a right of access. It was not intended to forbid their use in places which were private. Portions of various buildings mentioned in said phrase of the regulations may be, and in fact often are, private, and the public has no right of access to them. It would not be within the scope of your authority in making regulations under this statute to apply the inhibition against the designated utensils to such private places. Your present regulations, as set forth in your letter, appear to be within the authority delegated to you by the statute, and in the form in which they would stand by the adoption of the proposed amendment would exceed such authority.

Very truly yours,

JOSEPH E. WARNER, Attorney General.

Director of Accounts — Towns — Municipal Indebtedness.

The unlawful disbursement of the funds of a town in payment of a liability lawfully incurred is not such a violation of G. L., c. 44, §§ 2–13, that the Director of Accounts may, in his discretion, refuse to certify notes issued in relation to such payment.

Oct. 6, 1928.

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

DEAR SIR: — You have asked my opinion as to whether the Director of Accounts is authorized to certify notes issued by the town of Westport under date of August 13, 1928.

The warrant for the annual town meeting held on March 13, 1928, contained the following article:

"Article 24. To see if the Town will vote to purchase a five hundred gallon Triple Combination fire truck and proper equipment for same, appropriate money for such purchase and act anything thereon."

The vote of the town meeting thereon was as follows:

"That the Town purchase a five hundred gallon Triple Combination fire truck and necessary and usual equipment for the same, and that the Town raise and appropriate the sum of $9,200 dollars therefor, and that
a committee be appointed by the Moderator for the purpose of carrying
the provisions of this vote into effect."

G. L., c. 40, § 5, provides: —

"A town may at any town meeting appropriate money for the follow-
ing purposes:

(30) For the compensation of all town officers whose election or ap-
pointment is authorized or required by law, and for all other necessary
charges arising in such town."

The words "all other necessary charges" have been "construed to
authorize a town to raise and appropriate money in respect to matters
where it has a corporate duty, right or interest to perform, defend or
protect." Leonard v. Middleborough, 198 Mass. 221. Protection from
fires always has been treated as a general function of government. Wil-
liams College v. Williamstown, 219 Mass. 46, 48. It was within the cor-
porate powers of the town to raise and appropriate money for the purchase
of a fire truck.

The next question to consider is whether or not there has been a suffi-
cient compliance with the provisions of G. L., c. 44.

The article in the warrant under which the town voted to raise and
appropriate the money necessary to purchase the fire truck is as follows: —

"Article 52. To determine the manner of raising the appropriations
to defray the Town's charges for the year ensuing."

The following vote was adopted thereunder: —

"Voted: That for the purpose of meeting the appropriation made
under Article 24 there be raised in the tax levy of the current year the
sum of $1,700.00 and the Treasurer with the approval of the Selectmen
be and hereby is authorized to borrow the sum of $7,500.00, and to issue
bonds or notes of the Town therefor, such bonds or notes to be payable
in accordance with the provisions of Section 19, Chapter 44, General
Laws, so that the whole loan shall be paid in not more than 5 years from
the date of issue of the first bond or note or at such earlier dates as the
Treasurer and Selectmen may determine."

No question has been raised by your inquiry of proper service of the
warrant, and I shall presume for the purpose of this opinion that proper
service was made.

The wording of the article in the warrant under which the foregoing
vote was adopted has been held by the courts in numerous cases to be
sufficient for a town to appropriate money thereunder.

You do not state in your letter that the authorization of the loan was
in violation of G. L., c. 44, § 10, and I shall also presume that the in-
debt edness of the town of Westport does not exceed three per cent on the
average of the assessors' valuation of the taxable property for the three
preceding years.

G. L., c. 44, § 7, as amended by St. 1923, c. 338, provides: —

"Cities and towns may incur debt, within the limit of indebtedness
prescribed in section ten, for the following purposes, and payable within
the periods hereinafter specified, provided that as to each such purpose,
except those described in paragraphs (15), (16) and (17), only such sum
may in any year be authorized to be borrowed as exceeds twenty-five
cents per one thousand dollars of the valuation of the city or town for the preceding year:

(11) For the cost of additional departmental equipment, five years."

If the sum of $1,700 to be raised in the tax levy of the current year represents a sum equal to twenty-five cents per one thousand dollars of the valuation of the town for the preceding year, all of the requirements of the statutes with reference to the purchase and mode of payment for the fire truck have been complied with.

You state that an "audit of the accounts of the town has recently been made, and it was found that an appropriation of $9,200 was voted for the purchase of a fire truck and equipment, $7,500 of which was to be raised by a loan and $1,700 by taxation. It was also found that the truck and equipment had been purchased and that bills had been paid to the amount of $9,196.77, although the treasurer had not issued the loan authorized," and thereby raise the question as to whether or not the wrongful disbursement of public funds by the treasurer of the town in payment of the fire truck, a liability lawfully incurred, renders the whole proceeding in connection with the vote to purchase the said fire truck and the manner prescribed for its payment so defective as to warrant the refusal of the Director of Accounts to certify these notes.

G. L., c. 44, § 20, provides, in part, as follows: —

"The proceeds of any sale of bonds, or notes, except premiums, shall be used only for the purposes specified in the authorization of the loan; provided, that transfers of unexpended amounts may be made to other accounts to be used for similar purposes."

There is nothing before me to show that the town of Westport, by a vote of the town meeting, intends to use the proceeds of the sale of the notes for any purpose other than that specified in the authorization of the loan.

A town is a constituent element of sovereignty, and its affairs, within the authority specified by general law, or the powers incidental to its corporate duties as an existing body politic, are conducted by the qualified inhabitants thereof, who meet, deliberate, act and vote in their natural and personal capacities, in the exercise of their corporate powers.

To say that the act of the treasurer would render the mandates of the town nugatory and void is contrary to sound reason and law. Such a pronouncement would, in many instances, lead to serious disruption of the lawful conduct of the governmental and proprietary functions of a municipality.


"Misconduct of a public officer in the performance of a public function cannot prevent the proper operation of governmental authority when set in motion through appropriate channels."

I am of the opinion that the unlawful disbursement of the funds of the town of Westport in payment of a liability lawfully incurred is not a violation of the laws relating to municipal indebtedness (G. L., c. 44, §§ 2–13, inclusive), and that the Director of Accounts has no discretionary power to refuse to certify the notes in question.

Very truly yours,

Joseph E. Warner, Attorney General.
Commissioner of Public Safety — Order of State Fire Marshal — Appeal.
An appeal from an order of the State Fire Marshal revoking a permit granted by the board of aldermen of a city for a filling station does not lie since the enactment of St. 1928, c. 320.

Oct. 15, 1928.


Dear Sir: — You ask my opinion as to "whether the Commissioner may hold a hearing on the appeal from the State Fire Marshal's order" revoking a permit granted by the board of aldermen of the city of Somerville to "erect and use a filling station in the said city of Somerville."

You state that the permit was granted by the board of aldermen of the city of Somerville on July 12, 1928; that an appeal to the State Fire Marshal was taken on July 31, 1928; and that the order of the State Fire Marshal revoking the permit was dated August 21, 1928.

Before the order of the State Fire Marshal was made, and during the pendency of the appeal to him, St. 1928, c. 320, amending G. L., c. 147, § 5, became effective. Prior to the enactment of this statute a person affected by an order of the State Fire Marshal could appeal to the Commissioner, who, after hearing, could amend, suspend or revoke such order; and, if such person was aggrieved by an order approved by the Commissioner, he could appeal to the Superior Court. See G. L., c. 147, § 5. An appeal to the Commissioner was therefore a condition precedent to be performed before the Superior Court could review the matter.

St. 1928, c. 320, repealed this provision in G. L., c. 147, § 5, and a person aggrieved by an order of the State Fire Marshal may now appeal directly to the Superior Court.

The statute, as amended, regulates the practice in appeals from orders of the State Fire Marshal, and does not affect the substantive rights of any person aggrieved. "Statutes regulating practice, procedure and evidence ... and not affecting substantive rights ... commonly are treated as operating retroactively, and as applying to pending actions or causes of actions." Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1.

I am of the opinion that St. 1928, c. 320, applies to the instant case, and that the person affected cannot appeal to the Commissioner of Public Safety, and therefore that you cannot hold a hearing.

Very truly yours,

Joseph E. Warner, Attorney General.

Commissioner of Public Safety — License — Revocation.
The Commissioner of Public Safety cannot demand and require the surrender of a license granted under G. L., c. 140, § 183A, after its suspension or revocation.

Oct. 16, 1928.


Dear Sir: — You ask my opinion as to whether it is "within the province of the Commissioner, when he has suspended or revoked his approval (which action automatically suspends or revokes the license)," under the provisions of G. L., c. 140, § 183B (St. 1926, c. 299), "to demand and take up such license."
A license is in the nature of a permission to carry on a business which the Legislature has deemed it wise to surround with restrictions. *Sullivan v. Borden*, 163 Mass. 470. A "license," in the sense in which the word is used in your letter, means the written document by which the right or permission is conferred.

When the Commissioner suspends or revokes his approval of a license granted under the provisions of G. L., c. 140, § 183A, the right to carry on any of the callings therein stated is thereupon suspended or revoked, as the case may be. The mere fact that the document issued at the time of the granting of such license may be in the possession of the licensee after the suspension or revocation does not permit said licensee to continue to carry on the business for which he was licensed. The licensee, if he does carry on the business after suspension or revocation, and even though the certificate has not been surrendered, may be prosecuted under G. L., c. 140, § 183C.

I am of the opinion that the Commissioner cannot demand the surrender of the "license."

Yours very truly,

Joseph E. Warner, Attorney General.

Director of Registration — Board of Dental Examiners — License — Registration.

One who becomes a registered dentist after April first in any year need not pay a fee for registration in that year.

The certificate of registration issued to a dentist authorizes him to practice until it is revoked or suspended. He is required to pay a fee annually.


Mr. W. F. Craig, Director of Registration.

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

1. Under the provisions of G. L., c. 112, § 44, as amended by St. 1927, c. 147, does a new practitioner beginning practice in any month subsequent to March 31st in the calendar year comply with the law if he notifies the Board of Dental Examiners of his office address, or must he also pay the two-dollar registration fee?

2. Does the certificate of registration cover from April first of one year to March thirty-first of the following year, or does it cover simply the particular calendar year? Does compliance with this law require any official notice from the Board other than a simple receipt for the registration fee, with the date thereon?

3. What is the meaning and effect of the word "license" as used in said chapter 147?

In answer to your first question, I advise you that a new practitioner who begins practice in any year after March thirty-first need not pay the annual fee of two dollars until the next year. The statute requires that the two-dollar fee shall be paid annually before April first; and if a person is not a registered dentist between January first and April first, he need not pay the fee for that year. Of course, every new practitioner must notify the Board of his office address when he begins practicing.

I shall consider your second and third questions together. The certificate of registration originally issued to a dentist authorizes him to
practice until it is revoked or suspended. The duty imposed by St. 1927, c. 147, is to pay to the Board two dollars each year sometime between January first and April first. When a registered dentist complies with this provision he has done all that is necessary. It is not necessary that a new license or certificate be given to him. His authority to practice dentistry exists solely by virtue of his original certificate and not by virtue of anything he obtains in return for the annual two-dollar fee. It is to be noted that if he does not pay the two-dollar fee his authority to practice may be suspended by the Board. Unless and until the Board takes some affirmative action to suspend his authority he still practices legally by virtue of his original certificate. If the statute contemplated that a genuine license should be issued in return for the annual two-dollar payment, there would be no need of "suspending" the authority to practice for failure to comply with the statute; there would be no authority to practice, and suspension would be unnecessary.

Further, G. L., c. 112, § 45, provides that a certificate of registration shall be issued to an applicant who successfully passes the examination required by the Board. This certificate is prima facie evidence of the right of the holder to practice dentistry and must be kept in his office in plain view of the patients, and on application must be shown to any member or agent of the Board. This section has not been amended or changed in any way. If the Legislature by said chapter 147 contemplated a real license to take the place of, or to supplement, the certificate of registration, it would have amended said section 45 by requiring the new license to be exhibited in the dentist's office instead of, or together with, the certificate of registration. It is to be noticed that the annual report of the Board of Dental Examiners for the year 1926, which is the basis of this legislation, contemplated merely the annual registration of dentists for the purpose of securing more effective supervision of the profession. The report clearly shows that the Examiners did not desire or contemplate that a new or supplemental authority to practice was to be required annually.

The result is that a registered dentist complies with the law if he pays two dollars annually between January first and April first, and it is not necessary that the Board issue to him any new license or certificate. It may be advisable, however, to give such dentist a receipt indicating that for that calendar year he has paid the two dollars between January first and April first.

Very truly yours,

Joseph E. Warner, Attorney General.

State Hospitals — Patients — Absentee Voting.

The Department of Mental Diseases may, in its discretion, deliver or forward blank forms of application for absentee ballots on behalf of a patient, exercising in each instance due regard to the condition and welfare of the patient.

Oct. 29, 1928.

Dr. George M. Kline, Commissioner of Mental Diseases.

Dear Sir: — You have asked my opinion with relation to the duties of your Department and its superintendents of State hospitals for the insane in connection with "blanks for absentee voting" sent the patients
confined in such hospitals, either by commitment or by voluntary application. I assume that by "blanks for absentee voting" you refer to the blank forms of application for an official absent-voting ballot, as described in G. L., c. 54, §§ 86-89, as amended.

It is not necessary, in order to advise you upon the subject matter of your communication, to enter upon a consideration of the right of a patient in a State hospital to vote. The right of any citizen to have his name upon the list of registered voters in any city or town is a question the determination of which lies in the jurisdiction of such registrars. The due registration of a citizen's name as a voter is a prerequisite to his exercise of a right to vote. The blank form of application for an absentee ballot is to be sent in by the person desiring to vote. G. L., c. 54, § 86, as amended by St. 1925, c. 101, § 1.

G. L., c. 123, § 98, vests in your Department wide discretionary powers relative to letters sent to or from patients. The word "letters," as here used, may well be said to comprehend applications for ballots. The intent of the statute in this regard is to confer authority upon your Department to supervise the correspondence of all patients in institutions over which it has control. See IV Op. Atty. Gen. 219. It would follow that your Department, acting through its superintendents, may well exercise its discretion in delivering or forwarding the blank forms of application, with a view in each instance to the condition and welfare of the patient.

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

State Employee — Vacation — Pay.

A State employee is not entitled to a "vacation" after his employment has ceased, nor to pay for the period which would be covered by such vacation, in lieu thereof.

Nov. 2, 1928.

Dr. GEORGE M. KLINE, Commissioner of Mental Diseases.

DEAR SIR: — You have requested my opinion as to the application of G. L., c. 149, § 38, to the following facts: —

"A carpenter entered the service on August 22, 1927. After working a full year his retirement deductions were taken out of his pay. He objected, and when it was explained to him that the deductions were compulsory he gave his notice verbally to the foreman mechanic under whose direction he was working. This was about September 1st. He then asked that he be given his vacation. This request was denied, as he was on his notice. He completed working his notice of two weeks and demanded his pay for two weeks' vacation. As it was denied him he refused to take his last week's pay."

G. L., c. 149, § 38, reads as follows: —

"All laborers, workmen and mechanics permanently in the employ of the commonwealth or the metropolitan district commission who are within the provisions of section thirty as affected by sections thirty-two and thirty-six shall be entitled to an annual vacation of at least twelve working days with pay."
I assume from the facts as you have set them forth that the workman or mechanic who was hired by your Department as a carpenter was in the permanent employ of the Commonwealth, and that on or about September 1st, some days after he had completed a year of such employment, he duly resigned his position, such resignation to take effect two weeks after the day of its tender, and that such resignation was duly accepted and became effective at the end of the two-week period. He received no vacation.

It is obvious that prior to the date of the employee's resignation he would have been entitled to a vacation of twelve working days, with pay. It cannot be said that after his resignation, which was to take effect in two weeks, he was then permanently in the employ of the Commonwealth, as that word is used in the instant statute. The word "vacation," as used in the instant statute, implies a period of rest between periods of permanent employment, and may not properly be used in reference to a period of rest after permanent employment ceases. It contemplates that a person should be in the permanent employment of the Commonwealth at the time when the vacation commences.

As a matter of fact, the employee never had a vacation, and he is not entitled to receive two weeks' pay in addition to what has already been paid or tendered to him. If this were not so, the pay would be in the nature of a bonus or gratuity rather than pay. (See opinion to the Commissioner of Labor and Industries, dated February 8, 1928, page 38 of this report.)

Very truly yours,

JOSPEH E. WARNER, Attorney General.

Commissioner of Public Safety — License to store Oil — Vessel.

A license to store oil is required on behalf of a vessel anchored in that portion of Boston Harbor which is a part of the city of Boston. Such license may be issued by the street commissioners of said city.

Gen. A. F. Foote, Commissioner of Public Safety.

Dear Sir: — You have asked my opinion as to whether or not a license is required from the street commissioners of the city of Boston to enable a person to keep, store and sell fuel oil in a quantity not exceeding 200,000 gallons at any one time in an iron hull boat to be permanently anchored in Boston Harbor. I am informed that the boat is to be anchored about one and one-half miles from the Boston shore, outside the shipping channel, and I am further informed by the harbor master of Boston Harbor that he has approved the anchoring of the boat and the location thereof.

G. L., c. 148, § 28, establishes the Metropolitan Fire Prevention District, which includes, among other cities, the city of Boston.

G. L., c. 148, § 30, as amended by St. 1928, c. 274, provides that within the Metropolitan District the Fire Marshal shall have the powers given by section 14 of said chapter 148, as amended, to license persons or premises or to grant permits for the keeping, storage, use, sale, manufacture and transportation of crude petroleum or any of its products. Section 31 of said chapter provides that the Fire Marshal may delegate the granting or issuing of licenses and permits authorized by section 30 to the head of the fire department or to any other designated officer in any city or town.
in the Metropolitan District. In accordance with the provisions of said section 31, the Marshal has delegated the issuing of licenses in the city of Boston to the street commissioners of that city.

If the Metropolitan Fire Prevention District includes that portion of Boston Harbor in which the boat is to be anchored, I am of the opinion that a license from the street commissioners is necessary in this case. It has been determined under the provisions of G. L., c. 42, § 1, that that portion of Boston Harbor in which the boat is to be anchored is a part of the city of Boston, and it follows, therefore, in my opinion, that a license from the street commissioners of that city is necessary in this case.

Very truly yours,

JOSEPH E. WARNER, Attorney General.
INDEX TO OPINIONS.

Agriculture, Department of; Division of Ornithology; publications .......... 82
Betterments; land devoted to a public use ........................................ 76
Birth records; change of name in record by town clerk ......................... 33
Constitutional law; contracts between employers and employees ............ 51
Fire insurance; rate making .................................................................. 81
Mayors of cities; removal ....................................................................... 63
Municipalities; plants for purifying shellfish ....................................... 37
Pardon; parole ....................................................................................... 77
Restrictions on land abutting on Newbury Street, Boston; release .......... 60
Corporate securities; default in instalment payments; seller's commissions or expenses ................................................................. 76
Correction, Department of; authority to build dam across Nashoba Brook 96
County accounts; deputy sheriff; fees ..................................................... 44
County treasurer; county tuberculosis hospital treasurer; salary .......... 45
Dental Examiners, Board of; license; registration .................................. 107
District Attorney for the Northern District; special assistant ............... 35
Education, Commissioner of; conveyance of land to a town for highway purposes .............................................................................. 90
Fees; deputy sheriff; chief of police ........................................................ 44
Probate Courts; petitions for administration d. b. n., c. t. a. ................. 84
Fencing; lands of the Commonwealth .................................................... 88
Fisheries and Game, Division of; taking of fish by the use of torches ... 59
Game laws; venue of prosecution ............................................................ 55
Inspector of animals; appointment; continuance in office until appointment of successor ............................................................. 69
Insurance; fraternal benefit society; death fund .................................... 50
Group insurance; fraternal benefit association ....................................... 79
Massachusetts Agricultural College; employees ...................................... 61
Industrial life policy; surrender value ..................................................... 97
Life policies; incontestability; date of issue ............................................ 79
Medical examination of an insured .......................................................... 94
Mutual liability insurance company; dividends ....................................... 48
Title insurance company; incorporation ................................................. 46
Journeynan plumber; right to engage in plumbing business ................... 31
Justices of the peace; expiration of commission ................................. 56
Licenses; amusements conducted in connection with business of innholder, common victualler, etc.; revocation; surrender ............................... 106
Master plumber; renewal ....................................................................... 31
Storage of oil; vessel permanently anchored in Boston Harbor ............. 110
Massachusetts Reformatory; Concord sewerage system; apportionment of expense ................................................................. 40
Master plumber; renewal of license; employment by corporation; loan of license .............................................................. 31
Metropolitan District Commission; acquisition of easement in Beacon Street, Brookline ........................................................ 93
Metropolitan District Water Supply Commission; power to acquire real property owned by a town ......................................................... 56
Motor vehicles; registration; applications .............................................. 59
Non-residents .......................................................................................... 41
Motor Vehicles, Registrar of; revocation of license; judicial recommendation 64
Municipalities; city clerk; appointment and removal .......................... 74
Employees; blasting; permit; bond ........................................... 73
Vacations .................................................................................... 38
Fire department; fire chief; permanent member ............................... 53
Indebtedness; approval of notes by Director of Accounts ................. 103
Plants for purifying shellfish ...................................................... 37
Notaries public; appointment; age .............................................. 73
Expiration of commission ............................................................ 56
Plumbers, Board of Examiners of; approval of rules by Department of

Public Health .............................................................................. 31
Public Health, Department of; drainage systems; approval; hearing ........ 102
Regulations as to common drinking cups and towels; public places .... 102
Shellfish; importations from foreign countries ............................... 89
Water supply; taking; hearing ..................................................... 43
Questions of public policy; submission to voters; legislative resolutions 99
Retirement, Board of; State employee; death while at work in performance
of duties; pre-existing disability; widow’s pension ......................... 36
Riparian owners; erection of dam by the Commonwealth ................. 96
Savings banks; investments; bank stock ....................................... 86
Schools; pupils; free transportation; State forest reservation .......... 85
Shellfish; importations from foreign countries ............................... 89
Purifying plants; municipalities ................................................... 37
State employees; vacation; pay .................................................... 109
State Fire Marshal; order revoking permit granted by board of aldermen
of a city; appeal ....................................................................... 106
Permit for blasting; appeal .......................................................... 99
State forests; improved land; fencing .......................................... 88
State hospitals; patients; absentee voting ..................................... 108
Support of inmates; statute of limitations ..................................... 58
Taxation; corporations; interest on abatement of tax with respect to change
in Federal net income .................................................................. 65
Interest on additional assessment of excise with respect to change in
Federal net income ..................................................................... 83
Foreign banking associations and corporations; foreign banks as fiduciaries 70
Vacations; municipal employees .................................................. 38
State employees ......................................................................... 109
Witness summoned in an adjoining State; payment of forfeiture .... 91

P.D. 12. 113
RULES OF PRACTICE

IN INTERSTATE RENDITION.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:—

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(b) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate.
A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to be facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application,—for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted,—new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except upon compliance with these rules.