THIS VOLUME CONTAINS
THE OPINIONS OF ATTORNEYS-GENERAL
HENRY C. ATTWILL, 1917-1919
HENRY A. WYMAN, 1919-1920
J. WESTON ALLEN, 1920-
ALSO TABLES OF STATUTES AND CASES CITED, AND AN INDEX DIGEST
PREFACE.

This volume is issued by the Attorney-General in pursuance of the authority contained in Resolves of 1921, chapter 23, which provides that the Attorney-General shall "collect and publish in a volume properly indexed and digested such of the official opinions heretofore published as an appendix to the annual reports of the attorney-general during the years nineteen hundred and seventeen to nineteen hundred and twenty, inclusive, as he may deem to be of public interest or useful for reference."

This volume is in substantial uniformity with the preceding volumes. The work of preparation has been in charge of Mr. Louis H. Freese, Chief Clerk.

J. WESTON ALLEN,
Attorney-General.

Boston, January, 1922.
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Public Warehouseman, Definition of.

A department store which has a cold-storage department for the storage of furs of its customers is required to file a bond and procure a license as a public warehouseman, under the provisions of Gen. St. 1915, c. 98, if it makes a charge for such storage or if such storage was not part of the arrangement entered into when the furs were purchased by the customer; otherwise it is not required to do so.

You request my opinion as to whether or not a department store which has a cold-storage department for the storage of the furs of its customers is required to file a bond and procure a license as a public warehouseman under the provisions of Gen. St. 1915, c. 98.

That act defines a public warehouse and a public warehouseman in the following terms: —

The words "public warehouse," as used in this chapter, shall mean any building, or part of a building, kept and maintained for the storage of goods, wares and merchandise as a business; and the words "public warehouseman" shall mean any person, corporation, partnership, association or trustees keeping and maintaining a public warehouse as defined in this section.

The warehouse receipts act (St. 1907, c. 582) contains the following definition: —

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

The foregoing definitions are very broad, and, in my opinion, include all persons or corporations engaged in storing any goods, wares or merchandise for profit.
Accordingly, if a department store makes a charge to its customers for the storage of furs, it comes within the provisions of Gen. St. 1915, c. 98, and is required to file a bond and procure a license as a public warehouseman. If such department store is storing furs for its customers without making a charge therefor, or as part of an arrangement entered into when the furs were purchased by the customer, in my opinion it does not come within the provisions of the statute.


Whether the issuance by an insurance company of a policy of accident insurance containing no provision for cancellation by the company is a violation of St. 1910, c. 493, quâre. The fact that the Insurance Commissioner approved the form of such a policy does not constitute evidence either of incompetency or failure to act honestly or in good faith.

You have requested my opinion upon the matters of law raised by reason of objection made to the action of the Insurance Commissioner in approving a certain policy form of accident insurance.

Apparently this form was filed with the Commissioner and approved by him under the provisions of St. 1910, c. 493, § 1. It was to be known as a non-cancelable policy, and contained neither in form nor substance the provisions of the clause numbered 8 in said section.

The statute mentioned provides that no policy of accident insurance shall be issued in this Commonwealth until a copy has been filed with the Insurance Commissioner at least thirty days, unless before the expiration of that time he approves it in writing, nor if the Insurance Commissioner notifies the company that in his opinion the form does not comply with the law, nor unless it is in certain form and contains certain provisions. These provisions are set forth in subsections 1 to 9, inclusive.
Section 2 of the act provides that no policy shall be issued if it contains, in substance, certain specified provisions.

Section 7 provides that any company or officer thereof "which issues or delivers in this commonwealth any accident or health policy or contract in wilful violation of the provisions of this act, shall be punished by a fine of not more than five hundred dollars for each offence, . . ."

This statute in substance and form is analogous to provisions of law applicable to life insurance companies and policies which had been in effect for some years. Those provisions have been interpreted by the Supreme Judicial Court, and so far as the enactments are the same, by a familiar rule of construction, the interpretation under the present act would also be the same. In Aetna Life Ins. Co. v. Hardison, 199 Mass. 181, at 187, Knowlton, C.J., says: —

Another question is whether the provisions which, in substance, must be inserted in the policy, must appear in a form substantially identical with that given in the statute, or whether it is enough if they contain everything, in meaning and legal effect, that the statute prescribes, and at the same time include other things relating to the same subject, no one of which impairs the force of that which is prescribed for the benefit of the insured. Inasmuch as the ten provisions referred to and the other prescribed parts of the policy were intended for the protection of the policy holder, we are of opinion that, if they are contained in substance in the policy, their form may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied, and are left undiminished by that which is added.

In New York Life Ins. Co. v. Hardison, 199 Mass. 190, it was held that a variation from the provisions required by the statute, by inserting terms more favorable to the insured than those prescribed, was permissible, and the action of the Insurance Commissioner in disapproving a policy under those circumstances was held to be erroneous.

The court says, at page 194: —

No departure from the exact provisions required by the statute should be permitted, unless it is too plain for doubt that the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision.
OPINIONS OF THE ATTORNEY-GENERAL.

Other language in the opinion indicates that the examination of the Commissioner is to make sure that "everything secured to the insured by the statute is secured by" the language of the policy.

So far as the provisions of this statute were enacted for the sole purpose of protecting the assured, the principles of the foregoing cases would seem to govern.

A decision as to the correctness of the Commissioner's ruling, therefore, would depend on a determination of the intent and purpose of the Legislature in the enactment of St. 1910, c. 493. Many of the requirements of this act appear clearly to be in the interest of the policyholder, and to constitute protection against imposition on the assured.

Some of the required terms, however, do not, on their face, indicate such an intention, and no doubt arguments entitled to careful consideration could be made that the clause relating to cancellation is in the interest and for the protection of the company. The language of the statute is as follows:—

8. A provision that the policy may be cancelled at any time by the company by written notice delivered to the insured or mailed to him at his last address as shown by the records of the company and the tender of the company's check for the unearned portion of the premium, but that such cancellation shall be without prejudice to any claim arising on account of disability commencing prior to the date on which the cancellation takes effect.

Nevertheless, under this requirement certain protection to the assured is created, in that cancellation can be made only by (1) a written notice to the assured, (2) tender of check for the unearned portion of the premium, and (3) without prejudice to any claim on account of disability commencing prior to the date on which cancellation takes effect.

Insurance policies might conceivably contain, and undoubtedly in times past frequently have contained, cancellation clauses containing no such safeguards, and it may be that the Legislature intended, by the enactment of this provision, only to require cancellation clauses, when inserted, to contain at least this much protection to the assured.
A knowledge of the forms of policies issued prior to the enactment of the statute, of the history of the accident and health insurance business, and the conditions surrounding and affecting the same, such as the Insurance Commissioner is especially qualified to possess, would aid in determining the probable intention of the Legislature, and I am not prepared to say that his opinion was erroneous.

It hardly seems to me that a decision of that question is necessary for disposition of the present complaint.

The Insurance Commissioner, by his approval under this statute, confers no substantive rights upon the insurance company. The only effect of the approval is to permit the company to begin issuing policies, if they in fact conform to the law, without awaiting the expiration of the period of thirty days after filing with the Commissioner.

If thirty days expire and the Commissioner does nothing, the company may then proceed to issue policies, provided they actually do comply with the law. If the Commissioner notifies the company that in his opinion the policy does not comply with the requirements of the statute, the company may have the Commissioner's opinion reviewed by the Supreme Judicial Court. But even though the Commissioner were palpably wrong in his opinion, the company is forbidden to issue the policy until his action shall have been reversed by the court. In other words, the Legislature has placed in the hands of an administrative officer the power of suspending business which seems to him improper, pending a decision by the court. Obviously, this is an important restriction of an important business, to be exercised with discretion and not upon mere suspicion. The court has said: "His duty was to approve of every form of policy that seemed to him correct." (199 Mass. at 197.)

If the approval of the Commissioner were a grant of some right, he might well be overcautious in the matter of approval, compelling the companies to take an appeal in all doubtful cases. In the present case, however, the prohibition of the statute remains absolute, regardless of his action, and if the
policy is contrary to the terms of the statute, the company, and its agent issuing the same, may be prosecuted in the criminal courts. Any person who feels that the law is being violated can present a complaint to the proper court or district attorney.

In view of the language quoted above, it would not seem that the Insurance Commissioner had acted improperly, even though he were mistaken in his opinion, but that so long as he honestly held the opinion that the policy was lawful he ought not to interfere with the business of a company by disapproving the form.

The issues presented to Your Excellency by such a complaint as this must be based on a charge of incompetency or failure to act honestly or in good faith.

The fact that the Commissioner has acted in the manner indicated and approved the form of policy stated does not, in my opinion, constitute evidence of either. Certainly the tendency of the decisions of the Supreme Judicial Court is along the line of this decision rather than contrary to it. His letter to the protestant shows a knowledge of the important cases upon the point, and an intention to make his action comply with those cases and the law, as understood by him. There is no suggestion of improper or corrupt motives.

Accordingly, I am of the opinion that the papers and facts submitted to me do not call for any action on the part of Your Excellency.
HENRY C. ATTWILL, ATTORNEY-GENERAL.

TAX RETURNS — BOARD OF ASSESSORS OF EVERETT — POWER OF MAYOR.

While two members of the board of three assessors of the city of Everett remain in office, they are qualified to act as such board, and the mayor of Everett has no power under the city charter to act as an assessor, and consequently has no authority to inspect, under St. 1909, c. 490, Pt. I, § 44, so much of the returns of taxpayers filed with the Tax Commissioner as shows the details of the personal estate, except by order of a court.

You ask my opinion as to whether the mayor of Everett may lawfully inspect the returns made to the board of assessors by taxpayers, under the provisions of St. 1909, c. 490, Pt. I, § 44. You state that the question arises because one of the members of the board of assessors of Everett has been appointed and has qualified as a deputy to the income tax assessor for the Middlesex district. I assume that the member referred to has resigned from the board of assessors of Everett, as otherwise I do not see how the question would arise.

Said section 44 provides that the list returned by taxpayers and filed with the Tax Commissioner “shall be open to the inspection of the assessors, their assistants and clerks and to the tax commissioner and his deputy, but so much of the lists as shows the details of the personal estate to that of no other person except by the order of a court.”

Section 26 of the charter of the city of Everett (St. 1892, c. 355) is as follows: —

The mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him and be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control.

This section gives the mayor of the city broad powers. It vests in him the executive power of the city, to be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control. Read literally, this section would seem to give him the power to perform any of the duties imposed upon the several officers and boards in their respective
departments at any time, irrespective of the question of whether there were such officers or boards qualified to act. The section, however, must be interpreted reasonably and read in connection with the other provisions of the charter, and with consideration to general statutes applicable to the duties such officers and boards are appointed to perform.

Under section 35 of the charter it is the duty of the mayor to appoint a board of assessors consisting of three persons. The duties of assessors are particularly prescribed by the statutes of the Commonwealth. These statutes, together with the provisions of section 35, negative the idea that the duties of the board of assessors are to be performed by the mayor, if ever, when there is a board of assessors in existence, duly qualified to act.

St. 1913, c. 835, § 408, provides that "there shall be three, five, seven or nine assessors in each city and town, and as nearly one third as may be of the number shall be elected or appointed annually."

The only question that arises, therefore, in my judgment, is whether there is a board of assessors duly qualified to act when one member of three has resigned.

This question seems to be answered by the case of Cooke v. Inhabitants of Scituate, 201 Mass. 107, in which it was decided by the Supreme Judicial Court that, under a similar statute relating to towns, two members of a board of three assessors were qualified to act as such board after the third member had died.

Accordingly, I am of the opinion that, upon the facts stated by you, the mayor of Everett has no power to act as an assessor, and consequently has no authority to inspect so much of the returns made by taxpayers and filed with the Tax Commissioner as shows the details of the personal estate, except by the order of a court.
HENRY C. ATTWILL, ATTORNEY-GENERAL.

VACANCY IN OFFICE OF COUNTY COMMISSIONER — EFFECT OF DEATH OF PERSON ELECTED BEFORE HE QUALIFIES.

Where a person who has been elected county commissioner dies before qualifying as required by R. L., c. 20, § 13, such death does not create a vacancy in the board of county commissioners, as the member of the board whose place the deceased was to have taken holds over, under the provisions of St. 1913, c. 835, § 391, until his successor is qualified.

I am in receipt of your letter in which you state that the person who was chosen county commissioner by the voters of Berkshire County at the last annual election died without having taken the oath of office, the member of the board of county commissioners whose place the deceased was to have taken being still alive. You also state that there are two county commissioners other than the persons above referred to, and two associate commissioners, all duly elected and qualified, whose terms of office have not yet expired, and my opinion is requested as to whether there is a vacancy in the board of county commissioners; and if not, of what three persons the membership of the board consists.

St. 1913, c. 835, § 391, provides that county commissioners shall hold office for a term of three years, beginning with the first Wednesday of January in the year succeeding their respective elections, “and until their successors are chosen and qualified.” R. L., c. 20, § 13, provides that “county commissioners before entering upon their duties shall be sworn, . . .”

If there had been a failure to elect a county commissioner at the last annual election, a special election under the provisions of St. 1913, c. 835, § 341, would have been necessary. This section also provides that upon a vacancy in the office of county commissioner a special election shall be had in like manner, and that until such election, in the case of a vacancy, the remaining county commissioners may appoint some person to fill the office until a person is duly elected and qualified.

R. L., c. 20, § 20, relating to associate commissioners, provides that if a commissioner is interested in a question before the board, if he is unable to attend or if there is a vacancy in
the board, the other member or members shall give notice to one or both of the associate commissioners, as the case requires, who shall then act as a member or members of the board. I assume that there is in this case no question raised as to the ineligibility of the Commissioner on account of interest or his inability to attend.

It is apparent that in this case there was no failure to elect, so that it is necessary that a vacancy exist before a special election can be held or before an associate commissioner may be authorized to act as a member of the board.

Although no case has been decided in this Commonwealth which passes upon the question of whether in the situation here described a vacancy exists, the question has frequently arisen in other jurisdictions, and it has almost uniformly been held that there was no vacancy under provisions of law substantially the same as ours.

In *Commonwealth v. Hanley*, 9 Penn. St. 513, Hanley was elected clerk of court in October, 1845, and duly qualified. The Constitution of Pennsylvania provided that such officers should "hold their offices for three years, if they shall so long behave themselves well, and until their successors shall be duly qualified. Vacancies in any of said offices shall be filled by appointments to be made by the governor." On the second Tuesday of October, 1848, one Brooks was duly elected as his successor, but died before qualifying. The Governor, assuming that Hanley's office became vacant at the expiration of the three years, appointed a successor. It was held by the court that the appointment by the Governor was unauthorized and invalid, since there was no vacancy, and that Hanley continued to hold a valid title to the office.

To the same effect are the cases of *State v. Metcalfe*, 80 Ohio St. 244; *State v. Hayes*, 91 Miss. 755; and *Kimberlim v. State*, 130 Ind. 120. In the last case one Tow was duly elected township trustee in 1888 and duly qualified. At the April election in 1890 Brown and Murray were the opposing candidates for the office. On the day of the election, after the polls were closed but before the result was announced, Brown died. On
the completion of the count it was found that Brown was elected. Under the theory that there was a vacancy in the office, an election was held in November, 1890, at which Tow and Kimberlim were the opposing candidates. Kimberlim received a majority of the votes. It was held by the court in this case, which was a proceeding to try the title to the office, that Tow nevertheless continued to hold title to it, since the Constitution provided that whenever the term of any officer was fixed by law "the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified;" that there was, therefore, no vacancy to be filled at the November election; and that the election of Kimberlim was invalid. In this case the court says, at page 125: —

The weight of authority is that, where there exists a constitutional provision such as we are now considering, a term of office fixed by statute runs, not only for the period fixed, but for an additional period between the date fixed for its termination and the date at which a successor shall be qualified to take office. The period between the expiration of the term fixed by statute and the time at which a successor shall be qualified to take office is as much a part of the incumbent's term as the fixed statutory period.

In discussing a similar question the court, in State ex rel. v. Wright, 56 Ohio St. 540, speaking of the office of mayor, said: —

His right to serve after the expiration of the designated period, until the qualification of his successor, being conferred by statute at the time of his election, is no less a part of his statutory term of office than is the fixed period itself; and while he is so serving there can be no vacancy in the office in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same.

I am therefore of the opinion that the member of the board of county commissioners of your county who was elected in November, 1913, still remains a legal member of that board, and, accordingly, that there is no vacancy in that office. It follows that an associate commissioner would not be authorized to fill this office on the theory that a vacancy existed, and that
the board of county commissioners of your county now consists of the member elected in 1913, the member elected in 1914 and the member elected in 1915.

I have felt some hesitancy in advising your board upon this question, as there is serious doubt as to whether I am authorized by law to do so. Since, however, in the event that your board should call a special election, it would be my duty to advise the Secretary of the Commonwealth as to his duty to prepare ballots therefor, and in view of the importance of the question, I have considered it appropriate in this instance to advise you upon the question propounded.

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Health, Local Board of — Authority of Mayor of Everett to exercise the Powers of.

While there is in the city of Everett no board of health qualified to act, the mayor may, under the charter of that city (St. 1892, c. 355), exercise such powers of the board of health as have been delegated to it by the city, but not such powers as have been conferred by law directly upon that board.

My opinion is requested upon certain questions propounded to you by the agent of the board of health of Everett. As all these questions are answered by a determination of whether there is at present in the city of Everett a board of health duly qualified to perform the duties imposed upon boards of health, and if not, whether the mayor can act in its place, I think it sufficient to confine my opinion to such determination.

R. L., c. 75, § 9, provides that "in each city except Boston the board of health shall consist of three persons, one of whom shall be a doctor of medicine and no one of whom shall be a member of the city council."

You state in your communication that the mayor of Everett has removed two members of the present board of health, leaving only one member in office. Assuming these removals were legal, I am of the opinion that there is now no board of health in the city of Everett qualified to act as such.
The question arises, therefore, as to whether the mayor of Everett is authorized to perform the duties of the board of health, at least until such time as there is a board of health duly qualified to act.

Section 26 of the charter of the city of Everett (St. 1892, c. 355) is as follows:

The mayor shall be the chief executive officer of the city, and the executive powers of the city shall be vested in him and be exercised by him either personally or through the several officers and boards in their respective departments, under his general supervision and control.

This section, together with other provisions of the charter, gives the mayor very broad powers. In my judgment, he has the power to exercise all executive powers of the city delegated to the board of health, at least where there is no such board duly qualified to exercise them.

A distinction should be made in this connection between powers which have been conferred upon the city itself and delegated by it to the officers by whom such powers are to be exercised, and powers which are conferred by law, not upon the city itself but directly upon certain officers. In the latter case the powers exercised by such officers are in no sense derived from the city.

With this distinction in mind it is clear that the powers given to the mayor by the section above quoted include only powers of the first class. While it is true that under another section of the charter the mayor has the power to appoint, with the approval of the board of aldermen, members of the board of health, and to remove them at his pleasure, it by no means follows that the powers which have been conferred upon this board are powers belonging to the city.

As was said by the court in Johnson v. Somerville, 195 Mass. 370, at page 377, in speaking of a highway surveyor:

The highway surveyor is elected by the inhabitants of the town in town meeting, but that does not make him the agent or servant of the town. The election of the highway surveyor no more makes him the servant of the town than does the appointment of the police commissioner.
of the city of Boston by the Governor, by and with the consent of the Council, make the police commissioner the agent or servant of the Governor and Council. The way in which the highway surveyor is made highway surveyor, namely, by election in town meeting, is not material. When he is made highway surveyor he is an independent public officer, whose duties and powers are prescribed by statute.

To a large extent the powers of local boards of health are conferred by general statutes of the Commonwealth, and the duties of such boards of health are therein prescribed. When acting under such powers and performing such duties, the members of the board of health act as public officers, that is, as agents of the State and not of the city. *Attorney-General v. Stratton*, 194 Mass. 51; *Hathaway v. Everett*, 205 Mass. 246; *Haley v. Boston*, 191 Mass. 291.

So far as the board of health of the city of Everett acts as a public board, performing duties imposed upon it directly by the State, I am of the opinion that it does not exercise any powers belonging to the city, and that the mayor has no power to perform such duties in its place, whether they are judicial, legislative or executive in their nature. In so far, however, as the execution of powers belonging to the city itself has been delegated by it to the local board of health, I am of the opinion that they may be exercised by the mayor, acting under the charter, at least where there is existing no board of health qualified to act.
Insurance — Reinsurance of "Full Coverage" Automobile Policy — Fire Insurance on Automobile wherever located.

Each of the particular hazards included in a "full coverage" automobile policy may be reinsured in a company authorized to insure against that particular hazard, even though such company is not itself authorized to issue a "full coverage" automobile policy under St. 1907, c. 576, § 32, cl. 2.

Insurance against fire upon movable risks of the sort specified in St. 1907, c. 576, § 32, cl. 2, may be written either by a fire insurance company or by a marine insurance company. If such a policy is written by a fire or fire and marine insurance company it must be in the standard form prescribed by section 60 of this statute, so far as that form is applicable, but if such a policy is written by a marine insurance company it need not be in the standard form prescribed by section 60.

You request my opinion as to whether, under the provisions of St. 1907, c. 576, § 20, an insurance company authorized to transact in this Commonwealth the kinds of business specified in clause 2 of section 32 of this statute, which issues a "full coverage" automobile policy, must, in case of reinsurance of any of the risks covered by the policy, reinsure only in a company also authorized to do business under clause 2.

Section 20 provides, in part, as follows:

If the company authorized to transact the business of insurance in this commonwealth directly or indirectly contracts for or effects any reinsurance of any risk or part thereof taken by it, it shall make a sworn report thereof to the insurance commissioner at the time of filing its annual statement or at such other time as he may request; and such reinsurance unless effected in companies authorized to transact in this commonwealth the class of business reinsured shall not reduce the taxes to be paid by it nor the reserve to be charged to it.

This section must be read in connection with the provision of St. 1909, c. 490, Pt. III, § 33, permitting a deduction in determining the premium tax on such a company of "all sums actually paid either to other domestic insurance companies or to the agents of foreign companies for reinsurance on risks, the premium on which, but for such reinsurance, would be liable to taxation."
In my opinion, the words of section 20, "the class of business reinsured," when read together with the above provision of the tax act must be interpreted to refer to the particular subordinate risk or hazard which is being reinsured, and as merely one of the items of the general coverage policy. This language was not intended to be used in the broader sense as referring to the class of business authorized by clause 2, treating that class as an indivisible whole. Thus, in my opinion, when a marine company reinsures the fire or the theft hazard included in a general coverage policy, that action constitutes the reinsurance of fire or theft business within the meaning of this provision. Consequently, such a company may reinsure the fire hazard of such a policy with a company authorized to do business under clause 1 of section 32, and may reinsure the theft hazard of such a policy with a company authorized to do business under clause 11 of that section, and nevertheless be entitled to credit for the premiums paid on such reinsurance under the provisions of section 20 of the insurance law or section 33 of the tax act.

You also ask my opinion as to whether a policy insuring an automobile or other movable personal property, wherever located, against fire only comes within the provisions of clause 1 or clause 2 of section 32 of the insurance statute, and also whether it must be issued upon the Massachusetts standard form under the provisions of section 60.

The clauses of section 32 to which you refer are as follows: —

First, To insure upon the stock or mutual plan against loss or damage to property and loss of use and occupancy by fire; explosion, fire ensuing; explosion, no fire ensuing, except explosion of steam boilers and fly wheels; lightning, hail, or tempest on land; bombardment; a rising of the waters of the ocean or its tributaries, or by any two or more of said causes.

Second, To insure upon the stock or mutual plan vessels, freights, goods, money, effects, and money lent on bottomry or respondentia, against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation; also to insure against loss or damage to and loss of use of motor vehicles, their fittings and contents, whether such vehicles are being operated or not, and wherever the same may be, resulting from accident, collision or any of the
perils usually insured against by marine insurance, including inland navigation and transportation.

Section 60 provides: —

No fire insurance company shall issue fire insurance policies on property in this commonwealth, other than those of the standard form herein set forth, except as follows: [The exceptions are not material.]

In my opinion, a policy of the character to which you refer constitutes insurance "against loss or damage to property. . . by fire." Accordingly, it may be issued by a company authorized to do business only under clause 1, namely, by a fire insurance company. When so issued it clearly comes within the provisions of section 60, and must, accordingly, be issued upon the standard form thus required, with, of course, a waiver of the provisions of the policy requiring the property insured to be located at a specified place.

As I understand it, the peril of loss by fire has always been one of the perils "usually insured against by marine insurance," within the meaning of clause 2. Accordingly, a company authorized to do business only under the provisions of clause 2, since it may insure against loss by fire to the limited extent thus authorized as a part of a general marine policy, may likewise insure to the same limited extent against loss by fire only. It thus may also insure motor vehicles against loss by fire only. Such insurance, however, may only be written by such companies upon movable risks of the sort specified in clause 2. A company authorized to do business only under the provisions of clause 2 is obviously a marine insurance company and not in any sense a fire insurance company. Therefore, if it issues a policy of the limited sort to which I have referred, insuring against fire only, there is no requirement that such a policy shall be written upon the standard form prescribed by section 60. The requirement of that section applies to fire insurance companies only.

Section 34 of the insurance statute contains the following provision: —
Any domestic insurance company now or hereafter authorized to transact the business specified in either the first or second clauses of section thirty-two of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven is hereby authorized to transact the kinds of business specified in both of said clauses: provided, that the capital stock of such company is not less than four hundred thousand dollars.

An insurance company authorized under this provision to transact business under either clause 1 or clause 2 is called by various provisions of the statutes a fire and marine company. It is thus subject to the limitations imposed upon both such companies. In my opinion, if such a company issues a policy insuring an automobile or other movable personal property, wherever located, against fire only, it must issue that policy upon the standard form in accordance with the requirements of section 60. Such company, being both a fire and a marine company, is subject to the limitations imposed by law upon both such companies.

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**Taxation — Property devoted to a Public Use.**

A town may not legally assess taxes upon a water district on account of water mains extended outside the territorial limits of that district and into the limits of such town.

You request my opinion as to whether the assessors of the town of Oxford may legally assess taxes upon the Cherry Valley and Rochdale water district on account of water mains extended outside the territorial limits of that district and into the town of Oxford.

By St. 1910, c. 381, the inhabitants of this district, a certain specified portion of the territory of the town of Leicester, were created a municipal corporation for the purpose of supplying themselves with water, and were given the power to raise money by taxation and other similar powers usually granted to such corporations. By section 7 of this statute the district was authorized to extend its pipes into the town of Oxford for a distance not exceeding 500 feet from the boundary.
lines between the towns of Leicester and Oxford, and by St. 1911, c. 152, this distance was increased to 4,000 feet.

It is well settled that property devoted to a public use is exempt from taxation, in the absence of any express provision of law authorizing its taxation. Accordingly, it is held that property owned by one town for the purposes of a water supply and located within the territorial limits of another is exempt from taxation. *Wayland v. Middlesex County Commissioners*, 4 Gray, 500. It is also held that, in the absence of any provision of law to the contrary, the property of a private water company is exempt from taxation. *Milford Water Company v. Hopkinton*, 192 Mass. 491. It is now provided by St. 1909, c. 490, Pt. 1, § 11, that the real estate and machinery of every private water company shall be subject to taxation. By section 8 of this statute it is also provided that a city or town owning property in another city or town for the purpose of a water supply shall annually pay to the city or town in which the property lies "an amount equal to that which such place would receive for taxes upon the average of the assessed values of such land, without buildings or other structures, for the three years last preceding the acquisition thereof."

So far as I am aware, there is no provision of law for the taxation of property, real or personal, owned by a water district and located within the limits of another city or town from that in which the district is situated. Such a district is not a private water company, and therefore section 11 does not apply to it. Such a district is not a city or town, and thus section 8 does not apply to it. Furthermore, the payment provided for by section 8 is based only upon the assessed values of land located in the other city or town. The payment there provided for is based in nowise upon personal property.

The pipes laid by this water district within the limits of the town of Oxford are plainly personal property. I find no provision of law authorizing the town of Oxford to tax them, and, accordingly, I am of opinion that they are not subject to
taxation by that town. In my opinion, it is proper for you to advise the assessors of the town of Oxford that they should abate any such taxes heretofore assessed which remain uncollected, and that they should omit to assess such taxes in the future.


The position of delegate to the Constitutional Convention provided for by Gen. St. 1916, c. 98, is a "place under the authority of the commonwealth" which the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court are precluded from holding by Mass. Const., Pt. II, c. VI, art. II.

The position of delegate to the Constitutional Convention is not an "office under the government of this commonwealth" within the meaning of Article XIII of the Amendments to our Constitution, and the holding of the office of justice of any court of the Commonwealth, other than the Supreme Judicial Court, is not incompatible with the holding by the same person of the position of such delegate.

Members of the General Court, councillors, officers of the Commonwealth, other than Governor and Lieutenant-Governor, elected by vote of all the people, and senators and representatives from this Commonwealth in the Congress of the United States are eligible under our Constitution to hold the position of delegate to the Constitutional Convention provided for by Gen. St. 1916, c. 98.

You request my opinion upon the following questions:

1. Are any or all of the officers mentioned in House Bill No. 795 now ineligible to membership in the Constitutional Convention provided for by chapter 98 of the General Acts of the year 1916?

2. If any or all of said officers are ineligible, is it within the power of the Legislature to make such officers eligible to membership in the convention?

The officers mentioned in this bill are the members of the General Court, the Governor, Lieutenant-Governor, councillors, the justices of the Supreme Judicial and the Superior Courts, the justices of all other courts in this Commonwealth, any officer of the Commonwealth elected by vote of all the people, and senators and representatives from this Commonwealth in the Congress of the United States.

Mass. Const., Pt. II, c. VI, art. II, provides that —

No governor, lieutenant-governor, or judge of the supreme judicial court, shall hold any other office or place, under the authority of this com-
monwealth, except such as by this constitution they are admitted to hold, saving that the judges of the said court may hold the offices of justices of the peace through the state; nor shall they hold any other place or office, or receive any pension or salary from any other state or government or power whatever.

If the convention called to revise, alter or amend the Constitution pursuant to the vote of the people at the last annual election, under Gen. St. 1916, c. 98, is authorized by the provisions of our present Constitution, the position of a delegate to the convention is a "place under the authority of the commonwealth," and it follows that the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court would be violating the provisions of the Constitution by sitting in said convention.

It has been asserted by many, and seems to have been the opinion of the justices of the Supreme Judicial Court in an opinion to the Legislature (reported in 6 Cush. 573), that Article IX of the Amendments to the Constitution, providing a method for the adoption of specific and particular amendments to our Constitution, excluded by implication any authorization to the people to revise or change it by the convention method, and this view is not unsupported by other authority. Opinion of the Justices, 14 R. I. 649.

The Preamble to our Constitution recites that —

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

Article VII of the Bill of Rights of our Constitution is as follows: —

Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible
right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.

This incontestable, unalienable and indefeasible right, which indeed is the essence of a republican form of government, cannot, in my judgment, be taken away except by plain and unmistakable language. That the people of one generation can deprive the people of a succeeding generation of their unalienable right to reform, alter or totally change their form of government, except in a restricted manner, when their protection, safety, prosperity and happiness require it, is repugnant to our theory of government, that the right to govern depends upon the consent of the governed. It seems to me a much more reasonable if not a necessary construction of the Constitution to hold that Article IX of the Amendments provides only a manner of amending the Constitution in addition to other methods that may be adopted by the people of changing their form of government, under the fundamental right guaranteed by the Bill of Rights, whenever "their protection, safety, prosperity, and happiness" require it.

This view is strengthened by an examination of the debates in the convention of 1821, which framed this article of amendment for submission to the people. Mr. Webster, in discussing this article at that time, said that he knew of no principle that could prevent a majority, even a bare majority, of the people from altering the Constitution, and that the object of the mode proposed for making amendments in it was to prevent the people from being called upon to make trivial amendments or any amendments except when a real evil existed. Debates in Convention of 1820 (ed. 1853), 407; Jameson, Const. Conventions, §§ 571-575.

Accordingly, I am of the opinion that the convention will be held under the authority of the Commonwealth, that the position of a delegate to said convention is a place under the authority of the Commonwealth, and that therefore the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court cannot sit therein as delegates without violat-
ing the provisions of Mass. Const., Pt. II, c. VI, art. II. It is unnecessary, however, to determine whether the position of a delegate is a place under the authority of the Commonwealth, as it will be noted that the prohibition contained in Mass. Const., Pt. II, c. VI, art. II, is not limited to places under the authority of the Commonwealth, but includes all places, at least of a public nature; and thus I am of the opinion that whatever view is adopted as to the nature of the convention, the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court, while occupying their respective offices, cannot properly sit as delegates therein.

Your specific question is as to their eligibility. Doubtless they are eligible to be candidates, and may hold the position of delegate subject to the provision of Gen. St. 1916, c. 98, § 6, that the delegates "shall be the judges of the returns and elections of their own members."

It was held by the Supreme Judicial Court in the case of Commonwealth v. Hawkes, 123 Mass. 525, that a person holding the office of judge might lawfully hold a seat in the Legislature, the acceptance of such seat, however, being a resignation of his office as judge.

Accordingly, it would seem that while the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court might lawfully hold a seat in the convention if elected thereto, the acceptance of such seat would operate as a resignation of their office, or would render them liable to impeachment. In arriving at this conclusion I have not overlooked the fact that His Honor William Phillips, then Lieutenant-Governor, and Hon. Isaac Parker, then chief justice, and Hon. Samuel S. Wilde, a justice, of the Supreme Judicial Court, sat as delegates in the Constitutional Convention of 1820. Their right to do so does not appear to have been questioned at that time.

The only provision in the Constitution that can be construed as a prohibition to the judges of the Superior Court and the other courts of the Commonwealth sitting as delegates in the convention is contained in Article VIII of the Amendments, which provides that —
Judges of the courts of common pleas shall hold no other office under the government of this commonwealth, the office of justice of the peace and militia offices excepted.

There is some question whether the phrase "courts of common pleas" refers to the courts which were established at the time of the adoption of this amendment under that name, or whether it has a much broader meaning, including all courts having jurisdiction of common pleas.

Bouvier defines "common pleas" as—

The name of a court having jurisdiction generally of civil actions.

Such pleas or actions are brought by private persons against private persons, or by the government when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from pleas of the Crown.

I think it unnecessary to consider this question, as I have come to the conclusion, with some hesitation, that the position of delegate in the convention is not an office of the Commonwealth, within the meaning of this amendment. It is to be observed that the phrase here is "office under the government of this commonwealth," whereas the phrase contained in the provision relative to the justices of the Supreme Judicial Court is "office or place under the authority of this commonwealth." The language used in connection with the justices of the Supreme Judicial Court is much more comprehensive than that used in relation to the judges of the courts of common pleas.

In some jurisdictions a clear distinction has been made between "office" and "place" under the government. Worthy v. Barrett, 63 N. C. 199. In that case it was said that a member of the Legislature was not an officer although he held a place of trust and profit. On the other hand, in Morrill v. Haines, 2 N. H. 246, it was held that a member of the Legislature was an officer of the State. No case has occurred in this Commonwealth where this question has been decided. In the case of Fitchburg R.R. Co. v. Grand Junction R.R., etc., Co., 1 Allen, 552, the question was raised, but the court, in arriving
at its conclusions, found it unnecessary to determine the point and expressly left it open.

Whatever may be said in relation to a member of the Legislature, he at least takes part in the execution of one of the powers of government, whereas a delegate in the convention acts substantially as one of a committee of the people, whose power is restricted to making a report to the people.

The whole purpose of the convention is to take under consideration the propriety of revising or altering the present Constitution, and to report back to the people such revision, alteration or amendment as it may propose. Its powers are similar to that of a committee, its work is entirely preliminary, and it has no power to do any act which of itself has any final effect.

It is my view that the word "office," as used in Article VIII of the Amendments, refers to a position the incumbent of which exercises some power of government, and not to the position of a person selected to act in an advisory capacity in framing a scheme or change of government to be submitted to the people for adoption or rejection. See in this connection Attorney-General v. Tillinghast, 203 Mass. 539, 543.

Accordingly, I am of the opinion that there is nothing in our Constitution which renders the office of justice of any court of the Commonwealth, other than the Supreme Judicial Court, incompatible with the position of delegate to the Constitutional Convention, or which in any way affects his eligibility to such position.

As to the other officers referred to in your inquiry, the only provision of the Constitution which might be said to apply thereto is clause 2 of Article II of Chapter VI of Part the Second, which reads as follows: —

... and never more than any two offices, which are to be held by appointment of the governor, or the governor and council, or the senate, or the house of representatives, or by the election of the people of the state at large, or of the people of any county, military offices, and the offices of justices of the peace excepted, shall be held by one person.

This would apply, if at all, only to such delegates as were elected at large. Even then I am of the opinion that this
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I think it unnecessary to consider this question, as I have come to the conclusion, with some hesitation, that the position of delegate in the convention is not an office of the Commonwealth, within the meaning of this amendment. It is to be observed that the phrase here is "office under the government of this commonwealth," whereas the phrase contained in the provision relative to the justices of the Supreme Judicial Court is "office or place under the authority of this commonwealth." The language used in connection with the justices of the Supreme Judicial Court is much more comprehensive than that used in relation to the judges of the courts of common pleas.

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The whole purpose of the convention is to take under consideration the propriety of revising or altering the present Constitution, and to report back to the people such revision, alteration or amendment as it may propose. Its powers are similar to that of a committee, its work is entirely preliminary, and it has no power to do any act which of itself has any final effect.

It is my view that the word "office," as used in Article VIII of the Amendments, refers to a position the incumbent of which exercises some power of government, and not to the position of a person selected to act in an advisory capacity in framing a scheme or change of government to be submitted to the people for adoption or rejection. See in this connection Attorney-General v. Tillinghast, 203 Mass. 539, 543.

Accordingly, I am of the opinion that there is nothing in our Constitution which renders the office of justice of any court of the Commonwealth, other than the Supreme Judicial Court, incompatible with the position of delegate to the Constitutional Convention, or which in any way affects his eligibility to such position.

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... and never more than any two offices, which are to be held by appointment of the governor, or the governor and council, or the senate, or the house of representatives, or by the election of the people of the state at large, or of the people of any county, military offices, and the offices of justices of the peace excepted, shall be held by one person.

This would apply, if at all, only to such delegates as were elected at large. Even then I am of the opinion that this
clause would have no application, since what I have before-
said in relation to an "office" as distinguished from a "place"
applies with equal force to this provision of the Constitution.

The only statutory provision that in any way applies to
the questions propounded by you is R. L., c. 18, § 11, which
prohibits any person from receiving more than one salary at
the same time from the treasury of the Commonwealth.

I am informed that House Bill No. 26, which provides that
this section shall not apply to the position of delegate to the
convention, has been favorably reported by your committee.
There is, of course, no constitutional objection to the enact-
ment of this bill, and if enacted into law I am of the opinion
that there is nothing in the Constitution or laws of the Com-
monwealth which in any way interferes with such officers sitting
as delegates in the Constitutional Convention.

As to your second question, since the offices of Governor,
Lieutenant-Governor and justice of the Supreme Judicial Court
are incompatible with the position of delegate in the convention,
by reason of the provisions of the Constitution itself, it is ob-
vious that the Legislature has no power to remove the incom-
patibility. The other officers mentioned in your bill are, in my
opinion, already eligible to seats as delegates in the convention,
at least if House Bill No. 26 is enacted into law, so there seems
to be no occasion for the enactment into law of any of the pro-
visions of House Bill No. 795.
CONSTITUTIONAL LAW — OFFICE OF DISTRICT ATTORNEY —
POWER OF GENERAL COURT TO PROVIDE FOR INVESTIGATION OF.

Under Mass. Const., Pt. II, c. I, § I, art. IV, the General Court has the power to prescribe and determine the methods and basis for the entry of *nolle prosequi* and filing of criminal cases by a district attorney, and for that purpose it may provide for the appointment of a commission to investigate as to what has been done in the past in this regard in a particular district, this power being in no way limited by Article XIX of the Amendments to the Constitution.

You request my opinion as to the right of the Legislature to enact legislation substantially in accordance with Senate Bill No. 136, entitled "A Resolve providing for an investigation of the office of the district attorney of Suffolk County." I assume the office referred to is that of district attorney for the Suffolk district, as there is no office of district attorney of Suffolk County in this Commonwealth.

The resolve provides for the appointment by the Governor of a commission of three persons for the purpose of investigating the office of the district attorney of Suffolk County, "to determine the methods and the basis for the nol-prossing and filing" of criminal cases. The commission is given power to summon witnesses, and is required to report to the General Court.

By Mass. Const., Pt. II, c. I, § I, art. IV, the General Court is given —

Full power and authority . . . to 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, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered

To the Joint Committee on the Judiciary.

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unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution. . . .

Under this authority the Legislature has undoubted power to change or regulate the powers and duties of the office in question, or even to abolish it, unless limited in this respect by some other provision of the Constitution. The only other provision of the Constitution touching this particular question is Article XIX of the Amendments, which provides as follows:—

The legislature shall prescribe, by general law, for the election of sheriffs, registers of probate, and clerks of the courts, by the people of the several counties, and that district-attorneys shall be chosen by the people of the several districts, for such term of office as the legislature shall prescribe.

In pursuance of this amendment, which was ratified by the people in 1855, St. 1856, c. 173, was enacted, providing for the election and the term of office of the officers specified in the article of amendment.

The effect of this article was considered by the justices of the Supreme Judicial Court in an opinion given to the House of Representatives under date of April 20, 1875, reported in 117 Mass. at page 603, in which the question of whether the office of register of probate and insolvency could lawfully be abolished by the Legislature was answered in the affirmative. Referring to the amendment in question, the justices say:—

The Constitution does not secure the tenure of office of registers of probate, nor confer any right in the office beyond the control of the Legislature, but merely ordains how such officers shall be elected. It is within the constitutional authority of the Legislature, by general law, to change the term of office, or to abolish the office itself, and transfer the powers and duties thereof to another. . . .

The original statute of 1856, chapter 173 (now R. L., c. 156, § 4), provides for the removal of these officers by a majority of the justices of the Supreme Judicial Court. This provision for removal apparently was assumed to be constitutional in the case of Bullock v. Aldrich, 11 Gray, 206, and a removal
from the office of district attorney for the Suffolk district was made thereunder in the case of Commonwealth v. Cooley, 1 Allen, 358.

It is my opinion, therefore, that the power of the Legislature over the office in question is not impaired or diminished by the nineteenth article of amendment, except as to the manner in which it shall be filled. It follows that it is within the proper sphere of the Legislature to prescribe and determine, if it deems it desirable, the methods and basis for the entry of nolle prosequi and filing of criminal cases by a district attorney.

It may be that the Legislature believes that it can obtain assistance in determining the wisdom of the passage of laws to regulate or restrict the disposition of criminal cases by filing or the entry of nolle prosequi by ascertaining the nature, number and cause of the disposition of such cases in this manner in the past. Nor does the fact that the investigation is limited to one district alone affect the constitutionality of the resolve. Whether the wisdom of limiting the power long exercised by prosecuting attorneys can as well be determined by the investigation of the disposition of cases in only one district as by an investigation of this subject throughout the Commonwealth, is a matter for the Legislature itself to determine.

It is my opinion that the Legislature is not restricted in obtaining this information to committees made up of its own members, but that it may provide for the appointment of such a commission as is proposed for the purpose of investigating this matter and reporting to the Legislature.

As to how far the commission may go in requiring the district attorney, or his assistants, to disclose confidential communications or other matter which may be privileged, it is unnecessary for the purpose of your question to determine.

Accordingly, the answer to your question must be in the affirmative.
Registrrs of Voters — Power of Assistant City Clerk to act as Member of in Place of City Clerk.

Where a city has not adopted the provisions of St. 1913, c. 835, § 24, the city council is not authorized, under R. L., c. 26, § 16, to provide by ordinance that the assistant city clerk shall perform the duties of registrar of voters in place of the city clerk when the clerk is unable personally to perform such duties.

You have requested my opinion upon the following question: —

The city clerk of the city of Gloucester is a member of the board of registrars, under the provisions of St. 1913, c. 835, § 25. The city is about to adopt or has adopted an ordinance which will impose upon the assistant city clerk the performance of all duties pertaining to the office of city clerk when the city clerk is absent.

Would this, in your opinion, give the assistant city clerk the power to register voters in the absence of the city clerk?

St. 1913, c. 835, §§ 24 to 33, inclusive, relate to registrars of voters, their appointment, terms of office, etc. In cities which have adopted the provisions of section 24 the board of registrars shall consist of four persons appointed by the mayor and aldermen, whose terms of office shall be for four years. In such cities the city clerk ceases to be a member of the board of registrars. Under section 25 cities which have not adopted the provisions of this section shall have an appointive board of three members, who shall act with the city clerk, and the terms of office of the appointive members shall be for three years. By both these sections provision is made for equal political representation.

The following sections provide for the filling of vacancies and appointment of assistant registrars, and define their duties: —

Section 29. If a member of the board of registrars shall be disabled by illness or other cause from performing the duties of his office, or shall, at the time of any meeting of said board, be absent from the city or town, the mayor or selectmen may, upon the request in writing of a majority of the remaining members of the board, appoint in writing some person to fill such temporary vacancy, who shall be of the same political party as the member whose position he is appointed to fill. Such temporary registrar
shall perform the duties and be subject to the requirements and penalties provided by law for a registrar of voters.

Section 32. A city council, except in the city of Boston, may authorize the registrars to appoint assistant registrars for the term of one year, beginning with the first day of October, unless sooner removed by the registrars, and they shall, as nearly as may be, equally represent the different political parties.

Section 33. The registrars in a city authorizing the appointment of assistant registrars may cause the duties devolving upon a single registrar to be performed by one or two assistant registrars, and they may designate two assistant registrars, so far as practicable of different political parties, for the sessions required by law to be held outside of their principal office. The registrars shall make suitable regulations for the government of the assistant registrars, whose doings shall be subject to their revision and acceptance. Assistant registrars shall be subject to the same obligations and penalties as registrars. Registrars may remove an assistant registrar, and may fill any vacancy in the number of assistant registrars for the remainder of the term.

R. L., c. 26, § 16, provides for the appointment of assistant city clerks, and is as follows: —

A city may by ordinance establish the office of assistant city clerk, and prescribe the manner of his appointment and his powers and duties. His certificate or attestation shall have the same effect as that of the city clerk.

If I am correct in the assumption that the city of Gloucester has not adopted the provisions of section 24, above quoted, then the city clerk is a member of the board of registrars of voters. The statute makes him a member of the board. No special provision is made as to who shall act in his absence, and it seems clear that the provisions of section 29 apply to a temporary vacancy caused by his disability to serve.

The question is, therefore, Do the provisions of R. L., c. 26, § 16, authorize the city council by ordinance to provide that the assistant clerk shall act in the place of the clerk when he is unable to perform the duties of registrar? In my opinion they do not. The provisions of said section 16 were originally passed in 1869, and, as then passed, provided that the assistant
city clerk "shall be appointed in such manner and for such duties and powers now belonging to the office of city clerk as such ordinance shall prescribe and determine." The office of registrar of voters was not established until the passage of St. 1881, c. 210. Prior to that time the powers now exercised by registrars of voters were exercised in cities by the mayor and aldermen and in towns by the selectmen. It seems plain that at the time of the original passage of the statute authorizing the establishment of the office of assistant city clerk the duties and powers now exercised by the board of registrars were in no sense duties and powers belonging to the office of city clerk.

It is my view that the statutes establishing boards of registrars created a distinct office from that of city clerk, and imposed upon the city clerk, in certain instances, the duty of exercising the powers of said office, and in no way enlarged the authority given a city in prescribing the powers and duties of an assistant city clerk under the provisions of R. L., c. 26, § 16. Furthermore, the statutes provide methods for the filling of vacancies and the appointment of assistant registrars. (§§ 29, 32 and 33.) Ordinarily, when a specific method of appointment to office is provided by statute it excludes other methods of appointment, unless they are specifically provided for by statute.

It should also be noted that the statute provides for equal political representation, as near as may be, on the board of registrars of voters. As it is possible for the clerk and assistant clerk to be of different political parties, an ordinance of the city which provides that the assistant clerk shall act as registrar of voters in the absence of the clerk might nullify the provision for equal political representation.

Accordingly, I am of the opinion that your question is to be answered in the negative.
CITIES AND TOWNS — HOSPITALS FOR CONSUMPTIVES — STATE SUBSIDY — COUNTY TUBERCULOSIS HOSPITALS.

Since the passage of Gen. St. 1916, c. 286, the city of Everett, being of less than 50,000 population, is no longer required to make hospital provision for consumptive persons, but until the completion of the county hospitals provided for by that statute, that city is entitled to receive from the Commonwealth $5 per week for each patient who is unable, or whose kindred are unable, to pay for his support, and who is maintained by that city under the conditions specified in St. 1912, c. 637, in the Cambridge Tuberculosis Hospital.

You request my opinion upon the question of whether the city of Everett was acting within its rights in closing the hospital which it had heretofore erected for its tuberculosis patients, as bearing upon the further question of whether the city of Everett is entitled to a subsidy from the Commonwealth for its consumptive patients cared for at the Cambridge Tuberculosis Hospital under an arrangement with that city.

R. L., c. 75, § 35, as amended by St. 1906, c. 365, and by St. 1911, c. 613, provides that each city and town shall establish and constantly maintain within its limits one or more isolation hospitals for the reception of persons having certain diseases, including tuberculosis.

St. 1911, c. 597, provided that every city or town which establishes and maintains a tuberculosis hospital shall be entitled to receive from the Commonwealth a subsidy of $5 per week for each patient who is unable, or whose kindred are unable, to pay for his support.

St. 1912, c. 151, exempted from the obligation to establish and maintain tuberculosis hospitals such cities and towns as make an arrangement satisfactory to the State Department of Health with a neighboring city or town for the care of persons having such disease.

By St. 1912, c. 637, the right to the State subsidy was extended to cities and towns which placed their patients suffering from tuberculosis in a municipal or incorporated tuberculosis hospital in this Commonwealth, or in a building or ward set apart by such hospital for patients suffering from this disease. This act has been amended in other respects by
Gen. St. 1916, cc. 57 and 197, but these later amendments have no bearing upon the present question.

Until the enactment of Gen. St. 1916, c. 286, the city of Everett was bound by law to make hospital provision for its tuberculosis patients, either by maintaining a hospital of its own for that purpose or by making an arrangement satisfactory to the State Department of Health with a neighboring city or town for their care. This act, however, providing for the establishment of county tuberculosis hospitals, expressly repeals so much of R. I., c. 75, § 35, and the amendments thereof, as required cities and towns having less than 50,000 population to make hospital provision for tuberculosis patients. Since the city of Everett has a population of less than 50,000, it is obvious that it is no longer under any obligation to make hospital provision for its consumptive patients, and, accordingly, the answer to your question must be in the affirmative.

The question of whether the city of Everett is entitled to receive a subsidy from the Commonwealth for its patients maintained in the Cambridge Tuberculosis Hospital under contract with that city depends upon whether said chapter 286 had the effect of repealing prior laws in relation to such subsidy. I am informed that no county tuberculosis hospital has as yet been erected in Middlesex County under the provisions of this act. Section 4 of this chapter provides that cities having more than 50,000 inhabitants, and also cities and towns having less than 50,000 inhabitants but already possessing and continuing to furnish adequate tuberculosis hospital provision, shall be exempt from the provisions of the act, and shall not be required to pay any part of the county tax which is assessed in order to comply with its provisions.

If the city of Everett, having already established a tuberculosis hospital, had continued to maintain it, it is clear that no question could be raised but that the city would be entitled to receive the subsidy provided for by the statutes of 1911 and 1912. It is also clear that after the completion of the county hospitals provided for by this act the city of Everett will not be entitled to receive any subsidy, except under the
provisions of Gen. St. 1916, c. 286, § 12, for its patients which are supported in the county hospital. The difficulty is whether the city of Everett, being released by this later act from its obligation to make any provision for tuberculosis patients other than in the county hospitals provided for therein, is entitled to receive from the State a subsidy for such patients maintained by it in the manner described.

The act of 1916 contains no express repeal of the laws then existing relating to State subsidies. It does, however, contain a provision for the payment of subsidies under certain conditions to cities and towns for the support of their patients in hospitals provided for under that act, and, in so far as this provision is inconsistent with former acts, they are, under the general rule of statutory construction, thereby repealed. This subsidy is of necessity not available until the completion of the hospitals contemplated by the act, and I am of opinion that it was not the intention of the Legislature to repeal the former laws relating to subsidies to cities and towns coming within the act until the time therein fixed for the completion of said hospitals, or their actual completion before that time.

Accordingly, I am of the opinion that the city of Everett is entitled to a subsidy from the Commonwealth for the tuberculosis patients maintained by it in the Cambridge Tuberculosis Hospital under the conditions specified in St. 1912, c. 637, as amended, provided this arrangement between the city of Everett and the city of Cambridge is satisfactory to the State Department of Health.
INToxicating LIquORS — SALE TO MINOR — SIXTH-CLASS LiCENSES — CERTIFICATES OF FITNESS.

The sale of intoxicating liquor upon a physician's prescription to a minor by a druggist operating under a sixth-class license would be a violation of the conditions of such license. Such a sale by a druggist operating under a certificate of fitness, as provided by St. 1913, c. 413, would subject him to the penalties prescribed by R. L., c. 100, § 62, and would constitute sufficient cause for the revocation of the certificate of fitness by the Board of Registration in Pharmacy.

You request my opinion as to whether intoxicating liquor or alcohol may be sold on a physician's prescription to a minor by a druggist operating under a sixth-class license, or by a druggist operating under a certificate of fitness issued under the provisions of St. 1913, c. 413.

By R. L., c. 100, § 17, par. 4, it is made a condition of every license —

That liquor shall not be sold or delivered on the licensed premises to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding, or to a minor.

These provisions apply alike to all classes of licenses, and therefore a druggist operating under a sixth-class license cannot sell intoxicating liquor to a minor upon a physician's prescription without violating the conditions of his license.

As to a druggist operating under a certificate of fitness issued under the provisions of St. 1913, c. 413, there appears to be no law which prohibits his making such sale to a minor. It is to be noted, however, that a druggist who makes such sale will subject himself to liability under the provisions of R. L., c. 100, § 62, while a druggist operating under a sixth-class license who makes such sale is not subject to the provisions of this section. I am of the opinion, however, that the making of such sale by a druggist operating under a certificate of fitness would be sufficient cause for the revocation of his certificate of fitness by your Board, under the provisions of St. 1913, c. 413, § 2.
Credit Unions, Powers of — Security required for Loans.

Credit unions incorporated under Gen. St. 1915, c. 268, may loan money to its members upon mortgages of real estate generally, and the sufficiency of the property mortgaged is left entirely to the discretion of the credit committee, under the provisions of section 17 of this act, except as to loans secured by mortgages upon farm lands, which are restricted by section 18 of this statute to 50 per cent of the value of the property pledged.

A credit union may not loan money to a person not a member of that union.

You have requested my opinion as to whether credit unions incorporated or doing business under the authority of Gen. St. 1915, c. 268, are authorized to loan money upon mortgages of real estate other than farm lands, and if so, whether there is any limitation upon the amount of such loans.

Gen. St. 1915, c. 268, contains the following pertinent provisions:

Section 2. Seven or more persons, resident in this commonwealth, who have associated themselves by an agreement in writing with the intention of forming a corporation for the purpose of accumulating and investing the savings of its members and making loans to members for provident purposes, may . . . become a corporation . . .

Section 5. A credit union may receive the savings of its members in payment for shares or on deposit; may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated; and may undertake such other activities relating to the purpose of the association, as its by-laws may authorize, any provisions in section one of chapter one hundred and fourteen of the Revised Laws notwithstanding.

Section 8. All property of a credit union, except real estate, and all capital stock in a credit union shall be exempt from state and local taxation, except legacy and succession taxes.

Section 11. The capital, deposits and surplus funds of a credit union shall be invested in loans to members with the approval of the credit committee as provided in section seventeen of this act, and any capital, deposits or surplus funds in excess of the amount for which loans shall be approved by the credit committee may be deposited in savings banks or trust companies incorporated under the laws of this commonwealth, or in national banks located therein, or may be invested in the bonds of any
other credit union or any farmland bank incorporated under the laws of
this commonwealth, or in any securities which are at the time of their pur-
chase legal investments for savings banks in this commonwealth, . . .

Section 17. . . . All applications for loans shall be made in writ-
ing and shall state the purpose for which the loan is desired and the secu-
ritv offered.

Section 18. Loans upon the security of first mortgages upon farm
lands shall in no case exceed in amount fifty per cent of the value of the
property pledged as security, and shall be for the following purposes
only: . . .

This statute presents the rather unusual situation of a cor-
poration as to which there is no express authorization to hold
either real or personal property. However, it seems to be the
common law that a corporation has a right to take and hold
real property reasonably necessary and convenient for the pur-
poses authorized, except so far as expressly prohibited. 10 Cyc.
1122; 7 Am. & Eng. Encyc. of Law, 714; see also Old Colony

The purposes of a credit union, as disclosed by this statute,
necessarily require the possession of power to take and hold
property, and there is a direct implication that this power in-
cludes real estate, found in the provisions of section 8 above
quoted.

The primary purpose of these corporations is stated to be
that of "accumulating and investing the savings of its mem-
bers and making loans to members for provident purposes."

Whenever a corporation has power to loan money or enter into any
other contract by which another becomes or may become indebted to it,
and there are no express or implied charter or statutory restrictions, it al-
ways has, as an incident thereto, the same power as an individual to take
any of the ordinary securities. And it may take a mortgage or deed of
trust on real property, though not authorized to purchase or deal in land.
(7 Am. & Eng. Encyc. of Law, p. 801; 10 Cyc. 1127.)

The present act contains an express implication of the power
to take security, since it is provided in section 17 that all ap-
lications for loans shall state "the security offered."
Section 18 of the act prescribes in detail the limitations placed upon the security obtained by first mortgages upon farm lands, thereby recognizing the right in the corporation to take such mortgages.

A further indication pointing in the same direction is found in the provision of section 5 exempting such corporations from the provisions of R. L., c. 114, § 1, which section is a prohibition upon any persons or corporations, with certain exceptions therein stated, against transacting "the business of accumulating the savings of its members and loaning to them such accumulations in the manner of a co-operative bank."

A careful examination of the entire act discloses no express prohibition against taking a mortgage of real estate as security for a loan to a member of a credit union other than the limitations as to loans upon farm lands, found in section 18.

Accordingly, I am of the opinion that a credit union is authorized to take as security for a loan to a member a mortgage of real estate generally.

Your question is broad enough to include a query as to whether a loan could be made to a person other than a member and secured by mortgage of real estate.

I am of the opinion that such an investment is not authorized by the terms of this statute. It is true that section 11 authorizes surplus funds to be invested "in any securities which are at the time of their purchase legal investments for savings banks." It is, of course, common knowledge that first mortgages of a certain class are legal investments for savings banks. "Securities" is a word of broad meaning, and, in its widest interpretation, is almost synonymous with "investments." The definition applied to it by the Supreme Judicial Court of Massachusetts in the case of Boston Railroad Holding Co. v. Commonwealth, 215 Mass. 493, 497, is perhaps broad enough to include mortgages. The word, however, is frequently employed in a more limited sense as referring to investments of the kind ordinarily bought and sold in the market. In the present statute this word is restricted to this limited sense by the use of the word "purchase," as shown in the quotation above. It is only securities
which are "at the time of their purchase" legal investments for savings banks which are here dealt with. A loan secured by a mortgage is not a purchase of a mortgage.

The present statute in several places indicates an intention that loans are to be made only to members. In section 5 it is provided that the credit union "may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated." Section 6 authorizes the making of by-laws prescribing "the fines, if any, which shall be charged for failure to meet obligations to the corporation punctually." Such a by-law, of course, would not be binding upon persons not members, and therefore an implication arises that loans are to be made only to members.

St. 1909, c. 419, which was the first act authorizing the incorporation of credit unions, and which, although repealed by the present act, is, in fundamental provisions, largely continued by it, contains the following:—

Section 15. The capital, deposits and surplus funds of the corporation shall be either lent to the members for such purposes and upon such security and terms as the credit committee shall approve, or deposited to the credit of the corporation in savings banks or trust companies incorporated under the laws of this commonwealth, or in national banks located therein.

In my opinion, it was not intended by the enactment of Gen. St., 1915, c. 268, to enlarge the class of persons to whom loans might be made.

Accordingly, I am of the opinion that such a corporation is not authorized to make loans to persons who are not members of it.

There is to be found in the act no restriction as to the ratio of a loan to the value of the security offered other than the limitation of section 18 with reference to mortgages upon farm lands, and I find no language seeming to imply such limitation.

Therefore I am of the opinion that in making a loan secured by a mortgage upon real estate other than farm lands the sufficiency of the security offered is left entirely to the discretion
of the credit committee, under the provisions of section 17 of the act, which is as follows:

The credit committee shall hold meetings, of which due notice shall be given to its members, for the purpose of considering applications for loans, and no loan shall be made unless all members of the committee who are present when the application is considered, and at least two thirds of all the members of the committee, approve the loan and are satisfied that it promises to benefit the borrower. All applications for loans shall be made in writing and shall state the purpose for which the loan is desired and the security offered.

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**Insurance — Status of Alien Enemy — Situation of German Insurance Companies in Event of Declaration of War between This Country and Germany.**

The Insurance Commissioner would be justified, under St. 1907, c. 576, § 7, in revoking the certificate of authority granted to a German insurance company, its officers and agents, in the event of a declaration of war between this country and Germany.

An alien enemy cannot enforce the payment of debts in the courts of this country during the continuance of the war, but his liabilities may be enforced against him, provided assets can be found here to meet such liabilities.

It seems that payments to an agent of a German insurance company resident in this country may legally be made by a policyholder in the absence of an act of Congress prohibiting such payment, and that such policyholder may properly receive payment of claims from such resident agents.

You have requested my opinion as to whether, in the event of war between this country and Germany, the German insurance companies now admitted under the law to transact business in this Commonwealth, through United States branches, so called, can continue to make new contracts of insurance herein, renew their present contracts, collect premiums, pay losses and carry out the terms of their policies now outstanding.

It is not possible to say that the law governing such a situation is definitely settled. In time of war the ultimate limit to the disabilities which may be placed upon citizens of the enemy country is a matter of power rather than of law. Conceivably, it would be possible for this country to confiscate
the property of German companies situated in this country, and thereby render them incapable of carrying out either old or new contracts.

There would seem to be grave doubt as to the legality of any contract made or renewed by a company incorporated under the laws of a nation with which our own country might be at war.

One of the most complete discussions of this subject is found in the Massachusetts case of Kershaw v. Kelsey, 100 Mass. 561. In that opinion the following language is used by Mr. Justice Gray: —

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. . . .

. . . When a creditor, although a subject to the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. (pp. 572–573.)

The decision in this case has not always met with complete approval. In Robinson v. Premium Oil Pipe Line, Ltd. (1915, 2 Chancery, p. 124), it is said: —

The learned Judge Gray, in the case of Kershaw v. Kelsey, which is reported in 100 Mass. page 561 (97 Am. Dec. 124, 1 Am. Rep. 142), states the law in our opinion correctly when he says, "The law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their coun-

tries," but we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse.

As pointed out in the Massachusetts case, there may be found many declarations in other cases to the effect that practically all contracts between citizens of belligerent nations are prohibited. For example, in Scholefield v. Eichelberger, 7 Pet. 586, 593, it is said by Johnson, J.:—

The doctrine is not at this day to be questioned, that during a state of hostility the citizens of the hostile States are incapable of contracting with each other. For near twenty years this has been acknowledged as the settled doctrine of this court.

The purpose of acquiring insurance, of course, is to obtain a certainty of payment, in case of loss, as complete as possible. It is most undesirable for citizens of this State to be given policies as to which any reasonable excuse for avoidance can be imagined.

St. 1907, c. 576, § 7, provides that the Insurance Commissioner may revoke the certificate of authority granted to a foreign insurance company, its officers or agents, if he is of opinion that "its condition is such as to render its proceedings hazardous to the public or to its policyholders."

In view of the uncertainty as to payment of the policies issued by such a company, I am of opinion that you would be justified, in the event of a declaration of war, in revoking the authority of such companies.

As to payments made to such companies, it seems to be established that it is illegal to make payments to citizens of a hostile nation where, in order so to do, the money is transmitted to that country. On the other hand, apart from some enactment by Congress, it appears by the quotation from the Massachusetts court, set forth above, that payment to an agent of such companies resident here would not be prohibited. 40 Cyc. 321–323.

The United States Supreme Court has held, contrary to the opinions of certain State courts, that the authority of an
agent of a life insurance company resident in hostile territory is terminated by war, although by agreement of the company and the agent it might continue. Insurance Co. v. Davis, 95 U. S. 425. Whether or not the present contracts of agency of the German companies contain such provisions I am not informed, and of course I cannot predict whether or not, if the agents are willing to continue to represent those companies, their acts will be ratified.

It is stated that the law of Germany differs from that of England and the United States, and that under that law trade with the enemy is permitted to continue after the outbreak of war unless special prohibitive orders are issued. S. Oppenheim: Treatise on International Law (2d ed.), p. 136. If this is a correct statement of the German law, it might well be held that the authorization of agents of German companies continued after a declaration of war until terminated by corporate action or official order.

It is to be remembered, however, that during war the citizens of one of the enemy countries have no standing in the courts of the other, and can maintain no action to enforce payment of debts so long as hostilities continue. Kershaw v. Kelsey, supra.

On the other hand, liabilities of German companies may be enforced against them by the courts of this country, provided assets can be found here to meet such liabilities. See Watts, Watts & Co. v. Unione Austriaca Di Navigazione, 224 Fed. Rep., 188, 192. If the resident agents of such companies were willing to pay such claims without suit, I see no objection to an American citizen receiving the same.
Taxation, Exemption from — Farming Utensils — Utensils Used in Connection with Making Maple Sugar.

Utensils used by the owner or occupant of a farm in connection with the making of maple syrup or sugar are "farming utensils" within the meaning of St. 1909, c. 490, Pt. I, § 5, cl. 11, providing for their exemption from taxation, only when the sap is gathered and made into maple sugar or syrup merely as an incidental part of the operation of such farm.

You request my opinion as to whether utensils used in connection with the making of maple sugar are "farming utensils" within the meaning of St. 1909, c. 490, Pt. I, § 5, cl. 11, exempting from taxation "the wearing apparel and farming utensils of every person; his household furniture not exceeding one thousand dollars in value; and the necessary tools of a mechanic not exceeding three hundred dollars in value."

The foregoing provision is an exemption from a general tax, and therefore, in accordance with the usual rule, is to be construed strictly against the taxpayer. In my opinion, the word "farming," as used in this statute, includes merely the pursuit of agriculture, and, accordingly, refers to the tillage of the soil. It cannot be extended to include the gathering or harvesting of natural forest products. Thus, the gathering of sap from maple trees and its manufacture into syrup or sugar do not of themselves constitute farming within the meaning of this provision. It is, however, an incident of the operation of a farm for the owner or occupant to gather such products as are grown upon his farm and to market them. This has come to be an ordinary incident of the operation of a farm. Accordingly, in my opinion, when the sap of maple trees is gathered and made into syrup or sugar by the owner or occupant of a farm merely as an incidental part of the operation of his farm, the utensils used by him may be said to be "farming utensils" within the meaning of the above quoted provision, and thus exempt from taxation. Where such operations are not carried on as an incident of conducting a farm, in my opinion utensils thus used do not come within this exemption. In reaching this conclusion I in no way attempt to review or reconsider the classification of farming utensils as set forth in the opinion of one of my predecessors. III Op. Atty.-Gen. 66.

An employer in this Commonwealth who is furnishing war supplies under contract with the Federal government is subject to the provisions of St. 1913, c. 758, except when the performance of such contract, independent of other work, requires the employment of labor in a manner contrary to the provisions of that chapter.

You request my opinion on the following question: —

Shall a contractor, furnishing war materials under contract or requirement of the United States government, be exempt from the requirements relating to the hours of labor of women and children contained in chapter 758 of the Acts of 1913, or shall the State Board of Labor and Industries, in each case called to its attention, determine what is "extraordinary emergency" or "extraordinary public requirement" under the law to which we have referred?

It is to be noted at the outset that your question does not involve a situation where the United States has required the employer to do the work. In such a situation I would unhesitatingly advise you that the laws of this Commonwealth would not apply. When a state of war exists no law of the Commonwealth can interfere or control the necessities or exigencies of the Federal government in prosecuting the war. Your question involves only voluntary contracts made with the United States for war supplies.

St. 1913, c. 758, provides, in part, that —

Every employer engaged in furnishing public service or in any other kind of business in respect to which the state board of labor and industries shall find that public necessity or convenience requires the employment of children under the age of eighteen or women by shifts during different periods or parts of the day, shall post in a conspicuous place in every room in which such persons are employed a printed notice stating separately the hours of employment for each shift or tour of duty and the amount of time allowed for meals.

It further provides that —

In cases of extraordinary emergency as defined by section one of chapter four hundred and ninety-four of the acts of the year nineteen hundred
and eleven or extraordinary public requirement, the provisions of this act shall not apply to employers engaged in public service or in other kinds of business in which shifts may be required as hereinbefore stated; but in such cases no employment in excess of the hours authorized under the provisions of this act shall be considered as legalized until a written report of the day and hour of its occurrence and its duration is sent to the state board of labor and industries.

Cases of extraordinary emergency, as defined by St. 1911, c. 494, § 1, as amended by Gen. St. 1916, c. 240, are the following: danger to property, life, public safety or public health.

I think it plain that employers engaged in furnishing war materials to the United States government, under contracts, are employers engaged in public service, within the meaning of the act. It follows that in cases of extraordinary emergency or extraordinary public requirement the provisions of St. 1913, c. 758, do not apply to such employers.

It is to be presumed that the United States government, at the time of making such contracts, has knowledge of the laws of the Commonwealth and the capacity of the employers' factories, and that it will not enter into contracts with employers in this Commonwealth requiring the operation of their factories contrary to the provisions of our laws unless an extraordinary emergency or public requirement necessitates it. It follows that if, in order to fulfill the contracts, it is necessary to operate the factories outside the provisions of said chapter 758, an extraordinary emergency or public requirement exists. This emergency or requirement exists, however, only when the necessity of so operating the factory is required to fulfill the government's contracts. In other words, it does not arise unless the work for the government, independent of other work, requires the operation of the factory in a manner contrary to the provisions of said chapter.

Accordingly, each case brought to your attention will depend upon its own facts, and in the first instance, applying the views above indicated, it is for your Board to determine whether or not an extraordinary emergency or public requirement exists.

Instances may arise where the operation of the factory in a
manner outside of the provisions of chapter 758 is requested by officials of the United States government, although the work of the factory is not devoted exclusively to the manufacture of war materials. In such instances I am of the opinion that your Board should assume that an extraordinary emergency or extraordinary public requirement exists.

Assessors of Town, Vacancy in Office of — How Filled.

The office of assessor of taxes of a town is not one which can be filled under the provisions of St. 1913, c. 835, § 429.

You request my opinion as to whether a vacancy in the office of assessor can be filled under the provisions of St. 1913, c. 835, § 429.

If at all, the vacancy could be filled only under the provisions of the second clause of the section, as the office of assessor is expressly excepted in the first clause. I am of the opinion that in view of the reference in the first clause of the section to the office of assessor as a town office, which but for the exception contained therein would be a town office, a vacancy in which would be filled by the selectmen by appointment, it was not the intention of the Legislature to include an assessor as a member of "a board" referred to in the second clause, and, therefore, the section has no application to a vacancy occurring in the office of assessor. I am fortified in this view by the fact that assessors are seldom referred to as a board in the Revisd Laws and other statutes subsequent thereto.

It is also to be observed that where the statute provides that three assessors shall be elected, two assessors may act in the event of the death of one or in the event of the refusal of one to qualify. See Cook v. Scituate, 201 Mass. 107; George v. School District in Mendon, 6 Met. 497, 511.
Motor Vehicles, Registration of — Operator's License — Status of Automobiles owned by Federal or State Government and used for Military Purposes.

The laws of this Commonwealth do not require the registration of motor vehicles owned by the United States and used in the military service, or of motor vehicles owned by the Commonwealth or by its militia or home guard when such organizations are called out for active duty by the Commander-in-Chief, nor are the operators of such motor vehicles required to be licensed while operating them for military purposes.

You have requested my opinion upon the question of whether automobiles owned by the Federal government, the militia of this Commonwealth or the Home Guard authorized by Gen. St. 1917, c. 148, must be registered before being operated on the highways, and the operators thereof licensed, in accordance with St. 1909, c. 534, and acts in amendment thereof.

Under date of May 8, 1908, in an opinion rendered to your Commission by the Hon. Dana Malone, then Attorney-General, it was held that motor vehicles owned by the United States government were exempt from registration in this Commonwealth under the statutes relating to the use and operation of motor vehicles, on the ground that a State cannot tax or subject to conditions instrumentalities of the Federal government used in carrying out its constitutional functions. A fortiori it must be held that in time of war motor vehicles owned by the United States are exempt from registration under our statutes while being used in military service, and the operators of such automobiles, while on active duty, are not required to be licensed.

Somewhat different considerations apply as regards automobiles owned by the Commonwealth or its military forces. In this case there is no constitutional objection to requiring such vehicles to be registered and the operators thereof licensed under our statutes. The question is one of interpretation, to determine whether or not it was the intention of the Legislature to include automobiles of this class. It is a well-settled rule of statutory construction that a general statute does not
apply to the sovereign in the absence of language in the act showing a contrary intention. In this connection see Teasdale v. Newell, etc., Construction Co., 192 Mass. 440.

Accordingly, I am of the opinion that automobiles owned by the Commonwealth, the militia or the Home Guard provided for by Gen. St. 1917, c. 148, when called out for active duty by the Governor as Commander-in-Chief, are not required to be registered before being operated upon the highway, nor the operators thereof to be licensed while such vehicles are being used for military purposes.

I suggest the advisability of your Commission communicating with the Governor and the United States military authorities, to the end that some distinguishing sign may be placed on such cars while in active service, so as to obviate the confusion and difficulties which would otherwise arise.

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**Fire Prevention Commissioner — Control over Cities and Towns in Metropolitan District.**

The Fire Prevention Commissioner is empowered by St. 1914, c. 795, to make regulations governing the storage, use or other disposition of dynamite or other explosives by cities and towns within the metropolitan district.

You have requested my opinion as to whether St. 1914, c. 795, gives you control of the keeping, storage, use, handling and other disposition of dynamite and other explosives by cities and towns within the metropolitan fire prevention district.

Under section 3 of that chapter all existing powers, in whatever officers vested, other than courts, "to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite . . . or any explosive or inflammable fluids or compounds, . . . are hereby transferred to and vested in the commissioner."

St. 1904, c. 370, § 2, as amended by St. 1905, c. 280, § 1, provides as follows: —
The detective and fire inspection department of the district police may make regulations, except as hereinbefore provided, for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, except fireworks and fire crackers, and may prescribe the materials and construction of buildings to be used for any of the said purposes.

There is no intimation in these statutes of any exception in favor of cities and towns, and, accordingly, I am of the opinion that your powers in this respect extend to cities and towns as well as to individuals.

Sale of Real Estate for Payment of Taxes — Requisites of — Where assessed to Heirs of Deceased Person.

It seems that a tax collector, in advertising for sale for payment of taxes real estate assessed to the heirs of a deceased person, under St. 1909, c. 490, Pt. II, § 39, should insert in the notice of the time and place of the sale the names of all heirs or devisees shown by the records of the probate court.

You request my opinion as to whether, under St. 1909, c. 490, Pt. II, § 39, a tax collector, in advertising for sale real estate assessed to the heirs of a deceased person, is required to give the names of those heirs as disclosed by the records of the Probate Court. The section in question is as follows:

The collector shall give notice of the time and place of sale of land for payment of taxes by publication thereof. Such notice so published shall contain a substantially accurate description of the several rights, lots, or divisions of the land to be sold, the amount of the tax assessed on each, and the names of all owners known to the collector.

In the case of Conners v. Lowell, 209 Mass. 111, 118, the Supreme Judicial Court, in discussing the validity of a number of tax sales made by the collector of the city of Lowell, dealt with a somewhat similar question in the following manner:

Certain lands were properly assessed to the "Heirs of George T. Woodward" and to the "Heirs of Irene E. Richardson," under R. L., c. 12, § 21
(now St. 1909, c. 490, Pt. I, § 21). In these instances the records of the Probate Court for the county in which Lowell is located showed on the 1st of May of the year in which the taxes were assessed who the heirs of Woodward and Richardson severally were, and that one or more of the heirs of each resided in Lowell. The recitals in the deeds of this class were that demand was made upon "the heirs" of deceased. The collector was required to serve a demand for the payment of the tax upon every resident assessed, or, in case of heirs of a deceased person, upon one of them, and to state in his deed "the name of the person on whom the demand . . . was made." R. L., c. 13, §§ 14, 43 (Now St. 1909, c. 490, Pt. II, §§ 14, 44). To say that a demand has been made upon the heirs of an intestate is not giving the name of the person upon whom the demand was made. The two sections cited impose upon the collector the duty of finding a resident heir, if there is one, making the demand upon him, and then naming him in the deed. To name a person is not the same as to describe him. The name of a person is the distinctive characterization in words by which he is known and distinguished from others. Such a designating appellation was not given by the words "heirs of" a person. Tax deeds lacking it are invalid. Reed v. Crapo, 127 Mass. 39. Assessors are charged with notice of what may be found upon the probate records in determining whether to make an assessment to the heirs or devisees of one deceased. Tobin v. Gillespie, 152 Mass. 219. There is no hardship in holding the tax collector to the same investigation, if necessary, in ascertaining the name of an heir.

If assessors are charged with notice of what may be found upon the probate records in determining whether an assessment is to be made to the heirs or devisees of a deceased person, and a tax collector is charged with the same notice in determining the name of an heir for the purpose of making a demand, it seems to me probable that the court would hold that a tax collector is also charged with notice of what may be found upon the probate records in determining the names of all owners known to him, for the purpose of complying with section 39. In any event, in view of the necessity for a strict compliance by a tax collector with all the requirements of law in order that a tax sale may be valid, I must advise you that the safe course for the collector to take is to insert in the notice of the time and place of the sale the names of all heirs or devisees shown by the records of the Probate Court.
Trust Companies — Reserve — Status of Government Bonds.

A trust company holding, as part of its reserve, bonds of the United States or of this Commonwealth complies with the provisions of St. 1908, c. 520, § 9, if the amount of money held by it is at all times equal to at least 5 per cent of the amount of all its time and demand deposits, and provided the amount of such bonds is sufficient to bring the total cash and bonds up to two-fifths of the total reserve required.

You have requested my opinion as to whether, under the provisions of St. 1908, c. 520, § 9, a trust company, part of whose reserve is made up of United States bonds, is required to have cash equal to two-fifths of the required reserve, or only 5 per cent of the aggregate amount of all its time and demand deposits.

The section referred to is as follows: —

Not less than two fifths of such reserve shall consist either of lawful money of the United States, gold certificates, silver certificates or notes and bills issued by any lawfully organized national banking association, and the remainder of such reserve may consist of balances, payable on demand, due from any trust company in the city of Boston authorized to act as reserve agent as hereinafter provided, or from any national banking association doing business either in this commonwealth or in the cities of New York, Philadelphia, Chicago, or Albany; but a portion of such reserve not exceeding one fifth may consist of bonds of the United States or of this commonwealth computed at their fair market value, which are the absolute property and in the possession of such corporation: provided, that the aggregate amount of lawful money of the United States, gold certificates, silver certificates, and notes and bills issued by any lawfully organized national banking association held by such corporation shall at all times be equal to at least five per cent of the aggregate amount of all its time and demand deposits, exclusive of deposits in its savings department.

While the statute is by no means clear in its provisions in this regard, it appears that the section authorizes a portion of "such reserve," meaning thereby the total reserve provided in section 8, to consist of bonds of the United States or of this Commonwealth, with the proviso immediately following that the aggregate amount of lawful money held by the company
shall be equal to 5 per cent of the aggregate deposits, exclusive of deposits in its savings department.

It is to be observed that the deposits to be considered in determining this 5 per cent will in general be a larger amount than those upon which the total reserve of 15 per cent is normally based, since that reserve is determined by excluding the amount of time deposits represented by certificates or agreements in writing upon which thirty days are still to run.

In view of the ready marketability and generally stable value of the bonds specified, it would seem that the Legislature might well have considered that such bonds to a limited extent could safely be substituted for cash. Although, in view of the difference in the class of deposits upon which the two-fifths of the reserve dealt with in the first part of the section and the 5 per cent mentioned in the latter part are to be figured, it is conceivable that the 5 per cent might in some cases exceed the two-fifths, such a condition would be most unlikely. Accordingly, it is difficult to see what purpose could have been intended by the Legislature in providing for the 5 per cent mentioned except to fix absolutely the amount of cash required as a minimum in cases where the company holds government bonds as a part of its reserve.

I am of the opinion, therefore, that a trust company holding, as a part of its reserve, bonds of the United States or of this Commonwealth complies with the provisions of this section if the aggregate amount of lawful money is at all times equal to at least 5 per cent of the aggregate amount of all its time and demand deposits, provided the amount of such bonds is sufficient to bring the total cash and bonds up to two-fifths of the total reserve required.
Constitutional Law — Effect of Unconstitutionality of Part of Statute upon Remaining Parts.

A statute which exempts agreements between farmers relative to the sale of their crops from the operation of a general act, prohibiting combinations in restraint of trade, is unconstitutional.

If such exemption was contained in a statute independent of the general act, its unconstitutionality would not affect the validity of the general act.

You request my opinion upon the following questions:

1. Whether the committee may recommend a division of House Bill No. 1805, entitled "An Act to prohibit the control of prices of commodities in common use," into two bills, the first to contain all the provisions of the present bill, and the second to contain an exemption of agreements between farmers or other persons engaged in agricultural or horticultural pursuits relative to the sale of the products of their own farms.

2. Whether, if this be done and both enactments passed as separate bills, they would be constitutional.

Your first request presents a question of parliamentary law which is to be determined by the rules and precedents of the General Court, and is one upon which I feel I should express no opinion.

In answer to your second inquiry, I beg to advise you that, in my opinion, the bill which exempts from the operation of the general act, prohibiting certain combinations in restraint of trade and monopolies, agreements between farmers or other persons engaged in agricultural or like pursuits relative to the sale of products of their own lands, under the decision of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, would be unconstitutional, as in violation of the Fourteenth Amendment to the Constitution of the United States.

The precise question presented by your order is as to what effect the unconstitutionality of this exemption would have upon the validity of the main bill. It was held in the Connolly case, above cited, that where this exemption constituted a part of the principal bill the entire bill was invalid. This is on the ground that the court could not say that the Legislature would have passed the bill if the exemption had not been included. The rule is stated in Commonwealth v. Petranich,
183 Mass. 217, 220, that "it is an established principle that where a statutory provision is unconstitutional, if it is in its nature separable from the other parts of the statute, so that they may well stand independently of it, and if there is no such connection between the valid and the invalid parts that the Legislature would not be expected to enact the valid part without the other, the statute will be held good, except in that part which is in conflict with the Constitution."

Where an exemption from the operation of a general statute is enacted subsequently to and independently of the main statute, the two bills would quite clearly seem to be separable, and the intention of the Legislature to have the main bill take effect, even though the exemption were invalid, would be sufficiently indicated. See ex parte Pfirrman, 134 Cal. 143, where it was held that an unconstitutional special act amending a general act which was passed earlier on the same day did not affect the validity of the otherwise valid general act.

Accordingly, I am of the opinion that if the exemption referred to is incorporated into a separate bill and passed subsequently to the enactment of the main provisions of House Bill No. 1805, the unconstitutionality of the exemption would not affect the validity of the principal bill.


A bill prohibiting the buying of milk or cream within the Commonwealth from producers, for the purpose of shipping it to any other city or town for sale or manufacture, unless such business is transacted regularly at an office or station within the State, and unless the vendee is licensed by the State Board of Agriculture and furnishes security conditioned upon the prompt payment by him for milk or cream purchased, would be unconstitutional if enacted into law, as it would violate the Fourteenth Amendment to the Constitution of the United States.

My opinion is requested upon the constitutionality of House Bill No. 14, entitled "An act to require the licensing of milk contractors by the State Board of Agriculture and to regulate payment by them to milk producers."
The bill in substance provides that no milk or cream shall be bought in the State from producers, for the purpose of shipping the same to any other city or town for sale or manufacture, unless such business be transacted regularly at an office or station within the State, and unless the vendee is licensed by the secretary of the State Board of Agriculture. The bill further provides that before issuing a license the secretary may require the applicant to furnish security, by bond or otherwise, conditioned upon the prompt payment by him for the milk or cream purchased, provided that the secretary may exempt from the requirement of furnishing a bond an applicant who satisfies the secretary of his financial responsibility, reliability and good intent, or who makes a sworn statement that he intends to pay his patrons at regular intervals of not more than two weeks for milk or cream furnished to him. All licenses are made subject to revocation by the secretary of the State Board of Agriculture for failure on the part of the licensee to pay his bills for milk and cream, in which case no new license may be issued to him until he shall satisfy the secretary of his good intent and ability to pay in the future, and all payments due the producers for milk or cream prior to the cancelling of the license are made in full.

The obvious purpose of the proposed act is to insure regular payments to producers for milk and cream purchased from them for the purpose of resale or manufacture.

It is unnecessary, for the purposes of your question, to determine whether legislation of the general character contemplated by the bill could constitutionally be enacted if restricted in its operation to vital necessaries, for the reason that, assuming this could be done, there are objections to the bill which, in my opinion, are fatal to its constitutionality. If a bill of this character can constitutionally be enacted, it must be upon the ground that it tends to promote the public health or welfare by insuring an adequate production and supply of such a vital necessity. All legislation to promote the public health or welfare must be reasonable and fairly adapted to effect that result.

Ordinarily, a bill which limits the right of a person to engage
in a lawful business must be uniform, and apply equally to all persons engaging in such business. Such legislation is subject to the provisions of the Fourteenth Amendment to the Constitution of the United States, which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. No arbitrary distinctions or discriminations can be made by the Legislature in enacting such laws, at least between persons within the general scope of the act. All classifications must be based upon some sound reason. As was said by the court in Commonwealth v. Hana, 195 Mass. 262, 266, in discussing the constitutionality of an act requiring hawkers and peddlers to be licensed, but exempting residents of a city or town who paid taxes there on their stock in trade and who were qualified to vote there —

Even before the adoption of the Fourteenth Amendment it was a settled principle of constitutional law that statutes in regard to the transaction of business must operate equally upon all citizens who desire to engage in the business, and that there shall be no arbitrary discrimination between different classes of citizens. Under the Fourteenth Amendment, all persons are entitled to the equal protection of the laws. . . . These cases and others show that a discrimination, founded on the residence of the applicant for a license or the amount of tax paid by him, cannot be sustained under the Constitution.

This bill applies only to persons, firms, associations or corporations that buy milk or cream within the State from producers, for the purpose of shipping the same to any other city or town for sale or manufacture. It does not apply to persons who buy milk or cream for the purpose of selling or manufacturing it in the same city or town. Neither does it apply to a person who buys milk or cream for such purpose in a city or town other than that in which he sells or manufactures it, unless the milk or cream be “shipped” to the latter place. The ordinary meaning of the word “ship” is to deliver to a common carrier for transportation. Thus, a person in these circumstances who transports the milk or cream himself or by an agent other than a common carrier, to another city or town for the purpose of sale or manufacture, would be exempt from the
requirements of this bill, while another person in the same
situation who delivers his milk for transportation to a common
carrier is required to obtain a license and to furnish security by
bond or otherwise. I am unable to discern any sound ground
for this distinction, since there appears to be no reason why a
person who ships milk or cream, for the purpose of sale or
manufacture, into a town other than that in which it was pur-
chased is not as likely to pay his milk bills to the producers as
a person who buys from producers in the same town in which
he sells or manufactures it, or a person who himself transports
milk or cream into the town or city in which it is sold or
manufactured.

The bill would permit a person whose place of business is in
Boston to purchase milk of producers in the various cities and
towns and to resell it in the same community to persons who
ship the milk to other cities or towns for the purpose of sale
or manufacture there, without either of these persons being
subject to the provisions of this act.

Indeed, it is somewhat difficult to see any sound reason why
the general public is not as much interested in securing to the
producers payment for milk and cream bought from them by a
person, firm, association or corporation, when it is bought for
its own consumption or other use, as well as when bought for
the purpose of sale or manufacture.

Furthermore, the bill applies not only to milk but also to
cream, excluding all other products of milk. If a distinction
can be made at all in regard to necessaries of life, in a bill
which is not designed for purposes of inspection or insuring
the wholesome condition of their handling or transportation,
but solely intended for insuring an adequate supply by secur-
ing payment to the producers, it necessarily must be because
there is a greater necessity for the supply of the one than of
the others. Cream, so far as I am aware, is a no greater
necessity of life than other products of milk, such as butter
or cheese. Under the operation of this bill a person buying
cream from a producer is compelled to be licensed, furnish a
bond and regularly to maintain an office or station in the
place in which he purchases the cream, while another, buying butter or cheese under the same circumstances, is under no such obligation. I am unable to see any sound ground for this distinction.

It is to be observed, as bearing upon the reasonableness of this provision, that one farmer engaged in the production of cream is given certain security by law, while his neighbor engaged in selling other products of milk is not given this security.

The bill makes no distinction between persons buying milk and cream for cash and those buying milk or cream on credit. It is manifestly unreasonable to require persons purchasing products paid for in cash at the time of the purchase to furnish security for such payment.

The bill is, in my opinion, further objectionable in that it requires not only the securing of a license and the furnishing of a bond by a person, firm, association or corporation that buys milk or cream for the purposes named in the bill, but in addition requires that such business be transacted regularly at an office or station within the State. If this latter requirement stood alone it would be doubtful whether it should be construed as requiring a person buying milk or cream to maintain an office or station at which the business of buying such milk or cream should be transacted regularly at every place where the milk or cream was purchased, or whether it required a person engaging in such business to maintain only one office or station within the State where this business is transacted regularly.

Section 1 of the bill, however, contains this further provision in regard to the issuance of a license:—

The secretary shall thereupon issue to such applicant, on payment of five dollars, a license entitling the applicant to conduct the business of buying milk and cream from producers for the purpose aforesaid at an office or station at the place named in the application.

This plainly indicates that the former construction must be adopted; that is, that all persons buying milk or cream within the State for the purposes mentioned in the bill must main-
tain an office or station, and regularly transact business at every place where milk or cream is so purchased.

This additional requirement is, in my opinion, unreasonable and burdensome. It would prevent, in times of emergency or drought, persons who ordinarily buy their milk at certain places in the State from buying milk at any other places, unless the business of buying milk at such other places be regularly transacted. It would operate to restrain trade by tending to eliminate free competition and to divide the milk-producing territory, and cannot, in my opinion, reasonably be justified as a proper exercise by the Legislature of its police power in the interests of the general welfare.

Again, section 3 of the bill provides that —

The secretary of the state board of agriculture may exempt from the furnishing of a bond, any person, firm, corporation, partnership or association applying for license as a milk contractor, who satisfies said secretary of his financial responsibility, reliability and good intent.

I doubt very much whether any law applicable to a particular business, which exempts from its operation all those who satisfy an administrative officer of their financial responsibility, reliability and good intent, can be sustained on the theory that those who satisfy such officer of these facts are as likely to pay their bills and to comply with the law without furnishing security as those who actually do furnish security, particularly when the statute leaves the determination of such exemption to the practically uncontrolled discretion of the administrative officer. As is well stated in Cooley's Constitutional Limitations, at page 559: —

Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."

There are other objections which might be urged against the bill, dependent upon the construction finally given to its terms, which I deem it unnecessary to discuss.

For the foregoing reasons I am of the opinion that House Bill No. 14 would be unconstitutional if enacted into law.
Hawker and Pedler—Itinerant Vendor—Sales of Goods by Sample for Future Delivery.

A person who conducts a transient business in a building or structure, making only bona fide sales by sample for future delivery, is not required to obtain a license either as an itinerant vendor under R. L., c. 65, §§ 1 to 12, as amended, or as a hawker and pedler under R. L., c. 65, § 13, as amended by Gen. St. 1916, c. 242.

You request my opinion as to whether a person who is conducting a transient business in a building or structure, making only bona fide sales by sample for future delivery, is required to obtain a license either as an itinerant vendor under R. L., c. 65, §§ 1 to 12, inclusive, as amended, or as a hawker and pedler under section 13 of that chapter, as amended by Gen. St. 1916, c. 242.

Such a person plainly seems to come within the definition of an itinerant vendor set forth in R. L., c. 65, § 1. By section 2, however, it is expressly provided that the first twelve sections of this chapter, regulating itinerant vendors, shall not apply to "bona fide sales of goods, wares or merchandise by sample for future delivery." This provision makes it plain that a person conducting a business such as you describe is not required to obtain a license as an itinerant vendor.

R. L., c. 65, § 13, as amended by Gen. St. 1916, c. 242, defines a hawker and pedler as follows:—

Whoever, except itinerant vendors, wholesalers or jobbers having a permanent place of business in this commonwealth and selling to dealers only, and commercial agents or other persons selling at wholesale by sample, lists, catalogue or otherwise for future delivery, goes from town to town or from place to place in the same town carrying for sale or barter, or exposing for sale or barter, goods, wares or merchandise, shall be deemed a hawker or pedler within the meaning of this chapter.

In my opinion, the phrase "except itinerant vendors" refers to itinerant vendors as defined by section 1, and not merely to such itinerant vendors as are regulated and required to be licensed by the first twelve sections of the chapter. It follows that no persons coming within the definition of itinerant

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vendors set forth in section 1 can come within the definition of hawkers and pedlers set forth in section 13, as amended.

Furthermore, a hawker and pedler is defined as a person who "goes from town to town or from place to place in the same town carrying for sale or barter, or exposing for sale or barter, goods, wares or merchandise." A person who is conducting a transient business in a building or structure cannot be said to go from town to town or from place to place in the same town, within the meaning of this definition, nor, in my opinion, does a person who carries only samples, and who sells only for future delivery by use of such samples, carry for sale or expose for sale goods, wares and merchandise. Accordingly, a person engaged in a business such as you describe is not a hawker and pedler, and is not required to obtain a license as such.

TIDEWATERS, COMPENSATION FOR DISPLACEMENT OF.

The proprietors of the land bounding on the southerly side of the Mystic River between Johnson's Wharf, so called, and the Chelsea bridge cannot now fill the flats adjoining their property except subject to the provisions of R. L., c. 96, § 23, providing for compensation for tidewater displaced. Bradford v. Metcalf, 185 Mass. 205, distinguished.

You request my opinion upon the question of whether your Commission is authorized to make a charge for tidewater displacement, under the provisions of R. L., c. 96, § 23, to present owners of property within the area bounding on the southerly side of the Mystic River between Johnson's Wharf, so called, and the Chelsea bridge.

By St. 1852, c. 105, the proprietors of land and flats within this area were incorporated under the name of the Mystic River Corporation, and the right was granted to this corporation to fill certain flats within the boundaries specified in said act, provided that the work should be commenced within three years and completed within eight years from the passage of the act. This statute was repealed by St. 1855, c. 481, except so far as it related to the incorporation of the Mystic River...
Corporation. By the later statute substantially the same rights were conferred upon the corporation, some change being made in the boundaries within which the filling could be made, and the time for the completion of the work extended to ten years from the passage of the act. It appears that the Mystic River Corporation attempted to divide the benefits among its individual members, to be held by them in severalty in proportion to their respective ownership of the shore. This attempt, together with adverse possession for a long period of time on the part of the individual owners, as against the corporation, was decided by our Supreme Judicial Court in the case of Bradford v. Metcalf, 185 Mass. 205, to have conferred upon the individual proprietors the rights which were granted to the corporation by the acts above referred to.

The time allowed to the corporation for the doing of the work was extended by various statutes, the last of which appears to be St. 1893, c. 334. That statute provided that —

The time heretofore allowed for the completion of the improvements by the proprietors of the lands, wharves and flats lying between Johnson's wharf and Elm street on Mystic river, authorized by the special laws of this Commonwealth, is, with the rights and subject to the requirements of such laws, extended ten years from the passage hereof.

In 1902 the precise question which you have presented arose in the case of Bradford v. Metcalf, supra (decided 1904), in which it was determined that the Commonwealth was not entitled to receive compensation for displacement of tidewater caused by filling in this area. It is to be noted that the displacement involved in this case was caused by work which was done before the expiration of the time allowed for the completion of the improvements, as extended by St. 1893, c. 334.

No statute subsequent to 1893, further extending the time for the completion of this work, can be found, and, accordingly, I am of the opinion that the case of Bradford v. Metcalf, supra, is not applicable to the present situation, since the grant has by its own terms expired. Before any work can now be done in this area a license must be procured from your Commission,
which will be subject to all the requirements of the general law, including payment for displacement of tidewater. The answer to your question, therefore, must be in the affirmative.

ATTORNEY-GENERAL, POWERS OF — DISTRICT ATTORNEYS.

The Attorney-General has as much power in investigating alleged criminal acts as any other official, but has no power to enforce the attendance of witnesses or the giving of testimony, that power being restricted solely to the grand jury. The Attorney-General has power equal to that of a district attorney in presenting evidence to the grand jury. Under R. L., c. 7, § 17, the Attorney-General, when present, has control of all cases, both civil and criminal, enumerated in that section.

I acknowledge the receipt of an order of the House of Representatives in the following form: —

Ordered, That the House of Representatives hereby requests the opinion of the Attorney-General upon the following question of law: Has the Attorney-General full power under existing statutes to investigate and to prosecute criminally any individual, firm or corporation that may have been guilty of fraud in the building or financing of the Hampden Railroad Corporation or in connection with the securities thereof?

I assume that the fraud therein referred to means such fraud as would constitute a criminal offence at the common law or under the statutes of the Commonwealth.

Your inquiry raises two questions: first, as to the power of the Attorney-General, under the existing statutes, to investigate any alleged criminal act; and second, as to his power to prosecute individuals, firms or corporations that may have been guilty thereof.

As to the power of the Attorney-General to investigate: It is not entirely clear what is meant by "full" power. If the meaning of this question is to inquire whether the Attorney-General has power to investigate equal to that of any other official, the question is to be answered in the affirmative. If, on the other hand, the purpose of the inquiry is to ascertain whether greater power could be given to the Attorney-General
to investigate than is now furnished under existing statutes, I answer your question in the negative. The Attorney-General may investigate an alleged criminal fraud to the extent to which the persons within whose knowledge the facts lie are willing to disclose them, but he has no power, in aid of such investigation, to summon, or enforce the attendance of, witnesses or to require any one to furnish information unless such person desires to do so. This power, in the type of case to which your question refers, is restricted solely to a grand jury.

It is to be observed that under the Constitution of this Commonwealth the prosecution of crimes punishable by imprisonment in a State prison can be only after indictment by a grand jury. *Jones v. Robbins*, 8 Gray, 329. The position of the district attorney or any other prosecuting officer before the grand jury is but that of an assistant to that body, and his right to remain and assist the grand jury is subject to their control. I think it plain that the power of the Attorney-General in assisting the grand jury is equal to that of a district attorney, and that he may assist and present evidence to that body with its consent.

The second part of your question is more difficult to answer. The powers of the Attorney-General are not defined by the provisions of the Constitution. He is the general law officer of the Commonwealth, and usually it has been assumed that, where there is no provision of statute to the contrary, he may represent the Commonwealth in all proceedings of every nature in which the Commonwealth is a party or interested. From time to time, however, statutes have been passed giving powers to the district attorneys, and your question involves a consideration of whether such statutes, by providing that the district attorney shall represent the Commonwealth in certain instances, abridge the power of the Attorney-General by placing the district attorney in exclusive control in such instances.

R. L., c. 7, § 1, provides that the Attorney-General shall appear for the Commonwealth and its officers, boards and commissions "in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official
acts and doings of said officers are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds." It also provides that "all legal services required by such officers, boards, commissions and commissioner of pilots for the harbor of Boston in matters relating to their official duties shall be rendered by the attorney general or under his direction." This statute undoubtedly gives to the Attorney-General the general control of all civil suits in which the Commonwealth is a party or interested, other than suits upon criminal recognizances and bail bonds.

Section 4 of the same chapter provides that the Attorney-General "shall consult with and advise the district attorneys in matters relating to their duties; and, if in his judgment the public interest so requires, he shall assist them by attending the grand jury in the examination of a case in which the accused is charged with a capital crime, and appear for the commonwealth in the trial of indictments for capital crimes."

Section 17 of said chapter 7 provides:—

The district attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge, shall aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally; but the attorney general, when present, shall have the control of such cases.

Statutes are to be construed, when possible, so as not to be in conflict with each other, and I am therefore of opinion that the clause in section 17, "but the attorney general, when present, shall have the control of such cases," refers not alone to the case in which the district attorney is aiding the Attorney-General in the duties required of him, but refers to all cases, both civil and criminal. By adopting such a construction the provisions of sections 1, 4 and 17 of chapter 7 are not inconsistent. Under section 1 general authority over all civil cases, other than suits on recognizances and bail bonds, is expressly
given to the Attorney-General. Under section 4 he is directed to appear in all capital cases if in his judgment the public interest so requires; and by section 17 the district attorney is required to appear in criminal cases and in civil cases unless relieved from this obligation by reason of the Attorney-General's appearing in such cases, and at all times, within their respective districts, the district attorneys are required to render such aid to the Attorney-General as he may require.

I am fortified in this view by the history of section 17. St. 1832, c. 130, § 9, provided for the division of the Commonwealth into criminal districts, and for the appointment of a district attorney for each district. It provided that the district attorneys, within their respective districts, should appear and act for the Commonwealth in all cases, criminal or civil, in which the Commonwealth should be a party to the record or be interested, in the courts of common pleas and in the Supreme Judicial Court; and that they should also, within their respective districts, perform all the duties which the Attorney-General and the solicitor general, or either of them, before the passage of the act were by law obliged to perform, provided "that the attorney general, when present, shall in any court have the direction and control of any prosecutions and suits in behalf of the commonwealth." This provision was carried into the Revised Statutes, appearing in section 38 of chapter 13, as follows: "Provided, that the attorney general, when present, shall have the direction and management of all prosecutions and suits in behalf of the commonwealth." The clause as it now reads in the Revised Laws appears for the first time in section 31 of chapter 14 of the General Statutes. Section 9 of chapter 181 of the General Statutes provides that "the provisions of the General Statutes so far as they are the same as those of existing laws, shall be construed as a continuation of such laws, and not as new enactments." This same provision is contained in the Public Statutes and the Revised Laws.

Accordingly, I am of the opinion that "such cases," referred to in the latter part of section 17 of chapter 7 of the Revised
Laws, refers to all cases, criminal or civil, in which the Commonwealth is a party, enumerated in said section.

Assuming, then, that by the use of the term "full power" to investigate is meant power equal to that of any other official, I answer your inquiry in the affirmative.

Statutes — Repeal by Implication — Board of Health.

The repeal of R. L., c. 75, § 57, by the enactment of St. 1902, c. 213, did not repeal by implication R. L., c. 75, § 53, relating to the effect of the neglect of local boards of health to give notice to the State Board of Health, now the State Department of Health, of diseases dangerous to the public health, in their respective cities and towns.

You have requested my opinion as to whether R. L., c. 75, § 53, is law at the present time, in view of the repeal of R. L., c. 75, § 57, by the enactment of St. 1902, c. 213.

R. L., c. 75, § 52, requires local boards of health having notice of a disease dangerous to the public health, in their respective cities or towns, to give notice thereof to the State Board of Health, now the State Department of Health.

Section 53 provides:

If such board refuses or neglects to give such notice, the city or town shall forfeit its claim upon the Commonwealth for the payment of expenses as provided in section fifty-seven.

Section 57 provides that reasonable expenses incurred by local boards of health, in making the provision required by law for a person infected with such a disease, "shall be paid by such person, his parents or master, if able; otherwise by the town in which he has a legal settlement. If he has no settlement, they shall be paid by the Commonwealth and the bills therefor shall be approved by the state board of charity."

St. 1902, c. 213, § 1, although it contains several new requirements with reference to notice and determination of settlement, nevertheless leaves the law substantially the same.
chapter 565, to prohibit the sale or use of fireworks and firecrackers, and to limit the time within which firecrackers and torpedoes may be used, was transferred to the Fire Prevention Commissioner by the provisions of said chapter 795. If such is the construction to be placed upon the act, the power of a city or town to prohibit the sale and use of fireworks and firecrackers throughout its limits has been taken away and given to the Fire Prevention Commissioner.

I think this is not a reasonable construction to place upon the act, and such construction would not be open to argument but for the use of the word "restrain" in section 3 of said chapter 795. While the word "restrain" may include the power to prohibit, ordinarily such power, when derived from the power to restrain, is limited to such prohibition as is incidental to the power to regulate.

In my judgment, the purpose of St. 1914, c. 795, as its title indicates, is for the better prevention of fires. Under the provisions of St. 1910, c. 565, cities and towns were not restricted, in the making of by-laws to prohibit the sale or use of fireworks or firecrackers, to those reasonably adapted to prevent fires. By the passage of the act cities and towns were given full power, in the exercise of local self-government, to determine whether or not fireworks and firecrackers should be sold at all, and to determine and limit the time within which firecrackers and torpedoes could be used. It was not a power of regulation, such as is given to the Fire Prevention Commissioner, to determine under what conditions they might be sold or used, but the power to pass by-laws and ordinances applicable throughout the city or town to prohibit absolutely the sale or use of fireworks and firecrackers, or to limit the time within which firecrackers and torpedoes could be used. This power, in my opinion, still remains in the cities and towns, and thus cannot be exercised by the Fire Prevention Commissioner. I think it plain, however, that, as incidental to his power to prescribe regulations not inconsistent with the first or second sections of chapter 565 of the Acts of 1910, for the keeping, storage, transportation, manufacture, sale and use of fireworks
and firecrackers, he may restrain or prohibit their use where such restraint or prohibition is reasonably necessary for the prevention of fires.

Workmen's Compensation Act — Authority of Counties or Municipalities to Insure Their Liability thereunder.

A county, city, town or district having the power of taxation, which has accepted the provisions of St. 1913, c. 807, may insure its liability to pay the compensation therein provided for with a liability insurance company or the Massachusetts Employees Insurance Association, but cannot take out such a policy covering some of its departments and not others.

You have requested my opinion as to whether a county, city, town or district having the power of taxation, which has adopted the provisions of St. 1913, c. 807, may insure its liability to pay compensation to injured laborers, workmen and mechanics with the association created by St. 1911, c. 751, Pt. IV, or with a liability insurance company, in accordance with section 3 of Part V of said act, or must carry its risk directly, as a self-insurer.

Gen. St. 1915, c. 244, entitled "An Act to fix responsibility for the payment of workmen's compensation by the Commonwealth and by counties, cities, towns and districts," by section 1 required every city, town, etc., which had accepted the provisions of St. 1913, c. 807, to "designate a person to act as its agent in furnishing the benefits due under chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof and in addition thereto."

Section 2 is as follows: —

This act shall not apply to counties, cities, towns and districts which are insured under the provisions of chapter seven hundred and fifty-one of the acts of the year nineteen hundred and eleven and acts in amendment thereof.

While the language here used refers in express terms only to the present ("counties, cities, towns and districts which are
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insured”), it is inconceivable that the Legislature intended to exempt only those counties, cities, towns and districts, if any, which happened to be insured on the date when the act took effect. It must have been intended as of general application, effective throughout the future, and equivalent to saying that this act shall not apply to counties, cities, towns and districts which may provide insurance under the provisions of St. 1911, c. 751.

It may be that this act was passed under the impression that St. 1913, c. 807, in conjunction with St. 1911, c. 751, authorized counties, cities, towns and districts to insure the liability thereby created or permitted, and that such assumption was erroneous. However, I deem it unnecessary to determine whether or not that is the case.

As was said by the late Chief Justice Marshall —

A mistaken opinion of the Legislature concerning the law does not make law; but if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. Postmaster General v. Early, 12 Wheat. 136, 148.

This principle has been recognized and acted upon by other courts. Norton v. Spooner, 9 Moore, P. C., 129; Queen v. Mayor of Oldham, L. R. 3 Q. B., 474; State v. Miller, 23 Wis. 634; Swann v. Buck, 40 Miss. 258, 308; State v. Eskridge, 1 Swan (Tenn.), 413.

The question then arises whether the language of this section is broad enough to confer authority to take out insurance of this type, if that authority did not already exist.

Assuming for the moment that there was no such authority, and that that fact was known to the Legislature, it would then appear that the Legislature must have intended to grant the right to insure as a necessary implication from the language used. The exemption of a person or corporation from certain liabilities, in the event some act is done, contains in itself authority to do the act.

In any event, this section is an absolute nullity unless these districts are authorized to insure—a result which, under one
of the fundamental canons of construction, is to be avoided if in any way possible.

I fail to see how the language used is any the less "competent to make the law in the future" if we assume that the Legislature was mistaken as to the existing state of the law, than if we assume the contrary. In either event the language used is the same.

It may be answered that the ultimate guide to correct statutory interpretation is the intent of the Legislature, and that this intent is different in the cases supposed, even though the language is the same. But it is the basic intent and purpose which is the real guide, and that intent, in the present case, was to exempt certain counties, cities, towns and districts from the application of the statute. This intent is carried out only if the power to insure is held to exist.

The form of your question implies some doubt because of the limited authority of taxation conferred upon cities and towns. R. L., c. 25, § 15, besides authorizing taxation for many specific purposes, contains at the end the following words: "For all other necessary charges arising in such town." This language has been employed since 1693, and though considerably limited in its scope by the decisions of the courts, it frequently has been held to include matters in which "a town or city has a duty to perform, an interest to protect, or a right to defend." Waters v. Bonvouloir, 172 Mass. 286, 288.

In Dunn v. Framingham, 132 Mass. 436, 437, it is said:—

Therefore, whenever the Legislature confers a power or imposes a duty upon towns, this clause applies and gives the towns authority to grant money which is required to enable them to execute the power or to perform the duty.

If the Legislature has authorized insurance in this class of cases, that authorization carries with it the right to expend moneys for the purpose, and to obtain those funds by taxation.

Accordingly, though with some hesitation, I have come to the conclusion that your first question is to be answered in the affirmative.
You also ask whether a municipality has the right to take out a workmen's compensation policy with an insurance company covering the laborers, workmen and mechanics of some of its departments and not such employees in other departments.

The language of neither St. 1913, c. 807, nor St. 1911, c. 751, contains any suggestion that employees of a single employer may be divided into classes, one of which shall be protected in one manner and others in another. The original idea, upon the basis of which St. 1911, c. 751, was framed, was of one insurance company, in which all employers who came under the act should insure all their employees.

Part V, section 2, of that statute defines "employee" as including "every person in the service of another," with certain exceptions not here material. Under Part II of the act "employees" of subscribers are given certain rights of compensation. Part V, section 3, permits liability insurance companies "to insure the liability to pay the compensation provided for by part two."

In my opinion, when insurance is provided under this act it applies, subject to exceptions immaterial to this discussion, to all employees of the employer obtaining the insurance, and there is no ground for excepting part of such employees by their division into departments or otherwise. Cox's Case, 225 Mass. 220.

It is perhaps needless to point out that this question does not relate to a policy of indemnity, but only to a workmen's compensation policy, under which the insurance company takes the place of the "association," under the provisions of St. 1911, c. 751.

It follows that in my opinion your second question is to be answered in the negative.
Corporations — Issue of New Stock — Right of Stockholders to participate proportionately — Constitutional Law.

A statute which purports to authorize a railroad corporation to issue certain preferred stock, exchangeable for common stock, without the consent of certain stockholders who are denied the right to participate in such issue, is unconstitutional in so far as it affects the value of the shares of such stockholders by reducing their interest in the property of the corporation.

You request my opinion upon certain questions raised by a proposed amendment to section 1 of House Bill No. 2061. The bill provides as follows:—

Section 1. The New York, New Haven and Hartford Railroad Company is authorized, for the purpose of paying its indebtedness, to issue, subject to approval of the public service commission and the provisions of chapter two hundred and ninety-nine of the General Acts of the year nineteen hundred and fifteen, shares of preferred stock of the par value of one hundred dollars each, upon which the company may pay dividends out of its net income.

Section 2. Said preferred stock may be issued under such provisions for future retirement or exchange for common stock as may be authorized by a vote of stockholders holding not less than two-thirds of the stock of such company and approved by the public service commission.

The amendment proposed adds at the end of section 1 the following:—

Provided, however, that if such preferred shares entitle the holders to any voting power, no railroad corporation or railroad holding company or express company, whether organized under the laws of this commonwealth or any other state, shall directly or indirectly subscribe for, purchase or hold any such preferred shares, and upon the offer of such preferred shares to the stockholders of the New York, New Haven and Hartford Railroad Company any railroad corporation, railroad holding company or express company which is a stockholder shall be excluded from such offer.

Your specific questions are as follows:—

1. As to whether the New York, New Haven & Hartford Railroad Company could lawfully comply with the proviso if incorporated into the act.
2. As to whether non-compliance with the proviso would result in the New York, New Haven & Hartford Railroad Company losing the right conferred by the act to pay dividends out of its net earnings.

I assume from your inquiry that certain railroad corporations, railroad holding companies and express companies are at present stockholders of the New York, New Haven & Hartford Railroad Company.

The effect of the proposed amendment is to provide, as a requirement of the new issue of the preferred shares, that none of such shares shall be offered to or held by a railroad corporation, a railroad holding company or an express company.

You have called my attention to the cases of Gray v. Portland Bank, 3 Mass. 363, and Atkins v. Albree, 12 Allen, 359. The effect of these decisions is that each stockholder has a vested right to participate proportionately in any augmentation of the capital of the corporation, at least where new stock is sold at less than its true value. The reason of this is plain. In a sense stockholders are partners. Their interest in the partnership and the partnership property is represented by the shares they hold, and if it were permissible for those in control of the corporation so to increase the capital without giving to all stockholders an opportunity to participate proportionately in such increase, the interest of the stockholders denied the opportunity to participate would arbitrarily be changed, and a part of their interest in the corporation would thereby be taken away from them. It would in effect be a taking of property without due process of law.

In this Commonwealth there is a reserve power in the Legislature to amend or alter the charter of a corporation, but this power has some limitations, and it cannot be exercised so as to take away property of the corporation or of the stockholders. Commonwealth v. Essex Co., 13 Gray, 239, 253. It follows that, in order to increase the capital stock under authority of the Legislature, it must be done in such a way as not to impair the value of the stock of shareholders who are denied the right to participate in the new issue.

So far as the proposed amendment may affect participation in
the control and management of the property of the corporation, I am inclined to the view that it is free from objection. Statutes affecting this right have in the past been enacted and have operated in this Commonwealth without question. An illustration is St. 1908, c. 636, § 2, which provides that if the increase in the capital stock does not exceed 4 per cent of the existing capital stock it may be sold at public auction without first offering the same to the stockholders. St. 1871, c. 392, provided that any increased stock should be sold at public auction. This was the only manner in which increased stock in a railroad corporation could be sold from that time until the passage of St. 1878, c. 84, which provided that such increased stock might first be offered to the stockholders. By St. 1893, c. 315, it was provided that stock in railroad corporations should first be offered to the stockholders, except that where the increase did not exceed 4 per cent it might be sold at public auction without first offering the same to the stockholders.

So far, however, as the bill, as amended, affects the value of shares of present stockholders by reducing the interest of such stockholders in the property of the corporation, I am of the opinion that it would be unconstitutional if construed as authorizing the issue of the new stock without the consent of the stockholders denied the right to participate.

The question of whether the issuance of this stock in the manner proposed would have this effect is complicated by the provision in the bill that the new stock may be issued exchangeable for common stock. This is a question of fact which, obviously, I am not in a position to determine.

Accordingly, I am of the opinion that if the bill has the effect above indicated, and is construed to authorize the issue without the consent of stockholders who are denied the right to acquire such stock, your first question is to be answered in the negative; otherwise, in the affirmative.

The answer to your second question, in the first instance, is in the affirmative, and in the second it is in the affirmative as to such stock as may be held by railroad corporations, railroad holding companies and express companies.

A general anti-trust bill which exempts agreements between farmers or other persons engaged in agricultural pursuits, relative to the sale of products of their own lands, would be unconstitutional if enacted into law, as denying to all persons within the State the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States.

You have requested my opinion upon the constitutionality of an act entitled "An act to prohibit combinations and monopolies to control prices of commodities in common use," which has been passed by both branches of the General Court and is now awaiting the approval of Your Excellency. This act is as follows:—

Section 1. Whoever agrees or combines with another to fix or control the price at which any commodity or article in common use shall be sold by any person, or to refrain from competition with any person in the buying or selling of any such commodity or article, and whoever monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any such article or commodity, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the house of correction for not more than three years.

Section 2. The provisions of this act shall not apply to agreements between vendor and vendee as to the price at which such goods are sold by the vendor to the vendee; nor to agreements between persons owning property jointly or in common as to the price at which such property shall be sold; nor to agreements between the vendor and vendee, in connection with the sale of the good-will of a business, which are reasonably necessary for the preservation and protection of the property which is sold; nor to agreements between farmers, or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms; nor shall the labor of a person be considered a commodity or article in common use, within the meaning of this act.

Section 3. The provisions of this act shall apply to, and the word "person" as used herein shall include, corporations.

Section 4. The provisions of this act shall remain in force only for the duration of the existing state of war.

House Bill No. 1805, from which this act originated, was reported on March 16, 1917, by the joint committee on the
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judiciary, and enacted by the House of Representatives in form identical with the first three sections of the present act. While the bill was in the committee on bills in the third reading of the Senate I advised the Hon. Alpheus Sanford, chairman of that committee, and the Hon. James F. Cavanagh, chairman of the joint committee on the judiciary, under date of April 5, 1917, that the bill, if enacted in the form it was then in, would, under the decision of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, be unconstitutional, and recommended that the exemption of agreements between farmers or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms, should be stricken out, in order to insure the constitutionality of the bill under the Connolly case. On the same day the Senate committee on bills in the third reading reported the bill, recommending that this be done, and the bill was accordingly passed by the Senate, with the exemption of agreements between farmers or other persons engaged in agricultural or horticultural pursuits, relative to the sale of the products of their own farms, stricken out. The House of Representatives non-concurred in this amendment, and the bill was thereupon referred to the committee on conference. This committee reported under date of May 15, 1917, recommending that the Senate recede from its amendment, and that the bill be amended by adding the following new section:—

Section 4. The provisions of this act shall remain in force only for the duration of the existing state of war.

This report was accepted by both branches of the General Court and enacted in its present form.

If the question of whether the exemption from the operation of a general anti-trust bill, of agreements between farmers or other persons engaged in agricultural pursuits, relative to the sale of the products of their own lands, would be such an arbitrary discrimination as to render the bill unconstitutional, as denying to all persons the equal protection of the laws, were to arise now for the first time, it might be con-
tended with much force that this exemption amounted to no more than a reasonable classification, on the ground that it was not within the evil sought to be remedied, since agricultural producers must dispose of their stock quickly and have no facilities for combinations. This contention is, however, now concluded by the Connolly case, supra (1902), in which the Supreme Court of the United States flatly decided that section 9 of an anti-trust statute of Illinois of 1893, which provided that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser," created an arbitrary discrimination in favor of farmers and stock raisers, and denied to the other persons falling within the scope of the bill the equal protection of the laws, guaranteed by our Federal Constitution. It further decided that this had the effect of rendering the entire act unconstitutional, since the first section of the act embraced within its terms all persons, firms, corporations or associations; and if section 9 were eliminated as unconstitutional, then the act, if it stood, would apply to agriculturists and live-stock dealers, which result the Legislature could not be held to have intended.

The Supreme Court of the United States, in the case of International Harvester Co. v. Missouri, 234 U. S. 199 (1914), decided that the exemption of labor unions from such a bill was constitutional, but cited with approval and reaffirmed the Connolly case.

This case is decisive of the present question, unless the effect of section 4 of our act is to create a sound reason for the difference in treatment accorded to farmers or agriculturists and all other persons included in the act.

It is difficult to see how such an emergency justifies the difference in treatment between these classes, and, accordingly, I am of the opinion that the act in question would be unconstititutional if allowed to become a law.
HENRY C. ATTWILL, ATTORNEY-GENERAL.


A statute making it compulsory for all employers in this Commonwealth to take out insurance under the workman's compensation act (St. 1911, c. 751), but allowing employees to claim their common-law rights under the existing compensation act, would be unconstitutional, as an unreasonable exercise of the police power.

A workmen's compensation act compulsory alike upon employer and employee would be constitutional, if limited to extra hazardous occupations and excluding persons engaged in interstate commerce, although making no provision for a trial by jury.

I acknowledge an order from the honorable House of Representatives in the following form: —

Ordered, That the House of Representatives hereby requests the opinion of the Attorney-General on the following question of law: Would House Bill No. 973 of the current year, being "An Act to require all employers coming under the provisions of the workmen's compensation act to insure for the protection of their employees," if enacted into law be valid and in accordance with the provisions of the Constitution of the Commonwealth and of the United States?

The bill referred to is as follows: —

Section 1. All employers shall secure compensation to their employees by becoming and continuing as subscribers in the association or in some stock or mutual liability insurance company authorized to do business within this commonwealth.

Section 2. If an employer shall be in default under the provisions of the preceding section for a period of thirty days, he may be enjoined by the superior court from carrying on his business while such default continues.

This bill, in my opinion, is not in proper form for enactment, since its meaning and application cannot be determined except by reference to the title. If the bill is to be enacted, section 1 should be so drawn as to refer in terms to the workmen's compensation act and its amendments. It has been called to my attention, however, that this bill has been referred to the next General Court, and, accordingly, I assume that my opinion is desired not so much with reference to a bill in this
particular form as for use in connection with some legislative action looking toward the enactment of legislation along the general lines suggested by this bill. I therefore discuss the question presented by the order as a general proposition, without reference to the particular phraseology of the bill.

I assume that the purpose of this order is to obtain an opinion as to whether a statute may be enacted requiring all persons having in their service employees who are entitled to the benefits of the workmen's compensation act (St. 1911, c. 751) and its amendments to take out insurance under its provisions. In other words, the question is: Can the provisions of this statute, by which an employer is given the right to elect as to whether he will bring himself within the statute by subscribing to the Massachusetts Employees Association or insuring with some other liability insurance company, be so amended as to require him thus to insure, without modifying the other features?

The workmen's compensation act now in force in this Commonwealth is entirely elective in character, both as to employers and as to employees. An employer may insure under its provisions or not, as he chooses. If he does not elect to do so, his employees, in case of injury, obtain more extensive rights against him than they otherwise would have, since, in that event, an employer is deprived of any defence on the ground that the employee was negligent, or that the injury was caused by a fellow servant, or that the employee assumed the risk. If the employer elects to insure, the employee is given the right to choose whether he will come within the provisions of the act and take the benefit of the insurance or not. On entering the employment or, if the employer insures after the employee has been hired, within thirty days after such insurance, the employee may claim his common-law rights by notice in writing. If he fails to do so, he is held to have chosen to accept the benefits of the act. If he affirmatively elects not to accept the benefits of the act, in case of injury he obtains only his common-law rights as they existed before the enactment of the employers' liability act. Thus it will be seen that the existing
act gives both employer and employee a right to choose whether they will come within the provisions or not, although an attempt has been made to induce both parties to choose in favor of the act by making the results of that choice in the ordinary case more attractive than the results of the opposite course.

The effect of the proposed bill is merely to deprive the employer of his right to elect not to come within the provisions of the act. The bill requires him to subscribe to the Massachusetts Employees Association or otherwise to insure, under penalty of being enjoined from carrying on his business if he fails to do so. The bill, however, leaves the remainder of the act entirely unaffected, and thus still leaves to the employee the right, upon entering the service or upon notice that the employer is insured, to choose whether he will come within the provisions of the act or not.

It was largely because of its elective character that the workmen’s compensation act, as originally enacted, was sustained by the Supreme Judicial Court as constitutional. Opinion of the Justices, 209 Mass. 607; Young v. Duncan, 218 Mass. 346.

The court has never had occasion to pass upon the question as to whether an act compulsory in any of its features could constitutionally be enacted. It is my opinion, however, that a law which requires all employers and employees who come within its scope to submit to its provisions is not beyond the power of the General Court, if such act is properly drawn and properly limited. This is made plain, so far as the Federal Constitution is concerned, by two recent decisions of the United States Supreme Court.

In New York Central R.R. Co. v. White, 243 U. S. 188, the court unanimously sustained the workmen’s compensation law of the State of New York. That law establishes forty-two groups of hazardous employments, and requires all employers and employees in such groups to comply with its provisions and to submit to the exclusive provisions for compensation which it establishes in case of personal injury. Aside from the fact that the law is compulsory in its application to all per-
sons coming within its scope, the system of compensation provided and the method of administering it are analogous to those established by our act. This statute, however, permitted an employer to secure compensation to his employees by (1) insuring in a State fund established by the act; or (2) insuring in any stock or mutual insurance company authorized to transact such business in the State; or (3) paying the compensation provided by the act himself, the right to make this latter election being conditioned upon furnishing satisfactory proof to the commission of his financial ability to pay, and, if required, upon depositing security with the commission. The court held that it is within the power of the States entirely to set aside the rights and liabilities of employers and employees in accident cases, as they exist at common law, at least provided that some reasonably just substitute is given therefor. It held that the substitute provided, of compensation upon a fixed and reasonable basis in all cases of injury, whether with or without fault, short of intentional injury on the part of either the employer or employee, was not an unreasonable nor an arbitrary scheme. In view of the fact that this statute gave to an employer a reasonable opportunity to subject himself only to liability to his employees, instead of bearing through insurance the burdens of all industrial accidents in industries of his class, none of the judges appear to have had any doubt as to the reasonable character of the statute in the liability which it imposed on employers.

In Mountain Timber Co. v. Washington, 243 U. S. 219, the court sustained the compensation act of the State of Washington, four justices dissenting. This statute was similar in character to the New York statute, and, like that statute, was applicable only to certain classes of employments expressly recognized as "extra hazardous." It differed, however, from the New York statute in one essential feature, namely, all employers were required to secure compensation to their employees through contributions to a State fund established by the act for the purpose of insuring payments of compensation under it. This statute was thus in all respects compulsory,
and required each employer coming within its scope to contribute toward the payment of compensation to all employees in industries of his class, entirely without reference to whether they received their injuries in his employ or not. In dealing with this additional feature of the Washington statute the court says:—

We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Central R.R. Co. v. White*, supra, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

It is to be noted that in sustaining this statute the court emphasizes the fact that it is applicable only to persons engaged in "industrial occupations that frequently and inevitably produce personal injuries and disability;" or, in other words, to extra hazardous occupations. This emphasis strongly suggests that if this statute had applied to all occupations, without reference to the hazard involved, it would have been declared invalid by the court.

These decisions of the Supreme Court of the United States make it plain that a workmen's compensation act enacted in this Commonwealth, applicable only to extra hazardous employments, and compulsory as to all employers and employees engaged in such industries, would not be in violation of the Constitution of the United States.
The fundamental rights guaranteed by the Declaration of Rights of the Constitution of Massachusetts are in substance the same as those protected by the Fourteenth Amendment to the Federal Constitution. In Commonwealth v. Strauss, 191 Mass. 545, 550, the Supreme Judicial Court said: —

The rights relied upon under the Fourteenth Amendment to the Constitution of the United States, and under the Declaration of Rights in the Constitution of Massachusetts, are substantially the same.

Though our court, in interpreting and applying the provisions of the Massachusetts Constitution to such a statute, is the final authority and is not bound by the decisions of the Supreme Court of the United States, yet in view of the high authority of that court and its clear reasoning in these cases it seems highly probable that our Supreme Judicial Court would arrive at the conclusion that such a statute is not inconsistent with our Declaration of Rights.

The enactment of such a compulsory law would, however, raise one serious question not involved in the decisions referred to, namely: Would a compulsory law, administered, like the present law, by a State board which determines all questions of fact, be a violation of the right to a trial by jury guaranteed by the Massachusetts Constitution? Article XV of the Declaration of Rights is as follows: —

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

It would seem that in the light of these decisions a controversy as to the extent of the injury of an employee and the amount of compensation which he is entitled to receive therefor under such an act is not a controversy concerning property, within the meaning of this provision; nor, in my opinion, is a proceeding before an industrial accident board for the
arbitration of disputed questions of fact arising between an employee and an insurance company, on a claim for compensation under a compulsory compensation act applicable to hazardous businesses, a suit between two or more persons, within the meaning of this provision. Neither the committee of arbitration provided for by the act nor the Industrial Accident Board is a court in the strict sense of the word, nor are their members judicial officers, within the meaning of the Constitution. Pigeon's Case, 216 Mass. 51, 56. The proceedings before these bodies are hearings before administrative boards authorized to make determinations of fact in the administration of the act, rather than trials of suits between two or more persons.

In my opinion, however, this matter need not be put on any narrow ground. It being held, as has been done by the Supreme Court of the United States, that actions of law between employers and employees in hazardous occupations may be abolished, and a reasonable system of compensation administered by a public board substituted therefor, it would seem to follow that where such system has been established the constitutional right to a trial by jury of questions of fact relating to such matters no longer exists. Rights of action within the scope of the system have been abolished, and, therefore, there can be no suit between parties to be determined by a jury. As the court said in Mountain Timber Co. v. Washington, at page 235: —

As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

This was also the view expressed by the Supreme Court of the State of Washington in sustaining the same law. State v. Mountain Timber Co., 75 Wash. 581.

A fundamental feature of all workmen's compensation laws is that so far as possible they shall work automatically, the amount of compensation being readily ascertainable when the extent of the injury is known. It is essential to the proper
administration of these laws that, except so far as questions of law arise, they should be executed without the intervention of the courts. To sustain as reasonable the scheme substituted for the common-law liability of the employer, and to deny the validity of a fundamental feature of its method of administration, can be regarded only as an absurd result. In my opinion, a properly limited compulsory workmen's compensation law would not be inconsistent with the provision of our Constitution guaranteeing a trial by jury.

Accordingly, I reach the conclusion that a compulsory workmen's compensation law similar either to that in force in New York or in Washington would be valid if enacted in this Commonwealth.

The proposed legislation referred to in the order of the House does not, in my opinion, make the existing workmen's compensation law of this Commonwealth a compulsory law such as those I have described. House Bill No. 973 or any similar measure, if enacted into law, would apply its compulsory provisions only to employers. It would still leave to employees their right under the existing compensation act to elect their common-law rights under the methods provided by the existing act, and thus to subject their employers to actions at law for damages in proper cases. Employers, on the other hand, would be required by such enactment to obtain insurance under the compensation act, and thus each employer would be required to bear his share of the burdens of all industrial accidents in his industry, whether caused to his employees or not, and at the same time be required to run the risk of suits by any of his employees who choose to claim their common-law rights. The only remedy of the employer would be to refuse to hire, or to discharge, any person who claimed such rights. It seems to me that to make the law compulsory as to the employer and elective as to the employee is an arbitrary discrimination and not a reasonable application of the police power. It does not appear to find justification in any industrial condition that has been called to my attention.

Furthermore, our present compensation act applies to all
employees except domestic servants and farm laborers. If the proposed compulsory insurance provisions were added to it, every person in the Commonwealth having one or more employees other than domestic servants or farm laborers would be required to secure insurance under the act. This compulsory feature would apply to all employments, whether to any appreciable extent hazardous or not. The small merchant with one clerk, the business or professional man with but one stenographer, or with only an office boy, and every other business man in the Commonwealth, no matter how trivial were the risks run by his employees in the course of their employment, would be required to insure under the act. I know of no conditions which warrant any such compulsion. The decisions of the Supreme Court of the United States to which I have referred are based largely upon the fact that the laws there under consideration are confined in their operation to industries reasonably classified as extra hazardous. In my opinion, a compulsory law applicable to all employees except domestic servants and farm laborers would be held to be unconstitutional, as an unreasonable exercise of the police power.

The proposed bill is extremely broad in its terms, and appears to apply even to persons and corporations engaged in interstate commerce. Very recent decisions of the Supreme Court of the United States indicate that if given such a broad application the statute would be to that extent in violation of the Federal Constitution. If legislation of this sort is to be enacted, it should expressly be made inapplicable to persons engaged in interstate commerce.

If a valid compulsory workmen's compensation law is enacted, I can see no reason why an employer who fails to comply with its provisions may not be subjected to the penalty of an injunction restraining him from further conducting his business until he has so complied, in the general manner provided by the second section of this bill.
You request my opinion as to whether the provision of Gen. St. 1916, c. 269, § 2 (a), 1st, relating to the exemption from the income tax of the interest on certain deposits in the savings departments of trust companies, applies only to the interest on accounts of individual depositors not in excess of the limits imposed upon deposits in savings banks, or whether it is applicable to interest on such part of all accounts as does not exceed in amount such limits.

The exemption provision to which you refer is as follows:—

Deposits in any savings bank chartered by this commonwealth or in the Massachusetts Hospital Life Insurance Company, or such of the deposits in the savings department of any trust company so chartered as do not exceed in amount the limits imposed upon deposits in savings banks by section forty-six of chapter five hundred and ninety of the acts of the year nineteen hundred and eight, and acts in amendment thereof and in addition thereto.

The words which require interpretation are “such of the deposits in the savings department of any trust company ... as do not exceed in amount the limits imposed upon deposits in savings banks.” This language must be construed in connection with the statutes relating to the establishment and taxation of such departments of trust companies.

The establishment of savings departments by trust companies was authorized and their conduct regulated by St. 1908, c. 520. No provision, however, was included for the imposition of an excise tax on such deposits nor for their exemption from taxation to the depositor.

By St. 1909, c. 342, it was provided as follows:—

Section 1. Every trust company having a savings department, as defined by chapter five hundred and twenty of the acts of the year nine-
teen hundred and eight, shall pay to the treasurer and receiver general on account of its depositors in such department, an annual tax on the amount of its deposits therein, to be assessed and paid at the rate, in the manner, and at the times specified in chapter fourteen of the Revised Laws and acts in amendment thereof and in addition thereto, for the taxation of deposits in savings banks, except that in the year nineteen hundred and ten the rate of said tax shall be one eighth of one per cent, in the year nineteen hundred and eleven one quarter of one per cent, and in the year nineteen hundred and twelve three eighths of one per cent.

Section 4. All deposits taxed under the provisions of section one of this act shall otherwise be exempt from taxation in any year in which said tax is paid.

As no limit upon the amount of deposits in the savings departments of trust companies is imposed by law, the foregoing statute was apparently thought too favorable for such depositors, and, accordingly, by St. 1911, c. 337, § 1, it was provided as follows:—

The tax imposed by section one of chapter three hundred and forty-two of the acts of the year nineteen hundred and nine shall apply only to such of the deposits therein designated as do not exceed in amount the limits imposed upon deposits in savings banks by section forty-six of chapter five hundred and ninety of the acts of the year nineteen hundred and eight and acts in amendment thereof and in addition thereto.

It is to be noted that the provision of the income tax law under consideration adopts the essential language of the statute just quoted. In Old Colony Trust Co. v. Commonwealth, 220 Mass. 409, 411, the court stated the effect of this last-mentioned statute to be as follows:—

The law as to the excise tax, which is the growth of many years, thus is made applicable only to that part of the deposits in the savings departments of trust companies which corresponds with savings bank deposits in amounts from individual depositors.

It is conceded that it has always been the practice of your department and of the trust companies maintaining savings departments to interpret this statute as subjecting to the excise
tax only the total amount of the accounts in which deposits do not exceed the savings bank limits. The opinion in the case referred to plainly indicates that that is the proper construction of the statute. It follows that before the enactment of the income tax law only such accounts as did not exceed the savings bank limits were exempt from taxation to the depositors. In my opinion, it was plainly the purpose of the income tax law, in adopting the language of the statute of 1911, merely to adopt this exemption and not in any way to extend it.

It is my opinion, therefore, that the income tax law should be construed as exempting from taxation only the income from such accounts in the savings departments of trust companies as do not exceed in the amount of their deposits the limits imposed upon deposits in savings banks.

CONSTITUTIONAL CONVENTION — OATH OF OFFICE.

Members of the Constitutional Convention are not required by law to take any oath of office.

You request my opinion upon the question of whether the persons who have been elected delegates to the convention to revise, alter or amend the Constitution of Massachusetts, under the provisions of Gen. St. 1916, c. 98, are required to take any oath before entering into the performance of their duties as such delegates.

Both the act providing for the convention and the statute law of the Commonwealth are silent upon this question, so that if required at all, it must be by virtue either of the Constitution of the United States or of our Constitution.

Article VI of the Constitution of the United States provides, in part, as follows: —

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution.
In my opinion, this article does not apply to the position of delegate to the convention in question, for the reason that the convention cannot be said to be a State Legislature, nor can the delegates elected thereto be said to be executive or judicial officers.

Mass. Const., Pt. II, c. VI, art. I, provides —

Every person chosen to either of the places or offices aforesaid [governor, lieutenant-governor, councillor, senator, or representative], as also any person appointed or commissioned to any judicial, executive, military, or other office under the government, shall, before he enters on the discharge of the business of his place or office, take and subscribe the following declaration, and oaths or affirmations, viz.:

"I, A. B., do solemnly swear and affirm, that I will faithfully and impartially discharge and perform all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of the commonwealth. So help me, God."

It is obvious that this article does not apply to the position of delegate to the Constitutional Convention.

The only other provision of our Constitution bearing upon this question is Article VI of the Amendments to the Constitution of Massachusetts, which provides, in part, as follows: —

Instead of the oath of allegiance prescribed by the constitution, the following oath shall be taken and subscribed by every person chosen or appointed to any office, civil or military, under the government of this commonwealth, before he shall enter on the duties of his office, to wit: —

"I, A. B., do solemnly swear, that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and will support the constitution thereof. So help me, God."

It is to be noted that this article applies only to offices under the government of this Commonwealth. In an opinion rendered under date of Feb. 19, 1917, I advised the joint committee of the Legislature on constitutional amendments that the position of delegate to this convention was not an office under the government of this Commonwealth, within the
meaning of Article VIII of the Amendments of our Constitution, for the reason that the word "office," as used in that article, referred to a position the incumbent of which exercises some power of the existing government and not to the position of a person selected to act in an advisory capacity in framing a scheme or change of government to be submitted to the people for adoption or rejection. The meaning of the phrase "office under the government of this commonwealth," as used in Articles VI and VIII of the Amendments, is undoubtedly the same, as both these articles were drafted at the same time by the same convention. I am of the opinion, therefore, that the position of delegate to this convention is not an office under the government of this Commonwealth, within the meaning of Article VI of the Amendments to our Constitution.

Accordingly, I am of the opinion that no oath or affirmation is required by law to be taken by delegates to the Constitutional Convention. I am fortified in this opinion by reason of the fact that it does not appear that the delegates to the convention of 1820 or the convention of 1853 took any oaths of office or otherwise, nor that it was contended that they were bound by law to do so. The convention may, of course, if it deems it fitting and appropriate to do so, prescribe oaths to be taken by its members, but this is a matter which, in my judgment, rests entirely within the discretion of the convention itself.

War Service — State Pay — Woman Yeoman.

A woman who enlists in the navy as a yeoman is not a soldier or sailor within the meaning of Gen. St. 1917, c. 211 and 332.

You ask my opinion as to whether a woman who enlists in the navy as a yeoman is entitled to State pay under the provisions of Gen. St. 1917, c. 211, as defined and extended by Gen. St. 1917, c. 332.

As I understand it, the duties performed by a woman so
enlisting are the ordinary duties performed by a stenographer or a clerk. In my opinion, a woman who performs such duties is not a soldier or a sailor, within the meaning of these statutes.

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**War Service, Scope of Statutes providing for State Pay to Persons in.**

Gen. St. 1917, c. 211, providing for State pay of $10 a month to certain persons mustered into the military or naval service of the United States "as a part of the quota of this Commonwealth," applies only to non-commissioned officers, soldiers and sailors of the National Guard of the Commonwealth, including therein any naval militia maintained by the Commonwealth, who have been mustered into the Federal service.

Gen. St. 1917, c. 332, extends the benefits conferred by chapter 211 to any non-commissioned officer or enlisted man who enlists or re-enlists as a resident of this Commonwealth in the regular or volunteer forces of the United States Army, Navy or Marine Corps subsequent to Feb. 3, 1917, and who has been for at least six months legally domiciled in the Commonwealth, although such enlistment or re-enlistment actually takes place in another State.

You have asked my opinion as to several questions which have arisen in carrying out the provisions of Gen. St. 1917, c. 211, as defined and extended by Gen. St. 1917, c. 332.

Section 1 of chapter 211 provides, in part, as follows: —

There shall be allowed and paid out of the treasury of the commonwealth to each non-commissioned officer, soldier and sailor, who has been, or is hereafter, mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign country, the sum of ten dollars per month. . . .

Section 1 of chapter 332, for the purpose of carrying out the foregoing provision, defines the war with the German Empire as having begun Feb. 3, 1917, and then provides as follows: —

And any non-commissioned officer or enlisted man having a residence of at least six months within this state and serving to the credit of this commonwealth in the regular or volunteer forces of the United States army, navy or marine corps, whose federal service began subsequent to said February third, nineteen hundred and seventeen, is eligible under the provisions of the above acts.
The first question to be decided in determining the persons who are entitled to receive State pay under the provisions of these statutes is the proper interpretation of the words "as a part of the quota of this commonwealth," as they appear in chapter 211.

The word "quota" implies allotment or assignment of a certain specified number of men which it is the duty of the Commonwealth to raise for the military or naval service of the United States. So far as I am aware, the only quota of this character in any manner as yet assigned to the Commonwealth by the Federal government grows out of the provision for the maintenance of a portion of the National Guard by the Commonwealth. Section 62 of the Act of Congress approved June 3, 1916, entitled "An Act for making further and more effectual provision for the national defense and for other purposes," provides that the number of enlisted men of the National Guard to be organized by each State within one year from the passage of that act in accordance with its provisions shall be in the proportion of 200 men for each senator and representative in Congress from the State, and further provides that this number shall be increased not less than 50 per centum in each year thereafter until a total peace strength of not less than 800 enlisted men for each senator and representative shall have been reached.

Section 117 of this act, in authorizing the formation of a naval militia, contains the following proviso: —

Provided, that each state, territory or district maintaining a naval militia, as herein provided, may be credited to the extent of the number thereof in the quota that would otherwise be required by section sixty-two of this act.

This provision plainly seems to indicate that the word "quota" is there used to indicate the total number of enlisted men of the National Guard which each State is required to raise.

In my opinion, therefore, the provision for State pay, contained in chapter 211, applies at present only to the non-com-
missioned officers, soldiers and sailors of the National Guard of the Commonwealth, including therein any naval militia maintained by the Commonwealth, who have been mustered into the Federal service. It applies, however, to all such persons, without condition as to length of residence in the Commonwealth.

Chapter 332 does two things: It first defines the date of the beginning of the war with the German Empire as February 3 last; and, in the second place, it somewhat extends the right to receive State pay granted by chapter 211. It provides that, in addition to the persons entitled to State pay under chapter 211, any non-commissioned officer or enlisted man having a residence of at least six months within this State and serving to the credit of the Commonwealth in the regular or volunteer forces of the United States Army, Navy or Marine Corps shall be entitled to that pay, provided his Federal service began subsequent to the beginning of the war, defined as being upon the 3d of February. This provision, in my opinion, extended the right to receive State pay to all persons enlisting in the United States Army, Navy or Marine Corps subsequent to February 3, provided such persons had at the time of their enlistment been residents of the Commonwealth for at least six months. By its terms, however, it does not apply to persons who had enlisted in the United States Army, Navy or Marine Corps prior to the 3d of February.

In my opinion, the condition of residence for six months within the Commonwealth, applicable only to the additional persons entitled to State pay under chapter 332, must be interpreted as requiring that the applicant for such State pay shall have been legally domiciled within the Commonwealth for a period of at least six months before his enlistment.

A question of some difficulty arises in determining when the Federal service of an applicant under chapter 332 began where his original enlistment was before the beginning of the war and has been followed by a re-enlistment after February 3 and immediately at the expiration of his original term of service, so that in a sense his Federal service has been of continuous duration. On the whole, however, in view of the
obvious purpose of the statute to encourage enlistments of citizens of the Commonwealth, it is my opinion that the term "Federal service," as used in this statute, should refer only to service under the current enlistment of the applicant.

Accordingly, in case of re-enlistment after the beginning of the war, the enlisted man, if then legally resident in the Commonwealth for the required period, is entitled to State pay.

The result of the foregoing is that all non-commissioned officers, soldiers and sailors who have been mustered into the military or naval service of the United States as a part of the National Guard of the Commonwealth, including in that description any naval militia of the Commonwealth, for service in connection with the war with the German Empire, are entitled to State pay from the time when they entered the service of the United States, without reference to their legal residence. In addition to the foregoing, any non-commissioned officer or enlisted man who enlists or re-enlists in the regular or volunteer forces of the United States Army, Navy or Marine Corps subsequent to Feb. 3, 1917, is entitled to such pay, provided that, at the time of the beginning of his Federal service by such enlistment or re-enlistment, he has been for at least six months legally domiciled in the Commonwealth and enlisted as a resident thereof. In my opinion, it is not a requirement that such enlistments or re-enlistments in the Army, Navy, or Marine Corps of the United States shall take place within the Commonwealth. It is only essential that the applicant, at the time of such enlistment, shall be a legal resident of the Commonwealth.

The determination of the question as to whether a given person is a legal resident of the Commonwealth may often be a matter of some difficulty, particularly in the case of re-enlistment of a man who has been for some time in the Federal service. If such a man originally enlisted from Massachusetts, was then legally domiciled here, and his immediate family or next of kin were then, and still are, domiciled here, it would seem that he had retained his legal residence in the Commonwealth. If, at the time of his original enlistment, he or his
next of kin were domiciled elsewhere, but the latter have since acquired a legal residence here, and the applicant has in good faith treated this change of residence on the part of his family as a change of his own residence, it would seem that it might well be said in such a case that he had acquired a legal residence here and was entitled to State pay under the provisions of chapter 332 in case of subsequent re-enlistment. Of course, the reverse of that proposition would also be true, namely, that a change of domicile from Massachusetts to another State by the family of a man who had originally enlisted from Massachusetts should ordinarily be taken as meaning that he, too, has changed his residence to the other State. These various questions of legal residence, however, are all matters of fact which must be determined in the particular cases as they arise.

Street Railways — Power of Company to sell its Railway.

The sale by a street railway company of its electric cars to another street railway company, and of its trolley lines, poles, fixtures and land to a third company, is illegal and in violation of St. 1906, c. 463, Pt. III, § 51.

You have communicated to me certain facts with reference to a particular street railway company, stating that it had sold its electric cars to another street railway company, from which company it now leases them, and had sold its trolley lines, poles, fixtures and land to another corporation. I infer from your letter that you desire an opinion as to the legality of such transfers.

Apparently, this is governed at present by the provisions of St. 1906, c. 463, Pt. III, § 51, which is as follows: —

A street railway company shall not lease or contract for the operation of its railway for a period of more than ninety-nine years without the consent of the general court, nor, except as provided in the three following sections, shall it sell its railway unless authorized so to do by its charter or by special act of the general court.
I understand that no authorization under the three sections following section 51 has been obtained, and that neither the charter nor any special act of the General Court authorizes the transfers mentioned.

So far as this section deals with a sale, it was first enacted by St. 1864, c. 229, § 24, which was as follows:—

No street railway corporation shall sell or lease its road or property unless authorized so to do by its charter, or by special act of the legislature.

In 1871 this section was amended by omitting the words "or property." As so changed, the section in substance has remained until the present time, except for the substitution of the word "railway" for "road" in the statute of 1906.

In the case of Richardson v. Sibley, 11 Allen, 65 (1865), the Supreme Judicial Court decided that this section prevented a general mortgage of all the property, real and personal, of a street railway corporation. The court said, at page 70:—

But any alienation, either in fee, or for the period of its corporate existence, or for any less term, of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and the meaning of this prohibition.

In this opinion the court laid some stress upon the fact that the prohibition extended to a sale or lease of the "property" as well as the "road" of the street railway corporation, and pointed out that this should not be construed to prevent the disposal of unimportant portions of the property of the corporation, as "a few horses or cars, or worn-out rails, or other articles the sale or transfer of which would not impair its powers to carry on its business."

Despite the fact that since 1871 the word "property" has not appeared in the statute, the decisions of the Supreme Judicial Court seem to imply that the rule as laid down in Richardson v. Sibley is still law.

In Clemons Electrical Manfg. Co. v. Walton, 206 Mass. 215, the court says:—
But a transfer of the property necessary to enable a railway to perform its duties as a public carrier is as much forbidden by Pub. Sts. c. 113, § 56 (now St. 1906, c. 463, Pt. III, § 51), as a transfer of its franchise. That was pointed out in the original case of Richardson v. Sibley, 11 Allen, 65, 70, and reaffirmed and decided in Clemons Electrical Manuf. Co. v. Walton, 173 Mass. 286.

In French v. Jones, 191 Mass. 522, the court also said:—

Our earliest statute upon this subject provided that "no street railway corporation shall sell or lease its road or property unless authorized so to do by its charter, or by special act of the Legislature." St. 1864, c. 229, § 24. And "any alienation, either in fee, or for the period of its corporate existence, or for any less term, of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and meaning of this prohibition." Gray, J., in Richardson v. Sibley, ubi supra. And subject to certain limitations not material to the decision of this case, the same prohibition has since remained in force (Pub. Sts. c. 113, § 56; St. 1897, c. 269; R. L. c. 112, §§ 85 et seq.), except that in 1900 power was given to the receiver of a street railway company to make such a sale of its road, property, locations and franchises as is here in question.

Apart from this statutory prohibition there are cases holding that transfers of the corporate franchise or of the entire property of public service corporations without express authorization of the Legislature are ultra vires, because of the fact that thereby the public service corporation disables itself from the performance of the duties for which it was incorporated. See Davis v. Old Colony R.R. Co., 131 Mass. 258, and cases cited; Braslin v. Somerville Horse R.R. Co., 145 Mass. 64.

Accordingly, I am of the opinion that these transfers by the street railway company first referred to, taken together, inasmuch as they include practically all of the property of that corporation, and thereby disable it from the performance of its public duties, are illegal and beyond the powers of that corporation effectually to complete.

Apparently, action by your Commission in such a situation is still governed by the provisions of St. 1906, c. 463, Pt. I, § 8, which is as follows:—
If, in the judgment of the board, a railroad corporation or street railway company has violated a law, or neglects in any respect to comply with the terms of the act by which it was created or with the provisions of any law of this commonwealth, it shall give notice thereof in writing to such corporation or company; and thereafter, if such violation or neglect continues, shall forthwith present the facts to the attorney-general for his action.

It would seem that notice under this section should be given to the two corporations mentioned as grantees, inasmuch as they are participating in the illegal transaction.

INToxicating Liquors — Delivery by Railroad.

Under R. L., c. 100, § 49, as amended by St. 1912, c. 201, a railroad company may lawfully deliver at its railroad station intoxicating liquors to the actual person shown upon the package as the purchaser or consignee.

In consequence of a complaint relative to the practices of the New York, New Haven & Hartford Railroad Company in connection with the delivery of shipments of intoxicating liquors in no-license towns, you have requested my opinion upon the following question:

Do the provisions of R. L., c. 100, § 49, as amended by St. 1912, c. 201, providing that packages of liquors shipped to no-license towns be plainly marked with the name and address, by street and number if there be such, of the consignee, and that delivery to a person other than the owner or consignee, "or at any other place than is thereon marked," shall be deemed a sale, constitute a requirement to deliver only at the residence or place of business of the consignee, the address to be shown on the package by some form of description, using the street and number, if any, and by implication forbid the delivery of such a shipment to the consignee at the freight station of the railroad company?

R. L., c. 100, § 49, as amended, is as follows:

Spiritsuous or intoxicating liquor which is to be transported for hire or reward for delivery in a city or town in which licenses of the first five classes are not granted, shall be delivered by the seller or consignor to a railroad corporation or steamboat corporation operating a regular line of steamships to Martha's Vineyard or Nantucket, or to a person or cor-
poration regularly and lawfully conducting a general express business, and to no other person or corporation, in vessels or packages plainly and legibly marked in a conspicuous place on the outside with the name and address, by street and number, if there be such, of the seller or consignor, and of the purchaser or consignee, and also plainly and legibly marked on the same place or label as the addresses aforesaid, with the kind and amount of liquor therein contained. No person or corporation not regularly and lawfully conducting a general express business, except a railroad corporation or steamboat corporation operating a regular line of steamships to Martha's Vineyard or Nantucket, or a street railway corporation authorized to carry freight or express, shall receive such liquors for transportation for hire or reward for delivery in a city or town, in which licenses of the first five classes are not granted, nor transport or deliver such liquors in such cities or towns. Delivery of such liquors or any part thereof by a railroad corporation, or steamboat corporation or by a person or corporation regularly and lawfully conducting a general express business to a person, other than the owner or consignee, whose name is marked by the seller or consignor on said vessels or packages, or at any other place than is thereon marked, shall be deemed to be a sale by any person making such delivery to such person in the place in which such delivery is made.

It is the interpretation of the last sentence of this section which raises the question involved. The language here used is substantially the same as that found in the original enactment upon this subject, St. 1897, c. 271.

Section 1 of that statute is as follows:—

All spirituous or intoxicating liquors to be transported for delivery to or in a city or town where licenses of the first five classes have not been granted, when to be transported for hire or reward, shall be delivered by the seller or consignor to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business, in vessels or packages plainly and legibly marked on the outside with the name and address, by street and number, if there be such, of the seller or consignor, and of the purchaser or consignee, and with the kind and amount of liquor therein contained. Delivery of such liquors or any part thereof, either by a railroad corporation or by a person or corporation regularly and lawfully conducting a general express business, or by any other person, to any person other than the owner or consignee whose name is marked by the seller or consignor on said vessels or packages, or at any other place than thereon marked, shall be deemed to be a sale by any person making such delivery to such person in the place where such delivery is made.
Section 2 required "every railroad corporation" or person conducting a general express business, receiving such liquors, "or actually delivering intoxicating liquors to any person or place in a city or town described in section one of this act," to keep a book showing the date of receipt, a correct transcript of the marks required, date of delivery and name of person to whom delivered, the latter signed by the person receiving.

Read with strict literal accuracy, this last sentence of section 1 makes delivery either to any person other than the owner or consignee or at any place other than that marked on the package a sale by the person making such delivery to the person in the place where delivery is made.

However, I am unable to believe that the Legislature intended that this act should be so construed. It would seem more reasonable to interpret the sentence to read, "delivery other than to the owner or consignee or at the place thereon marked shall be deemed to be a sale."

It is a matter of common knowledge that railroad corporations in this Commonwealth do not deliver freight from house to house or other than at their freight houses or established delivery points. This fact was recognized by the Supreme Judicial Court in the case of Commonwealth v. Mixer, 207 Mass. 141, 147, per Rugg, J.:—

Moreover, railroads and street railways, common carriers which do not deliver merchandise to houses or places of business, are exempted from the operation of the statute (St. 1906, c. 421).

It is plain from an examination of St. 1897, c. 271, that it was not intended thereby to prohibit the transportation and delivery of intoxicating liquors in no-license cities or towns by railroad corporations. The first sentence of the section requires that sellers deliver the liquors "to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business." Obviously, if intoxicating liquors transported by a railroad corporation cannot lawfully come into possession of the consignee, the inclusion of the railroad cor-
poration in the classes of persons to whom the seller might deliver liquors for transportation is an absurdity.

It may be suggested that under this 1897 statute a railroad corporation might transport liquors to its freight station and there turn them over to a person or corporation conducting a general express business, as a connecting carrier, and therefore the reasoning above is inconclusive; but it would seem that such delivery by the railroad corporation is as much within the literal prohibitions of this section as that involved in the present question, and it is also doubtful whether the carting of freight or packages from a freight station to a house in the same town is the transaction of an express business. See Commonwealth v. Peoples Express Co., 201 Mass. 564, 579.

It is only "liquors to be transported for delivery" to which this statute applies. Wherever "delivery" is used in this act it seems to refer to the ultimate delivery to the consignee, and it is for that purpose that the seller is to turn over the liquors either to a railroad corporation or to a person or corporation regularly and lawfully conducting a general express business.

It would seem that the clauses of this last sentence were used distributively, — delivery to the person addressed, applying primarily to the class of carriers first mentioned, to wit, railroads; and delivery at the place designated, applying primarily to those mentioned next, to wit, the express companies. Such application of the words would be in accordance with the well-known practice of each class as to manner of delivery.

Section 2 of said act, as shown by the quotation therefrom, expressly recognizes that railroad corporations may lawfully perform this service, and further indicates quite clearly that it was not intended to require delivery to the person at the place marked on the package by the seller, but only to compel delivery either to the person or at the place shown.

The language is, "Every railroad corporation or person . . . conducting a general express business, receiving . . . liquors for delivery, or actually delivering intoxicating liquors to any person or place in a city or town described in section one."
In my opinion, this prohibition of the statute is not violated where delivery is made to the consignee in person or at the place marked upon the package as the address of the purchaser or consignee.

Apparently, this was the substance of the charge of the presiding justice in the case of Commonwealth v. Cronan, 220 Mass. 467. The language of the court is as follows: —

The presiding judge in his instructions to the jury carefully and repeatedly stated that the charge against the defendant was keeping intoxicating liquors with intent to sell the same, and after referring to St. 1912, c. 201, and reading it to the jury, pointed out that before a delivery of intoxicating liquors could be deemed to be a sale the delivery must be of such liquors as are referred to in the statutes, and by a person doing a general express business, and that the liquors must have been delivered either to a person other than the owner or consignee whose name is marked on the vessel or package, or to some other place than is marked thereon.

I am aware that there is some language in the opinion in the case of Rea v. Aldermen of Everett, 217 Mass. 427, 429, which, taken strictly, would imply an opposite construction, but it seems that the court was not dealing expressly with this point, and, in my opinion, did not intend to pass upon the question here involved.

It has several times been said that —

The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection when setting up the fraudulent defence that the liquors found in the possession of the carrier were for delivery by him as such to some person. Commonwealth v. Intoxicating Liquors, 172 Mass. 311, 315.

Obviously, the interpretation outlined above in no way violates the purpose of the act as here defined, and the tracing of the liquors from the seller to the real purchaser is as complete where delivery is made to the party in person, designated as the purchaser, as where made at the address specified.

Assuming that this is the correct interpretation of the act as
passed in 1897, the later amendments to the particular section have not changed its effect in this respect. Other acts upon the same subject which have since been enacted can give little light as to the intention of an earlier Legislature, and none of them seem at all inconsistent with this construction.

Accordingly, though with some hesitation, I have come to the opinion that delivery by a railroad corporation at its freight station to the actual person shown upon the package as the purchaser or consignee of the intoxicating liquors is not illegal by virtue of the provisions of R. L., c. 100, § 49, as amended by St. 1912, c. 201.

Motor Vehicles used by the Federal or the State Government for Military Purposes—Registration of—Licensing of Operators of.

Motor vehicles which are loaned to the Federal or the State Government for military purposes are not required to be registered, nor the operators thereof to be licensed, while such vehicles are actually being used for military purposes and operated by persons in the military service of the Federal or State government in the performance of their duty.

You request my opinion upon the question of "whether motor vehicles which are in the control of, but not owned by, the United States or the Commonwealth must be registered, notwithstanding the fact that they are to be used solely for military service; and whether the operators of such vehicles must be licensed."

Under date of April 24, 1917, I advised your Commission that motor vehicles owned by the United States or by the Commonwealth are not required by the laws of this Commonwealth to be registered while being used for military purposes, nor the operators thereof to be licensed.

In my opinion, the same answer must be given with reference to cases where motor vehicles are loaned to the Federal or the State government for military purposes, the title remaining in the individual owners, namely, that while such vehicles are actually being used for military purposes and
operated by persons in the military service of the Federal or the State government in the performance of their duty, they are not required to be registered, nor such operators to be licensed.

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**Employees of Commonwealth — Compensation of — Temporary Increase — Watchmen at State Prison.**

Watchmen at the State Prison who have received an increase in salary under R. L., c. 223, § 19, as last amended by St. 1914, c. 554, since July 1, 1916, are not entitled to receive the additional compensation provided by St. 1917, c. 323, unless they choose to waive such increase; nor will any of such watchmen be entitled to any increase in pay hereafter under R. L., c. 223, § 19, as amended by St. 1914, c. 554, while they continue to receive additional compensation under Gen. St. 1917, c. 323.

You request my opinion upon whether any or all of the watchmen in the State Prison are entitled to the temporary increases of salary provided for by Gen. St. 1917, c. 323.

Sections 1 and 2 of said chapter provide for a temporary increase in salary of 20 per cent, but not to exceed $100 per year, for all persons who have been regularly in the employ of the Commonwealth from the first day of July, 1916, based upon the salary received on that date. Section 4 of this act is as follows:—

This act shall not be construed as in any way repealing or abridging any act providing for the increase of compensation of any employees of the commonwealth, including employees whose salaries, under existing provisions of law, are made to increase automatically, by graduated installments, from year to year, until the maximum therein provided has been reached, but employees who accept additional compensation under the provisions of this act shall not, during such time as they shall continue to receive the additional compensation herein provided for, be entitled to the benefit of any increase in compensation which they may have received since the first day of July in the year nineteen hundred and sixteen, or to which they may hereafter become entitled. But any such employee may at any time elect to receive any increase in compensation to which he might otherwise be entitled in lieu of the additional compensation hereby provided for.
HENRY C. ATTWILL, ATTORNEY-GENERAL.

R. L., c. 223, § 19, as last amended by St. 1914, c. 554, provides that watchmen in the State Prison who have been in said service for less than one year shall receive an annual salary of $800; watchmen who have been in said service for more than one year and less than three years shall receive an annual salary of $1,000; watchmen who have been in said service for three years and less than five years shall receive an annual salary of $1,200; and watchmen who have been in said service for five or more years shall receive an annual salary of $1,400.

In my opinion, any of the watchmen at the State Prison who have received an increase in salary since the first day of July, 1916, are not entitled to the benefit of the additional compensation provided for by Gen. St. 1917, c. 323, unless, of course, they choose to waive such increase; nor will any of the watchmen be entitled to any increase in pay hereafter under the provisions of St. 1914, c. 554, while they continue to receive the additional compensation provided for by the act of 1917. For example, a watchman who had been in said service more than five years on July 1, 1916, and who was, therefore, receiving a salary of $1,400 a year, would be entitled to an increase of $100; but a watchman who had completed his five-year term of service since July 1, 1916, and whose salary, therefore, was increased from $1,200 to $1,400 since that date, would not, as a practical matter, be entitled to receive the additional compensation provided for by the act of the present year, since, in order to be entitled thereto, it would be necessary for him to waive the increase in salary of $200, which, obviously, he would not elect to do.
EMPLEES OF COMMONWEALTH — COMPENSATION OF —
Temporary Increase.

The temporary increase in the compensation of certain employees of the Commonwealth, provided for by Gen. St. 1917, c. 323, is to be apportioned to each of the monthly payments of salary, and is not to be paid in a lump sum.

The maximum increase in salary of an employee coming within Gen. St. 1917, c. 323, § 3, is one-half of the maximum increase of $100 provided for by section 2 of that act.

An employee of the Commonwealth who comes within the provisions of St. 1914, c. 605, by accepting the temporary increase provided by Gen. St. 1917, c. 323, waives the benefit of any increase in salary received under said chapter 605 after July 1, 1916, so long as such employee continues to receive the temporary increase under said chapter 323. But upon the relinquishment by such employee of the temporary increase, he becomes entitled to the increase in compensation to which he would otherwise be entitled under St. 1914, c. 605.

You have requested my opinion as to certain questions which have arisen as to the proper interpretation of Gen. St. 1917, c. 323, entitled "An Act to authorize temporary increase in the compensation of certain employees of the Commonwealth."

In my opinion, the increase in compensation provided for by section 2 of that statute is to be regarded as an addition to the regular salary of the employees entitled to it. Thus, it is to be apportioned to each of the monthly payments of salary, and is not to be paid in a lump sum.

Section 3 provides, in part, as follows: —

All persons included in the provisions of section one who are receiving from the commonwealth as part of their compensation maintenance in full or in part, provided that the amount of compensation which they receive in full for all services in addition to such maintenance does not exceed twelve hundred dollars a year, shall, for the period specified in said section, receive as additional compensation a sum equal to one half the additional compensation provided for by section two. . . .

In my opinion, the maximum increase of an employee coming within the terms of this section is to be one-half of the maximum increase of $100 provided for by section 2. It is, therefore, to be $50.

Section 4 is as follows: —
This act shall not be construed as in any way repealing or abridging any act providing for the increase of compensation of any employees of the commonwealth, including employees whose salaries, under existing provisions of law, are made to increase automatically, by graduated installments, from year to year, until the maximum therein provided has been reached, but employees who accept additional compensation under the provisions of this act shall not, during such time as they shall continue to receive the additional compensation herein provided for, be entitled to the benefit of any increase in compensation which they may have received since the first day of July in the year nineteen hundred and sixteen, or to which they may hereafter become entitled. But any such employee may at any time elect to receive any increase in compensation to which he might otherwise be entitled in lieu of the additional compensation hereby provided for.

It is my opinion that under the provisions of this section any employee receiving compensation under St. 1914, c. 605, who accepts the temporary increase provided by chapter 323, is required thereafter to waive the benefit of any increases of salary received under the provisions of chapter 605 after July 1, 1916, so long as such person continues to receive such temporary increase. In my opinion, however, the last sentence of section 4 of said chapter 323 must be interpreted as authorizing any employee who comes within the provisions of St. 1914, c. 605, and has accepted the temporary increase, to relinquish that increase and to receive the compensation to which he would at that time be entitled under chapter 605 if he had not accepted the temporary increase. Any other interpretation of this last-mentioned provision would result in penalizing an employee for accepting the temporary increase.

It is to be noted, however, that increases under the provisions of St. 1914, c. 605, are not strictly automatic. By section 4 of said chapter 605 they are made dependent upon a certificate by the head of the department to the Auditor that the conduct of the clerk or stenographer has been in all respects satisfactory and that he or she is entitled to the increase. It is not entirely clear that the head of a department is authorized to issue such certificates for more than one annual increase of $50 at one time. Accordingly, if the head of
a department desires that an employee coming within the provisions of this statute should continue to have the benefit of the annual increases provided by it, he should annually certify under the provisions of section 4 of said chapter 605 that such employee is entitled to this increase, even though in fact the employee is not accepting the increase but is claiming the temporary compensation provided by Gen. St. 1917, c. 323. Such a course is desirable in order that when the employee desires to give up the temporary increase and return to the system of compensation provided by St. 1914, c. 605, there may be no question as to his status under that statute at that time.

War Service — State Pay — Aviation Corps — Medical Department.

Persons having a residence of at least six months within the Commonwealth, who, subsequent to Feb. 3, 1917, have enlisted in the aviation section of the signal corps of the United States Army or in the medical department of the army, whether as members of the regular force or of the enlisted reserve corps, and who have been called into active service and assigned to that department, are eligible to the State pay provided by Gen. St. 1917, cc. 211 and 332.

You request my opinion as to whether citizens of Massachusetts who enlist in the aviation corps or in base hospital units are entitled to receive payments under Gen. St. 1917, cc. 211 and 332.

As I understand it, neither of the units to which you refer is connected with the National Guard of the Commonwealth, and therefore these men do not form a part of the quota of the Commonwealth, within the meaning of chapter 211. In order to bring them within the additional rights created by chapter 332, it must appear that the units with which they are connected are a part of the regular or volunteer forces of the United States Army, Navy or Marine Corps as recognized by the Federal statutes.

The act of Congress approved June 3, 1916, regulating the organization of the army of the United States, provides, in
section 13, for an aviation section of the signal corps. Connected with this section are certain enlisted men, including non-commissioned officers. These men, in my opinion, if otherwise entitled, come within the provisions of chapter 332.

Section 10 of the Federal statute to which I have referred provides for the organization of the medical department of the regular army, and establishes a certain enlisted force. In my opinion, the members of this force, if otherwise entitled, come within the provisions of chapter 332.

This Federal statute also provides for the enlisted reserve corps as one of the sections of the army of the United States. This corps is established, as provided in section 55, "for the purpose of securing an additional reserve of enlisted men for military service with the Engineer, Signal, Quartermaster Corps, Ordnance and Medical Departments, of the Regular Army." The men enlisted in this corps, when called into active service, have all the authority, rights and privileges of men of like grades in the regular army; they wear the same uniform, perform the same duties, and receive the same pay as such grades. The President is authorized to assign them "as reserves to particular organizations of the Regular Army." In my opinion, the members of this enlisted reserve corps, when called into active service and duly assigned to the medical department of the regular army, or to any other particular organization of that army, if otherwise entitled, come within the provisions of chapter 332. Thus, citizens serving in the base hospital units to which you refer, if members of the enlisted force of the medical department of the regular army or members of the enlisted reserve corps called into active service and duly assigned to that department, are entitled to receive the payments provided for by Gen. St., cc. 211 and 332.
Appointment to fill an Anticipated Vacancy in Public Office, Validity of.

A valid appointment may be made to fill an office created by a statute after the passage of that statute and before it goes into effect.

You request my opinion in relation to the appointment of the two additional members of the Industrial Accident Board authorized by Gen. St. 1917, c. 297, entitled "An Act relative to the settlement of claims under the workmen's compensation act." The question submitted is: Has the Governor authority to name the two additional members of the Industrial Accident Board, as authorized by this act, before the date that the act goes into full effect?

R. L., c. 8, § 1, provides: —

A statute shall take effect throughout the commonwealth, unless otherwise expressly provided therein, on the thirtieth day next after the day on which it is approved by the governor, or is otherwise passed and approved, or has the force of a law, conformably to the constitution.

I think it clear that by reason of this statute the act did not go into full effect until the thirtieth day next after May 24, 1917, the date when it was approved by the Governor.

Mechem's Public Offices and Officers, § 133, lays down the following proposition: —

A prospective appointment to fill an anticipated vacancy in a public office made by the person or body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of express law forbidding it, a legal appointment and vests title to the office in the appointee.

See also Whitney v. Van Buskirk, 40 N. J. L. 463.

I have been unable to find any authority to the contrary. It would seem as if the principle laid down in Mechem's Public Offices and Officers would apply in the present instance, although I have been unable to find any case in which this precise question has arisen. The reason for this doctrine is to prevent hiatuses occurring. If the appointment could not be
thus made, many instances might occur where there was no official qualified to act under the law during the period required to appoint, and secure the confirmation of the appointment, and the qualification of the official. I think it can be strongly argued that one of the purposes of R. L., c. 8, § 1, is to make provision so that the machinery required by a statute may be prepared, in order that the act may go into full operation upon its taking effect.

Accordingly, it is my opinion that appointments made between May 24, 1917, and the time when the act went into effect are lawful.

Banks and Banking—State Banks, Repeal of Law Authorizing Formation of.

R. L., c. 115, authorizing the formation of State banks, was not repealed by St. 1908, c. 590, and acts in amendment thereof, and an incorporation may now be effected under R. L., c. 115.

You have requested my opinion as to whether you should proceed under the provisions of R. L., c. 115, § 3, to appoint commissioners to examine and count the money paid in upon the capital stock of a new banking corporation organized under that chapter, which relates to the formation and regulation of State banks. The application in the present instance is made by a proposed corporation having the name “The State Bank.”

Although as a practical matter this chapter has been inoperative for many years, it has remained upon the statute books without express repeal and without direct amendment for a long period of time.

The Commissioners for Consolidating and Arranging the Public Statutes in their report annexed to this chapter the following note:—

This chapter is printed without substantial change. It has not been amended since the Public Statutes of 1882, and nearly all its provisions were enacted prior to the General Statutes of 1860. After the passage of Sts. 1863, c. 244, 1864, c. 190, and acts in addition thereto relating to State banks surrendering their charters upon becoming banking associa-
tions under the laws of the United States, all the State banks in this Commonwealth surrendered their State charters. For many years no State bank has existed under this chapter, and until there is a change in the United States banking laws no such bank will be established. Many of the provisions of the chapter are antiquated and not adapted to present modes of business, and the chapter requires revision by a legislative committee on banks and banking before being enforced. If the chapter is repealed, some provision may be necessary to authorize the continuance of business in this Commonwealth of foreign banking corporations. See opinion of the Attorney-General March 30, 1899, addressed to the Commissioner of Corporations. See also note, c. 118, § 27.

The implied recommendation of repeal thereby made was not accepted. The Bank Commissioner in his last report to the Legislature also advised that this chapter be repealed (Pub. Doc. No. 8, p. xv). Such action, however, was not taken.

The doubt as to your duty to make the appointment requested arises by reason of St. 1908, c. 590, § 16, as amended by St. 1909, c. 491, § 4, and by St. 1914, c. 610, which is as follows:—

No corporation, either domestic or foreign, and no person, partnership or association except savings banks and trust companies incorporated under the laws of this commonwealth, or such foreign banking corporations as were doing business in this commonwealth and were subject to examination or supervision of the commissioner on June first, nineteen hundred and six, shall hereafter make use of any sign at the place where its business is transacted having thereon any name, or other word or words, indicating that such place or office is the place or office of a savings bank. Nor shall such corporation, person, partnership or association make use of or circulate any written or printed or partly written and partly printed paper whatever, having thereon any name, or other word or words, indicating that such business is the business of a savings bank; nor shall any such corporation, person, partnership or association, or any agent of a foreign corporation not having an established place of business in this commonwealth, solicit or receive deposits or transact business in the way or manner of a savings bank, or in such a way or manner as to lead the public to believe, or as in the opinion of the commissioner might lead the public to believe, that its business is that of a savings bank. Nor shall any person, partnership, corporation or association except co-operative banks incorporated under the laws of this commonwealth and corporations described in the first sentence of this section hereafter transact business under any name or title which contains the words "bank" or
"banking," as descriptive of said business, or, if he or it does a banking business or makes a business of receiving money on deposit, under any name or title which contains the word "trust," as descriptive of said business.

The last sentence of this section, down to the words "or, if he or it does a banking business or makes a business of receiving money on deposit, under any name or title which contains the word 'trust,' as descriptive of said business," was added by the 1909 amendment, and the words quoted immediately above were added by the amendment of 1914.

While it may be doubted whether the Legislature, in enacting the amendment of 1909, had in mind the possibility of the formation of corporations under R. L., c. 115, the language used therein is broad enough in its terms to exclude all corporations, other than those expressly excepted, from the transaction of business "under any name or title which contains the word 'bank.'" The fact that in the sweeping language of this amendment there was included an exception of "co-operative banks" would ordinarily raise an implication that co-operative banks would have been included in the general language but for their exception, and, accordingly, that the Legislature intended a prohibition as broad as the language in fact used.

But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible.

What indications of the general legislative intent are disclosed by these statutes? Section 16 of St. 1908, c. 590, is entitled "Unauthorized Banking Prohibited." The amendatory act, St. 1909, c. 491, is entitled "An Act relative to savings banks and trust companies," while section 4 thereof, which adds to said section 16 the words which cause the present difficulty, leaves the title of section 16 substantially as before,— "Unauthorized banking prohibited, etc."

These titles expressly show an intent to prohibit "unauthorized" banking rather than to prohibit the transaction of business by special corporations expressly authorized to engage in banking.

R. L., c. 115, § 4, prescribes the name of corporations created under that chapter to be in the following form: "The President, Directors, and Company of the Bank (the name of the bank)."

It is to be observed that the 1909 amendment was passed apparently as a result of the recommendation of the Bank Commissioner, found on page xxx of his report for the year 1908:—

Section 16 might well be broadened to prevent the use of the words "bank," "banking" and "trust" in connection with the word "company" by organizations not incorporated under the banking or trust company laws of this Commonwealth.

The bill which ultimately became St. 1909, c. 491, was reported to the Legislature by the committee to which was referred this portion of the report of the Bank Commissioner.

This fact also would raise some doubt as to whether the Legislature intended to enact legislation so much more sweeping in its effect than that recommended by the Bank Commissioner, as would be the case if the statute were interpreted as forbidding the transaction of business by a corporation formed under the provisions of the statutes of the Commonwealth specially designed for the formation of banking corporations, and expressly requiring the use of the word "bank" as a part of the name thereof.

Unless there is implied some exception to the language used
in this amendment, the statute, if constitutional, would prohibit the transaction of business by national banking associations doing business under the sanction and authority of Federal laws. In my opinion, the Legislature could not have intended such a result, and the section must be construed as not including such corporations within its prohibitions. Similarly, it seems unlikely that the Legislature intended to affect domestic corporations required by Massachusetts statutes to have the word "bank" as a part of their names.

It is true that State banks would fall within the literal terms of the prohibition, but in cases where it appears that a literal interpretation would lead to results absurd or contrary to the supposed intention of the Legislature, the Supreme Judicial Court frequently has interpreted such statutes as subject to an implied exception.

For example, the statute making a mother and grandmother bound to support a pauper was held not to apply to a married woman, but, it was said, "must be read as if the description were 'mother and grandmother not being under coverture.'" Gleason v. Boston, 144 Mass. 25, 28.

A statute placing a heavier penalty upon larceny "by stealing in any building" than upon ordinary larceny was held not to apply to larceny by the owner of the building or his wife. Commonwealth v. Hartnett, 3 Gray, 150.

The United States statute limiting the individual liability "of a shipowner" was held not to apply to the owner of a fishing vessel, especially in view of the title to the act. Simpson v. Story, 145 Mass. 497; see also Ayers v. Knox, 7 Mass. 309.

In Inhabitants of Somerset v. Inhabitants of Dighton, 12 Mass. 383, at page 384, it is said: —

But, in the exposition of statutes such a construction should be given as will best effectuate the intention of the makers. In some cases, the letter of a statute may be restrained by an equitable construction; in others, enlarged; and, in others, the construction may be even contrary to the letter. For a case may be within the letter, and not within the meaning of a statute.

It would seem, then, that the Legislature could not have intended to prohibit the transaction of business under a name which included the word "bank" when the use of such name was expressly authorized by law in a chapter authorizing the creation of State banks, unless it had in mind the repeal of the earlier chapter. That the Legislature intended such a sweeping effect seems to me improbable. In order to reach the conclusion that new corporations cannot now be formed under this chapter, it would be necessary to hold that it had been repealed by implication. Such repeals are not to be favored. *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 24 Pick. 296; *Haynes v. Jenks*, 2 Pick. 172, 176.

If the Legislature intended to repeal an entire chapter of the Revised Laws it is fair to assume that it would be done by express enactment rather than by implication.

Accordingly, although with some hesitation because of the arguments which can be advanced on either side of the question, I have come to the conclusion that an incorporation may be legally effected under the provisions of R. L., c. 115, and that you are warranted in proceeding to appoint commissioners under section 3 thereof.

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**TAXATION — FAILURE TO BRING IN LIST OF TAXABLE PERSONAL ESTATE — AMOUNT OF ASSESSMENT — ABATEMENT.**

A person who fails to bring in a list of his taxable personal estate, as required by sections 41 to 49, inclusive, of St. 1909, c. 490, Pt. I, must in the first instance be assessed by local assessors for an amount of personal estate not less than that for which he was assessed in 1916, and then he has all the remedies for abatement provided by sections 72 to 84 of that statute, subject to any conditions and penalties therein contained.

You request my opinion as to whether the provisions of the statutes with reference to the abatement of taxes assessed upon
personal property apply to assessments made under the provisions of Gen. St. 1916, c. 269, § 22.

That section provides, in part, as follows:

Any taxpayer who in the year nineteen hundred and seventeen fails to bring in a list of taxable personal estate, as provided in sections forty-one to forty-nine, inclusive, of Part I of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, and acts in amendment thereof and in addition thereto, shall be assessed in that year for an amount of personal estate not less than that for which he was assessed and taxed in the year nineteen hundred and sixteen.

This section makes no reference whatever to abatement proceedings.

St. 1909, c. 490, Pt. I, § 73, provides, in part, as follows:

A person shall not have an abatement, except as otherwise provided, unless he has brought in to the assessors the list of his estate as required by section forty-one. . . . If such list is not filed within the time specified in the notice required by section forty-one, no part of the tax assessed upon the personal estate shall be abated unless the applicant shows to the assessors a reasonable excuse for the delay or unless such tax exceeds by more than fifty per cent the amount which would have been assessed upon such estate if the list had been seasonably brought in, and in such case only the excess over such fifty per cent shall be abated. . . .

You refer to section 22 of the income tax law as a penalty section. I cannot agree that it should be so construed. It does not purport to impose a penalty upon a taxpayer who fails to bring in a list, in addition to that imposed by section 73. It is applicable only in the year 1917, and it is most unusual to establish a penalty for one year only.

In my opinion, section 22 of the income tax law should be construed merely as a direction to the assessors as to the manner in which in the year 1917 they should perform the duty imposed upon them by St. 1909, c. 490, Pt. I, § 47, which provides that “they shall ascertain as nearly as possible the particulars of the personal estate . . . of any person, firm or corporation which has not brought in such list, and shall estimate its just value, according to their best information and belief.”
As a result of the income tax law, hereafter local assessors are to assess only tangible personal property. Their previous assessments of personal property did not ordinarily give any indication of the value of the tangible personal property owned by the various taxpayers. It was necessary for the proper administration of the new law that there should be some definite starting point fixed in the assessment of local taxes for the first year of the operation of the new law. The Legislature, by enacting section 22, chose to fix as that starting point for all cases where no return of taxable personal property was filed the assessed valuation of the personal property for the preceding year, and, accordingly, by this section the assessors were directed to make their assessments for 1917 upon this basis. The fact that the only penalty referred to in this section is one to be imposed upon assessors who do not carry out its provisions, plainly indicates that the section is to be construed solely as a direction to the assessors, and not as imposing a penalty upon taxpayers in one year only.

The result is that, in my opinion, a person who fails to bring in a list of his taxable personal estate, as provided in sections 41 to 49, inclusive, of Part I of the tax act, must in the first instance be assessed by local assessors for an amount of personal estate not less than that for which he was assessed and taxed in 1916, and that he then has all the remedies for abatement provided by sections 72 to 84 of Part I of said act, subject, of course, to any conditions and penalties therein contained.
Settlement — Illegitimate Children — Inmates of Boston State Hospital or Massachusetts School for the Feeble-minded.

An illegitimate child whose mother died prior to the passage of St. 1911, c. 669, retains the settlement, if any, which it had under the law as it previously stood. St. 1911, c. 669, § 2, applies to persons admitted to the Psychopathic Department of the Boston State Hospital or the school department of the Massachusetts School for the Feeble-minded.

You have requested my opinion upon certain questions arising under St. 1911, c. 669, as follows:—

1. Can an illegitimate child, who was a minor when this law was passed, follow and have the settlement of the mother, in accordance with the provisions of the fourth paragraph of section 1, if the mother dies prior to the passage of the act?

The clause referred to is as follows:—

Fourth, Illegitimate children shall follow and have the settlement of their mother if she has any within the commonwealth.

The law as it previously stood provided (R. L., c. 80, § 1, cl. 3d):—

Illegitimate children shall have the settlement of their mother at the time of their birth, if she then has any within the commonwealth.

It is a general presumption in the construction of statutes that their operation is to be prospective unless the contrary appears. Commonwealth v. Sudbury, 106 Mass. 268.

While the Legislature has the power arbitrarily to create a settlement or transfer it from one municipality to another, the intention to cause such a result must clearly appear if it is to be effected.

I do not find any language in this statute which would seem to rebut the general presumption that it is prospective in its operation.

Under the facts stated the mother of the child died prior to the enactment; consequently, it cannot strictly be said that at the date of its passage “she has any” settlement within the Commonwealth.
Accordingly, I am of the opinion that an illegitimate child whose mother died prior to the passage of St. 1911, c. 669, retains the settlement, if any, which it had under the law as it previously stood.

2. Does section 2 apply to persons admitted to the Psychopathic Department of the Boston State Hospital or to the school department of the Massachusetts School for the Feeble-minded?

Section 2 is as follows: —

No person shall acquire a settlement, or be in process of acquiring a settlement, while receiving relief as a pauper, unless, within two years after the time of receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth, or to the city or town furnishing the same.

This is but a slight modification of the law as laid down by the court prior to the original passage of this statute in 1874 (Charlestown v. Groveland, 15 Gray, 15), the general principle being that persons supported at public expense are not capable of acquiring a settlement.

As to the Psychopathic Department of the Boston State Hospital, I am not aware of any statute which puts it in any different class from the other hospitals for the insane. Persons cared for therein are supported at the expense of the Commonwealth.

As to the school department of the Massachusetts School for the Feeble-minded there may originally have been some distinction. In its inception this institution was a corporation supported by private charity. Gradually, however, control has been taken over by the State, so that it appears from the sixty-ninth annual report of the trustees that all of the regular maintenance expenses are borne by the State. Apparently, by Gen. St. 1917, c. 223, the right of the trustees previously existing to admit pupils gratuitously is practically abolished, while by chapter 133 of the General Acts of the same year provision is made for collection of charges for the support of all inmates in the same manner as provided for inmates of other institutions under the supervision of the Commission on Mental Diseases.
Accordingly, at the present time it seems that all inmates, charges for whose support are not paid by themselves or their friends or relatives, are in fact supported at public expense as truly as are any other persons who are prevented from acquiring a settlement thereby.

I am of the opinion, therefore, that section 2 of St. 1911, c. 669, does apply to persons admitted to the Psychopathic Department of the Boston State Hospital or to the school department of the Massachusetts School for the Feeble-minded.

3. How does section 4 affect the legal settlement of a person absent from his place of settlement for five years, exclusive of the time he was in the almshouse of said place, he at the time of admission to the almshouse being a resident of another city or town and immediately after discharge returning thereto?

Section 4 is as follows: —

A person who, after the passage of this act, is absent for five consecutive years from the city or town in which he had a settlement shall thereby lose his settlement. But the time during which a person shall have been an inmate of any public hospital, public sanatorium, almshouse, jail, prison, or other public institution, within the commonwealth, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or for losing a settlement, except as provided in section two.

Under this section the absence from the city or town of settlement which will operate to defeat the settlement must be "for five consecutive years." If a person is in the almshouse located in the place of his settlement, it cannot be said that he is absent from that city or town.

Accordingly, in my opinion, the fact that he was absent from his place of settlement for a period of time less than five years prior to his admission to the almshouse in his place of settlement is not to be taken into account in applying the provisions of section 4 of this act, and such a person will not lose his settlement by departing from that place after his discharge from its almshouse until he has been absent for five years consecutively thereafter.
COMMONWEALTH — COMMISSION FOR THE BLIND — LAWS RELATING TO HAWKERS AND PEDLERS NOT APPLICABLE TO SALES BY.

R. L., c. 65, and amendatory acts, relating to itinerant vendors and hawkers and pedlers, do not apply to sales conducted by the Massachusetts Commission for the Blind for disposing of home and shop products of blind labor.

You request my opinion as to whether the provisions of R. L., c. 65, and its amendments, relating to the regulation of sales by itinerant vendors and by hawkers and pedlers, apply to sales conducted by your Board for disposing of home and shop products of blind labor.

As I understand it, these sales are made by persons employed by your Board and paid out of the appropriation made for your work. I also understand that the goods sold are either the property of the Commonwealth which have been made by blind labor paid for by the Commonwealth, from material furnished by it, or else that they are goods made by blind persons from their own materials on their own account and consigned to your Board for sale. In the latter case the goods are sold by you as agents of the consignors and no commission is charged. On these facts it is apparent that these sales are either sales conducted by the Commonwealth of its own property, or sales conducted by it as agent, in both instances as a part of its work of educating, assisting and maintaining blind persons.

It is well settled that police regulations are not to be construed as applying to the Commonwealth unless it clearly appears that it was intended that they should so apply. Teasdale v. Newell, etc., Construction Co., 192 Mass. 440; II Op. Atty.-Gen. 400.

The statute under consideration is plainly a police regulation, and must be construed with reference to this rule. I am unable to find in it or in any of its amendments the slightest indication that it was intended by the General Court to apply to activities of the Commonwealth. Accordingly, in my opinion, it must be interpreted as not applying to the activities of your Board, and therefore your agents in carrying on
the work of your Board are not required to be licensed either as itinerant vendors or as hawkers and pedlers, even though the methods employed by them would otherwise bring them within the terms of the statute.

Retirement Association — Assessment upon Members in Military or Naval Service.

The assessments to be made upon members of the Retirement Association who have been mustered into the military or naval service of the United States, and who are receiving from the Commonwealth the payments provided by Gen. St. 1917, c. 301, should be in the same amount as before the members were mustered into the Federal service.

You have requested my opinion as to the basis upon which assessments are to be made upon members of the Retirement Association who have been mustered into the military or naval service of the United States and are receiving payments under the provisions of Gen. St. 1917, c. 301.

Section 1 of that statute is as follows: —

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. The said payments shall continue so long as he continues in the military or naval service of the United States, but shall cease one month after the termination of the war. In case of his death in the said service his widow, minor children, parents or dependents shall receive the said sum until the termination of the war.

R. L., c. 19, § 25, provides as follows: —

Any person in the classified public service of the commonwealth or of any city or town thereof who resigns such office or leaves such service for the purpose of enlisting and serving in the army or navy of the United States or in the militia of this commonwealth in time of war and so enlists and serves, may at any time within one year after his honorable discharge from such military or naval service be appointed to or employed in his
former or a similar position or employment, without application or exami-
nation.

Though the first-mentioned statute does not expressly pro-
vide that an employee is to be taken back into the service of
the Commonwealth at the termination of the war or of his
military or naval service, yet the last-mentioned provision
seems plainly to authorize such action, at least in the case of
employees in the classified civil service. The implication is
that the person performing the work of the absent employee is
doing so only temporarily, and that the absent employee may
be reinstated upon his return.

Reading these two sections together, in the light of their
apparent purpose, it seems to me that, at least for the pur-
poses of the administration of the retirement system, Gen. St.
1917, c. 301, should be interpreted as granting a leave of ab-
sence, with pay, during the continuance of the war and for
thirty days thereafter, to all employees mustered into the
military or naval service of the United States during the pres-
ent war. The employee is required to credit against his salary
merely such compensation as he receives on account of his
military services. Thus interpreting the statute, it is my opin-
ion that you should take as a basis for the assessments upon
members of the Retirement Association their full salary as it
was paid them when their leaves of absence under this statute
began, without considering the deductions made on account of
their military or naval pay. The result is that their assess-
ments are of the same amount as they were before the mem-
bers entered the service of the United States.

If cases arise where employees of the Commonwealth receive
more compensation on account of their military or naval serv-
ces than they had been receiving from the Commonwealth,
and thus they receive no compensation under chapter 301, it
is my opinion that, if you are satisfied that they have not re-
signed their positions but have merely been granted leaves of
absence, you are warranted in accepting from them assess-
ments of the same amount which they were paying before
they entered the service of the United States.
COMMONWEALTH FLATS — AUTHORITY OF COMMISSION ON WATERWAYS AND PUBLIC LANDS TO AUTHORIZE LESSEE TO KEEP OR SELL GASOLINE.

The Commission on Waterways and Public Lands may lease portions of the Commonwealth Flats, so called, in South Boston, but cannot authorize the keeping or sale of gasoline by the lessee without the approval of the Fire Prevention Commissioner.

You have requested my opinion as to whether your Commission has authority to "grant a location for a station from which gasoline may be sold on State property in South Boston; and whether, if such a grant may be made, it is subject to the approval of the Fire Prevention Commissioner."

Your Commission undoubtedly has the right to lease portions of the Commonwealth's lands in South Boston, subject to the approval of no persons except, in certain instances, the Governor and Council.

The lessee of such lands, however, is not exempt from the police regulations of the State simply by reason of the fact that he has obtained his title from the Commonwealth. Any lease which might be given to a person or corporation intending to keep or sell gasoline would not, in my opinion, exempt such lessee from the provisions of law requiring a license for that purpose.

WAR SERVICE — STATE PAY — DRAFTED MEN NOT ENTITLED TO.

The State pay of $10 a month provided for by Gen. St. 1917, c. 211, as extended by Gen. St. 1917, c. 332, is not available to persons drafted from this Commonwealth into the military service of the United States under the provisions of the act of Congress of May 18, 1917.

You have asked my opinion as to whether Gen. St. 1917, c. 211, as extended by Gen. St. 1917, c. 332, applies to men who are drafted into the military service of the United States under the provisions of the Selective Service Law, so called, approved May 18, 1917.

Gen. St. 1917, c. 211, is entitled "An Act to provide State
pay for soldiers and sailors from this Commonwealth in the volunteer service of the United States.” Section 1 provides, in part, as follows:—

There shall be allowed and paid out of the treasury of the commonwealth to each non-commissioned officer, soldier and sailor, who has been, or is hereafter, mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign country, the sum of ten dollars per month.

By Gen. St. 1917, c. 332, the last-mentioned statute is extended so as to apply to “any non-commissioned officer or enlisted man having a residence of at least six months within this state and serving to the credit of this commonwealth in the regular or volunteer forces of the United States army, navy or marine corps, whose federal service began subsequent to” Feb. 3, 1917.

This last-mentioned statute was approved on May 25, 1917, and thus after the enactment of the Selective Service Law. It is obvious, however, that it cannot apply to men drafted into the military service of the United States under that act. Men drafted into service under this act cannot, of course, be said to be serving in the “volunteer forces of the United States army;” nor are they serving in the regular forces of that army. This is made plain by the terms of the Selective Service Law. It is entitled “An Act to authorize the President to increase temporarily the military establishment of the United States.” On account of the existing emergency the President is authorized to raise by draft, organize and equip certain additional forces, and the men so drafted are to serve for the period of the existing emergency, unless sooner discharged. It is plain, therefore, that the forces raised by the Selective Service Law are not regular forces of the United States Army as permanently established by the Federal statutes, but constitute merely special forces temporarily added to the military establishment of the United States for and during the period of a particular emergency.

Accordingly, it becomes necessary to determine whether
the men drafted under this Federal law, and mustered into service thereunder, have been "mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign country," within the meaning of section 1 of chapter 211. On May 2, 1917, when this chapter was approved and took effect, as I pointed out in the opinion rendered you on June 6 last, the only quota assigned to this Commonwealth by the Federal government was that of the National Guard. Section 2 of the Selective Service Law, subsequently enacted by Congress, provides for the assignment of quotas for the several States and Territories. The question raised is whether the language of chapter 211 is broad enough to include such quotas assigned under the provisions of that law, which was not in force when chapter 211 was enacted.

The last-mentioned statute originated in a message sent by the Governor to the General Court on April 2, 1917, in which the following recommendations were made:—

Three regiments of the National Guard of the Commonwealth have been called by the President of the United States and are now in the Federal service. How long this service will continue or how many men of our Guard may be called to serve with them cannot now be known, but we have the same situation that arose last summer after the Legislature was prorogued and that was dealt with by it when it came together again. The pay allowed by the national government is only $15 a month, or scarcely more than the pay of the soldier fifty years ago. The last Legislature by an act passed in September, 1916, granted a supplementary pay of $10 a month to each non-commissioned officer and soldier who had been called to do service at the Mexican Border.

I recommend that you make similar provision in favor of the non-commissioned officers and men of the National Guard who have been or who shall be summoned into the national service. The object of this recommendation is to establish the aggregate pay which the men shall receive from the national and State government together at $25 a month. If the national government should raise the pay, as it probably will do, to that extent the amount involved in my recommendation would be correspondingly decreased.

A bill was submitted with this message, which was enacted without change so far as the language now under discussion
is concerned. This history of the statute rather points to the conclusion that it was intended to apply only to the members of the National Guard. The fact that it was thought necessary thereafter to extend the rights thus granted by the provision already quoted from chapter 332 points also in the same direction. It is significant that this last-mentioned statute, enacted after the approval of the Selective Service Law, makes no reference to it or to men summoned into service in accordance with its provisions.

Though the language of section 1 of chapter 211 is not entirely clear, the title of the chapter seems to indicate an intent of the Legislature to restrict its application to volunteers. It is well settled that reference to a title is permissible when the enacting clauses of the statute are not free from doubt. The title states it to be the purpose of the act "to provide State pay for soldiers and sailors from this Commonwealth in the volunteer service of the United States." The two statutes under consideration were apparently designed to provide more adequate pay for the members of the National Guard when summoned into the Federal service, and to encourage voluntary enlistments in the various branches of the military service of the United States. Under all the circumstances it is my opinion that the provisions of neither chapter 211 nor chapter 332 of the General Acts of 1917 apply to men drafted into the military service of the United States under the provisions of the Selective Service Law.

I reach the conclusion just stated with less hesitation because of the fact that the payments authorized by these statutes are to continue only until Jan. 15, 1918. Even if construed as applicable to drafted men, they could be given only when such men were actually mustered into service, and would necessarily terminate on January 15 next. On or before that date the General Court will probably be obliged to consider the question of extending or modifying the provisions for these payments. It can at that time deal with the case of men drafted into service in such manner as is deemed appropriate.
WAR SERVICE — AID BY CITIES AND TOWNS TO DEPENDENTS OF PERSONS DRAFTED INTO.

The wife, widow, children or other dependents of a person drafted into the military service of the United States under the Selective Service Law, so called, are eligible to receive the aid authorized by Gen. St. 1917, c. 179, from the city or town of which the person so drafted was an inhabitant and in which he was residing.

You have requested my opinion as to whether the dependents of men drafted into the military service of the United States under the provisions of the Selective Service Law are entitled to receive aid under the provisions of Gen. St. 1917, c. 179.

I have to-day advised the Treasurer and Receiver-General that the provisions of Gen. St. 1917, c. 211, as extended by Gen. St. 1917, c. 332, do not apply to such drafted men. The language of chapter 179, however, is quite different, and, in my opinion, requires a different conclusion. Section 1 is as follows: —

Any city or town may raise money by taxation or otherwise, and, if necessary, expend the same by the officers authorized by law to furnish state and military aid, for the benefit of the wife, widow, children under sixteen years of age, or any child dependent by reason of physical or mental incapacity, or the actually dependent parents, brothers and sisters, of any inhabitant of such city or town, having a residence and actually residing therein, who has enlisted, and responded to the call of the president or war department, or hereafter shall duly be enlisted, and who has been or shall be mustered into the military or naval service of the United States as a part of the quota of this commonwealth which may be called for service in the United States or in any foreign country, up to January fifteenth, nineteen hundred and nineteen, unless the said service is sooner terminated, in the same manner and under the same limitations, except as hereinafter provided, as state aid is paid to dependent relatives of soldiers or sailors of the civil war and of the war with Spain.

It thus applies to the dependents of any inhabitant coming within its terms "who has enlisted, and responded to the call of the president or war department, or hereafter shall duly be enlisted, and who has been or shall be mustered into the military or naval service of the United States as a part of the quota of this commonwealth which may be called for service
in the United States or in any foreign country." The Selective Service Law provides for the assignment of quota for the several States and Territories, and in the assigning of these quotas credit is given for members of the National Guard in the service of the United States on April 1, 1917, and for men subsequently enlisted as members of the regular army or National Guard. The language of chapter 179 is broad enough to include the quota of the Commonwealth under the Selective Service Law, and there is nothing in the title of chapter 179 which would restrict the meaning of this language.

In *Sheffield v. Otis*, 107 Mass. 282, 284, our Supreme Judicial Court, in construing a statute containing somewhat similar language, thus defined the meaning of the word "enlist:" —

It seems clear to us that the case is not taken out of the statute by the fact that Walley was drafted, and did not volunteer to enter the service. The words of the statute are, "any person who shall have been duly enlisted," and not any person who shall voluntarily enlist. By the primary meaning of the word, a person is "enlisted" whose name is duly entered upon the military rolls, and it applies to those who are drafted as well as to those who volunteer. Both are enlisted. The word is used in this sense in the articles of war for the government of the armies of the United States. The eleventh article provides that, "after a non-commissioned officer or soldier shall have been duly enlisted and sworn, he shall not be dismissed the service without a discharge in writing." The twentieth article provides that "all officers and soldiers who have received pay, or have been duly enlisted in the service of the United States, and shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of court martial shall be inflicted" U. S. St. 1806, c. 20; 2 U. S. Sts. at Large, 361, 362. In both of these articles the term "duly enlisted" necessarily includes soldiers who have been drafted, as well as those who have entered the service as volunteers.

In view of the foregoing definition it is my opinion that a person drafted and mustered into service under the Selective Service Law is a person who has been "enlisted, . . . and . . . mustered into the military or naval service of the United States," within the meaning of chapter 179. In my opinion, therefore, this chapter should be construed as applying to the dependents of men thus drafted.
I see no inconsistency in reaching different conclusions as to the application in this respect of chapters 179 and 211. The latter relates merely to the compensation of enlisted men, and a substantial portion of its purpose was to encourage voluntary enlistments. The former, however, applies to all persons who are dependent for their means of sustenance upon inhabitants of the Commonwealth engaged in military service. The duty of the Commonwealth toward all such dependents is the same without regard to the class of service in which the person upon whom they are dependent is engaged.

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Club Charter — Cause for Revocation by Secretary of Commonwealth.

A conviction under the provisions of R. L., c. 100, § 88, does not warrant action by the Secretary of the Commonwealth under R. L., c. 100, § 89, relating to the revocation of club charters.

You have requested my opinion as to whether the charter of a club incorporated under the provisions of R. L., c. 125, should be declared void, in accordance with the provisions of R. L., c. 100, § 89, on evidence that a certain person has been found guilty of a charge that he did "without legal authority keep and maintain a certain building and place . . . used by a club . . . for the purpose of illegally selling, distributing and dispensing intoxicating liquors to its members and others to the common nuisance of all the people."

Such a complaint is preferred under R. L., c. 100, § 88.

The provision of section 89 is —

If any person is convicted of exposing and keeping for sale or selling intoxicating liquor on the premises occupied by any club . . . or of illegal gaming upon said premises, . . . the selectmen of the town . . . shall immediately notify the secretary of the commonwealth, and he shall, upon receipt of such notice, declare the charter of said club void.

It thus appears that the sale or keeping for sale of intoxicating liquors is a distinct offence from that prescribed by section
88, under which the conviction in the present case was had, and, accordingly, it does not appear that any person has been convicted of exposing and keeping for sale intoxicating liquors on the premises occupied by the club in question.

Furthermore, it is to be observed that a conviction under the provisions of section 88 is sustained by proof of either a sale and distribution or a dispensing of intoxicating liquors, and therefore a conviction may occur under the section where no illegal sale took place.

As this is a penal statute, it is to be construed strictly, and, accordingly, I am of the opinion that such conviction does not warrant your taking action under the provisions of R. L., c. 100, § 89.

Steam Boilers — Board of Boiler Rules — Power to exempt from Operation of Rules.

Under St. 1907, c. 465, the Board of Boiler Rules has no power, even in time of war, to grant special permission to any person to install in this Commonwealth boilers which do not conform to the rules of construction formulated by said Board.

You have requested my opinion as to the legality of a suggested amendment to the rules formulated by the Board of Boiler Rules which in substance would permit, during a time of war, the installation within this Commonwealth of boilers which do not conform to the rules of construction formulated by the Board of Boiler Rules, upon application made to that Board and permission granted by it.

The law governing the regulation of steam boilers is found in St. 1907, c. 465, as amended.

Section 1 of that chapter, as originally enacted, contained the following: —

No certificate of inspection shall be granted on any boiler installed after May first, nineteen hundred and eight, which does not conform to the rules of construction formulated by the board of boiler rules.

It was undoubtedly the purpose of this act to forbid, in general, and, subject to the exceptions found therein, to pro-
hibit, the operation of boilers which had not been inspected and a certificate of inspection issued therefor. Although the original act may not in its criminal provisions have effectually enforced its purpose, the later amendments have cured any such defects.

By section 24 of that act the Board of Boiler Rules was created. By section 26 it was provided:—

It shall be the duty of the board of boiler rules to formulate rules for the construction, installation and inspection of steam boilers, and for ascertaining the safe working pressure to be carried on said boilers, to prescribe tests, if they deem it necessary, to ascertain the qualities of materials used in the construction of boilers; to formulate rules regulating the construction and sizes of safety valves for boilers of different sizes and pressures, the construction, use and location of fusible safety plugs, appliances for indicating the pressure of steam and the level of water in the boiler, and such other appliances as the board may deem necessary to safety in operating steam boilers; and to make a standard form of certificate of inspection.

Under this statute as originally enacted it is certainly doubtful whether, in view of the provision of section 1 above quoted, it was within the power of the Board of Boiler Rules, in formulating the rules which, by section 26, it was authorized to make, to provide that any person might by special permission from that Board violate the rules made.

It is apparent that the purpose of the statute in this respect and of the rules to be formulated by this Board was to secure "safety in operating steam boilers;" and there would seem to be no reason for exempting special persons from the operation of laws and rules necessary to secure such safety.

If any doubt upon this point could exist under the original law, it would seem to have been removed by the later amendments.

St. 1909, c. 393, § 1, amended the original section 1 by inserting the following:—

A boiler in this commonwealth at the time of the passage of this act, which does not conform to the rules of construction formulated by the board of boiler rules may be installed after a thorough internal and ex-
ternal inspection and hydrostatic pressure test by a member of the boiler inspection department of the district police, or by an inspector holding a certificate of competency as an inspector of steam boilers, as provided by section six of chapter four hundred and sixty-five of the acts of the year nineteen hundred and seven, and employed by the company insuring the boiler. The pressure allowed on such boilers is to be ascertained by rules formulated by the board of boiler rules.

This express provision of the Legislature for installation of certain boilers which might not conform to the rules of construction formulated by the Board of Boiler Rules would naturally exclude from such special favor boilers not included within the class designated, to wit: boilers in this Commonwealth at the time of the passage of that act.

This same act of the year 1909 amended section 26 by the insertion of certain provisions in part as follows:—

When a person desires to manufacture a special type of boiler the design of which is not covered by the rules formulated by the board of boiler rules, he shall submit drawings and specifications of such boiler to said board, which, if it approves, shall permit the construction of the same.

This provision for special type of boilers not covered by the rules also impliedly excludes the idea of special permission by the Board of Boiler Rules for the construction or installation of boilers in fact covered by the rules but contrary to their terms.

As stated above, the design and purpose of these statutes and rules is to prevent the operation of boilers which cannot be operated with safety. It would seem to be undesirable that boilers which cannot be operated with safety should be installed or used at any time. If, on the other hand, the rules formulated by the Board of Boiler Rules now existing prevent the installation or operation of boilers which can be used with safety to the public, it would seem to furnish a reason for amending the rules so as to permit the installation and use of such boilers, regardless of the persons desiring to use the same, rather than for the creation of a rule permitting the use by some and refusing it to others.
HENRY C. ATTWILL, ATTORNEY-GENERAL.

For the reasons stated above, I am of the opinion that such a rule as is referred to in your request is not authorized by the statutes upon this subject.

BOARD OF PAROLE — PERMITS TO BE AT LIBERTY — CANNOT BE VOTED TO A CONVICT WHILE ACTUALLY CONFINED IN INSANE HOSPITAL.

A person who has been sentenced to the Massachusetts Reformatory, the Reformatory for Women, the State Prison or the Prison Camp and Hospital, and who has been committed under St. 1909, c. 504, § 105, from any of said institutions to a State hospital for the insane, cannot be voted a permit to be at liberty by the Board of Parole of the Massachusetts Bureau of Prisons so long as he is actually confined in such insane hospital.

I acknowledge receipt of your communication in which you state the following facts: —

A person was committed to the reformatory at Concord on the 18th of June, 1914. On the 24th of September, 1915, under the provisions of St. 1909, c. 504, § 105, he was committed to the State Hospital at Bridgewater. It now seems advisable to the Commission on Mental Diseases and to the Board of Parole that this prisoner be transferred to the control of the authorities of the State of Connecticut having charge of insane persons.

You request my opinion upon the question of whether your Board has authority under these circumstances to vote a permit to be at liberty to this man, he now being actually in confinement at the Bridgewater State Hospital.

You further request my opinion as to whether, if he had been transferred to the Bridgewater State Hospital from the State Prison, the Prison Camp and Hospital, or (being a woman) from the Reformatory for Women at Sherborn, the Board would have such authority.

R. L., c. 225, § 117, as amended by St. 1906, c. 244, authorizes the Prison Commissioners to issue a permit to be at liberty to “a prisoner in the Massachusetts reformatory, or a prisoner who has been removed therefrom to a jail or house of correction,” under the conditions therein set forth.
Section 118 of this chapter conferred a similar authority upon the Prison Commissioners in relation to "a prisoner in the reformatory prison for women, or a prisoner who has been removed therefrom to a jail or house of correction."

No permits to be at liberty could be issued to a prisoner in the State Prison who had been sentenced thereto for a crime committed after Jan. 1, 1896, until after his minimum term of sentence had expired, until the passage of St. 1911, c. 451. This statute authorized the granting by the Prison Commissioners, under certain conditions, of "a special permit to be at liberty from the state prison to a prisoner held therein." The provisions of this act were extended by St. 1912, c. 103, to prisoners transferred from the State Prison to the Massachusetts Reformatory.

St. 1906, c. 243, relating to the Prison Camp and Hospital, provided that all laws relative to the temporary industrial camp for prisoners should apply to the Prison Camp and Hospital. St. 1904, c. 243, relating to the industrial camp for prisoners, provided that —

The prison commissioners in their discretion may issue to any prisoner held at said camp a permit to be at liberty upon such terms and conditions as they shall prescribe.

St. 1913, c. 829, as amended by Gen. St. 1915, c. 206, creating the Board of Parole for the State Prison and the Massachusetts Reformatory, and the Board of Parole for the Reformatory for Women, provided —

All the powers of the board of prison commissioners relating to the granting of permits to be at liberty from the state prison, the Massachusetts reformatory, the reformatory for women and the prison camp and hospital are hereby transferred to and vested in the several boards of parole for said institutions.

By Gen. St. 1916, c. 241, the Board of Parole for the State Prison and the Massachusetts Reformatory and the Board of Parole for the Reformatory for Women were abolished, and all the powers and duties of said Boards of Parole were transferred to the Board of Parole of the Massachusetts Bureau of
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Prisons, which was thereby established. All other powers and duties belonging to the Board of Prison Commissioners were transferred to the Director of said Massachusetts Bureau of Prisons, and the Board of Prison Commissioners was abolished.

It may be noted that the powers transferred by St. 1913, c. 829, were limited to the issuance of permits to be at liberty from the State Prison, the Massachusetts Reformatory and the Reformatory for Women. It did not include the authority to issue such permits to prisoners who had been removed from the Massachusetts Reformatory or the Reformatory for Women to a jail or house of correction, but this authority remained in the Board of Prison Commissioners, and was transferred by Gen. St. 1916, c. 241, to the Director of the Massachusetts Bureau of Prisons instead of to the Board of Parole. This situation, however, was changed by Gen. St. 1917, c. 245, which provides that—

All the powers and duties of the director of prisons relating to the granting of permits to be at liberty to prisoners who have been removed from the Massachusetts reformatory to a jail or house of correction, and to prisoners who have been removed from the reformatory for women to a jail or house of correction, are hereby transferred to, and shall hereafter be exercised by, the board of parole of the Massachusetts bureau of prisons.

Since the passage of the act last quoted, your Board possesses all the powers in relation to the granting of permits to be at liberty theretofore exercised by the Board of Prison Commissioners.

The difficulty, however, which, in my judgment, prevents your Board from issuing a permit to be at liberty to the prisoner in question is that, so long as he is actually confined in the Bridgewater State Hospital under order of the court, he cannot be considered to be "a prisoner in the Massachusetts Reformatory," within the meaning of R. L., c. 225, § 117, as amended by St. 1906, c. 224.

St. 1909, c. 504, § 105, is as follows:—

The state board of insanity shall designate two persons, experts in insanity, to examine prisoners in the state prison, the Massachusetts
reformatory, or the reformatory prison for women, who are alleged to be insane. If any such prisoner appears to be insane, the warden or superintendent shall notify one or both of the persons so designated, who shall, with the physician of the prison, examine the prisoner and report the result of their investigation to the superior court of the county in which the prison is situated. If, upon such report, the court considers the prisoner to be insane and his removal expedient, it shall issue a warrant, directed to the warden or superintendent, authorizing him to cause the prisoner, if a male, to be removed to the Bridgewater state hospital and, if a female, to be removed to one of the state hospitals for the insane, there to be kept until, in the judgment of the superintendent and the trustees of the hospital to which the prisoner has been committed, he or she should be returned to prison. When the superintendent and trustees determine that the prisoner should be so returned, they shall so certify upon the said warrant, and notice, accompanied by a written statement regarding the mental condition of the prisoner, shall be given to the warden or superintendent of the prison, who shall thereupon cause the prisoner to be reconveyed to the prison, there to remain pursuant to the original sentence, computing the time of his detention or confinement in the hospital as part of the term of his imprisonment.

When a prisoner has been removed under the provisions of this section from the State Prison, the Massachusetts Reformatory or the Reformatory Prison for Women to a State hospital for the insane, he must, in my judgment, be kept there until he is in fit condition to be reconveyed to the prison or reformatory from which he was sent. When a prisoner has been so reconveyed, your Board of course has authority to grant to him a permit to be at liberty, under the conditions prescribed by the statutes first above quoted; but so long as he is actually confined in a State hospital for the insane I am of the opinion that your Board has no jurisdiction over him in this respect. Accordingly, the answer to your inquiry must be in the negative.

In reply to your further inquiry I advise you that, in my opinion, it would make no difference if the prisoner had been committed to the Bridgewater State Hospital from the State Prison, the Reformatory for Women or the Prison Camp and Hospital.
WAR SERVICE — EMPLOYEES OF COMMONWEALTH — PAYMENT OF DIFFERENCE IN COMPENSATION TO THOSE DRAFTED.

An employee of the Commonwealth who has been drafted into the military service of the United States under the Selective Service Law, so called, is entitled to the benefits provided by Gen. St. 1917, c. 301.

You request my opinion as to whether a State employee who is drafted into the military service of the United States under the so-called Selective Service Law is entitled to the difference between his military pay and the amount which he is receiving from the Commonwealth under the provisions of Gen. St. 1917, c. 301. Section 1 of that statute provides, in part, as follows:—

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. . . .

This language is very broad, and applies to every employee of the Commonwealth "who has been or is hereafter mustered into the military or naval service of the United States during the present war." Plainly, employees who are drafted into that service come within this language. They are, in my opinion, entitled to the benefits of the act from the date when they are thus mustered into the military service.
You have requested my opinion as to whether employees of the Commonwealth who attend officers' training camps conducted at Plattsburg and elsewhere are entitled to the benefits of Gen. St. 1917, c. 301. Section 1 of that act provides, in part, as follows:—

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. . . .

These officers' training camps are conducted by the War Department under the authority of section 54 of the National Defense Act. It is there provided that these camps are to be conducted "under such terms of enlistment and regulations as may be prescribed by the Secretary of War." He has prescribed that persons admitted to these camps for training shall be required to enlist for a period of three months, though this enlistment carries with it an obligation to undertake service in the training camp only. It is also required that a person attending such a camp shall agree to accept such commission in the army of the United States as he may be tendered by the Secretary of War.

The question whether a person serving in one of these camps has been "mustered into the military service of the United States" must be determined largely by the attitude of the United States, particularly the War Department, toward these
men. If the War Department considers them and deals with them as in the military service of the government, the Commonwealth ought to follow that ruling. Accordingly, I have delayed replying to your letter until I could learn what that attitude was. I have just received a letter from the Judge Advocate-General of the United States, which reads in part as follows:

This office, in an opinion dated June 30, 1917, on the question whether candidates for commissions undergoing training in the reserve officers' training camps are to be considered in the military service of the United States for campaign badge purposes, or whether they are to be considered civilians until receiving commissions, held that such candidates should be considered to be in the military service of the United States, and that campaign badges may properly be issued to such of them as might be entitled thereto, using the following language respecting their status:

Upon inquiry at the office of The Adjutant-General this office has been informed that the men now in training camps have been enlisted for three months under the provisions of section 54 of the National Defense Act, authorizing the training of "such citizens as may be selected for instruction and training, upon their application and under such terms of enlistment and regulations as may be prescribed by the Secretary of War; . . ." Being enlisted in the service of the United States they are, for the term of their enlistment, members of the military force of the United States, although the purpose of their membership is solely training for future use as commissioned officers.

In view of this ruling I deem it my duty to advise you that employees of the Commonwealth while attending these training camps, so far as they are conducted under present conditions, are to be regarded as "mustered into the military . . . service of the United States," and that, accordingly, they are entitled to the benefits of this statute.
WAR SERVICE — EMPLOYEES OF COMMONWEALTH DRAFTED INTO MILITARY SERVICE — APPLICATION OF CIVIL SERVICE LAWS AND RULES TO.

Under R. L., c. 19, § 25, any person in the classified public service of the Commonwealth who has been drafted into the military service of the United States under the Selective Service Law, so called, may be appointed to or employed in his former or a similar position in the classified public service within one year after his honorable discharge from such military service, without application or examination, and Civil Service Rules 31 and 45 do not apply to such a situation in so far as they are inconsistent with this statute.

You have requested my opinion upon behalf of the committee on civil service of the Executive Council upon the question of whether R. L., c. 19, § 25, protects employees of the Commonwealth who have been drafted into the military service of the United States so that they may without difficulty return to their positions in the State service when their military service is finished; and whether the present Civil Service Rules 31 and 45 conflict in any way with R. L., c. 19, § 25, or in any way jeopardize the positions of State employees who have entered the military or naval service of the United States.

R. L., c. 19, § 25, is as follows: —

Any person in the classified public service of the commonwealth or of any city or town thereof who resigns such office or leaves such service for the purpose of enlisting and serving in the army or navy of the United States or in the militia of this commonwealth in time of war and so enlists and serves, may at any time within one year after his honorable discharge from such military or naval service be appointed to or employed in his former or a similar position or employment, without application or examination.

The difficulty presented by your inquiry is whether a person selected for military service and inducted into the military forces of the United States under the provisions of the act of Congress approved May 18 can be said to have enlisted, within the meaning of the act above quoted. In considering a similar question our Supreme Judicial Court said, in the case of Sheffield v. Otis, 107 Mass. 282: —

It seems clear to us that the case is not taken out of the statute by the fact that Walley was drafted, and did not volunteer to enter the service.
The words of the statute are, "any person who shall have been duly enlisted," and not any person who shall voluntarily enlist. By the primary meaning of the word, a person is "enlisted" whose name is duly entered upon the military rolls, and it applies to those who are drafted as well as to those who volunteer. Both are enlisted.

While it is true that R. L., c. 19, § 25 (originally St. 1898, c. 454), was enacted at the time of our war with Spain, at which time no draft law was in effect, or, so far as is known, under contemplation, nevertheless, I am of the opinion that an employee of the Commonwealth who is drafted under the provisions of the Selective Service Law, so called, comes within the purview of this statute, and may be appointed to or employed in his former or a similar position or employment after his honorable discharge from military or naval service without application or examination.

I am fortified in this opinion by reason of the fact that under the provisions of Gen. St. 1917, c. 301, employees of the Commonwealth who are mustered into the military or naval service of the United States during the present war are paid by the Commonwealth an amount equal to the difference between the compensation they were receiving at the time when they were mustered in and the amount which they receive while in the military service. In an opinion given under date of Sept. 18, 1917, to the Auditor of the Commonwealth ruled that the provisions of this act included drafted men.

It would seem that it was in the mind of the Legislature that these men were to be considered as temporarily absent from the service of the Commonwealth as on a leave of absence, and that their positions in the classified civil service were not to be affected by their absence until the cause of such absence had been removed.

Furthermore, I beg to advise that Civil Service Rules 31 and 45, in my opinion, do not conflict in any way with the statute in question nor jeopardize the positions of State employees who have entered the military or naval service of the United States. All rules made by the Civil Service Commission must be consistent with law, and they cannot change the
force or effect of this statute. General rules of the Civil Service Commission relating to reinstatements and appointments, such as the ones to which you refer, must be interpreted as not applying to persons within the purview of said section 25 in so far as these rules are inconsistent with the terms of that section. Accordingly, the answer to your second question must be in the negative.

Street Railways — Location — Power to mortgage — Rights of Purchaser at Foreclosure Sale.

The location of a street railway company may be included in a mortgage given by it to secure a bond issue, and upon foreclosure of the mortgage may pass to the purchaser and his successors in title.

The signature of one of the subscribers to the agreement of organization of a proposed street railway company made by an attorney is a sufficient and proper signature, provided the attorney had sufficient authority.

In connection with the application of a street railway company for a certificate under St. 1906, c. 463, Pt. III, § 9, you have requested my opinion upon the following questions:—

1. It appears that said company, in process of organization, has acquired from a purchaser at a foreclosure sale, made by the trustee under a mortgage given to secure an issue of bonds by a street railway company, "all and singular the lines of railway," "lands," "real and leasehold estate," "franchises," "rights" and "privileges" of said mortgagor company. The question presented is whether by this means it has "obtained" "locations" "for a railway between the termini and substantially over the route set forth in the agreement of association," which is one of the conditions required by section 9 of Part III of chapter 463 of the Acts of 1906.

In other words, does the location of a street railway company pass as a part of its grant under a mortgage given by it to secure a bond issue?

Under the provisions of R. L., c. 112, § 23, and the earlier act, St. 1889, c. 316, a street railway company is authorized to secure an issue of bonds "by a mortgage of a part or of the whole of the railway of such company and its equipments, franchise and other property, real and personal."
This language is sweeping in its terms, and, in my opinion, was intended to authorize the conveyance by mortgage of all of its property and rights. This conclusion is strengthened by the fact that R. L., c. 111, § 74, which, by the provisions of R. L., c. 112, § 24, is made applicable to street railway companies, provides —

A purchaser of a railroad at a sale under a valid foreclosure of a legal mortgage thereof and his successors in title, shall be subject to all and the same duties, liabilities and restrictions, and have all and the same powers and rights, relative to the construction, maintenance and operation of said railroad which the mortgagor was subject to and had at the time of said sale.

The applicability of this provision to street railways was provided for by St. 1889, c. 316, § 3, referred to above.

It is apparent that in order for this authorization to become effective it is requisite that the locations of the street railway company should pass to the mortgagee and purchasers at a sale under a foreclosure.

By express provision of the section last quoted these rights pass equally to the successors in title of a purchaser at a foreclosure sale.

This provision of the statute is still in effect. See St. 1906, c. 463, Pt. II, § 56, made applicable to street railways by Pt. III, § 103.

It has been held by the court that these statutes are but declaratory of the law "as it exists without legislation in other jurisdictions, and as doubtless it would have been held to be in this Commonwealth upon general principles before the enactment of the statute." Chadwick v. Old Colony R.R., 171 Mass. 239, 244.

Accordingly, I am of the opinion that by conveyance to the said street railway company from a purchaser at a foreclosure sale it may properly be found to have obtained locations as required by St. 1906, c. 463, Pt. III, § 9.

2. The question is also raised as to whether signature of one of the subscribers to the agreement for organization of the proposed street rail-
way company made by an attorney, expressly authorized thereto in writing, is a sufficient and proper signature.

In my opinion, the requirement of the statute is satisfied when there is an agreement of association so executed as to be legally binding upon the individual associates. I see no reason for doubting the validity of such an agreement executed by an attorney, provided the authority in that attorney sufficiently appears.

It is stated that the particular person whose name is signed by power of attorney is one of the directors. The foregoing opinion relates merely to the agreement of association, and does not extend to any of the preliminary papers which are required by the statute to be executed by the preliminary officers or directors.

LABORERS — REGULARLY EMPLOYED BY CITIES AND TOWNS FOR MORE THAN A YEAR — DETERMINATION OF WHO ARE.

A person whose employment has not been terminated for more than a year, and which is of such a nature as to require the services of such person the usual number of hours a day throughout the year, is "regularly employed" for more than a year, within the meaning of St. 1914, c. 217, § 1, even though he has been absent from his work for some time during the year on account of sickness or other cause.

You request my opinion as to the interpretation of the word "regularly" as used in St. 1914, c. 217, § 1. That section reads as follows:—

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.

You state that certain cities and towns have arbitrarily fixed the number of days which shall constitute regular employment under this act; others leave it to the discretion of the employing authorities; while still others have prepared a list of those employed all the time, and hold that these only are entitled to vacation.
While it is difficult in a matter of this kind to prescribe a general rule which will apply to all cases which may hereafter arise, it is my opinion that the word "regularly" in this act is used in the sense of continuously, as distinguished from intermittently or at intervals. This does not mean, however, that a person must be actually at work during all of the working days of the year. The fact that he was absent from his work on account of sickness or other cause which did not constitute a termination of his employment would not prevent him from being regularly employed within the meaning of this act. On the other hand, if his employment had terminated during the year this fact would prevent him from being regularly employed, although he was re-employed by the city or town a short time afterwards. The test, in my judgment, is whether or not the employment of the man has terminated within the year so as to make it necessary for him to be re-employed before he starts to work again. If it has been so terminated, he cannot be said to be regularly employed for more than one year, within the meaning of the act above quoted. If, however, it is not terminated for more than a year, and the nature of his employment is such as to require his services for the usual number of hours a day throughout the year, he is, in my opinion, regularly employed within the meaning of this act.

Elections — Corrupt Practices Act — Promise by Candidate to Donate His Salary to Particular Charity.

A promise made by a candidate for office of representative in the General Court to donate his salary, if elected, to the Red Cross would be a violation of the corrupt practices act.

You request my opinion upon the question of whether a promise by a candidate for the position of representative in the General Court to donate his salary, in case he is elected, to the Red Cross would "conflict with paragraph 4 in section 347 of the corrupt practices act."

Section 347 of this act (St. 1913, c. 835) only forbids a
candidate to promise to appoint or assist in securing the appointment, nomination or election of another person to a public position or employment, or to a position of honor, trust or emolument. This section plainly does not apply to the promise in question.

Section 348 of this act, as superseded by St. 1914, c. 783, § 2, provides as follows:—

No person shall, in order to aid or promote his own nomination or election to a public office, either directly or indirectly, himself or through another person, give, pay, expend or contribute, or promise to give, pay, expend or contribute any money or other thing of value in excess of the following amounts:

For each Representative in the General Court to which a district is entitled, $100

The gift, payment, contribution or promise of any money or thing of value in excess of the sums hereby authorized to be expended for the several offices, by a candidate directly or indirectly, or by any other person or persons for his benefit, excepting political committees as hereinafter provided, shall be deemed a corrupt practice.

This section prohibits all promises by candidates to pay money in excess of the amount named in order to aid their election. I am inclined to the view that a promise of the character described is to be construed as a promise made for the purpose of aiding the election of the candidate. Accordingly, I am of the opinion that it is prohibited by the terms of the statute.
The trial justice of the town of North Andover has no jurisdiction over cases arising in the town of Methuen, but all such cases as could be heard by the trial justice of Methuen may, during his incapacity, be heard and determined by the District Court of Lawrence.

You have requested my opinion as to the legality of the trial justice of the town of North Andover sitting on cases in the town of Methuen, the trial justice in the town of Methuen being incapacitated at the present time.

Formerly trial justices were appointed under the provisions of R. L., c. 161, in the several counties, and their jurisdiction extended throughout the counties for which they were appointed. The law was changed in this respect by Gen. St. 1917, c. 326, which provides for the designation of justices of the peace as trial justices in certain towns therein specified, including North Andover and Methuen. Section 1 of this act, superseding R. L., c. 161, § 10, expressly confers authority upon such trial justices to receive complaints, issue warrants and try criminal cases within the towns where they are resident at the time when they are appointed and commissioned, "except that the trial justices resident in Barre and Hardwick shall have concurrent jurisdiction of offences committed in the towns of New Braintree and Oakham." This section, taken in connection with the other provisions of this act, seems to me clearly to indicate that the intention of the Legislature was to restrict the jurisdiction of these trial justices to the towns where they were resident at the time of their appointment, and to prevent their exercising jurisdiction as trial justices within any other towns.

Accordingly, I am of the opinion that the trial justice of the town of North Andover may not hear and determine cases arising in the town of Methuen.

The fact that the trial justice in the town of Methuen is at present incapacitated to perform his duties as such trial justice does not, however, seriously embarrass the administration of the law in that town, inasmuch as there is a police court which
has jurisdiction of cases arising in that town which is concurrent with the trial justice. By St. 1914, c. 532, the towns of North Andover, Andover and Methuen were annexed to, and made a part of, the judicial district of the police court of Lawrence for civil business, and the name of that court was changed to the District Court of Lawrence. Gen. St. 1917, c. 302, § 1, provides that all towns now within the judicial district of any district court for civil business shall be annexed to, and made a part of, the judicial district of such court for all kinds of business. Section 2 of this act provides that the jurisdiction acquired by any court under the provisions of section 1 shall, in all towns which now or hereafter have a trial justice resident and holding court therein, be exclusive of such trial justice only as to matters without the jurisdiction of a trial justice and concurrent with the trial justice as to all matters within his jurisdiction. It seems clear, therefore, that all cases which could be heard by the trial justice of Methuen can, during his incapacity, be as readily heard and determined by the District Court of Lawrence.

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**War Service — State Pay — Enlistments in National Guard of Another State.**

Citizens of this Commonwealth who have enlisted in the National Guard of another State are not entitled to the State pay from this Commonwealth of $10 a month provided for by Gen. St. 1917, cc. 211 and 332.

You request my opinion as to whether certain citizens of the Commonwealth residing in Attleboro and its vicinity, who have enlisted in regiments of the Rhode Island National Guard, are entitled to the State pay from this Commonwealth of $10 a month granted by Gen. St. 1917, c. 211, as defined and extended by Gen. St. 1917 c. 332.

Section 1 of chapter 211 provides that this allowance shall be paid “to each non-commissioned officer, soldier and sailor, who has been, or is hereafter, mustered into the military or naval service of the United States as a part of the quota of
this commonwealth for service in the United States or in any foreign country." At the time of the enactment of this statute the only quota in any manner assigned to the Commonwealth by the Federal government grew out of the provision in the National Defense Act regulating the numerical strength of the National Guard to be maintained by the Commonwealth.

Accordingly, on June 6 last I advised the Treasurer and Receiver-General as follows:—

In my opinion, therefore, the provision for State pay contained in chapter 211 applies at present only to the non-commissioned officers, soldiers and sailors of the National Guard of the Commonwealth, including therein any naval militia maintained by the Commonwealth, who have been mustered into the Federal service. It applies, however, to all such persons without condition as to length of residence in the Commonwealth.

Since this opinion was given, a further quota was assigned to the Commonwealth in connection with the draft under the Selective Service Law. After a full consideration of the matter, however, I am of the opinion that neither chapter 211 nor chapter 332 applies to men called to service under that statute, and I have advised State officials upon whom the duties in connection with the administration of these statutes devolve to that effect. In my opinion, it follows that chapter 211 applies only to soldiers and sailors mustered into the National Guard of the Commonwealth, and cannot apply to men who enlist in the National Guard of another State. They become a part of the quota of that State and not a part of the quota of this Commonwealth.

Chapter 332 extends the rights granted by chapter 211 to "any non-commissioned officer or enlisted man having a residence of at least six months within this state and serving to the credit of this commonwealth in the regular or volunteer forces of the United States army, navy or marine corps, whose federal service began subsequent to said February third, nineteen hundred and seventeen." This provision, however, applies only to men serving in the United States Army, Navy or Marine Corps, and does not, in my opinion, apply to men
serving in the National Guard of any State. Furthermore, it requires that the service shall be “to the credit of this commonwealth.” That, in my opinion, at least requires that the Commonwealth shall have the credit of the service of such men in the records of the Federal government. It is obvious that it cannot have such credit in the case under consideration, for the men referred to are serving as a part of the quota of Rhode Island in the National Guard of that State, and I know of no way in which it can appear in the records of the Federal government that this Commonwealth is to have the credit of such service.

Accordingly, in my opinion, the men to whom you refer are not entitled to the benefits of either chapter 211 or chapter 332 of the General Acts of 1917.

Militia — State Guard — Status of — Appropriations for.

The State Guard established under Gen. St. 1917, c. 148, does not have the same status as the National Guard, but is rather a part of the unorganized militia of the Commonwealth, temporarily organized in a limited way and for a limited purpose.

No part of the appropriations made by Spec. St. 1917, c. 292, for the land and naval forces of the Commonwealth may be used in organizing, maintaining and training the State Guard.

You have submitted to me the following request for my opinion: —

The National Guard of this Commonwealth, which was formerly the only organized militia of the Commonwealth, has been called into the service of the United States, leaving within the State but five commissioned officers.

The Legislature, under Gen. St. 1917, c. 148, and under Gen. St. 1917, c. 342, § 10, created a military force from our unorganized militia, which has been called the State Guard.

Your opinion is respectfully requested as to how far appropriations created by the Legislature under Gen. St. 1917, c. 292, approved April 23, 1917, may be used in organizing, maintaining and training said State Guard.
The answer to your inquiry involves the determination of the status of the State Guard in its relation to the military forces of the Commonwealth and the various statutes governing their organization and maintenance. Various similar questions, the answers to which depend upon that status, have already arisen and others are likely to arise. Accordingly, I propose to discuss that matter somewhat more broadly than the terms of your request necessarily require.

The provision for the organization of a State Guard, then called a home guard, was first made by Gen. St. 1917, c. 148, which took effect April 5, 1917. Section 1 authorized the Commander-in-Chief in time of war to raise by voluntary enlistment and organize such a body from certain specified classes of citizens of the United States who are inhabitants of the Commonwealth. Section 2 provides as follows:—

The home guard may be of such numerical strength, and shall be so organized, maintained, officered, armed and equipped, and enlisted for, or disbanded from, such service within the commonwealth at any time and on such terms as the commander-in-chief may from time to time by executive order determine. When called for service the home guard shall perform such duties as shall be prescribed by order of the commander-in-chief, and all members of the home guard shall have and exercise throughout the commonwealth all the powers of constables, police officers and watchmen, except the service of civil process. The compensation of officers and men of the home guard, when called by executive order for service and while on such service, shall be fixed by the commander-in-chief, and shall in no event exceed the compensation of officers and men of the national guard of like grade.

By section 3 certain provisions of the existing military law relating to the election, appointment and authority of officers and to the compensation of members injured in the discharge of their duty are made applicable to this force. By section 4 it is exempted from the provisions forbidding bodies not expressly authorized to drill with firearms or to maintain an armory. Except in these respects there is no attempt to extend the general statutes for the government and maintenance of the organized militia to this body. Section 6 is as follows:—
For the purpose of carrying out the provisions of this act the governor is authorized to expend the sum of two hundred thousand dollars, to be taken from the sum of one million dollars appropriated by chapter two hundred and two of the Special Acts of the year nineteen hundred and seventeen.

The appropriation referred to is a special emergency appropriation made in view of the exigencies of a possible war.

By Gen. St. 1917, c. 327, approved May 25, 1917, the statutes relating to the militia of the Commonwealth were codified, revised and amended. No part of the statutes then in force as to the State Guard was in any way incorporated in this codification or referred to therein. They appear in no way to have been repealed or otherwise affected by it. (See § 268.)

By Gen. St. 1917, c. 331, the Governor is authorized to "incur expenses, not exceeding two hundred and fifty thousand dollars, for the maintenance of the state guard, so-called, when said guard is called for active duty."

On Aug. 20, 1917, the Governor, as Commander-in-Chief, issued the following executive order: —

(a) By the authority vested in me by chapter 148, General Acts of 1917, I prescribe that the Guard authorized by said chapter 148 shall be organized, maintained, officered, armed and equipped, as the organized militia is organized, maintained, officered, armed and equipped, under the provisions of chapter 327, General Acts of 1917, in so far as the provisions of said chapter 327 are not inconsistent with the provisions of said chapter 148.

(b) All officers of the hereinbefore mentioned Guard are directed to execute any and all lawful commands issued to them by the proper persons mentioned in sections 25 to 34, both inclusive, chapter 327, General Acts of 1917.

Obviously, the State Guard, not being organized in accordance with the Federal law (act of June 3, 1916) or in accordance with the laws governing the Massachusetts Volunteer Militia (St. 1908, c. 604; Gen. St. 1917, c. 327), cannot be a part of the National Guard.

The limited provisions of the statutes above set forth dealing
with the organization, equipment and maintenance of this force seem to me to make it clear that it was not intended to be a complete substitute for the National Guard, or to have all the powers and privileges of that force while it is absent from the Commonwealth in the service of the United States.

In my opinion, the State Guard may be regarded as a part of the unorganized militia of the Commonwealth temporarily organized in a limited way and for a limited purpose. Its character, duties and powers, in the main, are prescribed by Gen. St. 1917, c. 148, § 2. It is to be of such numerical strength, to be organized, equipped and maintained, and to have such terms of service as the Commander-in-Chief shall determine. "When called for service" it "shall perform such duties as shall be prescribed by order of the commander-in-chief, and all members of the home guard shall have and exercise throughout the commonwealth all the powers of constables, police officers and watchmen, except the service of civil process."

Acting under the authority given to him by Gen. St. 1917, c. 148, § 2, the Commander-in-Chief, on Aug. 20, 1917, prescribed that so far as not inconsistent with chapter 148, the State Guard shall be organized, maintained, officered, armed and equipped in the same manner as the National Guard under Gen. St. 1917, c. 327. This was merely a convenient method of carrying out the provisions of section 2 of chapter 148.

By the same general order the Commander-in-Chief also directed all officers of the State Guard "to execute any and all lawful commands issued to them by the proper persons mentioned in sections 25 to 34, both inclusive, chapter 327, General Acts of 1917." These sections provide for the calling out of the Volunteer Militia by the Commander-in-Chief or a brigade commander in case of actual or threatened invasion or insurrection, or, in case of riot or public catastrophe, by certain local civil officers. The Governor has thus, under the general authority granted to him by chapter 148, prescribed
that the State Guard shall perform the duties which ordinarily devolve upon the Volunteer Militia under those sections. So far as I am informed this is the only duty as yet assigned to this force, but it is at any time subject to be called to active service within the Commonwealth and assigned to perform such emergency duties therein as the Commander-in-Chief shall by general or special order direct.

The status of the State Guard being as above determined, the various questions which have arisen as to the scope of its duties and the manner of its organization and maintenance may readily be answered. Particularly is this so as to the use of appropriations. The appropriations made by Spec. St. 1917, c. 292, are declared to be "for salaries and expenses in the department of the adjutant general, and for certain allowances and expenses of the land and naval forces." Its items cover the annual appropriations ordinarily made for the Volunteer Militia. In large part it covers various annual allowances established by law for that militia. (St. 1908, c. 604, §§ 173 and 177, as amended by Gen. St. 1917, c. 105.) The term "land and naval forces" used in this appropriation statute is plainly used to describe the land forces and the naval forces as defined in the codification of the military laws shortly after enacted by the same General Court. (See Gen. St. 1917, c. 327, §§ 78 and 194.) These definitions do not include the State Guard, and, as already pointed out, this codification does not purport to deal with that organization. Furthermore, definite special provisions have been made for financing it. By St. 1917, c. 148, § 6, the Governor was authorized to expend the sum of $200,000 for its organization. By Gen. St. 1917, c. 331, he was authorized "to incur expenses, not exceeding two hundred and fifty thousand dollars for the maintenance of the state guard, so-called, when said guard is called for active duty," the amount thus expended to be raised by a loan. These two statutes fully cover the matter; the former providing for the expense of organizing and equipping the State Guard, and the latter for its maintenance when and if called for active duty. If either or both of the amounts
thus authorized prove inadequate, the Governor, with the consent of the Council, may unquestionably apply to such purpose any part of the second war emergency appropriation of $1,000,000 authorized by Gen. St. 1917, c. 324.

Accordingly, answering your specific question, in my opinion no part of the appropriations made by Spec. St. 1917, c. 292, for the land and naval forces of the Commonwealth may be used in organizing, maintaining and training the State Guard.

War Service — Employees of Commonwealth — Amount paid by Commonwealth to those entering Military or Naval Service of the United States.

The so-called family allowance granted to enlisted men in the military or naval forces of the United States by act of Congress approved Oct. 6, 1917, is to be regarded as part of the compensation received by such men from the United States, for the purpose of computing the amount which an employee of the Commonwealth is entitled to receive from this Commonwealth under the provisions of Gen. St. 1917, c. 301.

You have requested my opinion as to whether the so-called family allowance granted to enlisted men in the military and naval forces of the United States by sections 204 to 210, inclusive, of an act of Congress approved Oct. 6, 1917, is to be regarded as a part of the compensation received by such men from the United States in administering the provisions of Gen. St. 1917, c. 301.

This family allowance is an amount not exceeding $50 a month which is paid, upon application and subject to certain restrictions, to the wife and children of all enlisted men in the military and naval forces of the United States, and to certain other relatives who are shown to be in whole or in part dependent upon them. It is a payment made on account of the enlisted man because of the services which he is rendering in the performance of his duty, for the purpose of enabling him the better to perform his legal and moral obligations with reference to the support of his family. This payment ceases
upon the death of an enlisted man in the service or one month after his discharge from the service.

Though the matter is not entirely free from doubt, it seems to me, on the whole, that this payment may and fairly ought to be regarded as a part of "the compensation received by him from the United States," within the meaning of Gen. St. 1917, c. 301, § 1. The allowance paid relieves him, to the extent thereof, of an obligation that he otherwise would have to assume. The members of Class A of the Federal act, for whom allowances are made, are those whom a man ordinarily is bound by law to support, while the allowances to the members of Class B under the act are to be granted only if and while the member is dependent in whole or in part on the enlisted man, and then only if and while the enlisted man makes a voluntary allotment of his pay for said member. Thus, the benefit of the payment accrues to the enlisted man fully as much as if paid to him directly and by him used to discharge obligations imposed on him by law or voluntarily assumed. Any other interpretation would place an employee of the Commonwealth mustered into the military or naval service of the United States, and his family, in a better financial position than if he had not enlisted. It would result in their having the benefit of an amount equivalent to the full salary which he was receiving from the Commonwealth at the time of his enlistment, and in addition the amount of this family allowance paid by the United States. I cannot believe that it was the intention of the General Court that such a result should follow from the enactment of this statute. It rather was its purpose to place an employee of the Commonwealth enlisting in the military or naval service in the same financial position that he would have been in if he had not so enlisted. In my opinion, the statute should be so interpreted as to carry out this purpose, and not, unless absolutely necessary, to place the employee in a better position financially than he was in before enlistment.
War Service — Associate Members of Legal Advisory Boards — Incompatibility of Offices.

Associate members of legal advisory boards do not hold office under authority of the United States, within the meaning of Article VIII of the Amendments to the Massachusetts Constitution, so as to disqualify them as members of the General Court.

You have requested my opinion as to whether members of legal advisory boards hold an office under authority of the United States, within the meaning of Article VIII of the Amendments to the Massachusetts Constitution, so that the acceptance of that office after the beginning of the legislative year 1918 would disqualify them as members of the General Court.

The members of the so-called permanent legal advisory boards are appointed under the rules of the President promulgated on the eighth day of November, 1917, under the provisions of the Selective Service Act of Congress. The associate members of such legal advisory boards are such members of the bar and competent laymen as are called upon by the Governor to offer their services to the permanent legal advisory boards in the several districts, for the purpose of being present at the headquarters of the local boards and rendering aid and advice to registrants.

To hold an office under the authority of the United States within the meaning of said amendment to the Constitution, in my opinion, a person must be an officer of the government of the United States, whose duties involve in their performance the exercise of some portion of the sovereign power, whether great or small. In advising and assisting registrants in the filling out of the so-called questionnaire I think it is obvious that the associate members of the legal advisory boards are not exercising any part of the sovereign power of the United States.

Accordingly, my answer to your question is in the negative.
To the Secretary.
1918 January 16.

Justice of Peace — Notary Public — Jurisdiction.

No person appointed a justice of the peace or notary public in this Commonwealth can act as such when outside the jurisdiction of the Commonwealth. A justice of the peace or notary public can continue to act as such although he is at the same time in the service of the United States Army, provided that when he acts as such he is within the Commonwealth.

You request my opinion as to whether a justice of the peace or notary public in this Commonwealth can continue to act after he goes to another State, and whether he can continue to act after entering the service of the United States Army, either as a private or non-commissioned officer, if stationed in this Commonwealth or elsewhere.

I am of the opinion that a justice of the peace or notary public can continue to act as such although he is at the same time in the service of the United States Army, provided that when he acts as such he is in the Commonwealth. It is to be noted, however, that section 1222 of the Revised Statutes of the United States provides that no officer of the army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the army, and his commission shall thereby be vacated.

I am of the opinion that no person appointed a justice of the peace or notary public in this Commonwealth can act as such when outside the jurisdiction of the Commonwealth.

To the Adjutant-General.
1918 January 17.

War Service — State Benefits — United States Guard.

The organization known as the United States Guard is a volunteer force of the United States Army, within the meaning of Gen. St. 1917, c. 332. Persons enlisting in the United States Guard subsequent to Feb. 3, 1917, are eligible to the benefits provided for by Gen. St. 1917, c. 179.

You request my opinion upon the question of "whether the United States Guard, now being enlisted in the service of the United States, is considered a part of the quota of the Com-
monwealth of Massachusetts, and therefore eligible to aids and pay under the statutes of 1917."

I am informed that the United States Guard, so called, is a military force raised under the provisions of section 2 of the act of Congress approved May 18, 1917, which is as follows:—

Provided, That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this act.

Gen. St. 1917, c. 211, entitled "An Act to provide State pay for soldiers and sailors from this Commonwealth in the volunteer service of the United States," provides, in part, as follows:—

There shall be allowed and paid out of the treasury of the commonwealth to each non-commissioned officer, soldier and sailor, who has been, or is hereafter, mustered into the military or naval service of the United States as a part of the quota of this commonwealth for service in the United States or in any foreign country, the sum of ten dollars per month.

It should be noted that this chapter expressly provides that the benefits of this statute shall not continue beyond Jan. 15, 1918, so that your inquiry, so far as it relates to the aid provided for by this statute, is now a moot question.

Gen. St. 1917, c. 179, entitled "An Act to provide aid for certain dependent relatives of soldiers and sailors of the commonwealth in the federal service," authorized cities and towns to provide aid for certain relatives and dependents "of any inhabitant of such city or town, having a residence and actually residing therein, who has enlisted, and responded to the call of the president or war department, or hereafter shall duly be enlisted, and who has been or shall be mustered into the military or naval service of the United States as a part of the quota of this commonwealth which may be called for service in the United States or in any foreign country."

The benefits of these acts were extended by chapter 332 of the acts of the same year to "any non-commissioned officer or
enlisted man having a residence of at least six months within this state and serving to the credit of this commonwealth in the regular or volunteer forces of the United States army, navy or marine corps, whose federal service began subsequent to said February third, nineteen hundred and seventeen."

In an opinion rendered by me to the Treasurer and Receiver-General under date of June 6, 1917, it was stated that the requirement that the service must be "as a part of the quota of this commonwealth" limited the scope of said chapter 211 to non-commissioned officers, soldiers and sailors of the National Guard of the Commonwealth, including therein any naval militia maintained by the Commonwealth, who have been mustered into the Federal service. This phrase as used in chapter 179 must be interpreted likewise. My opinion was also expressed that the right to receive State pay was extended by the provisions of said chapter 332 to all persons enlisting in the regular or volunteer forces of the United States Army, provided such persons had at the time of their enlistment been residents of the Commonwealth for at least six months.

It seems plain, in my judgment, that the organization raised by the President under the provisions of the act of Congress of May 18, 1917, above quoted, and known as the United States Guard, is a volunteer force of the United States Army, within the meaning of Gen. St. 1917, c. 332. The copy of the enlistment blanks used by persons enlisting in this force appears to be similar in form to those used in the regular army.

Accordingly, I am of opinion that persons enlisting in the United States Guard subsequent to Feb. 3, 1917, are eligible to the benefits provided for by Gen. St. 1917, c. 179.
Corporations — Increase of Capital Stock — Filing Fee.

The Secretary of the Commonwealth is not authorized to return to a corporation the filing fee paid by it on filing a certificate of increase of capital stock, even though the stock may in fact never be issued. Upon the filing of the certificate the authority to increase the capital stock is complete, and it is for that right that the fee is required.

You have requested my opinion as to whether you can properly refund to a corporation a filing fee paid by it on filing a certificate of increase of capital stock, in view of the fact that thirty days after the filing of such certificate the directors and stockholders of the corporation each voted to rescind all action which had previously been taken, so that as a matter of fact it appears that there has been no actual increase of the stock of the corporation.

Under the provisions of St. 1903, c. 437, §§ 40 to 44, inclusive, a corporation is permitted to amend its agreement of association in several ways, including therein the amount of stock authorized. Under the provisions of section 41 the amendments cannot take effect until the articles of amendment have been filed in the office of the Secretary of the Commonwealth, and it is for such filing that the fee fixed by the provisions of section 89, as amended, is required.

Upon such filing the authority to increase the capital stock is complete. Even though the stock may in fact never be issued, the right to issue it has been obtained, and it is for that right that the fee is required.

The same situation exists with reference to original incorporation. The fees based on capitalization are determined by the amount of stock authorized, not by the amount which may be issued after the authorization has been obtained. It seems quite clear that if, upon incorporating, a larger amount of capital were authorized than needed, and, the whole amount authorized not having been issued, the amount of capital should be reduced, there would be no ground for requesting a return of any part of the fees.

Similarly, the fact that the corporation did not avail itself of the authority which it had obtained, but saw fit to have

To the Secretary.
1918
January 21.
that authority revoked, does not affect the fact that it did obtain the right to increase its capital stock. Very much the same reasoning appears in an opinion of the Attorney-General rendered in 1895 to the Secretary of the Commonwealth (I Op. Atty.-Gen. 205).

Accordingly, I am of the opinion that you are not authorized to return to the corporation in question the filing fee which has been paid.

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**Board of Registration in Pharmacy — Medicated Alcohol — Recording of Sales.**

Medicated alcohol containing ingredients rendering the compound poisonous does not fall within the prohibition of our laws relative to intoxicating liquors. It is not necessary that the sale of such a non-beverage alcohol shall be recorded in the liquor record book, under the provisions of R. L., c. 100, § 26.

You request my opinion as to the right of a druggist to sell "non-beverage" alcohol without making a record of the sale in the liquor record book, under the provisions of R. L., c. 100, § 26.

R. L., c. 100, § 21, as amended by St. 1913, c. 410, and as affected by St. 1913, c. 413, provides that a registered pharmacist to whom a certificate of fitness has been issued may sell pure alcohol for medicinal and other purposes without a physician's prescription, if such sale is recorded in the manner provided for in section 26 of said chapter 100. Under the United States law enacted on Sept. 9, 1917, and the regulations issued by the Commissioner of Internal Revenue relative to the regulation and control of alcohol purchased for use or sale, it is provided that pharmacists who are holders of special tax stamps as retail liquor dealers will be entitled to sell non-beverage alcohol if the same is properly medicated in accordance with certain formulæ therein mentioned, among which are the following:—

Carbolic acid 1 part, alcohol 99 parts.
Formaldehyde 1 part, alcohol 250 parts.
Bichloride of mercury 1 part, alcohol 2,000 parts.
I am advised that in every instance the added ingredients render the compound poisonous, and if the alcohol were to be used as a beverage it would probably be attended with fatal results. At all events, I think it clear that such medicated alcohol is not pure alcohol, under the provisions of chapters 410 and 413 of the Acts of 1913. Nor do I understand that such medicated alcohol can be used as an intoxicating drink. If not, it does not fall within the prohibition of our laws relative to intoxicating liquor. Commonwealth v. Ramsdell, 130 Mass. 68, 69.

Accordingly, without expressing any opinion as to whether such medicated alcohol is of such a poisonous nature as to require the recording of its sale in the book in which sales of poisonous substances are required to be recorded, I am of the opinion that its sale need not be recorded in the liquor book.

Minimum Wage Commission — Authority to issue Special Licenses — Women Physically Defective.

Under the provisions of St. 1912, c. 706, § 9, the Minimum Wage Commission is warranted in issuing to women special licenses permitting their employment at less than the legal minimum wage fixed for women in their occupation, provided the women are physically defective to such an extent as to make them incapable of doing an amount of work required to entitle them to the minimum wage determined. The Minimum Wage Commission is not warranted in issuing such licenses to women incapacitated solely by reason of mental defects.

You request my opinion as to whether your Commission is authorized to issue special licenses to women incapacitated by age or mental defect, permitting their employment at less than the legal minimum wage fixed for women in their occupation, under the provisions of St. 1912, c. 706, § 9.

Section 9 is as follows:—

For any occupation in which a minimum time rate only has been established, the commission may issue to any woman physically defective a special license authorizing the employment of the licensee for a wage less than the legal minimum wage: provided, that it is not less than the special minimum wage fixed for that person.
This section, in my judgment, is to be construed in connection with the other provisions of the act. The act provides for the determination of a minimum wage suitable for a female employee of ordinary ability in the occupation in question, and also suitable minimum wages for learners and apprentices and for minors below the age of eighteen years. I think it obvious that the Legislature intended to authorize your Board to issue special licenses to women who were physically defective, from any cause, to such an extent as to make them incapable of doing an amount of work required to entitle them to the minimum wage determined. Consequently, if a woman's physical powers have become impaired by age to such an extent, I am of the opinion that your Board is warranted in issuing to her a license in which a special minimum wage is fixed.

Ordinarily, mental defects are not included within the term "physical defects," and I am of the opinion that you are not warranted in issuing such licenses to women incapacitated solely by reason of mental defects.

Employment of Minors — Selling Newspapers and Practicing Other Street Trades — Employment Certificate.

A boy between the ages of fourteen and sixteen, who has an employment certificate issued under St. 1913, c. 779, § 15, and who is in fact regularly and habitually engaged for at least six hours per day in the employment or business of selling newspapers or in the practice of other street trades, does not come within the compulsory provisions of section 1 of said act. The person whose duty it is to issue the employment certificate should be satisfied that the pledge or promise presented is made in good faith by or in behalf of a bona fide employer; if he is not so satisfied, he should decline to approve and file the pledge or promise, and refuse to issue the certificate.

You request my opinion upon the following question: —

Shall the selling of newspapers and the practice of street trades upon the public streets during school hours by boys between the compulsory school ages of fourteen and sixteen years be considered regular employment for the granting of employment certificates in accordance with the
requirements of St. 1913, c. 779, § 1, even though the boy claims to be so
engaged for at least six hours per day and presents a written promise for
such employment?

The section to which reference is made in this question relates merely to children upon whom school attendance is
made compulsory. Among its other provisions it requires
attendance of "every child under sixteen years of age who has
not received an employment certificate as provided in this act
and is not engaged in some regular employment or business for
at least six hours per day." Thus, to be excused from attend-
ance such a child must have received an employment certifi-
cate and be actually "engaged in some regular employment or
business for at least six hours per day." The nature of the
employment or business is not specified. In my opinion, the
statute intends to cover any legal employment or business in
which the child is habitually engaged for at least six hours per
day. There seems to be no intention to restrict the employ-
ment or business in any way, or to confine it to the classes of
employment mentioned in St. 1913, c. 779, § 15.

Accordingly, in my opinion, if a boy between the ages of
fourteen and sixteen has an employment certificate issued
under section 15 of this statute, and is in fact regularly and
habitually engaged for at least six hours per day in the em-
ployment or business of selling newspapers or in the practice
of other street trades, he does not come within the compulsory
provisions of section 1.

It should be noted that to be exempt from school attendance
such a boy must have an employment certificate, and that, by
section 16, this certificate cannot be issued before the person
issuing it has received, examined, approved and filed a pledge
or promise of employment signed by the employer or in his
behalf, containing the detailed statements set forth in section
16. If the person whose duty it is to issue the certificate is not
satisfied that the pledge or promise presented is made in good
faith by or in behalf of a bona fide employer, he should, of
course, decline to approve and file it, and refuse to issue the
certificate.
BOARD OF PAROLE — PERMITS TO BE AT LIBERTY — ISSUANCE THEREOF TO INMATES OF THE STATE PRISON WHO HAVE BEEN TRANSFERRED TO THE PRISON CAMP AND HOSPITAL.

The Board of Parole of the Massachusetts Bureau of Prisons has the authority to issue permits to be at liberty to inmates of the State Prison who have been transferred to the Prison Camp and Hospital, subject, however, to the provisions of St. 1911, c. 451.

You request my opinion as to whether you may issue permits to be at liberty to inmates of the State Prison who have been transferred to the Prison Camp and Hospital.

By St. 1904, c. 243, § 3, the Prison Commissioners were authorized to issue a permit to be at liberty to any prisoner held at said camp, upon such terms and conditions as they should prescribe. By Gen. St. 1915, c. 141, all the powers of the Board of Prison Commissioners to release a prisoner from the Prison Camp and Hospital on permits to be at liberty were transferred and vested in the Board of Parole for the State Prison and the Massachusetts Reformatory. Gen. St. 1916, c. 241, § 1, provided that all the powers of the Board of Parole for the State Prison and Massachusetts Reformatory should be transferred and vested in the Board of Parole of the Massachusetts Bureau of Prisons. Thus all the powers to release prisoners from the Prison Camp and Hospital are now vested in your Board.

Under the provisions of Gen. St. 1916, c. 76, prisoners may be removed from the State Prison to the Prison Camp and Hospital. I think that the Legislature did not intend by the passage of this act to repeal in any way any of the general laws relating to the release of prisoners sentenced to the State Prison. The act of 1916, therefore, must be read in connection with the provisions of law which were in effect at the time of the passage of the act relating to the release of prisoners from the State Prison.

St. 1911, c. 451, § 1, provides that special permits to be at liberty from the State Prison may be granted to certain prisoners who have served at least two-thirds of the minimum
term of their sentence, but in no event until such prisoner has served at least two and one-half years in said prison.

Accordingly, I am of the opinion that you may release prisoners in the Prison Camp and Hospital who have been transferred thereto from the State Prison, subject, however, to the provisions of St. 1911, c. 451.

STATE BOARD OF AGRICULTURE—MASSACHUSETTS APPLE GRADING LAW—LIABILITY FOR SELLING OR DISTRIBUTING ADULTERATED OR MISBRANDED APPLES.

Under the provisions of Gen. St. 1915, c. 261, known as the Massachusetts Apple Grading Law, a person who sells or distributes adulterated or misbranded apples is not subject to the penalty imposed by section 14 of the aforesaid act if it appears that he acted in good faith solely as a distributor. The word "distributor" is to be interpreted as meaning the middleman, and if he acts in good faith he must sell or distribute without knowing or having reasonable ground for believing that the packages of apples with which he is dealing have been packed in violation of law.

If the apples in the possession of the middleman have been inspected by the State authorities, under the provisions of section 10, and he has been notified that they are not packed in accordance with law, he cannot, after such notice, be said to be acting in good faith, within the meaning of section 15 of the aforesaid act.

You request my opinion with reference to certain questions which have arisen under Gen. St. 1915, c. 261, known as the Massachusetts Apple Grading Law, relative to the liability of persons who purchase apples packed or marked in violation of law and later resell them after holding them in storage.

This statute establishes certain standard grades for apples packed in Massachusetts, and provides for the manner in which such apples shall be packed and marked. It defines adulteration and misbranding within the meaning of the statute, and, by section 14, imposes a penalty upon "any person who adulterates or misbrands apples within the meaning of this act, or who packs, repacks, sells, distributes, or offers or exposes for sale or distribution, apples in violation of any provision of this act." Section 10 provides that apples that have been in cold storage shall not be sold or distributed in closed
packages until they have been inspected under rules and regulations to be prescribed by you. Section 15 provides as follows:—

No person who sells or distributes or offers or exposes for sale or distribution apples adulterated or misbranded within the meaning of this act shall be deemed to have violated any of the provisions of this act, if it shall appear that he acted in good faith solely as a distributor, or if he shall furnish a guaranty signed by the person from whom he received the apples, with the address of such person, that the apples are not adulterated or misbranded within the meaning of this act. In such case, the person from whom the distributor received the apples shall be liable for the acts of the distributor who relied upon his guaranty, to the same extent as the distributor would have been liable under the provisions of this act.

You will note that the last-mentioned section excludes from liability for the penalty imposed by section 14 a person who sells or distributes adulterated or misbranded apples "if it shall appear that he acted in good faith solely as a distributor." In my opinion, the word "distributor" is intended to refer to a person not a grower, who receives or purchases apples for the purpose of selling them to other dealers either on his own account or as an agent; in other words, it refers to the middleman, so called. By this section such a middleman is excused from liability if he sells or distributes in good faith. This seems to imply that he sells or distributes without knowing or having reasonable ground for believing that the packages of apples with which he is dealing have been packed in violation of law. It seems to me plain that, if you inspect the apples in his possession, under the provisions of section 10, and notify him that they are not packed in accordance with law, he cannot, after such notice, be said to be acting in good faith, within the meaning of section 15.

Accordingly, in my opinion he will be liable to the penalty imposed by section 14, unless he is able to bring himself within the other provision of section 15, relating to a guaranty signed by the person from whom he received the apples.
War Service — Selective Service Act — Clerk of District Court — Classification.

Under the Selective Service Act and the rules and regulations made thereunder, the clerk of the District Court of Western Hampden is entitled to classification in Class V.

You request my opinion as to whether or not the clerk of the District Court of Western Hampden is entitled to classification in Class V, under the Selective Service Act and the rules and regulations made thereunder, as a legislative, executive or judicial officer of the Commonwealth.

The District Court of Western Hampden is established by R. L., c. 160. Section 9 of this chapter provides that clerks of district courts shall be appointed by the Governor, with the advice and consent of the Council, for a term of five years. Section 13 provides that —

... If the office of clerk is established by law, the clerk may make and issue warrants, writs and processes, shall make all returns of the court, tax all bills of costs and receive all fines, forfeitures, fees and costs accruing from the business of the court in civil and criminal cases, including fees for blanks and copies.

In performing these acts the clerk represents the Commonwealth as a whole, and exercises some portion of the sovereign power of the State, within the rule laid down in Attorney-General v. Tillinghast, 203 Mass. 539.

Accordingly, I am of opinion that your question is to be answered in the affirmative.
Commissioners of Massachusetts School Fund — Method of Distribution of Income — Definition of "School Tax" and of "Whole Tax" — Figures to be used in arriving at Distribution.

Under the provisions of St. 1903, c. 456, which directs the method of distribution of the income of the Massachusetts School Fund, the words "school tax" mean the amount appropriated for school purposes which is included by the assessors in making up the local tax rate. The "whole tax" rate of a city or town, as those words are commonly employed, is the rate made necessary by the inclusion of the State and county taxes. The figures to be used under the provisions of the aforesaid statute are those of the same calendar year as that in which was accumulated the income which is to be distributed.

You request my opinion upon certain questions connected with the interpretation of St. 1903, c. 456, which directs the method of distribution of the income of the Massachusetts School Fund.

One portion of this fund is to be distributed to certain towns "whose annual tax for the support of public schools is not less than one sixth of their whole tax for the year, as follows: — Every town whose school tax is not less than one third of its whole tax shall receive a proportion of said remainder expressed by one third; every town whose school tax is not less than one fourth of its whole tax shall receive a proportion expressed by one fourth; every town whose school tax is not less than one fifth of its whole tax shall receive a proportion expressed by one fifth; and every town whose school tax is not less than one sixth of its whole tax shall receive a proportion expressed by one sixth."

You desire my opinion as to the meaning of the terms "school tax" and "whole tax," as used in the quotation above.

It is at the present time, and was at the time this method of distribution was first adopted (1893), the general practice for all sums to be raised by taxation in the various cities and towns, whether for State, county or local purposes, to be included in one tax levy. It is apparent, therefore, that the phrase "school tax" was not intended to be interpreted with strict literal accuracy, and must be considered to have been
intended to mean the tax which would have been imposed in case all moneys raised by taxation for school purposes were raised by a special tax.

In fact, the language used in the original statute (St. 1891, c. 178, § 1) provided for distribution to certain towns "whose annual tax rate for the support of public schools is not less than one sixth of their whole tax rate for the year." The omission of the word "rate" in the Revised Laws would not indicate an intention to change the meaning of the statute.

The whole tax rate of a city or town, as those words are commonly employed, is the rate made necessary by the inclusion of the State and county taxes, even though a taxpayer has the right to have the amounts separated. See Boston Fish Market Corp. v. Commonwealth, 224 Mass. 31.

You query whether the amounts received by a town from the Massachusetts School Fund and by reason of certain State aid for school purposes are an element to be taken into consideration in defining the term "school tax." So far as these sums are deducted from amounts which would otherwise be raised by taxation they are to be taken into account. In my opinion, it is only the amount appropriated for school purposes which is included by the assessors in making up the local tax rate which is to be considered as the school tax.

Your second question is whether the above-mentioned figures should be those of the "preceding year." St. 1903, c. 456, § 2, provides that income accrued on the thirty-first day of December in each year shall be apportioned and the amounts paid on the twenty-fifth day of January thereafter. In my opinion, the figures to be used are those of the calendar year preceding the day of payment (January 25); or, in other words, those of the same calendar year as that in which was accumulated the income which is to be distributed.
Board of Conciliation and Arbitration — Non-performance of Award.

The non-performance of an award made by the Board of Conciliation and Arbitration under St. 1909, c. 514, § 12, as amended by St. 1914, c. 681, does not subject the non-complying parties to the penalty contained in section 36 of said chapter 514.

You inquire whether the non-performance of an award of your Board is an offence punishable under St. 1909, c. 514, § 36, and if such non-performance is an offence, by whom or by what department complaint should be made.

I assume that your inquiry is directed to that part of St. 1909, c. 514, § 12, as amended by St. 1914, c. 681, which reads as follows: —

Said decision shall, for six months, be binding upon the parties who join in said application, or until the expiration of sixty days after either party has given notice in writing to the other party and to the board of his intention not to be bound thereby.

I am of the opinion that this provision deals simply with the effect of the decision made by the Board upon an arbitration voluntarily entered into by the parties, and does not provide for a rule of conduct to be observed by the parties which subjects them, upon a breach thereof, to the penalty contained in section 36 of said chapter 514.

I am confirmed in this view by the history of the provisions of the statute involved in your inquiry. Section 36 of said chapter 514 first appeared as section 70 of chapter 106 of the Revised Laws. It was evidently inserted by the commissioners to take the place of the following statutes: St. 1892, c. 410, § 2, and St. 1894, c. 508, § 78. St. 1892, c. 410, was an act to prohibit the deduction of wages of employees engaged at weaving, and St. 1894, c. 508, was an act regulating the employment of labor, section 78 of the latter act providing as follows: —

Any person violating any provision of this act where no special provision as to the penalty for such violation is made shall be punished by a fine not exceeding one hundred dollars.
HENRY C. ATTWILL, ATTORNEY-GENERAL.

St. 1909, c. 514, § 12, is a re-enactment of R. L., c. 106, § 3, as amended by St. 1904, c. 313, § 2. The provision in said section 12 that "said decision shall, for six months, be binding upon the parties who join in said application, or until the expiration of sixty days after either party has given notice in writing to the other party and to the board of his intention not to be bound thereby," first appears in section 6 of chapter 263 of the Acts of 1886. Neither said chapter 263 nor any amendment thereof contains any penalty for violation of any of its provisions.

Criminal statutes are to be construed strictly, and it would be a violation of this principle to assume that, because St. 1886, c. 263, and its amendments were subsequently grouped in R. L., c. 106, and later in St. 1909, c. 514, with the other provisions of law relating to labor, it was the intention of the Legislature to make the non-compliance of one of the parties to the decision of the Board in an arbitration a crime where such non-compliance was not a crime prior to such grouping.

Accordingly, I am of the opinion that your question is to be answered in the negative.

Commissioners on Fisheries and Game — Licenses to Catch or Take Lobsters.

Licenses issued by clerks of cities and towns to catch or take lobsters, under the provisions of Gen. St. 1917, c. 312, § 2, give authority to catch or take lobsters in the waters of the Commonwealth lying within the county within which the city or town granting the license is situated, or in the waters of an adjoining county lying within three miles of the county in which said city or town is situated.

You request my opinion as to the construction to be placed upon that part of section 2 of chapter 312 of the General Acts of 1917 which provides that —

The clerk of any city or town in the counties of Essex, Middlesex, Suffolk, Norfolk, Plymouth, Barnstable, Bristol, Dukes or Nantucket, situated on the shores of this commonwealth, shall, in the manner and subject to the provisions hereinafter set forth, grant licenses to catch or
take lobsters from the waters of the commonwealth within three miles of the county within which the city or town granting the license is situated.

I understand your question is directed to whether the license authorizes the holder to catch and take lobsters only within three miles of the shore line of the county within which the city or town granting the license is situated, or to catch and take lobsters in the waters of the Commonwealth in said county and also in an adjoining county if the lobsters are caught or taken within three miles of the county within which the city or town granting the license is situated.

R. L., c. 20, § 1, provides that "the boundary line of counties bordering on the sea shall coincide with the line of the commonwealth as defined in section three of chapter one" of the Revised Laws. Said section 3 is as follows: —

The territorial limits of this commonwealth extend one marine league from its sea shore at extreme low water mark. If an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line.

All of the waters of the Commonwealth, therefore, lying within three miles directly offshore are within the county, and if it was intended to restrict the catching and taking of lobsters to the waters of the Commonwealth within the county, it would have been unnecessary to have used the words "three miles of," and the intent of the Legislature would have been more clearly expressed by the omission of those words. On the other hand, it seems unlikely that the Legislature intended to prohibit the taking of lobsters within the county in the waters of the Commonwealth which might be more than three miles from the shore line.

Accordingly, I am of the opinion that the licensee is authorized to take or catch lobsters in the waters of the Commonwealth lying within the county within which the city or town granting the license is situated, or in the waters of an adjoining county lying within three miles of the county in which said city or town is situated.
INDUSTRIAL SCHOOL OF SHOEMAKING AT LYNN — COST OF
ESTABLISHMENT AND EQUIPMENT — COST OF MAINTENANCE
AND OPERATION.

To the extent of paying the cost of the establishment and equipment of the Industrial School of Shoemaking at Lynn, and raising by taxation annually such sums as may be needed for its maintenance and operation after it has been established and equipped, Spec. St. 1916, c. 174, is mandatory upon the city of Lynn.

You request my opinion as to whether, upon acceptance by the voters of the city of Lynn of Spec. St. 1916, c. 174, it became mandatory upon said city to establish, equip and maintain an industrial school of shoemaking, subject to the approval of the Board of Education, in accordance with the provisions of St. 1911, c. 471.

Spec. St. 1916, c. 174, provides that, upon acceptance of the act by a majority of the voters of the city of Lynn, the Governor, with the advice and consent of the Council, shall appoint eight persons, residents of said city of Lynn, who, together with the mayor of Lynn, shall be known as the Trustees of the Independent Industrial Shoemaking School of the City of Lynn. Section 3 of the act provides: —

The said trustees are hereby authorized to determine the situation of the said school, subject to the approval of the board of education, and to expend annually for rent of suitable floor space for the school a sum not exceeding six thousand dollars until such time as it is deemed expedient to purchase, construct or alter a building for the use of the school. After the said school is established and equipped, the city of Lynn shall annually raise by taxation such sums as may be needed for its maintenance and operation.

Under this section the trustees are given the power, subject to the approval of the Board of Education, to determine the situation of the school and to expend annually for rent of suitable floor space a sum not exceeding six thousand dollars, until such time as it shall be deemed expedient to purchase, construct or alter a building for the use of the school. The section further provides that after the school is established and
equipped the city of Lynn shall annually raise by taxation such sums as may be needed for its maintenance and operation.

I think it plain that the trustees are authorized to incur liability for rent of floor space so long as this liability does not exceed $6,000 annually, provided the situation has first been approved by the Board of Education. This expense is to be met in the first instance by the city of Lynn, a part thereof to be subsequently paid by the Commonwealth.

When the school has been established and equipped, the city of Lynn is bound by law to raise annually by taxation such sums as may be needed for its maintenance and operation. By the provisions of section 4 the cost of establishing and equipping the said school is to be paid by the city of Lynn.

The provisions of the act are somewhat indefinite as to who is to determine the equipment of the school, but I think any question that may be raised in relation thereto is met by section 5, which provides that the school established under this act is to be "established and maintained as an approved school, subject to the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and eleven, and of any amendments thereof."

Section 4 of the last-mentioned act provides:—

Any city or town may, through its school committee or through a board of trustees elected by the city or town to serve for a period of not more than five years, and to be known as the local board of trustees for vocational education, establish and maintain independent industrial, agricultural and household arts schools.

Section 8 provides:—

Independent industrial, agricultural and household arts schools shall, so long as they are approved by the board of education as to organization, control, location, equipment, courses of study, qualifications of teachers, methods of instruction, conditions of admission, employment of pupils and expenditures of money, constitute approved local or district independent vocational schools. Cities and towns maintaining such approved local or district independent vocational schools shall receive reimbursement as provided in sections nine and ten of this act.
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Reading the two acts together, the intention of the Legislature seems clear. The school is to be organized, equipped and maintained through a board of trustees consisting of the mayor and eight persons to be appointed by the Governor, subject to the approval of the Board of Education, as provided in St. 1911, c. 471, § 8, the cost to be met in the first instance by the city of Lynn, reimbursement to be made by the Commonwealth to the extent provided by said chapter 471.

It follows that, by Spec. St. 1916, c. 174, the trustees are empowered to establish the school at a place to be approved by the Board of Education so long as the rental for floor space does not exceed $6,000 annually, and to incur expenses on behalf of the city for its equipment, which the city is bound by law to meet and pay; and that, after the school is established and equipped, the city of Lynn is bound to raise annually by taxation such sums as are needed for its maintenance and operation.

Accordingly, to the extent of paying the cost of the establishment and equipment of the school and raising by taxation annually such sums as may be needed for its maintenance and operation after it has been established and equipped, the act, in my opinion, is mandatory upon the city of Lynn, and, to that extent, the answer to your question is in the affirmative.

STATE BOARD OF CHARITY — CHARITABLE CORPORATION — ELECTION OF OFFICERS — VOTING BY PROXY.

A charitable corporation organized under the laws of Massachusetts cannot legally conduct an election of officers by mail only, without the assembly of the voters at a meeting.

Members of a charitable corporation may legally vote by proxy for any purpose, including the election of officers, provided the by-laws of the corporation so provide.

You request my opinion upon the following questions: —

1. Can a charitable corporation organized under Massachusetts laws legally conduct an election of officers by mail only, without the assembly of the voters at a meeting?
2. Can members legally vote by proxy for any purpose, including the election of officers?

1. It seems to be generally accepted law that a corporation cannot hold a valid meeting for the election of officers or other purpose except by assembly of the stockholders or members, either in person or by proxy, at a meeting duly called. 1 Thompson on Corporations, § 706; 10 Cyc. 323. The general reason for this rule is that each member has a right of consultation with the others, and the minority has a right to be heard by other members for the purpose of attempting, at least, to change their opinion.

2. As to voting by proxy, R. L., c. 109, § 5, which is applicable to all corporations organized under the laws of this Commonwealth except so far as its terms are inconsistent with the provisions of special statutes, provides that "every corporation may by its by-laws, except as otherwise expressly provided, determine . . . the mode of voting by proxy." There is nothing in the general law relating to charitable organizations which is inconsistent with such a by-law.

Accordingly, I am of the opinion that members of such a corporation may legally vote by proxy for any purpose, including the election of officers, provided the by-laws of the particular corporation so provide.

If, however, the by-laws do not contain provisions for voting by proxy, such method is not permissible.

Salaries — Probation Officer — District Court — Superior Court.

A probation officer of a district court, who has been temporarily employed in connection with the probation work of the Superior Court during the disability of a probation officer of that court, is entitled to receive compensation from the county for the latter services.

You request my opinion as to whether the probation officer of a district court, who has been temporarily employed in connection with the probation work of the Superior Court during
the disability of a probation officer of that court, is entitled to receive compensation from the county for the latter services.

In my opinion, R. L., c. 204, § 42, has no application to the question raised. Its main purpose is to prevent the officers specified from receiving fees or extra compensation for services performed as a natural or ordinary incident of their regular duties, but it does not forbid an officer to perform work out of the line of his regular duties which is not inconsistent with those duties, and does not interfere with their performance. Nor does it prevent him from obtaining proper compensation therefor.

R. L., c. 217, § 92, provides:—

The compensation of each probation officer and assistant probation officer of a police, district or municipal court shall be determined by the justice thereof, subject to the approval of the county commissioners, and shall be paid by the county, upon vouchers approved by said justice and the county commissioners, . . .

As I understand it, the amount of time which the probation officers of the various district courts are required to devote to their work depends upon the number of cases which are referred to them, and varies greatly in the different districts. I assume that their compensation also varies, and that it is fixed with due consideration of the amount of time they are required to devote to their duties. I am told that in a number of instances the probation officer of a district court has also been appointed probation officer of the Superior Court, and has been able to perform the duties of both offices.

It seems to me that the question raised by your inquiry depends entirely upon the amount of time which the probation officer in question is required to devote to the work of the district court. His salary has doubtless been fixed by the justice of that court after due consideration of the amount of time which he is required to devote to his work. I see no reason why the time which the officer is not required to devote to the work of the district court is not his own, and why, if he chooses, he may not employ that time in probation work in
some other court. He must not, however, neglect his regular duties, and must devote to them the full time required, as otherwise he will not be entitled to full compensation.

The statute, however, provides that the compensation of the probation officers of the district courts shall be paid “upon vouchers approved by said justice and the county commissioners.” If the probation officer in question has presented a proper voucher for his compensation as probation officer of a district court, that would seem to settle his right to receive pay for services rendered in that court. His right to receive that pay will establish the fact that he has fully performed the duties of that office, and I see no reason why his right to receive compensation for additional services rendered to the county in any other capacity should be questioned.

Weights and Measures — Kindling Wood, Sale of, without Measure.

The provisions of R. L., c. 57, § 78, do not forbid the selling or offering for sale of kindling wood without being measured by a sworn measurer, provided the wood is not offered as containing any specific quantity determined by cord measure.

You have requested my opinion as to whether, in view of the provisions of R. L., c. 57, § 78, kindling wood can be sold or offered for sale without being measured by a sworn measurer.

The section to which you refer is as follows: —

If firewood or bark which is exposed for sale in a market or upon a cart or other vehicle is offered for sale before it has been measured by a public measurer of wood and bark and before a ticket thereof signed by him has been delivered to the driver, certifying the quantity which the load contains, the name of the driver and the place in which he resides, the driver and owner shall for each load thereof severally forfeit five dollars.

It is by no means clear that kindling wood is included within the term “firewood” as used in this statute. In view of the length of time this statute has been in force, it would seem
more natural that it should apply to wood used for maintaining a fire than to wood consumed merely in the starting of a fire. However that may be, it is my opinion that this section applies merely to wood offered for sale, under the conditions and in the manner specified in the statute, by cord measure and when sold as an entire load. In my opinion, the statute does not apply to wood offered for sale in less than an entire load, and in no way forbids the sale of wood by any other method of measurement than by cord measure. It follows that this section does not forbid the selling of kindling wood by bag or basket, or even by the load when the latter is not offered as containing any specific quantity determined by cord measure.

War Service — State Aid — Dependents of Persons drafted into the Military Service — Brothers and Sisters of Half Blood — Stepbrothers and Stepsisters — Brothers and Sisters through Adoption.

Under Gen. St. 1917, c. 179, brothers and sisters of half blood and brothers and sisters through adoption are entitled to State aid where actual dependency on a person drafted into the military service of the United States exists. Stepbrothers and stepsisters are not entitled to receive State aid under the statute referred to.

I have received from you the following request for an opinion: —

Will you kindly give me your opinion as to the eligibility of brothers and sisters of half blood, stepbrothers and stepsisters and brothers and sisters through adoption to receive State aid under the provisions of Gen. St. 1917, c. 179, § 1.

Section 1 of the statute referred to authorizes any city or town to raise money by taxation or otherwise, and, if necessary, to expend such money, through certain designated officials, —

for the benefit of the wife, widow, children under sixteen years of age, or any child dependent by reason of physical or mental incapacity, or the
actually dependent parents, brothers and sisters of any inhabitant of such city or town ... who has enlisted ... or hereafter shall duly be enlisted, and who has been or shall be mustered into the military or naval service of the United States. ...

Brothers and sisters of half blood have from an early period in this Commonwealth been accorded equal rights of inheritance with those of whole blood. R. L., c. 133, § 2.

Under the laws of this Commonwealth an adopted child stands in the same relation to a natural child of the adopting parent as if he were the natural child of such parent. R. L., c. 154, § 7.

It would seem, therefore, that under Gen. St. 1917, c. 179, brothers and sisters of half blood and brothers and sisters through adoption are entitled to receive State aid where actual dependency exists. Your question, so far as it relates to step-brothers and stepsisters, is to be answered in the negative.

Treasurer and Receiver-General — Intoxicating Liquors — License Fees — Clubs.

One-fourth of the fees received by a city or town from liquor licenses issued to clubs should be paid to the Treasurer and Receiver-General, under the provisions of R. L., c. 100, § 45.

With reference to the letter sent to you by the treasurer of the town of Agawam I would say that from an examination of the history of R. L., c. 100, § 45, one-fourth of the fees received by a city or town from liquor licenses issued to clubs should be paid to the Treasurer and Receiver-General as therein provided.

Pub. St., c. 100, § 14, provides: —

The treasurer of a city or town shall pay to the treasurer of the commonwealth one-fourth of all moneys received by him for licenses, within one month after he receives the same.

Club licenses were first authorized by St. 1887, c. 206. St. 1897, c. 233, § 1, provides as follows: —
All treasurers of cities and towns in this Commonwealth shall, within thirty days after the receipt of moneys for liquor licenses granted by their several cities and towns, make a return of amounts so received to the treasurer of the Commonwealth, and at the same time shall pay to him twenty-five per cent. of the amount so received, in accordance with the provisions of section fourteen of chapter one hundred of the Public Statutes.

This last act was never amended or changed, but when the commissioners compiled the Revised Laws they substituted therefor section 45 of chapter 100. You will note that the act of 1897 provided for money received from liquor licenses, but R. L., c. 100, § 45, changed the phraseology so that it should read, "money received for licenses for the sale of intoxicating liquors."

It is plain that under the provisions of the act of 1897, 25 per cent of the money received from club licenses was payable into the treasury of the Commonwealth, as well as money received for other liquor licenses. No reason was given by the commissioners in revising the laws for the change in the wording, and thus there appears to have been no intention on their part to change the law; neither is there anything to indicate that the Legislature intended any change. An interpretation of the present statute as excluding club licenses is, under the circumstances, not to be favored, and, accordingly, I advise you that one-fourth of the fees received from club licenses should be paid to the Treasurer and Receiver-General.
Retirement — Supervisor of Loan Agencies — Removal — Refund — Pension.

Under the provisions of the statutes governing the retirement system for the employees of the Commonwealth, where a person was appointed Supervisor of Loan Agencies on Jan. 1, 1912, and at the expiration of his three-year term of office failed to receive reappointment but was removed, and thereafter, in accordance with his request, his deposits as a member of the Retirement Association remained in the annuity fund for a period of two years, the only course open to him after that is to accept a refund of his payments.

Any member of the association who ceases to be an employee after he has acquired voluntary retirement rights is not entitled to a refund of his payments. The only course open to him upon leaving the service is to exercise his retirement rights and to accept a pension.

You request my opinion with reference to certain questions which have arisen as to the interpretation of the statutes governing the retirement system for the employees of the Commonwealth (St. 1911, c. 532, as amended).

You refer to the case of a person who was appointed Supervisor of Loan Agencies on Jan. 1, 1912, and who, at the expiration of his three-year term of office as provided by the statutes, failed to receive reappointment but was removed. You state that, in accordance with his request, his deposits as a member of the Retirement Association remained in the annuity fund for a period of two years, and that at the expiration of that period he refused to accept a refund and filed a request for retirement, which the Board refused to grant.

For the purpose of dealing with your inquiry, I assume, without attempting to pass upon the matter, that the retirement system is intended to include public officers appointed by the Governor, with the consent of the Council, for definite terms. The section of the retirement act relating to refunds is as follows (section 6 (2)):

A. Refunds.— (a) Should a member of the association cease to be an employee of the commonwealth for any cause other than death, or to enter the service of the public schools as defined by paragraph (5) of section one of chapter eight hundred and thirty-two of the acts of the year nineteen hundred and thirteen, before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section five, (2) A, with such interest as shall have been earned thereon.
In my opinion, the phrase "before becoming entitled to a pension" must be interpreted as meaning before having become entitled to retire as a matter of right. It thus restricts refunds to persons who have not yet acquired voluntary retirement rights.

The member to whom you refer had not been "in the continuous service of the commonwealth for a period of fifteen years immediately preceding," and therefore, though over sixty years of age, he was not entitled to retire under section 3 (4). He does not come within section 3 (5). As he had reached the age of fifty-five years when the retirement system was established, his only rights arose under the following provision of section 6 (2) C:

Any employee who had already reached the age of fifty-five years on the date when the retirement system was established, and also became a member of the association may be retired under the provisions of the preceding paragraph [intending to refer to paragraph (2) C (b) of section 6] without having completed the otherwise required service period of fifteen years...

It is plain that under this provision the person to whom you refer at no time was entitled to retire as a matter of right, but could be retired only by action of your Board under its discretionary power. The only effect, however, of this last-mentioned provision is in certain cases to establish an exception to the retirement privileges granted by section 3 (4). Those privileges are conditioned upon having been in the "continuous service of the commonwealth for a period of fifteen years immediately preceding" retirement. The exception is merely that an employee who had reached the age of fifty-five years when the retirement system was established could be retired "without having completed the otherwise required service period of fifteen years." If so retired by action of your Board, he received the benefits of section 6 (2) C (b), but the only exception was that he need not complete the required service period. There is no exception to the requirement of "continuous service." His service must be of such a character as
regards continuity that if the fifteen-year period were completed he would come within section 3 (4). Thus, his service must be continuous, though not extended over the full period required of younger men.

It is provided, however, by section 1 (f), which was added to the retirement act by St. 1914, c. 568, that "the words 'continuous service' mean uninterrupted employment, with these exceptions: a lay-off on account of illness or reduction of force, and a leave of absence, suspension or dismissal followed by reinstatement within two years.” It follows from this provision that in case of suspension or dismissal an employee does not absolutely lose his rights until the expiration of the two-year period within which he may be reinstated and regain his rights. When that period has expired, however, such an employee has no further right to complete his period of continuous service.

It follows, in my opinion, that after the service of the person in question had been terminated by removal, your Board had no power under the act to retire him until and unless he was reinstated in the service of the Commonwealth within two years from his removal. When that period expired without such reinstatement, the continuity of service was broken, and he had no rights under section 6 (2) C (b), even in the discretion of your Board. Therefore, the only course now open to him is to accept a refund of his payments.

Answering your remaining questions, it is my opinion that any member of the association who ceases to be an employee after he has acquired voluntary retirement rights is not entitled to a refund of his payments. In my judgment, he has become "entitled to a pension," within the meaning of section 6 (2) A, and thus no refund to him is authorized. The only course open to him upon leaving the service is to exercise his retirement rights and to accept a pension.
CONSTITUTIONAL LAW — MAINTENANCE AND DISTRIBUTION OF NECESSARIES — POWER OF GENERAL COURT — POWER OF CITIES AND TOWNS — STATUTES, CONSTRUCTION OF.

Under Article XLVII of the Amendments to the Constitution of the Commonwealth, although the General Court may in the first instance determine what rates are reasonable for the distribution of necessaries, its determination is subject to review by the courts.

The power given to the General Court by this article of amendment can be exercised only when a time of war, public exigency, emergency or distress actually exists, but during these times the General Court may determine when this power is to be exercised.

Cities and towns have no power to exercise the public functions declared in Article XLVII of the Amendments to the Constitution of this Commonwealth except as provided by the General Court.

House Bill No. 1400, authorizing cities and towns to exercise the powers enumerated in Article XLVII of the Amendments to the Constitution of the Commonwealth, is construed as not affecting powers of officials of the United States or of officials acting directly for the Commonwealth.

You request my opinion on certain questions relative to House Bill No. 1400, hereinafter referred to. The questions relate to Article XLVII of the Amendments to the Constitution, which is as follows:

The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.

The first clause of the amendment is a declaration that, during time of war, public exigency, emergency or distress, the maintenance and distribution at reasonable rates of a sufficient supply of food and other common necessaries of life and the providing of shelter are public functions. The purpose of the amendment is to authorize the raising of funds by taxation, in time of war or other public emergency, for the purpose of securing at reasonable rates a supply of food and other common necessaries of life for the inhabitants of the Commonwealth. Justification for the use of this power of taxation is a public exigency, emergency or distress which creates a situa-
tion in which the inhabitants may not be able to obtain the necessaries of life at reasonable rates. Thus, where a public exigency or emergency arises of such a character that a sufficient supply of food or other common necessaries of life or of shelter cannot be or is not supplied at reasonable rates by private effort, or such as to create reasonable grounds for the belief that such supplies cannot or will not be furnished at reasonable rates by such effort, the exercise of the power is justified. The amendment, in my opinion, does not authorize the engaging in business at a profit, nor, on the other hand, does it justify a distribution of the necessaries of life at a loss, unless required to carry out the object of the amendment.

It is to be borne in mind that the power of the Legislature to provide relief to those in want or distress, and to raise funds by taxation for that purpose, never has been questioned in this Commonwealth. The amendment goes further, and authorizes the raising of funds so that those who are not actually in want or distress may obtain the necessaries of life at reasonable rates.

With these observations in mind I proceed to answer your specific questions.

Your first question is: "Has the General Court any authority to determine what are reasonable rates?"

The final determination of what are reasonable rates is a judicial question. Within reasonable limits, however, the General Court, in authorizing the exercise by the Commonwealth and the cities and towns of the power conferred by the amendment, may, in my opinion, prescribe conditions and regulations adapted to the securing of a reasonable use of that power. This may involve a control of the prices at which the supplies are to be sold, and may, in the first instance, involve a determination by the General Court of what, in its judgment, are reasonable rates. The action of the General Court in this respect will not lightly be disturbed by the courts. If there is any sound basis for the judgment of the General Court, in my opinion it will be upheld.

I am not sure as to your purpose in asking this question, but
I assume it is occasioned by the provision in the bill that the supplies "shall, so far as practicable, be sold, furnished or provided at rates calculated to cover all costs and charges connected with the particular undertaking or service." I am of the opinion that this provision does not undertake to determine what are reasonable rates. As I have before stated, the object of the amendment is to insure the distribution of a sufficient supply of necessaries at reasonable rates, and it contemplates that it may be necessary on the part of the Commonwealth and the cities and towns therein, in order to accomplish this object, to acquire necessaries and distribute them in competition with others. In order to obtain this result it may sometimes be necessary to sell the supplies to the communities at less than the cost thereof. On the other hand, ordinarily it would seem reasonable to expect that they could be sold at a price sufficient to cover the cost, and thus relieve the general taxpayers of any burden. The provision in the bill simply directs the community, in the exercise of the power, to sell, so far as is practicable, the supplies at a price to cover the cost thereof.

Your second question is: "Has the General Court any authority to define what is meant by 'time of war, public exigency, emergency or distress'?"

Obviously, the General Court cannot declare it to be a time of war when there is no war, nor can it declare a public exigency, emergency or distress to exist when none exists. On the other hand, it may determine when and in what manner the power may be exercised in time of war, and it may define the kind of public exigency, emergency or distress in which the power may be exercised. In other words, it may limit the use of the power to certain wars, exigencies, emergencies or times of distress.

Your third question is: "If the General Court makes any provisions either as to rates or as to definition of terms will these provisions be enforced by the courts?"

The answer to this question is dependent upon the character of the provisions. Without further information as to what
provisions you have in mind I am unable to answer this question other than in a general way. In a general way your question is answered by my answers to your other questions.

Your fourth question is: "Whether a bill passed by the General Court, authorizing cities and towns to provide the common necessaries of life, etc., gives to the cities and towns any greater authority than they now have under the Constitution?"

This question is to be answered in the affirmative. The cities and towns have no power to exercise the public functions declared in the first part of the amendment except as is provided in the last part of the amendment; that is, in such manner as the General Court shall determine. The mere fact that an undertaking can be sustained as a public function does not warrant a city or town in carrying on the undertaking. There are now many public functions that they cannot perform without authority from the General Court. If the General Court fails to prescribe the manner in which the public functions declared in the amendment are to be performed, the cities and towns have no authority to perform them.

Your fifth question is: "If the General Court fails to pass any bill in regard to this matter will the cities and towns have authority to act by virtue of the Constitution?"

This question I have already answered in the negative in my answer to your previous question.

Your sixth question is: "How much is included by the words 'in such manner as the General Court shall determine,' in Article XLVII of the Amendments to the Constitution?"

These words, in my opinion, are comprehensive, and, within the scope of the power authorized by the amendment, the General Court has full control over the manner in which the power or any part thereof shall be exercised by the cities and towns. It is obvious that the General Court cannot authorize the cities and towns to exercise greater powers than are authorized by the amendment or to exercise them in a manner other than that prescribed by the amendment; but in prescribing the manner in which the power may be exercised it
may, in my judgment, impose restrictions and limitations upon its exercise.

In your seventh question you request my opinion as to whether the addition of a proposed amendment will change the effect of the bill in any way, and if so, to what extent. The proposed amendment is as follows:—

Nothing in this act shall be construed to interfere with the operation of the statutes or regulations of the United States or of this state in regard to the conservation and distribution of food or other necessaries of life herein mentioned, or the powers and duties of the administrators duly appointed to carry out the provisions of such statutes or regulations.

The part of the proposed amendment relating to the statutes or regulations of the United States, or the lawful acts of duly appointed officers thereof, if adopted, in my opinion would have no effect. Without this provision the bill will be construed "with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded." Commonwealth v. Gagne, 153 Mass. 205; Attorney-General v. Electric Storage Battery Co., 188 Mass. 239. The amendment is equally unnecessary and of no effect in so far as it might be claimed that the bill interferes with the exercise by the Commonwealth, acting through its food administrators or other officials, of powers in the conservation and distribution of food or other necessaries of life. Acts of the General Court authorizing the exercise of powers by cities and towns are to be construed as not invading the powers of officials acting directly for the sovereign in relation to such powers, unless such an intention by the General Court is clearly apparent from the act. Teasdale v. Newell Construction Co., 192 Mass. 440. In so far, therefore, as the proposed amendment relates to powers exercised by officials of the United States, or powers exercised by officers acting directly for the Commonwealth, I am of the opinion that the proposed amendment is unnecessary and would be of no effect.
Bureau of Statistics — Cities and Towns — Serial Bond or Note Issue — Temporary Loan.

Under the provisions of St. 1913, c. 719, § 9, a temporary loan can be made in advance of each of several loans which a town treasurer, with the approval of the selectmen, is authorized to make under a vote of the town.

The Director of the Bureau of Statistics has authority to certify notes issued in anticipation of a serial bond or note issue, as authorized by St. 1913, c. 719, § 9, when the loans are made from time to time covering a period of more than one year.

You have requested my opinion as to whether you may properly certify notes issued in anticipation of a serial bond or note issue, as authorized by St. 1913, c. 719, § 9, when the loans are made from time to time covering a period of more than one year.

In my opinion, your question is dependent upon the vote of the town authorizing the loan. Your question, I understand, arises in connection with the raising of money for the building of a schoolhouse in Norwood under a vote of the town, in part as follows: —

And that the town treasurer and collector of taxes, with the approval of the selectmen, be and hereby is authorized and directed to borrow a sum or sums of money in the aggregate not exceeding $250,000, and to issue therefor notes of the town subject to the provisions and limitations of chapter 719 of the Acts of 1913 and amendments thereto.

This vote, obviously, authorized the treasurer, with the approval of the selectmen, from time to time to borrow sums of money so long as the aggregate of the sums did not exceed $250,000. Under the vote the treasurer and the selectmen were authorized to issue different series of notes of the town, maturing at different times, so long as none of the notes matured at a period of time beyond that prescribed by said chapter 719.

By St. 1913, c. 719, § 9, it is provided that if a city or town votes to issue bonds, notes or certificates of indebtedness in accordance with the provisions of law, the officers authorized to issue the same may, in the name of such city or town, make a temporary loan for a period of not more than one year, in
anticipation of the money to be derived from the sale of such bonds, notes or certificates of indebtedness, and may issue notes therefor; but the time within which such securities shall become due and payable shall not be extended, by reason of the making of such temporary loan, beyond the time fixed in the vote authorizing the issue of such bonds, notes or certificates of indebtedness. This section, in my judgment, authorizes the raising of money temporarily in anticipation of a permanent loan to be later made in place thereof. The temporary and the permanent loan are to be treated as one loan in estimating the time within which the securities are to mature, when given for the permanent loan which takes the place of the temporary loan.

Your question resolves itself to this: Can a temporary loan be made in advance of each of the several loans which the treasurer, with the approval of the selectmen, is authorized to make under the vote?

I am of the opinion that this can be done. There seems at be no sound reason why the statute should be interpreted so limiting the town to making a temporary loan in anticipation of the first loan it is proposed to negotiate under the authority of the vote. Such an interpretation would work to the disadvantage of the town, as it would tend to the borrowing of more money than was actually needed at the time, and a consequent imposition of unnecessary interest charges upon the town. Such a result I cannot believe was contemplated by the Legislature.

Taxation of Property of the Commonwealth — Sidewalk Assessment.

The Commonwealth is not liable for a sidewalk assessment levied by a city for a sidewalk constructed in front of an armory owned by the Commonwealth in that city.

You have requested my opinion as to whether the Commonwealth is liable for a sidewalk assessment levied by the city of Brockton for a sidewalk constructed in front of an armory owned by the Commonwealth in that city.
It is a general principle of law that the Commonwealth is not liable for taxes unless there is some express legislative enactment to that effect. *Boston Fish Market Corp. v. Boston*, 224 Mass. 31, 34. In that case the court said:

Naturally, and apart from express enactment or plain implication, property of the State is not subject to taxation. Instrumentalities of government are not deemed ordinarily subject to taxation in any form.


There is no language in the statutes authorizing assessments upon abutters of a portion of the cost of construction of a sidewalk which indicates any intention to depart from this general rule. In fact, it is provided that the collection of such assessments "may be made in like manner as demands for the payment of taxes, and sales for the non-payment of such assessments or charges and all proceedings connected therewith shall be upon the same notices thereof, and shall be otherwise conducted in the same manner as sales for non-payment of taxes." R. L., c. 49, §§ 22, 45.

Accordingly, there seems to be no reason for considering that a different rule should be applied in the case of sidewalk assessments from that applicable to taxes in general.

I am of the opinion that the Commonwealth is not liable for the assessment mentioned.

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**Municipal Government — Refusal of Assessors to act — Power to fill Vacancies.**

A board of selectmen has no authority to accept the resignation of a board of assessors, which resignation can become effective only upon acceptance by the voters of the town in a town meeting duly called for that purpose.

Under St. 1913, c. 835, § 426, if there are actual vacancies in a board of assessors, or if the assessors refuse to act, the county commissioners have the power to appoint three or more inhabitants of the county to act as assessors.

You have requested my opinion concerning a situation which has arisen in the town of Maynard owing to the fact that two of the three members of the board of assessors have signified to the board of selectmen their intention and desire to resign, and have refused to act further as members of the board of assessors.
I find no provision in the statutes relating to or permitting the resignation of assessors or similar town officers in this manner. In my opinion, the selectmen have no authority to accept their resignation, which can become effective only upon acceptance by the voters of the town in a town meeting duly called for that purpose.

As I stated to you in an opinion rendered April 18, 1917, it is my opinion that St. 1913, c. 835, § 429, has no application to vacancies in boards of assessors, and, accordingly, even if such vacancies existed in the present case, they could not be filled by the joint action of the selectmen and the remaining member of the board of assessors.

The facts stated seem to me plainly to warrant action by the county commissioners under section 426 of said chapter 835. That section applies not merely to actual vacancies in the board of assessors, but to all cases where for any reason the assessors are failing to perform the duties imposed upon them by law. If two of the assessors of the town continue in their refusal to act, it is my opinion that, under the last-mentioned section, the county commissioners of the county of Middlesex are authorized to appoint three or more inhabitants of the county to act as assessors. If they take such action, I see no reason why they cannot appoint as one of the members of the board to be designated by them the third assessor, who has not refused to perform his duties.


It is unconstitutional for the Legislature to delegate to the voters of any city the unrestricted right and power to determine the size of its city council.

In accordance with your request, I have examined House Bill No. 479, entitled "An Act to provide for a home rule charter for cities," giving particular consideration to section 12.

Under the provisions of that section and the other related provisions of the bill, a city which adopts the form of government prescribed by this bill would, without any action by the
General Court, determine the number of its councilmen. It is provided that the petition for the adoption of this form of government shall state that one councilman is to be elected from each ward, and the remainder, the number to be determined by the persons preparing and submitting the petition, are to be elected at large. It is thus left to the petitioners, in the first instance, without limitation, to determine how many councilmen at large shall be proposed for approval by the city. If the city then votes to adopt the proposed form of government, the number of councilmen at large stated in the petition becomes fixed as the number of councilmen to be chosen, so long as this form of government remains in force. It would thus be within the power of the city to adopt a council varying in size from one for each ward into which the city was divided, with no upper limit whatever. Under our Constitution it is the duty of the General Court to determine the form of government which may be adopted by any city in the Commonwealth. In my opinion, it is an unconstitutional delegation of power for it to leave to the voters of any city the unrestricted right to determine the size of its city council. Accordingly, in my judgment, the provisions of section 12 and the other related provisions of this proposed act would be unconstitutional if enacted.

Constitutional Law — Educational Institutions — Tuition — Appropriation of Funds for.

Under Article XLVI of the Amendments to the Constitution of this Commonwealth it still remains unconstitutional for cities and towns to appropriate funds for the maintenance of an academy not under the order and superintendence of the school committee, or to pay the tuition of pupils resident in such town and attending such academy.

It is unconstitutional for cities and towns to appropriate funds to reimburse parents for tuition they may pay for pupils attending a school of their own choice, such choice including an academy not under the order and superintendence of the school committee.

You request my opinion as to whether, after Oct. 1, 1918, when Article XLVI of the Amendments to the Constitution becomes effective, it will be constitutional for a town to expend money for any one of the following purposes:—
1. To appropriate funds for the maintenance of an academy not under the order and superintendence of the school committee; or —

2. To pay the tuition of pupils resident in such town and attending such an academy; or —

3. To reimburse parents for tuition that they may pay for pupils attending a school of their own choice, such choice including such an academy when the parents so elect.

On March 18, 1896 (I Op. Atty.-Gen. 319), my predecessor, in an opinion rendered to the Senate, declared that, by reason of the provisions of Article XVIII of the Amendments to the Constitution, it was unconstitutional for a town to grant and vote money to pay the tuition of children attending an academy in the town or to pay the tuition of children attending an academy outside of the town. This opinion was based upon the ground that such an expenditure, being for the education of the children of the town, was an expenditure of money "raised by taxation in the towns and cities for the support of public schools," and that therefore, by Article XVIII, it could be "applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended."

I see no reason for disagreeing with this opinion. When Article XLVI of the Amendments to the Constitution becomes effective, it takes the place of Article XVIII, but it plainly gives no broader powers to cities and towns with reference to the expenditure of moneys appropriated for educational purposes than they had under the earlier article. It seems to me plain, therefore, that under the later amendment cities and towns will have no constitutional right to appropriate funds for the maintenance of an academy not under the order and superintendence of the school committee, or to pay the tuition of pupils resident in such town and attending such an academy.

It seems to me to follow, with equal clearness, that they will have no constitutional right to reimburse parents for tuition they may pay for pupils attending a school of their own choice when that choice includes such an academy. For the purpose
of enforcing the provisions of the Constitution under discussion, the substance, and not the mere form of the transaction, must be considered. The money in fact will go from the treasury of the town to that of the academy, whether the parents be required to make the payment out of their own pockets in the first instance or not. In my judgment, it would be a mere subterfuge to hold that the town was authorized to reimburse the parents for tuition paid by them in cases where it had no constitutional authority to make the payment direct to the academy in the first instance.

Insurance — Circumstances under which Agreement by Automobile Association to furnish Attorney or guarantee Credit may not be Contract of Insurance.

An agreement by an automobile association to furnish attorney’s services, or to guarantee the credit of a member under certain conditions up to $25, is not a contract of insurance; but an agreement to reimburse a member for reasonable charges which he may be obliged to pay to an attorney is a contract of insurance.

You have requested my opinion as to whether any features contained in a contract of membership of the Automobile Legal Association involve insurance.

Under this contract the association agrees to furnish the member with the services of its attorneys to defend civil and criminal complaints and to furnish advice. It further agrees that if “the services of said attorneys cannot be secured promptly, or if the association has no regularly appointed attorney at the place where needed by said member,” then the member may employ any attorney he desires, and the association will reimburse the member for reasonable charges paid.

In accordance with opinions rendered to your department by former Attorneys-General, one of which appears in I Op. Atty.-Gen. 544, this agreement, so far as it provides for furnishing the services of the association’s attorneys, is a contract of service rather than of insurance; but the agreement to reimburse the
member for reasonable charges which he may be obliged to pay does constitute insurance. The association assumes the risk of the member's requiring legal services because of the institution of proceedings against him, and agrees to reimburse his loss on that account. I see no reason for departing from the rule applied in those opinions.

In my opinion, the so-called credit guarantee in the form submitted does not constitute an insurance contract, nor does the issuance of such contracts constitute the transaction of an insurance business.

The association agrees with the member that it will "guarantee the credit of said member at any hotel or garage once during said membership year for a sum not to exceed $25, as per coupon hereto attached."

This agreement cannot be considered insurance, since it involves no risk or hazard which is insured against, nor, employing the words of the statutory definition, the destruction, loss or injury of something in which the member has an interest. The determination of the member to use the guarantee coupon depends entirely upon his own volition.

The guarantee coupon attached to the policy states the obligation of the association in these words: —

I,................................, address,.....................................................,
hereby acknowledge my indebtedness to.....................................................,
address, .................................................................,
in the sum of $................, and agree to pay the same within thirty
days from this date,..............................................................
Signature of Debtor.................................

The Automobile Legal Association . . . hereby guarantees the payment of this account up to $25, provided notice by the creditor is mailed to the association at once, and also provided that if the indebtedness is not paid by the debtor within thirty days the creditor will make demand on the association for payment within thirty days thereafter, accompanied by an itemized bill.

The member is undoubtedly authorized, as agent of the association, to fill in the blanks in the above coupon and deliver the instrument to the creditor. It may be suggested that this
new contract so made between the association and the hotel or garage owner is one of insurance. In many respects it is similar to the business of credit insurance companies.

However, I am of the opinion that it is to be regarded rather as an ordinary contract of guaranty than as insurance, and for the same underlying reason stated above. The liability of the Automobile Legal Association is not dependent upon the destruction, loss or injury of anything in which the hotel keeper has an interest, nor upon any risk or hazard, as those words are employed in insurance matters. It is dependent upon a contingency, to wit, non-payment by the debtor within thirty days. But it is not true that all contracts dependent upon a contingency constitute insurance contracts, but only those dependent upon the limited class of contingencies which involve a risk of loss to the assured.

An agreement, for a consideration, to pay a certain sum of money to another on July 1 next if there should be a thunder shower upon that day would constitute a gambling contract, not a contract of insurance; while an agreement to pay a sum in the event that the other party should apprehend the perpetrator of a crime would also be dependent upon a contingency, but not such as to constitute a contract one of insurance.

Ordinary credit insurance contracts do, nevertheless, involve an insurable risk, since they are based on the destruction or loss of credit of the customers of the assured. The liability in such cases is generally limited to losses arising from sales to persons of apparently sound credit who have later been ascertained to be insolvent.

Under the contract in the present case the liability of the association is not dependent upon such a loss of credit, but is absolute upon the lapse of thirty days, subject to the stipulated notices.

For the reasons stated I am of the opinion that the contract referred to is not open to objection upon this ground.
War Service — State Aid — Dependents of State Employee who, upon his Death, was in the Military Service of the United States.

Under the provisions of Gen. St. 1917, c. 301, the dependents of a deceased employee who died in the military service of the United States are entitled to be paid only the amount which the employee was entitled to receive at the time of his decease.

You request my opinion as to the amount which the dependents of a deceased employee are entitled to receive from the Commonwealth under the provisions of Gen. St. 1917, c. 301. Section 1 of that act is as follows: —

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. The said payments shall continue so long as he continues in the military or naval service of the United States, but shall cease one month after the termination of the war. In case of his death in the said service his widow, minor children, parents or dependents shall receive the said sum until the termination of the war.

The first portion of this section establishes the method of determining the amount which an employee of the Commonwealth who is mustered into the military or naval service of the United States is to receive during the continuation of the war, provided he remains in that service. The last sentence is as follows: —

In case of his death in the said service his widow, minor children, parents or dependents shall receive the said sum until the termination of the war.

This provides for the payment of "the said sum" to the beneficiaries named, in case of the employee's death in the service. These words seem to me to refer back to the amount established by the earlier portion of the section, and, in my judg-
ment, should be interpreted as authorizing the payment to the beneficiaries only of the amount which the employee was entitled to receive at the time of his decease. In my opinion, this amount should not in any manner be increased after the decease of the employee, and should not be diminished by any consideration of insurance or similar benefits which may become payable to the beneficiaries on account of such decease.

CONSTITUTIONAL LAW — REGISTRATION OF CERTAIN Aliens — REGISTRATION FEE — TREATIES.

A proposed bill requiring "every male alien twenty years and over, unless enrolled in the military or naval service of the United States, who has resided in this commonwealth for twelve months prior to the first day of May in the current year," to register with the city or town clerk of his residence and file a written statement of certain facts concerning his history, and requiring that "said statement shall be accompanied by a registration fee of five dollars," is inconsistent with the provisions of treaties entered into between the United States and various other nations. Treaties entered into by the United States protect resident aliens against the imposition of fees and excises because of their alienage. Therefore, such a bill as proposed, if enacted, would be unconstitutional and void.

I acknowledge the receipt of an order from the House of Representatives in the following form: —

Ordered, That the House of Representatives hereby requests the opinion of the Attorney-General on the following question of law: Would Senate Bill No. 321 of the current year, being "An Act to provide for the registration of certain aliens," if enacted into law be valid and in accordance with the provisions of the Constitution of the Commonwealth, and the Constitution, laws and treaties of the United States?

The important sections of the bill in question are as follows: —

SECTION 1. Every male alien, twenty years and over, unless enrolled in the military or naval service of the United States, who has resided in this commonwealth for twelve months prior to the first day of May in the current year, shall, between the first and twentieth days of May in said year or within such further time not exceeding thirty days as the city or town clerk may for good cause allow, file with the clerk of the city or town wherein he resides, upon blanks to be furnished by said clerk, a written statement setting forth his name, age, residence by street and
number, his employment and place of business, place of birth, port or point of entry into the United States and date. Said statement shall be accompanied by a registration fee of five dollars. On or before the first day of July in the current year the proceeds of all such registration fees received by the city or town, less the expense to the city or town of conducting said registration, to be approved by the treasurer and receiver general, shall be paid into the treasury of the commonwealth.

Section 3. Failure on the part of any alien designated in section one to comply with the provisions thereof shall be punished by a fine of not less than twenty-five dollars to the use of the commonwealth.

The proposed bill contains two main features. It requires "every male alien, twenty years and over, unless enrolled in the military or naval service of the United States, who has resided in this commonwealth for twelve months prior to the first day of May in the current year," to register with the city or town clerk of his residence and file a written statement of certain facts concerning his history. Failure to comply with this requirement subjects the alien to a fine of "not less than twenty-five dollars." The bill then provides: "Said statement shall be accompanied by a registration fee of five dollars."

In my opinion, the registration feature of this bill, if enacted into law, would be valid, at least in time of war, as a reasonable police regulation in the interest of the public safety. In time of war it is vital that it be publicly known what residents of the community are alien enemies. Furthermore, I am of the opinion that it cannot be said that the General Court would not be warranted in concluding that aliens who are subjects of neutral or even friendly nations are more likely than citizens to become involved in unfriendly or hostile acts or enterprises. The registration requirement of this bill, in providing for a public record in time of war of the facts specified regarding persons who are likely to be a source of danger to the community, seems to me a measure reasonably directed toward the preservation of the public safety.

The difficulty with the proposed act arises from the requirement of the registration fee of $5. The bill in its present form,
as passed to be engrossed in the Senate, seems to indicate that it is intended, in part at least, to be a revenue measure. Section 1 closes with the following provision: —

On or before the first day of July in the current year the proceeds of all such registration fees received by the city or town, less the expense to the city or town of conducting said registration, to be approved by the treasurer and receiver general, shall be paid into the treasury of the commonwealth.

Whether the amount of money to be realized by such a fee could be regarded as not disproportionate to the financial burden imposed by the registration upon the Commonwealth and its cities and towns is, in the first instance, a legislative question. The judgment of the General Court would not lightly be set aside by the courts. If this fee can be deemed to bear a reasonable relation to such cost, it would then be imposed in connection with or as a part of a valid police regulation, and, in that event would not, in my judgment, be in violation of the provisions of the Fourteenth Amendment to the Federal Constitution, prohibiting the denial of the equal protection of the laws. Whether such a fee can be imposed under the Constitution of the Commonwealth, in view of the fact that it would in no way be connected with any privilege granted by the laws of the Commonwealth, is a grave question. It is unnecessary now to consider that matter, since, in my opinion, in any event, the requirement of this fee, whatever its character, is inconsistent with the provisions of treaties entered into between the United States and various other nations.

From a memorandum furnished to His Excellency the Governor by the Secretary of State of the United States, submitted to me with the order of the House, I make the following quotations. A treaty between the United States and Japan, concluded Feb. 21, 1911, referring to citizens or subjects of each country traveling or residing in the other, provides: —

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.
A provision of similar import in a treaty between the United States and Serbia, concluded Oct. 14, 1881, declares:—

They shall be at liberty to exercise their industry and trade, both by wholesale and by retail, in the whole extent of both territories, without being subjected as to their persons or property, or with regard to the exercise of their trade or business, to any taxes, whether general or local, or to any imposts or conditions of any kind other or more onerous than those which are or may be imposed upon natives or upon the subjects of the most favored nation.

Other treaties contain agreements similar in phraseology or import; for example, see treaty between the United States and Spain, concluded July 3, 1902, and treaty between the United States and Switzerland, concluded Nov. 25, 1850. Treaties with various other nations secure to the subjects of those nations the privileges and protection enjoyed in this country by the subjects of the most favored nation. Such a clause in any treaty would, of course, adopt as a part of such treaty the protective obligation of the character under discussion, which is the broadest in its scope in any of the treaties of this character entered into by the United States.

It requires no discussion to establish that the registration fee provision of the proposed bill is in conflict with these treaty obligations. Whatever the limits of the treaty-making power in its relation to the police power of the State, I cannot doubt that it extends to the protection of resident aliens against the imposition of fees and excises because of their alienage. Treaties duly entered into by the United States are, by the Constitution, expressly made "the supreme law of the land" (U. S. Const., art. VI), and it follows that legislation of any State in conflict therewith is invalid.

Accordingly, I must advise the House of Representatives that Senate Bill No. 321, entitled "An Act to provide for the registration of certain aliens," would be invalid if enacted into law in its present form.
**Collection of Taxes on Real Estate of a Person in the Military Service — Soldiers' and Sailors' Civil Relief Act.**

The provisions of the Soldiers' and Sailors' Civil Relief Act, relating to the collection of taxes on real estate owned or occupied by a person in the military service, do not apply to taxes assessed upon real estate in this Commonwealth in 1917 and the years prior thereto.

You have requested my opinion as to the effect of section 500 of the act of Congress approved March 8, 1918, known as the Soldiers' and Sailors' Civil Relief Act, upon the collection of taxes on real estate assessed in this Commonwealth in 1917 and the years prior thereto.

The section referred to is as follows:

(1) That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war.

(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

(4) Whenever any tax or assessment shall not be paid when due, such
tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon.

As is apparent from paragraph (1) of this section, it applies only to taxes "falling due during the period of military service." Paragraph (2) of section 101 of this act defines the term "period of military service" as follows:

The term "period of military service," as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

It is plain, therefore, that the provisions of section 500 can have no effect upon the collection of taxes "falling due" prior to the approval of this act on March 8, 1918.

St. 1909, c. 490, Pt. I, § 71, as amended by Gen. St. 1916, c. 103, provides as follows:

Taxes shall be payable in every city and town and in every fire, water, watch or improvement district, in which the same are assessed, and bills for the same shall be sent out, not later than the fifteenth day of October of each year, unless by vote, ordinance or by-law of the city, town or district, an earlier date of payment is fixed. On all taxes remaining unpaid after the expiration of fifteen days from the date when taxes are payable, interest shall be paid at the rate of six per cent per annum, computed from the date on which they become payable; but if, in any case, the tax bill is sent out later than the day prescribed, interest shall be computed only from the expiration of such fifteen days. In no case shall interest be added to taxes paid prior to the expiration of fifteen days from the date when they are payable. Bills for taxes assessed under the provisions of section eighty-five of Part I of said chapter four hundred and ninety shall be sent out not later than December twenty-sixth, and said taxes shall be payable not later than December thirty-first. If remaining unpaid after that date, interest shall be paid at the rate above specified, computed from December thirty-first until the day of payment, but if, in any case, the tax bill is sent out later than December twenty-sixth, interest shall be computed from the fifteenth day of January next following.
In all cases where interest is payable, it shall be added to and become a part of the tax.

In my opinion, under the provisions of this section all taxes upon real estate or personal property assessed in due course in the regular annual assessment of taxes become due and payable not later than the fifteenth day of October in each year, and taxes assessed as omitted assessments under the provisions of section 85, therein referred to, become due and payable not later than December 31. To use the language of the Federal statute, these taxes must be regarded as "falling due" not later than the dates specified.

Accordingly, in my judgment, it follows that all taxes assessed upon real estate in this Commonwealth in the year 1917 and the years prior thereto must be taken as having fallen due prior to any period of military service protected by the Soldiers' and Sailors' Civil Relief Act. Thus the provisions of that act have no application to the collection of these taxes.

Perhaps, however, it might not be inappropriate for me to suggest that collectors of taxes, acting within the spirit of this Federal statute, should, so far as is consistent with the performance of the duties imposed upon them by law, exercise whatever discretion is granted to them by law in such a manner as will not impose undue hardship upon any person in the military service of the United States. They, of course, cannot omit to take all steps necessary to insure the eventual collection of such taxes from these persons, but they can, and doubtless will, in proper cases, as long as is possible within the provisions of the statutes, delay selling the property of such persons which is of the character protected by this act.
State Guard — Authority of the Commander-in-Chief to require by General Orders the Execution of Commands given by Civil Authorities.

The Commander-in-Chief may properly issue a general order requiring all officers to execute commands issued to them by the proper persons mentioned in Gen. St. 1917, c. 327, Pt. I, §§ 25-34, inclusive.

You request my opinion as to the legality of that part of General Orders No. 17, issued by the Commander-in-Chief under the provisions of Gen. St. 1917, c. 148, § 2, which directs all officers to execute any and all lawful commands issued to them by the proper persons mentioned in Gen. St. 1917, c. 327, Pt. I, §§ 25-34, inclusive.

Section 26 of said chapter 327 provides: —

In case of a tumult, riot, mob or a body of persons acting together by force to violate or resist the laws of the commonwealth, or when such tumult, riot or mob is threatened, or in case of public catastrophe when the usual police provisions are inadequate to preserve order and afford protection to persons and property, and the fact appears to the commander-in-chief, to the sheriff of a county, to the mayor of a city or to the selectmen of a town, the commander-in-chief may issue his order, or such sheriff, mayor or selectmen may issue a precept, directed to any commander of a brigade, regiment, naval brigade or battalion, battalion, squadron, corps of cadets or company, within the jurisdiction of the officer issuing such order or precept, directing him to order his command, or any part thereof, to appear at a time and place therein specified to aid the civil authority in suppressing such violations and supporting the laws.

In my communication to you of Nov. 15, 1917, I said, in referring to this part of the order of the Commander-in-Chief, that “the Governor has thus, under the general authority granted to him by chapter 148, prescribed that the State Guard shall perform the duties which ordinarily devolve upon the volunteer militia” under said sections 25 to 34, inclusive.

I am of the opinion that there is no difficulty on the ground of delegation of authority. What the Governor has done is simply to direct the officers of the various units of the State Guard to execute any and all lawful commands issued to them by the proper persons mentioned in said sections. This in-
cludes responding to precepts lawfully issued by the officers mentioned in section 26. Accordingly, I am of the opinion that the order of the Commander-in-Chief was authorized by law.

Pharmacy Law — Registered Pharmacist — Certificate of Fitness, Suspension or Revocation of.

The suspension or revocation of certificates of fitness to registered pharmacists by the Board of Registration in Pharmacy or by the licensing authorities of cities and towns need not be for cause, but such suspension or revocation must be made in good faith.

You submit for my opinion the following question:—

Must the suspension or revocation by the Board of Registration in Pharmacy or by the licensing authorities of cities and towns of certificates of fitness to registered pharmacists be for cause, or otherwise?

You will note that under R. L., c. 100, § 23, St. 1907, c. 308, and St. 1909, c. 261, the certificate of fitness there is a prerequisite to the granting of a sixth-class license by the licensing authorities. The suspension or revocation of a certificate of fitness upon which a sixth-class license has been granted must be after giving a hearing to the parties interested and for any cause that the Board may deem proper, as provided for in St. 1909, c. 261, § 1.

Under St. 1906, c. 281, and St. 1913, c. 413, the certificate of fitness is issued to registered pharmacists, and under it they may sell intoxicating liquors on the prescription of a registered physician.

Bearing on this, it is to be noted that while St. 1906, c. 281, was under discussion before its enactment, a motion to amend section 2 by inserting after the word "revocation," in line 7, the words, for cause, and another motion to strike out in section 2, line 8, the word "by," and insert in place thereof the words, at the pleasure of, were both lost.

Therefore, I am of the opinion that the intent of the Legislature was that the action of your Board was not to be re-
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stricted when, in your discretion, you determined to suspend or revoke in good faith certificates of fitness by which registered pharmacists are permitted to sell intoxicating liquors on the prescription of a registered physician.

TRUST COMPANIES — LOANS IN EXCESS OF ONE-FIFTH OF THE SURPLUS ACCOUNT AND CAPITAL STOCK — DUTY OF BANK COMMISSIONER.

A trust company which lends sums of money (in each case less than one-fifth of its capital stock) to several individual borrowers, who later assign their several interests to a single corporation, to an aggregate amount exceeding one-fifth of the capital stock and surplus of the trust company, is not necessarily to be regarded as having lent to one borrower more than the law allows, especially where each loan was made upon adequate security; but the Bank Commissioner has authority to direct the discontinuance of such loans or if for any reason he regards them as unsafe for the trust company.

You ask my opinion upon the following question: —

A trust company has arranged to lend sums of money, which are less than one-fifth of its capital stock, to ten or more persons, each person giving a separate note and mortgage on separate parcels of real estate adjoining one another. The various borrowers have entered into a contract with a construction company to erect buildings upon their land, and have assigned to that construction company the advances that may be due from time to time on account of their mortgages. These various borrowers, subsequent to their giving their notes and mortgages, appear to have transferred their titles to the aforesaid construction company. The name of the construction company does not appear on any of the notes or the mortgages.

While each note is less than one-fifth of the capital stock of the trust company, yet the aggregate of these loans would exceed the statutory limit.

My question is: Can I assume this to be a subterfuge which would justify my taking action against the trust company as having lent to one borrower more than the law allows?

The prohibition against the trust company lending money in excess of one-fifth of its paid-up capital stock and its
surplus account is contained in R. L., c. 116, § 34, as amended by Gen. St. 1916, c. 129, § 2, and Gen. St. 1917, c. 172, § 2. Said section 34, as amended, is as follows:—

The total liabilities of a person, other than cities or towns, including in the liabilities of a firm the liabilities of its several members, for money borrowed from and drafts drawn on any such corporation having a capital stock of five hundred thousand dollars or more shall at no time exceed one fifth part of the surplus account and of such amount of the capital stock of such corporation as is actually paid up. Such total liabilities to any such corporation having a capital stock of less than five hundred thousand dollars shall at no time exceed one fifth of such amount of the capital stock of the corporation as is actually paid up; but the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating it, shall not be considered as money borrowed. The total liabilities to any one such corporation of any government, either foreign or domestic, other than the government of the United States of America or of this commonwealth, shall not exceed one tenth part of the surplus account and of such amount of the capital stock of such corporation as is actually paid up, and no trust company shall invest, or advance an aggregate amount exceeding at any one time twenty per cent of its surplus account and paid up capital stock in such securities and evidences of indebtedness.

Obviously, in the case you state there is no person whose liability to the trust company exceeds one-fifth of the surplus account and the paid-up capital stock, unless the persons signing the notes, or some of them, constitute a firm, within the meaning of said section 34. I think it extremely doubtful whether this could be contended simply on the facts stated by you, even if the persons signed the notes with an understanding with the construction company that as soon as the notes and mortgages were signed their equities in the separate parcels were to be immediately transferred to the construction company.

If the persons signing the notes should be considered as members of a firm, and the various loans treated as one loan, then your duty in the premises is a limited one, defined by St. 1908, c. 590, § 8, as amended by St. 1910, c. 622. Said section provides:—
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If, in the opinion of the commissioner, such bank, or its officers or trustees have violated any law relative thereto, he may forthwith report such violation to the attorney-general, who shall forthwith, in behalf of the commonwealth, institute a prosecution therefor. If, in the opinion of the commissioner, such bank is conducting any part of its business in an unsafe or unauthorized manner, he shall direct in writing that such unsafe or unauthorized practice shall be discontinued; and if any such bank shall refuse or neglect to comply with any such direction of the commissioner, or if, in the opinion of the commissioner, a trustee or officer of such bank has abused his trust, or has used his official position in a manner contrary to the interest of such bank or its depositors, or has been negligent in the performance of his duties, the commissioner may in the case of a savings bank, forthwith report the facts to the attorney-general, who may, after granting a hearing to said savings bank, trustee or officer, institute proceedings in the supreme judicial court which shall have jurisdiction in equity of such proceedings, for the removal of one or more of the trustees or officers, or of such other proceedings as the case may require; or the commissioner may, in the case of any bank, after giving a hearing to the directors or trustees thereof, either report to the shareholders thereof, or, with the consent in writing of a board composed of the treasurer and receiver general, the attorney-general and the commissioner of corporations, publish such facts relative thereto as in his opinion the public interest may require.

The violation of law referred to in the first sentence of the section obviously refers to a violation of a criminal law, as it provides for a prosecution therefor. The making of a loan in excess of one-fifth of the capital stock and surplus account nowhere is made a criminal act, unless made under such circumstances as to show an intent to defraud the bank. It is an unauthorized act, of which it is your duty to take notice and to direct that it be discontinued; and, if not discontinued, if you deem it expedient, after giving a hearing to the directors or trustees of the bank, to report to the shareholders thereof, or, with the consent in writing of a board composed of the Treasurer and Receiver-General, the Attorney-General and the Commissioner of Corporations, publish such facts relative thereto as in your opinion the public interest may require.

However, upon the facts stated in your letter and the additional fact stated by you verbally to me, that the se-
curity given upon each loan is more than adequate to secure the same, I am of the opinion that the loans are not such as to require you to direct that they be discontinued on the ground of being unauthorized. On the other hand, if you are of the opinion, for any reason, that the loans are unsafe for the trust company, I think it your duty, under the provisions of said section 8, to direct in writing that such loans be discontinued.

Board of Retirement — State Employees in Institutions taken over by Commonwealth — Annuities and Pensions.

Employees of certain educational institutions taken over and operated by the Commonwealth forthwith become employees of the Commonwealth, and their membership in the Retirement Association is made compulsory.

Any pension dependent on prior service is to be computed in such cases precisely as if the employee had entered the service of the Commonwealth at the time when he in fact entered the service of the institution.

The Board of Retirement has no authority to allow such employees to make up previous annuity assessments.

You have requested my opinion as to certain questions which have arisen with reference to the status in the retirement system of employees of the New Bedford Textile School, the Bradford Durfee Textile School, the Lowell Textile School and the Massachusetts Agricultural College after such institutions have been taken over and are being operated by the Commonwealth under the provisions of chapters 246, 248, 274 and 262, respectively, of the General Acts of the present year.

In my opinion, the employees of these institutions become employees of the Commonwealth as soon as these institutions are taken over by the Commonwealth. They then enter the service of the Commonwealth for the first time, and, accordingly, their membership in the Retirement Association is made compulsory by St. 1911, c. 532, § 3 (2), as amended by St. 1912, c. 363. I find no provision in any statute which authorizes your Board to extend to them the privilege of declining membership within any period of time.
The Retirement Act contains the following provision, added to section 1 by St. 1912, c. 363:—

In the case of employees of any department or institution formerly administered by a city, county or corporation and later taken over by the commonwealth, service rendered prior to such transfer shall be counted as a part of the continuous service for the purposes of this act.

This refers to the provision of the Retirement Act establishing pensions based upon prior service, which is as follows:—

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

In my opinion, in applying these two provisions to employees of these institutions thus taken over by the Commonwealth, it must be held that any such employee who thereafter retires and who has had the requisite service since his employment by the institution shall be entitled to an extra pension for prior service "as large as the amount of the annuity and pension to which he might have acquired a claim if the retirement system had been in operation at the time when he entered the service" of the institution in question, "and if accordingly he had paid regular contributions from that date to the date of the establishment of the retirement association."

In my judgment, the first quoted provision requires a pension on prior service in these cases to be computed
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precisely as if the employee had entered the service of the Commonwealth at the time when he in fact entered the service of the institution.

I find no provision in the law which authorizes your Board to allow any such employees to make up the annuity assessments which they would have paid if they had been in the service of the Commonwealth when the retirement system was established to the time when they now, for the first time, actually enter the service of the Commonwealth. In the absence of express authority authorizing such a course, it is my opinion that your Board has no authority to permit it. The result will be that these employees will be entitled to pensions and annuities under section 6 (2) B and C based upon annuity payments actually made by them after these institutions have been taken over by the Commonwealth.

STATE BOARD OF LABOR AND INDUSTRIES — WAR EMERGENCY INDUSTRIAL COMMITTEE.

The State Board of Labor and Industries has authority to remove certain members of the War Emergency Industrial Board established by Gen. St. 1917, c. 342, § 24, but has no authority to nullify or veto its acts.

You have requested my opinion as to whether the State Board of Labor and Industries can revoke at any time any orders issued by the War Emergency Industrial Committee established by Gen. St. 1917, c. 342, § 24.

In my opinion, it has no such authority. The committee provided for by the section in question is to be appointed and given its name by your Board. The section then provides: —

Any action taken and all permits granted by said committee shall have the same effect as though taken or granted by said board, which may at any time revoke the authority of said committee, remove any of its members except the commissioner of labor, and may fill any vacancies in said committee, and in the temporary absence of any member thereof, the committee or the commissioner of labor may fill such vacancy temporarily.
I find no other provision in this section which bears upon your inquiry. In my judgment, while the language quoted authorizes your Board to remove any or all members of the committee except the commissioner of labor, and to fill any vacancies, and also authorizes you at any time to "revoke the authority of said committee," it does not authorize you to nullify or veto any of its acts. The statute provides that the permits granted by this committee "shall be revocable at any time by the aforesaid committee," but contains no other provision relating to revocation. In my opinion, such permits may be revoked only by the committee.

Military Service — Absent Voter — "Year" preceding Election.

The word "year," as used in the act permitting voting by persons absent in the military service (Gen. St. 1918, c. 293), does not mean the calendar year beginning January 1, but the period of twelve calendar months preceding the election at which the absent voter is proposing to vote.

You have requested my opinion as to whether applications for registration as absent voters, under the provisions of Gen. St. 1918, c. 293, filed on or before September 1 next, would permit the absent voter to vote at the next State election.

Section 3 of that statute provides:

Any person in the military or naval service of the United States who is a qualified voter in any city or town of this commonwealth may apply, in writing, to the secretary of the commonwealth for registration as an absent voter not later than September first in the year preceding the election.

The question presented, in short, is whether, by the use of the words "not later than September first in the year preceding the election," the Legislature intended the calendar year beginning January 1 and ending December 31, or the year of twelve months, or three hundred and sixty-five days, preceding the election.
R. L., c. 8, § 5, provides:—

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

Eleventh, The word "month" shall mean a calendar month, and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord."

When the word "year" appears in a statute, accordingly, it is to have the meaning stated above unless from the other provisions of the statute a contrary intention on the part of the Legislature is discerned. Cases have arisen in other States in which such intention has been discovered by the courts. Thus in Knod v. Baldrige, 73 Ind. 54, 55, it is said:—

When the word "year" is used, twelve calendar months are usually intended, but not necessarily twelve months commencing with the first and ending with the twelfth month of the calendar.

Similarly, in Rhode Island a provision of the Constitution, that no person should be allowed to vote in certain elections in Providence unless "he shall within the year next preceding have paid a tax assessed upon his property therein," was held not to mean the preceding calendar year, but only the preceding twelve months. In re Providence Voters, 13 R. I. 737, 740; see also Inhabitants of Paris v. Inhabitants of Hiram, 12 Mass. 262.

Looking at the provisions of the present statute it is apparent that unless the word "year" is considered as meaning the period of twelve calendar months, or three hundred and sixty-five days, preceding the election, in ordinary cases it would be necessary for a voter to register fourteen months in advance of the election. Obviously, there could be no reason for requiring such a lengthy period in advance of the election.

Section 13 of the act provides:—

For all state and national elections there shall be prepared and printed official ballots to be known as absent voter ballots. . . .
This clearly requires the printing of absent voter ballots for use in the next election following the passage of the act on June 13, 1918. It is apparent, therefore, that the Legislature intended that registrations might be made which would permit of the use of such a ballot at the election in the following November, and, accordingly, I am of the opinion that the word "year," as used in section 3, does not mean the calendar year from January 1 to December 31, but rather the period of twelve calendar months preceding the election at which the absent voter is proposing to vote.

I am of the opinion that applications filed on or before September 1 next will be in time to permit the absent voter to vote at the next State election, provided the other requirements of the act are complied with.

Officers, Matrons and Subordinate Employees in the Prison Service — Compensation.

The term "officers in the prison service of the several counties," as used in Gen. St. 1918, c. 240, does not include all subordinate employees, clerks or assistants, but only persons who as a regular and substantial part of their duties have charge and control of prisoners, and apparently does not include matrons. Whether or not any particular individual is to be regarded as an "officer" under this section is a question of fact to be decided in the first instance by the county treasurer, whose determination ought not to be set aside unless it is clearly wrong.

You have requested my opinion as to what persons come within the scope of Gen. St. 1918, c. 240, § 2, which establishes certain minimum salaries for "officers who have been in the prison service of the several counties of the commonwealth for" specified periods of years.

By R. L., c. 224, § 16, the following provision is made for the appointment of subordinates in jails and houses of correction:

The jailer, master or keeper shall appoint subordinate assistants, employees and officers, and shall be responsible for them.

Section 18 of that chapter provides:
The county commissioners shall establish fixed salaries for all officers, assistants and employees of jails and houses of correction.

These quotations seem plainly to indicate that all employees in the prison service subordinate to the master or keeper are not to be regarded as officers. They are described as "subordinate assistants, employees and officers." The statute under consideration, establishing minimum salaries, expressly applies only to officers.

My predecessor had occasion to consider the question as to what persons were officers or instructors in the prison service, within the meaning of St. 1908, c. 601, as amended by St. 1911, c. 673, providing for the retirement of such officers and instructors and the granting of pensions to them. In an opinion dated Sept. 24, 1914, directed to the chairman of the Board of Retirement, he ruled that a carpenter, a mechanic and a mason whose regular duties did not appear to require them to have charge of any prisoners were not officers or instructors, within the meaning of this statute. He defined officers of a prison to mean "those persons who are employed to, and who as a regular part of their duties do, have charge either of all or a definite number of persons committed to the prison, jail or reformatory by legal process." This seems to me to be an appropriate definition of the term, and, in my opinion, it should be employed in determining who are officers in the prison service, within the meaning of the statute under consideration. It necessarily becomes a question of fact in each individual case, as to whether the particular employee, as a regular part of his duties, has charge of some or all of the prisoners. This question of fact must be decided, in the first instance at least, by the county treasurer, whose duty it is to pay the salaries established by this act. In my opinion, in performing the duties intrusted to you by law you ought not to question a determination of this character once made by him unless you are satisfied that it was plainly wrong.

If an employee is appointed and carried on the pay roll as an officer, that fact may, _prima facie_, entitle him to the
benefits of this statute, though it is not conclusive. Calling a clerk an officer, of course, cannot make him such. Nor does the fact that an employee may occasionally, as an incidental part of his work, have some supervision over a few of the prisoners who are assigned to work in his department make him an officer. It must be a regular and substantial part of his duty to have charge and control of prisoners in order to bring him within the definition of prison officers to which I have referred. Thus, the engineers, assistant engineers and stewards or cooks cannot, in my opinion, be regarded as officers merely because prisoners are from time to time assigned to work in their departments under their direction. Again, persons appointed as, and in the main performing the duties of, clerks are not officers unless in addition they perform substantial duties of the character indicated in this definition of prison officers.

The question whether matrons come within the terms of this statute is a matter of some difficulty. From the facts furnished me, apparently they perform with reference to the female prisoners much the same duties that are performed with regard to the male prisoners by some of the persons who are plainly prison officers. There appears, however, to be no provision in the statute expressly authorizing the appointment of matrons. They seem to be appointed under the general authority to appoint subordinate assistants and employees. So far as the matter has been called to my attention, the compensation paid them is substantially less than that paid to any of the male employees prior to the enactment of this statute. In no county where the matter has been called to my attention are they paid more than $600 a year. In the County of Barnstable the matron receives but $100 a year. I cannot believe that by the enactment of this statute, and without referring definitely to these positions, the General Court intended to increase these salaries to a minimum of $1,000, increasing to a minimum of $1,400 in case of more than five years' service. I must advise you that these matrons do not come within the provisions of chapter 240.
Retirement Association — Officer of Massachusetts Reformatory employed after June 7, 1911 — Contributions to Annuity Fund.

A person employed in the Lyman School for Boys, who was transferred to the Massachusetts Reformatory as an officer subsequent to June 7, 1911, does not become entitled to the non-contributory pension provided by St. 1908, c. 601, and must, therefore, continue to make payments as a member of the Retirement Association.

You have requested my opinion as to whether a person employed in the Lyman School for Boys, who has now been transferred to the Massachusetts Reformatory as an officer or instructor in that institution, continues to be a member of the Retirement Association and is required to make the contributions to the annuity fund as such member.

Apparently, no question is raised or could be raised but that this employee while in the service of the Lyman School for Boys properly became a member of the Retirement Association as an employee of the Commonwealth, within the scope of the retirement act (St. 1911, c. 532). This person still remains an employee of the Commonwealth after his transfer to the Massachusetts Reformatory, and undoubtedly must remain a member of the Retirement Association unless excluded therefrom by the provision of section 3 (3) of the Retirement Act, to the effect that "any employee who is or will be entitled to a pension from the commonwealth for any reason other than membership in the association" is not entitled to be a member of it.

By St. 1908, c. 601, as amended by St. 1911, c. 673, provision is made for non-contributory pensions upon retirement from active prison service of "any officer of the state prison, or of the Massachusetts reformatory, or of the state farm, or of the reformatory prison for women, or of any jail or house of correction, or any person employed to instruct the prisoners in any prison or reformatory, as provided in section forty-four of chapter two hundred and twenty-five of the Revised Laws, who began employment as such officer or instructor on
or before June seventh, nineteen hundred and eleven." It is further expressly declared:—

Provided, that no such officer or instructor shall be retired unless he began employment as such officer or instructor on or before June seventh, nineteen hundred and eleven.

In my opinion, only persons who began their employment as such officers or instructors in the institutions named in this statute before June 7, 1911, are entitled to this non-contributory pension. The person to whom your inquiry relates did not begin his employment as such officer or instructor until his recent transfer to the Massachusetts Reformatory from the Lyman School for Boys. It follows that he is not entitled to the non-contributory pension to which I have referred, and must, therefore, remain a member of the Retirement Association and pay the regular contributions to the annuity fund required of such members.

STATE GUARD — MILITIA — ADVANCES FROM STATE TREASURY FOR CAMP PAY AND EXPENSES.

The State Guard is not a part of the organized militia of the Commonwealth, and the Auditor of the Commonwealth has no authority to advance $42,000 for camp pay and expenses of this organization, nor any other sum for this purpose beyond the amount of $150 at any one time, as authorized by St. 1914, c. 370, § 1.

You have requested my opinion as to whether the Auditor of the Commonwealth is authorized to comply with the request of the Adjutant-General and arrange for an advance from the treasury of the sum of $42,000 for camp pay and expenses of mileage of the State Guard in connection with the tour of camp duty prescribed by your order as Commander-in-Chief, dated June 25, 1918.

The provision of law relied upon by the Adjutant-General in making this request is St. 1914, c. 370, § 2, a portion of which is as follows:—
The acting paymaster general of the militia may have advanced to him from the treasury of the commonwealth one hundred per cent of the pay and mileage for duty performed at camp or annual drill, under such rules and regulations as the auditor may prescribe, and shall return the unexpended balance of the sum so advanced as soon as possible, or at such times as the auditor may require; . . .

This provision now appears in the codification of the laws relating to the militia, known as the Militia Law (Gen. St. 1917, c. 327), as follows: —

Section 175. The chief quartermaster may have advanced to him, from the treasury of the commonwealth, under such rules and regulations as the auditor may prescribe, one hundred per cent of the pay and mileage for duty performed at camp or annual drill, and shall return the unexpended balance of the sum so advanced as soon as possible, or at such times as the auditor may require.

On November 15 last, in an opinion given to the Adjutant-General with reference to the status of the State Guard, after reviewing at some length the statutes relating to that organization, I advised him as follows: —

Obviously the State Guard, not being organized in accordance with the Federal law (act of June 3, 1916) or in accordance with the laws governing the Massachusetts volunteer militia (St. 1908, c. 604; Gen. St. 1917, c. 327), cannot be a part of the National Guard.

The limited provision of the statutes above set forth dealing with the organization, equipment and maintenance of this force seems to me to make it clear that it was not intended to be a complete substitute for the National Guard or to have all the powers and privileges of that force while it is absent from the Commonwealth in the service of the United States.

In my opinion, the State Guard may be regarded as a part of the unorganized militia of the Commonwealth temporarily organized in a limited way and for a limited purpose. Its character, duties and powers in the main are prescribed by Gen. St. 1917, c. 148, § 2. It is to be of such numerical strength, to be organized, equipped and maintained, and to have such terms of service as the Commander-in-Chief shall determine. "When called for service" it "shall perform such duties as shall be prescribed by order of the commander-in-chief, and all members of the home guard shall have and exercise throughout the commonwealth all the powers of constables, police officers and watchmen, except the service of civil process."
Both the provision from chapter 370 of the Acts of 1914 and Gen. St. 1917, c. 327, known as the Militia Law, in my judgment, apply only to the organized militia. In the opinion to which I have referred I advised the Adjutant-General that the latter statute had no application to the State Guard. In my opinion, neither of the provisions relied upon authorizes the advance requested. No other provision of law has been called to my attention, and I know of none which authorizes the suggested advance. Sums not exceeding $150 at any one time may be advanced to the Adjutant-General as well as to other departments, under St. 1914, c. 370, § 1, but, in my opinion, this is the extent to which advances may be made.

**Civil Service — Certificate of Positive Merit — Six Months' Probationary Period — Promotions.**

The statutory provision (St. 1914, c. 605, § 6) for promotion of clerks and stenographers in the service of the Commonwealth upon a certificate of merit from the head of a department refers only to persons in the permanent service of the Commonwealth, and does not affect Civil Service Rule 26, relating to persons in the six months' probationary period.

The Civil Service Commission has no authority to review a certificate of positive merit filed by the head of a department in making a promotion to a higher grade, under said section 6.

You have requested my opinion as to certain questions involving the interpretation of St. 1914, c. 605, § 6, relating to the grading of clerks and stenographers in the service of the Commonwealth. That section is as follows: —

Promotions shall not be made from a lower to a higher grade except for positive merit and upon a certificate signed by the head of the department and filed with the civil service commission that the person to be promoted is thoroughly competent to perform efficiently work of a superior and more advanced character and that the needs of the department justify such promotion, and no increase of salary shall be paid until such certificate is filed.

In an opinion rendered by me to the Auditor of the Commonwealth (IV Op. Atty.-Gen. 437) the following statement was made: —
Section 6 by plain implication authorizes promotions from a lower grade to a higher one for positive merit and upon the filing of a certificate of the nature described in the section. There is no limitation upon this right of promotion from one grade to another, and I therefore see no reason why a head of a department may not make such a promotion from any step in the lower grade to the higher grade.

The reading of this opinion, as a whole, will show that the questions which I then had before me related only, so far as persons under the Civil Service Law and Rules are concerned, to persons in the permanent service of the Commonwealth. The effect of this statute, so far as it relates to the promotion of persons under the civil service rules during the six months' probationary period established by section 1 of Rule 26, was in no way considered by me. In my opinion, this statute is not to be regarded as revoking Rule 26. It is to be read in connection with that rule. It follows that, in my judgment, a clerk or stenographer under civil service rules cannot be promoted to a higher grade, under the provisions of section 6 of chapter 605 of the statute of 1914 above referred to, during the six months' probationary period except in accordance with section 2 of Civil Service Rule 26.

In my opinion, section 6 of chapter 605 of the statute of 1914 above referred to does not authorize your Board in any manner to review or examine into the certificate of positive merit filed by the head of a department as a condition of making a promotion to a higher grade under this section. The statute, in my judgment, places the sole responsibility for determining the existence of such positive merit as justifies a promotion upon the head of the department making the promotion.
Board of Parole — Release of Prisoner after Expiration of Minimum Term of Sentence — Authority of the Warden of the State Prison.

The Board of Parole is authorized, under R. L., c. 225, § 115, to determine whether a prisoner has observed the rules of the prison during the minimum term of his sentence, and, if he has, to permit him to be at liberty for the remainder of the sentence, upon such reasonable terms and conditions as they may prescribe. The warden of the State Prison is not at liberty to release any prisoner under this section of the law except upon a permit granted by the Board of Parole, after an investigation.

You have requested my opinion as to certain questions which have arisen in connection with the enforcement of R. L., c. 225, § 115. That section is as follows: —

If the record of a prisoner who was sentenced to the state prison for a crime committed on or after the first day of January in the year eighteen hundred and ninety-six shows that he has faithfully observed all the rules of the prison and has not been subjected to punishment, the commissioners shall, upon the expiration of his minimum term of sentence, issue to him a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence, upon such terms and conditions as they shall prescribe. If the record shows that he has violated the rules of the prison, he may be given a like permit at such time after the expiration of the minimum term of his sentence as the commissioners shall determine. If the prisoner is held in the prison upon two or more sentences, he shall be entitled to receive such permit when he has served a term equal to the aggregate of the minimum terms of the several sentences, and he shall be subject to all the provisions of this section until the expiration of a term equal to the aggregate of the maximum terms of said sentences.

The authority granted to the Prison Commissioners and the duties imposed upon them by this section have now been transferred to your Board.

In my opinion, the section in question imposes upon your Board two duties. It first must determine whether the record of a prisoner who comes within its terms "shows that he has faithfully observed all the rules of the prison and has not been subjected to punishment." If this determination is made in favor of the prisoner, it becomes the duty of the
Board to "issue to him a permit to be at liberty therefrom during the unexpired portion of the maximum term of his sentence, upon such terms and conditions as they shall prescribe." This plainly imposes a second duty upon your Board of determining what shall be the terms and conditions under which the permit to be at liberty is to be issued. It seems to be within the discretion of your Board to impose any reasonable terms and conditions upon such a permit which are not inconsistent with any other provisions of this section or of the statutes in general. In my judgment, therefore, under the terms of this section the warden of the State Prison is not authorized to release any prisoner except upon a permit to be at liberty duly granted by your Board, after an investigation of the matter by you. If the terms and conditions imposed by your Board in connection with the issuance of such a permit require the assent or acceptance of the prisoner, the permit cannot be issued or the prisoner released until he has indicated his assent or acceptance.

War Service — Useful Occupation Act — Registration — Duty of Director of the Bureau of Statistics.

The act requiring work in a useful occupation during the war (Gen. St. 1918, c. 286) applies only to the persons specified in it, and others who have registered in error are under no obligation to make weekly reports under section 4. Persons affected by it are not thereby required to engage in some useful occupation during their vacation season.

I acknowledge your communication in relation to Gen. St. 1918, c. 286. The act provides: —

It shall be the duty of every male resident of the commonwealth, who is able to work and who is between the ages of eighteen and fifty years, to engage in and to pursue some regular, useful occupation for at least thirty-six hours per week, and to comply with the provisions of this act relative to registration.

It further provides that any such person who fails so to be employed or who fails to comply with the provisions of the act shall be punished by a fine or imprisonment.
The act has no application to persons not between the ages of eighteen and fifty years, nor to persons who are unable to work. It follows that where persons have registered in error they are under no obligation to continue to report weekly under the provisions of section 4 of the act, nor is a person who has registered but who later becomes unable to work required to register while his disability continues.

Section 11 provides that the act shall not apply to persons temporarily unemployed by reason of difficulties with their employers, nor to bona fide students during a school or college term, nor to persons fitting themselves to engage in trade or industrial pursuits, if any such person is able to produce from his union, strike committee, proper school or college authority, or other authority designated by the Director of the Bureau of Statistics, a satisfactory statement in writing setting forth the reason for his non-employment.

It would seem to follow from the provisions of this act that students are required to register between terms of schools and colleges. I do not think, however, that school teachers who are engaged by the year are required to register between terms, as such an interpretation would require all male persons between the ages of eighteen and fifty to register during their vacation period. It seems unlikely that the Legislature intended to require all male persons between the ages of eighteen and fifty to engage in some useful occupation during their vacation period.

Confirming my conversation with you in relation to your duty under the act, I beg to say that the act apparently does not place upon you the responsibility of its enforcement. It is your duty to provide, in so far as you are able, employment for persons who register. Of course, it is your duty, if you have knowledge of any person who is violating the provisions of the act, to bring it to the attention of the proper authorities, in order that they may prosecute such person. No duty is imposed upon you to make classifications, nor would any classification made by you as to what are useful occupations and what are not be of any binding effect. Where a
person is in doubt as to whether or not the occupation in which he is engaged is a useful one, it would seem wise for such person to register under the act.

You call my attention to an instance of very great hardship of a partially paralyzed man in impoverished circumstances, who, in order to register weekly, will be obliged to hire a conveyance and travel a considerable distance. Unless he is unable to work, the law apparently gives no relief, as the provisions of section 4 require that he shall report in person. I doubt very much, however, if a man in his physical condition would be held to be a man able to work, within the provisions of the act.

COUNTY OFFICERS AND EMPLOYEES — INCREASE IN COMPENSATION — BASIS ON WHICH PERCENTAGE IS TO BE DETERMINED — WHO ARE ENTITLED TO RECEIVE IT.

Gen. St. 1918, c. 260, providing a temporary increase of 10 per cent in salaries not previously increased and not exceeding $2,500, applies to all persons in the public service whose salaries are paid from the treasuries of the several counties, although they may not be strictly county officers or employees.

Gen. St. 1918, c. 211, establishing the salaries of clerks of police, district and municipal courts at three-quarters of the salary received by the justice of such court, to take effect as of June 1, 1917, effected an increase in pay only in the cases where the previous act (Gen. St. 1917, c. 340) had not already been adopted by the county commissioners.

The increase provided by the statute is to be computed upon the amount which the officer or employee was receiving on July 1, 1917, but is to be added to the salary actually established on July 1, 1918. The county commissioners have power to correct certain discriminations.

You have requested my opinion with regard to certain questions which have arisen as to the general scope and effect of Gen. St. 1918, c. 260, entitled "An Act to authorize a temporary increase in the compensation of certain employees of the counties of the Commonwealth." Section 1 of that act is as follows:

From and after the first day of July in the current year, all persons who are regularly in the employ of the several counties of the commonwealth whose annual compensation in full for all services rendered does
not exceed twenty-five hundred dollars and whose salaries have not been increased by act of the general court passed during the current year, shall, until further action of the general court relative to the standardization of the salaries of judicial and county officers and employees, receive additional temporary compensation equal to ten per cent of the salaries received by them on the first day of July in the year nineteen hundred and seventeen.

This applies to “all persons who are regularly in the employ of the several counties of the Commonwealth” whose annual compensation does not exceed the sum specified. The chief difficulty in applying this statute is to determine the meaning of this language. It is not apt language to designate public officers. Furthermore, in a strict sense of the term, few, if any, persons can be said to be “regularly in the employ of the several counties” in their corporate capacities. They are either public officers elected by the people of the counties, or public employees appointed by the county commissioners or other so-called county officials. It becomes necessary to examine with some detail the history of this act and of various other statutes that were enacted in connection with it.

In 1916 the Executive Council, at the request of the General Court, undertook an investigation and standardization of “salaries and compensations paid by the commonwealth and by the several counties, so far as they are established by the commonwealth.” The report of the special committee of the Council upon this matter was submitted to the General Court this year as House Document No. 1175. Part I of this document was devoted to departmental and institutional officials and employees, and dealt strictly with officials and employees of the Commonwealth. Part II was devoted to judicial and county officials and employees. It considered chiefly the matter of compensation of judicial officers and various other public officers usually referred to as county officials. It paid little or no attention to minor employees.

This report was referred to the committee on public service. That committee, on March 21, submitted a report (Senate, No. 316) recommending the enactment of a statute based
upon Part I of the report of the Executive Council. It also suggested that there was need of further investigation as to the salaries of judicial and county officers, and recommended that "the subject of salaries and compensation paid to judicial and county officials and employees and to all other officers and employees of the commonwealth other than those included in" the bill based upon Part I of the committee's report be referred to a special recess committee. The bill reported by the committee was subsequently enacted, with some changes, as Gen. St. 1918, c. 228. The matter of the order for a recess committee was recommitted to the committee on public service.

On May 21 the committee on public service submitted a further report (Senate, No. 395), stating in substance that after further investigation they had become convinced that thorough analysis and standardization of county and State offices and positions not covered by the bill already reported was essential. They say: "Furthermore, we have not gone sufficiently deep into the matter of compensation of county employees other than those elective and appointive officers specified in House, No. 1175. Investigation should be made of salaries of janitors, draw tenders and other minor officials and employees." The committee recommended five separate bills dealing with the salaries of specific officials. They repeated their recommendations for a recess committee to consider the salaries "paid to judicial and county officials and employees, and to all other officers and employees of the commonwealth or the counties thereof, elected or appointed, other than those included in" the bill recommended in their first report. They also reported "a temporary bill which makes an attempt in the meantime to offset the increase in the cost of living."

The five separate bills referred to subsequently became chapters 261, 263, 272, 284 and 287 of the General Acts of 1918, dealing with the salaries, respectively, of county commissioners, county treasurers, district attorneys, judges and registers of probate courts and clerks of court. The order for
an investigation recommended by the committee was subsequently amended so as to impose the duty of investigation upon the Supervisor of Administration, and was enacted as chapter 86 of the Resolves of 1918. This resolve applies to "the judicial and all other officials and employees, appointive or elective, of the commonwealth, except in the department of legislation, and the several counties thereof, other than those included in senate document number three hundred and seventy of the present year." Senate Document No. 370 is the proposed bill, which was subsequently enacted as Gen. St. 1918, c. 228, above referred to.

The temporary bill recommended by the committee was the original bill which formed the basis of the statute now under consideration. As first recommended, however, it applied to "all persons who are regularly in the employ of the commonwealth or of the counties thereof, as hereinafter specified." The persons specified were judges, registers and assistant registers of probate, assistant recorders of the Land Court, registers and assistant registers of deeds, sheriffs, medical examiners and justices, clerks and assistant clerks of district courts. The salaries of these officials, except those of the judges, registers and assistant registers of probate, are paid from the treasuries of the several counties. This bill was subsequently redrafted by the ways and means committee of the Senate so as to apply to "all persons who are regularly in the employ of the commonwealth or of the counties thereof" whose compensation did not exceed $2,500, without restriction. Still later, various changes in form were made, and the bill was again redrafted so as to apply to "all persons who are regularly in the employ of the several counties of the commonwealth" whose compensation did not exceed the specified sum, any reference to persons in the employ of the Commonwealth being eliminated. At the same time a second section was added establishing the salary of the justice of the District Court of Dukes County, and a third section dealing with the compensation of assistant recorders of the Land Court. In this form the bill was finally enacted. This
temporary bill, the resolve for an investigation by the Supervisor of Administration and four of the five special bills were all approved on May 31. Chapter 287 was approved on June 1.

From the history and language of the act under consideration and from the provisions of the other related legislation, particularly resolve 86, I am led to the conclusion that it was the intention of the General Court, by the use in this statute of the words "all persons who are regularly in the employ of the several counties of the commonwealth," to designate as entitled to the proposed 10 per cent increase all persons in the public service whose salaries are paid from the treasuries of the several counties. The specific reference in the bill first drawn to justices, clerks and assistant clerks of district courts, who are not strictly county officers but who are paid by the counties, and the addition at its final stage of section 2, establishing the salary of the justice of the District Court of Dukes County, who is thus treated as an employee of a county within the scope of the statute as defined by its title, point to this conclusion. These suggestions, when considered together with the provision that the increase granted is to continue "until further action of the general court relative to the standardization of the salaries of judicial and county officers and employees," which it is contemplated will result from the investigation authorized by resolve 86, and the statement in the report of the committee on public service that this temporary increase is granted "to offset the increased cost of living," pending the investigation, all seem to indicate that there was no intention to confine the benefits of this temporary bill to persons who are strictly county officers or employees. The language used is unfortunate and gives rise to disturbing doubts, but on the whole I am of opinion that the statute must be construed as granting increase of salary to all persons otherwise within its terms who are by authority of law paid their salaries from the treasuries of the several counties of the Commonwealth.

This statute is limited by its terms to persons otherwise
within it "whose salaries have not been increased by act of the general court passed during the current year." Gen. St. 1918, c. 211, established the salaries of clerks of police, district and municipal courts at three-quarters of the salary received by the justice of their respective courts. This statute was made effective as of June 1, 1917. Gen. St. 1917, c. 340, established the salaries of these officials on the same basis, except that it provided that that act was to become effective upon acceptance by the respective county commissioners. I am informed that this 1917 statute was accepted by most if not all the county commissioners at varying times before the enactment of Gen. St. 1918, c. 211. It follows that, to the extent that the 1917 statute had been thus accepted by the county commissioners, the 1918 statute did not grant an increase in salary but merely provided back pay from June 1, 1917, to the date of such acceptance. In such cases it is not, in my judgment, to be regarded as an increase in salaries by the General Court during 1918, within the meaning of chapter 260, under discussion. If in any case the 1917 statute was not accepted by the county commissioners before the enactment of Gen. St. 1918, c. 211, in such cases the latter statute did actually increase existing salaries, and thus in such cases no increase can be allowed under chapter 260.

In my opinion, in no case are clerks of district courts entitled to three-quarters of the 10 per cent increase granted by this statute to the judges of the district courts. They are entitled to an increase of 10 per cent of their salaries as established on July 1, 1917, but to no further increase.

As the 10 per cent increase granted by this statute is based upon "the salaries received by them on the first day of July in the year nineteen hundred and seventeen," it, in my opinion, applies only to persons who were in the service of the county, as herein defined, on that date, and who have been regularly in its service since that time. It does not apply to persons appointed or employed after July 1, 1917.

The increase provided for by this statute, being based upon the salary received on July 1, 1917, is to be computed upon
the amount which the officer or employee was entitled to receive at that time, and in no other manner. The increase is to be added to the salary which the officer or employee would have received but for the enactment of this statute. If his salary was readjusted in January, 1918, on the basis of the business of his office in 1917, as in the case of registers and assistant registers of deeds, the increase must be added, by the terms of the statute, to the readjusted salary of 1918. If, in the case of salaries not fixed by act of the Legislature, county commissioners or other persons in authority have granted increases subsequent to July 1, 1917, and prior to the enactment of this statute, its language seems to require the addition of the increase granted to such increased salaries. In other words, the increase is to be added to the salary actually established on July 1, 1918. It is to be noted, however, that if this last-mentioned result works a discrimination in any cases, it is well within the power of the county commissioners or other constituted authority to withdraw increases granted during the year, in order that certain employees may not have the benefit of two increases within a year if such a result is not, in their opinion, justified.

CIVIL SERVICE — FIRE DEPARTMENT — HEIGHT REQUIRED FOR FIREMEN.

St. 1896, c. 424, does not restrict the power of the Civil Service Commission to certify persons for appointment as firemen to those who are 5 feet 5 inches in height or over, but prevents them from requiring any greater height.

You request my opinion as to whether the provisions of St. 1896, c. 424, are now in force. The provisions of that chapter are now incorporated in R. L., c. 19, § 11, which is as follows: —

Persons five feet five inches in height or over, if otherwise qualified, shall be eligible to appointment in the fire department of the city of Boston.
These provisions were not affected by subsequent legislation included in St. 1904, c. 194, and St. 1911, c. 352.

Your remaining question is whether, by reason of the provisions of R. L., c. 19, § 11, your Commission is restricted to certifying persons who are 5 feet 5 inches in height or over. This construction could arise only by implication. The provisions of the statute as originally passed (St. 1896, c. 424) seem to rebut this conclusion. Said chapter 424 reads as follows:—

Persons five feet five inches in height, and over, shall be eligible to appointment on the fire force of the city of Boston, if otherwise qualified; and no rule shall be made by the civil service commissioners in conflict with the provisions of this section.

Prior to the passage of said chapter 424 the minimum height of applicants for fire service in Boston was fixed by the civil service rules. Obviously, this rule was the cause of the passage of said chapter 424 of the Acts of 1896. As there is no rule at the present time fixing the height of applicants to the fire service of the city of Boston, I am of the opinion that you are warranted in certifying applicants irrespective of height.

District Attorneys — Power over Cases in Inferior Courts.

The power of a district attorney over a criminal case arising within his district is as complete before it reaches the Superior Court as after, and the statutory requirement (R. L., c. 7, § 17) as to certain appearances in the Superior Court does not in any way lessen his power to appear in the inferior courts.

You have requested my opinion as to your power in relation to criminal cases which have not yet reached the Superior Court either by way of appeal, by indictment or by the defendant's being held to await the action of the grand jury.

I am of the opinion that your power over criminal cases arising within your district is as complete before they reach the Superior Court as after reaching that court.
OPINIONS OF THE ATTORNEY-GENERAL.

On May 15, 1917, I had occasion to advise the House of Representatives as to the powers of the Attorney-General and the district attorneys. I then stated in relation to the powers of the Attorney-General that —

The powers of the Attorney-General are not defined by the provisions of the Constitution. He is the general law officer of the Commonwealth, and usually it has been assumed that, where there is no provision of statute to the contrary, he may represent the Commonwealth in all proceedings of every nature in which the Commonwealth is a party or interested.

It was said in Commonwealth v. Tuck, 20 Pick. 364, that —

The authority of the Attorney-General when present, to conduct and manage all criminal prosecutions, is unquestionable. It is his exclusive duty to do so; and although he may seek assistance from his brethren of the bar, yet a private prosecutor has no right to employ counsel to aid him. The law, in the district attorneys, has provided the proper assistance.

Within their respective districts I am of the opinion that the power of the district attorneys in the administration of the criminal law is as complete as that of the Attorney-General, unless the Attorney-General sees fit to supersede them or to assume the direction of the investigation and trial of criminal cases.

In my judgment, the purpose of R. L., c. 7, § 17, was not to restrict the power of the district attorneys to appearing in the Superior Court, but was for the purpose of making it mandatory upon the district attorneys to appear for the Commonwealth in all cases, criminal or civil, in which the Commonwealth was a party, leaving it to their discretion as to how far they should appear in cases in which the Commonwealth was a party in the inferior courts.
Public Defence — Right of Governor and Council to Erect and Remove Temporary Office Building on State Property.

The Governor and Council have authority to erect a temporary building on the State House grounds for use as office room for the Committee on Public Safety and the Food and Fuel Administration.

In the absence of legislative direction, the Governor and Council have authority to request that such a building be taken down at least six months after the close of the war.

Under the provisions of Gen. St. 1917, c. 342, relating to the public safety or defence, and Mass. Const., Pt. II, c. II, § I, art. VII, the Governor may use any property of the Commonwealth for the defence of the Commonwealth, and, with the approval of the Council, may take possession of private property in case of such necessity. In the absence of direction by the Legislature, the power of the Governor in this respect is full and complete.

You request my opinion as to whether the Governor or the Governor and Council have authority to erect a temporary wooden building on the State House grounds, adjacent to the west wing of the State House, for use as office room for the Committee on Public Safety and the Food and Fuel Administration; and also if the Governor or the Governor and Council have authority to request that the building be taken down at least within six months after the close of the war.

Gen. St. 1917, c. 342, § 6, provides that —

Whenever the governor shall believe it necessary or expedient for the purpose of better securing the public safety or the defence or welfare of the commonwealth, he may with the approval of the council take possession:

(a) of any land or buildings, machinery or equipment. . . .

It further provides: —

He may use and employ all property so taken possession of for the service of the commonwealth or of the United States, for such times and in such manner as he shall deem for the interests of the commonwealth or its inhabitants.

Section 11 of the same act provides: —

The governor shall have full power and authority to co-operate with the federal authorities and with the governors of other states in matters pertaining to the common defence, and with the military and naval forces of the United States and of the other states.
In a communication to you bearing date Nov. 9, 1917, I expressed some doubt as to whether the provisions of this act as to the taking possession of property included property of the Commonwealth, or at least property devoted by the Commonwealth to a specific purpose. I then called to your attention that, under the provisions of Article VII of Section I of Chapter II of Part the Second of the Constitution, the Governor was authorized, "for the special defence and safety of the commonwealth, to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, repel, resist, expel, and pursue, by force of arms, as well by sea as by land, within or without the limits of this commonwealth, and also to kill, slay, and destroy, if necessary, and conquer, by all fitting ways, enterprises, and means whatsoever, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment, or annoyance of this commonwealth."

It is my view that the provisions of Gen. St. 1917, c. 342, were passed to supplement this power given by the Constitution, providing means by which the Governor, with the advice and consent of the Council, could take possession, for the purpose of the defence of the Commonwealth, of private property.

Accordingly, in my judgment, if the Governor is of the opinion that it is necessary to use property of the Commonwealth for the purpose of repelling or resisting hostile attempts or enterprises for the destruction, invasion, detriment or annoyance of the Commonwealth by those now at war with this country, or to conquer them, he is authorized to take possession of and use such property; and he may, with the approval of the Council, under the provisions of said chapter 342, take possession of private property in case of such necessity. The authority given the Governor under the provisions of said Article VII is to be exercised, as therein stated, "agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise." I do not think this provision
of the Constitution is to be construed as requiring an act of the Legislature before the authority can be exercised, but is to be construed as giving the Legislature power to regulate and control the exercise of it. Where no such regulation or control is exercised, the power of the Governor is full and complete.

It follows, in my judgment, that unless there is some statute prohibiting the taking possession of land or property of the Commonwealth which the Governor may determine to be necessary for the proper defence of the Commonwealth, he is authorized to take possession of such land or property. I have examined the statutes and I find no provision prohibiting the exercise of this power in relation to the State House grounds. The only provision relating to the subject is contained in R. L., c. 10, § 20, which provides:

The land now taken by the commonwealth about the state house shall remain an open space, and no railroad or railway shall be constructed or operated in, upon or over the same.

This statute was passed in 1894, and relates to land other than that referred to in your communication. The land referred to in your communication was taken under authority of Gen. St. 1915, c. 256, and Gen. St. 1916, c. 250.

If, therefore, you deem the necessity exists, you may take possession of the land, and if the Council approves you may expend out of the appropriation made available by Gen. St. 1918, c. 278, such sum as may be necessary for the building.

As to your second question, I think that the Governor and Council can require the building to be taken down within six months after the war, as the only authority for its construction and maintenance would be the necessity arising out of the war. The necessity having been removed, its maintenance would no longer be authorized. Of course, if the Legislature should, after the erection of the building, authorize or require its use for specific purposes, the Governor and Council would not have authority to remove it.
Teachers' Retirement Act — Pensioner who becomes Member of the General Court.

A teacher, other than one excepted by St. 1913, c. 657, § 1, as amended, could not, after Feb. 1, 1919, while receiving a pension under the Teachers' Retirement Act, be paid for services rendered as a member of the General Court.

You request my opinion as to whether a teacher pensioned under the terms of the Teachers' Retirement Act would forfeit his pension if he served as a member of the General Court.

So far as I am aware, there is no provision of law in force at the present time applicable to such a case. St. 1913, c. 657, § 1, as amended by Gen. St. 1916, c. 88, applies only to persons who receive pensions or annuities from cities, towns or counties. However, by Gen. St. 1918, c. 257, § 135, the foregoing section was amended so as to read as follows: —

No person while receiving a pension or an annuity from the commonwealth, or from any county, city or town, except teachers who on March thirty-first, nineteen hundred and sixteen, were receiving annuities not exceeding one hundred and eighty dollars per annum, shall, after the date of the first payment of such annuity or pension, be paid for any service, except jury service, rendered to the commonwealth, county, city or town, from whose treasury said pension or annuity is payable.

This amendment becomes effective on Feb. 1, 1919.

It would seem that after that date a teacher pensioned under the terms of the Teachers' Retirement Act, other than one excepted from the operation of this provision by its terms, could not be paid for services rendered to the Commonwealth as a member of the General Court while receiving a pension. It will be noted, however, that the statute quoted in no way forfeits or affects any pension or annuity. Its sole operation is to forbid payment for services rendered in certain cases to persons who are receiving a pension. Thus, to answer your specific question, a teacher pensioned under the terms of the Teachers' Retirement Act would not forfeit his pension if he should serve as a member of the General Court.
Public Service Commission — Jurisdiction of Appeal by a Street Railway Company from City Regulations, in Certain Cases.

The Public Service Commission has no jurisdiction of an appeal by a street railway company from the rules and regulations of a city relating to the licensing of public vehicles, when the city has not accepted the provisions of Gen. St. 1916, c. 293, and the vehicles in question are not owned or operated by a street railway company.

You have called my attention to the following situation: —

The city of New Bedford has not accepted Gen. St. 1916, c. 293, entitled "An Act to authorize the licensing by cities and towns of motor vehicles carrying passengers for hire.” That city, however, has adopted certain ordinances relating to the licensing of public vehicles. The Union Street Railway Company operates a street railway in the city of New Bedford, and has not applied for or been granted the right to acquire, own and operate, for the transportation of passengers or freight, motor vehicles not running upon rails or tracks, which right might be granted to it by your Commission under the provisions of Gen. St. 1918, c. 226. The street railway company however, has appealed to your Commission from the orders, rules and regulations of the city of New Bedford which are in force.

You have requested my opinion as to whether your Commission has jurisdiction in the premises.

This jurisdiction, if it exists, is by virtue of the last-mentioned statute. This act is entitled, “An Act to permit street railway companies to use motor vehicles not running on rails or tracks, and to make operators of such vehicles common carriers subject to the supervision of the Public Service Commission.”

Section 1 of the statute authorizes a street railway company, with the approval of your Commission, to acquire, own and operate such vehicles for the purposes mentioned.

Section 2 declares operators of such vehicles “for the carriage of passengers for hire in such a manner as to afford a means of transportation similar to that afforded by a street railway . . .” to be common carriers, and subject to orders,
rules and regulations prescribed by the licensing authorities "of any city or town which has accepted the provisions of chapter two hundred and ninety-three of the General Acts of nineteen hundred and sixteen. Any petitioner, or any street railway company aggrieved by such orders, rules or regulations, may appeal to the public service commission."

Section 3 is as follows:—

In cities or towns that have not accepted the provisions of said chapter two hundred and ninety-three wherein a street railway exists, and wherein a line of motor vehicles has been established under the provisions of section one of this act, the public service commission shall have original jurisdiction over persons, firms or corporations mentioned in section two, and may prescribe rules and regulations until the city or town accepts the provisions of said chapter two hundred and ninety-three whereupon original jurisdiction shall rest in the city or town, subject to appeal to the public service commission as provided in section two.

It is apparent from the language of section 2 quoted above that the appeal therein provided for is from orders, rules and regulations prescribed or adopted by the licensing authorities of cities or towns which have accepted Gen. St. 1916, c. 293, and does not extend to rules, ordinances, etc., adopted in a city or town which has not accepted said act.

In the latter class, in which it appears from your statement the city of New Bedford falls, the only authority of your Commission with reference to rules and regulations relating to such vehicles so employed arises under the provisions of section 3, and is limited, as expressly stated therein, to such cities or towns "wherein a street railway exists, and wherein a line of motor vehicles has been established under the provisions of section one."
Military Service — Absent Voters — Registration before September 1.

An application for registration by a person in the military or naval service of the United States to permit his voting in a State election under Gen. St. 1918, c. 293, must be actually received by the Secretary of the Commonwealth, or in his office, not later than September 1.

You have requested my opinion as to whether persons in the military or naval service of the United States may lawfully be permitted to vote at the next election if their applications for registration under the provisions of Gen. St. 1918, c. 293, are filed with the Secretary of the Commonwealth later than September 1 of the current year.

Section 3 of that act provides, in part: —

Any person in the military or naval service of the United States who is a qualified voter in any city or town of this commonwealth may apply, in writing, to the secretary of the commonwealth for registration as an absent voter not later than September first in the year preceding the election.

It would seem that the insertion of the date mentioned in this sentence could have been intended only for the purpose of fixing a time limit before which applications for registration must be made, in order to insure ample time for completing the lists of qualified absent voters before the election day. Any other interpretation would result in rendering the last eleven words of the sentence of no practical effect. The mere filling out of an application, without presenting the same to the Secretary of the Commonwealth, would not constitute applying “to the secretary of the commonwealth,” and any interpretation which held that to be the only act required to be done before September 1 would also result in nullifying any purpose which the insertion of the time limit could have been intended to fulfil.

I am of the opinion that in order to entitle the applicant to vote in the coming election, applications for registration must be received by the Secretary of the Commonwealth, or in his office, not later than September 1 of the current year.

The employment of an engineer and janitor at a State normal school in doing cleaning work, in addition to the regular employment, is a violation of the eight-hour law, unless the dirt to be removed is of such a character as to endanger public health or public safety.

You have requested my opinion as to whether the employment of an engineer and janitor at a State normal school in doing cleaning work, in addition to the regular employment, is in violation of the eight-hour law.

The provisions of law which apply are found in St. 1911, c. 494, as amended, sections 1 and 4 of which are as follows:

Section 1. The service of all laborers, workmen and mechanics, now or hereafter employed by the commonwealth or by any county therein or by any city or town which has accepted the provisions of section twenty of chapter one hundred and six of the Revised Laws, or of section forty-two of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, or by any contractor or sub-contractor for or upon any public works of the commonwealth or of any county therein or of any such city or town, is hereby restricted to eight hours in any one calendar day, and to forty-eight hours in any one week, and it shall be unlawful for any officer of the commonwealth or of any county therein, or of any such city or town, or of any such contractor or sub-contractor or other person whose duty it shall be to employ, direct or control the service of such laborers, workmen or mechanics to require or permit any such laborer, workman or mechanic to work more than eight hours in any one calendar day, or more than forty-eight hours in any one week, except in cases of extraordinary emergency. Danger to property, life, public safety or public health only shall be considered cases of extraordinary emergency within the meaning of this section. In cases where a Saturday half holiday is given the hours of labor upon the other working days of the week may be increased sufficiently to make a total of forty-eight hours for the week's work. Threat of loss of employment or to obstruct or prevent the obtaining of employment or to refrain from employing in the future, shall each be considered to be "requiring" within the meaning of this section. Engineers shall be regarded as mechanics within the meaning of this act.

Section 4. This act shall not apply to the preparation, printing, shipment and delivery of ballots to be used at a caucus, primary, state,
city or town election, nor during the sessions of the general court to persons employed in legislative printing or binding; nor shall it apply at any time to persons employed in any state, county or municipal institution, on a farm, or in the care of the grounds, in the stable, in the domestic or kitchen and dining room service or in store rooms or offices, nor to persons employed by the trustees of the Massachusetts nautical school, on boats maintained by the district police for the enforcement of certain laws in the waters of the commonwealth, or in connection with the care and maintenance of state armories.

Apparently, this employment does not come within any of the exceptions found in the statute, unless within the one "in cases of extraordinary emergency. Danger to property, life, public safety or public health only shall be considered cases of extraordinary emergency within the meaning of this section."

The work of cleaning up the buildings to which extensive repairs have been made could hardly be said, in my opinion, to come within this definition, unless the dirt to be removed was of such a character as to endanger public health or, because of its highly inflammable nature, to endanger public safety.

Fraternal Benefit Societies — Reserve Requirement — Financial Condition — Surrender Values and Withdrawal Equities.

A fraternal benefit society whose rates are based upon a table of mortality lower than the American Experience Table is not authorized to grant paid-up protection or cash surrender values, even though at a particular moment its reserve may equal that required by the American Experience Table.

The requirement of St. 1911, c. 628, as to accumulating and maintaining a reserve by a fraternal benefit society, refers to the general financial strength and permanent system of the organization, and not to a financial condition which may be temporary.

You have requested my opinion as to whether a fraternal benefit society whose rates are based upon a table of mortality lower than the American Experience Table and 4 per cent interest may grant to its members extended or paid-up protection or cash surrender values if, as a matter of fact, on the
date of its annual report the reserve thereby shown equals that required by the American Experience Table of Mortality.

St. 1911, c. 628, § 5, subsection 2, as amended by Gen. St. 1917, c. 108, provides: —

Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the full reserve required by a table of mortality not lower than the American Experience Table and four per cent interest, may grant to its members such extended or paid-up protection or such withdrawal equities as its constitution and laws may provide: provided, that such grants shall be equitable, and shall in no case exceed in value the portion of the reserve derived from the payments of the individual members to whom they are made.

The annual valuation referred to is dealt with in section 22. This section, briefly stated, requires an annual statement, under oath, of the financial condition of the society and its transactions for the year. Subdivision b thereof provides: —

In addition to the annual report herein required, every society on the lodge system and authorized to pay benefits in this commonwealth upon the death of its members, . . . shall annually report to the insurance commissioner a valuation of its certificates providing for death benefits in force on December thirty-first last preceding: . . . The said report of valuation shall show, as contingent liabilities, the present mid-year value of the death benefits promised in the outstanding contracts of the society, and, as contingent assets, the present mid-year value of the future net mortuary contributions provided in the constitution and laws as the same are in practice actually collected, not including therein any value for the right to make extra assessments.

. . . The legal minimum standard of valuation shall be the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress, August twenty-three, eighteen hundred and ninety-nine; or, at the option of the society, any higher mortality table; or, at its option, it may use a mortality table based on the society’s own experience of at least twenty years, and covering not less than one hundred thousand lives, with interest assumption not higher than four per cent per annum, whichever mortality table is adopted. Every such valuation report shall set forth clearly and fully the mortality and interest bases and the method of valuation. . . .

It is to be noted that the language of section 5, quoted above, is not that the society has accumulated the full reserve
required by the American Experience Table, but *is* accumulating and maintaining such full reserve. It by no means follows that because at a particularly advantageous moment a society happens to have a reserve which satisfies the American Experience Table it can be said that the society *is* accumulating such reserve. Many situations can be imagined where for a short time such a condition might exist, although because of the company's lower rates, it could not reasonably be predicted that such a state would continue; for example, a new society recently organized might, by reason of an actual experience for a few years of a lower rate of mortality than that upon which its dues were based, have a reserve equal to that required by the American Experience Table.

On the other hand, a sudden large withdrawal of members from a particular society, whereby the withdrawing members forfeited the reserves which their previous payments had provided for their policies, might result in momentarily doubling the reserve, and such society might find that it had at that particular moment reserves in excess of those required by the American Experience Table.

It does not seem that the Legislature could have intended that the right of a society to grant the benefit specified in this section should depend upon such fluctuations. A society can hardly be said to be accumulating a reserve required by a particular table of mortality unless the rates charged to its members are based upon that or a higher table, or its reserves have been maintained at the required figure over a period of time sufficiently long to warrant the inference that it is a continuing condition.

I am of the opinion that a fraternal benefit society is not entitled to avail itself of the privileges granted by section 5, subsection 2, referred to above, unless its rates are based upon the American Experience Table and 4 per cent interest, and it has the full reserve required thereby, or such a reserve has been maintained over a sufficient number of years so that it can be inferred to be a continuing accumulation.
VITAL STATISTICS — TRANSMISSION OF RETURNS BY CITY OR TOWN CLERKS TO THE SECRETARY OF THE COMMONWEALTH MORE OFTEN THAN ONCE A YEAR.

The Secretary of the Commonwealth may permit, but cannot require, clerks of cities and towns to transmit copies of records of births and marriages at intervals of less than one year.

You have requested my opinion as to whether, under the provisions of R. L., c. 29, § 18, as amended by St. 1903, c. 305, and St. 1906, c. 415, you can permit city and town clerks to transmit copies of the records of births and marriages at intervals of less than one year.

This statute reads, in part, as follows:—

The clerk of each town and of each city . . . shall annually . . . transmit to the secretary of the Commonwealth certified copies of the records of births and marriages recorded therein during the preceding calendar year, with certified copies, upon blanks provided by the secretary, of all such records and corrections in records of births and marriages as may not have been previously returned.

This statute also fixes the particular day on or before which such action shall be taken.

This statute, taken literally, requires an annual return, but the act clearly is designed to bring it to pass that the records in the office of the Secretary of the Commonwealth shall be full and complete.

While under its terms you could not require city and town clerks to make returns more often than once a year, if they voluntarily do so the full intent and purpose of the act are accomplished if, subsequent to the end of a particular year, and before the date fixed by the statute, a return is made transmitting any records which have not previously been forwarded to the Secretary of the Commonwealth.

I am of the opinion that you are authorized to permit town and city clerks to transmit copies of the records of births and marriages at intervals of less than one year.
Boston Elevated Railway — Public Service Commission — Filing of Schedule of Fares.

The trustees of the Boston Elevated Railway Company are not subject to the provisions of St. 1913, c. 784, requiring every common carrier to file its schedule of fares and transfer privileges with the Public Service Commission.

The act providing for the public operation of the Boston Elevated Railway Company (Spec. St. 1918, c. 159) removes the control and regulation of its fares from the Public Service Commission.

You have requested my opinion as to whether the trustees of the Boston Elevated Railway Company are required to file with the Public Service Commission the schedules of fares put in force or which may be adopted by them.

You have called my attention to the provisions of St. 1913, c. 784, § 20, in part, as follows: —

Every common carrier shall file with the commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth, . . . No common carrier shall, except as otherwise provided in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the commission and in effect at the time.

St. 1913, c. 784, §§ 20 and 21, provide a comprehensive scheme for regulation of rates by and through the Public Service Commission. Briefly summarized, they require the filing of schedules of all rates, fares, etc., and forbid the collection of any rates or fares not shown upon the schedule filed with the Commission and in effect at the time. They forbid putting into effect new rates unless the proposed new schedule has been on file a specified number of days, or unless such action is especially permitted by the Commission, and permit the suspension by the Commission of any proposed schedules pending investigation as to the reasonableness of the rates involved.

Spec. St. 1918, c. 159, entitled “An Act to provide for the public operation of the Boston Elevated Railway Company,”
provides for the appointment of a board of public trustees to take over the management and operation of the railway system owned and operated by that company. By section 2 it is enacted that the trustees "shall have the right to regulate and fix fares, including the issue, granting and withdrawal of transfers, and the imposition of charges therefor, and shall determine the character and extent of the service and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission."

Sections 6 to 10, inclusive, of that act provided a detailed method for fixing rates upon the Boston Elevated Railway system. It is provided that the trustees shall "from time to time ... fix such rates of fare as will reasonably insure sufficient income to meet the cost of the service." They are required within sixty days after their appointment and qualification to "fix and put in operation rates of fare which in their judgment will produce sufficient income to meet the cost of the service ... ," and within sixty days thereafter to —

adopt and publish a schedule of eight different grades of fare, of which four shall be below and four above the rate of fare first established; and whenever by reason of any change in the existing rate of fare there are less than four grades, either above or below the rate then in force, the trustees shall forthwith adopt and publish a schedule of additional grades of fare so that there shall always be not less than four grades of fare above and below the existing rate of fare.

If at any time the trustees shall be of opinion that said rates of fare or schedule should be changed, either with regard to the method or basis upon which the fares and transfer privileges are established, or because the steps between the different grades are too small or too great, or for any other reason, the trustees may adopt, publish, and put in effect new schedules or rates of fare to take the place of the existing schedule or rates of fare.

The trustees are required, if the reserve fund created has upon certain days increased or decreased above or below established amounts, to put in effect the next lower or higher grade of fare under the schedules made and published as provided above, and to do this "within one month."
It is obvious from the provisions of the special act that the method of fixing fares therein provided is entirely inconsistent with the system established by the Public Service Commission act, and that it was the intention of the Legislature to remove the matter of fares upon the Boston Elevated system from the operation of that act. The provision of section 2, that the authority of the trustees "shall be exclusive and shall not be subject to the approval, control or direction of any other state board or commission," is conclusive as to this.

If the requirement of the Public Service Commission law as to filing of schedules were an independent provision of law, there might be some basis for the contention that such filing was for the purpose of public information, and consequently would continue in force after the passage of the special act with reference to the Boston Elevated Railway Company; but it appears that this provision is but one step in the system provided by the Public Service Commission law for the control and regulation of rates. Inasmuch as that control and regulation with reference to this company have been taken out of the hands of the Public Service Commission, it does not seem to me that any portion of that law dealing with the regulation of rates is longer applicable to the Boston Elevated Railway Company.

The provision of the special act that the trustees shall "publish" the schedules adopted by them indicates that public information is to be given in that manner rather than by filing with any commission.

Accordingly, I am of the opinion that the trustees of the Boston Elevated Railway Company are not required to file with the Public Service Commission the schedules of fares and transfer privileges which have been or may be adopted by them.
Insurance — Criminal Law — Aiding Unlicensed Agent.

An insurance company does not incur criminal liability under the insurance law (St. 1907, c. 576) by issuing a contract of insurance with knowledge that it has been negotiated through the efforts of a person not licensed to act as an insurance agent or broker.

A statute which fully regulates certain transactions, and in terms imposes a penalty upon one party to such transactions if carried on without a license, is not to be construed as creating a criminal responsibility upon other parties to such transactions who are not specifically mentioned.

You have requested my opinion as to whether under varying circumstances tending to show knowledge or reasonable ground for knowledge on the part of an insurance company or its general agent that a contract of insurance issued by the company had been negotiated through the efforts of a person not licensed to act either as an insurance agent or broker, the insurance company or general agent could be held guilty of aiding and abetting the unlicensed person in the offence committed by him.

Such action on the part of the unlicensed person constitutes a violation of the following provisions of the insurance law:

St. 1907, c. 576, §§ 92 (as amended), 98, 107 and 120.

Section 92. . . . Whoever shall assume to act as such agent or, unless a licensed broker, shall, in any manner, for compensation, aid in negotiating contracts of insurance on behalf of such corporation for a person other than himself, prior to the issuing of a license as aforesaid, or after receiving notice of such finding of unsuitability, or after the determination of the license or renewal, shall be subject to the penalties of section one hundred and twenty.

. . . . . . . . . . . . . . . . . . . . . . .

Section 98. Whoever, for compensation, not being the appointed agent or officer of the company in which any insurance or reinsurance is effected, acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a person other than himself, shall be an insurance broker, and no person shall act as such broker, except as provided in section ninety-five.

A person not a duly licensed insurance broker, who for compensation solicits insurance on behalf of any insurance company, or transmits for a person other than himself an application for or a policy of insurance to
or from such company, or offers or assumes to act in the negotiation of such insurance, shall be an insurance agent within the intent of this act, and shall thereby become liable to all the duties, requirements, liabilities and penalties to which an agent of such company is subject.

 SECTION 107. A person who assumes to act as an insurance agent or insurance broker without license therefor as herein provided, or who acts in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this commonwealth, or who, as principal or agent, violates any provision of this act relative to the negotiation or effecting of contracts of insurance, shall be punished for each offence by a fine of not less than one hundred nor more than five hundred dollars.

 SECTION 120. Whoever violates any provision of this act, the penalty whereof is not specifically provided for herein, shall be punished by a fine of not more than five hundred dollars.

Violation of these provisions would constitute a misdemeanor, and it is familiar law that as to most misdemeanors a person who aids and abets another in the commission of the offence, or does acts which, if the offence were a felony, would render him liable to prosecution as an accessory, is subject to prosecution as a principal.

This statement, however, is not true as applied to all misdemeanors, as there are certain offences in which persons who merely solicit, aid or abet the principal are not subject to prosecution. The dividing line between the two classes is decidedly indefinite, and the courts have supplied no rule of general application by which it can be said with certainty that an offence falls clearly in one class or the other.

Certain writers have attempted to draw a line between things regarded as mala prohibita as opposed to things mala in se, and further, to create a class of so-called "police" offences as to which it is said that in general accessories are not indictable. See Wharton's Criminal Law, §§ 223, 239.

Such line of distinction can hardly be said to prevail in this jurisdiction. For example, in the case of Commonwealth v. Sherman, 191 Mass. 439, violation of speed laws with reference
to an automobile was held to render a man who aided and abetted liable to prosecution as principal offender.

Nevertheless, it has been said by one of the greatest judges of this State that "one consideration, however, is manifest in all the cases, and that is, that the offence proposed to be committed, by the counsel, advice or enticement of another, is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law." *Commonwealth v. Willard*, 22 Pick. 476, 478. In that case a person purchasing intoxicating liquors from an unlicensed person was held not to be guilty of an offence. The real ground of the decision seems to be set forth in the following quotation:

> There is another view of the subject, which we think has an important bearing on the question, if it is not indeed decisive. The statute imposes a penalty upon any person who shall sell. But every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the Legislature. Now, if it were intended that the purchaser should be subject to any penalty, it is to be presumed that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act to all persons aiding, counselling or encouraging the principal offender. There being no such provision in the statute, there is a strong implication that none such was intended by the Legislature.


In the present case the offence consists in aiding in the negotiation of an insurance contract without being licensed as an agent or broker. Every such contract, of course, must have as one party an insurance company represented by some individual as its duly authorized officer or agent. The same reasoning that was applied in the case of *Commonwealth v. Willard* would seem to be decisive of the present case.

A statute as complete and comprehensive as the law of this Commonwealth with reference to insurance would seem to
make doubly valid the reasoning that if the Legislature had intended to penalize the company or its officer or agent acting for it they would have been specifically mentioned.

By St. 1907, c. 576, as amended and supplemented, there is the most detailed regulation of the transaction of insurance business in this Commonwealth.

By section 3 it is made unlawful "for a company to make a contract of insurance upon or relative to any property or interests or lives in this commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of such insurance," except as authorized by certain statutes of this Commonwealth.

There is a detailed provision for the organization and management of insurance companies incorporated under the laws of this Commonwealth in the many recognized branches of insurance. There is a provision for the admission and licensing of foreign companies, and they are required to "make contracts of insurance upon lives, property or interests therein, only by lawfully constituted and licensed resident agents." There are many provisions in which the prohibition and penalty for committing a prohibited act are specifically applied to both the companies and their officers and agents, or persons purporting to act as such. For example, sections 29, 74, 114, 118; St. 1912, c. 401; St. 1913, c. 474, § 2.

Taking into consideration these detailed provisions, I am of the opinion that if the Legislature had intended that the company or its officers or licensed agents should be liable to any penalty by reason of issuing a contract in the negotiation of which an unlicensed person had aided, it would have specifically so provided, and, accordingly, that neither the company nor its licensed agents issuing such a contract are liable to the penalty prescribed for an unlicensed person who aids in the negotiation of an insurance contract.
Public Defence — Authority of Governor to Incur Expense in Combating Influenza Epidemic.

The power of the Governor to incur emergency expenses incident to the war, under Gen. St. 1918, c. 278, authorizes incurring expenses to combat the influenza epidemic.

You have requested my opinion as to whether Gen. St. 1918, c. 278, entitled "An Act authorizing the governor to incur emergency expenses incident to the existing state of war," authorizes the incurring of expenses for the purpose of combating the epidemic of influenza now prevailing in the Commonwealth.

Section 1 of this statute provides: —

Expenditures are hereby authorized not exceeding one million dollars, to be incurred under the direction of the governor, subject to the approval of the council, to meet any emergency which may arise during the recess of the general court by reason of the exigencies of the existing state of war. . . .

In my opinion, this statute is not to be interpreted as merely authorizing expenditures to meet an emergency directly caused by the war. As its title declares, it authorizes "emergency expenses incident to the existing state of war." In my judgment, it must be interpreted as authorizing expenditures to meet conditions which, because of the exigencies of the existing state of war, may be said to constitute an emergency. I am of opinion that the prevailing epidemic clearly is such an emergency. The presence of a large military cantonment within the Commonwealth, the fact that many citizens of the Commonwealth will soon be summoned to military service under the latest draft, and, in general, the disastrous effect which this epidemic, if not checked, will have in limiting the ability of the people of the Commonwealth to aid in the successful prosecution of the war, all make it plain that this epidemic, viewed in the light of existing war conditions, is a real war emergency. In my opinion, the suggested expenditures are authorized by the statute.
Civil Service Commission — Power to revoke Certification obtained by Fraud or Misrepresentation.

The Civil Service Commission has the power to revoke its certification of a person as eligible to appointment to a position in the classified civil service, even after such person has been appointed to the position, if such certification was obtained from the Commission through fraud or misrepresentation.

It appears from information furnished to this Department by your Commission that on Sept. 7, 1916, an applicant was given an examination for an appointment to the position of engineer at the Beverly pumping station, which is a second-class plant, and classified under clause 26 of rule 6 of the civil service rules then in effect. In consequence of this examination the applicant was certified by your Commission to the commissioner of public works of Beverly as a person eligible to be appointed to that position, which appointment was subsequently made. The commissioner of public works of Beverly having now requested that the certification of this employee as an eligible person to be appointed to this position be revoked, on the ground that it was obtained by the employee through fraud or misrepresentation, you have requested my opinion upon the question of whether your Commission has the power to revoke such a certification after an appointment has been made.

The laws relating to the civil service and the rules and regulations made thereunder provide in effect that no appointments shall be made to positions classified under said rules except from a list of persons who shall be certified by the Civil Service Commission as eligible to fill such positions. After a valid appointment has once been made, the appointee cannot be removed from his position except for just cause.

It is true that, as a general rule, after an appointment has once been made from a certified eligible list your Commission has no jurisdiction over the tenure of the appointee, but it seems quite plain to me that if your Commission has, through mistake or fraud, erroneously placed a person on an eligible list from which he is subsequently appointed, you may, upon
discovery of the error or fraud, revoke your action in placing his name upon such list. Suppose, for example, that your Commission, intending to certify as eligible a particular person, should make a mistake in writing the name, so that it appeared as the name of another person, and that the latter person was appointed to the position—it is impossible to suppose that your Commission has lost its power to revoke its certification. If so, the person wrongfully appointed would be secure in his position. Or suppose that one should fraudulently take an examination in the name of another, and that that other should subsequently be appointed in consequence of having been certified by the Commission as an eligible person on the basis of such examination; or suppose that an applicant should, through fraud or misrepresentation practiced upon the Commission, secure his certification as an eligible person—the appointing officer could hardly contend that the fraud practiced upon the Commission, or the error or mistake on its part, constituted just cause, within the meaning of the statute protecting the tenure of office in a civil service position, for the reason that it is difficult to see how he would have the power to determine whether the Civil Service Commission had been deceived or had made a mistake. It seems to me that such a matter is within the sole jurisdiction of the Civil Service Commission, and that if it should determine, even after an appointment had been made, that its action in relation thereto had been taken through error or mistake, it has the power to revoke or rescind such action.

In my opinion, the revocation by your Commission of its action in certifying a person as eligible to a position classified under the civil service rules would place him in the same position as if he had never been certified, and hence would render his continued employment in that position illegal.
Credit Unions — Who can be Members — Loans.

A credit union must confine its membership to individuals, and cannot include corporations or associations, and must limit its loans to its own members.

You request my opinion as to whether a credit union can make a loan either to a corporation or an association, and whether a corporation or an association can be a member of a credit union; also, whether a credit union can loan to persons, corporations or associations located outside the Commonwealth.

Gen. St. 1915, c. 268 §§ 2, 5, 6, 11 and 24, provide: —

Section 2. Seven or more persons, resident in this commonwealth who have associated themselves by an agreement in writing with the intention of forming a corporation for the purpose of accumulating and investing the savings of its members and making loans to members for provident purposes, may, with the consent of the board of bank incorporation, become a corporation.

Section 5. A credit union may receive the savings of its members in payment for shares or on deposit; may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated.

Section 6. The by-laws shall prescribe the name of the corporation, the purposes for which it is formed, the conditions of residence or occupation which qualify persons for membership, the fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.

Section 11. The capital, deposits and surplus funds of a credit union shall be invested in loans to members with the approval of the credit committee as provided in section seventeen of this act, and any capital, deposits or surplus funds in excess of the amount for which loans shall be approved by the credit committee in any securities which are at the time of their purchase legal investments for savings banks in this commonwealth.

Section 24. The board of directors may expel from a credit union any member who has not carried out his engagements with the credit union, or who has been convicted of a criminal offence, or who neglects or refuses to comply with the provisions of this act or of the by-laws, or whose private life is a source of scandal, or who habitually neglects to pay...
his debts, or who shall become insolvent or bankrupt, or who shall have
deceived the corporation or any committee thereof with regard to the use
of borrowed money; but no member shall so be expelled until he has been
informed in writing of the charges against him, and an opportunity has
been given to him, after reasonable notice, to be heard thereon.

From a general observation of this statute it clearly appears
to have been framed with the main purpose of promoting
thrift among members of a credit union, and of assisting mem-
ers for provident purposes. In my opinion, it was the inten-
tion of the Legislature that membership in credit unions should
be limited to individuals, and should not include corporations
or associations. The fact that the word "resident" is used in
section 2 and "residence" in section 6 would imply that indi-
viduals were meant and not corporations. The word "resi-
dent" occurring in a statute ordinarily means an individual or
a citizen, and does not mean a corporation. People v. Schoon-
maker, 63 Barbour's, 44, 51; Farmers Loan & Trust Co. v.
Chicago, 27 Fed. Rep. 50. Then, again, the phraseology of
section 24 would imply that it was the intention that the mem-
bership be made up of individuals and not of corporations or
associations.

Your second question is as to whether a credit union can
make a loan to a corporation or association. In an opinion
rendered to you on April 3, 1917, I expressed the view that
credit unions were restricted in making loans to the members
thereof. It follows that, as it is my opinion that a corpora-
tion or association cannot be a member of a credit union,
loans by credit unions to corporations and associations are
unauthorized.
County Officers and Employees — Increase in Compensation — Salaries of Clerks and Justices Increased during Year — Court Stenographers.

Where the justice and clerk of a local court were given additional salary by Gen. St. 1918, c. 173, readjusting their salaries to correspond with an enlargement of their district, they are not entitled to the 10 per cent temporary increase provided by Gen. St. 1918, c. 260.

A court stenographer whose salary is $2,500 is entitled to this temporary increase, although there is a possibility of additional compensation from extra work done as such stenographer in behalf of the county.

You have requested my opinion as to whether the justices, clerks and assistant clerks of the district courts whose salaries were affected by Gen. St. 1918, c. 173, are entitled to the temporary increase in salary authorized by Gen. St. 1918, c. 260. By its terms the latter statute applies only to persons "whose salaries have not been increased by act of the general court passed during the current year," and the sole question is as to whether Gen. St. 1918, c. 173, is to be regarded as having granted such an increase in salary within this provision.

By Gen. St. 1917, c. 302, the territorial jurisdiction of various district and police courts was enlarged by annexing thereto one or more towns. This statute took effect on Oct. 1, 1917, but contained no provision relating to the salaries of the justices or clerks of those courts. The various police, district and municipal courts of the Commonwealth had been classified, and the salaries of their justices and clerks established on the basis of population, by St. 1904, c. 453, and this statute, with its various amendments, is still in force.

St. 1910, c. 501, provided that these salaries shall be readjusted on the first day of July in the year in which a national or State census is taken, so that thereafter the salaries shall be based upon the population of the district as shown by the latest enumeration.

As the statute of 1917, increasing the territorial jurisdiction of the courts in question, contained no provision increasing the salaries of the justices and clerks to correspond to the added population, it is plain that without further legislation
they were not entitled to an increase in salary based on such added population until a readjustment should take place, in accordance with the statute of 1910, on the first day of July of the year in which the next national or State census is taken.

This being the situation, the General Court this year enacted Gen. St. 1918, c. 173, § 1 of which is as follows: —

The salaries of the justices, clerks and assistant clerks of the district, police and municipal courts whose judicial districts were enlarged by the provisions of chapter three hundred and two of the General Acts of nineteen hundred and seventeen, and the classes into which said courts are distributed under the provisions of chapter four hundred and fifty-three of the acts of nineteen hundred and four and the amendments thereof, shall be readjusted, by the officer paying said salaries, so as to correspond with the classes and salaries prescribed by said chapter four hundred and fifty-three and the amendments thereof. The readjustment shall be made as of October first, nineteen hundred and seventeen, and all increases of salary hereunder shall take effect as of that date.

In view of the statutes relating to salaries in the courts in question at the date of the enactment of this statute, it is my opinion that it can be regarded as having no other effect than granting an increase in salary to the justices, clerks and assistant clerks specified, and providing for the payment of the increase from Oct. 1, 1917. In my judgment, this is an increase in salary granted by act of the General Court passed during the year 1918, and, accordingly, these justices and clerks do not come within the provisions of chapter 260 of the acts of this year.

You also ask my opinion as to whether court stenographers who receive an annual salary of $2,500 are entitled to the benefits of Gen. St. 1918, c. 260.

This question arises from the fact that these stenographers are required by R. L., c. 165, § 85, at the request of the presiding justice, to provide him with a transcript of such portion of their notes as he may require, payment for such transcript to be made by the county. The result is that in cases where a stenographer is requested to perform any such additional work by the presiding justice he receives compensation from
the county in excess of $2,500. The habits of the various presiding justices with regard to making such requests vary greatly, and it is impossible to determine in advance whether any particular stenographer during any year will receive compensation for such work, and, if so, to what extent.

Gen. St. 1918, c. 260, applies only to persons "whose annual compensation in full for all services rendered does not exceed twenty-five hundred dollars." The temporary increase in salary granted is "equal to ten per cent of the salaries received by them on the first day of July in the year nineteen hundred and seventeen." This appears to make the basis of the increase the rate of regular compensation received on that date. It does not permit the consideration of occasional extra compensation paid for additional work performed out of regular hours.

Regular salaries paid these stenographers appear to be compensation for the services rendered by them in taking notes and performing other incidental services during the sessions of the court. The furnishing of transcripts of evidence to presiding justices of necessity requires work out of regular court hours and frequently beyond regular business hours. Though it is not entirely free from doubt, it seems to me, on the whole, that it must be regarded as work performed in addition to the regular duties of the office. Because of the uncertainty of its extent, it is paid for in the manner above indicated. I am inclined to the opinion, therefore, that amounts received on account of such additional work are not to be considered in determining the annual compensation of such stenographers for the purpose of the application of Gen. St. 1918, c. 260.

Accordingly, in my judgment, stenographers who merely receive additional compensation for furnishing transcripts of their notes to presiding justices are not debarred thereby from the temporary increase authorized by Gen. St. 1918, c. 260.
STATE EMPLOYEES — MILITARY SERVICE — EXTRA COMPENSATION — PERMANENT OR TEMPORARY EMPLOYMENT.

Gen. St. 1917, c. 301, providing certain compensation for employees of the Commonwealth in the military service of the United States, applies to all persons engaged in the regular, permanent service of the Commonwealth, regardless of the date of their original employment, but does not apply to persons rendering only temporary, limited, or casual services to the Commonwealth. The provisions of Gen. St. 1917, c. 301, practically provide a leave of absence, with pay, for persons indefinitely employed in the regular, permanent service of the Commonwealth.

You have requested my opinion as to whether payments under Gen. St. 1917, c. 301, can be made, first, to persons who entered the service of the Commonwealth after that statute was enacted and subsequently were mustered into the military service of the United States; and second, to persons who were mustered into that service while only temporarily in the employ of the Commonwealth for a brief period of time.

Section 1 of the statute in question is as follows:—

There shall be allowed and paid, out of the treasury of the commonwealth, to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the Unites States during the present war, an amount equal to the difference between the compensation received by him from the United States, plus the compensation received as extra military pay, received from the commonwealth, and the amount which he was receiving from the commonwealth at the time when he was mustered in. The said payments shall continue so long as he continues in the military or naval service of the United States, but shall cease one month after the termination of the war. In case of his death in the said service his widow, minor children, parents or dependents shall receive the said sum until the termination of the war.

This section is broad in its application "to every employee of the commonwealth who has been or is hereafter mustered into the military or naval service of the United States during the present war." It applies to persons who have been so mustered in before the enactment of the statute, and I find in it no limitation restricting its application to persons subsequently entering the regular service of the Commonwealth and
thereafter mustered into the military service. In the absence of any such limitation, it seems to me that it must be held to apply to all persons mustered into the military or naval service of the United States, who, at the time of such "mustering in," were employees of the Commonwealth, as hereinafter defined.

Your second question is a much more difficult one to determine. As already stated, the language of this statute is very broad, and in terms applies "to every employee of the commonwealth." By the latter part of the section, however, it is provided that "said payments shall continue so long as he continues in the military or naval service of the United States, but shall cease one month after the termination of the war. In case of his death in the said service his widow, minor children, parents or dependents shall receive the said sum until the termination of the war."

It is difficult to assume that the General Court intended that such payments should be made to or on account of a person in the service of the Commonwealth who had entered that service for a brief temporary period of time, or for a few weeks or months, or to perform a temporary limited service which could take but a short time.

In dealing with this statute on other occasions I have suggested that in many respects it was to be regarded as granting a leave of absence with pay. In an opinion rendered the Board of Retirement on July 13, 1917, I stated:—

It seems to me that, at least for the purposes of the administration of the retirement system, Gen. St. 1917, c. 301, should be interpreted as granting a leave of absence, with pay, during the continuance of the war and for thirty days thereafter, to all employees mustered into the military or naval service of the United States during the present war. The employee is required to credit against his salary merely such compensation as he receives on account of his military services.

Again, on Oct. 16, 1917, in an opinion rendered the Supervisor of Administration with reference to the status of persons in the classified public service who have been drafted into the military service of the United States, referring to the statute now under consideration I said:—
It would seem that it was in the mind of the Legislature that these men were to be considered as temporarily absent from the service of the Commonwealth as on a leave of absence, and that their positions in the classified civil service were not to be affected by their absence until the cause of such absence had been removed.

Thus regarding the statute, it seems to me entirely inconsistent with its general purport that a person temporarily employed by the Commonwealth for a few months should, in the event that he is mustered into the military service during the period of his employment, receive the equivalent of his pay from the Commonwealth, after deducting his military pay, long after the period that he would have remained in the employ of the Commonwealth if he had not been mustered into the military service. In the absence of a clear provision requiring such a result, I am of the opinion that the statute is not to be given that construction. Looking at this statute as a whole, it seems to me that the persons whom the General Court intended to benefit were those employees of the Commonwealth who were in its permanent and regular service, and who would, in the ordinary course of events, have indefinitely continued in that employment if they had not been mustered into the service of the United States. To such persons the General Court granted a leave of absence, with pay, until one month after the termination of the war.

Accordingly, in my judgment, the benefits of this statute are to be restricted to such persons as were in the regular and permanent employment of the Commonwealth at the time of their mustering into the United States service, and no payments are thereby authorized to persons who at the time of such mustering in were in the employment of the Commonwealth only for a brief definite period of time, or for the purpose of performing a service which was not a part of the regular activities of the Commonwealth, or required but a brief time for its performance.
HEALTH INSPECTORS — SLAUGHTERING AT COUNTY TRAINING SCHOOLS.

A county training school may lawfully slaughter animals belonging to it without inspection by a health inspector, and may serve the meat of such animals to the inmates of the school.

You request my opinion on the following questions: —

1. Is it lawful or proper for slaughtering to be done at a county training school without inspection by an inspector?
2. Is it lawful to have the meat of such carcass served to the inmates of said institution?

The particular section of the statute which is involved in your request appears to be R. L., c. 75, § 105, as amended by Gen. St. 1916, c. 139, which reads as follows: —

The provisions of the six preceding sections shall not apply to a person not engaged in such business, who, upon his own premises and not in a slaughter house, slaughters his own neat cattle, sheep or swine, but the carcass of any such animals, intended for sale, shall be inspected, and, unless condemned, shall be stamped or branded according to the provisions of section one hundred and three of chapter seventy-five of the Revised Laws, as set forth in chapter two hundred and twenty of the acts of the year nineteen hundred and three, and as amended by chapter four hundred and seventy-one of the acts of the year nineteen hundred and eleven, by an inspector at the time of slaughter.

The six preceding sections referred to relate to certain requirements regarding the slaughtering of cattle and the inspection of the same at slaughterhouses.

The first inquiry raises the question as to whether or not a county is a “person,” within the meaning of said chapter 139. R. L., c. 20, § 1, provides as follows: —

Each county shall continue a body politic and corporate for the following purposes: to sue and be sued, to purchase and hold, for the use of the county, personal estate and land lying within its limits, and to make necessary contracts and do necessary acts relative to its property and affairs.
R. L., c. 9, § 16, provides that the word "person" may be extended and applied to bodies politic or corporate. It has been held to apply to counties. 30 Cyc., p. 1527. A county training school is operated by, and is a part of, the county. Consequently, it is my opinion that a county is a "person," within the meaning of the statute.

Nor do I think the application of said chapter 139 is restricted to slaughtering by the owner of the premises himself. In my judgment, such owner may do such slaughtering by or with the assistance of others.

Assuming, therefore, that the slaughtering of neat cattle, sheep or swine belonging to the county is done by the county training school on the premises of the county training school, and that the meat is not intended for sale, I am of the opinion that your first question is to be answered in the affirmative.

It is manifest that such meat, when served to the inmates of the institution, is not "being offered for sale," within the meaning of the statute, and, accordingly, your second inquiry is to be answered in the affirmative.

PUBLIC OFFICERS — TRUSTEES OF THE NEW BEDFORD TEXTILE SCHOOL — CORPORATION.

The trustees of the New Bedford Textile School, appointed under Gen. St. 1918, c. 246, have the same duties and obligations as those previously exercised by the original corporation, but are a board of public officers and not a legal corporation.

You request my opinion as to whether the trustees of the New Bedford Textile School, appointed under the provisions of Gen. St. 1918, c. 246, are to be regarded as constituting a corporation.

The New Bedford Textile School was established under the provisions of St. 1895, c. 475, now appearing as R. L., c. 125, §§ 20 to 22, inclusive. A corporation known as the "trustees of the New Bedford Textile School" was formed under the provisions of that statute, and this corporation continued to
operate and manage the school until the 1st of July last. On or about that date, in accordance with the provisions of Gen. St. 1918, c. 246, this corporation transferred all its property to the Commonwealth, and thereupon a board of seventeen trustees was constituted and appointed in accordance with the provisions of section 2 of that act. This section provided:

Upon their qualification, said trustees shall be vested with all the powers, rights and privileges and shall be subject to all the duties, of the existing trustees of the New Bedford Textile School, except that the title to all the property of said school shall be vested in the commonwealth.

Accordingly, since the transfer of its property to the Commonwealth this school has been, and hereafter will be, operated and managed by a board of seventeen trustees thus appointed. The corporation which originally established the school under the earlier statute will have no further functions to perform with relation to the school, and very likely may be said no longer to exist.

In my opinion, it was the intention of the General Court that this new board of trustees should be merely a board of public officers to manage the school in and upon property owned by the Commonwealth. In my judgment, in vesting them "with all the powers, rights and privileges" and subjecting them to "all the duties" of the old board of trustees, it was intended merely to give them the same powers and to impose upon them the same obligations with reference to the maintenance and management of the school as had heretofore been granted to and imposed upon the original corporation. In the absence of an express provision declaring that this new board of trustees shall constitute the corporation, it does not seem to me to be consistent with the policy of the General Court, as declared in this statute and in similar statutes relating to other textile schools enacted this year, and also expressed in Gen. St. 1918, c. 262, dissolving the corporation of the Massachusetts Agricultural College, to construe the act under which your Board is established as constituting it a corporation.
Workmen’s Compensation Act — “Laborers, Workmen and Mechanics.”

Civil engineers employed by the Commonwealth are not “laborers, workmen and mechanics” within the meaning of St. 1913, c. 807, providing for the payment of compensation to certain employees of the Commonwealth.

I have your letter in which you state that in several instances engineers, while in the discharge of their duties or assisting laborers at work on State highways, have been injured and have filed claims for compensation under the Workmen’s Compensation Act, and you request my opinion upon the question of whether the provisions of the Workmen’s Compensation Act apply to engineers in the employ of your Commission. I assume that by the word “engineers” you mean civil engineers, and not those who work around an engine or boiler.

St. 1913, c. 807, as amended, extends the provisions of the Workmen’s Compensation Act to no persons in public employment other than “laborers, workmen and mechanics.”

The above-quoted phrase has been interpreted by our Supreme Judicial Court in Devney’s Case, 223 Mass. 270, as not including a hoseman in the fire department of the city of Boston; in White’s Case, 226 Mass. 517, as including a janitor who did manual labor, but not one who acted only as a superintendent over others; and in Lesuer’s Case, 227 Mass. 44, as not including an instructor in a vocational school, although he occasionally gave practical demonstrations involving manual labor.

In the last case the court said: —

The word “mechanic” as used in the statute connotes a manual occupation, — a performance of mechanical labor, or work at one of many constructive trades, as a principal means of livelihood.

In Devney’s Case, supra, the court defined these words as follows: —

A “laborer” ordinarily is a person without particular training who is employed at manual labor under a contract terminable at will, while “workmen” and “mechanics” broadly embrace those who are skilled users of tools... And the framers of the statute undoubtedly intended
that the words "laborers, workmen and mechanics" should be taken in their ordinary lexical sense.

While it is difficult to lay down any hard and fast rule for determining whether any particular employment falls within or outside of this class, as each case depends largely upon its own facts, it seems to me reasonably clear that civil engineers employed by your Commission are not entitled to the benefits of the Workmen's Compensation Act on account of injuries sustained by them arising out of and in the course of their employment, and I beg to advise you accordingly. It is perhaps needless to add that this is a question which the injured employee is entitled to have adjudicated by the Industrial Accident Board, subject to appeal to the Supreme Judicial Court.

Savings Banks — Bonds of Railroads taken over by the United States Government — Legal Investments.

Under St. 1908, c. 590, § 68, with certain exceptions, the bonds of railroad corporations which have been taken over by the United States government are not legal investments for savings banks.

You ask my opinion on the following questions: —

1. Whether the bonds of railroad corporations that were legal investments for savings banks at the time the government took over the roads would still be legal investments if they are operated by the government, as at present.

2. Whether the "gross earnings" are to be determined by their returns, as formerly, or by the rentals from the United States Railroad Administration.

You refer to the provisions of St. 1908, c. 590, § 68, which govern the investment by savings banks in bonds and notes of railroads. I am of opinion that the provisions of this section, with the exception of subdivisions b, c and d of clause 3, contemplate that the railroad property shall be operated by the railroad corporation owning such property. Said subdivisions, b, c and d authorize the investment in certain New England
railroads which may be leased to another railroad corporation.

The act of Congress approved March 21, 1918, relative to the Federal control of railroads, recites, in the first paragraph thereof —

That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation, . . .

I think it plain that at the present time the United States government is operating the railroads that have been taken over by the President; and it is my opinion, accordingly, that your first inquiry is to be answered in the negative.

The answer to your first inquiry makes it unnecessary for me to answer your second inquiry.

RULES AND REGULATIONS ISSUED BY STATE BOARDS AND COMMISSIONS — GENERAL SCOPE.

Rules and regulations of State boards and commissions are general in scope, within the meaning of Gen. St. 1917, c. 307, when they apply to all the citizens of the State, although they prohibit the doing of an act only in a certain locality.

You have requested my opinion upon the question of whether certain rules and regulations made by your Commission are to be considered "general in scope," within the meaning of Gen. St. 1917, c. 307. Section 1 of that act is as follows: —

Every commission, board or official vested by law with the power to make and issue rules and regulations general in scope, and to be observed or performed under penalty for the violation thereof, shall file attested copies thereof, together with a citation of the law by authority of which the same purport to have been issued with the secretary of the commonwealth, and such rules and regulations shall not take effect until so filed. Nothing herein contained shall be deemed to apply to rules and regulations issued by commissions, boards or officials of cities or towns, or to municipal ordinances or by-laws, or to rules and regulations affecting
solely the internal management or discipline of a commission or board, nor to orders or decrees made in specific cases within the jurisdiction of a commission, board or official.

Section 3 requires the Secretary of the Commonwealth to publish as a public document all orders, rules and regulations filed with him under the provisions of this act.

The difficulty in interpreting this act lies in defining the phrase "general in scope." Viewed from different angles, this phrase might be interpreted with reference either to the area over which, or the time during which, the rules and regulations were effective, or as referring to the persons whose actions were thereby restricted. What was meant by the expression "general law" as contrasted with "special law" was considered in State v. Corson, 67 N. J. L., 178, where the court said: —

A statute is not special or local merely because it authorizes or prohibits the doing of a thing in a certain locality. It is, notwithstanding this fact, a general law if it applies to all the citizens of the State and deals with a matter of general concern. Doughty v. Conover, 13 Vroom, 193. The application of this principle led this court, in the case cited, to the conclusion that a statutory provision which made it unlawful for any person to net fish during certain periods of the year "in the waters of Burlington and Atlantic" was not special or local but general. The act before us, tested by this rule, is also general.

Notwithstanding the use of the words "in scope" in connection with the word "general" in this statute, I have come to the conclusion that the statute is to be construed as if it read "general rules and regulations." I have reached this conclusion the more readily because it seems to me that this interpretation serves more adequately to carry out the apparent purpose for which the act was passed, namely, that of giving notice to the public generally of acts of boards or commissions by which it was bound under penalty.

Accordingly, I beg to advise that, in my opinion, a rule or regulation is "general in scope," within the meaning of this statute, when it applies to all the citizens of the State, although it prohibits the doing of a thing only in a certain locality.

You have further requested my opinion on certain specific
rules and regulations made by your Commission, which are stated by you as follows:—

1. Under chapter 410, Acts of 1911, the commissioners order a close season on certain areas of land for a definite period of time. The public as a whole is prohibited from hunting and performing certain other acts within these areas.

2. Under chapter 285, Acts of 1911, the Commissioners on Fisheries and Game, on petition, stock certain great ponds and specify the times and methods of taking fish in those particular ponds for a definite period of time. The regulations apply to the public in general, in so far as relates to that particular pond.

3. Under section 5, chapter 91, Revised Laws, the Commissioners on Fisheries and Game, on petition, stock certain brooks and specify the times and methods of taking fish in those brooks for a definite period of time. The regulations apply to the public in general, in so far as relates to those particular brooks.

4. Under chapter 401, Acts of 1914, the Board of Commissioners on Fisheries and Game declare an open season on pheasants between certain specified dates, within certain counties, requiring that hunters shall observe a certain bag limit and make certain reports.

5. Under sections 113 and 114, R. L., c. 91, the Commissioners on Fisheries and Game, on the request of the State Department of Health, issue orders prohibiting the taking of shellfish from certain areas. These regulations apply to the public as a whole, in so far as relates to that particular area.

These rules and regulations are "to be observed or performed under penalty for the violation thereof."

It is my opinion that all of the above rules and regulations are to be construed as general in scope, within the meaning of Gen. St. 1917, c. 307, and that copies thereof are required by that statute to be filed with the Secretary of the Commonwealth in accordance with the provisions of the act.

Other specific rules and regulations upon which you have also requested my opinion are as follows:—

6. In numerous cases the statutes extend protection to a certain bird or animal. The statute applies to the public in general. The Board of Commissioners on Fisheries and Game, however, are authorized to issue permits, exempting the holders from the observance of the statute. While this permit may carry with it certain rules and regulations to be
observed by the holder, these permits and rules apply only to the holder and not to the public in general.

7. Under chapter 460, Acts of 1910, the Commissioners on Fisheries and Game issue orders in writing to the owner or tenant of a sawmill, manufacturing or mechanical plant, dwelling house, stable or other building, prohibiting or regulating the discharge or escape of sawdust or certain other materials therefrom, into the brook or stream on which it is located.

8. Under chapter 365, Acts of 1904, the Commissioners on Fisheries and Game issue orders in writing to owners of dams and fishways concerning changes, repairs, building of new fishways, and times when same shall be kept open.

9. Under chapter 529, Acts of 1910, the Board of Commissioners on Fisheries and Game may lease Tisbury Great Pond from time to time until Jan. 1, 1920. These leases contain such rules and regulations for the taking of fish thereunder as the Commissioners deem expedient. The regulations, however, apply to the lessees only, and not to the public in general.

The orders made by your Commission, as above specified in Nos. 7 and 8, seem to me clearly to be excluded from the operation of this act by the last sentence of section 1, which provides that "nothing herein contained shall be deemed to apply . . . to orders or decrees made in specific cases within the jurisdiction of a commission, board or official."

The rules and regulations above specified under Nos. 6 and 9 are, in my opinion, not general in scope, within the meaning of this statute, and, accordingly, need not be filed with the Secretary of the Commonwealth in accordance with the provisions of the act.

Local Boards of Health — Physician Member in Towns of over 5,000 Inhabitants.

In a town of more than 5,000 inhabitants, where the selectmen do not themselves act as the board of health, one member of such board must be a physician, and the selectmen cannot appoint a layman, under Gen. St. 1918, c. 185, if the board would thereby be left without a physician member.

You have requested my opinion as to whether the selectmen of a town of more than 5,000 inhabitants, acting under the provisions of Gen. St. 1918, c. 185, can appoint a layman to perform the duties of the physician member of the board of health
of such town, who is absent in the military or naval service of the United States.

Said chapter 185, in my opinion, is to be read in connection with the statutes relating to boards of health existing at the time of its passage. It is not to be presumed that the Legislature intended by the passage of the act to change the existing requirements with reference to the personnel of boards of health. By St. 1913, c. 835, § 405, it is provided that in towns having more than 5,000 inhabitants, as determined by the latest national or State census, unless composed of the selectmen, one member of the board of health shall be a physician. Where there is only one physician upon a board of health in such town, and he is absent temporarily in the military service of the United States, and it is desired to appoint a person to perform his duties in his absence, under the provisions of said chapter 185, I am of the opinion that such appointee must be possessed of the qualifications of the person whose position he is to fill.

ALIEN ENEMY — ELIGIBLE FOR CERTIFICATE TO PRACTICE DENTISTRY.

A person who has passed an examination satisfactory to the Board of Dental Examiners, and has been found to possess the requisite qualifications and to be of good moral character, is not debarred from obtaining a certificate to practice dentistry because of being an alien enemy.

You request my opinion as to the issuance to an alien enemy resident in this Commonwealth of a certificate to practice dentistry within the Commonwealth.

Having passed an examination satisfactory to the Board and been found to possess the requisite qualifications and to be of good moral character, the mere fact that a person is an alien enemy does not prevent the issuing of a certificate to him. This is pointed out in the case of Hutchinson v. Brock, 11 Mass. 118, at page 122, which states that "the citizen or subject of a foreign country or sovereign, against whom we declare war, who is residing with us when war commences, and who is
permitted afterwards to reside, and be at large, under the protection of our laws, is enabled by his residence and by virtue of this protection, to maintain civil actions, notwithstanding the war, and any supposed duty of natural allegiance."

Therefore, on the facts stated, an alien enemy resident in this Commonwealth is entitled to the protection and advantages of the laws of this Commonwealth.

**Salaries of Employees of the Commonwealth—Effect of Classification by Supervisor of Administration upon those fixed by Statute.**

Gen. St. 1918, c. 228, providing for the classification by the Supervisor of Administration of certain offices and positions in the government of the Commonwealth, has no effect upon salaries established by statute.

You have asked my opinion as to whether the provisions of Gen. St. 1918, c. 228, relative to classifications, have the effect of repealing the specific salary rates which have from time to time been established by statute.

Section 1 of said chapter provides:—

All appointive offices and positions in the government of the commonwealth, except those in the judicial and legislative branches, shall be classified by the supervisor of administration, subject to the approval of the governor and council, in services, groups and grades according to the duties pertaining to each office or position.

In so far as classification is concerned, the section, in my judgment, applies to all such positions. Such classification, however, can have no effect upon salaries fixed by statute. Indeed, there are no provisions in the statute controlling the action of the head of a department in determining the salaries of officials and employees not established by law except those contained in section 3. The classification has no effect, of itself, upon the salaries of officers and employees. It is specifically provided in section 6 that the provisions of the act shall not effect a reduction in any salary, and there is no provision in the act by which the classification increases any salary.
It would seem that the classification is for the assistance of the Legislature in making appropriations, and of the Governor and Council in determining whether to approve increases in salaries subject to their approval. Where a salary is specifically fixed by statute, it cannot be increased or reduced except by act of the Legislature. Where it is not so fixed, it cannot be increased except in the manner provided by law, which is, ordinarily, by the head of a department, with the approval of the Governor and Council; and, since the passage of said chapter 228, in no event unless an appropriation sufficient to cover such increase has been granted by the General Court in pursuit of a specific recommendation in the estimates filed as required by law.

Accordingly, I am of the opinion that said chapter has no effect upon salaries established by statute.

Supervisor of Administration — Disclosure of Fees by Sheriffs and Deputy Sheriffs.

The Supervisor of Administration has authority, under chapter 86 of the Resolves of 1918, to require a disclosure of the amount of fees received by the various sheriffs and deputy sheriffs of the several counties.

You have requested my opinion as to whether, under the provisions of chapter 86 of the Resolves of 1918, your department is authorized to require a disclosure of the amount of fees received by the various sheriffs and deputy sheriffs of the several counties.

The resolve in question authorizes and directs the Supervisor of Administration “to investigate the working conditions of the judicial and all other officials and employees, appointive or elective, of the commonwealth, except in the department of legislation, and the several counties thereof, other than those included in senate document number three hundred and seventy of the present year, and the duties of such officials and employees, and their salaries, fees, allowances and other compensations.” It then provides:—
For the purposes of this resolve the supervisor shall have and may exercise in regard to all officials, employees and activities to which this resolve applies, the powers granted by chapter two hundred and ninety-six of the General Acts of nineteen hundred and sixteen, and amendments thereto, relating to employment in the service of the commonwealth.

Senate Document No. 370, referred to in this resolve, was subsequently enacted as Gen. St. 1918, c. 228.

The offices of sheriffs and of deputy sheriffs plainly do not come within the scope of this last-mentioned statute, but do, without doubt, come within the broad language of chapter 86 of the Resolves of 1918. In my opinion, there can be no question but that, under this resolve, it is your duty to investigate "the working conditions" and "the duties of such officials . . . and their salaries, fees, allowances and other compensations."

Gen. St. 1916, c. 296, referred to in this resolve, abolished the Commission on Economy and Efficiency and created your Department, giving to it "all the rights, powers, duties and obligations" of its predecessor, except as limited in the act. Section 8 provided as follows: —

Unless authorized as provided by section six of chapter seven hundred and nineteen of the acts of the year nineteen hundred and twelve, the supervisor shall not exercise the powers conferred by section nine of said chapter without first obtaining the approval of the governor or of the committee on finance of the council, except that in making any examination he may require the production of books, papers, contracts and documents relating to any matter within the scope of the investigation.

St. 1912, c. 719, § 6, is as follows: —

On request of either branch of the general court or of the ways and means committee of either branch, or of the governor, or of the committee on finance of the governor's council, the commission shall make a special examination of any matter affecting the management or finances of any department, institution, board, undertaking or commission mentioned in section three, and on request shall give any information in its possession to either branch of the general court or to the ways and means committee of either branch or to the governor.

Section 9 granted the following powers: —
For the purpose of this act and in order to provide information which shall serve as a basis for legislation, the commission shall have the power to require the attendance and testimony of witnesses and the production of all books, papers, contracts and documents relating to any matter within the scope of any investigation authorized by this act.

In my judgment, the provisions of chapter 86 of the Resolves of 1918 are to be regarded as an authorization, under St. 1912, c. 719, § 6, of the use of the powers above stated, granted by section 9 of the last-mentioned statute. Accordingly, your Department is authorized to require the attendance and testimony of witnesses and the production of books and papers relating to the amount of fees received by the various sheriffs and deputy sheriffs, in connection with such investigations as you are making under the provisions of chapter 86 of the Resolves of 1918.

STATE EMPLOYEES — LIABILITY INSURANCE IN CONNECTION WITH THE OPERATION OF MOTOR VEHICLES — EXPENSE.

The cost of liability insurance carried by an employee of the Massachusetts Highway Commission, who is required to operate a motor vehicle in connection with his work, cannot properly be paid by the Commonwealth, since it is merely to provide indemnity to the insured against the possible results of his own negligence.

You have requested my opinion as to whether the cost of liability insurance carried by certain of your employees, who, because of the nature of their duties, are required to operate motor vehicles in connection with their work, can be paid by the Commonwealth as a part of the expense of operating your Department.

In my opinion, such items cannot properly be paid by the Commonwealth. The purpose of liability insurance in cases of this character is merely to provide indemnity to the insured for damages and expenses which he may be required to pay as the result of his own acts. If he is required to pay damages, it is because he has been found to be negligent. It seems to me that such insurance must be regarded as a personal protec-
tion of the employee, taken out solely for his interest, and thus, that it cannot properly be charged against the Commonwealth. It differs only slightly from a policy of personal accident insurance which an employee might feel it desirable to carry because of the hazardous nature of his occupation. It may also be compared to a policy of fire insurance upon the home or property of an employee, which costs him more because of the fact that his duties require him to live in a neighborhood of extra hazard.

In any case where the duties of an employee subject him to a substantial risk of losses of the character covered by liability insurance, it is, of course, well within the power of your Commission to take that matter into consideration in determining the compensation of the employee. In my opinion, the matter under consideration should be dealt with in this manner, and not by the allowance of liability insurance premiums as an expense of your Department.

Public Service Commission — Jurisdiction over a Street Railway Company in the Hands of a Receiver Appointed by a Federal Court — Discontinuance of Service.

The receiver of a street railway company appointed by a Federal court has no greater rights with reference to the discontinuance of service upon the lines of such company than the company itself would have in operating its own property, and although he may discontinue service in certain cases, he can do so only subject to the investigation and control of the Public Service Commission.

In case of such investigation by the Public Service Commission, the court appointing the receiver would undoubtedly direct him to present his side of the case, and if not satisfied with the order of the Commission, to appeal to the Supreme Judicial Court, under St. 1913, c. 784, § 27.

You have asked my opinion with reference to certain questions of law relative to the powers and duties of your Commission, suggested by the petition of the receiver of the Bay State Street Railway Company, appointed by the United States District Court, asking that court for instructions as to a pro-
posal that he shall discontinue service upon certain lines of that company.

Your first question is as follows:—

In what respect, if any, does the right of a street railway company, organized and operated in this Commonwealth but in the hands of a receiver appointed by a Federal court, to discontinue service on all or a portion of its lines differ from the right of a similar company which is not in a receiver's hands?

In my opinion, a receiver of the property of such a street railway company, appointed by a Federal court, who is operating those properties by virtue of a decree of the court appointing him, has no greater rights with reference to the discontinuance of service upon the lines of such company than the company itself would have in operating its own property.

The Supreme Court of the United States has declared "that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the State in which it is situated." Erb v. Morasch, 177 U. S. 584, 585. "For in so far as he transports passengers and property he is a common carrier with rights and civil responsibilities as such." United States v. Nixon, 235 U. S. 231, 234.

As the last-cited case points out, he may be even subject to penal provisions of statutes directed against common carriers. When this liability, whether civil or criminal, is a statutory one, the question may arise whether the language of the statute is broad enough to impose its liability upon receivers. Wall v. Platt, 169 Mass. 398; United States v. Harris, 177 U. S. 305; United States v. Nixon, supra. But, as these decisions indicate, this is merely a question of statutory construction. If the statute indicates a clear intention to impose a liability upon a receiver of a railroad, he cannot escape its burden.

The right of street railways in this Commonwealth to discontinue the use of their tracks was fully considered and discussed by the Supreme Judicial Court in Selectmen of Ames-
bury v. Citizens Electric Street Railway Co., 199 Mass. 394. It was there held that, subject to the provisions of its charter or other specific statutes, a street railway might at any time voluntarily discontinue, in whole or in part, the use of its tracks. Reference was made to St. 1891, c. 216, now codified as St. 1906, c. 463, Pt. III, § 97, which is as follows:—

If, in the opinion of the board of railroad commissioners, additional accommodations for the travelling public are required upon any street railway, it may, after due notice to the company and a hearing, make an order requiring such additional accommodations as it determines are just, and may alter, renew or revoke the order. A street railway company which, for more than one week after receiving notice in writing of such order, neglects to comply therewith, shall forfeit to the use of the city or town for which such additional accommodations are ordered, or if they are ordered for more than one city or town, to the use equally of such cities or towns, one hundred dollars for each day thereafter during which such neglect continues.

The court declared:—

After the enactment of this statute and under the provisions of Pub. Sts. c. 112, §§ 14, 17, either the municipal officers or twenty or more legal voters of a city or town within which part of any street railway was located could, if the public accommodation so required, obtain an order from the Board that the railway company should furnish such additional accommodations as were needed upon its railway, including of course any part thereof of which the company had chosen to discontinue the operation; for we cannot doubt that, so long at least as the tracks remained in the street, they were still a part of the company's street railway. One effect accordingly of this statute was to make the company's discontinuance of the use of any portion of its tracks subject to the investigation and control of the Board of Railroad Commissioners in the manner provided for; but otherwise the power of the company remained unaffected.

As the statute quoted is directed against street railway companies only, and as the only provision for its enforcement is the imposition of a penalty upon a street railway company which neglects to comply with such an order, it may be argued with considerable force that this section is not to be construed as applicable to receivers of the property of street railway companies operating the same under decrees of court. If this
were the only provision of law applicable to the situation, I should hesitate to say that such a receiver could not discontinue the use of any tracks without interference from your Commission, provided no charter or other specific statutory provision stood in the way. But the language of the Public Service Commission act (St. 1913, c. 724) is much broader. Section 23 provides:

Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby.

In my opinion, this statute, being applicable to "any common carrier," must be construed as authorizing your Commission to make an order upon any subject-matter coming within its scope, directed to the receiver of the property of any street railway company who is operating the same within the Commonwealth as a common carrier. In my judgment, the discontinuance of service upon any existing line of tracks by any such common carrier, whether proposed or accomplished, is a subject placed within the jurisdiction of your Commission by this section.

It follows, in my opinion, that the receiver of the Bay State Street Railway Company has the right to discontinue service upon any lines of that company, provided he can do so without violating any specific charter or other statutory requirements or any previous orders of your Commission or its predecessors. He has taken the property subject to all existing obligations and duties imposed upon it by law, and he may operate it only subject thereto. However, if he does so discontinue service, he must do so subject to the investigation and control of your Commission, under the authority given it by the section last quoted. In this respect he is subject to
the same obligations and limitations as any street railway company operating its own property.

Your second question is as follows:—

If the discontinuance of service on all or a portion of its lines by a street railway company, organized and operated in this Commonwealth, but in the hands of a receiver appointed by a Federal court, is ordered or approved by said court, in what respect, if any, is the authority of this Commission over said service affected?

So far as this question relates to the authority of your Commission to enter orders requiring the receiver to re-establish, in whole or in part, upon existing lines or tracks service discontinued by him, it is fully considered by me in dealing with your first question. So far as this question relates to the manner in which any such order would be enforced by or in behalf of your Commission, it need not be fully considered until such question arises.

It is proper to suggest, however, that in case your Commission institutes proceedings to determine the reasonableness or propriety of any such discontinuance by the receiver, or the adequacy of the service resulting therefrom, it can hardly be doubted that the court by which he was appointed would direct him to present the matter fully before your Commission, and, if not satisfied by any order entered by you, to appeal to the Supreme Judicial Court for a revision thereof, under St. 1913, c. 784, § 27. Such a practice has been suggested by the United States Supreme Court to be an appropriate one in somewhat analogous cases. *In re Tyler*, 149 U. S. 164. By such a procedure all questions as to the operation and effect of the State statutes would be determined by our courts. If any Federal question or any question of general law arising in connection with the receivership proceedings then remained, it could be decided in the Federal courts in connection with the determination as to what order should be given to the receiver, if and after your order had been sustained by the Supreme Judicial Court. The Federal courts might possibly then be in a position where they must choose between direct-
ing the receiver to obey the order of your Commission or requiring him to cease operating the railway. At best, in such cases, the court appointing the receiver is acting only in the interest of the creditors of the corporation, and has no authority to direct or permit violations of State laws for their benefit.

Your third question, after stating the statutory provisions hereinbefore discussed, is as follows:—

In view of these provisions of the statutes, does this Commission have power to order a street railway company to restore service where it has been discontinued, and if so, what, in general, are the limitations upon this power? The commission has in mind questions such as these:—

(a) Is a street railway company justified in discontinuing service upon a portion of its railway because it yields little or no return on investment, although the patronage is sufficient to meet running expenses?

(b) Is a street railway company justified in discontinuing service during the winter months upon a portion of its railway because the patronage is not sufficient in such months to meet running expenses, although it is sufficient on the average throughout the year to meet such expenses?

(c) Is a street railway company justified in discontinuing service upon a portion of its railway because the patronage is not sufficient to meet running expenses, when such portion is located in a city where the lines of the company, taken as a whole, not only meet such expenses, but yield a return upon investment?

As I have already pointed out, your Commission has authority to order a street railway company to restore service where it has been discontinued, at least so far as the tracks still remain in the streets or upon the locations; but apart from the facts of particular cases, the limitations upon this power can be stated only in a most general way. I feel that it will prove much more satisfactory for me to leave the discussion of this matter until your Commission has before it questions relating to the restoration of service upon specific lines. I can then consider the questions which you raise in their relation to the facts of the individual cases.
Teachers’ Retirement Association — Teachers in Private Schools — Forty-sixth Amendment — State Aid.

Teachers in schools which are privately owned cannot be members of the Teachers’ Retirement Association since the adoption of the Forty-sixth Amendment to the Constitution, forbidding the expenditure of public money for aiding such schools, although such schools may be conducted under the order and superintendence of a school committee and are “public schools,” within the meaning of the Retirement Law (St. 1913, c. 832). Teachers in these schools previously enrolled as members of the Teachers’ Retirement Association are entitled only to the rights of withdrawing members of the association.

You have called my attention to the fact that there are within the Commonwealth a number of schools and academies which are privately owned but conducted under the order and superintendence of duly elected school committees. You point out that, in view of the Forty-sixth Amendment to the Massachusetts Constitution, which became effective Oct. 1, 1918, no expenditure of the public money can hereafter be made for the purpose of maintaining or aiding such schools, since they are undertakings which are not publicly owned. In view of these conditions, you ask me the following questions relative to the administration of the Teachers’ Retirement Act:

1. Should the teachers who have entered the service of these private schools since October 1 be members of the Retirement Association —
   (a) If they were formerly members of the Retirement Association, having formerly been employed in a public school?
   (b) If they are just commencing their service as teachers?

2. Should teachers who have been employed in these academies and who have been enrolled as members of the association be continued as members of the Retirement Association?

Assuming that these schools are conducted under the order and superintendence of the school committee of the particular town where they are located, they come within the definition of “public school” set forth in the Retirement Law (St. 1913, c. 832, § 1, par. 5). Prior to the adoption of said amendment to the Constitution, the public moneys could legally be expended in maintaining and aiding these schools, and thus teachers therein could be given the benefit of the Teachers’ Retirement Act. It seems plain, however, that making pro-
vision for the payment of a pension out of public funds upon the retirement from service of a teacher in one of these schools is a proposal for the expenditure of public money in aid of such a school, and is, therefore, forbidden by said amendment to the Constitution. Thus, to the extent that the Teachers' Retirement Act authorizes membership in the Teachers' Retirement Association for teachers in these schools, it is in violation of this amendment, and, since Oct. 1, 1918, to that extent void. Membership in the association must hereafter be limited to teachers in schools which are "publicly owned" as well as "under the exclusive control, order and superintendence of public officers" (Forty-sixth Amendment).

Thus, in answer to your first question, it must be said that no teacher who has entered the service of any of the schools to which you refer since Oct. 1, 1918, can be a member of the Teachers' Retirement Association. It is immaterial whether such teachers were previously members of the association or not. They are plainly excluded from future membership by the fact that they have entered the service of a school which is no longer a public school.

A similar answer must be made to your second question. Since Oct. 1, 1918, these schools have ceased to be schools in the aid of which the public moneys may be appropriated. By the adoption of the Forty-sixth Amendment any authority for the maintenance of these schools as public institutions was revoked, and thus they were required to be returned to private control. Accordingly, teachers employed therein ceased to be teachers in the public schools, and the public moneys cannot thereafter be used to provide pensions for them.

This result is not, in my judgment, affected by the exception in the amendment that "appropriations may be made ... to carry out legal obligations, if any, already entered into." The Commonwealth has entered into no legal obligation binding it to maintain these schools as public institutions, or restricting its right in any way to modify their character. It has not bound itself not to abolish the positions of these teachers as public employees. The establishment of a pension system can-
not limit the right of the Commonwealth thereafter to abandon or abolish any department or branch of the public service. This is all that has been done in the instance under consideration. Public schools maintained upon private property have been abolished as public institutions.

It follows, in my opinion, that teachers in these schools who have been enrolled as members of the Teachers' Retirement Association can no longer be continued in its membership. By continuing in the service of these schools after Oct. 1, 1918, they must be regarded as having withdrawn from service in the public schools and entered the service of a private institution. They are, of course, as withdrawing members of the association, entitled to all the rights granted upon such withdrawal by section 7 of the Teachers' Retirement Act.

Boards of Health—Disease Dangerous to Health—Notice.

Gen. St. 1918, c. 130, relieving cities and towns failing to give notice to the Commonwealth from the expense of caring for persons having a disease dangerous to health, who reside or have no settlement in such city or town, is not retroactive.

You request my opinion as to whether Gen. St. 1918, c. 130, which amends section 52 of chapter 75 of the Revised Laws, is retroactive.

Sections 52, 53 and 57 of chapter 75 of the Revised Laws read as follows:—

Section 52. If the board of health of a city or town has had notice of a case of smallpox, diphtheria, scarlet fever or of any other disease dangerous to the public health therein, it shall within twenty-four hour thereafter give notice thereof to the state board of health stating the name and the location of the patient so afflicted, and the secretary thereof shall forthwith transmit a copy of such notice to the state board of charity.

Section 53. If such board refuses or neglects to give such notice, the city or town shall forfeit its claim upon the Commonwealth for the payment of expenses as provided in section fifty-seven.

...
Section 57. Reasonable expenses incurred by the board of health in making the provision required by law for a person infected with the small-pox or other disease dangerous to the public health shall be paid by such person, his parents or master, if able; otherwise by the town in which he has a legal settlement. If he has no settlement, they shall be paid by the commonwealth and the bills therefor shall be approved by the state board of charity.

R. L., c. 75, § 52, has been amended by St. 1907, c. 480, § 1, and by Gen. St. 1916, c. 55, but these amendments do not affect the question in issue.

Gen. St. 1918, c. 130, amending said section 52, reads as follows:—

Section 1. The board of health of every city and town, or in towns not having such a board, the board of selectmen acting as a board of health, shall appoint some person, who may or may not be a member of the board, whose duty it shall be to give notice to the state department of health of diseases dangerous to the public health as provided by section fifty-two of chapter seventy-five of the Revised Laws, as amended by section one of chapter four hundred and eighty of the acts of nineteen hundred and seven and by chapter fifty-five of the General Acts of nineteen hundred and sixteen, and in case of the absence or disability of such appointee the board shall appoint another person to perform said duty during such absence or disability. Such appointments and the acceptance thereof by the persons so appointed shall be placed upon the records of the board. Any person who accepts such an appointment and who wilfully refuses or wilfully neglects or through gross negligence fails to make and send the notices required by said section fifty-two, as amended as aforesaid, in accordance with its terms, shall be punished by a fine of not exceeding fifty dollars.

Section 2. A claim of a city or town against the commonwealth for reasonable expenses incurred by the board of health of such city or town, or by the board of selectmen acting as such, in making the provision required by law for persons infected with a disease dangerous to the public health shall not be defeated by reason of the failure on the part of its board of health, or by the board of selectmen acting as such, to give notice of such disease to the state department of health in accordance with the provisions of said section fifty-two as amended as aforesaid, if such claim is otherwise a valid claim against the commonwealth.

The general rule is, that all statutes are prospective in their operation, unless an intention that they shall be retroactive
appears by necessary implication from their words, context or objects when considered in the light of the subject-matter, the pre-existing state of the law and the effect upon existing rights, remedies and obligations. All legislation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. Garfield v. Bemis, 2 Allen, 435; Bucher v. Fitchburg Railroad, 131 Mass. 156; Kelley v. Boston & Maine Railroad, 135 Mass. 448; Whitman v. Hapgood, 10 Mass. 437; King v. Tirrell, 2 Gray, 331; Gerry v. Stoneham, 1 Allen, 319; North Bridgewater Bank v. Copeland, 7 Allen, 139; Commonwealth v. Sudbury, 106 Mass. 268.

That certain statutes retrospective in their operation may be passed when of a remedial character and not affecting substantive rights regulating practice, procedure and evidence is not controverted, but the general rule that is applied to all statutes is that they are to have a prospective operation only unless it is otherwise distinctly expressed in them or clearly implied from the necessity of thus giving effect to their provisions.

The general rule that statutes are prospective only in their effect has been applied to statutes respecting suits on bonds for breach of liberty in prison yards, Call v. Hagger, 8 Mass. 423; evidence of an advancement, Whitman v. Hapgood, 10 Mass. 437; limitations of actions against executors and administrators, King v. Tirrell, 2 Gray, 331, Page v. Melvin, 10 Gray, 208; consummation of illegal railroad location, Commonwealth v. Old Colony & Fall River Railroad, 14 Gray, 93; extension of equity jurisdiction, Buck v. Dowley, 16 Gray, 555; remedies against estates of deceased persons, Garfield v. Bemis, 2 Allen, 445; recovery of illegal assessments, Gerry v. Stoneham, 1 Allen, 319; abolishing usury as a defence, North Bridgewater Bank v. Copeland, 7 Allen, 139, Whitten v. Hayden, 7 Allen, 407; complaints for support of bastard children, Wheelright v. Greer, 10 Allen, 389; validation as a corporation seal of a mere impression upon paper, Bates v. Boston & New York Central Railroad, 10 Allen, 256; sales of intoxicating liquor,

The statutes considered in all these foregoing cases have
been held to apply only to causes arising subsequent to their taking effect.


Until Gen. St. 1918, c. 130, went into effect the notice required by R. L. 75, § 52, was a condition precedent to the right of the city or town to maintain an action against the Commonwealth for the payment of expenses, as provided in section 57. There are several decisions of our Supreme Judicial Court on questions of law similar to the question at hand. In *Shallow v. City of Salem*, 136 Mass. 136, the plaintiff brought suit for personal injuries caused by a defect in a highway. The notice given by him under St. 1877, c. 234, was held by the court to be insufficient. St. 1882, c. 36, enacted subsequently to the plaintiff's injury and to the giving of the notice by him, provided that "no notice shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury: provided, that it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby."

The plaintiff contended that, inasmuch as there was no intention to mislead, and as the defendant was not actually misled by the insufficiency of the notice, St. 1882, c. 36, was to be construed as acting retrospectively, and thus as validating the notice. The court in its opinion went on to say:—

Even if it be remedial in its character, and intended to affect procedure only, full force is given to it when it is applied to cases in which the time for notice had not expired, and the notice had not been given, although the injury might have occurred before its passage. To treat it as applicable
to those cases where the time for notice had expired, and where no sufficient notice had been given, is to give it a retroactive character in no respect demanded by its language, ... The language of the St. of 1882 applies to notices given after the act shall take effect.

In *Dalton v. Salem*, 139 Mass. 91, which was a suit for personal injuries caused by a defect in a highway, the principle of law decided in *Shallow v. Salem* was followed. The court said: —

Under the statutes in force at the time the plaintiff received her injury, it was necessary for her, as a condition precedent to her right to maintain this action, to give to the defendant a notice in writing of the time, place, and cause of her injury. The St. of 1882, c. 36, does not apply to this case.

In *Pierce v. Cabot*, 159 Mass. 202, the action was a petition for enforcement of a mechanic's lien. The notice in this case, being a condition precedent, was a statement of account, filed in the registry of deeds, under the section of the Public Statutes. The statement was insufficient. The statement was filed in September, 1891. The petitioners claimed that the defect was cured by St. 1892, c. 191, which law went into effect on April 22, 1892. The court followed the decision of *Shallow v. Salem*, and held that the statute could not be held to be applicable to statements filed before it went into effect.

In *McNamara v. Boston & Maine Railroad*, 216 Mass. 506, the plaintiff brought an action to recover damages for injuries received by him upon a platform of a railroad station. No sufficient notice of the cause of the plaintiff's injuries was given to satisfy the requirements of St. 1908, c. 305, and the time for giving notice had expired before the enactment of St. 1912, c. 221. The court said: —

St. 1912, c. 221, having been enacted after the time expired for giving notice in this case, has no bearing. Statutes commonly are to be construed as prospective only in their operation.

Gen. St. 1918, c. 130, is not to be distinguished as to its effect upon pending or past matters from those under con-
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consideration in the numerous cases cited above. There is nothing to show that the Legislature intended that this statute should be taken out of the operation of the general rule. In my opinion, there was no intention, either express or implied, that this statute should be retroactive.


The Minimum Wage Commission has no power to qualify or to limit the application of any determination made by a wage board.

You have requested my opinion upon the following question:—

A wage board in a certain occupation, in its report, states that the sum required to supply the necessary cost of living and to maintain in health a female employee is not less than, say, $11, and, after showing that while the usual day's work is six hours it does vary from three hours in some establishments to eight or nine in others, it determines the minimum hourly wage suitable for the said employee of ordinary ability to be, say, 30 cents. This hourly rate in case of a six-hour day would not produce more than $11, but in case of an eight or nine hour day the weekly wages would exceed $11. If the Commission otherwise approves the determination of the wage board, can it issue a decree fixing an hourly rate, with a provision that "the total payment for a week's work need not exceed $11, with a pro rata deduction for time lost"?

Section 5 of the act establishing your Commission, and providing for the determination of the minimum wages for women and minors, provides, in part, that "each wage board . . . shall endeavor to determine the minimum wage, whether by time rate or piece rate. . . . When a majority of the members of a wage board shall agree upon minimum wage determinations, they shall report such determinations to the commission, together with the reasons therefor and the facts relating thereto."

Section 6 of the act provides, in part, that "upon receipt of a report from a wage board, the commission shall review the same, and may approve any or all of the determinations rec-
ommended, or may disapprove any or all of them, or may recommit the subject to the same or to a new wage board.

"I understand that the question has arisen as the result of a recommendation of the office and other building cleaners' wage board made to your Commission on July 18, 1918. The following determinations were reported by that wage board to you:

1. The minimum wage to be paid to any female employed as an office or other building cleaner shall be as follows:

(a) Between the hours of 7 P.M. and 8 A.M., 30 cents an hour.

(b) Between the hours of 8 A.M. and 7 P.M., 26 cents an hour.

I am of the opinion that the powers given you under section 6 of the statute referred to limit you to approving or disapproving all of the determinations of the wage board or to approving certain of the determinations and disapproving others which are separable from one another. You have no power, in my opinion, to qualify or limit the application of any determination made by the board. If the determination without such qualifications and limitations is unsatisfactory to your Commission, it is your duty to disapprove the same, or to recommit the subject to the said wage board or to a new wage board.

UNREGISTERED PHARMACIST — RIGHT TO DO BUSINESS.

An unregistered person lawfully actively engaged in the business of pharmacy as a copartner or stockholder prior to the passage of St. 1913, c. 720, may thereafter actively engage in the drug business if associated with a registered pharmacist.

You have made an inquiry relative to the right of an unregistered pharmacist who was a copartner or a stockholder in a drug business at the time of the passage of St. 1913, c. 720, actively to engage in the drug business, but in another partnership or corporation.

Section 1 of said chapter 720 provides:
No unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business shall hereafter be actively engaged in the drug business.

Section 2 provides an exception to the above, as follows: —

The provision of . . . section one of this act; that no unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business shall hereafter be actively engaged in the drug business, shall not apply to those engaged in said business at the time of the passage of this act.

It becomes important to determine what is meant by the words "shall not apply to those engaged in said business." Do they refer to the drug business generally, or to a particular business conducted by a particular partnership or corporation? Does this language exempt from the operation of the law all persons who at the date of passage were then unregistered stockholders or partners, or does it merely exempt such persons so long as they continue to be connected with a specific corporation or partnership? The language is not at all clear.

If a narrow interpretation is given to the exception, then a surviving unregistered partner cannot continue to engage in the drug business upon the death of one of his partners, notwithstanding the business is to be continued at the same place and by the remaining partners. St. 1913, c. 720, contains a penalty for its violation, and consequently is to be construed strictly in favor of the unregistered copartner or stockholder excepted from its provisions.

The provisions relating to an unregistered copartner first appeared in St. 1908, c. 525, § 2, where it was provided as follows: —

No unregistered co-partner shall hereafter be actively engaged in the business of pharmacy; but this provision shall not apply to those engaged in the business at the time of the enactment hereof.

In my judgment, the exception contained in this provision permitted a copartner then engaged in the business of pharmacy to continue in the business he was then in, or to engage thereafter as a copartner with others in the business of pharmacy.
By the passage of St. 1913, c. 720, the provision affecting an unregistered copartner was enlarged to include unregistered stockholders in a corporation doing a retail drug business. I do not think it is to be presumed that the statute of 1913 intended to do anything more than to include unregistered stockholders in the exception. Accordingly, it is my opinion that an unregistered person who was lawfully actively engaged in the business of pharmacy prior to May 28, 1913, as a partner with a registered pharmacist, or a stockholder who was lawfully actively engaged in the business of pharmacy, may actively engage in the drug business as an unregistered copartner or unregistered stockholder in a corporation engaged in a retail drug business.

School Permits — Minors — Domestic Service.

Under the provisions of R. L., c. 44, § 1, a girl between the ages of fourteen and sixteen must first receive a permit from the superintendent of schools in order legally to leave school and engage in domestic duties in her own home.

You have requested my opinion upon the following question:

Whether, under the provisions of R. L., c. 44, § 1, a girl between the ages of fourteen and sixteen must receive either a permit or a certificate from the superintendent of schools in order that she may legally leave school and engage in domestic duties in her own home.

R. L., c. 44, § 1, as amended by St. 1905, c. 320, St. 1906, c. 383, St. 1913, c. 779, § 1, and Gen. St. 1915, c. 81, § 1, so far as it affects your question, provides that "every child under sixteen years of age who has not received an employment certificate as provided in this act and is not engaged in some regular employment or business for at least six hours per day or has not the written permission of the superintendent of schools of the city or town in which he resides to engage in profitable employment at home, shall attend a public day
school in said city or town or some other day school approved by the school committee, during the entire time the public schools are in session." The section then provides that the above provisions are subject to exceptions as enumerated. In brief, the statute requires the attendance at school of every child under sixteen years of age unless the child falls within specific excepted classes.

A girl, under the facts stated in your question, does not come within any of the statutory exceptions, and, accordingly, I am of the opinion that it is necessary for her to obtain written permission of the superintendent of schools to leave school and engage in domestic duties in her own home. The giving of the written permission by the superintendent is the proper method in a case like this, as the giving of an employment certificate, in my opinion, covers cases where a child is permitted to work in a factory, workshop, manufacturing, mechanical or mercantile establishment. St. 1909, c. 514, § 17, provides that the "exercise of manual labor in a private house or private room by the family dwelling therein or by any of them or if a majority of the persons therein employed are members of such family, shall not of itself constitute such house or room a workshop."

CONSTITUTIONAL LAW — APPROPRIATION BY LEGISLATURE — PRIVATE INSTITUTIONS.

An appropriation by the Legislature in furtherance of a pre-existing agreement to provide moneys for a term of years to certain private institutions of learning is valid, under Article XLVI of the Amendments to the Constitution.

You request my opinion upon the following question of law:—

Are the items recommended for appropriation in favor of the Massachusetts Institute of Technology and the Worcester Polytechnic Institute, included in the Governor's Budget recommendations (House No. 185), Items Nos. 473 and 474, valid and legal under Article XLVI of the Amendments to the Constitution of the Commonwealth?
I assume these items are included in the budget to carry out the provisions of chapter 78 of the Resolves of the year 1911, and chapter 87 of the Resolves of the year 1912. The first is a resolve in favor of the Massachusetts Institute of Technology, and the second is in favor of the Worcester Polytechnic Institute. These resolves are similar in character.

The resolve in favor of the Massachusetts Institute of Technology provides for the payment annually, for the term of ten years beginning with the first day of January, 1912, of the sum of $100,000, to be expended under the direction of the corporation of said institute, for the general purposes of the institute; provided, however, that the last five annual payments are conditioned upon the presentation of satisfactory evidence to the Governor and Council that the institute has received by bequest or gift from other sources the sum of $1,000,000 in addition to all funds held by it on the day of the approval of the resolve.

The resolve in favor of the Worcester Polytechnic Institute provides for the annual payment to said institute, for the term of ten years beginning with the first day of September, 1912, of the sum of $50,000, to be expended under the direction of the corporation of said institute, for the general purposes of the institute; provided, however, that the last five payments are conditioned upon the presentation of satisfactory evidence to the Governor and Council that the institute has received by bequest or gift from other sources property amounting in value to $350,000 in addition to the property held by it on the day of the approval of the resolve.

The resolve in favor of the Massachusetts Institute of Technology further provides that, in consideration of the payments and during the continuance thereof, the institute shall maintain eighty free scholarships, to be granted by the Board of Education to residents or minor children of residents of Massachusetts; while the resolve in favor of the Worcester Polytechnic Institute provides that, in consideration of the payment to it and of the grant made by chapter 57 of the Resolves of the year 1869, the Worcester Polytechnic Institute
shall maintain forty free scholarships, to be awarded to pupils of the public schools of Massachusetts.

The Massachusetts Institute of Technology was chartered by the Legislature in 1861 for the purpose of instituting and maintaining a society of arts, a museum of arts and a school of industrial science, and aiding generally the advancement, development and practical application of science in connection with arts, agriculture, manufactures and commerce.

The Worcester Polytechnic Institute was chartered in 1865 under the name of the Worcester County Free Institute of Industrial Science, for the purpose of establishing and maintaining in the city of Worcester an institution to aid in the advancement, development and practical application of science in connection with arts, agriculture, manufactures, mercantile business and such other kindred branches of practical education as said corporation shall determine.

The appropriation of money for the advancement of the purposes for which these institutions were chartered is undoubtedly an appropriation of money for a public purpose, and thus there is no constitutional objection to the appropriation of money in aid of these institutions, apart from Article XVIII of the Amendments to the Constitution.

Article XVIII of the Amendments to the Constitution contains an exception from its prohibitions that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into. I assume that the legal obligations referred to in the exception are such obligations as would constitute a contract the impairment of which is prohibited by the Federal Constitution.

Your question therefore resolves itself to this: Has the Commonwealth, by chapter 78 of the Resolves of the year 1911 and chapter 87 of the Resolves of the year 1912, entered into contracts the impairment of which is prohibited by the terms of the Federal Constitution?

It was stated in the opinion in the case of Cary Library v.
Bliss, 151 Mass. 364, that it was settled by the case of Dartmouth College v. Woodward, 4 Wheat. 518, that the word "contract," as used in the Constitution of the United States, "is to be interpreted broadly and liberally, so as to include all obligations which should be enforced and held sacred growing out of agreements, express or implied, for which there is a valuable consideration."

I am of the opinion that the Legislature of the year 1911 intended by the passage of chapter 78 of the resolves of that year to hold out an inducement to the Massachusetts Institute of Technology to obtain, by solicitation or otherwise, $1,000,000 to enable it to better carry on the purposes for which the institute was created, and to induce members of the public to give to the institute $1,000,000; and the inducement was that in the event the institute obtained, by gift or otherwise, $1,000,000, on its part the Commonwealth would appropriate to the institute $1,000,000 in annual payments of $100,000 each. If the Legislature intended to hold out an inducement of this character, it seems to me that it intended the inducement to be one of substance; that is, one legally binding the Commonwealth on its part to carry out its assurance given to the institute, if the institute on its part accepted the proposition contained in the resolve, and carried out the conditions imposed in the resolve. Nor do I think the fact that the action of the General Court was by resolve rather than by an act is important. A long-established usage seems to justify resolves of this character, and I am of the opinion that they have in the present instance the same binding effect upon the Commonwealth as if the action of the General Court had been taken by acts. Furthermore, this method seems to be recognized by Article XI of Section I of Chapter II of Part the Second of the Constitution.

If, therefore, the Massachusetts Institute of Technology has produced satisfactory evidence that it has obtained $1,000,000 by bequest or gift from other sources, and has maintained the scholarships required, I am of the opinion that the institute has accepted the offer of the Commonwealth and has met its
obligations incurred by such acceptance; and thus chapter 78 of the Resolves of the year 1911 constitutes a contract binding upon the Commonwealth. What I have said in relation to the resolve in favor of the Massachusetts Institute of Technology applies to the resolve in favor of the Worcester Polytechnic Institute.

Accordingly, your question is to be answered in the affirmative.

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Street Railways — Cancellation of Rates — Redemption of Outstanding Tickets.

Unused reduced-rate tickets, after the schedule of rates under which they were issued has been canceled, are to be redeemed at the pro rata value of the unused portion.

You request my opinion as to the rights of persons who hold partially used reduced-rate tickets issued by street railways and steam railroads, concerning the use of such tickets after the schedule of rates under which they were issued has been canceled and new rates providing for a higher fare have become effective.

St. 1913, c. 784, § 20, requires every common carrier to file with your Board schedules of fares to be charged by it for service rendered or furnished within the Commonwealth. After such schedules have become effective every carrier is forbidden to charge any different rates from those stated in the schedules. This section authorizes a change to be made in any schedule of rates on file by a thirty days' notice to your Board by the carrier. By section 21 you are empowered to investigate the propriety of any such proposed changes, to suspend the taking effect of the same and to substitute new rates therefor if, in your judgment, the proposed rates are unreasonable. When, however, any change in a schedule of fares has become effective, either by the action of the carrier without interference by you or as a result of an order made by you after an investigation, it is plain that such new rates become the only rates which may legally be charged by the carrier.
It is forbidden by section 20 to charge fares upon any other basis.

Accordingly, in my opinion, when a schedule of rates providing for reduced-rate tickets to be sold in books or in lots of a specific number has been canceled in the manner provided in St. 1913, c. 784, and a new schedule substituted therefore, eliminating such tickets or increasing the amount to be charged for them, a carrier is not only not required thereafter to accept the old tickets, but is actually forbidden by law to do so. Assuming that these tickets constitute a contract between the person purchasing them and the company issuing them, they are contracts subject to cancellation by a change of rates made effective in accordance with the provisions of law. To hold otherwise would be in effect to discriminate in favor of persons who had been farsighted enough to buy up quantities of such tickets when there was a prospect of an increase in rates. Any such discrimination is directly forbidden by section 20.

I understand that the schedule under which the ticket was issued which gave rise to your inquiry provided that partially used tickets would be redeemed by the company at the difference between the cost of the complete ticket and the full cash fare for the rides represented by the used portions. In my judgment, this provision applies only to tickets presented for redemption by purchasers while the rate is in force. It does not apply to cases where the rate under which the ticket was issued has been canceled by act of the carrier or of your Board. In such cases, in my opinion, the carrier is required to redeem outstanding tickets at the pro rata value of the unused portion. I understand that the company involved in the case under consideration is entirely ready to redeem upon this basis.
CONSTITUTIONAL LAW — PAYMENTS BY COMMONWEALTH — PRIVATE INSTITUTIONS — "ANTI-AID" AMENDMENT.

The payment of moneys to the New England Asylum for the Blind, later changed to the Perkins Institution and Massachusetts School for the Blind, under the provisions of St. 1829, c. 113, and under subsequent legislation, does not constitute a contractual obligation on the part of the Commonwealth, and as the management of the institution is not under the exclusive control of the Commonwealth, further payments to it by the Commonwealth are prohibited under the provisions of the "anti-aid" amendment.

I acknowledge your letter in which you ask the following: —

Whether Article XLVI of the Amendments to the Constitution prohibits payments by the Commonwealth of an annual grant to the Perkins Institution and Massachusetts School for the Blind, in accordance with the provisions of Res. 1864, c. 56, as amended.

The first provision made by the Legislature calling for the payment of funds to the New England Asylum for the Blind appears in St. 1829, c. 113, which was the act of incorporation. By section 7 of said chapter it was provided that the State should pay to said corporation, for the maintenance and education of each blind person sent to the said asylum under the authority of the Legislature, the same compensation as by the by-laws of said corporation might be demanded and was actually received for the maintenance and education of such other blind persons as were at that time residing in said asylum.

By Res. 1830, c. 81, the Legislature allowed the unexpended balance of the appropriation for the deaf and dumb to be paid to the New England Asylum for the Blind for the current year, and from time to time thereafter upon the Governor's warrant, unless other disposition thereof was made by the General Court.

Res. 1833, c. 28, provided that $6,000 was to be paid annually to this institution during the pleasure of the Legislature.

Res. 1847, c. 49, allowed the payment of $9,000 at the pleasure of the Legislature, on condition that the asylum should receive forty State beneficiaries, if so many should be recommended. All previous grants were repealed.

By Res. 1855, c. 62, the annual appropriation was increased
from $9,000 to $12,000 a year, the same to continue at the
pleasure of the Legislature.

Res. 1861, c. 51, provided that an additional appropriation
of $3,000 be made on condition that the trustees admit all
such persons as the Governor might designate, and educate
them gratuitously. Res. 1862, c. 84, and Res. 1863, c. 65,
repeated the preceding grant.

By Res. 1864, c. 56, the Legislature provided that the
annual appropriation in favor of the Perkins Institution and
Massachusetts Asylum for the Blind should be increased from
$12,000 a year to $16,000 a year, commencing from the first
day of April, 1864, and continuing until otherwise ordered by
the Legislature.

Res. 1868, c. 12, provided that $9,000 should be allowed in ad-
dition to the regular appropriation of $16,000 to this institution.

By Res. 1869, c. 19, it appears that an appropriation of
$5,000 was made, the same to be paid annually in addition to
the sums authorized by Res. 1864, c. 56, and Res. 1868, c. 12,
making an annual appropriation that year and thereafter of
$30,000, subject to the conditions of Res. 1864, c. 56. This
was to supersede the appropriation of $16,000 made by St.
1869, c. 27. The last payment by the State of $30,000 to this
institution was made under the authority of Spec. St. 1918,
c. 110. After considering this and other legislation dealing
with the payment of State funds to this school, it appears that
all appropriations since 1869 have been made under the au-
thority provided by Res. 1869, c. 19.

On examining the legislation pertaining to this institution
it is apparent that at the present time there is no existing con-
tract between the Commonwealth of Massachusetts and the
Perkins Institution and Massachusetts School for the Blind
which calls for the payment of money annually to the school
in question. In my judgment, all past appropriations by the
Legislature must be considered as gratuities which have been
paid subject to the pleasure of the Legislature rather than as
the fulfilment of any contractual obligation on the part of the
Commonwealth.
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St. 1829, c. 113, § 4, provided that the New England Asylum for the Blind should be under the direction and management of twelve trustees, who were to be chosen annually and to remain in office until others were chosen and qualified in their stead. Four of the trustees were to be chosen by the board of visitors, and the remaining eight by the corporation itself.

By St. 1864, c. 96, the Governor was granted the power formerly vested in the board of visitors to appoint four trustees to hold office for one year, or until their successors were appointed. Such portion of St. 1829, c. 113, as authorized the appointment of trustees by a board of visitors was repealed.

Res. 1869, c. 71, provided that the sum of $80,000 should be appropriated for the purpose of erecting suitable buildings for the use of the Perkins Institution and Massachusetts Asylum for the Blind, provided that no portion of said sum should be paid until the said trustees conveyed to the Commonwealth by a good and sufficient deed, free from all incumbrances, the land on which the buildings to be erected should stand, and so much adjacent thereto as the Governor and Council should require. It appears that later the institution desired to dispose of the property which was conveyed to the Commonwealth in compliance with the provisions of Res. 1869, c. 71, and accordingly a resolve was passed which authorized and directed the Treasurer and Receiver-General of the Commonwealth to convey to the Perkins Institution and Massachusetts School for the Blind the land which was conveyed to the Commonwealth in compliance with the provisions of said chapter 71. See Res. 1909, c. 90.

It is to be noted that on Oct. 3, 1877, the name of the institution was changed to the Perkins Institution and Massachusetts School for the Blind.

Section 2 of Article XLVI of the Amendments to the Constitution provides, in part, as follows: —

... no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control
or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth.

The present governing board of the Perkins Institution and Massachusetts School for the Blind consists of twelve trustees, eight of whom are chosen by the corporation and four of whom are appointed by the Governor. It is obvious that since the majority of the trustees of this institution are chosen by the corporation, it cannot be said that the management of the school is under the exclusive control of public officers or agents authorized by the Commonwealth of Massachusetts. I am informed by the secretary of this institution that the legal title to all real estate owned by it at the present time is held in the name of the trustees, which precludes any contention that the institution is publicly owned.

Accordingly, I am of the opinion that as the school is constituted at the present time it is prohibited from receiving further payments by the Commonwealth of Massachusetts.

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Chain Drug Stores — Central Prescription Department.

A drug corporation operating a chain of stores may establish a central prescription department in one of them, provided each store is conducted in accordance with law.

I have your letter concerning the proposal of a certain drug corporation operating a number of stores in Boston to have a central prescription department at one of its present stores, to which prescriptions taken in at each of its other stores in Boston should be sent for compounding and returned by messenger for delivery at the stores where they were taken in. You ask: —

Would such method affect the permit already granted by the Board to each of these stores whereby each store carries on its own prescription
department in the usual way; also, under this arrangement would the Board be justified in refusing to issue a permit?

St. 1913, c. 705, as amended, provides in substance as follows:—

SECTION 1. The term "drug business" as used in this act shall mean the sale, or the keeping or exposing for sale of drugs, medicines, ... and the said term shall also mean the compounding and dispensing of physicians' prescriptions.

SECTION 2. No store shall be kept open for the transaction of the retail drug business unless it is registered with and a permit therefor has been issued by the board of registration in pharmacy as herein provided.

SECTION 3. The board of registration in pharmacy shall, upon application, issue a permit to keep open a store for the transaction of the retail drug business to such persons, firms and corporations as the board may deem qualified to conduct such a store.

SECTION 4. No such permit shall be issued for a corporation to keep open a store for the transaction of the retail drug business, unless it shall appear to the satisfaction of the said board that the management of the drug business in such store is in the hands of a registered pharmacist.

SECTION 5. The said board may suspend or revoke a permit issued hereunder for any violation of the law pertaining to the drug business; but before suspending or revoking any such permit the said board shall give a hearing to the person, firm or corporation holding the permit, after due notice to such person, firm or corporation of the charges against him or it and of the time and place of the hearing.

SECTION 7. Whoever violates any provision of this act shall be punished by a fine of not less than five nor more than one hundred dollars; or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

Upon examination of the above statute, as well as other acts pertaining to the drug business, I find nothing therein contained which prohibits the sending of prescriptions by one drug store to another which is operated by the same company, where both stores are being conducted in accordance with the requirements of the statute, and the management of each of said stores is in the hands of a registered pharmacist. The compounding of prescriptions is but one incident of the retail drug business. Each store, however, in view of the fact that
it is selling drugs and dispensing physicians' prescriptions, must strictly comply with the provisions of the aforesaid act and of all acts pertaining to the drug business. Such a method, in my opinion, will not affect a permit already granted by the Board; nor do I think the Board will be justified in refusing to issue permits to the several stores of said corporation solely because of this arrangement.

Constitutional Law — Public Operation of Street Railways.

A law providing for the public operation of a street railway, allowing compensation to its stockholders upon the acceptance by them of terms, is constitutional.

I beg to acknowledge the receipt from the Honorable Senate of the following order: —

Ordered, That the Senate request the opinion of the Attorney-General as to the constitutionality of chapter one hundred and fifty-nine of the Special Acts of the year nineteen hundred and eighteen, entitled "An Act to provide for the public operation of the Boston Elevated Railway Company."

Your question is not directed to any particular feature of said act. Obviously, it is impossible for me to foresee every question that might be raised or that the Honorable Senate may have in mind. I have confined my attention to those questions which I conceive might be raised, and which to me seem to merit consideration.

Said act provides for the appointment by the Governor, with the advice and consent of the Council, of public trustees to assume the control and operation of the Boston Elevated Railway for the period specified in the act. The Governor may remove said trustees, with the advice and consent of the Council. The act provides in section 2 that the trustees "shall take and have possession" of the Boston Elevated Railway Company and the property owned, leased or operated by it, "in behalf of the Commonwealth, during the period of public operation" provided for in the act.
In effect the act provides for the taking over by the Commonwealth of the possession and control of the Boston Elevated Railway system, with its leased lines, for a period of ten years, and for a longer period unless the Commonwealth elects to discontinue its operation of the road. This is done upon the assent of a majority of the stockholders of the Boston Elevated Railway Company and a majority of the stockholders of the West End Street Railway Company, and in consideration of the payment by the Commonwealth, during the period of public operation, of a fixed amount upon the capital stock of the Boston Elevated Railway Company out of the receipts of the road after the payment of interest charges and expenses of operation; and, in the event of the receipts being insufficient, then the Commonwealth is to pay out of its own treasury the amount necessary to meet any deficit, such deficit to be apportioned as provided by the act upon the communities specially benefited by the operation of the system. Thus in effect it is the same as if the Commonwealth had taken a direct lease of the system, agreeing to assume the interest charges and operating expenses and to pay the corporation a rental; the corporation, on the other hand, agreeing to issue from time to time notes or certificates of indebtedness to renew indebtedness already existing and properly chargeable to capital account.

The provision of section 2 of the act, that in the management and operation of the company and its properties the trustees and their agents and employees shall be deemed to be acting as the agents of the company, obviously was inserted in order that persons suffering damages by reason of the operation of the railway could continue to bring suits therefor as heretofore, thus obviating provisions which would otherwise have been necessary to enable them to bring their actions directly against the Commonwealth.

I do not think there can be any question at this day that a street railway is a public utility, and that the appropriation of public funds for its construction, maintenance and operation is for a public purpose. In the present state of
civilization and economic conditions the operation of means of transportation is of vital concern to all the people. Contemplation of the results of the discontinuance of the operation of the Boston Elevated Railway and its leased lines graphically answers any suggestion that the welfare of the general public is not involved in its continued operation. Furthermore, a long line of decisions of the Supreme Judicial Court of this State seems to recognize that the construction, maintenance and operation of means of transportation are public purposes.

Thus it was held, as far back as 1842, in the case of Worcester v. Western Railroad Corporation, 4 Met. 564, that properties devoted to railroad purposes were public works, and as such were exempt from taxation unless it was specifically provided in the terms of the act authorizing their construction and maintenance that they should be taxed. It was there said, by Chief Justice Shaw:

"It is true, that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public. The company have not the general power of disposal, incident to the absolute right of property; they are obliged to use it in a particular manner, and for the accomplishment of a well-defined public object; they are required to render frequent accounts of their management of this property to the agents of the public.

It is because railroads and railways are engaged in a public purpose which the public might otherwise undertake itself that the State may delegate to them its power of eminent domain. Furthermore, it is not novel for the Commonwealth to own a railroad. Thus, on Sept. 4, 1862, the Commonwealth took possession of the Troy & Greenfield Railroad, about the same time acquired title to the Southern Vermont Railroad by virtue of the provisions of St. 1862, c. 156, and completed the Hoosac Tunnel and the Troy & Greenfield Railroad at a total expense of about $17,000,000, and opened them for use about June 30, 1876.

In many instances the Legislature has granted aid to railroad corporations from its own treasury, Kingman, petitioner,
153 Mass. 566. It in many instances has authorized cities and towns to furnish aid to railroads by subscribing for stock in such railroads, and in other ways. *Prince v. Crocker*, 166 Mass. 347, 361.

I think it is equally plain that the Commonwealth can operate either a railroad or street railway. Granted that the State may construct and own a railroad or railway, it seems to follow, because of its character, that the State has the power to make it useful by providing for its operation. That the State can authorize a city to operate a street railway transportation system seems to have been assumed in *Brown v. Turner*, 176 Mass. 9, 14. See also the *Minnesota Rate Cases*, 230 U. S. 352, 416; *Attorney-General v. Boston*, 123 Mass. 460.

Convinced, as I am, that there is no constitutional objection to the Commonwealth acquiring and operating a railroad or street railway, it follows, in my judgment, that the Commonwealth may lease a railroad or street railway or take over the control of the same, with the consent of its owners, and pay compensation to the owners while it holds it by lease or the exercise of such control. The determination of the amount and terms of compensation to be paid and the details of the control and operation are matters for the Legislature alone to determine. The provision for the payment of dividends on the stock of the Boston Elevated Railway Company, in my judgment, is a provision for the payment of compensation in the nature of a rental. The stock is taken as a convenient measure of the rent. *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. Rep. 721, 763. This is the ordinary and usual method of measuring rentals where a transportation company is leased.

Therefore, in my opinion, the provisions of said act, so far as they relate to the taking of possession by the Commonwealth of the property of the Boston Elevated Railway Company and the control of the same, and the payment of compensation for such use and control, upon the acceptance of the terms thereof by the corporations involved, are constitutional.
This leaves but two other questions which, in my judgment, merit consideration: First, do the provisions of the act in any way impair the rights of any stockholders in either the Boston Elevated Railway Company or the West End Street Railway Company; and second, is the method adopted to meet any deficit occurring in the operation of the railway, and the assessment of such deficit upon the municipalities in which the Boston Elevated Railway system operates, constitutional?

As to the first remaining question I think that the act is free from objection. In my judgment, there is no question but that the Legislature can authorize a street railway company, upon the affirmative vote of a majority of its stockholders, to lease its property and authorize its operation by others. The charters of all corporations are subject to amendment, alteration or repeal by the General Court. It is true that this power is limited by the provisions of our own and the Federal Constitution, that no person shall be deprived of his property without due process of law. So long, however, as the amendment or alteration is not open to this objection, such amendment or alteration is within the power of the General Court to enact. The statute in question is not open to this objection, as it makes adequate provision to protect and safeguard the interests of non-assenting stockholders by providing for a fair return upon their capital invested and the return of the property of the corporation at the end of the period of control in good operating condition. I do not think it could be successfully contended that a regulation of rates and fares by the Commonwealth of the Boston Elevated Railway System, which allowed a return upon the capital invested of from 5 to 6 per cent per annum, after due allowance for operating expenses, taxes, rentals, interest on indebtedness and allowances for depreciation of property and for obsolescence and losses in respect to property, deprived the stockholders of property without due process of law. The act in question allows a return upon the capital invested of at least 5 to 6 per cent per annum. The non-assenting
stockholders are, therefore, under the operation of the act, in no worse situation than they would be under the general regulation of rates by the Public Service Commission, or a like body.

Furthermore, it is to be borne in mind that at the time of the acceptance of the act the Boston Elevated Railway Company was restricted by its charter from establishing and taking a toll of fare which should exceed 5 cents for a single continuous passage in the same general direction.

So far as the stockholders of the West End Street Railway Company are concerned, it is to be observed that the Commonwealth takes possession of the property of the West End Street Railway Company subject to the terms of its lease to the Boston Elevated Railway Company.

The extensions and additions that the trustees are authorized to make are such as the railway itself could undertake, if, indeed, such extensions and additions could not be required by the Legislature; and consequently a majority of its stockholders can authorize such extensions and additions by the public trustees.

As to the method adopted to meet any deficit occurring in the operation of the railway and the assessment of the same upon the municipalities in which the Boston Elevated Railway System operates, this is defined in sections 11 and 14 of the act. Section 11 provides for notice by the trustees to the Treasurer and Receiver-General of any deficit existing as of the last day of June or the last day of December in any year, and it is therein provided that the Commonwealth shall thereupon pay over to the company the amount of such deficit. It further provides that in order to meet any payment required of the Commonwealth the Treasurer and Receiver-General may borrow, in anticipation of assessments to be levied upon the cities and towns, such sums as may be necessary to make such payments. It is also provided that, in the event of a surplus in the reserve fund provided for in the act as of the last day of any June or December, the trustees shall apply the surplus, so far as
necessary, to reimburse the Commonwealth for any amounts which it may have paid to the company under the provisions of said section. The amount of reimbursement thereon is to be distributed among the cities and towns contributing payments to meet the deficit.

By section 14 it is provided that such deficit shall be assessed upon the cities and towns in which the company operates, by an addition to the State tax next thereafter assessed in the proportion therein set forth.

I do not think there can be any question as to the constitutionality of section 11, which simply provides means for the Commonwealth meeting an obligation which it has undertaken.

Any objection which may be raised in relation to section 14, in my judgment, is answered by the case of Kingman, petitioner, 153 Mass. 566. In that case it was said, in relation to the construction and support of a public utility, that —

The Legislature may properly determine that the whole or a part of the cost shall be borne by the Commonwealth, or it may impose it wholly upon counties, or wholly upon towns, or a part upon each. And in doing so it is not necessarily limited by county or town lines. . . . Absolute equality in the distribution of burdens of course is not to be hoped for. But with a view to the nearest approach to it that is possible, the Constitution wisely vests a large and general power in the Legislature. And if at any time it is found, either from a change of circumstances or otherwise, that the burden presses too hardly upon a particular town or county, the Legislature may change it. Nor does the fact that the money has been advanced in the first instance from the treasury of the Commonwealth prevent the Legislature from providing for a reimbursement from counties, cities, or towns.

It is to be observed that if there is any constitutional difficulty in the method adopted of apportioning the burden of the cost of the operation of the railway system, it undoubtedly is separable from the rest of the act.

A further suggestion may be made that, in view of the fact that the charter of the Boston Elevated Railway Company contained a condition that in the operation of its road it should not charge more than 5 cents for a single continuous passage in the same general direction, at least until the
year 1922, the effect of the legislation is to grant a gratuity to the stockholders. This, in my judgment, cannot successfully be contended, because, so far as I am aware, there is no way in which to compel a public service corporation to continue to operate its road when it is unable to pay its operating expenses. Confronted with such a situation, there is no doubt that the General Court may make a new arrangement with the corporation for the continued operation of its road. *Friend v. Gilbert*, 108 Mass. 408; *Abbott v. Doane*, 163 Mass. 433.

Accordingly, in my opinion, said chapter 159 of the Special Acts of the year 1918 is constitutional.

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**Constitutional Law — Bakers — Hours of Employment.**

A law regulating the hours of employment of bakery workers which has no reasonable relation to the public health, safety or morals is unconstitutional.

You request my opinion upon the constitutionality of House Bill No. 114, entitled "An Act to regulate the hours of employment of bakery workers."

The first two sections of the act are as follows: —

**Section 1.** Except in cases of emergency as hereinafter provided, it shall be unlawful to make or bake bread, rolls, buns, biscuits, cake, pastry and crackers and all other bakery goods in any bakeshop, bakery, hotel, restaurant or club, between the hours of eight o'clock in the evening and four o'clock in the morning.

**Section 2.** In cases of emergency where serious suffering, loss, damage, or public inconvenience are threatened, the police commissioner of the city of Boston, or any member of the police department thereof having the rank not lower than captain and designated by said commissioner, or the chief of police of any other city or of any town upon such terms and conditions as he shall impose may issue a permit allowing the work prohibited in the preceding section to be done in the prohibited hours, but such permit shall be valid only during the twelve hours after the time it is issued.

In the case of *Lochner v. New York*, 198 U. S. 45, it was held that a statute of New York limiting the hours of employ-
ment in bakeries to not more than ten hours a day was unconstitutional, as "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best or which they may agree upon with the other parties to such contracts." This decision was expressly recognized by our Supreme Judicial Court in the case of Commonwealth v. Boston & Maine R.R., 222 Mass. 206, as binding upon the Legislature and courts of this Commonwealth.

It seems clear from these decisions that House Bill No. 114 would be unconstitutional if enacted into law, unless the fact that the prohibition contained in this bill applies only to night work, and baking at night makes it distinguishable from these cases. If employment in the night time in a bakery, or baking at night, has any reasonable relation to the public health, safety or morals, acts of this character might be sustained as valid police regulations. The question of whether the prohibition contained in this bill is appropriate to safeguard the public health or the health of individuals who are following the trade of a baker is largely a question of fact, in the first instance at least, to be determined by the Legislature itself. No evidence, however, has come to my attention which tends to show that this bill can be distinguished from the acts found to be unconstitutional in the cases cited, and, accordingly, I am constrained to advise that, in my opinion, House Bill No. 114 would be unconstitutional if enacted into law.

Doctor — Use of Title — Degree.

The mere use of the prefix "Dr." or "Doctor" by a person not in possession of a degree from an institution having the power to grant degrees is not a violation of R. L., c. 208, § 75.

You request my opinion upon the following question: —

Can the use of the prefix "Dr." or "Doctor" by a person not in possession of a degree conferred by a legally chartered college or other educational institution having the power to grant degrees, be regarded as a violation of section 75 of chapter 208 of the Revised Laws?
The word "doctor" comes from the Latin word *doctor*, meaning teacher, and this was derived from the Latin verb *docere*, meaning to teach. Consequently, the earliest English use of this word was synonymous with teacher. It later became the subject of degrees conferred by universities and colleges on men of great learning, such as doctors of divinity.

Lexicographers define the word "doctor" to mean, in addition to physician, the following: —

(1) A teacher; instructor; one who gives instruction in some branch of knowledge or inculcates an opinion of principals. (2) One who by reason of his skill in any branch of knowledge is competent to teach it or whose attainments entitle him to express an authoritative opinion; an eminently learned man. (New English Dictionary.)

A teacher; an instructor; a learned man; one skilled in a learned profession. (Century Dictionary.)

A person of great learning and qualified to instruct; literally, a teacher. (Standard Dictionary.)

According to the Encyclopedia Britannica the word comes from the Latin for teacher, and "though the word is commonly used as synonymous with physician, it was not until the fourteenth century that the doctor's degree began to be conferred in medicine."

R. L., c. 208, § 75 (originally St. 1893, c. 355, § 1), is as follows: —

Whoever, in a book, pamphlet, circular, advertisement or advertising sign, or by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to have been an officer or teacher, or to be a graduate or to hold any degree of a college or other educational institution of this commonwealth or elsewhere, which is authorized to grant degrees, or of a public school of this commonwealth, and whoever, without the authority of a special act of the general court granting the power to give degrees, offers or grants degrees as a school, college, or as a private individual, alone or associated with others, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.

During the next year St. 1894, c. 458, providing for the registration of physicians and surgeons, was passed. Sections 10 and 11 of said chapter 458 were as follows: —
SECTION 10. Whoever not being registered as aforesaid shall advertise or hold himself out to the public as a physician or surgeon in this Commonwealth, by appending to his name the letters "M.D.," or using the title of doctor, meaning thereby a doctor of medicine, shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offence, or by imprisonment in jail for three months, or both.

SECTION 11. This act shall not apply to commissioned officers of the United States army, navy or marine hospital service, or to a physician or surgeon who is called from another state to treat a particular case, and who does not otherwise practice in this state, or to prohibit gratuitous services; nor to clairvoyants, or to persons practising hypnotism, magnetic healing, mind cure, massage methods, christian science, cosmopathic or any other method of healing: provided, such persons do not violate any of the provisions of section ten of this act.

Thus, apparently, it was contemplated that persons other than persons holding the degree of doctor granted by a college authorized to confer such degree might use the prefix "doctor," provided they did not represent themselves as doctors of medicine. Applicants for registration as physicians were not required to have a degree of doctor of medicine or its equivalent from a legally chartered medical school having power to confer degrees, until the passage of Gen. St. 1915, c. 293. If it is intended by R. L., c. 208, § 75, that only a person who has a doctor's degree from a college authorized to confer such degree can use the title "doctor," obviously all persons registered as physicians and surgeons prior to the passage of Gen. St. 1915, c. 293, who have not received a degree of doctor from a college authorized to grant such a degree are not entitled to use the title "doctor." Certainly such a construction is not to be placed upon R. L., c. 208, § 75.

Accordingly, I am of the opinion that merely the use of the prefix "Dr." or "Doctor" by a person not in possession of a degree from a college or other educational institution having the power to grant degrees is not a violation of R. L., c. 208, § 75.
Constitutional Law — Public Buildings — Mercantile Purposes.

A law providing for the erection of buildings by cities and towns to be used for both public and mercantile purposes is unconstitutional.

You have requested my opinion as to whether House Bill No. 30, if enacted, will be constitutional and valid. This bill provides:—

Section 1. Cities and towns may issue bonds, the proceeds of which shall be used to purchase land and build and erect thereon buildings to be used for public assemblage and for the use and occupation of men who were in the service of the country in the German war and the Spanish-American war, including the use for social, educational and recreation purposes.

Section 2. Such buildings shall be under the immediate control of trustees or directors, the appointment and number of which and the duties of the same to be prescribed by an ordinance or by-laws.

Section 3. The city or town availing itself of the provisions of this act may erect and maintain in said buildings stores on the ground floor and devote the basement of said building or a proportional part thereof to mercantile or business purposes, and the trustees or directors may charge a reasonable rent for the occupation of the same.

Section 4. All income derived in any manner from the use or occupation of said building shall be used for the purposes of maintaining said buildings, and in the maintenance account there shall be a reasonable amount set apart for up-keep and depreciation, and the balance, if any, shall be paid each year into the city treasury and be applied to the payment of maturing bonds. Any deficiency required in order to meet the maintenance and depreciation charges shall be borne by the city or town by annual appropriation.

Section 5. This act shall take effect upon its passage.

The principal question raised by your inquiry is whether or not the provision that a city or town "may erect and maintain in said buildings stores on the ground floor and devote the basement of said building or a proportional part thereof to mercantile or business purposes, and the trustees or directors may charge a reasonable rent for the occupation of the same" is constitutional.

Money raised by taxation can be expended only for public
purposes. The Legislature has no power to authorize the expenditure of money raised by bonds which ultimately must be paid, in part at least, through taxation, for other than public uses. In its last analysis any other principle is a taking of private property for a private use, which is contrary to the fundamental conceptions of our form of government.

It has been decided that once a municipality has erected buildings, built in good faith and used for municipal purposes, it has the right to allow such buildings, or parts thereof, to be used incidentally for other purposes, either gratuitously or for a compensation. French v. Quincy, 3 Allen, 9; Worden v. New Bedford, 131 Mass. 23.

It is equally well settled that a municipality cannot enter into private business by erecting and maintaining a public building for gain. Wheelock v. Lowell, 196 Mass. 220; Spaulding v. Lowell, 23 Pick. 71, 80; Opinion of the Justices, 182 Mass. 605.

The buildings contemplated under the proposed act are to be erected in part for mercantile purposes to aid in meeting the expense of the erection and maintenance of that part used for public purposes. This is not a case where a building is erected to be used in its entirety for public purposes and incidentally is to be let for private purposes when not required for the public purposes for which it is erected. In my opinion, the situation is the same as if on one lot two buildings were to be erected, one to be devoted to public purposes, the other to private purposes, the income derived from the one devoted to private purposes to be applied to meet in part the maintenance and cost of the building devoted to public purposes.

In effect the proposition is to devote public funds in mercantile pursuits to enable the community better to sustain its public burdens, which, in my judgment, cannot be done.

Accordingly, in my opinion, the bill in its present form would be unconstitutional if enacted.
A law providing that an alien who claimed exemption from military service during the World War shall never be eligible to hold public office is unconstitutional.

In reply to your inquiry as to whether the article of amendment contained in House Resolve No. 466 would be unconstitutional as conflicting with the provisions of the Federal Constitution, I submit the following.

The proposed article of amendment is as follows: —

No person who pleaded his alien status as an exemption from military service during the war against Germany shall ever be eligible to hold and enjoy any office of honor, trust or profit under the government of the commonwealth, or any county, city or town thereof.

There is no doubt that a State may prescribe qualifications for the holding of office under its government.

Mass. Const., c. I, § I, art. IV.


Section 10 of Article I of the Constitution of the United States provides, in part, as follows: —

No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. . . .

The question involved is whether the proposed amendment can be justified as establishing a qualification for office, or is in effect a punishment for an act already done.

It was said by Mr. Justice Field, in Cummings v. The State of Missouri, 4 Wall. 277, 321, that —

The theory upon which our political institutions rest is that all men have certain inalienable rights — that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.
A provision for a qualification must have some reasonable relation to that purpose. Under the form of creating a qualification a State cannot evade the inhibition contained in the Federal Constitution.

It seems to me obvious that the claiming of an exemption from military service by an alien has no such reasonable connection with his fitness for office, when he shall become a citizen, as to take such a provision out of the inhibition prescribed by the Federal Constitution.

I am of the opinion, in view of the decision in Cummings v. The State of Missouri, already referred to, and the cases of Ex parte Garland, 4 Wall. 333, and Pierce v. Carskaden, 16 Wall. 234, that such an amendment to the Constitution must be viewed as inflicting a punishment upon such aliens who may hereafter become citizens of the United States for an act already done which was lawful when done. In Cummings v. The State of Missouri it was pointed out that "under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights."

The principle decided in Cummings v. The State of Missouri and Ex parte Garland, supra, has been recognized by the Supreme Court of the United States as late as 1912. See Johannesen v. United States, 225 U. S. 227, at 242.

Accordingly, in my opinion the proposed article of amendment, if adopted, would be in violation of the Constitution of the United States.


Orders, regulations and requirements of the Commissioner of Animal Industry for permission to ship anti-hog cholera serum into this Commonwealth, in accordance with the provisions of R. L., c. 90, and St. 1912, c. 608, and amendments thereof, where Congress has prescribed and authorized rules and regulations in respect to interstate trade in such serums, cease to have any force and effect.

You have requested my opinion on the question of whether or not the orders and regulations relative to the distribution, sale and use of anti-hog cholera virus or serum and the regu-
lations for serum companies, promulgated by you in accordance
with the provisions of R. L., c. 90, and St. 1912, c. 608, and
acts in amendment thereof and addition thereto, are in conflict
with the acts of Congress or with the authority of Congress
to regulate interstate commerce.

Under the provisions of our statutes, you have the power to
make orders and regulations relative to the prevention, sup-
pression and extirpation of contagious diseases among domestic
animals, and those orders and regulations have to be approved
by the Governor and Council.

Under the provisions of the statutes cited, you made the
following order on Oct. 28, 1914: —

To all persons whom it may concern.

Whereas, the disease known as hog cholera, which is a contagious
disease and is so recognized under the laws of this Commonwealth, pre-
vails extensively among swine in this Commonwealth, and whereas it has
become necessary to adopt measures for the prevention of the spread of
said contagious disease;

Now, therefore, acting under and by virtue of the authority vested in
me by the provisions of chapter 90 of the Revised Laws, and chapter 608
of the Acts of 1912, and all acts and amendments thereof and in addition
thereto, and all other authority me hereto enabling, I do hereby make
the following order and regulation: —

No person, firm or corporation shall distribute, sell or use in the Com-
monwealth of Massachusetts virulent blood from hog-cholera-infected
hogs, or "virus," or anti-hog cholera serum, unless written permission
has been obtained from the Commissioner of Animal Industry for such
distribution, sale or use, which written permission will be granted per-
sons deemed proper by the Commissioner of Animal Industry.

This order shall take effect upon its approval.

This order shall be published by sending a copy to each inspector of
animals in the Commonwealth, and by distribution to known breeders of
swine, to commercial houses known to be dealing in the aforesaid com-
modity, and to veterinarians registered under the laws of the Common-
wealth.

On Sept. 15, 1915, you made the following order: —

To all persons whom it may concern.

Whereas, the Department of Animal Industry is now actively engaged
in the control and eradication of hog cholera, which is a contagious disease,
and is so recognized under the laws of this Commonwealth;
And whereas, successful control of this disease has been accomplished only in those States which have regulated and restricted the sale, distribution, possession and administration of various commercial products known as anti-hog cholera serum, and virulent blood or virus, which products, while designed to prevent or cure hog cholera, in the hands of untrained men tend to create and cause an epidemic of this disease;

Now, therefore, acting under and by virtue of the authority vested in me by the provisions of chapter 90 of the Revised Laws, and chapter 608 of the Acts of 1912, and all acts and amendments thereof and in addition thereto, and all other authority me hereto enabling, I do hereby make the following order and regulation:—

No person, firm or corporation shall, directly or indirectly, administer or procure, or cause to be administered, or have in possession with intent to have administered, directly or indirectly, within the Commonwealth of Massachusetts, anti-hog cholera serum, virulent blood or virus, or any other preparation of a similar composition under whatever name, and administered in a similar way for the prevention and cure of hog cholera, unless written permission has been obtained from the Commissioner of Animal Industry for such administration or possession.

This order shall take effect upon its approval.

This order shall be published by sending a copy to each inspector of animals in the Commonwealth, and by distribution to known breeders of swine, to commercial houses known to be dealing in the aforesaid products, and to veterinarians registered under the laws of the Commonwealth.

You have also made the following regulations for the issuing of a permit to ship anti-hog cholera serum or hog cholera virus to be used within the Commonwealth:—

SECTION 1. A permit shall be obtained from the Commissioner of Animal Industry for each individual shipment of either anti-hog cholera serum or hog cholera virus to be used within the State of Massachusetts, which permit shall be inoperative until the provisions mentioned in section 3 hereof have been complied with.

SECTION 2. All anti-hog cholera serum and hog cholera virus to be used in Massachusetts, permit for the shipment of which has been granted, shall be shipped in care of the Department of Animal Industry to such place as the Commissioner shall designate.

SECTION 3. Every person, firm or corporation which receives a permit to ship anti-hog cholera serum or hog cholera virus to be used in Massachusetts shall build, equip and maintain a building suitable for the purpose of testing these products, the plans and location for this building
to be approved by the Commissioner of Animal Industry before the build-
ing are constructed.

Section 4. The entire expense of testing anti-hog cholera serum and
hog cholera virus, and for storing the same before and after testing, shall
be borne by the company submitting the same for test.

Section 5. Every lot of anti-hog cholera serum shall be tested by a
veterinarian registered in Massachusetts who shall be approved by the
Commissioner of Animal Industry, and in a manner prescribed by said
Commissioner.

Section 6. If any anti-hog cholera serum fails to pass the prescribed
test, the entire lot within the State of Massachusetts bearing the same
serial number shall be sealed and returned to the company holding the
permit, or shipped to any other address outside of the State of Massachu-
setts furnished by said company; shipment in either case to be at the
expense of said company.

Section 7. Anti-hog cholera serum and hog cholera virus, after pass-
ing tests approved by the Commissioner of Animal Industry, shall be
held under conditions prescribed by him, and cannot leave the custody of
the Department except for immediate use by its authorized agents.

Section 8. If it becomes necessary, while virus is being tested, to use
the same in order to prevent it reaching the date of expiration, and it is
later found that this virus has not passed the required test, all such prod-
uct anywhere in the State which bears the same serial number shall be
condemned and destroyed. All animals upon which a portion of said
virus has been used shall receive whatever treatment the Commissioner
of Animal Industry deems necessary, the same to be done at the expense
of the company producing said virus.

Section 9. Copies of records of the physiological, bacteriological
and microscopical tests to which anti-hog cholera serum and hog cholera
virus have been subjected shall be furnished the Commissioner of Animal
Industry with each shipment of these products, or as often as in his opin-
ion may be necessary.

Section 10. Any person, firm or corporation applying for a permit
under above regulations must satisfy the Commissioner of Animal Indus-
try that their products shipped to Massachusetts are not produced in a
plant located within one-half mile of a public stockyard or within any
district under quarantine by order of the Bureau of Animal Industry of
the United States Department of Agriculture.

Section 11. Each company which applies for a permit to ship anti-
hog cholera serum or hog cholera virus to the Department of Animal
Industry agrees to observe all present and future orders which the Com-
missioner may consider to be necessary for the proper control of hog
cholera in Massachusetts.
The shipment of such serum from State to State is a branch of interstate commerce, and any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the shipment of such a serum from one State to another is taken under direct national supervision, and a system devised by which contaminated and dangerous serum may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Morgan v. Louisiana*, 118 U. S. 455, 464; *Hennington v. Georgia*, 163 U. S. 299, 317; *N. Y., N. H. & H. R.R. Co. v. New York*, 165 U. S. 628, 631; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 626; *Rasmussen v. Idaho*, 181 U. S. 198, 200.

The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject is thereby left under the police power of the States.

It has been held that where Congress has not by any statute covered the whole subject of transportation of certain articles, a wide field is left for the exercise by the States of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases. *Reid v. Colorado*, 187 U. S. 137; *Rasmussen v. Idaho*, *supra*; *Adams v. Lytle*, 154 Fed. 876; *Kansas City Ry. Co. v. State*, 90 Ark. 343. But the difficulty in this case, in my opinion, is that Congress has prescribed and authorized rules and regulations in respect to interstate trade in such serums which are paramount throughout the Union.

Chapter 145 of the act of Congress of March 4, 1913, provides, in part:—

That from and after July first, nineteen hundred and thirteen, it shall be unlawful for any person, firm, or corporation to prepare, sell, barter, or exchange . . . , or to ship or deliver for shipment from one State . . . to any
other State ... any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in the treatment of domestic animals, and no person, firm, or corporation shall prepare, sell, barter, exchange, or ship as aforesaid any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals, unless and until the said virus, serum, toxin, or analogous product shall have been prepared, under and in compliance with regulations prescribed by the Secretary of Agriculture, at an establishment holding an unsuspended and unrevoked license issued by the Secretary of Agriculture as hereinafter authorized. ... That the Secretary of Agriculture be, and hereby is, authorized to make and promulgate from time to time such rules and regulations as may be necessary to prevent the preparation, sale, barter, exchange, or shipment as aforesaid of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals, and to issue, suspend, and revoke licenses for the maintenance of establishments for the preparation of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, intended for sale, barter, exchange or shipment as aforesaid. ... All licenses issued under authority of this Act to establishments where such viruses, serums, toxins, or analogous products are prepared for sale, barter, exchange, or shipment as aforesaid, shall be issued on condition that the licensee shall permit the inspection of such establishments and of such products and their preparation; and the Secretary of Agriculture may suspend or revoke any permit or license issued under authority of this Act, after opportunity for hearing has been granted the licensee or importer, when the Secretary of Agriculture is satisfied that such license or permit is being used to facilitate or effect the preparation, sale, barter, exchange or shipment as aforesaid, ... of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals.

The act then goes on to provide that any officer of the Department of Agriculture may inspect any establishment licensed under this act at any hour during the daytime or night time, and that any person, firm or corporation violating any of the provisions of the act shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment.

In my judgment, the provisions of this act of Congress and the regulations of the Department of Agriculture made thereunder cover the whole subject of the preparation, sale and
shipment of the hog cholera serum in question. The entire subject has been taken under direct national supervision, and under the act and regulations worthless, contaminating, dangerous or harmful serums may be excluded from interstate commerce. This being the case, local and State regulations in respect of the matter cease to have any force, and the rules and regulations made in accordance with the act of Congress alone control.

Accordingly, I am of the opinion that the orders and regulations and the requirements for permission to ship hog cholera serum into this Commonwealth made by you are in conflict with the act of Congress of March 4, 1913, and with the authority of Congress to regulate interstate commerce.

Co-operative Banks — Matured Shares — Dues Capital.

Matured shares of a co-operative bank held by it under the provisions of St. 1914, c. 646, § 6, are to be treated as "dues capital."

You have requested my opinion as to whether any portion of matured shares continued in a co-operative bank, under the provisions of St. 1914, c. 643, § 6, is to be treated as "dues capital." "Dues capital" is referred to in St. 1912, c. 623, §§ 35 and 36, having to do with the guaranty fund and the surplus account.

By St. 1913, c. 264, a co-operative bank may "invest a sum not exceeding its surplus account in the purchase of a suitable site and the erection or preparation of a suitable building for the convenient transaction of its business, but in no case exceeding two per cent of its dues capital."

A co-operative bank holding a number of matured shares desires to purchase a bank building, and the question arises as to whether any part of the matured shares is to be considered as "dues capital."

Under the provisions of law relating to co-operative banks, capital has always been considered as consisting of (1) dues
capital, — that part of the funds of the bank that has been paid in by members thereof as dues; and (2) profits capital, — that part consisting of interest which the bank has received from loans made by it from the savings of its members and from other minor sources of income.

I see no reason why matured shares, which, by the provisions of St. 1914, c. 643, § 6, may be continued under certain conditions, should be considered as a new form of capital. I assume it is possible at any time to ascertain that portion of the matured shares which is made up of dues capital and that portion which is made up of profits capital.

Obviously, the capital applicable to the matured share is the same the moment after the share matures as the moment before, and thus it continues to be made up of part dues capital and part profits capital, and I think must continue to be treated as such unless the Legislature has expressed an intention that it should be treated otherwise.

It has been suggested that if any portion of the capital applicable to matured shares can be treated as dues capital the nature of co-operative banks is seriously changed, because of the provisions of law providing for the reservation of an amount of the profits as a guaranty fund until it amounts to 5 per cent of the dues and profits capital. There is much force in this suggestion. However, I am of the opinion that it cannot be assumed that the Legislature, in passing the provision authorizing continued matured shares, did not give this subject consideration. I find nothing in the act which indicates an intention upon the part of the Legislature that the capital applicable to matured shares should be treated otherwise than the other capital of the bank.

Accordingly, I am of the opinion that your inquiry is to be answered in the affirmative.
Property of the Commonwealth — Sidewalk Assessment.

The Commonwealth is not liable for a sidewalk assessment levied by a town for a sidewalk constructed in front of an armory owned by the Commonwealth in that town.

You ask my opinion on the following question: —

I have a bill from the town of Stoneham, dated Dec. 28, 1914, for a sidewalk assessment, State armory, Main Street, $160.79. Will you kindly advise me if the Commonwealth is liable for such an assessment.

St. 1909, c. 490, Pt. 1, § 5, cl. 2, expressly provides that "the property of the commonwealth, except real estate of which the commonwealth is in possession under a mortgage for condition broken," shall be exempt from taxation. The words "the property of the commonwealth" mean the same as "all the property of the commonwealth," as decided in the case of Corcoran v. Boston, 185 Mass. 325.

The property of the Commonwealth is exempt from taxation because, as the sovereign power, it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished, discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions. As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication.


Accordingly, I am of the opinion that the Commonwealth is not liable for this assessment.
Commonwealth — Cities and Towns — Troy Weight.

Under the provisions of R. L., c. 62, §§ 11 and 12, as amended, the Commonwealth is not obliged to furnish standard troy weights and measures to cities and towns.

You have requested my opinion as to whether or not it is incumbent upon this State to furnish cities and towns with standard troy weights, or shall the town or city, upon designation by this office, furnish these weights at their own expense?

The original act in this connection was St. 1890, c. 426, which is as follows: —

Section 1. The standard weights, measures and balances which shall be kept by the counties, cities and towns of the Commonwealth, except as hereinafter provided, shall be the following: . . .

Section 2. In addition to the standards mentioned above, each shire town, and each city not a shire town, shall keep the metre and kilogram, and also such standard troy-weights as the treasurer and receiver-general may designate. . . .

Section 3. Any county, city or town which has not received from the Commonwealth a complete set of the standard weights, measures and balances, as provided in section one, shall at once make application to the treasurer and receiver-general for the weights, measures and balances which such county, city or town has not received, and the same shall be furnished to such county, city or town at the expense of the Commonwealth.

. . . . . . . . . . . . . . . . . .

It will be noted that by section 3, above quoted, it was the intent of the statute that the Commonwealth should furnish to each county, city or town a set of the standard weights, measures and balances as provided in section 1, and that no provision is made for the furnishing by the Commonwealth of standard troy weights, mentioned in section 2.

R. L., c. 62, § 11 (since amended by St. 1907, c. 534, § 3, and by St. 1909, c. 310), provided as follows: —

The treasurer shall provide each county, city or town with a complete set of the standard weights, measures and balances named in the following section.

R. L., c. 62, § 12 (since amended by St. 1909, c. 310), provided: —
Counties, cities and towns shall keep the following standard weights, measures and balances: ... and each city and each shire town shall keep the meter and kilogram and such standard troy weights as the treasurer and receiver general may designate. ... 

The commissioners, when revising the laws and statutes for the purpose of incorporating them in the Revised Laws, were given authority to omit enactments which were redundant. By virtue of this authority St. 1890, c. 426, § 2, was omitted as redundant, and the following was added to section 12 in place thereof: — 

Each city and each shire town shall keep the meter and kilogram and such standard troy weights as the treasurer and receiver general may designate.

It is apparent, therefore, that it was not intended that the meaning and purposes of St. 1890, c. 426, should be changed. It being clear that under sections 1, 2 and 3 of said chapter 426 it was not incumbent upon the Commonwealth to furnish each city and town standard troy weights, it is my opinion that R. L., c. 62, §§ 11 and 12, as amended, do not make it incumbent upon the Commonwealth to furnish each city and town standard troy weights and measures.

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**Insurance — Inducement not specified in Policy — Loans and Insurance.**

A provision by an insurance company that the issuance of a policy should be dependent upon the policyholder making a loan, or the making of a loan dependent upon the borrower taking out a policy, is a violation of the provisions of St. 1907, c. 576, § 69.

I have considered your inquiry as to whether the method of the conduct of business by the Morris Plan Insurance Society, if conducted in this Commonwealth as set forth in a brief submitted by its counsel, would constitute a violation of that part of section 69 of chapter 576 of the Acts of 1907 which reads as follows: —

... or give, sell or purchase or offer to give, sell or purchase as inducement to insurance or in connection therewith, any stocks, bonds or other...
The words "or in connection therewith" are, I think, to be construed as meaning something in addition to inducement. It is not to be assumed that the Legislature makes use of idle words. It is my view that the words mean that as a part of the transaction of insuring there shall be no sale, gift or purchase of anything other than that set forth in the policy. I do not think that the section prohibits an insurance agent selling stocks, bonds or securities or other like things at the same time he writes insurance, but the sale must not be connected in any way with the insurance; that is, they must be independent transactions.

It is claimed by the Morris Plan Insurance Society that the provisions of the statute are not violated by requiring one who desires a loan to take out an insurance policy, nor by agreement made by a borrower to give his insurance exclusively to the lender, and that it has been so held in other jurisdictions. I do not concur in this view, and I am of the opinion that such transactions would be held in this Commonwealth to be in violation of said section.

Your question therefore resolves itself to this: Does the lending of money and the taking of a note therefor, with indorsers, co-makers or sureties, involve a gift, sale or purchase of anything of value, within the terms of the statute; and if so, is the gift, sale or purchase in connection with insurance?

The notes taken by the Morris Plan Insurance Society at the time the loans are made are more than mere evidences of the debt created by the loan, and I think the transactions constitute purchases of the notes. This being so, if the loans are made in connection with insurance there is a violation of the provisions of the statute. Furthermore, it may well be contended that the society gives a privilege of securing a loan. Whether there is a violation of the statute is largely a question of fact. If the insurance is in any way made dependent upon the policyholder making a loan, or if the loan is made de-
dependent upon the borrower taking out a policy of insurance, then, in my opinion, the transaction is in violation of the statute; otherwise, not.

As to the suggestion made by the company that the terms of the statute will be complied with if the company indorses on each policy where a loan is made that such loan has been made, I do not concur in the suggestion. The statute provides that that which is given, sold or purchased of value shall be specified in the policy. It seems to me it contemplates that it shall be incorporated as one of the provisions of the policy, and applicable to each holder thereof in the class.

Furthermore, I am of the opinion that there is a limit upon that which may be offered, sold or purchased in connection with the insurance transaction. I do not feel that our laws contemplate that in connection with the insurance business companies can carry on businesses foreign to insurance. St. 1907, c. 576, § 26, specifically provides that domestic companies shall not engage in any other business than the business for which the insurance company is incorporated.

Moreover, grave practical difficulties will arise if the provisions of the section are held to authorize insurance companies to specify and undertake obligations which are foreign to insurance. The Commissioner passes upon the premiums, and it is difficult to see how he can pass intelligently upon the premium required if insurance companies are authorized to undertake any and all kinds of obligations, the cost of which it is impracticable to determine.

Accordingly, I am of the opinion that the provisions of the statute will not be satisfied by such an indorsement.

The form of policy submitted to me seems to indicate that the manner in which the business is being transacted in other States by the Morris Plan Insurance Society is done in connection with the lending of money. The last condition on the second page of the policy is as follows:

Payment of Premiums. — If the insured be indebted to the first beneficiary named in said schedule the insured agrees not to allow this policy to lapse for the non-payment of premiums.
Obviously, this is a condition required by the insurance company, not for its own benefit but for the benefit of the loan company, which under the arrangement is named as the first beneficiary. If you should determine as a matter of fact that the lending of the money by the Morris Plan Insurance Society and the doing of the insurance business by the Morris Plan Insurance Society are to be conducted as separate and distinct businesses, although undertaken, for the most part, by an agent representing both, it is obvious that the last condition named on the second page should be eliminated from the policy.

Supervisor of Plans — Regulations — Fireproof Construction.

Under St. 1913, c. 655, § 15, the supervisor of plans may require fireproof construction in the lower portions of apartment buildings of extreme height, so long as the requirement is made in good faith, is not discriminatory, and applies to all buildings of the same class thereafter to be constructed.

You request my opinion as to whether the provision in St. 1913, c. 655, § 15, that the supervisor of plans may require "that proper fire stops shall be provided in the floors, walls, partitions and stairways of such building," is sufficiently elastic to be so construed that the supervisor of plans may require fireproof construction in the lower portions of certain apartment buildings of extreme height, where he feels that extra precaution should be taken for the safety of the occupants thereof.

It may be that this provision, standing alone, would not justify requiring fireproof construction in the lower portion of an apartment building of extreme height, but I think that, taken in connection with the sentence following, the supervisor of plans would be justified in making such a requirement. The sentence above referred to is as follows: —

He may make such further requirements as may be necessary to prevent the spread of fire, or its communication from any steam boiler or heating apparatus therein.
Said section 15 was originally enacted in 1888 as section 1 of chapter 316 of the Acts of 1888, and as first enacted read, in part, as follows: —

Such inspector may require that proper fire stops shall be provided in the floors, walls and partitions of such buildings and may make such further requirements as may be necessary or proper to prevent the spread of fire therein or its communication from any steam boiler or heating apparatus.

The only changes made since that time in this provision are the elimination of the words “or proper,” the elimination of the word “therein” after the word “fire” and the substitution of a comma therefor, and the addition of the word “therein” after the word “apparatus.” The meaning of the provision has not been changed.

It is to be borne in mind that section 15 is a provision to require buildings to be so constructed as to insure the safety of the occupants thereof in the event of fire, and the provision in the section that the inspector may make such further requirements as may be necessary to prevent the spread of fire therein, in my opinion, gives to the inspector authority to require such provisions as he may deem reasonably necessary to prevent the spread of fire in the building. This necessarily involves the power to require walls, floors and partitions to be of such construction and such material as the inspector may deem necessary to prevent the spread of fire in the building.

Accordingly, I am of the opinion that the inspector has the power to require such fireproof construction in the lower portions of apartment buildings of extreme height as may be necessary, in his judgment, to prevent the spread of fire in the buildings, so long as the requirements are made in good faith and are not discriminatory, and apply to all buildings of the same class and character thereafter to be constructed. The inspector’s judgment in the first instance as to what is necessary is controlling, and I doubt if the requirements can be considered unreasonable so long as they require no more than have been established by the Legislature as reasonable provisions in relation to buildings in the city of Boston of a like character to those enumerated in section 15.
GovernoR — Return of Bill to Legislature — Resubmission.

Under the provisions of Article LVI of the Amendments to the Constitution a bill returned to the General Court by the Governor with recommendations of amendment cannot be resubmitted to him without re-enactment by both branches of the General Court.

You request my opinion upon the following questions: —

When, in accordance with the provisions of Article LVI of the Amendments to the Constitution, a bill is returned by the Governor with a recommendation that amendments specified by him be made therein, and the branch to which the bill has been returned fails to amend it, what procedure must follow in that branch, or in both branches, in order that the said bill may again be laid before the Governor for his approbation?

If the branch to which the bill is so returned fails to amend it, can that branch thereupon proceed to re-enact the bill, and return it to the Governor, without first giving the co-ordinate branch opportunity to consider the bill with reference to any amendment to which it may be subject, under the provisions of said Article LVI?

Article LVI of the Amendments to the Constitution reads as follows: —

The governor, within five days after any bill or resolve shall have been laid before him, shall have the right to return it to the branch of the general court in which it originated with a recommendation that any amendment or amendments specified by him be made therein. Such bill or resolve shall thereupon be before the general court and subject to amendment and re-enactment. If such bill or resolve is re-enacted in any form it shall again be laid before the governor for his action, but he shall have no right to return the same a second time with a recommendation to amend.

When a bill or resolve is returned under the provisions of this article to the branch of the General Court in which it originated, it is before the General Court and subject to amendment and re-enactment. If it is re-enacted in any form it shall again be laid before the Governor for his action.

I am of the opinion that the General Court is not restricted to the amendments proposed by the Governor in amending a bill returned. The suggestions of the Governor may entail further amendments, or other amendments may better secure
the purposes his suggested amendments are designed to accomplish. That this was contemplated by the framers of the amendment seems plain from the third sentence of the amendment, which provides that if the "bill or resolve is re-enacted in any form it shall again be laid before the governor for his action." Furthermore, this provision of the article, in my judgment, requires re-enactment by both branches of the General Court of a bill returned. It is to be observed that there is no provision for again laying the bill before the Governor without re-enactment. It may be that one branch may be of the view that a bill as to which the Governor suggests an amendment should not be re-enacted without amendment. Mass. Const., Pt. II, c. I, § 1, art. I, provides that each branch shall have a negative on the other. Thus, it would seem to follow that a bill returned may be amended in such manner as the General Court may determine, or may be rejected; but before it can again be laid before the Governor for his action it must be re-enacted by the General Court, that is, by both branches thereof.

Accordingly, I am of the opinion that the answer to your first question is that the bill must be re-enacted by both branches of the General Court in order that it may again be laid before the Governor. The order in which it may be re-enacted by the Senate and House is a matter to be determined by the General Court.

Your second question is to be answered in the negative.

STATE BOARD OF LABOR AND INDUSTRIES — EMPLOYMENT OF NURSES — FACTORIES AND SHOPS.

Under Gen. St. 1918, c. 110, the State Board of Labor and Industries has no authority to require persons, firms and corporations operating a factory or shop, in which machinery is used, to furnish a nurse or other person in attendance on its employees.

You request my opinion as to whether the provisions of Gen. St. 1918, c. 110, authorize your Board to make the following requirement contained in Bulletin No. 14 issued by your Board, viz: —
Such room shall be placed under the charge of a qualified nurse or other person trained in and competent to administer first aid, who shall be employed on the premises and on call when necessary to administer first aid only, unless further advised by a physician, and who shall keep a record of all cases of accident and sickness treated at the first-aid room, such records to be open to the inspection of the state board of labor and industries or its representatives.

Said chapter 110 is an amendment of St. 1909, c. 514, § 104, as amended by St. 1914, c. 557, and by Gen. St. 1915, c. 216. The section as originally enacted is contained in St. 1907, c. 164, entitled "An Act to provide for the keeping of medical and surgical appliances in factories." As originally enacted it required every person, firm or corporation operating a factory or shop in which machinery was used for manufacturing purposes, and certain other purposes, at all times to keep and maintain, free of expense to the employees, such a medical and surgical chest as should be required by the local board of health of any city or town where such machinery was used. By St. 1914, c. 557, certain changes in the statute were made, one of which was the requiring of a medical or surgical chest, or both, as might be required by the State Board of Labor and Industries. This act was entitled "An Act relative to the providing of medical and surgical chests in factories and machine shops." By Gen. St. 1915, c. 216, the act was further amended by providing as follows: —

Every such person, firm or corporation, employing one hundred or more persons, shall, if so required by the state board of labor and industries, provide accommodations, satisfactory to said board, for the treatment of persons injured or taken ill upon the premises.

The title of the act was as follows: "An Act to require manufacturing establishments to provide rooms and equipment for the treatment of injured or sick employees."

By Gen. St. 1918, c. 110, the act was further amended by providing that the persons, firms and corporations governed by the act should also provide "suitable and sanitary facilities for heating or warming food to be consumed by those employees of the factory or shop who so desire," the act being entitled
"An Act to require certain manufacturing and mechanical establishments to provide for their employees facilities for heating or warming food."

The specific question raised by your inquiry is this: Can the persons, firms and corporations coming within the provisions of the act be compelled, if required by the State Board of Labor and Industries, to provide a qualified nurse or other person trained in and competent to administer first aid in charge of the so-called first-aid room, who shall be employed on the premises and on call when necessary to administer first aid, and who shall keep a record of all cases of accident and sickness treated at the first-aid room?

This depends upon the interpretation to be given the words "accommodations for the treatment of persons," as used in the act.

It is to be borne in mind that the statute is a penal statute, and therefore is to be construed strictly against the Commonwealth, and unless it is reasonably clear that the term "accommodations" includes a nurse or other person who performs the duties of a nurse, such a requirement cannot be made by your Board.

It is to be noted that the accommodations which your Board may require are accommodations for the treatment of persons injured or taken ill upon the premises. You are not specifically authorized to require the treatment of persons injured or taken ill on the premises, or the furnishing of such treatment. Requirements by implication are not favored in criminal law.

Such light as can be obtained from the title of Gen. St. 1915, c. 216, seems to negative the idea that your Board can require anything other than physical accommodations. That chapter is entitled "An Act to require manufacturing establishments to provide rooms and equipment for the treatment of injured or sick employees." While the word "equipment" may at times be used to include human beings, ordinarily it is used to signify supplies and apparatus for a special service.

Accordingly, it is my opinion that persons, firms and cor-
porations cannot be required, under the provisions of Gen. St. 1918, c. 110, to furnish a nurse or other person in attendance as required by said bulletin.

GAS COMPANIES — NET MAXIMUM RATES — GROSS RATES.

A gas company may, after the lawful establishment of a net maximum rate, establish a reasonable gross rate, in excess of such net rate, to be paid by all customers who do not, prior to a specified date, pay the net rate.

I have the honor to acknowledge the receipt of a copy of the following order passed by the Honorable Senate: —

Ordered, That the Senate request the opinion of the Attorney-General as to whether a gas company, as defined in section 1 of chapter 742 of the Acts of 1914, may lawfully, after the establishment by the Board of Gas and Electric Light Commissioners or otherwise of a net maximum rate to be charged by such company, establish a gross rate, in excess of said net rate, which shall be paid by all customers who do not, prior to a specified date, pay the net rate.

I assume that the question presented by the order arises from a practice, which I am informed by the chairman of the Board of Gas and Electric Light Commissioners has prevailed for many years, of fixing in the orders of said Board, issued under the provisions of St. 1914, c. 742, § 162, a net price that may be charged by the company affected by the order. It is provided by said section 162 that upon the complaint in writing of the mayor of a city or the selectmen of a town, or of twenty customers, either as to the quality or price of the gas or electricity sold and delivered, the Board, after a hearing, may order any reduction in the price of gas or electricity or an improvement in the quality thereof; and it is further provided that the maximum price fixed by such order shall not thereafter be increased by the company except as provided in the following section. The following section (§ 163) provides for a revision of orders relative to the price and quality of gas or electricity made by the Board, upon application by the company.
Apart from these two sections, and except in so far as by reason of the nature of the business the rates must be reasonable, there are no provisions of general law that restrict a gas or electric light company as to the charges it may make for the service it furnishes, or as to the regulations it may adopt to insure prompt payment in accordance with the terms upon which it sells gas or electricity. Thus, a gas or electric light company as to which no order has been made may increase the price of gas or electricity without regard to said sections.

As I understand it, therefore, the question presented is this: Where a gas company has been charging a net price to those paying their bills promptly when due, and a larger price to those failing to pay when due, and the Board orders a reduction in or a revision of the net price, does the action of the Board in fixing a net price prohibit the charging thereafter of a gross price to the users of gas who do not pay the charges when due?

Assuming that the Board is authorized to make such an order, which I deem it unnecessary to determine, as otherwise it would seem no order binding upon the company is made, I am of the opinion that in such a case the company may charge a gross rate. A long-continued practice, acquiesced in by the public, is not lightly to be disturbed. But for the last sentence of section 162 there would be no doubt, as the only order made by the Board is in relation to the net price, leaving the company free to charge, as before, a gross price in excess of the net price to those not paying their bills promptly. The last sentence of the section provides that "the maximum price fixed by such order shall not thereafter be increased by said company except as provided in the following section." This provision originally appeared as a part of St. 1888, c. 350. The other provisions of that act are now contained in said section 163. The purpose of the provision seems to have been to insure that a price once fixed by an order of the Board should not thereafter be increased except as provided in said chapter 350. It is a reasonable view to take that it was not
intended by this provision to interfere with the conduct of the business of a company other than as ordered by the Board. It is to be noted that apparently the provision has no application to an order made under the provisions of said section 163. The intent was to prohibit a company from increasing the price fixed by an order of the Board. When, by order, the Board deals solely with a net price, it contemplates that a gross price in excess will be charged, and impliedly authorizes such a charge. Obviously, the gross rate must be reasonable, and the difference between the gross and net rates must have relation to the expense to which the company is put by the failure of the users of gas to pay the net rate when due. Assuming, therefore, that the gross rate charged is a reasonable rate, the question of the Honorable Senate is to be answered in the affirmative.

Street Railway — Public Trustees — Limitation of Stock Issue.

Under Spec. St. 1918, c. 188, § 4, the public trustees of the Eastern Massachusetts Street Railway Company are not restricted to the issuance of stocks, bonds and other evidences of indebtedness to the total amount mentioned therein as "the entire capitalization" plus or minus the adjustments to be made.

You request my opinion as to what the amount of the capital of the Eastern Massachusetts Street Railway Company properly should be under the provisions of Spec. St. 1918, c. 188. Since receiving your communication I have ascertained from the trustees that what they really desire is my opinion as to whether the new company may, under the provisions of section 4 of the act, issue stock, bonds and other evidences of indebtedness to a total amount in excess of $40,282,340 plus or minus such amount as shall be added thereto or deducted therefrom in accordance with the determination of the Public Service Commission, as provided in said section.

Said chapter 188 provides for the purchase of the property and franchises of the Bay State Street Railway Company by
a new company to be organized as provided in the act. Section 1 of the act provides that "the new company, upon the acquisition of the railways, property and franchises of the company may, subject to the provisions of this act, exercise all the powers and privileges of a street railway company organized under general laws, so far as the same are applicable, . . . and shall be subject to all the duties, restrictions and liabilities imposed upon street railway companies, except as otherwise provided." Special provisions are made for the incorporation of the new company. I think it obvious that in the organization of the company the general laws apply only to a limited extent; that is, in so far as they are not inconsistent with the specific provisions of said act.

The trustees appointed under the provisions of the act are to co-operate with the holders of the shares and securities of the Bay State Street Railway Company, and with the receiver operating the properties of said company, in arranging for the transfer of the railways, property and franchises of the Bay State Company to the new company.

It is provided in section 4 that the new company, for the purpose of paying for the railways, property and franchises of the company, may issue stock, bonds and other evidences of indebtedness in such amounts and proportions, with such par values and preferences, as may be approved by the directors and by the trustees.

Thus, it would seem that in the issuing of stock, bonds and other evidences of indebtedness for the purpose of paying for the property and franchises of the old company the provisions of general law have little if any application, and the determination of the amounts and proportions of such stock, bonds and evidences of indebtedness are matters left entirely to the discretion of the directors and the trustees, subject only to the limitations thereafter prescribed. It is thereafter provided that —

The entire capitalization of the new company, including stock, bonds and other evidences of indebtedness which may be issued to pay for, or which shall remain outstanding in respect of, the railways and property
owned, leased or operated by the company which were included in the computation of investment value contained in the decision of the public service commission, dated the thirty-first day of August, nineteen hundred and sixteen, shall not represent a capital bearing an annual interest and dividend charge (common dividends being computed at the rate of six per cent per annum) which will exceed six per cent upon the sum of forty million two hundred eighty-two thousand three hundred and forty dollars, etc.

As I interpret the section, the words "the entire capitalization" refer to the entire initial capitalization required to purchase the railways, property and franchises of the old company, and in the creation of this capitalization the company is not restricted to the issuance of stock, bonds and other evidences of indebtedness to a total amount of $40,282,340 plus or minus the adjustments to be made. I think it plain from the language of the section that such a limitation was not intended.

Light is thrown upon the provisions of section 4 by a consideration of the other provisions of the act. The act provides for what is known as a service at cost plan of operation, which in substance provides that the rates of fare shall not be in excess of those required to meet operating expenses and fixed charges and to pay 6 per cent per annum upon the common stock. I assume that it was intended by the Legislature to give the directors and the trustees latitude in effecting the organization of the new company and the acquisition of the property of the old, restricting, however, the creation of an initial capital to such an extent that the public will not be required to pay by way of fares more than 6 per cent upon the investment value of the property acquired, as determined by the Public Service Commission, as provided in said section, and relying upon the requirement of the approval of the trustees appointed under the provisions of the act, within the limitation prescribed, to safeguard the public interests. In this connection it is to be borne in mind that at the time of the passage of the act the Bay State Street Railway Company was in the hands of a receiver, that it was in default in the
payment of interest on its bonds and the property was subject to foreclosure under the mortgage securing the bonds, and that public service corporations were experiencing great diffi-
culty in raising capital for their needs. That it was generally recognized that public service corporations were experiencing difficulty in raising capital is indicated by Spec. St. 1918, c. 159, wherein the Boston Elevated Railway Company was authorized to issue preferred stock entitled to dividends at 7 per cent per annum, and by Spec. St. 1917, c. 366, which authorized the New York, New Haven & Hartford Railroad Company to issue preferred stock entitled to dividends at 7 per cent per annum.

Accordingly, I beg to advise you that I am of the opinion that so long as the initial capitalization created for the purpose of paying for the railways, property and franchises of the old company is not of such an amount and character as to subject the new company to the payment of interest and dividend charges (dividends on common stock computed at 6 per cent per annum on the par value thereof) to an amount in excess of 6 per cent of the investment value of the property as found under the provisions of said section, and is approved by the directors and by the trustees, it is authorized by the act.

Constitutional Law — Class Legislation — Delivery Vehicles.

A law regulating the dimensions of motor vehicles, with their loads, operated upon the public highways, exempting vehicles owned by manufacturers or dealers in boxes or barrels, is unreasonable class legislation, denies equal protection of the laws, and is, therefore, unconstitutional.

I acknowledge the receipt of an order from the Honorable Senate in the following form: —

Ordered, That the Senate request the opinion of the Attorney-General on the question whether exempting from the provisions of Senate Bill No. 547, entitled "An Act to regulate the dimensions of commercial vehicles and motor trucks and their trailers," so far as they restrict the
height of motor vehicles and their loads, delivery vehicles owned by manufacturers and dealers in boxes or barrels, would render the bill unconstitutional.

Section 1 of the proposed bill is as follows: —

No commercial vehicle, motor truck, or motor-drawn vehicle shall be operated on any way in this commonwealth, as defined in section one of chapter five hundred and thirty-four of the acts of nineteen hundred and nine, and amendments thereof, the outside width of which is more than ninety-six inches, the height of which exceeds thirteen feet, or the extreme over-all length of which exceeds twenty-eight feet; except that such vehicle may be operated exceeding thirteen feet in height when a special permit so to operate is secured from the superintendent of streets, selectmen or local road authorities having charge of the repair and maintenance of highways in the several cities and towns: provided, however, that where more than one vehicle or trailer is operated the length of such vehicles may exceed twenty-eight feet, but in no event shall all such vehicles or trailers so drawn or operated exceed eighty feet in length, over all. All of the aforesaid dimensions shall be inclusive of the load.

Section 2 provides for the granting of permits also by the Massachusetts Highway Commission and by the county commissioners, and section 3 establishes a penalty for violation of the act.

I am informed that an amendment has been proposed by which, if it is adopted, an additional section will be added to the bill as follows: —

In so far as it restricts the height of motor vehicles and their loads, this act shall not apply to delivery vehicles owned by manufacturers or dealers in boxes or barrels.

The order of the Senate appears to relate merely to the question whether this amendment will render the bill unconstitutional if enacted with the proposed amendment incorporated therein.

An exemption of special classes of persons from the burden of general police regulations always requires a clear explanation. It is fundamental that there can be no unreasonable or arbitrary distinctions in the application of such a statute.
Either it must apply equally to all, or any classification which it attempts must be based upon some reasonable ground connected with the nature and purpose of the regulation or the general public interest. That a regulation may cause special inconvenience to persons in certain kinds of business is not alone a reasonable ground for exempting them. Such exemptions and distinctions must be based upon public interest, not upon private inconvenience.

The purpose of the proposed bill appears to be merely to regulate and limit in the interest of public safety and convenience the dimensions of motor vehicles, with their loads, which are operated upon the public highways. The bill appears to have no relation to the weight of the vehicle or its load. Presumably manufacturers or dealers in boxes or barrels often have occasion in transporting empty boxes and barrels to carry loads of unusual height over the public highways, but so do manufacturers and dealers in other bulky articles of light weight. This bill, if enacted, will prove as inconvenient to all such manufacturers and dealers as to those especially exempted by the proposed amendment. Furthermore, this amendment completely exempts motor vehicles owned by the manufacturers and dealers specified, whether used in transporting boxes or barrels or any other articles or material. Then, others than manufacturers and dealers in boxes or barrels have occasion to transport them on motor vehicles. A motor truck and its load exceeding thirteen feet in height is precisely as great a danger or inconvenience to the public, whether operated by a person of the exempted class or by any other person.

No sound distinction for the classification proposed by this amendment in any way related to the purpose of this bill or the general public interest has been suggested to me, and none occurs to me. I must advise you that the bill would, in my judgment, be unconstitutional if enacted with the proposed amendment incorporated therein, on the ground that in that form it would be unreasonable class legislation, and that it would deny to persons operating motor vehicles within the
Commonwealth the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

TOWNS — JOINT EMPLOYMENT OF SUPERINTENDENT OF SCHOOLS — TERMINATION OF AGREEMENT.

Where two towns continue to employ jointly a superintendent of schools after they are no longer required by law so to do, either town can terminate such arrangement whenever it sees fit.

You ask my opinion as to whether the town of Wareham has the right to terminate the arrangement whereby the towns of Wareham and Marion jointly employ a superintendent of schools. In 1900 these towns formed a union under the provisions of St. 1898, c. 466, and they have, until April, 1919, employed jointly a superintendent of schools. The school committee of Wareham has since notified the school committee of Marion that the arrangement would no longer be continued. In 1910 the valuation of both these towns had exceeded $3,500,000, and under the then existing law the towns were no longer required to continue the union. They did, however, continue to employ a superintendent as before, through the agency of the joint school committee, although not in the manner provided in R. L., c. 42, § 42, which was by a committee consisting of the chairman and secretary of the two committees.

This arrangement was in effect when St. 1911, cc. 384 and 399 were enacted. Chapter 384 provided that in towns operating under the act relative to the forming of unions for the purpose of electing a superintendent of schools, said superintendent should be elected for a three-year term. Chapter 399 provided that such unions could not be dissolved except by a vote of a majority of the towns constituting the union, and with the consent of the Board of Education. The towns in question did not choose the superintendent for three years, but continued to elect one from year to year. In other words, these
towns, prior to the passage of the statutes of 1911, had outgrown the necessity for continuing the union established in 1900, but were by common consent employing a superintendent through the instrumentalities previously created.

Your question, therefore, really is whether St. 1911, c. 399, prohibits a dissolution of the original union unless there is a majority vote of the towns and the consent of the Board of Education is given. It is my opinion that the original union had been dissolved by operation of law before 1911, and that the continuation of a similar arrangement was a matter of convenience and not of legal necessity. Had St. 1911, c. 399, been enacted previous to the time when the towns reached a valuation of $3,500,000, and when they were operating under the original statute, said chapter would have changed the situation entirely. Under the facts above stated, however, it is my opinion that the towns were no longer subject to the control of the then existing law, and that the statutes of 1911 did not revive the original union or curtail the rights of the towns if either saw fit to discontinue the convenient arrangement of choosing a joint superintendent.

Constitutional Law — General Court — Delegation of Powers.

The Legislature cannot delegate to cities and towns the powers granted to it by Article LX of the Amendments to the Constitution, limiting the use or construction of buildings to specified districts.

I acknowledge the receipt of an order from the Honorable Senate in the following form:

Ordered, That the Senate request the opinion of the Attorney-General on the question whether Article LX of the Amendments to the Constitution empowers the General Court to authorize cities and towns to limit buildings according to their use and construction to specified districts thereof, and more especially whether House Bill No. 635 would be constitutional if enacted into law.
Article LX of the Amendments to the Constitution provides as follows: —

The general court shall have power to limit buildings according to their use or construction to specified districts of cities and towns.

House Bill No. 635 is entitled "An act to authorize cities and towns to limit buildings according to their use or construction." Its essential provision is as follows: —

Section 1. A city or town may by ordinances or by-laws not inconsistent with law and applicable throughout the whole or any defined part of its territory limit buildings according to their use or construction except such as are owned or occupied by the United States or by the commonwealth and may prescribe penalties not exceeding one hundred dollars for each violation of such ordinances or by-laws.

The phraseology of this section seems somewhat incomplete, in that it does not clearly state the nature of the limitation which is to be imposed upon "buildings according to their use or construction." I assume that the purpose of the bill is merely to authorize cities and towns "to limit buildings according to their use or construction" to specified districts thereof.

The bill of itself imposes no limitation whatever upon the use or construction of buildings in any specified district of any city or town. It in no way establishes any general principle to be applied in imposing limitations of this character. It is merely a complete delegation to each of the cities and towns within the Commonwealth of the entire power granted to the General Court by Article LX of the Amendments. Thus, the sole question presented by the order is whether such a delegation of legislative power is authorized by the Constitution of the Commonwealth.

The principles of law applicable to the determination of such a question were clearly stated by the Supreme Judicial Court in Brodbine v. Revere, 182 Mass. 598, 600: —

It is well established in this Commonwealth and elsewhere that the Legislature cannot delegate the general power to make laws conferred upon it by a Constitution like that of Massachusetts. Opinion of the Justices, 160 Mass. 589; Larcum v. Olin, 160 Mass. 102; Stone v. Charles-
town, 114 Mass. 214; State v. Hayes, 61 N. H. 264; Barto v. Himrod, 4 Seld. 483; Gloversville v. Howell, 70 N. Y. 287; Locke's Appeal, 72 Penn. St. 491; State v. Morris County, 7 Vroom, 72; Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491; People v. Hurlbut, 24 Mich. 44. This doctrine is held by the courts almost universally.

There is a well-known exception to it, resting upon conditions existing from ancient times in most of the older States of the Union, which the Constitutions of the States generally recognize, namely, the existence of town or other local governmental organizations which have always been accustomed to exercise self-government in regard to local police regulations and other matters affecting peculiarly the interests of their own inhabitants. On this account the determination of matters of this kind has been held to be a proper exercise of local self-government which the Legislature may commit to a city or town. Commonwealth v. Bennett, 108 Mass. 27; Stone v. Charlestown, 114 Mass. 214; Opinion of the Justices, 160 Mass. 586, 589; People v. Albertson, 55 N. Y. 50; Gloversville v. Howell, 70 N. Y. 287; State v. Morris County, 7 Vroom, 72.

In my judgment, the proposed bill does not deal merely with local police regulations or other matters affecting peculiarly the interests of the inhabitants of the various cities and towns of the Commonwealth. It rather purports to delegate the whole power and duty to determine what restrictions shall be placed upon the use and construction of buildings in specified districts without establishing any general policy whatever as to the purposes of such regulation or the standards to be applied in connection therewith. The legislation authorized by this amendment was obviously intended to be something more than police regulations in the interests of the public health, safety or morals. The amendment was entirely unnecessary to authorize such regulations. The determination of the question as to how far legislative power under this amendment can or should be exercised presents grave questions both of constitutional power, in view of the provisions of the Federal Constitution, and of legislative policy. Are certain kinds of business to be restricted to specified districts? Are manufacturing and mercantile buildings, and, perhaps, even apartment houses, to be excluded entirely from specified districts? Is the character or construction of buildings, even of those devoted merely to residential purposes, to be regulated as to their height, size, loca-
tion with reference to public highways or to other buildings or as to their artistic or architectural qualities? All these matters, so far as they are permissible matters of legislation under this amendment, are left by the proposed bill entirely to the determination of cities and towns. Such general considerations of policy in a new field of legislation cannot, in my judgment, be said to be mere matters of local self-government.

Of course, the acceptance or rejection of a general scheme of regulation may often be left to individual municipalities. This is merely leaving to the local community the determination of the question whether the conditions there existing make it desirable to put in force therein a definite regulation. Then, too, the fitting of the administrative details of such a regulation into the particular conditions of a given community may be left to local authorities or to general administrative boards. Doubtless much could be left to local determination in this manner in definite legislation enacted under this amendment, but this subject need not now be discussed, since nothing of that sort is attempted by the bill under consideration.

Accordingly, in my opinion, the General Court cannot completely delegate to cities and towns the powers granted to it by Article LX of the Amendments to the Constitution, and that House Bill No. 635 would be unconstitutional if enacted into law.

POLICE POWER — APPLICABILITY TO STATE INSTITUTIONS — HOURS OF LABOR.

Gen. St. 1919, c. 113, reducing the hours of labor of women and children, does not apply to the industrial department of the Reformatory for Women.

You request my opinion as to whether Gen. St. 1919, c. 113, amending the law with reference to the hours of employment for women and children, and reducing the period of such employment to forty-eight hours a week, applies to the industrial department of the Reformatory for Women.

The act in question applies only to women and children
“employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company.”

Assuming that the matrons employed in the industrial department of this institution can be said to be “employed in laboring,” within the meaning of the statute, I have grave doubts as to whether such an industrial department can be said to be a factory, workshop or manufacturing establishment within the meaning of this statute, or otherwise to come within its terms. Such a department is carrying on a part of the work of a penal or reformatory institution. Its primary purpose is not the employment of persons in the manufacture of goods.

It is, however, a well-established principle that a police regulation of the general character of the statute under consideration is not to be construed as applying to activities conducted by the State unless it clearly appears from its terms that it was intended to be so applicable. I find no indication whatever in this statute that the General Court intended it to apply to any State institutions of any sort, least of all to State penal institutions.

Accordingly, I construe this statute as not applicable to women employed at the Reformatory for Women.

Nurses’ Corps—State Benefits—World War.

Under Gen. St. 1918, c. 92, members of the nurses’ corps who saw active service in the World War are entitled to the benefits provided for by Gen. St. 1917, cc. 211 and 332.

You have asked my opinion as to whether members of the nurses’ corps, organized in connection with the medical department of the army of the United States, who saw active service in the war with the German Empire, are entitled to the benefits of Gen. St. 1917, cc. 211 and 332, as interpreted and extended by Gen. St. 1918, c. 92.
The language of the two chapters first mentioned plainly cannot refer to women, and therefore the rights of these nurses must depend upon the statute of 1918. Section 1 of that statute provides that the two earlier statutes "shall be construed to apply to all persons, male or female, voluntarily enlisted in the military or naval service of the United States since the beginning of the present war with the German Empire as defined by said chapter three hundred and thirty-two, or drafted into the military forces under the provisions of the federal selective service act, whether a part of the quota of this commonwealth or not, provided that such persons, at the time of their entry into said service, were residents of this commonwealth."

The terms of the Federal statutes and the practice of the War Department thereunder seem to make it clear that these nurses are not "enlisted" in the military service, in the ordinary technical sense of that term. They are appointed to their positions by the Secretary of War, and do not go through the formalities of an enlistment as do the enlisted men in the military service.

It is apparent, however, that, by the use of the word "female" in connection with persons in the military service, the General Court intended to extend the rights under these statutes to some persons who heretofore did not come within their terms. So far as I can perceive, there are no women in the military service, or to whom these words could possibly apply, except members of the nurses' corps. I am inclined to think, therefore, that the General Court intended by the use of these words to extend Gen. St. 1917, cc. 211 and 332, so as to include the members of the nurses' corps while in active service. I accordingly advise you that, in my opinion, the members of this corps while in such active service, if they otherwise come within the terms of these statutes, are entitled to their benefits.

The Massachusetts Highway Commission may purchase and take land in addition to that portion of the highway wrought for travel, when it is essential in order to insure the safety of persons traveling thereon.

You have requested my opinion upon the following question:

Chapter 213 of the Acts of 1916 directs the Massachusetts Highway Commission to construct and maintain a certain highway in the town of Hingham, and provides that the Commission is "authorized to purchase or take such land and buildings as may be deemed necessary in the laying out and construction of said highway."

At one point where this highway intersects an existing highway a very dangerous condition exists, due to the obstruction of the view by two buildings on land of the Beale estate, and it seems to the Commission quite necessary that the land on which these buildings are located should be purchased or taken in order to get rid of the present buildings and insure that no buildings shall hereafter be erected on said land.

The Commission desires to know if in your opinion it can purchase this land, which is outside of the portion that is necessary for travel.

It is my view that your Commission is not restricted in the purchase and taking of land which is necessary for travel. Very often it is necessary to take land outside of the portion that is constructed, for the purpose of grading and draining, in order to make that portion of the road which is to be wrought for travel safe and convenient for travel. The width of the road at its intersection with other roads, within reasonable limits to insure the safety of travelers, is a matter properly within the discretion of the Commission. If, therefore, a situation is presented wherein your Commission deems it necessary to purchase land in addition to that which is to be wrought for travel, in order to insure the safety of persons traveling on that portion of the highway that is wrought for travel, I am of the opinion that it can be purchased. Obviously, it must appear that the additional land is reasonably necessary for the convenience and safety of the use of the traveled portion of the road, in order to justify such action by your Commission. This,
in the first instance, is largely a question of fact for the determination of your Commission. Such being the fact, I am of the opinion that you are authorized to purchase such land.

PUBLIC SERVICE COMMISSION — MOTOR VEHICLES — RULES AND REGULATIONS — CITIES AND TOWNS.

Under the provisions of Gen. St. 1918, c. 226, the Public Service Commission, upon an appeal, is limited in its power relative to the operation of motor vehicles either to approving or disapproving the orders, rules and regulations adopted by local cities and towns.

You request my opinion "as to whether Gen. St. 1918, c. 226, which provides for an appeal to the Public Service Commission from the orders, rules and regulations prescribed by the local authorities relative to the operation of jitneys, so-called, limits the authority of the Commission to the approval or disapproval of the orders, rules and regulations from which an appeal is taken, or whether it empowers the Commission, in case it disapproves such orders, rules and regulations, to prescribe by order the just and reasonable rules and regulations thereafter to be in force, and, specifically, as to whether and in what respect, if any, the Commission exceeded its lawful authority in issuing its order of April 3, 1919 (P. S. C. 2151), relative to regulations governing the operation of jitneys in the cities of Lawrence, Haverhill, Malden, Lynn, Salem and Brockton, and the towns of Swampscott and Nahant."

Your question involves an interpretation of section 2 of the act. Said section provides, in part, as follows:—

Every person, firm or corporation, including street railway companies, operating any such motor vehicle upon any public street or way for the carriage of passengers for hire in such a manner as to afford a means of transportation similar to that afforded by a street railway, by indiscriminately receiving and discharging passengers along the route on which the vehicle is operated or may be running, is hereby declared to be a common carrier, and shall in respect to the operation of such vehicle be subject to such orders, rules and regulations as have been or may from time to time be prescribed or adopted by the licensing authorities of any
city or town which has accepted the provisions of chapter two hundred and ninety-three of the General Acts of nineteen hundred and sixteen.

So far the section is little more than a re-enactment of the provisions of Gen. St. 1916, c. 293, as under that act cities and towns could make orders, rules and regulations, and the operation of motor vehicles was subject thereto. The section then provides that—

Any petitioner, or any street railway company aggrieved by such orders, rules or regulations, may appeal to the public service commission whose decision, after notice to said licensing authorities and a hearing thereon if requested by such authorities, shall be final. Such appeal may be taken within thirty days from the time such orders, rules or regulations become effective or in case the same have already become effective, within thirty days after the passage of this act.

I assume that the petitioner referred to in this provision refers to some person who is operating a motor vehicle or desires to operate a motor vehicle. It is difficult to see how any other petitioner would be aggrieved by any orders, rules or regulations made under the provisions of Gen. St. 1916, c. 293, and I doubt the intention of the Legislature to give any member of the public who is affected by the rules and regulations only to the extent that all members of the public are affected a right to appeal to the Public Service Commission. This, it seems to me, throws light upon the meaning of the section. Neither a petitioner nor a street railway company can be said to be aggrieved unless the rules and regulations adopted appear to be unreasonable and to unduly restrict their power to operate motor vehicles. This being so, it would seem to follow that the cause of their grievance is eliminated by the action of the Public Service Commission in disapproving the rules, or so much thereof as appears to the Public Service Commission to be unreasonable. Certainly, up to the time of the passage of this act it could not be said that street railway companies were aggrieved by the adoption of rules regulating the operation of motor vehicles. They had no peculiar rights under the law to be protected against competition, and there is nothing in the
present statute to indicate that the Legislature intended to adopt another policy, unless it is derived by implication from the provisions of section 3. On the other hand, there is no provision for an appeal by a street railway company because of the failure of a municipality which has accepted the provisions of Gen. St. 1916, c. 293, to adopt rules and regulations. The purpose of the appeal, it seems to me, is to correct the alleged grievance. It is a grievance that is the foundation for the action of the Public Service Commission. The grievance is not corrected by allowing the rule or regulation appealed from to stand and adding additional rules and regulations to it.

The section provides that persons operating motor vehicles shall be subject to such orders, rules and regulations as may from time to time be adopted by the licensing authorities of the city or town. This is inconsistent with the view that the Public Service Commission has the power to originate and make rules and regulations upon appeal, in addition to those already adopted by the city or town, and finally to dispose of the whole matter.

Nor do I think that the declaration in the section, that the persons operating such motor vehicles are common carriers, adds much to the section; as, obviously, persons operating such vehicles are common carriers. I do not think it can soundly be contended, merely from this declaration, that the Public Service Commission was given jurisdiction of such vehicles under the provisions of St. 1913, c. 784. That chapter relates to common carriers of persons or property by railroads, street railways, electric railroads and steamships. It is true that clause b of section 2 provides that the Commission shall have general supervision and regulation of the operation of all conveniences, appliances, facilities or equipment utilized in connection with or appertaining to the transportation or carriage of persons or property by railroads, street railways, electric railroads and steamships, by whomsoever owned or by whomsoever provided, whether the service be common carriage or merely in facilitation of common carriage.

But for the provisions of section 2 of said chapter 226 it may
be that it could be contended with some force that street railway companies using motor vehicles for the purpose of facilitation of common carriage by street railways were subject to the regulations of the Public Service Commission, under the provisions of said chapter 784, as to the operation of such motor vehicles. Doubtless in some respects street railways in the operation of motor vehicles are subject to the control of the Public Service Commission. However, it is going to great length to say that the operation of a motor bus in no way connected with the street railway company is a convenience, appliance, facility or equipment utilized in connection with or appertaining to the transportation or carriage of persons or property by street railways or in facilitation of such transportation or carriage.

Section 3 of said chapter 226 provides: —

In cities or towns that have not accepted the provisions of said chapter two hundred and ninety-three wherein a street railway exists, and wherein a line of motor vehicles has been established under the provisions of section one of this act, the public service commission shall have original jurisdiction over persons, firms or corporations mentioned in section two, and may prescribe rules and regulations until the city or town accepts the provisions of said chapter two hundred and ninety-three, whereupon original jurisdiction shall vest in the city or town, subject to appeal to the public service commission as provided in section two.

I take it that this section gives to the Public Service Commission the power to establish rules and regulations in relation to automobiles, motor vehicles and the operation of motor vehicles in cities and towns that have not accepted the provisions of said chapter 293, wherein a street railway exists, or wherein a line of motor vehicles has been established under the provisions of section 1 of the act. Some argument might possibly be advanced under this section that by implication the power is given to the Public Service Commission, on appeal, under the provisions of section 2, to prescribe rules and regulations in addition to those adopted by the local community. The use of the words "original jurisdiction," it may be said, indicates that on appeal it has the same power that it has
when exercising original jurisdiction under the provisions of section 3, and that it has the right to pass rules and regulations in any community where a street railway exists, whether a line of motor vehicles has been established or not, or whether the street railway is operating a line of motor vehicles in the community; and consequently, it follows that the Legislature was of the opinion that a street railway might be aggrieved by the operation of a line of motor busses in a community where it operated a street railway, although it did not operate a line itself. On the other hand, under section 3 the Public Service Commission has no jurisdiction whatever over motor vehicles operated by others than street railway companies in a community where no street railway exists, as the application of section 3 is limited to towns wherein a street railway exists and towns wherein a line of motor vehicles has been established under the provisions of section 1, which relates entirely to street railway companies. Thus the original jurisdiction of the Public Service Commission is limited in its extent, and does not embrace all communities which have not accepted the provisions of said chapter 293. Furthermore, it is given original jurisdiction over the persons, firms and corporations mentioned in section 2. The section does not use the words "original jurisdiction" in connection with its power to prescribe rules and regulations.

However, in my judgment, whatever force the provisions of section 3 may have in supporting the view that the Commission, on appeal, may add to the regulations adopted by the city or town is controlled by the provisions of section 2 and the conclusions to be drawn from its provisions.

The provision in section 2, that all orders, rules or regulations made, established or prescribed hereunder shall be enforced in the manner provided in St. 1913, c. 784, § 28, is of no assistance in determining the question involved. If the provision is restricted to such rules and regulations as are affirmed, on appeal, by the Public Service Commission, then it leaves those as to which no appeal is taken to be enforced as provided in Gen. St. 1916, c. 293. If it applies to all rules and regulations
referred to in the section, then it necessarily relates to rules and regulations which may never come before the Public Service Commission for action.

Accordingly, I am of the opinion that it was not the intention to interfere with the power of the local communities accepting the provisions of said chapter 293 to regulate in such manner as they may determine the operation of motor vehicles coming within the provisions of the act, provided such regulations are not found to be unreasonable by the Public Service Commission upon appeal; and that your Commission is limited to either approving or disapproving the orders, rules and regulations adopted by such communities.

Board of Registration in Pharmacy — Certificate of Fitness — War Prohibition.

The Board of Registration in Pharmacy may, after the war prohibition act becomes effective, continue to grant certificates of fitness authorizing the sale of intoxicating liquors on prescriptions of registered physicians.

My opinion is requested upon the following question: —

Has the Board the right to issue a certificate of fitness (St. 1913, c. 413) to druggists in cities and towns which voted to grant the first five classes of licenses, which licenses were rendered ineffective on July 1 by war prohibition?

St. 1913, c. 413, provides: —

In any city or town in which licenses for the sale of intoxicating liquors of the first five classes are not granted, registered pharmacists to whom a certificate of fitness has been issued as provided for by section two of this act, may sell pure alcohol for medicinal, mechanical or chemical purposes without a physician's prescription, such sales to be recorded in the manner provided for in section twenty-six of chapter one hundred of the Revised Laws, and may sell intoxicating liquors upon the prescription of a registered physician practising in such city or town, provided that the prescription is dated, contains the name of the person prescribed for, and is signed by the physician.
I am of the opinion that your Board may continue to grant such certificates of fitness, and that such certificates will authorize the sale of intoxicating liquors upon the prescription of a registered physician to the extent authorized by said chapter 413, provided such sale does not violate the provisions of the Federal statutes.

UNLAWFUL COMBINATION — FIXING OF WAGES BY MINIMUM PRICE SCALE.

Agreements between employer and employee to establish minimum prices as a means of fixing wages are unlawful.

I am in receipt of a copy of an order adopted by the Honorable Senate, as follows: —

Ordered, That the Senate request the opinion of the Attorney-General on the following question of law: —

Would it be contrary to the laws of the United States or of this Commonwealth for a combination of fishermen to enter into an agreement with dealers purchasing their product fixing minimum prices for such product as a method of fixing the wages of such fishermen?

The order does not state to whom the product upon which the price is to be fixed belongs, but apparently it is assumed to belong to the fishermen. Upon this assumption it is not possible for me to give an opinion, for the reason that the answer would depend upon facts which are not stated; for example, whether the purpose of the combination of fishermen and dealers is to advance the price of fish, or whether the combination would be of such size as to give substantial price-making power.

I apprehend, however, that the purpose of the Honorable Senate in passing the order was to obtain an opinion which would be applicable to the situation in the fish industry in this Commonwealth, and therefore submit the following answer.

It is my understanding that the fishermen employed on vessels landing fish at Boston and other points in this Commonwealth are in general paid an amount equal to a certain pro-
portionate part of the proceeds of the cargo, the proportion varying from 7/1000 in the case of a fisherman on a steam trawler to a much larger percentage in the case of fishermen employed on sailing vessels, the variation being due principally to the fact that the trawler fishermen receive a definite salary in addition to their share in the proceeds.

As a general rule, the fish caught do not belong to the fishermen. While the pay received by the fisherman depends, at least in part, upon the value of the cargo, he cannot be considered the owner of such cargo, but still remains an employee. *Baxter v. Rodman*, 3 Pick. 435; *Cambra v. Santos*, 233 Mass. 131.

In this situation it is difficult to see how the fishermen may, by arrangement with dealers to whom the fish may be sold, fix a minimum price thereon, when, as above pointed out, the fish is not owned by them.

It is too well recognized to require the citation of authorities that employees have a right, both under the laws of this Commonwealth and of the United States, to combine and contract with their employer as to what wages they shall receive.

This right on the part of the employees, however, does not include the right to dictate to their employer as to the manner and terms upon which the product of the employees' labor shall be sold, and a combination to effect this, in my judgment, would be an unlawful combination. While it is true that combinations of workmen by collectively bargaining as to the wages they shall receive necessarily affect the price of the product of their labor, this is an incident necessarily flowing from the exercise of this right. When, however, a combination of workmen, under the guise of collective bargaining as to wages, attempts to fix the price at which the product of their labor shall be sold by their employer, they exceed their lawful rights, and the combination becomes unlawful. And I think it is equally plain that it is unlawful for such a combination to enter into agreements with the purchasers of the product, by which it is agreed that the product shall be bought only on certain terms.
I do not mean to intimate that I am of the opinion that an agreement may not legally be effected between the fishermen and their employer, by which the wages to be paid are fixed upon the basis that the fish caught is of a certain minimum value.

Assuming, therefore, that the facts are as I understand them, your question is to be answered in the affirmative.

Recess Committee — Appropriation for Services.

The Legislature may lawfully appropriate money to pay members of a recess committee appointed to consider the work being done by a commission to revise the laws of the Commonwealth.

You request my opinion as to whether or not you can sign an appropriation bill providing money for the payment of the members of a proposed recess committee to consider the work being done by the commission to revise the laws of the Commonwealth.

I assume that the appropriation arises by reason of the passage of chapter 11 of the Resolves of the present year, which extends to Oct. 15, 1919, the time within which the Commissioners for Consolidating and Arranging the General Laws of the Commonwealth, under authority of chapter 43 of the Resolves of 1916, are required to make their final report to the General Court.

The resolve provides that the commissioners shall complete the said consolidation and arrangement and present their final report in print on or before Oct. 15, 1919, and file the same with the clerk of the Senate.

Article LXV of the Amendments to the Constitution provides as follows: —

No person elected to the general court shall during the term for which he was elected be appointed to any office created or the emoluments whereof are increased during such term, nor receive additional salary or compensation for service upon any recess committee or commission except a committee appointed to examine a general revision of the statutes of the commonwealth when submitted to the general court for adoption.
The sole question involved, therefore, is what is meant by the words "when submitted to the General Court for adoption," as used in said amendment.

I am of the opinion that a reasonable construction should be given to these words, and that, accordingly, they are to be construed as including a report made to the clerk of the Senate by direction of the General Court, under an order which extends the time of the filing of the report of the commissioners with the General Court, and provides for the filing of said report with the clerk of the Senate.

Considering the filing with the clerk of the Senate under the provisions of the order as a submission to the General Court, it is clear that the amendment does not prohibit the payment of members of a committee appointed to examine the revision of the statutes, after the report is so submitted, for services performed after it is submitted.

In any event, in so far as the appropriation is concerned I am of the opinion that you may properly approve it, as it is made simply in anticipation of the receipt of the report by the General Court, and no question will arise until it is proposed to expend money under authority of the appropriation. If the report then is before the General Court the expenditure will be lawful.

COMMISSION ON WATERWAYS AND PUBLIC LANDS — GREAT POND — ISLANDS — TITLE.

Any pond of more than 10 acres is a great pond unless there was a grant of such pond prior to the enactment of the Colonial Ordinances. Title in it and to the islands therein is in the Commonwealth.

The Commission on Waterways and Public Land has authority to convey or lease islands in a great pond.

You request my opinion as to whether or not Swan Pond, in the town of Dennis, is a great pond belonging to the Commonwealth, and whether or not your Commission has authority, under St. 1904, c. 379, or any other provision of law, to sell and convey or lease two islands located in the northerly part of the pond.
HENRY C. ATTWILL, ATTORNEY-GENERAL.

Your question really divides itself into three parts: first, whether or not Swan Pond is a great pond belonging to the Commonwealth; second, whether or not the islands located in the pond belong to the Commonwealth; and third, whether or not your Commission has authority to sell and convey or lease the islands in the pond.

In the memorandum submitted by you in your letter you state that —

Swan Pond is a body of water situated in the town of Dennis and has an area of about 157 acres. There are two islands in the northerly part of the pond, and there are no buildings on either island.

Unless there was a grant of Swan Pond prior to the enactment of the Colonial Ordinances of 1641-47, the title is in the Commonwealth.

The Colonial Ordinances contain the following provision: —

Providing that no town shall appropriate to any particular person any great pond containing more than ten acres.

It is clear, therefore, that any pond of more than 10 acres is a great pond, and is owned by the State. Attorney-General v. Herrick, 190 Mass. 307; II Op. Atty.-Gen., 307; Auburn v. Union Water Power Co., 9 Me. 376.

So far as I am aware, there was no grant of Swan Pond before the Colonial Ordinances were enacted. Accordingly, I am of the opinion that Swan Pond is a great pond, the title to which is in the Commonwealth.

The second question is whether the islands in Swan Pond are owned by the Commonwealth. The only case in Massachusetts dealing with the subject is Attorney-General v. Herrick, 190 Mass. 307, 313, in which the court states that —

Ordinarily a grant of a pond as a piece of real estate would include the entire area within its borders. . . .

While there are grounds for an argument that the ordinance of 1641-47 had reference only to the waters of the great ponds and the land under them, there is much force in the suggestion that the expressions "great pond, containing more than ten acres of land," and "great ponds lying in
common, though within the bounds of some town," refer to great ponds as physical features of the country, including any islands within them.

It is my opinion that the islands in Swan Pond are the property of the Commonwealth.

As to the third part of your question, as to the right of your Commission to sell or lease the islands in Swan Pond, St. 1904, c. 379, § 1, provides as follows:

The board of harbor and land commissioners may, under the authority and subject to the approval of the governor and council, sell and convey or lease any of the islands owned by the Commonwealth in the great ponds.

By St. 1916, c. 288, the Board of Harbor and Land Commissioners was abolished, and all the powers, duties and obligations conferred and imposed by law on said Board were transferred to, and were to be exercised by, the Commission on Waterways and Public Lands. Accordingly, I am of the opinion that your Commission is authorized to convey or lease said islands, as provided in St. 1904, c. 379, § 1.

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Paupers — Loss of Settlement — Domicile.

Absence of paupers from cities or towns in which they have a residence, in order to constitute a loss of settlement, must be for five consecutive years and of such a character as to constitute a change of domicile.

You have requested my opinion upon the question arising out of the following facts:

A certain woman was born in Ireland May 1, 1878. Her parents never came to the United States. She married in Brighton, on April 8, 1908. Her husband came to the United States about 1897, and resided in Boston until he removed to Revere, Dec. 27, 1913, where he continued to reside until his death Aug. 17, 1917. He never gained a settlement. At the date of his death his wife had a legal settlement in Boston, gained through her own residence.

After the death of the husband, the wife went to her sister's home in Boston, where she remained until June 29, 1918, and then returned to Revere. When she went to her sister's home she had no fixed idea or
purpose of living there, but decided to remain there until she became reconciled to her husband’s death. She was also in poor health, and decided she would make her home with her sister until she felt able to return to her home in Revere and care for her home and children. Meanwhile, she had an offer to rent her home to advantage for the winter, which she accepted. She returned to Revere as soon as her home was vacated.

The question upon which you have asked my opinion is whether the woman, on Dec. 27, 1918, had been absent from Boston five consecutive years, within the meaning of St. 1911, c. 669, § 4, as amended.

This statutory provision, so far as applicable to this case, reads as follows: —

A person who, after the passage of this act, is absent for five consecutive years from the city or town in which he had a settlement shall thereby lose his settlement.

I assume from your facts that the woman had gained her settlement in Boston prior to Dec. 27, 1913.

Absence, within the meaning of the statute relating to the laws of settlement of paupers, in my opinion, must be of such a character and with such intent as to constitute a change of domicile. From the facts as given by you, it is manifest that this woman intended to regard Revere, and made it, her home from the date she went there to live with her husband, and that her domiciliary residence from Dec. 27, 1913, has been in Revere.

The woman referred to has therefore, in my judgment, lost, within the meaning of St. 1911, c. 669, § 4; as amended, the settlement which she had in Boston.

Gen. St. 1919, c. 112, increasing the compensation and mileage to be paid to traverse and grand jurors, is not a law the operation of which is restricted to a particular political division, district or locality of the Commonwealth, and cannot, therefore, take effect earlier than ninety days after it becomes a law by approval of the Governor.

You have requested my opinion as to when chapter 112 of the General Acts of 1919, increasing and establishing the rate of compensation and mileage to be paid traverse and grand jurors, becomes effective. This act applies to all jurors in attendance upon any court within the Commonwealth.

The initiative and referendum amendment to the Constitution, in the first article under the heading "The Referendum," contains the following provision: —

I. When Statutes shall take Effect.

No law passed by the General Court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

The statute under consideration is not declared to be an emergency measure, and therefore it cannot take effect earlier than ninety days after it has become a law, unless it is a statute which may not be the subject of a referendum petition.

Article III of this division of the amendment under consideration is, in part, as follows: —

III. Referendum Petitions.

Section 1. Contents. — A referendum petition may ask for a referendum to the people upon any law enacted by the General Court which is not herein expressly excluded.

Section 2. Excluded Matters. — No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts, or the operation of which is restricted to a particular town, city or other political division or to particular districts
or localities of the commonwealth, or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

The only item of excluded matters within which it has been suggested this statute may come is that of laws "the operation of which is restricted to a particular town, city or other political subdivision or to particular districts or localities of the commonwealth." The suggestion is made that as the General Court might have dealt with the matter of jurors' compensation by statutes applicable only in one or more counties and not throughout the Commonwealth, and thus by a series of statutes covering the several counties of the Commonwealth in succession, this statute must be regarded as the equivalent of such a series of statutes, and as coming within the matters excluded from the referendum by the clause under consideration.

By precisely the same reasoning, any statute dealing with a subject of legislation which it is within the power of the General Court to make applicable to less than the entire Commonwealth could be similarly regarded as the equivalent of several statutes applicable to districts or divisions of the Commonwealth. The real question, therefore, is whether the referendum is by the terms of the amendment limited to matters which are of such a character that they cannot constitutionally be restricted in their application to "a particular town, city or other political subdivision or to particular districts or localities of the commonwealth." The same language as that above quoted is used in defining the matters excluded from the operation of the initiative (The Initiative, art. II, § 2). So this suggestion also raises the question whether only those matters may be made the subject of the popular initiative as are required by the Constitution to be made applicable throughout the Commonwealth.

The history of the adoption of the initiative and referendum amendment is too recent to require stating. It was the result of a popular desire of considerable strength to provide the people with a more effective means of controlling the exercise of
legislative power. Its opening article, defining the scope of the amendment, is as follows:—

I. Definition.

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

Both expressly and by implication it is indicated throughout the amendment that both the initiative and the referendum shall be applicable to all exercises of legislative power except those dealing with matters excluded from their operation. The various exclusions are based upon different grounds of policy. That under consideration seems plainly to be founded on a desire not to burden the people of the whole Commonwealth with the duty of passing upon matters of only local or limited application in which they are not as a whole interested; but unless a matter is excluded on other grounds, it is the obvious purpose of the amendment to enable the people directly to consider, enact, approve or reject all matters of legislation which affect the people of the Commonwealth as a whole. Thus there are many matters which are ordinarily dealt with by general legislation applicable throughout the Commonwealth which conceivably might in a proper case be restricted to particular localities or districts. It cannot be said that all such matters are excluded from the initiative and referendum merely because the General Court might have dealt with them locally. It must be said that if it chooses to treat a matter as one of general application, and to deal with it as such by a general statute applicable to all the people of the Commonwealth who come within its scope, it is not excluded from the initiative and referendum. Such a statute is in fact made applicable to the entire Commonwealth, and therefore cannot be said to be a law "the operation of which is restricted to a particular town, city or other political subdivision or to particular districts or locali-
ties of the commonwealth." To construe the amendment otherwise would be to overlook its real character of a far-reaching reservation of power to the people, and thereby to thwart by a narrow construction the will of the people as expressed therein.

Accordingly, in my opinion, the statute to which you refer does not deal with a matter expressly excluded from the operation of the referendum by the provisions of the Constitution, and therefore, in my judgment, it cannot take effect earlier than ninety days after it became a law by approval by the Governor on April 18, 1919.


Under Gen. St. 1916, c. 290, the Massachusetts Highway Commission may, within one year of the time of conviction of an operator of a motor vehicle for violation of a law which provides for the surrender and revocation of a license, issue a new license where, on appeal, the district attorney has made an entry of nol. pros., but may not do so where, on appeal, a plea of nolo contendere is accepted by the court and the case is placed on file.

You have requested my opinion as to the following: —

Assuming that the holder of an operator's license has been convicted in the lower court of operating a motor vehicle while under the influence of intoxicating liquor, and that such conviction has been followed by the surrender and revocation of the license, has this Commission the power, after an investigation or upon hearing, to issue a new license to such operator under the following circumstances, viz.: —

(a) Within one year from such conviction in the lower court, in the event that in the Superior Court the entry of nol. pros. is made by the district attorney.

(b) Within one year from such conviction in the lower court, in the event that in the Superior Court the plea of nolo contendere is accepted and the case placed on file.

Gen. St. 1916, c. 290, provides: —

Whoever upon any way operates an automobile or motor cycle, recklessly, or while under the influence of intoxicating liquor, or so that the lives or safety of the public might be endangered, or upon a bet, wager or
race, or whoever operates a motor vehicle for the purpose of making a
record and thereby violates any provision of sections sixteen and seventeen
of this act, or whoever without stopping and making known his name, 
residence, and the number of his motor vehicle goes away after knowingly 
colliding with or otherwise causing injury to any other vehicle or property,
or whoever uses a motor vehicle without authority, shall be punished [as
therein provided].

The statute further provides: —

A conviction of a violation of this section shall be reported forthwith
by the court or magistrate to the commission which may in any event
and shall, unless the court or magistrate recommends otherwise, revoke
immediately the license of the person so convicted, and no appeal from
the judgment shall operate to stay the revocation of the license. . . . 
The commission in its discretion may issue a new license to any person
acquitted in the appellate court, or after an investigation or upon hearing
may issue a new license to a person convicted in any court: provided,
that no new license shall be issued by the commission to any person con-
victed of operating a motor vehicle while under the influence of intoxicat-
ing liquor until one year after the date of final conviction, if for a first
offence, or five years after any subsequent conviction, and to any person
convicted of violating any other provision of this section until sixty days
after the date of final conviction if for a first offence, or one year after the
date of any subsequent conviction.

It follows that upon a conviction in the lower court of
operating a motor vehicle while under the influence of intoxicat-
ing liquor the license then held by the person so operating
a motor vehicle is to be forthwith revoked, unless the court or
magistrate recommends otherwise; and that no appeal from the
judgment in the lower court shall operate to stay the revocation
of the license. The person so convicted cannot again receive
a new license unless he is acquitted in the appellate court, or
until one year has expired after the date of final conviction.

The questions which you raise, therefore, are dependent
upon whether what is done in the Superior Court amounts to
an acquittal or a conviction.

The words of the statute are to be given a reasonable con-
struction. I am of the opinion that the word “acquittal,” as
used in the statute, includes more than an acquittal by a jury.
I do not think it could have been intended by the Legislature
that where a complaint in the Superior Court is quashed by the court, or an entry of *nolle prosequi* is made by the district attorney, and no new complaint is brought, the person charged is to be forever barred from receiving a new license. This result will follow if the word “acquittal” is to be construed in its strict sense.

In the case of *Lizotte v. Dloska*, 200 Mass. 327, it was said by Chief Justice Rugg, at page 329, that “the entry of a *nolle prosequi* is final so far as the particular case is concerned.” While it is true that in some jurisdictions a *nolle prosequi* may be removed upon order of the court, and that that question has not been determined in this Commonwealth, yet it has always been considered, so far as other proceedings were concerned, that the entry of a *nolle prosequi* was to be considered as a final determination of the case. As was said by the chief justice in *Lizotte v. Dloska*:

> The district attorney had the absolute power to enter a *nolle prosequi* upon his official responsibility, without the approval or intervention of the court. He alone is answerable for the exercise of his discretion in this respect. It is presumed that he will act under such a heavy sense of obligation for enforcement of the law and sensitive consciousness of important public duty that no wrongful act will be committed.

It was said in *Commonwealth v. Lockwood*, 109 Mass. 323, that

> The ordinary legal meaning of “conviction,” when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt.

And this meaning of the word “conviction” was followed in the case of *Munkley v. Hoyt*, 179 Mass. 108.

I am of the opinion that the meaning of the word “conviction,” as used in the statute, is the ordinary legal meaning, and that the expression “final conviction,” as used in the statute, refers to that stage of the case where nothing is left to be done other than the imposition of the judgment or sentence.

In the case of *White v. Creamer*, 175 Mass. 567, it was said
that a sentence imposed after a plea of nolo contendere amounts to a conviction in the case in which the plea is entered, although such record could not be used in another judicial proceeding to show that the defendant was guilty. It is my opinion, therefore, that where a plea of nolo contendere is accepted, and the case is then placed on file, your Commission is authorized, after the expiration of one year from such plea, to issue a new license to the person entering the plea, but not before.

Accordingly, I am of the opinion that your first question is to be answered in the affirmative, and your second question in the negative.

Inmate of Public Institution — Acquiring a Settlement.

Under the provisions of St. 1911, c. 669, the time spent by a pauper as an inmate in any public institution at public expense, irrespective of the source from which the public funds come, is to be counted in computing the time for acquiring a settlement unless he tenders reimbursement within two years of the time of receiving such relief.

You have requested my opinion as to whether aid rendered to a poor person in a city or town hospital, which is supported in whole or in part by an appropriation other than that granted the overseers of the poor or board of health, prevents the gaining or acquiring of a settlement if such aid is not paid for by the overseers of the poor, by the board of health or by the State Board of Charity.

I assume by the use of the words “poor person” you have reference to a pauper.

St. 1911, c. 669, § 4, reads, in part, as follows: —

... But the time during which a person shall have been an inmate of any public hospital, public sanatorium, almshouse, jail, prison, or other public institution, within the commonwealth, or of a soldiers’ or sailors’ home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or for losing a settlement, except as provided in section two.

This provision of law applies to an inmate of any of the public institutions referred to, irrespective of the source from which the public funds come.
St. 1911, c. 669, § 2, referred to, reads as follows: —

No person shall acquire a settlement, or be in process of acquiring a settlement, while receiving relief as a pauper, unless, within two years after the time of receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth, or to the city or town furnishing the same.

Accordingly, I am of the opinion that under the provisions of section 4, above referred to, irrespective of the source of the aid rendered to a pauper in a city or town hospital, the time spent there is not to be counted in computing the time for gaining or acquiring a settlement, except as provided in section 2, by which, if he shall tender reimbursement of the cost to the city or town furnishing the same, he shall be in the process of acquiring a settlement.

Town Treasurer — Women — Eligibility to hold Office.

Under the provisions of St. 1913, c. 835, § 400, a woman is ineligible to election to the office of town treasurer.

You have requested my opinion as to whether a woman may fill the position of town treasurer.

St. 1913, c. 835, § 400, provides: —

Every town at its annual meeting shall in every year, except as is otherwise provided in the following sections, choose from the inhabitants thereof the following named town officers, who, except as otherwise provided in the following sections, shall serve during the year: . . .

Among the officers so to be chosen, as specified in the section, is a town treasurer. It is also provided, at the end of the section, that —

Women shall be eligible as overseers of the poor and school committee.

This provision grew out of the provision of St. 1874, c. 389, § 1, that “no person shall be deemed to be ineligible to serve upon a school committee by reason of sex;” and from the
provision of St. 1886, c. 150, that "no person shall be ineligible for the office of overseer of the poor by reason of sex."

The language used in said section 400 is substantially the same as that contained in R. L., c. 11, § 334. The expression that the town shall choose from the inhabitants thereof the various town officers enumerated appears in R. S., c. 15, § 33; Gen. Sts., c. 18, § 31; and P. S., c. 27, § 78.

The word "inhabitant," as used in these various statutes, in my opinion, does not include women unless specific provision is made therefor by the Legislature. This view is confirmed by the action of the Legislature in 1874 and in 1886, wherein women were made eligible to serve as members of a school committee and as overseers of the poor. It is also confirmed by the views expressed by the justices of the Supreme Judicial Court in an opinion rendered to the House of Representatives Feb. 6, 1811 (7 Mass. 523). See also Opinions of the Justices, 122 Mass. 594; 115 Mass. 602; 165 Mass. 599.

Accordingly, I am of the opinion that a woman is ineligible to be elected town treasurer, under the provisions of St. 1913, c. 835, § 400.

Co-operative Banks — Right to borrow Money.

A co-operative bank has no right to borrow money from national banks or trust companies for any purpose other than to meet an unusual demand by its depositors for withdrawals.

You have requested my opinion as to whether a co-operative bank may borrow money from a national bank or trust company in order to meet the demands of its borrowers.

Sections 1 and 19 of chapter 623 of the Acts of 1912 provide only for loaning accumulations of a co-operative bank, and do not provide for loaning borrowed money. The only provision of our statutes giving power to a co-operative bank to borrow is found in section 4 of chapter 643 of the Acts of 1914, which reads in part as follows:

On any occasion when there is an unusual demand by depositors for withdrawal from the funds of any co-operative bank . . . such co-
operative bank by a vote of at least three-fifths of its directors and with
the consent of the bank commissioner, may borrow from any national
bank, savings bank, co-operative bank or trust company.

I am of the opinion that the Legislature, by passing this statute, intended that co-operative banks in this Common-
wealth should be allowed to borrow only for the purpose set
forth, namely, to meet an unusual demand by its depositors
for withdrawals, and that by implication a co-operative bank
has no right to borrow money for any other purpose.

Life Insurance Companies — Loans to Policyholders —
Home Purchase Plan.

A life insurance company may constitute the taking out of a policy of insurance a
condition precedent to the making of a loan, provided such condition is stated
in the policy and made available to all policyholders of the same class.

You have requested my opinion as to whether a plan, called
the Home Purchase Plan, proposed by the Equitable Life Ass-
urance Society, will be in violation of the provisions of St.
1907, c. 576, § 69. You state, in brief, that it is an arrange-
ment whereby the Equitable Life Assurance Society will make
a loan to a person desiring to build a home, a condition of the
loan being that the borrower shall take out a policy of life in-
surance in the company. The premium on the policy, interest
on the loan and a certain agreed amount to be paid periodically
on the principal of the mortgage are paid in monthly instal-
ments, so graduated that at the end of ten years the property
is free from encumbrance and the life insurance policy is re-
assigned to the borrower.

The part of said section 69 involved is as follows:

... nor shall any such company or agent pay or allow, or offer to
pay or allow as inducement to insurance, any rebate of premium payable
on the policy, or any special favor or advantage in the dividends or other
benefit to accrue thereon, or any valuable consideration or inducement not
specified in the policy contract of insurance; or give, sell or purchase or
offer to give, sell or purchase as inducement to insurance or in connection
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therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the policy.

In an opinion given to you April 30, 1919, in relation to the method of the conduct of business by the Morris Plan Insurance Society, I expressed doubt as to whether the provisions of said section 69 authorized an insurance company to make any inducement it saw fit so long as the inducement was set out in the policy, and stated that if the section were held to authorize insurance companies to specify and undertake obligations foreign to insurance, grave practical difficulties would arise in carrying out the provisions of the insurance law.

But the investment of the money paid to insurance companies by policyholders is not foreign to insurance; in fact, it is a part of the business of the companies. In effect, it is simply preferring the policyholders in the investment of the companies' funds. Thus the privilege of obtaining a loan from a company upon a mortgage of residential property, the privilege and the terms thereof being stated in the policy as a part of the contract of insurance, and made available to all policyholders in the same class, does not, it seems to me, contravene the provisions of said section 69.

Accordingly, I beg to advise you that if the privilege of obtaining the loan is stated as one of the privileges enuring to the benefit of the assured under the policy, I am of the opinion that it will not be in violation of the provisions of said section 69.

State and Federal Military Service — Computation of Time — Service Medal.

The time of service of one who was lawfully drafted into the service of the United States while a member of the organized militia of the Commonwealth is to be computed in measuring the time of honorable service required for a State long-service medal.

You ask me the following questions in relation to Gen. St. 1917, c. 327, § 191: —
1. Can the words "honorable service," as contained in said section, be construed to mean any service other than service in the Massachusetts Volunteer Militia or the Massachusetts National Guard?

2. Can Federal service subsequent to the 5th of August, 1917, be allowed in computing the time required for a State long-service medal, under the provisions of said section?

Section 191 is as follows: —

To each officer or enlisted man who completes nine years of honorable service, continuous or otherwise, there shall be issued a medal, and, for each additional five years of like service, a clasp to be affixed thereto. Active, retired or honorably discharged officers and enlisted men who have served in the military or naval service of the United States in time of war and have been honorably discharged therefrom, shall receive an additional clasp indicative of such service, to be affixed to the medal herein provided for.

I understand the questions arise in relation to the application of a private of Co. B, 9th Regiment Infantry, for a State long-service medal. You state in your letter that he was drafted into the service of the United States under a proclamation of the President, published July 12, 1917, in accordance with the act of Congress of May 18, 1917. The question arises because of the following provision in the proclamation: —

Par. III. All persons hereby drafted shall on and from the 5 August 1917, stand discharged from the militia, . . .

I am of the opinion that the service of the private under the draft is to be computed as a part of the service required under the provisions of section 191. The section provides that "to each officer or enlisted man who completes nine years of honorable service, continuous or otherwise, there shall be issued a medal." It further provides that "active, retired or honorably discharged officers and enlisted men who have served in the military or naval service of the United States in time of war and have been honorably discharged therefrom, shall receive an additional clasp indicative of such service, to be affixed to the medal herein provided for."

It is my view that the statute contemplates that all service
which is directly connected with his enlistment in the organized militia of the Commonwealth is to be computed, and if, as a part of the obligation he entered into when he enlisted, he is called upon to act in the service of the United States government, it is to be deemed a part of his service within the provisions of the section.

I question the authority of the President to discharge any private who is enlisted in the organized militia of a State from service which he is under obligation to perform for the State, except for the time that the President of the United States deems it necessary to draft his services for Federal purposes. However, for the reasons stated above, I think it unnecessary to determine this question.

Accordingly, your questions are to be answered in the affirmative.

City of Boston — Police Commissioner — Duties — City Council.

The Boston city council has no power to impose duties upon the police commissioner of its city other than those which incidentally arise from his responsibility to enforce the law.

You have requested my opinion as to whether, assuming that the city council of Boston has the power to regulate by ordinance the operation of motor vehicles used for the carriage of passengers for hire in the city of Boston, it may properly delegate to you or impose upon you the duty of licensing the operators of such vehicles and of inspecting such vehicles.

While there is some doubt as to whether the Attorney-General is required to advise you in relation to your duties, I have heretofore taken the position that, in relation to State offices of a similar nature to yours, I would advise so far as such advice related to the construction of the statutes creating and governing such offices, and, accordingly, to that extent I answer your inquiry.

The office of police commissioner for the city of Boston was created by St. 1906, c. 291. That statute provides that he is
to be appointed by the Governor, with the advice and consent of the Council. Section 10 of said chapter provides that, except as otherwise provided therein, all the powers and duties that were conferred or imposed by law upon the board of police of the city of Boston at the time of the passage of that act are conferred and imposed upon said police commissioner. The powers and duties that were conferred and imposed by law upon the board of police of the city of Boston at the time of the passage of said chapter 291 are defined in St. 1885, c. 323, § 2, as follows: —

The board of police shall have authority to appoint and establish and organize the police of said city of Boston, and make all needful rules and regulations for its efficiency. All the powers now vested in the board of police commissioners in said city of Boston, by the statutes of the Commonwealth or by the ordinances, by-laws, rules and regulations of said city, except as otherwise hereby provided, are hereby conferred upon and vested in said board of police.

By St. 1878, c. 244, § 2, it was provided that all the powers vested by the statutes of the Commonwealth in the board of aldermen of the city of Boston in relation to the administration of police and the appointment of watchmen and policemen in said city should be vested in the board of police commissioners.

Thus, it becomes the duty of the police commissioner to have charge of and direct the activities of the police of the city of Boston in the maintenance of order and in the enforcement of law, and to perform such other duties as are imposed upon him by the statute by which the office was created. By the provisions of that statute the salary of the police commissioner is established, and, subject to the approval of the Governor and Council, he is to be provided with rooms, suitably furnished, and convenient and suitable for the performance of his duties, the expense of which is to be borne by the city of Boston. He is also authorized to employ such clerks, stenographers and other employees as he may deem necessary for the proper performance of the duties of his office, and to appoint, establish and organize the police of said city, and to make all needful
rules and regulations for its efficiency, subject only to the provision that he shall not appoint a greater number of police than the number authorized at the time of the passage of the act, nor change the compensation of such police except with the approval of the mayor: provided, however, that he is authorized, without such approval, to fix the salary of the police superintendent, which shall not exceed five thousand dollars per annum. There is no intimation in said statute that the police commissioner is to be in any way subject to the direction or control of the city council or the mayor in the performance of his duties.

I think it plain from the provisions of the statute creating the office and defining the duties of the police commissioner that he is a State official, responsible only to the Governor and to the Legislature, and that only by statute can additional duties be imposed or conferred upon him. Furthermore, it is my opinion that he is not warranted in assuming any duties other than those imposed upon him by statute.

Accordingly, I am of the opinion that it is beyond the power of the city council of Boston to impose any duties upon you other than those which incidentally arise from the responsibility that you are under to enforce the law, which necessarily includes the enforcement of valid ordinances to which penalties are attached.
HENRY A. WYMAN, ATTORNEY-GENERAL.

BUREAU OF STATISTICS — CERTIFICATION OF TOWN NOTES — REPAIRS.

Cities and towns are prohibited by law from issuing notes in payment for work in a schoolhouse unless it is for an addition to the building which increases its floor space.

You have requested an opinion as to your authority to certify notes of the town of Provincetown under the following article and vote: —

To act upon the report of the committee appointed at the last annual town meeting to consider the matter of heating and ventilating the Governor Bradford Schoolhouse.

It was voted that the report of the committee recommending an appropriation of $6,000 be accepted.

It was voted that $2,000 of this money be paid in 1920, $2,000 in 1921 and $2,000 in 1922.

The report of the committee referred to in said vote shows that no work was contemplated except to make changes in sanitary conditions, heating and ventilation. The report does not refer to any addition to the building, although it is contended that additional floor space would be secured by reason of the changes in equipment.

The laws on municipal indebtedness are found in St. 1913, c. 719. Clause 4 of section 5 of said chapter 719, which applies to the present case, reads as follows: —
Cities and towns may incur debt, within the limit of indebtedness prescribed in this act, for the following purposes, and payable within the periods hereinafter specified:—

(4) For the construction of additions to schoolhouses or buildings to be used for any municipal purpose, including the cost of original equipment and furnishings, where such additions increase the floor space of said buildings to which such additions are made, twenty years.

It would appear that neither an addition to a municipal building nor an increase in floor space in such building, alone, comes within the provisions of the statute, but that there must be an addition as well as an increased floor space in order to come within the provisions of the law. This statute was obviously enacted in an attempt to prevent increasing town debts for incidental or ordinary expenses, such as alterations and repairs, it evidently being deemed to be sound business policy to pay for such expenses out of the tax levy. This might possibly be accomplished by other language which would permit changes in equipment of an expensive or unusual nature, but in case language in the statute of a more general character were used, the purpose of the law might more easily be defeated. The Legislature having specifically expressed that additions are essential in order to entitle a town to the provisions of the "borrowing statute," it is my opinion that you may not properly certify the notes in question.
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City of Boston — Mayor — Police Commissioner — Police.

St. 1885, c. 323, § 6, is still in force and applicable to the police commissioner for the city of Boston. In case of action by the mayor under its provisions, the internal administration and personnel of the police force remain solely under the direction and control of the commissioner.

The mayor of Boston has no authority to direct the reinstatement of any police officer removed by the commissioner.

Under the provisions of Gen. St. 1919, c. 150, a war veteran is eligible to appointment to the police force of the city of Boston if he is a resident of this Commonwealth.

You request my opinion upon certain questions of law, and in reply thereto I beg to submit the following opinion.

In answer to your first inquiry, namely, whether the provisions of St. 1885, c. 323, § 6, are in force and applicable to the police commissioner, I am of the opinion that they are still in force and applicable to the police commissioner.

Your second question is whether the powers of the mayor and the duties of the police commissioner, as provided by St. 1885, c. 323, § 6, empower the mayor to control, direct or provide for the internal administration of the police force or its personnel under established regulations. In reply to this question I beg to advise you that in my opinion the internal administration of the police force of the city of Boston and its personnel remain under the control and direction of the police commissioner alone, in case of action by the mayor under authority of this statute.

In reply to your further specific question as to whether the mayor may direct the reinstatement of officers removed from the police force by the commissioner, in accordance with existing rules and regulations of the police department, I am of opinion that the mayor is without power to direct such reinstatement.

You ask my opinion as to whether, under the provisions of Gen. St. 1919, c. 150, a veteran, to be eligible for appointment to the police force of the city of Boston, must be a resident of that city, or whether he may be so appointed if a resident of the Commonwealth. I am of opinion that it is not necessary, in order for a veteran to be eligible for such appointment, that
he be a resident of said city, but that it is sufficient if he is a resident of this Commonwealth.

In my opinion, your last request presents a question of fact which, in the first instance, at least, is to be determined by you.

CONSTITUTIONAL LAW — RIGHT TO WITHDRAW PETITION FOR REFERENDUM.

A completed petition for a referendum on Gen. St. 1919, c. 116, after it has been filed with the Secretary of the Commonwealth cannot be withdrawn by one of its signers.

You have requested my opinion upon the question of whether a petition asking for a referendum on Gen. St. 1919, c. 116, and requesting that the operation of such law be suspended, may now be withdrawn by one of the signers of such petition.

It appears from your communication and a copy of a letter which you enclosed therewith that this petition has been completed by filing at your office the signatures of not less than 15,000 qualified voters within the time prescribed by the Constitution. The filing of these signatures had the effect of suspending the operation of this law, and made it the duty of the Secretary of the Commonwealth to submit the law to the people at the next State election. There is no provision in our Constitution which provides for the withdrawal of a referendum petition after it has been completed, except where the law on which a referendum is asked has been repealed. The law under consideration, while it was modified in some respects by chapter 326 of the General Acts of the present year, has not been repealed.

Accordingly, I am of opinion that your question must be answered in the negative.
Fish and Game Laws — Conviction for Violation — Surrender of Certificate.

Under Gen. St. 1919, c. 296, § 12, the imposition of a fine on a plea of *nolo contendere* constitutes a conviction. The filing of a case, with or without costs, upon a plea of *nolo contendere*, or upon a plea of guilty, or while an appeal from a conviction in a lower court is pending, does not constitute a conviction within the meaning of said statute.

You request my opinion as to the interpretation of Gen. St. 1919, c. 296, § 12.

This section reads, in part, as follows: —

The certificate of any person who shall be convicted of a violation of any of the fish and game laws or of any provision of this act shall be void, and his certificate shall immediately be surrendered to the officer who secures such conviction, and the officer shall forthwith forward the same to the commissioners, who shall cancel it and notify the clerk in whose city or town the certificate was recorded, of its cancellation; and no person shall be entitled to receive a certificate during the period of one year after the date of such conviction. A certificate issued to any person within one year after such a conviction shall be void, and shall be surrendered on demand of any officer authorized to enforce the fish and game laws.

The specific questions upon which you request my opinion are whether the following sets of facts amount to convictions, within the meaning of the law above quoted. The situations stated by you are as follows: —

1. Where the defendant pleads *nolo contendere* and the case is placed on file.
2. Where the defendant pleads *nolo contendere* and the court imposes a fine.
3. Where the defendant (in the Superior Court) pleads *nolo contendere* and upon payment of costs the case is placed on file.
4. Where the defendant pleads guilty and the case is placed on file.
5. Where the defendant pleads not guilty and is found guilty in the lower court and fined, and the defendant appeals to the Superior Court so that he will be allowed to retain his license pending the disposition of the case in the Superior Court.

In *Commonwealth v. Kiley*, 150 Mass. 325, it was held that the word "conviction," in St. 1887, c. 392, providing that "the
conviction by a court” of competent jurisdiction of a licensee for violating any of the provisions of the laws relating to intoxicating liquors “shall of itself make the license of such person void,” implied a final judgment of the court, and that the filing of a case by the court after a verdict of guilty did not amount to such a conviction.

A contrary conclusion was arrived at by our Supreme Judicial Court in the case of Munkley v. Hoyt, 179 Mass. 108, where the term “conviction,” in a somewhat different statute, was held to include a situation where the defendant pleaded guilty and his case was placed on file.

I am of opinion that, so far as your questions involve a determination of whether the placing of a case on file after a plea or a verdict amounts to a conviction, within the meaning of the instant statute, they are to be governed by the decision in Commonwealth v. Kiley, supra, and, accordingly, I beg to advise that the facts stated in your first, third and fourth questions do not amount to a conviction, within the meaning of the statute.

In regard to the second question, namely, where a fine is imposed after a plea of nolo contendere, I am of opinion that this amounts to a conviction, within the meaning of this statute. While it is well recognized that a plea of nolo contendere cannot be used in any other proceedings as an admission of guilt (Olszewski v. Goldberg, 223 Mass. 27), it amounts, when accepted by the court, to a plea of guilty for the purposes of the particular case. Commonwealth v. Ingersoll, 145 Mass. 381. In White v. Creamer, 175 Mass. 567, the court, in considering the effect of this plea, said: “We do not doubt that a sentence imposed after a plea of nolo contendere amounts to a conviction in the case in which the plea is entered.”

It follows from the foregoing authorities that if it were necessary to institute further proceedings to secure the forfeiture of the defendant’s license under our statute, a sentence imposed after a plea of nolo contendere could not be used as a basis for such proceedings. This is the conclusion arrived at by my predecessor in office, in an opinion rendered by him.
to the Board of Registration in Medicine under date of Dec. 9, 1915, in which he ruled that the imposition of a fine upon the defendant after acceptance by the court of a plea of *nolo contendere* did not warrant that Board in revoking any certificate held by him or in cancelling his registration as a physician, under R. L., c. 76, § 3, which provides that the Board, "after hearing, may by unanimous vote revoke any certificate issued by it and cancel the registration of any physician who has been convicted of a felony or of any crime in the practice of his profession." Under the statute with which we are concerned, however, no further proceedings are required in order to effect a forfeiture of the defendant's certificate. Such forfeiture automatically takes effect upon the conviction of the holder, and is in fact an additional punishment imposed upon conviction in the particular case.

Accordingly, I am of opinion that, as above stated, the facts set forth in your second question constitute a conviction, within the meaning of the statute in question.

Your fifth question is whether a conviction is had, within the meaning of this statute, where the defendant, pleading not guilty but being found guilty in the lower court and fined, appealed to the Superior Court. This question is, in my judgment, disposed of by an opinion rendered to the State Board of Health under date of Feb. 25, 1914, to the effect that the term "conviction" in a similar statute implied a final judgment, and did not apply while an appeal was pending from a lower court. IV Op. Atty.-Gen. 157. It results from this that in the situation set forth in your fifth inquiry the defendant cannot be considered as having been convicted while his appeal is still pending.

To recapitulate, the answers to questions 1, 3, 4 and 5 are in the negative; and to question 2, in the affirmative.
Secretary of the Commonwealth — Petition for Referendum — Public Opinion — Printing on Ballot.

Under the provisions of St. 1913, c. 819, the Secretary of the Commonwealth must, on a petition properly signed and filed with him, place on the official ballot, for submission to the voters of a senatorial or representative district, instructions to the senators and representatives of such districts to vote for certain legislation, if in the opinion of the Secretary it is a question of public policy.

I have your letter in which you state that there have been filed in the office of the Secretary of the Commonwealth, under the provisions of St. 1913, c. 819, petitions for the submission of the following question in certain senatorial and representative districts, namely:

Shall the senator and representatives from this district be instructed to vote for legislation to regulate and license the manufacture and sale of beverages containing not over 4 per cent of alcohol by weight and to define same to be non-intoxicating?

You request my opinion as to whether this question should be placed upon the official ballot in said districts at the next State election.

St. 1913, c. 819, § 1, 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 secretary of the commonwealth shall determine if such question is one of public policy, and if he shall so determine shall draft it in such simple, unequivocal and adequate form as he shall deem best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this act the secretary shall place such question on the official ballot to be used in that senatorial or representative district at the next state election.

I beg to advise that, in my opinion, there is nothing contained in the question which is proposed to be submitted which, as a matter of law, would prevent the Secretary of the Commonwealth from determining the question to be one of public policy. Whether the proposed question is, as a matter
of fact, one of public policy is for the Secretary of the Commonwealth alone to determine. If the Secretary should determine that it is a question of public policy, it of course follows that the question should be placed on the official ballots, as provided in said act.

War Bonus — Draftee — Discharge for Physical Disqualification or Bad Conduct.

The provisions of Gen. St. 1919, c. 283, granting a war bonus to men honorably discharged from the service of the United States in the World War, do not apply to drafted men who were passed by the draft board, sent to army camps and there discharged because physically disqualified, or to men discharged on account of bad conduct or similar ground.

You have asked my opinion with reference to several questions which have arisen as to the application of Gen. St. 1919, c. 283, entitled "An Act to provide suitable recognition for those residents of Massachusetts who served in the army and navy of the United States during the war with Germany.

The purpose of this statute is plainly set forth in its first section, and the remainder of the act must in each instance be construed in the light of this purpose. That section is as follows:

In order to promote the spirit of patriotism and loyalty, in testimony of the gratitude of the commonwealth, and in recognition of the services of certain residents of Massachusetts in the army and navy of the United States during the war with Germany, to the full extent of the demands made upon them and of their opportunity, the payments hereinafter specified are hereby authorized.

Your first question is whether men who were summoned in the draft, passed by the draft boards, sent to one of the army camps and there found physically disqualified, and given a discharge from the draft, are entitled to the benefits of this act. I understand that in each instance these men received no discharge from the army, but merely a discharge from the obligations of the Selective Service Law. Apparently, they never
became sufficiently members of the army to be discharged therefrom.

That portion of section 2 of the statute which specifies the persons who are to receive the benefit of the act is as follows: —

Upon application, as hereinafter provided, there shall be allowed and paid out of the treasury of the commonwealth, to each commissioned officer, enlisted man, field clerk and army or navy nurse duly recognized as such by the war or navy department, who was mustered into the federal service and reported for active duty subsequently to February third, nineteen hundred and seventeen and prior to November eleventh, nineteen hundred and eighteen, and to each commissioned officer, warrant officer, nurse and enlisted man, who enlisted or was enrolled in, or was mustered into the federal service and who has been called and reported for active duty in the United States Navy, United States Naval Reserve Forces, United States Marine Corps, United States Coast Guard, or the National Navy Volunteers, subsequently to said February third, and prior to said November eleventh, and to every man who served during the war in the regular army, navy or marine corps, or to the dependents or heirs at law of the persons above enumerated, as provided in section three, the sum of one hundred dollars: . . .

In my judgment, construing the language just quoted in the light of the purpose of the act as specified in section 1, it cannot be said that the class of men to which you refer was enlisted in or had been enrolled in or had been mustered into the Federal service, within the meaning of this statute. These men were never in the army of the United States to a sufficient extent to be discharged from it. In my opinion, it cannot be said that they performed "services . . . in the army . . . of the United States" of the character intended by this statute to be recognized. Accordingly, I must advise you that men of the class to which you refer are not entitled to the benefits of the statute.

You also request my opinion as to whether men who actually entered the Federal service during the period specified in the statute, but who subsequently received discharges not declared by their terms to be either honorable or dishonorable, but specified to be given on account of bad conduct or some similar ground, are entitled to the benefits of this act.
Section 5 of the statute provides in part as follows: —

No person shall be eligible for any benefit accruing under this act who (1) shall have received a dishonorable discharge from the service of the United States, . . .

In my judgment, this provision, when read in the light of the purpose of the act as declared in section 1, must not be strictly construed as referring only to persons who receive discharges expressly declared by their terms to be dishonorable. It should, rather, in my judgment, be given a broader construction and be held to exclude from the benefits of the act all persons who did not receive an honorable discharge. It was the purpose of the statute, as declared in section 1, to recognize all services rendered in the army or navy by citizens of Massachusetts “to the full extent of the demands made upon them and of their opportunity.” I cannot persuade myself that the services rendered by a man who so conducted himself as a member of the army of the United States that it became necessary to discharge him therefrom for misconduct were services of the character intended to be recognized. I am unwilling to assume that the General Court intended thus to reward any man who so failed to perform his duties that he was discharged for misconduct.

"Anti-aid" Amendment — Americanization Classes — Bureau of Immigration.

By virtue of the "anti-aid" amendment, Article XLVI, the provisions of Gen. St. 1919, c. 295, would not apply to educational classes for adult immigrants organized in factories, taught by private instructors and supervised by a supervisor employed and paid for by a city or town.

The State Board of Education, under the power granted it by Gen. St. 1919, c. 295, may train and employ teachers for naturalization classes conducted by the Bureau of Immigration.

You have requested my opinion relative to certain questions which have been raised in connection with Gen. St. 1919, c. 295, which provides for the promotion of Americanization through education of adult persons unable to use the English language.
Your first question is based upon the following circumstances: The school authorities in a city vote to accept the provisions of chapter 295. In this city there are several classes for adult immigrants, which have been organized in factories and which are taught by factory foremen or superintendents. These instructors are not in the employ of the school committee. The school committee and the factory employers both wish, however, to have these classes conducted according to public school requirements. To bring this to pass, the school committee plans to engage a supervisor who will visit these classes periodically and exercise general professional authority over them. Your first question is "whether or not such classes are to be considered under the control of public school authorities to the extent that this department will be enabled to recommend reimbursement for the salary of this supervisor."

My answer to this question is in the negative because of the so-called "anti-aid" amendment to our Constitution, being Article XLVI, which provides, in part, that no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the Commonwealth for the purpose of maintaining or aiding any school or any educational undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the Commonwealth. The provisions of chapter 295 do not, therefore, apply to classes organized in factories, as set forth by you, nor to supervisors over such classes.

Your second question is raised on the following facts: The Bureau of Immigration engages in the recruiting of naturalization classes. The Bureau requests your Board, under the power bestowed upon it by chapter 295, to supply teachers for these classes. You ask my opinion as to whether or not the phrase "to provide teachers and supervisors in Americanization work" is to be interpreted as meaning that under the provisions of this act the Board may train teachers and employ them for the above purpose.

In my opinion, by the provisions of section 1 of chapter 295
it was intended by the Legislature that the Board of Education, acting through the Department of University Extension, should be empowered to promote Americanization, in the first place by co-operation with cities and towns, and secondly by co-operation with other proper agencies of the Commonwealth, as is indicated by the general provision at the end of section 1, which empowers you "to provide teachers and supervisors in Americanization work."

Accordingly, I am of the opinion that your Board may train teachers and employ them, under the provisions of said chapter 295, for the naturalization classes of the Bureau of Immigration.

Constitutional Law — Public Operation of Street Railway — Service at Cost — Zones.

Spec. St. 1918, c. 159, providing for the fixing of such rates by the public trustees operating the Boston Elevated Railway Company as will reasonably insure a sufficient income to meet the cost of service, constitutes a contract binding upon the Commonwealth; any departure therefrom would be unconstitutional unless assented to by the stockholders.

Rates fixed on the "cost of service" principle may be determined on a zone basis. By the term "cost of service" as used in connection with Spec. St. 1918, c. 159, is meant the cost to the Boston Elevated Railway Company, exclusive of its expense to other agencies.

The General Court may authorize the taking of the Boston Elevated Railway Company in the exercise of the right of eminent domain.

Replying to the oral questions submitted to me for an opinion by you, which are as set out below, I beg to advise you as follows.

1. The first question is whether any departure from the service at cost principle prescribed by Spec. St. 1918, c. 159, would need to be assented to by the Boston Elevated Railway Company.

Section 18 of that act provides as follows: —

None of the provisions of this act shall be construed to constitute a contract binding upon the commonwealth other than the provisions which define the terms and conditions under which, during the period of public management and operation, the property owned, leased or
operated by the Boston Elevated Railway Company shall be managed
and operated by the said trustees, and the provisions of section thirteen,
which provisions shall constitute a contract binding upon the common-
wealth.

Section 6 of that act provides, in part, as follows: —

The trustees shall from time to time, in the manner hereinafter pro-
vided, fix such rates of fare as will reasonably insure sufficient income
to meet the cost of the service, . . .

It seems to me that the provision last above quoted, as to
the manner in which the rates of fare are to be fixed, is a term
and condition under which the property is to be managed and
operated by the trustees, within the meaning of said section 18,
and therefore constitutes a contract binding upon the Com-
monwealth, as provided in said section. It would seem to
follow from this that any departure from the service at cost
principle as prescribed by this act would be impairing the
obligation of this contract, contrary to the provisions of the
Constitution of the United States. It is my opinion, therefore,
that this cannot legally be done without the assent of the
stockholders of the Boston Elevated Railway Company.

The justices of our Supreme Judicial Court, in an opinion
given to the Senate under date of April 2, 1919 (231 Mass.
603), held that Senate Bill No. 54, which provided a maximum
fare of 5 cents on the lines of the Boston Elevated Railway
Company, was constitutional; but it is to be noted that sec-
tion 6 of that bill provided that it should not take effect until
it was accepted by a majority of the stockholders of the Boston
Elevated Railway Company.

2. As to the second question, I beg to advise that I can see no
reason why the system of the Boston Elevated Railway Com-
pany cannot be divided into zones for the purpose of determin-
ing rates of fare, and different rates of fare applied to the
various zones: provided, however, that such rates insure sufficient
income to meet the cost of service, within the meaning of sec-
tion 6 of said chapter 159.

3. If the Boston Elevated Railway Company is legally freed
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from its obligation to pay rental for the use of its subways, the rental of which it is so relieved should not be included in determining the cost of the service, and the fact that an amount equal to this rental is assessed upon the metropolitan district would not change this conclusion. It seems to me that the cost of service means the cost to the Boston Elevated Railway Company, and in determining this cost the expense which it involves to other agencies should not be included.

Replying to the question submitted in your letter of October 24, namely, "as to whether the State can take the property of the Boston Elevated Railway Company by condemnation to effect public ownership of the railway," I have to advise you as follows.

Under the Constitution and the decisions of our court there can be no question but that, if "the public exigencies" require the property of the Boston Elevated Railway Company to "be appropriated to public uses," it is within the constitutional power of the General Court to authorize such taking by eminent domain, making provision at the same time for the payment of reasonable compensation to the owners of said property.

Hunting License — Conviction — Forfeiture.

Under Gen. St. 1919, c. 296, a hunting license is automatically forfeited upon the conviction of the holder thereof, regardless of whether or not the officer procuring the conviction has obtained a surrender of the license, as required by law.

I have your letter in which you state that upon a plea of nolo contendere a defendant was fined $10 upon a complaint for killing a mourning dove, and that at the time of conviction he was not required to surrender his hunting license, as provided in Gen. St. 1919, c. 296. You request my opinion as to whether "this disposition of the case bars us from proceeding against him for the surrender of his license," and "if it does not, will you kindly indicate to us what action should be taken by this Board."

I advise you that, in accordance with the opinion rendered
to you September 22, upon such conviction no further proceed-
ings are required in order to effect a forfeiture of the defend-
ant's certificate. Such forfeiture automatically takes effect
upon the conviction of the holder, and is in fact an additional
punishment imposed upon conviction in the particular case.

The statute expressly states that "the certificate of any
person . . . shall be void, and his certificate shall immediately
be surrendered to the officer who secures such conviction, and
the officer shall forthwith forward the same to the commis-
ioners, who shall cancel it and notify the clerk in whose city
or town the certificate was recorded, of its cancellation."

It would appear that the officer securing this particular con-
viction failed to carry out the duties imposed upon him by the
statute. There would appear to be, however, no reason why
the officer should not now require the defendant to surrender
his certificate and forward it to you in accordance with the
terms of the statute. I doubt not that upon the proper de-
mand, if a person so convicted fails to comply forthwith, proper
proceedings may be instituted to compel the delivery of the
certificate. Furthermore, there would appear to be no objec-
tion to your notifying the city or town granting the certificate
that the same is void, and order its cancellation. The failure
of the officer to fulfill the duties imposed upon him by the
statute cannot change the force and effect of the statute in
making the certificate void, and under the circumstances set
out in your letter the person holding such certificate is without
any authority of law to act under it.

Constitutional Law — Capital Stock of Street Railway
Company — Eminent Domain.

The Legislature may authorize the taking of shares of the capital stock of a street
railway company in the exercise of the right of eminent domain.

You have requested my opinion upon the following ques-
tion: —

If public exigencies require, can the stock of the Boston Elevated
Railway Company be taken by condemnation proceedings?
I assume your inquiry to involve the question whether it is within the constitutional right of the Legislature to provide for the taking by condemnation proceedings of the capital stock of said railway company.

I do not find any constitutional provision, Federal or State, which in anywise restricts the exercise of the right of eminent domain as affecting the question at issue.

In an early case in Massachusetts, in an opinion by Chief Justice Shaw, the right of eminent domain is referred to as follows:

It is fully conceded that the right of eminent domain, the right of the sovereign, exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must judge, is a right incident to every government, and is often essential to its safety. And property is nomen generalissimum, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal heriditaments. Even the term "taking," which has sometimes been relied upon as implying something tangible or corporeal, is not used in the Massachusetts Declaration of Rights; but the provision is this: "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Declaration of Rights, art. 10. Here again the term "appropriate" is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated.

_Boston & Lowell R.R. Co. v. Salem & Lowell R.R. Co., 2 Gray, 1, 35._

In a New Jersey case decided in 1873 it was said by the court:

In the exercise of the right of eminent domain, the Legislature may authorize shares in corporations, and corporate franchises, to be taken for public uses upon just compensation. The title to this species of property is no more secure against invasion, when the public uses require it, than is the ownership of real estate. Under this paramount right in the public, subject to which all private property is held, the franchises of one corporation have been, and may be, taken and bestowed upon another.

_Black v. Delaware & Raritan Canal Co., 9 N. J. Eq., 455, 468._
It has been held that "even contracts and legislative grants, which are beyond the reach of ordinary legislation, are not exempt." *New York, Housatonic & Northern R.R. Co. v. Boston, Hartford & Erie R.R. Co.*, 36 Conn. 196, 198.

In the case of *New York, New Haven & Hartford R.R. Co. v. Offield*, 77 Conn. 417, in which the right to take two shares of stock of a railroad corporation was involved, and in which it was contended that one railroad corporation could not take the stock of another railroad corporation, it was said:—

The record shows the credit of the New Haven and Derby Railroad Company to be such that if it could provide the means for the projected improvement of its property at all, it must be by contracting loans at a higher rate of interest than would be paid by the plaintiff for similar assistance. This being so, the public interest would be better served by having the plaintiff do the work. That it is a necessary work in order to make the railroad of the greatest service to the public is admitted by the demurrer. It will therefore promote the use for which the line was originally constructed. Whatever in the nature of a property interest stands in the way of such promotion the State can put aside. Any kind of property can be taken for public use on making just compensation. The whole franchise of a corporation may be so taken. . . . Its whole property may be likewise taken. . . . Shares of stock represent an undivided interest in such franchises and property, and for the same reason can be taken, if to take them seems to the State necessary in furtherance of public uses.

This case was taken to the Supreme Court of the United States, and affirmed by a decision reported in 203 U. S. 372. See also *Contributors of the Pennsylvania Hospital v. City of Philadelphia et al.*, 245 U. S. 20; *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U. S. 390.

The right of the State to authorize the appropriation of every description of property, including every contract, whether between the State and an individual or between individuals only, for a public use, is one of its inherent powers, provided there be due process of law. The capital stock of the Boston Elevated Railway Company clearly falls within the scope of this sovereign authority of the Commonwealth, and I therefore answer your question in the affirmative.
HENRY A. WYMAN, ATTORNEY-GENERAL.

Constitutional Law — Secretary of the Commonwealth — Liquor License — Printing on Ballot.

Under the provisions of St. 1913, c. 835, § 419, the Secretary of the Commonwealth is bound to place on the ballots sent to towns the question, "Shall licenses be granted for the sale of intoxicating liquors in this town?" as nothing therein contained is in violation of the prohibition amendment or the National Prohibition Act.

You have requested my opinion upon the question of whether it is your duty to place upon the ballots which are sent to the town clerk of each town not using official ballots the question, "Shall licenses be granted for the sale of intoxicating liquors in this town?" in view of the so-called prohibition amendment to the Constitution of the United States and the acts of Congress passed for the enforcement of said amendment.

It is fundamental in our system of jurisprudence that the Constitution of the United States, and the laws made in pursuance thereof, is the supreme law of the land. It follows from this that if the law of this Commonwealth commanded the doing of that which is forbidden by the Constitution and laws of the United States the State law would be nugatory and of no effect. But so long as the performance of the duty imposed by the law of the State is not contrary to or prohibited by the Federal Constitution and the laws made thereunder, it is incumbent upon the person upon whom such duty is imposed to obey the law of the State. Changes in the paramount law of the land may create need for changing the law of the State. Indeed, it may create an imperative necessity, as a practical matter, that the law of the State be repealed or altered in such a manner as to work consistently and in harmony with the mandates of Federal authority. In all cases, however, where the law of the State is not in direct conflict with Federal law, the question of the wisdom, expediency or practical necessity of altering the laws of the State to conform more nearly with the provisions of Federal law is a matter for the legislative branch of the Commonwealth alone to determine, and officers of the State charged with the execution of its laws are bound to carry
out the provisions thereof until they are repealed or changed by the General Court.

Upon applying these general principles to the instant question, the answer to your question seems plain, for by St. 1913, c. 835, § 419, a positive duty is imposed upon you in relation to placing upon the ballots hereinbefore referred to the question of granting licenses for the sale of intoxicating liquors. That statute is as follows:—

The secretary of the commonwealth shall at least seven days before the annual meeting send to the town clerk of each town not using official ballots, ballots upon the question of granting licenses for the sale of intoxicating liquors therein, which shall contain the words: “Shall licenses be granted for the sale of intoxicating liquors in this town?” “Yes” or “No,” and no other words. Ballots of each kind shall be provided in number equal at least to the number of registered voters in such town. They shall be distributed to the voters at the polling place under the direction of the town clerk.

The material parts of the recent amendment to the Constitution of the United States, commonly known as the “prohibition amendment,” are as follows:—

Sect. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sect. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Pursuant to this amendment an act of Congress has lately been passed, under the title of the National Prohibition Act. Part II of this act, which is to take effect from and after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, prohibits the manufacture, sale and transportation of intoxicating liquor, and defines the term “intoxicating liquor” to include alcohol, brandy, whisky, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors containing one-half of 1 per cent or more of alcohol, by volume, which are fit for beverage purposes.
HENRY A. WYMAN, ATTORNEY—GENERAL.

It is clear that if this act remains in force on and after the date upon which licenses might be granted in cities and towns of this Commonwealth, the placing of this question upon the ballot and the voting thereon at the city or town elections will have little, if any, practical effect. It is equally clear, on the other hand, that nowhere in the constitutional amendment or the acts of Congress passed thereunder is there any prohibition or restriction which prevents the question in issue being placed upon the ballots, as required by section 419, above quoted. That section is not in violation of the Federal Constitution or Federal laws. It is not either expressly or by necessary implication repealed or annulled, but remains in force and effect as the law of this Commonwealth until repealed or amended by our General Court. The question is not the value, or lack thereof, or the practical effect resulting from your act, but the legal duty imposed upon you by the statute.

Accordingly, I beg to advise you that for the foregoing reasons I am of opinion that it is your duty to place upon the ballots sent to the town clerk of each town not using official ballots the question, “Shall licenses be granted for the sale of intoxicating liquors in this town?” as provided by St. 1913, c. 835, § 419.

Mechanic's Lien — Laborers — Weekly Wages.

A lien filed in due season by a laborer for work performed either prior to the recording of a mortgage or in connection with the erection, alteration, repair or removal of a building or structure, which erection, alteration, repair or removal was begun prior to the recording of the mortgage, takes precedence over the mortgage.

Where the erection, alteration, repair or removal of a building or structure is commenced after the recording of the mortgage, the only remedy of a workman who has done work in connection with such erection, alteration, repair or removal is against the contractor, either civilly for wages owed or criminally for failure to pay weekly.

You have asked my opinion as to whether Gen. St. 1918, c. 265, affects the weekly payment law, as provided in St. 1909, c. 514, § 112, as amended; and also whether there is any legal procedure by which a workman may obtain certain wages he has earned, on a particular set of facts stated in your letter.
Section 112, aforesaid, was last amended by Gen. St. 1918, c. 87, and under the statute as amended the contractor is liable criminally for failure to pay wages weekly. Gen. St. 1918, c. 265, does not affect this liability in any way. Section 1 of chapter 265 enlarges the lien of material men who do work after the date of the original contract. Section 2 provides for dissolution of the lien by notice from the person who holds the lien. Section 3 also relates to dissolution of liens, and section 4 to the rights of an attaching creditor, but there is nothing therein which restricts the rights of a laborer as created by prior laws.

The law relative to liens for labor and materials is contained in Gen. St. 1915, c. 292, and numerous amendments thereto, particularly Gen. St. 1916, c. 306. Section 6 of the 1915 act, as amended, reads as follows:—

No lien, except under the provisions of section one, shall avail as against a mortgage actually existing and duly registered or recorded prior to the filing or recording in the registry of deeds of the notice required by the provisions of this act, and no lien under section one shall avail as against such a mortgage unless the work or labor performed is in the erection, alteration, repair or removal of a building or structure, which erection, alteration, repair or removal was actually begun prior to the recording of the mortgage.

Section 1 therein referred to provides for the labor lien.

The effect, then, of section 6 is as follows: Where a workman does work before a mortgage is recorded he has a lien for the work if he files his claim in due season, and this lien has precedence over the mortgage. He also has a similar lien if the erection, alteration, repair or removal of a building or structure on which he was working was begun prior to the recording of the mortgage, even though he does not do his individual work until after the recording of the mortgage. If, however, he does not start his work until after the mortgage is recorded, and the mortgage was recorded before the erection, alteration, repair or removal of the building or structure was begun, the mortgage has precedence over his lien.

Assuming, then, that the laborers referred to in your letter
filed their claims in due season and started their work either before the mortgage was recorded or did work on the alteration, repair or removal of a building or structure which was begun prior to the recording of the mortgage, they have a lien on the land ahead of the mortgage. If, however, the mortgage was recorded before the job of erection, alteration, repair or removal of the building was begun, and they did no work prior to the recording of the mortgage, then they are shut out from their lien, as a practical matter, because the mortgage takes precedence over their lien, and their only remedy is against the contractor, which remedy can be pursued civilly for wages owed, and criminally for failure to pay weekly.

PUBLIC SERVICE COMMISSION — LIMITATION OF GRADE CROSSINGS — PUBLIC AND PRIVATE RAILROADS.

St. 1890, c. 382, and St. 1892, c. 228, as amended, authorizing the Public Service Commission to limit crossings at grade for a specified time, apply to private crossings on all railroads.

You have asked my opinion as to whether the position taken by the attorneys for the Fore River Railroad Corporation and the Fore River Shipbuilding Corporation, in regard to their right to maintain private freight tracks across highways at grade in Quincy and Braintree, is correct.

In the first place, it is my opinion that Spec. St. 1918, c. 138, authorizing the Fore River Shipbuilding Corporation to sell and convey its private property to any domestic railroad corporation, does not lessen in any way the obligations of the Fore River Railroad Corporation, which took over the property in question, and that all laws now or hereafter in force which controlled the shipbuilding corporation in its management of the railroad are equally applicable to the railroad corporation, except as such laws may be modified by section 3, relating to the expense of abolishing the grade crossing.

There are two statutes relating specifically to the question
at hand. The first is St. 1890, c. 382, as finally amended by St. 1912, c. 375, and the other is St. 1892, c. 228, as last amended by St. 1906, c. 463, § 22. A first reading of the 1890 statute would indicate that it was intended to apply to private railroads, and apparently the Legislature, when making its amendment in 1912, took this view; but an investigation of the report of the Railroad Commissioners for 1889, particularly at pages 30 and 33, indicates very strongly that the 1890 statute was passed for the purpose of safeguarding private crossings on all railroads rather than public crossings on private railroads, and that the words "for private use" modify, not the word "railroad" but the word "crossing."

The necessity for an act giving the commissioners supervision over public grade crossings, general in its character, is referred to in the report of the Railroad Commissioners of 1889, at page 33, and by draft of legislation in regard to grade crossings, at page 137, and again in their report of 1891, at page 95. The act of 1892, apparently passed for the reasons set forth in the reports cited, enumerated specifically the various types of public crossings that might exist, including the one in question. There is nothing in any statute that I can find which indicates that the word "railroad," as used in the 1892 statute, does not include a private railroad.

It is my opinion, therefore, that the Fore River Railroad Corporation is subject to St. 1892, c. 228, as amended, under which the Board has the power to limit a public crossing at grade for a specified length of time. It seems unnecessary to decide whether the same result might be reached under St. 1890, c. 382, as amended by St. 1912, c. 375.
Referendum — Existing Law — Effect of Ratification on Subsequent Amendment.

A petition for referendum on an existing law, subsequently amended, suspends operation both of the law and the amendment thereto, pending action thereon by the voters; and its approval by them carries with it the approval of the amendment.

I acknowledge the receipt of your letter in which you ask the following question:

As the question has been raised whether savings banks and trust companies having savings departments may pay dividends or interest monthly or semi-annually, I respectfully ask your opinion whether chapter 116 of the General Acts of 1919, which was suspended by a petition for a referendum, and which I understand was afterwards ratified by the referendum vote, is the rule, or whether chapter 326 of the General Acts of 1919, which is an amendment of said chapter 116, is the rule?

The effect of the petition for the referendum on Gen. St. 1919, c. 116, was to suspend the operation of the law pending the action of the voters thereon. They having acted, and, as I understand, approved the law, it takes effect thirty days after such approval.

This law had not in the meantime been repealed. Gen. St. 1919, c. 326, amended it. Suspending the operation of the original act suspended the operation of the amendment. The approval of the original act carried with it the approval of the amendment.

The legislative control of the enactment or amendment of laws is not affected by the referendum provisions of the Constitution; the operation of a given law is alone affected by the referendum. It may or may not become effective, as the voters act. When they do act, the status of the law is fixed, unless and until the Legislature, as it may, again acts with reference to the same subject-matter.

Joint School Committee — Election of Superintendent — Length of Term.

Under R. L., c. 42, § 44, as amended by St. 1911, c. 384, § 1, a superintendent of schools elected by a joint school committee of a school union must be employed for a three-year term, regardless of when the employment begins.

You have requested an opinion on the following propositions: —

Can a joint school committee, acting in December of this year, elect a superintendent of schools for a three-year term to begin July 1, 1920?

Can said committee elect a superintendent of schools to serve temporarily; that is, from Jan. 1, 1920, to July 1, 1920?

The law relating to this subject is incorporated in R. L., c. 42, § 44, as amended by St. 1911, c. 384, § 1, and is as follows: —

The joint committee shall annually, in April, meet at a day and place agreed upon by the chairman of the committees of the several towns comprising the union, and shall organize by the choice of a chairman and secretary. They shall employ a superintendent of schools, determine the relative amount of service to be performed by him in each town, fix his salary, apportion the amount thereof to be paid by the several towns and certify it to each town treasurer. Such superintendent of schools shall be employed for a term of three years, and his salary shall not be reduced during such term.

This law relates to the selection of a superintendent of schools by joint school committees of school unions, and is not specific on the points about which you inquire.

It is my opinion that a superintendent must be employed for a three-year term, regardless of when the employment begins.
MINORS — HAZARDOUS EMPLOYMENT — MANUAL TRAINING IN EDUCATIONAL INSTITUTION.

Under St. 1913, c. 831, § 27, the Board of Education or the school committee of a city or town must, on an application of the Co-operative School of Engineering of Northeastern College for approval of the manual training or industrial education in that school, give its approval or disapproval.

You have requested my opinion upon the following set of facts: The Co-operative School of Engineering of Northeastern College conducts courses in which pupils are alternately in school and in employment. Minors are thus sometimes engaged in hazardous employments forbidden except as specially provided for in St. 1913, c. 831. You have directed my attention to section 27 of said chapter, which provides, in part, that "nothing in this act shall be construed . . . to prevent minors of any age from receiving manual training or industrial education in or in connection with any school in the commonwealth which has duly been approved by the school committee or by the board of education." You have asked the three following questions:—

1. Are pupils in the co-operative courses of the Co-operative School of Engineering of Northeastern College receiving manual training or industrial education in or in connection with a school, as contemplated by said section 27?

2. Is said Co-operative School of Engineering the type of school contemplated by section 27, and therefore one which either school committees or the Board of Education could approve as such, thereby waiving the provisions of the child labor law?

3. Is approval of such a school as the said co-operative school, for the purposes of said section 27, a responsibility imposed by the statutes upon the Board of Education?

Your three questions are all to be answered in the affirmative. In my opinion, the provisions of section 27 require that when an educational institution makes application to a school committee or to the Board of Education for approval of its manual training or industrial education in that institution, it is incumbent upon the school committee or the Board of Education, as the case may be, to give its approval or disapproval.
CITIES AND TOWNS — SALE OF INTOXICATING LIQUORS — PAYMENT OF PART LICENSE FEE TO COMMONWEALTH.

Under the provisions of R. L., c. 100, § 2, malt liquors, cider and light wines containing more than 1 per cent alcohol by volume at 60° F. are intoxicating liquors, and under section 45 of said chapter the treasurer of a town issuing a license for the sale of such liquors is obliged to pay one-fourth of all of the moneys received for said licenses to the Treasurer and Receiver-General of the Commonwealth.

You have requested my opinion on a question as to the application of R. L., c. 100, § 45, under which cities and towns have paid into the treasury of the Commonwealth one-fourth of the amount received for licenses for the sale of intoxicating liquors. You state that the town treasurer of Maynard has paid one-fourth of a certain license under protest, and has forwarded to you a copy of a license issued by the board of selectmen of that town, the town claiming that it is not a license for the sale of intoxicating liquors within the language of section 45.

The license issued reads as follows:

This is to certify that the board of selectmen of the town of Maynard, Mass., have granted a license to , doing business at , to sell or expose or keep for sale malt liquors, cider and light wines (containing not more than 15 per cent of alcohol) to be drunk on the premises.

You desire to know whether treasurers of cities and towns are now obliged to pay to the Treasurer and Receiver-General one-fourth of the amount of money received for licenses for the sale of intoxicating liquors.

R. L., c. 100, § 45, provides as follows:

The treasurer of a city or town shall, within thirty days after the receipt of money for licenses for the sale of intoxicating liquors, make a return of the amount thereof to the treasurer and receiver general and at the same time shall pay to him one-fourth of the amount so received, and for neglect thereof he shall pay interest at the rate of six per cent per annum on the amount of such receipts from the time they become due until they are paid.

Section 2 of said chapter provides:

Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees
Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter.

In view of the fact that these provisions of law still stand upon our statute books, treasurers of cities and towns are obliged, under section 45, to pay to you one-fourth of all money received for licenses for the sale of intoxicating liquors.

Private Detective — Definition of Term.

By the words "private detective," as used in Gen. St. 1919, c. 171, is meant any person who generally engages in or solicits the business of seeking out and discovering evidence for use in civil or criminal proceedings.

You have asked me for a definition of the words "private detective" as used in Gen. St. 1919, c. 271, which forbids any person, firm or corporation "to engage in the business of, or solicit business as, a private detective, or the business commonly transacted by a private detective," without first obtaining a license as provided in said act.

The popular conception of a detective is a person whose occupation it is to seek out and discover, more or less secretly, evidence concerning the character or conduct of third persons. The popular conception of a private detective is a person engaged unofficially in this occupation. The act apparently uses the words "private detective" in their popular sense. The language of the act, however, lays stress on engaging in or soliciting such business. I am of opinion that a mere sporadic seeking of such evidence or information should not be held to be within its terms. This view is strengthened by the considerable license fee required (§ 5, §100), and further by the fact that a person who desires to obtain a license must have had three years' experience as an investigator (§ 2). Gen. St. 1919, c. 271, repeals and replaces R. L., c. 108, §§ 35 and 36. Section 35 authorizes certain municipal officials to license a private citizen "to act as a private detective for the detection, prevention and punishment of crime." In view of the broader
language used in Gen. St. 1919, c. 271, the definition of detective can no longer be restricted to the collection of information "for the detection, prevention or punishment of crime." It extends to civil proceedings.

As a practical rule, but by no means as an exhaustive and conclusive definition, I suggest that any person who *generally engages in or solicits the business* of seeking out and discovering *evidence* for use in civil or criminal proceedings will usually be found to be within the act. I do not feel, however, that a cast-iron rule can be laid down.

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**Fire Insurance Companies — Right to do more than One Class of Business — Reinsurance.**

Under St. 1907, c. 576, § 34, a foreign insurance company, admitted to this Commonwealth since the date mentioned therein, is not permitted to carry on more than one class or combination of classes of business mentioned therein.

A purely mutual fire insurance company may not qualify to issue policies by a contract of reinsurance by it of the business of another existing company. Before such a company may issue policies it must have subscriptions for at least four hundred separate risks of direct insurance upon property located within the Commonwealth, and amounting to not less than $1,000,000.

You request my opinion upon certain questions which have arisen in the administration of the statutes relating to insurance companies.

You call attention to the classes of business established by St. 1907, c. 576, § 32, with its amendments, and to the various combinations of those classes permitted in the case of foreign insurance companies by section 34. You state that —

An application has been filed by a company to transact business specified in clauses 5, 6, 8 and 11 of section 32. This combination is not set forth in section 34, and the questions are: —

1. Are the combinations set forth in section 34 the only combinations of classes of business which a foreign company may be admitted to transact?

2. Is the specific combination which the company in question desires to be admitted to transact permissible under the law?
Section 34 contains the following provision: —

No domestic insurance company shall transact any business other than that specified in its charter or agreement of association and no foreign insurance company admitted to this commonwealth prior to May thirty-first, eighteen hundred and eighty-seven, shall transact any other kind of business than it had been authorized to transact prior to that date, and no foreign insurance company admitted since said date shall transact more than one class or kind of business herein, except that a domestic company and, if its charter permits, and not otherwise, any admitted foreign company may transact.

Then follow numerous specifications of combinations of classes of business permitted to such companies, with a statement of the authorized capital to be required in certain instances.

The provision of this section that "no foreign insurance company admitted since said date shall transact more than one class or kind of business herein, except that . . . if its charter permits, and not otherwise, any admitted foreign company may transact" the specified combinations of classes of business, plainly limits the permissible combinations to those thus specified. The combination to which you refer is not authorized by this section, and therefore a foreign company may not be admitted to transact such business in this Commonwealth.

You further inquire if, in determining whether a purely mutual fire insurance company has complied with the conditions established by St. 1907, c. 576, § 42, so as to permit it to issue policies, consideration can be given to the reinsurance by it of the business of another existing company. This section provides in part as follows: —

No policy shall be issued by a purely mutual fire insurance company organized subsequent to the twenty-third day of April in the year eighteen hundred and ninety-four, nor by a mutual fire insurance company with a guaranty capital of less than one hundred thousand dollars, until not less than one million dollars of insurance, in not less than four hundred separate risks upon property located in this commonwealth, has been subscribed for and entered on its books. No policy shall be issued under the provisions of this section until a list of the subscribers for insurance, with such other information as the insurance commissioner may require, shall have been filed at the insurance department, nor until the president and secre-
tary of the company shall have certified under oath that every subscription for insurance in the list so filed is genuine and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within thirty days of the granting of a license to the company by the insurance commissioner to issue policies. If such officers shall take a false oath relative to such certificate they shall be guilty of perjury.

A contract of reinsurance is not a contract of insurance upon property. See II Op. Attys.-Gen. 157. It is rather a contract to insure, in whole or in part, the contractual risk assumed by the ceding company. It is merely an agreement to indemnify that company against loss upon its contracts. Thus it cannot be said that a contract for the reinsurance of the business of another company consisting of various separate risks of direct insurance assumed by it is a contract covering "separate risks upon property." Nor is an arrangement with another company for the reinsurance of its business in any proper sense of the term a "subscription for insurance" within the meaning of this section. In my opinion, this statute contemplates that the subscriptions for insurance which must be obtained before a mutual company may issue policies shall be subscriptions for four hundred separate risks of direct insurance upon property located within the Commonwealth. Thus, in my judgment, a company may not qualify to issue policies by a contract of reinsurance of the character stated by you.
HENRY A. WYMAN, ATTORNEY-GENERAL.


Gen. St. 1919, c. 9, exempting inhabitants of this Commonwealth who have served in the military and naval forces of the United States in the World War from the payment of poll taxes, does not apply to members of the merchant marine.

A trustee in bankruptcy is an officer in the bankruptcy court. He cannot be arrested for the non-payment of a tax due from the estate.

Neither an executor nor an administrator can be arrested for non-payment of a tax assessed in the estate or to him as said executor or said administrator, except as provided for in St. 1909, c. 490, Pt. II, § 34.

You have asked my opinion upon certain questions with reference to which you have been requested to advise local assessors and collectors of taxes.

Your first question is as follows: —

Under Gen. St. 1919, c. 9, do those who served in the merchant marine and coast guard come within its provisions as to exemption from payment of poll taxes; and also, if any poll taxes have been paid by those who are entitled to an exemption, must a refund be made, and from what money may it be repaid?

The statute to which you refer exempts from the payment of poll taxes assessed for 1917 and a certain period thereafter "inhabitants of this commonwealth who were engaged in the military or naval service of the United States in the present war before the passage of this act, and those who hereafter engage in said service during said war."

The question is, therefore, whether persons who served in the merchant marine and coast guard were in the military or naval service of the United States.

It is plain that those who served in the merchant marine were not in such service. They were not connected with the military or naval forces of the United States, but were engaged in purely merchant marine service under the United States Shipping Board. They have not been regarded as in the military or naval service for the purposes of Gen. St. 1919, c. 283, granting the so-called $100 bonus or gratuity. They therefore do not come within the provisions of this act.

To the Commissioner of Corporations and Taxation.
1919
December 24.
At the beginning of the war the coast guard was in the service of the Treasury Department, but during the war it was taken over by the Navy Department, and therefore its members must be regarded as in the naval service of the United States. They have been so considered in the administration of the bonus or gratuity statute above referred to. In my opinion, they come within the exemption from poll taxes established by the statute under discussion.

If poll taxes have been assessed upon, and paid by, any persons entitled to exemption under this statute, their remedy seems to be the ordinary one granted by the statutes for the abatement of taxes. They must apply to the local assessors, and their applications must be dealt with in the same manner and subject to the same conditions as all other applications for abatement.

Your second question is as follows:

Can an administrator, executor or assignee or trustee in bankruptcy be arrested for a tax assessed directly to them in their capacity as such administrator, etc.?

So far as your question relates to the right to arrest executors and administrators, it depends solely upon the interpretation of our statutes. The right to arrest is, of course, an extraordinary remedy, and is not regarded as granted unless the grant clearly appears by the terms of the statute. An executor or administrator acts purely in a representative capacity, and, in the eyes of the law, is an entirely different person from himself individually. He is not personally liable for taxes assessed upon the estate or to him as executor or administrator except under the conditions prescribed in St. 1909, c. 490, Pt. II, § 34, but if those conditions exist he is "personally liable therefor as for his own tax." The question is not free from doubt, but I am of opinion that this provision for personal liability would be construed by the court to bring an executor or administrator in a proper case within the scope of section 27 of the same act, provided, of course, the conditions of section 27 are also clearly satisfied. It seems proper to add, however, that the remedy of
arrest involves considerable personal peril to the collector. If the conditions which justify an arrest do not exist, and the arrest is none the less made, the collector is liable personally in tort. Collectors should be cautioned that the remedy of arrest is in this case peculiarly dangerous.

A trustee in bankruptcy is an officer of the courts of the United States. In my opinion, it is not within the power of a collector of taxes to arrest him for non-payment of taxes nor in any other way to interfere with his performance of the duties entrusted to him by the court. The rights of the tax collector must be enforced by appropriate proceedings in the bankruptcy court. *In re Tyler*, 149 U. S. 164.

Your third question is as follows:—

Do the labor laws of the Commonwealth apply to a tax collector or to the clerks employed in his department so far as the eight-hour law applies?

St. 1909, c. 490, Pt. III, § 5, imposes the duty of advising local assessors and collectors upon you in the following language:—

He shall give his opinion to assessors and collectors upon any question arising under any statute relating to the assessment and collection of taxes, and may advise and consult with the attorney-general upon all questions arising under this provision.

In my judgment, this question is not a question relating to the assessment and collection of taxes, within the meaning of this provision. Accordingly, it is a question with reference to which you have no duty to advise local assessors and collectors, and I do not deem it to be my duty to express any opinion with reference to the matter. Tax collectors should be advised upon this question by their city or town solicitors.
Board of Parole — House of Correction — Release or Parole of Prisoners.

A prisoner sentenced to the house of correction, the terms of which are maximum and minimum, can be released under the provisions of R. L., c. 225, § 121, as amended by St. 1902, c. 227, and St. 1912, c. 158. St. 1911, c. 451, does not apply.

Under R. L., c. 221, § 123, the county commissioners, except in the county of Suffolk, where the authority is conferred upon the commissioner of penal institutions of the city of Boston, are authorized to discharge a prisoner from the house of correction.

The Board of Parole of the Department of Correction has no jurisdiction over prisoners serving in the house of correction save in the special case provided for in Gen. St. 1918, c. 214.

I beg to submit the following reply to your letter containing the following inquiries: —

The Board of Parole has before it for consideration a matter regarding which it requires further legal authority, and respectfully requests an opinion on the following questions: —

1. When a prisoner is sentenced to a house of correction on a sentence, the terms of which are maximum and minimum, under what statute would he be released?

2. When a sentence, the terms of which are maximum and minimum, is being served in a house of correction, this being a sentence the terms of which are similar to those imposed on a prisoner in the State Prison, does the law, as defined in St. 1911, c. 451, apply to this sentence? Would a sentence of this nature, being served in a house of correction, in your opinion be defined in R. L., c. 220, § 19? Under the statute would the Massachusetts Board of Parole have authority to release on parole a prisoner sentenced to the house of correction, as above, on a maximum and minimum sentence?

If the said Board has not authority to release, by whom can the said release be granted?

1. R. L., c. 225, §§ 114, 115, 117 and 118, authorized the Prison Commissioners to issue permits to be at liberty to prisoners confined in the State Prison, in the Massachusetts Reformatory and in the Reformatory Prison for Women.

St. 1913, c. 829, § 1, created a board of parole for the State Prison and the Massachusetts Reformatory. Section 2 created a board of parole for the Reformatory for Women, and section 3 transferred to and vested in the parole boards for said institu-
tions all the powers of the Prison Commissioners relating to
the granting of permits to be at liberty from the State Prison,
the Massachusetts Reformatory and the Reformatory for
Women.

Gen. St. 1916, c. 241, § 1, abolished the Prison Commis-
sioners and the boards of parole for the State Prison, the Mas-
sachusetts Reformatory and the Reformatory for Women, and
transferred all the rights, powers, duties and obligations of said
boards of parole to the board of parole of the Massachusetts
Bureau of Prisons, established by that act, which board of
parole was made the lawful successor of said former boards
of parole. Section 5 further recognized that the said board of
parole of the Massachusetts Bureau of Prisons had authority
to grant permits to be at liberty "from the state prison, the
Massachusetts reformatory, the prison camp and hospital and
the reformatory for women."

Gen. St. 1918, c. 214, § 1, provided as follows: —

The power to grant a permit to be at liberty to any person sentenced
or transferred to the state prison, to the Massachusetts reformatory, to the
reformatory for women, or to the prison camp and hospital, and to revoke,
revise, alter or amend the same, shall remain in the board of parole of the
Massachusetts bureau of prisons, created by chapter two hundred and
forty-one of the General Acts of nineteen hundred and sixteen, until the
expiration of the maximum term of the sentence for the service of which the
person was so committed or transferred, notwithstanding the subsequent
transfer of such person to any other institution.

Gen. St. 1919, c. 350, §§ 1, 82 and 85, creates a Department
of Correction, abolishes the Massachusetts Bureau of Prisons
and transfers to the Board of Parole of the Department of
Correction the duties of the former Board of Parole of the Bu-
reau of Prisons. In my opinion the Board of Parole of the
Department of Correction is, with respect to permits to be at
liberty from the State Prison, the Massachusetts Reformatory,
the Prison Camp and Hospital and the Reformatory for
Women, the successor of the Prison Commissioners, of the
several boards of parole created by St. 1913, c. 829, and of the
board of parole for those institutions created as a part of the
Massachusetts Bureau of Prisons by Gen. St. 1916, c. 241. It has no jurisdiction to grant permits to be at liberty to prisoners in houses of correction, except in the special case provided for in Gen. St. 1918, c. 214, namely, where a prisoner sentenced or transferred to one of the four institutions above named is later committed or transferred to a house of correction. As St. 1911, c. 451, gives to "the prison commissioners a special authority to grant permits to be at liberty from the state prison to a prisoner held therein," it cannot, in my opinion, be construed to apply to prisoners in houses of correction.

2. The provision for release of persons confined in a jail or house of correction is contained in R. L., c. 225, § 121, as amended by St. 1902, c. 227, and St. 1912, c. 158, which reads as follows: —

A probation officer may, with the consent of the county commissioners, or, in the county of Suffolk, of the penal institutions commissioner of the city of Boston, investigate the case of any person who is imprisoned in jail or house of correction upon a sentence of not more than six months, or upon a longer sentence of which not more than six months remain unexpired, or for failure to pay a fine, for the purpose of ascertaining the probability of his reformation if released from imprisonment. If, after such investigation, he recommends the release of the prisoner, and the court which imposed the sentence, or, if the sentence was imposed by the superior court, the district attorney, certifies a concurrence in such recommendation, the county commissioners or the penal institutions commissioner may, if they consider it expedient, release him upon probation, upon such terms and conditions as they may prescribe and may require a bond for the fulfillment of such conditions. The surety upon any such bond may at any time take and surrender his principal, and the county commissioners or the penal institutions commissioner may at any time order any prisoner released by them upon probation to return to the prison from which he was released. The provisions of this section shall not apply to persons held upon sentence of the courts of the United States.

Here the prisoner is released "upon probation" instead of upon a permit to be at liberty. The bodies authorized so to release are the county commissioners, except in the county of Suffolk, where the authority is conferred upon the penal institutions commissioner of the city of Boston. The same bodies
are authorized by R. L., c. 225, § 123, to "discharge" a prisoner from the house of correction. These express grants of jurisdiction over prisoners confined in a house of correction are a further indication that the Board of Parole of the Department of Correction has no jurisdiction over such prisoners save in the case provided for in Gen. St. 1918, c. 214.

SCHOOLS — TRANSPORTATION OF PUPILS LIVING ON ISLANDS — AUTHORITY OF DEPARTMENT OF EDUCATION AND OF CITIES AND TOWNS.

Unless some statute requires it, a city or town need not provide transportation to and from school, or board in lieu thereof, for children of school age living upon islands within such city or town which are not provided with schools. R. L., c. 25, § 15, is permissive, not mandatory.

The Department of Education, which under Gen. St. 1919, c. 350, § 56, is the successor of the State Board of Education, is authorized by Gen. St. 1919, c. 292, § 5, if the facts warrant it, to furnish such transportation in all cases where some statute does not place this duty upon the city or town.

Gen. St. 1919, c. 292, § 9, authorizes the Department of Education, in a proper case, to require a town to furnish transportation to and from school to children living upon islands within the town which are not provided with schools.

You ask when a city or town must provide transportation to and from school, or board in lieu thereof, for children of school age living upon islands within the Commonwealth which are not provided with schools, and when, under Gen. St. 1919, c. 292, § 5, the Department of Education may do so.

In my opinion, only a general or special statute can impose this duty upon a city or town. Newcomb v. Rockport, 183 Mass. 74; Davis v. Chilmark, 199 Mass. 113. R. L., c. 25, § 15, is permissive only, not mandatory. Newcomb v. Rockport, 183 Mass. 74. It would seem, therefore, that the Department of Education, as the successor of the State Board of Education under Gen. St. 1919, c. 350, § 56, is authorized by Gen. St. 1919, c. 292, § 5, if the facts warrant, to furnish such transportation or board in all cases where some statute does not place this duty upon the city or town.

In my opinion, Gen. St. 1919, c. 292, § 9, authorizes the
State Board of Education (and so the Department of Education as the successor of that Board) to "require the town to furnish transportation" when the circumstances therein defined exist. I see no reason why this section should not apply to children of school age upon islands which are not provided with schools. I note, however, that this section apparently applies to towns alone (exclusive of cities), and that it contains no provision for requiring a town to furnish board in lieu of transportation.

Automobiles — Registration — Substitution of Motors — Change in Maker's Number.

Where an automobile has been registered, and where the maker's number was affixed to the motor therein, and subsequently another motor is substituted, with the result that the maker's number on the substituted motor would not then correspond with the maker's number on the registration card, there should be issued a new registration card bearing the maker's number appearing upon the substituted motor.

You ask my opinion upon the following facts: A company owns a number of Ford cars of different types which have been registered. You desire to know what should be done relative to registration in case the company places a spare motor in one of the cars now registered.

Gen. St. 1919, c. 294, § 2, provides that the application for the registration of a motor vehicle shall contain, among other things, the number, if any, affixed by the maker. I understand that in Ford automobiles the maker's number is affixed to the motor, so that if the company in question should substitute the spare motor in one of their cars, the maker's number thereon would not then correspond with the maker's number on the registration card. As the maker's number is, perhaps, the most important means of identification, I am of the opinion that when the company places its spare motor in one of its cars now registered, it should inform you of the fact, giving you both the maker's number that appears on the registration card of the car, and also the maker's number that appears on the
spare motor, and at the same time return to you the registration card. Your Department should then issue in place thereof a new registration card bearing the maker's number appearing upon the spare motor.

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Electric Company — Producing and Distributing Company — Substitution for Producing Plant of Contract to Purchase Current — Sale of Plant without Consent of Legislature — Conditional Sale.

A producing and distributing electric company may substitute for its producing plant a proper and sufficient contract for the purchase of electricity.

A producing and distributing electric company which substitutes for its producing plant a proper and sufficient contract for the purchase of electricity need not retain such plant in order to guard against a failure of the selling company to furnish electricity according to its contract, if such failure is not reasonably to be anticipated.

If a producing and distributing electric company has substituted for its producing plant a proper and sufficient contract for the purchase of electricity, a sale of such plant without first obtaining the consent of the Legislature does not violate St. 1914, c. 742, § 51.

If sale of such plant be proper, St. 1914, c. 742, § 51, does not forbid a contract of conditional sale which provides that immediate possession shall be given to the purchaser, who is bound to pay the purchase price by instalments during a term of years.

You request my opinion upon the following matter: —

The Worcester Suburban Electric Company is a corporation duly established under the General Laws, and is an electric company within the definition set forth in section 1 of chapter 742 of the Acts of the year 1914. The management of the company since the spring of 1914 has been in the hands of officers, a majority of whom are identified with A & Co., Inc. Prior to that time a controlling interest was owned by B & C, Inc., who are identified with the New England Power Company (formerly Connecticut River Transmission Company) and its affiliated interests. B & C, Inc., on March 31, 1914, in connection with and as part of the transaction hereinafter described, sold to A & Co., Inc., 5,793 out of the 6,000 shares of stock then outstanding. At the same time, and as a part of the same transaction, the company executed the following instruments with the Connecticut River Transmission Company: —

1. For the sale of electricity by the transmission company to the electric company, referred to as the contract for primary electricity.

2. For the distribution of electricity by the electric company for the transmission company, referred to as the distribution agreement.

To the Department of Public Utilities, January 13, 1920.
3. For reserving the steam station of the electric company at Uxbridge for the use of the transmission company, referred to as the agreement for reserving steam plant.

4. Lease of said steam station by the electric company to the transmission company.

The transaction in question has never been expressly authorized by the General Court. Is this transaction in violation of the terms of section 51 of chapter 742 of the Acts of the year 1914?

Reduced to its lowest terms, the question raised by these four instruments seems to be: If a producing and distributing electric company replaces its producing plant by a thirty-year contract for the purchase of sufficient current, and thereupon sells such producing plant without obtaining the consent of the Legislature, does it violate St. 1914, c. 742, § 51?

St. 1914, c. 742, § 51, provides:—

A corporation which is subject to the provisions of this act shall not, except as is otherwise expressly provided, transfer its franchise, lease its works or contract with any person, association or corporation to carry on its works, without the authority of the general court.

This statute does not in terms prohibit an electric company from selling its works. An electric company authorized to furnish electricity to the public is charged with a public duty which it must discharge within the limits of its reasonable ability. It may not voluntarily disable itself to perform that duty. The Supreme Judicial Court has held that a sale of its physical property which would so disable it is an evasion of the act and unlawful without legislative consent, even though the franchise is not transferred. On the other hand, the Supreme Judicial Court has also held that an electric company might make an agreement for division of territory with another electric company, and might lawfully sell that portion of its distributing system which lay within the territory so ceded by it. Taking these two cases together, the legality of a sale of so much of the physical property of an electric company as relates to its producing plant, without legislative consent, appears to depend upon whether it materially impairs the ability of the selling company to discharge its duty to the public.
I find nothing in the act which requires an electric company to produce the current which it sells and distributes to the public. On the contrary, section 1 defines an electric company as follows:—

"Electric company" means a corporation organized under the laws of this commonwealth for the purpose of making ... and selling, or distributing and selling, electricity within this commonwealth, ... 

Moreover, I am informed that many electric companies in this Commonwealth are not producing companies, but instead rely upon contracts for the purchase of current. In my opinion, the terms of the act and this common practice both indicate that an electric company may lawfully rely for the performance of its public duty upon an honest and apparently adequate contract for the purchase of current. As an incident of its public duty it is not required to produce the current which it furnishes to the public, or even to install a plant as an additional safeguard against an unanticipated failure of the selling company to supply current.

If a distributing electric company may lawfully rely upon an honest and apparently adequate contract as a source of supply, I see no reason why a company which has produced its own current may not lawfully substitute an adequate supply contract for such producing plant. The original decision of this question would seem fairly to lie in the corporate discretion of such company. It constitutes, as was said in Weld v. Gas Commission, 197 Mass. 556, "a detail of administration which is not in violation of law." If, however, the supply contract should not prove adequate to enable the company to discharge its public duty, there is ample power in your Board, under the law, to compel due performance thereof. So long as the company duly and adequately furnishes current to the public, I find nothing in the act which prescribes the means by which that duty shall be performed.

If a distributing company has made an honest and apparently adequate supply contract, so that it no longer requires its producing plant to enable it to discharge its public duty,
I find nothing in the act which requires the retention of the plant as protection against an unanticipated failure of the selling company to supply current. But if a distributing company which has made an honest and apparently adequate supply contract is not required to retain its plant, the terms upon which it will dispose of it would seem fairly to lie within its corporate discretion. So far as discharge of its public duty is concerned, it would seem to be immaterial whether the sale is a present sale for cash, or a long-term conditional sale upon payment by instalments. In either case the company is merely disposing of property which it no longer requires to enable it to discharge its public duty.

There is a clear duty devolving upon the officers of the corporation thus selling its producing plant to guard against any failure of the contracting producing company to perform its contract, which should be reasonably anticipated, and also to see that before the termination of the contract the selling company is so circumstanced as to continue its full functions as a public service company. It is not so much a question of law as a question of fact that would govern in this particular.

Apply the foregoing to the question submitted: The Worcester Suburban Electric Company, on March 31, 1914, made a contract with the Connecticut River Transmission Company for the purchase of primary electricity during a period of thirty years. There is no suggestion that this contract has not proved entirely sufficient to enable the electric company to discharge its duty to the public. By reason of this contract the steam plant of the electric company was no longer needed by the electric company as a source of its supply. As a part of the same transaction, the electric company, by the so-called reservation agreement, made a conditional sale of this steam plant to the transmission company, the purchase price to be paid in instalments during a period of twenty years, and the purchaser being put in immediate possession and control. If under these conditions the electric company might have sold outright for cash and have given immediate possession, I find nothing unlawful in giving such possession pending payment of the purchase
price under a contract of conditional sale. In neither case is the ability of the electric company to discharge its public duty injuriously affected. Indeed, since, under paragraph 5 of the reservation (conditional sale) agreement, the electric company may require the transmission company to operate the steam plant (materially improved and enlarged, as I am advised) for its benefit, the electric company, for twenty years at least, has two possible sources of supply instead of one.

Under these circumstances I do not find that the simultaneous execution of the agreement for the purchase of primary electricity and of the contract for the conditional sale of the steam plant (reservation agreement) was a violation of St. 1914, c. 742, § 51, even though the consent of the Legislature was not first obtained. There was no transfer of its franchise and no contract to carry on its works, within the meaning of the statute. The company continues to conduct its own business, and is not controlled by outside interests, which, I apprehend, is the real purpose underlying the provisions of the statute. To prohibit a corporation to "carry on its works" by means of the purchase of primary electricity, shown clearly to be advantageous to the company and the public, would, in effect, hamper if not deprive it of the management of its own affairs. Such is not, in my judgment, the natural construction to be given the statute, nor by any fair implication can it be so extended.

The question remains whether the execution on March 31, 1914, of the twenty-year "lease" of the steam plant in consideration of an annual rental of $1, and performance of the conditions of the simultaneous contracts, makes the transaction unlawful. If this "lease" had stood alone it might well be a violation of the act. But it does not stand alone. It is, on the contrary, a mere incident of the contract of conditional sale, of which it is an integral but unnecessary part, to which it adds nothing save an instrument which could be recorded as that contract could not be. The contract of conditional sale provides that throughout the twenty-year period thereof the purchaser, if he performs all his agreements, "may occupy, operate and use the steam plant." Thus, if the "lease" were canceled,
the transaction would not be materially changed. Under these circumstances, I regard the lease as immaterial and insufficient to taint an otherwise lawful transaction with illegality.

Moreover, as I am advised, the "lease," as such, has been by corporate action canceled, while the conditional sale stands, being evidenced by an escrow agreement in such form as to be made a matter of record.

Savings Deposits — Interest — Earned and Collected.

Interest collected in advance on a note which runs for a period beyond the date of declaring interest on savings deposits is not income earned during the next preceding period.

I have your letter in which you make the following inquiry: —

If a trust company has collected its interest in advance on a note which runs on savings deposits, can such company say that it is income earned during the next preceding period? In other words, can I allow a trust company to pay a dividend on savings deposits from interest collected in advance, on the theory that it has been earned in accordance with such statute?

The statute referred to, Gen. St. 1919, c. 326, provides: —

Dividends or interest on the deposits in the savings departments of trust companies, savings banks and institutions for savings may be declared and paid for periods of not less than one month or more than six months, as determined by their by-laws, from income which has been earned and collected during the next preceding interest period.

The words of the statute are, "earned and collected." These terms are not synonymous. Something more than mere collection is evidently required to bring a sum collected within the meaning of the term "earned." To hold that mere collection is sufficient to satisfy the statute would in effect strike out therefrom the words "and earned."

In my opinion, interest collected in advance is earned only as the period for which it is collected runs. If collected for a period beyond the date of declaring the interest, it cannot be said to have been earned "during the next preceding" period.
There are decisions which hold that where interest has been collected in advance for the entire period of a loan, and there is a right on the part of the borrower to repay the principal before the expiration of such period, which right is exercised, the borrower is entitled to a return of the interest paid for the unexpired balance of the period. Such interest, though collected in advance, is clearly unearned.

I am therefore of the opinion that a trust company which has collected its interest in advance on a note which runs for a period beyond the date of declaring interest on savings deposits cannot say that the interest for the period beyond the dividend date is income earned during the next preceding period.

Superintendent of Buildings — Division of Highways — Lease of Quarters outside of Boston for Storage of Trucks — Authority to submit Same to Governor and Council.

It is within the jurisdiction of the Superintendent of Buildings to lay before the Governor and Council a proposal to lease storage space outside the city of Boston for the use of the Division of Highways of the Department of Public Works, for the storage of trucks and outfit of the division.

You have referred to me a letter to you, dated January 2, from Mr. F. I. Bieler, secretary of the Division of Highways of the Department of Public Works, in which he requests you to lay before the Governor and Council for their approval a proposal to hire a stable in Middleborough for the storage of certain trucks and outfit of the Division of Highways of the Department of Public Works. You inquire whether this matter is within your jurisdiction.

Gen. St. 1919, c. 350, § 17, provides that all the rights, powers, duties and obligations of the sergeant-at-arms, as defined in R. L., c. 10, §§ 4, 8 and 9, St. 1909, c. 514, § 2, St. 1913, c. 711, and Gen. St. 1915, c. 224, are hereby transferred to the Superintendent of Buildings, and shall hereafter be performed by him. R. L., c. 10, § 4, provides, in part:
He [the sergeant-at-arms] shall have general charge and oversight of the state house and its appurtenances and of any other buildings in Boston owned by or leased to the commonwealth for the use of public officers.

I am orally informed by the sergeant-at-arms that at the time when this section was enacted quarters for State officers were almost entirely confined to the city of Boston. Since that time quarters for various boards and commissions have been required to a much greater extent throughout the State. The practice, therefore, grew up of submitting proposed leases of such quarters to the Governor and Council, for their approval, such submission being made through the sergeant-at-arms. In this way such proposed leases came before the Governor and Council through a single channel, whereby confusion and waste were avoided. This practice seems to have been to some extent recognized and approved by the Legislature, which, by St. 1910, c. 326, § 1, provided, subject to certain exceptions not here material:

The governor, with the advice and consent of the council, may assign the rooms in the state house and rooms elsewhere, used by the commonwealth, and may determine the occupancy thereof in such manner as the public service may from time to time require.

Gen. St. 1919, c. 350, § 19, provides in part:

The superintendent of buildings shall have charge of purchasing all office furniture, fixtures and equipment, stationery and office supplies for all executive and administrative departments and divisions and boards thereof, except paper for the state printing contract, which shall be bought by the secretary of the commonwealth as heretofore, and shall direct the making of all repairs and improvements in the state house and on the state house grounds. All said departments, and the divisions and boards thereof shall make requisition upon the superintendent of buildings for all office furniture, fixtures and equipment, stationery and office supplies which they may require, and for any repairs or improvements which may be necessary in the state house or in other buildings or parts of buildings owned, occupied by or leased to the commonwealth and occupied by said departments, divisions and boards.

While the matter is, perhaps, not entirely clear, viewed in the light of the statutes alone, I am of opinion that, in view of
the long-continued practice above referred to, it is within your jurisdiction, as Superintendent of Buildings, to lay before the Governor and Council the proposal to hire storage space in Middleborough for the use of the Division of Highways of the Department of Public Works.

INTERNATIONAL LAW — TAXATION — PROPERTY OWNED BY A FOREIGN GOVERNMENT.

It is a settled principle that jurisdiction is not asserted by a nation against foreign sovereigns or their sovereign rights. In the light of this principle the tax statutes of the Commonwealth must be construed as not asserting any power to tax against a foreign sovereign.

You ask my opinion as to whether taxes may legally be assessed in this Commonwealth upon tangible personal property of a taxable character, located therein on April 1 of any year, and owned by a foreign government. The specific property to which your inquiry relates consisted of bales of linters held in storage in Chicopee on April 1 last, in one instance owned by the government of Great Britain and under the control of the Imperial Munitions Board of the Dominion of Canada, and in another instance owned by the French Republic and under the control of the French High Commission, Munitions Department.

In my opinion, your inquiry must be answered in the negative. I assume that this property either was manufactured in Massachusetts or had otherwise acquired a permanent situs here, so that it would be taxable if owned by a non-resident individual or a foreign corporation.

It is true that our statutes purport to tax "all property, real and personal situated within the commonwealth . . . unless expressly exempted by law" (St. 1909, c. 490, Pt. I, § 2), and that there is no express statutory exemption of the property of foreign governments. Yet this provision must be construed in the light of established principles of international law and comity.

The jurisdiction of each independent nation is necessarily exclusive and absolute within its own territory. However, by
common consent among civilized nations, a consent largely implied from common usage and the necessities of mutual intercourse, that absolute jurisdiction is not asserted against foreign sovereigns or their sovereign rights. Whether this be called a rule of comity or of law, it has become a settled principle of international relations which has long been recognized by the Supreme Court of the United States. *Schooner Exchange v. M'Faddon*, 7 Cranch, 116. It is settled that the courts of one nation will assert no jurisdiction either against the person or the property of a foreign sovereign. *Briggs v. Lightboats*, 11 Allen, 157, 184.

In accordance with this principle, our Supreme Judicial Court refused to entertain an action of tort in our courts against a railroad owned directly by the sovereign of Great Britain, although jurisdiction in the usual sense of the term was obtained by attachment by trustee process of the property of the railroad located in Massachusetts. *Mason v. Intercolonial Railway*, 197 Mass. 349.

It follows that, even in the event that a tax of the character now in question were valid, no proceedings could be had in any court in the Commonwealth to enforce its payment, either against the foreign government or the property taxed so long as it was owned by that government. This fact alone strongly indicates that it was never intended by our statutes to impose such a tax. But the rule upon which these decisions are based goes much deeper than a refusal to assert mere judicial jurisdiction. It involves a waiver of all sovereign power. If a nation permits a foreign sovereign or his official representatives to enter the territory of that nation or to hold property therein, it impliedly consents that all sovereign rights of such foreign nation shall be recognized. One of these essential rights is independence of every other sovereign. For the Commonwealth to impose a tax upon the property of any sovereign within its borders would not only be exercising a jurisdiction to interfere with the rights of that sovereign in such property, but would be taking the further step of attempting to impose an obligation upon such sovereign to contribute toward the public expenses of the Com-
monwealth. It would be asserting a jurisdiction more fundamental in character, even, than judicial jurisdiction. In my judgment, the tax statutes of the Commonwealth must be read in the light of these principles, and, when so read, they must be construed as not asserting any power to tax which is at variance with them.

Accordingly, in my opinion, taxes of the character referred to in your inquiry cannot legally be assessed in this Commonwealth.

Prisoners — Sentence — Discharge of Common Night Walker from House of Correction.

The authority conferred by R. L., c. 225, upon the county commissioners, or, in the city of Boston, upon the penal institutions commissioner, to release persons sentenced to a house of correction is confined to persons sentenced as common night walkers under R. L., c. 212, § 55.

You inquire "whether, under R. L., c. 225, § 123, the county commissioners, or in the city of Boston the penal institutions commissioner, have a right to release any person sentenced to a house of correction in accordance with the terms of that section, or whether such right applies only to persons convicted in the manner described in lines 7, 8, 9 and 10 of that section."

R. L., c. 225, § 123, provides, in part: —

The county commissioners, or, in the city of Boston, the penal institutions commissioner, subject to the approval of a justice of the court which imposed the sentence, after six months from the time of sentence, may discharge a person sentenced to the house of correction, and the directors of a workhouse may discharge a person sentenced thereto upon a conviction under the provisions of section fifty-five of chapter two hundred and twelve of being a common night walker, if they are satisfied that the prisoner has reformed, or, for any term during the period of the sentence, they may bind out such prisoner as an apprentice or servant to any inhabitant of the commonwealth. . . .

In my opinion, this provision is confined to the discharge of a person sentenced as a common night walker under R. L., c. 212, § 55. To extend section 123 to all persons "sentenced
to the house of correction” would conflict with R. L., c. 225, § 121, which contains the general provisions for release upon probation of “any person who is imprisoned in a jail or house of correction.” I am confirmed in this view by an opinion rendered on Feb. 3, 1917, to the Deputy Director of the Bureau of Prisons.

SCHOOLS — TEACHING OF THRIFT.

R. L., c. 42, § 1, as amended by St. 1908, c. 181, and St. 1910, c. 524, permits but does not require that thrift shall be taught in the public schools.

You inquire whether instruction in thrift in the public schools is legally required by St. 1910, c. 524. That statute provides as follows: —

Section one of chapter forty-two of the Revised Laws, relating to the subjects that shall be taught in the public schools, as amended by chapter one hundred and eighty-one of the acts of the year nineteen hundred and eight, is hereby further amended by inserting after the word “ethics”, in the twenty-fourth line, the word: — thrift.

R. L., c. 42, § 1, as amended by St. 1908, c. 181, provides, in part, that “special instruction” as to certain subjects “shall be taught as a regular branch of study to all pupils in all schools which are supported wholly or partly by public money,” with certain exceptions. The next sentence provides: “Book-keeping, . . . civil government, ethics and such other subjects as the school committee consider expedient may be taught in the public schools.”

St. 1910, c. 524, provides that the word “thrift” shall be inserted in the above sentence after the word “ethics.” The act is, however, entitled “An act to provide for compulsory instruction in thrift in the public schools.” The precise question is whether this title renders the provision for instruction in thrift mandatory.

I am of opinion that it does not. The title of an act, of itself, cannot be held to control or enlarge the words of the statute unless they are doubtful or ambiguous. The sentence in
section 1 of R. L., c. 42, in which the word "thrift" is inserted, is clearly permissive, not mandatory. If so, the title of St. 1910, c. 524, cannot control or change its meaning; If there were any doubt as to this conclusion, it seems to be removed by Gen. St. 1917, c. 169, and Gen. St. 1918, c. 257, § 174, both of which re-enact the provision for instruction in thrift in the permissive form.

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Review of law relative to use of money in primaries and elections, and the powers of political committees, candidates and other persons defined.

You have asked five questions arising under the law relating to corrupt practices at elections (St. 1913, c. 835, as amended by St. 1914, c. 783, and Gen. St. 1916, c. 161). I will answer your questions seriatim.

1. Is a committee organized for the purpose of aiding the nomination, election or defeat of a candidate a "political committee"?

A similar question was submitted to one of my predecessors in office, who ruled that a political committee consisting of five or more persons selected and appointed by a candidate or a political party, or combination for the purpose of aiding the election of such candidate, was a political committee, within the meaning of the statute; but from a careful consideration of the corrupt practices act and its history I feel obliged to dissent from this ruling. Under the provisions of the original law of 1913 the term "political committee" applied "to every committee or combination of three or more persons who shall aid or promote the success or defeat of a political party or principle in a public election or shall aid or take part in the nomination, election or defeat of a candidate for public office." By the act of 1914, as amended by Gen. St. 1916, c. 161, this portion of the law was changed, and the term "political committee" was made to apply "to every committee or combination of three or more persons who shall aid or promote the suc-
cess or defeat of a political party or principle in a public election, or shall favor or oppose the adoption or rejection of a constitutional amendment or other question submitted to the voters."

It is not to be presumed that the change was unintentional, and it is my opinion that a committee organized for the purpose of aiding the nomination, election or defeat of a candidate is not a political committee.

2. What is the meaning of the words "public election"?

It will be noted that the words "public election" appear in Gen. St. 1916, c. 161, as quoted in the discussion of your first question. While the election laws of 1913 do not give a definition, the meaning of these words may be inferred from the following definitions: "city election" shall apply to any election held in a city for the choice of a city officer by the voters, whether for a full term or for the filling of a vacancy; "town election" shall apply to any meeting held for the election of town officers by the voters, whether for a full term or for the filling of a vacancy; "state election" shall apply to any election held for the choice of a national, State, district or county officer by the voters, whether for a full term or for the filling of a vacancy. "Primary" shall apply to a joint meeting of municipal or political parties held under the provisions of the act relating to primaries.

It is obvious that while a primary has much of the machinery of an election, it is not an election at all. It nominates but does not elect. The words "public election" include elections by a town, city or State, or subdivisions thereof, but cannot include a primary.

3. May a committee organized to promote the nomination or election of a candidate expend money for advertising purposes, printing or distributing letters or circulars in its behalf?

In my answer to your first question I have said that a committee organized to aid the nomination, election or defeat of a candidate is not a political committee. The committee so or-
ganized has no standing as a political committee, and therefore its members can do no more than an individual can do in their support of a candidate. The law is clearly stated in St. 1914, c. 783, § 5, which is as follows: —

No person, except a person acting under the authority or in behalf of a political committee having a treasurer, or a candidate for nomination or election to a public office, or person acting under his authority, shall receive money or its equivalent, or expend, disburse or promise to expend or disburse money or its equivalent, to aid or promote the success or defeat of a political party or principle or a constitutional amendment or other question submitted to the voters in any election, or to aid or influence the nomination, election or defeat of a candidate for office: provided, however, that nothing herein shall be construed to prohibit any individual, not a candidate, from contributing to political committees or to candidates a sum which in the aggregate of all contributions by him shall not exceed one thousand dollars in any election and primary preliminary thereto; and provided, also, that nothing herein shall be construed to prohibit the rendering of services by speakers, publishers, editors, writers, checkers and watchers at the polls or by other persons for which no compensation is asked, given or promised, expressly or by implication; nor to prohibit the payment by themselves of such personal expenses as may be incidental to the rendering of such services; and nothing herein shall be construed to prohibit the free use of property belonging to an individual and the exercise of ordinary hospitality for which no compensation is asked, given or promised, expressly or by implication.

Thus, neither an individual nor a campaign committee of an individual candidate can lawfully expend money in behalf of a party or a candidate except to contribute to a candidate's personal fund or to a duly constituted political committee. The reason for this is obvious, inasmuch as a candidate must make a return of his personal expenses, and a political committee must make a return of the party expenses. It was plainly the intention to confine direct expenditures to persons or groups of persons who are required to make return. It cannot be considered that it was intended to leave an easy means of escape from the limitation of expenditures established by statute.

In my opinion, the statute makes it unlawful for any person or combination of persons, except candidates or political com-
mittees, to defray any election expenses except by contributions as above stated.

4. May a committee organized for the express purpose of promoting the success of a political party expend money for advertising purposes, printing or distributing letters or circulars in behalf of an individual candidate?

A committee such as is described in this question is clearly a political committee, and the rights and limitations of such a committee are set forth in St. 1914, c. 783, § 3, as follows: —

Political committees, duly organized, may receive, pay and expend money or other things of value for the purposes authorized by this act, and may contribute to other political committees. The authorized purposes of expenditure shall be advertising, writing, printing and distributing circulars or other publications, hire and maintenance of political headquarters, and clerical hire incidental thereto, meetings, refreshments other than intoxicating liquors, decorations and music, postage, stationery, printing, expressage, traveling expenses of committee, speakers and clerks, telephone, telegraph and messenger service, hire of not more than one conveyance and not more than two persons at each polling place on election day: provided, however, that not more than one such conveyance and not more than two persons at each polling place shall be hired to represent the same political party or principle.

A political committee may contribute to the personal fund of a candidate, but no such committee shall pay, directly or indirectly, any personal expenses of any candidate for nomination or election, except by such a contribution to the fund of the candidate. The following expenses shall be deemed, for the purposes of this act, to be personal expenses: — Traveling expenses of a candidate and expenses properly incidental thereto, writing, printing and distributing any letter, circular or other publication or advertisement of or for an individual candidate, meetings and refreshments for the sole benefit of an individual candidate, hire and maintenance of personal political headquarters, and clerical hire incidental thereto, stationery, postage, telephone, telegraph and messenger service of an individual candidate, preparing, circulating and filing nomination papers, and the hire of conveyances and workers at primaries.

It will be observed that the first paragraph provides what a political committee may do, and the second what it may not do. It may expend money for the benefit of the party, but not
for the benefit of an individual candidate. It can, therefore, have nothing to do with relation to primaries, nor may it expend money for any individual candidate for election apart from aiding or promoting the success or defeat of a political party.

5. May an individual not a candidate expend money in support of a nomination or election of a candidate or for the success of a political party in a public election?

In connection with my answer to your third question you will find quoted section 5 of chapter 783 of the Acts of 1914, in which may be found the answer to this question. No individual not a candidate can lawfully expend money in advertising or for any other purpose in behalf of a candidate for nomination or election or to aid a political party at an election except by contribution to the personal fund of such candidate or to a political committee.

Moreover, assuming that St. 1914, c. 783, § 5, is constitutional, it forbids any person to spend money for political advertisements, even in the form required by St. 1913, c. 835, § 354, unless such expenditures are made by or under the authority of a candidate or political committee, and they must be included in his or its return.
License to store Inflammable Liquid — Appeal to Commissioner of Public Safety from Order of State Fire Marshal.

Under Gen. St. 1919, c. 350, § 109, a person "affected" by an order of the State Fire Marshal, made under St. 1914, c. 795, § 18, by which the State Fire Marshal affirmed a permit to store a volatile inflammatory liquid, granted by the license commissioners of Cambridge, may appeal to the Commissioner of Public Safety, who shall grant a hearing upon such appeal.

I am in receipt of your request for an opinion as to your duty to grant a hearing on an appeal from an order of the State Fire Marshal affirming the granting of a permit to store volatile inflammatory liquid by the license Commissioners of Cambridge. The facts briefly are these: said commissioners were given power by the Fire Prevention Commissioner of the metropolitan district, acting under the provisions of St. 1914, c. 795, § 4, to issue permits for the storage of inflammatory liquids, as authorized by section 6 of said chapter, and a permit was duly granted by said commissioners.

A person living in the vicinity where said liquid was sought to be stored, claiming to be aggrieved by the action of the commissioners, appealed to the State Fire Marshal for a hearing under the provisions of section 18 of said chapter 795, the State Fire Marshal being the successor in office of the Fire Prevention Commissioner.

Following a hearing held by the State Fire Marshal, an order was issued affirming the decision of the license commissioners.
The appellant now seeks a further hearing before the Commissioner of Public Safety under the provisions of Gen. St. 1919, c. 350, § 109, which reads as follows:—

Any person affected by an order of the department or of a division or office thereof, may, within such time as the commissioner may fix, which shall not be less than ten days after notice of such order, appeal to the commissioner, who shall thereupon grant a hearing, and after such hearing may amend, suspend or revoke such order. Any person aggrieved by an order approved by the commissioner may appeal to the superior court: provided, such appeal is taken within fifteen days from the date when such order is approved. The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department, and upon petition of the commissioner to enforce all valid orders issued by the department. Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy.

St. 1914, c. 795, § 18 provides that —

The commissioner [State Fire Marshal] shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons, acting or purporting to act under authority of the commissioner, done or made or purporting to be done or made under the provisions of this act, and shall make all necessary and proper orders thereupon, and any person aggrieved by any such action of the head of a fire department or other person shall have an absolute right of appeal to the commissioner.

Concisely stated, a person aggrieved at the action of a board or commission to whom the Fire Prevention Commissioner, now the State Fire Marshal, has delegated power to act, may appeal to said State Fire Marshal, who shall hear and determine the appeal and make an order thereon; and any person who is affected by an order of said State Fire Marshal may appeal to the Commissioner of Public Safety, who shall grant a hearing, and he may amend, suspend or revoke the order.

I must therefore advise you that you are required to grant a hearing to the appellant on the facts as stated.
Retirement—Employee who leaves the Service and later returns to it.

Where a member of the State Retirement Association leaves the service of the Commonwealth and receives a refund of the amount contributed by him to the association, in accordance with St. 1911, c. 532, § 6, par. 2, but returns to the service of the Commonwealth within five months, being then under fifty-five years of age, he begins a new term of employment in respect of which he is not entitled to credit because of his former employment, either for the purpose of reinstatement in the association or for the purpose of determining the period of service which will entitle him to retire with a pension.

You request my opinion upon certain questions in connection with the interpretation of St. 1911, c. 532, as amended, as applied to the following facts:—

A member of the Retirement Association resigns from the service of the Commonwealth, and a refund is made to him upon his application and notice of withdrawal from his employment, in accordance with the provisions of St. 1911, c. 532, § 6, par. (2) A (a).

Within five months, being then under fifty-five years of age, he returns to the position from which he had resigned, and makes written application to your Board for reinstatement in the Retirement Association, enclosing therewith his check for the amount which had been refunded to him.

Your first question is whether or not the law will permit your Board to reinstate him under such a basis.

Your second question is whether or not he would be entitled to any credit for the period of continuous service rendered prior to the date of his last appointment.

These questions are interrelated and will be treated as one.

St. 1911, c. 532, § 2, provides for the establishment of a retirement system, and section 3 of said chapter 532 provides for the organization of a retirement association among the employees of the Commonwealth.

Section 3, paragraph (1), provides that—

All employees of the commonwealth, on the date when the retirement system is established, may become members of the association. . . .

Section 3, paragraph (2), provides that—
All employees who enter the service of the commonwealth after the date when the retirement system is established, except persons who have already passed the age of fifty-five years, shall upon completing ninety days of service become thereby members of the association.

Section 6, paragraph (2) A (a), provides that —

Should a member of the association cease to be an employee of the commonwealth for any cause other than death, . . . before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section five, (2) A, with such interest as shall have been earned thereon.

Section 6, paragraph (2) B, provides that —

Any member who reaches the age of sixty years and has been in the continuous service of the commonwealth for fifteen years immediately preceding, and then or thereafter retires or is retired, . . . shall receive an annuity.

The member, having been an employee at the time that the retirement system was established, became a member of the Retirement Association under the provisions of section 3, paragraph (1). Having resigned prior to the expiration of fifteen years of continuous service, he was not entitled to any pension, but was entitled to the refund provided for in said section 6, paragraph (2) A (a). This refund was granted to him by your Board, and was accepted by him. His acceptance of the refund clearly shows that he intended at the time of his resignation to permanently discontinue in the employ of the Commonwealth.

St. 1911, c. 532, § 1 (f), reads as follows: —

The words "continuous service" mean uninterrupted employment, with these exceptions: — a lay-off on account of illness or reduction of force, and a leave of absence, suspension or dismissal followed by reinstatement within two years. . . .

Under the provisions of section 6, paragraph (2) B, as defined by section 1 (f), the fifteen years of employment must be uninterrupted other than for the exceptions mentioned therein. Should your Board consider his voluntary resignation in the
light of a subsequent return to the position which he had resigned as a mere interruption of the period of his employment, the time spent in the service of the Commonwealth prior to his resignation could still not be considered as part of a continuous service, since voluntary resignation is not included in the exceptions mentioned in said section 1 (f).

Under section 4, paragraph (4), of said act your Board is authorized to make by-laws and regulations, provided they are "not inconsistent with the provisions of this act."

No express provision for the reinstatement of a member who voluntarily resigns from the association appears in the act. Reinstatement in the association, together with the acceptance by your Board of a check for the amount which had been refunded to him, would revive the continuity of the term of his employment prior to the time of his resignation. Such act on the part of your Board would in effect constitute an additional exception to those specifically mentioned in said section 1 (f), and would result in giving an interpretation to the words "continuous service" contrary to that as defined by said section 1 (f). Any provision made by your Board permitting his reinstatement would clearly be inconsistent with the provisions of the act, and therefore illegal.

His term of employment having terminated, he would, upon re-entering the service of the Commonwealth, become a member of the association under the provisions of section 3, paragraph (2), and the term of fifteen years would commence to run from said date.

In view of the fact that his resignation constituted a termination of the first term of his employment, said term must be disregarded. I am therefore of the opinion that your Board could not lawfully reinstate him, nor would he be entitled to any credit for the period of continuous service rendered by him prior to the date of his last employment.

Your third question is whether or not this member, if not allowed credit for the period of service from the time of the establishment of the Retirement Association to the date of his resignation, would, on completion of fifteen years of continuous
service immediately preceding retirement at the age of sixty or over, be entitled to the pension for the period of service rendered prior to the establishment of the Retirement Association as provided by section 6, paragraph (2) C (b), by virtue of the fact that he had been in the service of the Commonwealth at the time the system went into effect.

Section 6, paragraph (2) C (b), provides as follows:—

... Any member of the association who reaches the age of sixty years, having been in the continuous service of the commonwealth for fifteen years or more immediately preceding, and ... thereafter retires or is retired, ... shall receive in addition to the annuity and pension provided for by paragraphs (2) B and C (a) of this section, an extra pension for life as large as the amount of the annuity and pension to which he might have acquired a claim if the retirement system had been in operation at the time when he entered the service of the commonwealth. ... 

This section was clearly enacted by the Legislature for the purpose of rewarding such of the employees of the Commonwealth as had been in its employ prior to the time of the establishment of the retirement system, who remained in its continuous service and who would be compelled to leave the service by the terms of the act, by providing them with a reasonable retirement allowance. Had the member remained in the continuous service of the Commonwealth he would unquestionably, under the provisions of said section, have been entitled to the additional pension as therein provided. His voluntary resignation from the service of the Commonwealth terminated his first employment. His subsequent re-employment and readmission constituted, for the purpose of this act, the actual beginning of the term of his employment in the service of the Commonwealth, and did not revive the former term.

Having voluntarily resigned and having thereby terminated the period of his employment which was in operation at the time the retirement system went into effect, he thereby forfeited whatever right he might have had to the special benefits provided for in said section 6, paragraph (2) C (b).

I am of the opinion that the term "when he entered the serv-
ice of the commonwealth,” as used in said section 6, paragraph (2) C (b), would in his case apply to his re-entry into the service, which was after the establishment of the retirement system, and that he would therefore not be entitled to the additional pension for the period of continuous service rendered prior to the time the retirement system went into effect.

BANKS AND BANKING — COLLECTIONS — RIGHT OF COLLECTING BANK TO BECOME DEBTOR FOR SUM COLLECTED — MONEY ON STORAGE — DEFUNCT TRUST COMPANY.

Where a draft is transmitted to a trust company for collection and is collected by it while the trust company is still solvent and open for business, the proceeds of such draft constitute a debt, and cannot be recovered in specie, under St. 1910, c. 399, § 12, as money “in its . . . possession for storage or safekeeping,” even though the trust company is closed by the Commissioner of Banks under authority of St. 1910, c. 399, § 2, before the treasurer’s check, transmitted in payment of the proceeds of said draft, is presented to the trust company for payment.

Semble that if the draft had been collected after the trust company had closed its doors or was known by its officers to be insolvent the proceeds thereof would be held in trust, and could be recovered in specie by the owner of the draft.

Semble that where a draft is transmitted to a trust company for collection the trust company holds it in a fiduciary capacity until collected.

I have considered the inquiry contained in your recent letter. As I understand your letter, supplemented by an oral interview, the case is this: —

A draft was drawn upon the X Company, a Massachusetts concern, payable at the Old South Trust Company on Dec. 16, 1919. It was transmitted to the Old South Trust Company for collection by the First National Bank of ——, ——. The drawee brought in a certified check on Dec. 16, 1919, which was received in payment of the draft. On the same day (Dec. 16, 1919), the Old South Trust Company drew a check on itself, signed by its treasurer, to the order of said First National Bank, and mailed it to that bank in payment of the collection. On Dec. 18, 1919, the Bank Commissioner, acting under the authority of St. 1910, c. 399, closed the Old South Trust Company. The said treasurer’s check was thereafter
presented to the Old South Trust Company and went to protest. You further inform me that it is a usual custom of banks and trust companies to pay such collection items by a cashier's or treasurer's check drawn on themselves. You ask whether the proceeds of this collection are money or property held by the trust company "in storage or safekeeping," within the meaning of St. 1910, c. 399, § 12.

St. 1910, c. 399, § 12, provides, in part, as follows:—

Should any corporation or individual banker, at the time when the bank commissioner takes possession of the property and business of such corporation or banker, have in its or his possession for safekeeping and storage, any jewelry, plate, money, securities, valuable papers or other valuable personal property, or should it or he have rented any box, safes, or safe deposit boxes, or any part thereof, for the storage of property of any kind, the bank commissioner may at any time after taking possession as aforesaid cause to be mailed to the person claiming to be, or appearing upon the books of the corporation or banker to be, the owner of such property, or to the person in whose name the safe, vault, or box stands, a notice in writing in a securely closed postpaid, registered letter, directed to such person at his postoffice address as recorded upon the books of the corporation or banker, notifying such person to remove, within a period fixed by said notice and not less than sixty days from the date thereof, all such personal property; and upon the date fixed by said notice, the contract, if any, between such persons and the corporation or banker for the storage of said property, or for the use of said safe, vault or box, shall cease and determine, and the amount of the unearned rent or charges, if any, paid by such person shall become a debt of the corporation or banker to such person. . . .

The question, therefore, is whether the Old South Trust Company could and did make itself the debtor of the First National Bank of — for the proceeds of this collection, or whether it held the specific money collected for delivery to its correspondent.

The general rule is that where commercial paper is transmitted to a bank for collection, the bank holds such paper as agent for the apparent owner until the collection is made. Manufacturers' Bank v. Continental Bank, 148 Mass. 553, 557; Freeman's National Bank v. National Tube Works, 151 Mass. 413, 417; Commercial Bank v. Armstrong, 148 U. S. 50; 7
Corpus Juris, pp. 597, 598, note 33. But the great weight of authority and the rule in this State appears to be that when the collection is made, the collecting bank may, by custom, mingle the proceeds with its general funds and become a debtor for the amount collected. Manufacturers Bank v. Continental Bank, 148 Mass. 553, 558; Freeman's National Bank v. National Tube Works, 151 Mass. 413, 418; Commercial Bank v. Armstrong, 148 U. S. 50. This custom may, of course, be modified by express directions (7 Corpus Juris, pp. 616, 617, notes 71, 72), and is further qualified by the implied condition that at the time the collection is made the bank has not closed its doors or is not known by its officers to be insolvent. Manufacturers' Bank v. Continental Bank, 148 Mass. 555, 559; Western German Bank v. Norvell, 134 Fed. Rep. 724; St. Louis & S. F. Ry. Co. v. Johnston, 133 U. S. 566; 7 Corpus Juris, p. 616, note 70. In other words, the authority of the bank to change its relation to the owner of the paper from agent to debtor ceases when the bank has closed its doors or is known by its officers to be insolvent. (See cases last cited.)

In the present case the collection was complete upon Dec. 16, 1919. You inform me that the bank was not then, and in your judgment is not now, insolvent. Its doors were not closed until Dec. 18, 1919. It does not appear that there was any direction to transmit the specific money collected to the owner of the draft, or that the treasurer's check of the Old South Trust Company was rejected and the proceeds of the collection claimed in specie. Under these circumstances, and in the absence of any further facts, I am of opinion that the Old South Company could and did make itself a debtor for the proceeds of this collection. Such a debt is not within St. 1910, c. 399, § 12.
INSANE PERSON — SURGERY — RIGHT TO OPERATE ON INSANE PATIENT WITHOUT CONSENT — QUARANTINE WITHOUT CONSENT, OF INSANE PATIENT WHO IS DANGEROUS OR AFFLICTED WITH A CONTAGIOUS DISEASE — VACCINATION OF INSANE PATIENT.

The superintendent of a State insane hospital has no authority to draw small quantities of blood and spinal fluid from a patient for purposes of diagnosis and treatment unless the patient, if competent, or his guardian, if he is incompetent, consents.

If a patient be dangerous or afflicted with a contagious or infectious disease, he may be quarantined, even against his will or the will of his guardian.

If the conditions prescribed by R. L., c. 75, § 138, are satisfied, a patient may be vaccinated against his will or that of his guardian.

You inquire whether superintendents of State insane hospitals have authority to draw small quantities of blood and spinal fluid from a patient for purposes of diagnosis and treatment, "notwithstanding the objections of the patient or his guardian or relatives."

Under date of Feb. 14, 1916, an opinion was rendered by this Department to the effect that lumbar punctures could not be made on patients without their consent, or the consent of their guardians if such patients were themselves incompetent to give such consent, where such punctures were made for the purpose of experiment or research.

On March 25, 1916, this Department rendered a further opinion to the State Board of Insanity that lumbar punctures cannot be made upon a patient in an insane hospital, even for purposes of diagnosis and treatment, unless the patient (if competent) or the patient’s guardian consents. IV Op. Atty.-Gen., 531. See also McClallen v. Adams, 19 Pick. 333; Purchase v. Seelye, 231 Mass. 434, 438.

In the light of these authorities I am of opinion that consent, either express or by conduct, is a condition of both surgical and medical treatment in the case of sane persons. McClallen v. Adams, 19 Pick. 333. But such consent may be manifested by conduct, either of the patient himself or of one who has authority to give such consent. McClallen v. Adams, 19 Pick.
333. In an emergency such consent may sometimes be presumed. *Mohr v. Williams*, 95 Minn. 261. The rule appears to be the same for insane patients. *Pratt v. Davis*, 224 Ill. 300. If the patient is competent to give consent, his assent, either express or by conduct, is a condition of treatment. IV Op. Atty.-Gen., 531. If the patient is incompetent, the consent of his guardian, either express or by conduct, is a condition of treatment. IV Op. Atty.-Gen., 531. It may be that the Legislature might modify this rule to some extent in the case of persons committed to State institutions. *Commonwealth v. Pear*, 183 Mass. 242; *Jacobson v. Massachusetts*, 197 U. S. 11. See also Gen. St. 1918, c. 58, § 2, and opinion of the Attorney-General to the State Department of Health under date of Aug. 22, 1919, as to physical examination of inmates of the penal institutions named in that act. I find no similar statute applicable to inmates of State insane hospitals. I am therefore of opinion that where the patient (if competent) or his guardian (if the patient be incompetent) has expressly forbidden a given sort of medical or surgical treatment, that prohibition is effective and such treatment may not be administered.

To avoid misunderstanding, let me add two general qualifications. In the first place, if a patient be dangerous or afflicted with a contagious or infectious disease, he might, in my opinion, be segregated and quarantined even against his will, for the protection of other inmates. In the second place, the Legislature has, by R. L., c. 75, § 138, made express provision for vaccination. That section provides as follows:—

The board of health of a city or town in which any incorporated manufacturing company, almshouse, reform or industrial school, hospital or other establishment where the poor or sick are received, prison, jail or house of correction or any institution which is supported or aided by the commonwealth is situated may, if it decides that it is necessary for the health of the inmates or for the public safety, require the authorities of said establishment or institution, at the expense thereof, to cause all said inmates to be vaccinated.

I am of opinion that, if the conditions provided in R. L., c. 75, § 138, are satisfied, a patient might be vaccinated even against his will or that of his guardian.

Constitutional Law — Provisions for raising Tax to pay Bonds no Contract with Bondholder or Taxpayer — Taxes not Borrowed Money — Application of Tax to Different Purpose.

Money raised by taxation to repay a loan is not "borrowed money," within the meaning of Mass. Const. Amend. LXII, § 4. The provisions of Gen. St. 1919, c. 283, § 9, with respect to the manner in which money shall be raised by State taxation to pay the bonds authorized by that act, do not constitute a contract with the bondholder. The provisions of Gen. St. 1919, c. 283, § 9, that the purpose of the tax thereby imposed shall be stated upon the tax bill, do not constitute a contract with the taxpayer that the tax shall be applied to such purpose. There is no constitutional provision which requires that the taxes raised under Gen. St. 1919, c. 283, § 9, shall be applied to the purpose stated therein. The Legislature may constitutionally provide that payment of the $10 bonus, authorized by Gen. St. 1917, c. 211, shall be made out of taxes raised under Gen. St. 1919, c. 283, to pay the $100 bonus authorized by that act.

You ask my opinion upon the following matter: —

Gen. St. 1919, c. 283, makes provision for the payment of $100 each to soldiers, sailors and certain others, resident in Massachusetts, who served in the war with Germany. Section 9 of that act provides as follows: —

For the purpose of meeting the expenditures authorized by this act the treasurer and receiver general is hereby authorized, with the approval of the governor and council, to issue bonds or notes from time to time, as they are needed, to an amount not exceeding twenty million dollars, for such terms as the governor shall recommend to the general court in accordance with section three of Article LXII of the amendments to the constitution. Such bonds or notes shall be designated on the face thereof Massachusetts Military Service Loan, Act of 1919, shall be countersigned by the governor, and shall be deemed a pledge of the faith and credit of the commonwealth; and the principal and interest thereof shall be paid at the times specified on said bonds or notes in gold coin of the United States, or its equivalent. Said bonds or notes shall be disposed of in such manner as shall be deemed best by the treasurer and receiver general, who shall
when issuing any of said bonds or notes, provide for the payment of the
same in the manner prescribed by chapter three of the acts of nineteen hun-
dred and twelve. The amount necessary to pay the principal of said loan
as it matures, and the interest as it accrues, shall be raised by the assess-
ment of a civilian war poll tax sufficient to provide not less than one half
of the said amount, and the balance of such amount shall be raised by the
imposition and levy of such assessments, rates and taxes, and of such duties
and excises as the general court may hereafter deem just and expedient
and may by law provide. All tax bills for the collection of taxes imposed
to meet the amount of said principal and interest shall show on the face
thereof that said taxes are imposed for the purpose of raising funds to pro-
vide for the payments hereby authorized to the soldiers and sailors of Mas-
sachusetts who served in the war with Germany. The tax commissioner
shall have authority to make suitable regulations for enforcing this provi-
sion. Any person entitled to the benefits of this act shall, upon application
to the board of assessors of the city or town in which he resides, receive an
abatement of the additional war poll tax assessed upon him under the
provisions of this section.

Section 10 provides for the levy of a poll tax of $5 in the
years 1920 to 1923, inclusive.

Gen. St. 1919, c. 307, provides that the bonds to be issued
under chapter 283 shall be for a term not exceeding five years,
and authorizes the issue of notes in anticipation, payable within
not more than one year from issue. Under this act $10,000,000
of notes have been issued. It is proposed to refund these
notes this year by a bond issue maturing in the amount of
$2,500,000 on December 1 of each of the years 1920 to 1923,
inclusive.

Gen. St. 1919, c. 342, imposes certain additional taxes (in-
cluding a special State tax of $650,000) for the purposes afore-
said, with provision for a statement of the purpose upon the
tax bills. Section 7 further provides that the amounts collected
under the act shall be set aside in a special fund to meet the
bonus requirements and the notes and bonds, and interest
thereon, and that "any surplus remaining in said fund after
all such payments have been made shall be disposed of as the
general court shall hereafter prescribe by law."

Gen. St. 1917, c. 211, § 1, provided for the payment of $10
per month for a prescribed period to each soldier and sailor
mustered into the military or naval service of the United States. Section 2 provided for a special issue of bonds or notes, not exceeding $1,500,000, for a term not exceeding five years.

It was and is anticipated that the amount required under the $100 bonus law will be less than $20,000,000, but that the amount required under the $10 bonus law will exceed $1,500,000.

Spec. St. 1919, c. 242, § 3 (the Supplementary Appropriation Bill), authorized the Treasurer and Receiver-General to pay a sum not exceeding $200,000 from the proceeds of the loan authorized by Gen. St. 1919, c. 283 (the $100 bonus law), to soldiers and sailors under Gen. St. 1917, c. 211 (the $10 bonus law). None of this appropriation has been expended. Question has been made whether this provision is in violation of Mass. Const. Amend. LXII, § 4, which provides:—

Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan.

In connection with a proposal to repeal section 3 of chapter 242 of the Special Acts of 1919 you make the following inquiry:—

May the General Court, by amendment to the acts creating the special taxes above mentioned or by new legislation, provide for the appropriation of the proceeds of any of said taxes to the payment of the $10 bonus provided for by Gen. St. 1917, c. 211, before such time as all indebtedness incurred under the above-mentioned acts has been discharged and as all the $100 bonus payments have been made or provided for? And if, in your opinion, such appropriation may be validly made at this time, what procedure would you suggest?

1. I am of opinion that money raised by taxation to repay a loan is not "borrowed money," within the meaning of Mass. Const. Amend. LXII, § 4, quoted above. It follows that that amendment does not require that money so raised by taxation shall be applied to repay such loan.

2. In my opinion, the provisions of Gen. St. 1919, c. 283, § 9, with regard to the manner in which money shall be raised by taxation to repay the loan thereby authorized, do not enter
into or become a part of the contract between the Commonwealth and note holders or bondholders. There is no express pledge of the proceeds of the taxes so imposed or to be imposed, similar to the express pledge of rentals and tolls in the case of the East Boston tunnel. See Opinion of the Justices, 190 Mass. 605. Even in the case of a municipality, a pledge of the receipts from certain water works was not implied from ordinances placing such receipts in a special fund to meet bonds issued to build the water works. Sinclair v. Fall River, 198 Mass. 248, 253. The act provides that the bonds or notes "shall be deemed a pledge of the faith and credit of the commonwealth." I am informed that bonds of the Commonwealth have always been issued without security. Under these circumstances, I am of opinion that the provision of section 9 for the imposition of taxes to pay the bonds must be regarded as a statutory declaration of the legislative will, which may be amended at pleasure, rather than as a contract with the bondholders or note holders.

3. I am of opinion that the provisions for stating on the tax bills the purpose for which the tax is raised confer no right upon the taxpayer to insist that the proceeds of the tax be applied to payment of the $100 bonus only. A statement of the reason for or purpose of the tax is not a declaration of trust which the taxpayer may enforce. Moreover, application of some part of the proceeds of the tax to the payment of the $10 bonus is an application to a purpose of similar character, namely, care of soldiers and sailors who served in the late war. I suggest, however, that if any of the proceeds of these taxes are to be applied to the payment of the $10 bonus the Commonwealth might well provide in any act for that purpose that the statement on the tax bill be so changed as to include payments under both acts.

4. I find no constitutional provision which requires that the taxes raised under or in connection with this act shall be applied to the purpose stated in the act.

I am therefore of opinion that the Legislature has power to provide that taxes raised under or in connection with Gen.
St. 1919, c. 283, may be immediately used to pay the $10 bonus provided for by Gen. St. 1917, c. 211. Mass. Const. Amend. LXII, § 4, applies only to the proceeds of the loan, and not to the taxes raised to pay it.

Civil Service — Fire Department — Promotion.

Under St. 1913, c. 487, as amended, and Civil Service Rule 34, a call captain of the fire department may not be promoted directly to the position of captain of the permanent force.

St. 1913, c. 487, § 1, as amended by St. 1914, c. 138, provides as follows:—

Cities and towns which have a call or part call fire department which now is or may hereafter be subject to the civil service rules may, on the recommendation of the board of engineers of the fire department or of the officer or board having charge of the fire department, appoint as members of the permanent force without civil service examination any persons then in the call or part call fire department who have served as call men or part call men for five or more successive years: provided, that such persons are certified by the city or town physician to be competent physically for the duty. If there is no city or town physician, then the said certification shall be made by a physician designated for the purpose by the board of engineers or other authority, as aforesaid.

Gen. St. 1916, c. 119, provides that the term "call men or part call men," as used in the above acts, shall be construed to include substitute call men. St. 1913, c. 487, which, by section 4, was subject to a referendum provision, was accepted by the town of Dedham on March 2, 1914. There are only seven permanent men in the Dedham fire department at present, none of whom are officers. All the officers are call men. Two men have served as call captains for more than five years. You inquire whether under the above acts and the rules of the civil service these two men may be promoted to the permanent force with the rank of captain, or whether they may be promoted only to the rank of private in the permanent force.

Paragraphs 1, 2 and 3 of Rule 34 of the Civil Service Rules provide as follows:—
1. In the Official Service, a promotion from one grade, as fixed by the rules or determined by the Commission, to another grade in the same class, shall not be valid until the candidate or candidates for promotion shall have been subjected to a competitive or non-competitive examination, as the Commission may decide (except as otherwise required by law), and until the promotion shall have been authorized by the Commission.

2. So far as practicable, promotions shall be made by successive grades; and no person shall be designated for promotion or examined until he shall have served at least six months in the lower position except by special vote of the Commission.

3. No promotion or transfer from the call to the permanent fire force shall be allowed except after open competitive examination with all applicants for said force, except as otherwise provided by statute. No examinations shall be required for promotion of call men within the call force.

A former Attorney-General has already advised you that under St. 1913, c. 487, and the Civil Service Rules, a call fireman cannot be promoted to the office of captain in the permanent force. IV Op. Atty.-Gen. 151.

It seems reasonably clear that appointment from the call force to the permanent force is a promotion by successive grade, within the meaning of Rule 34, paragraph 2. In my opinion, a call captain is, in spite of his rank, only a member of the call force. To appoint a call captain to the position of captain in the permanent force would, in my opinion, be equivalent to a promotion from call man to membership in the permanent force, and then from private in the permanent force to captain. I am of opinion that such appointment is not authorized by St. 1913, c. 487, as amended, and would conflict with both paragraph 1 and paragraph 2 of Rule 34.
SOLDIERS AND SAILORS — MILITARY AID — PERSON SUMMONED TO ACTIVE SERVICE BUT DISCHARGED FOR PREVIOUS DISABILITY — STATE AID TO DEPENDENTS OF SUCH PERSON.

In view of the express provision of Gen. St. 1919, c. 290, § 9, which incorporates into said section 9 the limitations prescribed by section 3 of said act, a man enrolled in the United States Naval Reserve Force, who is called for active duty but who is almost immediately discharged for a disability which is not incurred in said service, is not entitled to military aid in the first, second, third or fourth classes defined by said section 9.

The dependents of a man enrolled in the United States Naval Reserve Force, who is summoned for active duty but is almost immediately discharged by reason of a disability which is not incurred in said service, are not entitled to receive State aid in the first, second, third or fourth classes defined by Gen. St. 1919, c. 290, § 3.

You request my opinion upon the following inquiry: —

Your official opinion is requested by this Department as to the right of the State to pay State aid to the dependents of service men of the German War, and military aid to the ex-service men of the German War, who were officially enrolled in the United States Naval Reserve Force and who were later called to active duty but who were, before performing any real service, called before the medical officers of the Navy Department and found to be physically disqualified for service and almost immediately discharged from the service.

I understand that the physical disqualification above referred to was not incurred in the service. You further refer to a ruling of the Navy Department by the Chief of the Bureau of Navigation, to the following effect: —

Status of men enrolled in the Naval Reserve Force and found physically unqualified upon assignment to active duty.

1. If the men were enrolled in the Reserve Force and were called to active duty they were in active service during the war even if their active service was only for a period of one day.

1. Military Aid to Such Ex-Service Men.

Gen. St. 1919, c. 290, § 9, provides as follows: —

The recipient of military aid shall belong to and have the qualifications of one of the four following classes: —
First Class.

Each person of the first class shall have his settlement in the city or town aiding him: shall have served as a soldier, sailor, marine, nurse, or commissioned officer in the manner and under the limitations prescribed in the first class of section three; shall have been honorably discharged or released from active duty in such United States service and from all appointments and enlistments therein; shall be poor and indigent and, by reason of sickness or other physical disability, in such need as would entitle him to relief under the pauper laws; shall not be, directly or indirectly, in receipt of any other state or military aid, or of any pension for services rendered or disabilities incurred either in the Civil or Spanish wars, Mexican border service or German war service. The disability must have arisen from causes independent of his military or naval service aforesaid.

Second Class.

Each person of the second class shall have his settlement in the city or town aiding him, and shall be an invalid pensioner, entitled to receive state aid, whose income from pension or government compensation and state aid is inadequate for his relief, and who would otherwise receive relief under the pauper laws.

Third Class.

Each person of the third class shall have all the qualifications of persons of the first class except settlement, and shall have been a continuous resident of this commonwealth during the three years last preceding his receipt of military aid, and he or she shall be a resident of the city or town granting the aid.

Fourth Class.

Each person of the fourth class shall have all the qualifications of persons of the second class except settlement, and shall have been a continuous resident of this commonwealth during the three years last preceding his or her receipt of military aid, and shall be a resident of the city or town granting aid.

A. First and Third Classes. — Since each person of the third class "shall have all the qualifications of persons of the first class except settlement," I am of opinion that both classes may be considered together in respect of your inquiry.

There can be no question that a man enrolled in the United States Naval Reserve Force, who is called for active duty but who is almost immediately discharged from the service because
physically disqualified therefor, is "honorably discharged," within the meaning of the statute. I further assume, without deciding, that, in view of the ruling of the Navy Department, such a man was "discharged or released from active duty in such United States service," within the meaning of the act. The question, therefore, is whether such a man is not entitled to military aid because such physical disqualification was not incurred in the service.

Section 9, above quoted, requires that "each person of the first class . . . shall have served as a . . . sailor . . . in the manner and under the limitations prescribed in the first class of section three."

Section 3 contains the following requirements for membership in the first class in respect of the late war:

The recipient of state aid shall have a residence, and shall actually reside, in the city or town from which such aid is received, shall not receive aid from any other city or town in the commonwealth or from any other state, shall be in such needy circumstances as to require public assistance, and, if a soldier, sailor or nurse, shall have been honorably discharged from all appointments and enlistment in the army or navy, shall be so far disabled, as the result of his service in the army or navy, as to prevent him from following his usual occupation, and shall belong to one of the following classes:

First Class.

Any soldier, sailor, or nurse who served in the army or navy of the United States in the war with Germany, which for the purposes of this chapter shall be defined as having begun on the third day of February, nineteen hundred and seventeen, and as having ended on the eleventh day of November in the year nineteen hundred and eighteen: provided, that such soldier, sailor, or nurse, receives a pension or compensation from the United States government for disability incurred in such service, and was mustered into such service while an inhabitant of a city or town in the commonwealth and actually residing therein; and provided, further, that such soldier, sailor, or nurse was honorably discharged from such service by reason of illness or disability incurred therein.

It will be observed that these requirements contain the express proviso: "provided, further, that such . . . sailor . . . was honor-
ably discharged from such service by reason of illness or disability incurred therein."

I am of opinion that, in view of the express incorporation of the "limitations" of section 3 into section 9, this proviso of section 3 governs. It follows that a man officially enrolled in the United States Naval Reserve Force, who is called for active duty but almost immediately discharged from the service by reason of illness or disability not incurred therein, is not entitled to military aid in either the first or third classes defined by section 9 of chapter 290 of the General Acts of 1919.

B. Second and Fourth Classes. — Since each person of the fourth class "shall have all the qualifications of persons of the second class except settlement," I am of opinion that both classes may be considered together with respect to your inquiry. Each member of these two classes must be "an invalid pensioner entitled to receive state aid." I am of opinion that this requirement confines the right to receive military aid to those persons who would be entitled to State aid under the provisions of section 3. It follows that the conclusion already reached as to the first and third classes applies equally to the second and fourth classes.

2. State Aid to Dependents of Such Ex-Service Men.

The persons entitled to receive State aid as dependents are defined in the second, third, and fourth classes of section 3.

A. Second Class. — The provisions of section 3 applicable to this war are as follows: —

Dependent relatives of invalid pensioners and of soldiers or sailors who served in the manner and under the limitations described for such service under class one who did not die in the service above defined and who were honorably discharged therefrom, as follows:

The dependent widow, dependent widowed mother and dependent children up to the age of sixteen of any soldier, sailor, or nurse who died while in such service during the German war as defined in class one, or who shall die after an honorable discharge from such service from injuries received or disabilities or illness incurred therein, or any child dependent
by reason of physical or mental incapacity; provided, that the children were in being prior to his or her discharge or prior to the termination of said war as herein defined, or any person who stood to him or her in the relationship of a parent for five years prior to such service.

B. Third Class. — The third class is defined as follows: —

Dependent wives, and children up to sixteen years of age, widows and widowed mothers of soldiers, sailors, and nurses, entitled to state aid as defined in class one of this section, who appear on the rolls of their regiments or companies in the office of the adjutant general to be missing or to have been captured by the enemy, and who were not exchanged and have not returned from captivity, and whom the city or town officers granting such aid have good reason to believe to be dead.

C. Fourth Class. — The provision of section 3 applicable to this war is as follows: —

Fathers or mothers, the fathers being living, of soldiers or sailors who served in the German war, in the same manner and under the same limitations described herein for the service of said soldiers or sailors, and who died in such service, if such parents have been in receipt of state war allowance between February third nineteen hundred and seventeen and November eleventh nineteen hundred and eighteen.

It will be noted that membership in the second class is confined to the prescribed dependents of a man who either died in the service or who died after an honorable discharge from such service “from illness or disability incurred therein.” Membership in the fourth class is confined to the prescribed dependents of men “who died in such service.” The provisions as to membership in the third class manifestly do not apply. I am therefore of opinion that dependents of a man enrolled in the United States Naval Reserve Force, who is summoned for active duty but is almost immediately discharged by reason of illness or disability not incurred in the service, are not within the provisions of section 3 and are not entitled to State aid thereunder.
OPINIONS OF THE ATTORNEY-GENERAL.

Emergency Fund — Transfer therefrom to Meet Deficiency in Appropriation — Recommendation by Auditor as Condition Precedent to Transfer by Governor and Council.

Under R. L., c. 4, § 9, as amended by St. 1908, c. 549, § 1, a request for a transfer from the emergency fund, in order to meet a deficiency in an appropriation, must be recommended by the Auditor before the same can be approved by the Governor and Council.

I have received from the executive secretary a letter addressed to Your Excellency and the Honorable Council by the secretary of the Soldiers' and Sailors' Commission, and an informal request for an opinion in regard to the authority vested in Your Excellency and the Honorable Council to take the action requested in the letter.

The letter states that on Sept. 3, 1919, Your Excellency and the Honorable Council appropriated the sum of $5,000 for the use of the Soldiers' and Sailors' Commission, but that the amount was never transferred to the account of the commission. The letter further states that the amount is needed in order that the commission may properly carry on its work, and requests that such action be taken as will make this amount previously voted available for the use of the commission.

Upon the facts stated, the question presented would appear to be whether Your Excellency and the Honorable Council can by any action at this time make available for the use of the commission the sum of $5,000, the use of which was authorized by the vote of Sept. 3, 1919.

Upon inquiry I am advised by the Auditor that of the amount of $100,000 appropriated for extraordinary expenses last year, pursuant to St. 1908, c. 549, a balance of $467.60 remains unexpended. It is obvious, therefore, that no action which can now be taken would make available for the use of the commission the amount the use of which was authorized by the vote of last year.

The amount authorized by the vote of Sept. 3, 1919, being no longer available, a further question is presented as to whether
the commission may properly request Your Excellency and the Honorable Council to authorize the use of the amount desired from the amount to be appropriated for extraordinary expenses during the current year.

This raises the inquiry whether any occasion is presented at this time which would justify the use of any part of the emergency fund for the expenses of the commission. The commission was created by Spec. St. 1919, c. 112, and by the provisions of that act received an appropriation of $10,000. The General Court is now in session, and any request for funds to carry on the work of the commission during the current year would properly be addressed to the General Court in the first instance. I find in the cases in which the opinion of the Attorney-General has previously been requested no instance in which requests have been made to Your Excellency and the Honorable Council for a payment out of the emergency fund when the General Court was in session.

The question of what constitutes such an emergency as was contemplated by the General Court at the time of the passage of St. 1890, c. 415, by the terms of which the emergency fund was originally created, has been presented for consideration and discussed in previous opinions of the Attorneys-General. The original act, as incorporated in R. L., c. 4, § 9, is as follows:

An amount not exceeding twenty thousand dollars shall be appropriated each year for carrying out the provisions of sections one hundred and twenty to one hundred and twenty-seven, inclusive, of chapter sixteen, for the entertainment of the president of the United States and other distinguished guests while visiting or passing through this commonwealth and for extraordinary expenses, not otherwise provided for, which the governor and council may deem necessary.

Under this act the question was presented whether an amount due the State printer for printing the journal of the Senate and the journal of the House might properly be paid from the appropriation for extraordinary expenses when appropriations by the General Court for the purpose had proved inadequate, and the General Court was no longer in session. In the opinion of the Attorney-General, advising that it was for the Governor
and Council, in the large discretion conferred upon them by the act, to determine whether the faith and the interests of the Commonwealth rendered such payment necessary, he said: —

I am constrained to add, however, that such action is to be justified only if the Governor and Council deem it to be required by an exigency growing out of a particular condition of facts imperatively demanding immediate payment on grounds of good faith or of the interests of the Commonwealth, and no precedent should be established under which the fund in question may be held available for meeting deficiencies in general appropriations, for such is not its legitimate purpose.

In a later opinion, rendered on Dec. 22, 1903, the Attorney-General said: —

I had the honor to advise His Excellency the Governor heretofore, in an opinion under date of Nov. 12, 1903, that in my opinion the Legislature did not intend that the fund set apart for extraordinary expenses should be used to defray any expense incurred in the usual course of events, and for which an appropriation is regularly set apart —

and, in concluding, again emphasized the fact that the appropriation for extraordinary expenses should be rigidly confined to the purposes which were within the contemplation of the General Court at the time the act was passed. In this connection he said: —

But, since there does exist an appropriation to which these expenses might otherwise be charged, I should be evading the responsibility which I think Your Honor's inquiry puts upon me, if I did not further say, substantially as I have heretofore said to His Excellency the Governor, that the appropriation for extraordinary expenses should be held rigidly for the purposes for which the Legislature intended it, and any draught upon it can be justified only by the express provisions of the law, or by the responsible exercise of that discretion of the Council to which the Legislature confided the fund.

The specific provision for the use of this appropriation to meet deficiencies in appropriations made by the General Court was first made in an amendment to R. L., c. 4, § 9, being St. 1908, c. 549, § 1. The statute as then amended has not since been changed, and is as follows: —
An amount not exceeding one hundred thousand dollars shall be appropriated each year for carrying out the provisions of sections one hundred and twenty to one hundred and twenty-seven, inclusive, of chapter sixteen, for the entertainment of the president of the United States and other distinguished guests while visiting or passing through this commonwealth, for extraordinary expenses, not otherwise provided for, which the governor and council may deem necessary, and, upon the recommendation of the auditor with the approval of the governor and council, to make transfers to such appropriations as have proved insufficient.

The clear intent of the statute, as amended, is to require the recommendation of the Auditor as a condition precedent for favorable action by the Governor and Council upon any transfer from the appropriation for extraordinary expenses to meet a deficiency in any other appropriation. The statute contemplates that before exercising the large discretion vested in the Governor and Council in determining what are extraordinary expenses, within the purpose and intent of the act, they shall have the approval of the Auditor, based upon the full information with respect to previous appropriations and expenditures which is available to his department. As the recommendation of the Auditor is made a condition precedent to approval of a transfer from the fund appropriated for extraordinary expenses, it follows that until such recommendation has been made any request for a transfer of funds from the appropriation for extraordinary expenses to the use of the Soldiers' and Sailors' Commission for the purposes stated cannot properly be addressed to Your Excellency and the Honorable Council. See Opinion of the Justices, 13 Allen, 593.

Constitutional Law — Public Office — Commissioner to Qualify Civil Officers — Woman.

Under R. L., c. 17, § 8, and the Constitution of the Commonwealth a woman may not be appointed as commissioner to qualify civil officers.

You inquire whether, under R. L., c. 17, § 8, a woman may legally be appointed to the office of commissioner to qualify civil officers.
Mass. Const., Pt. II, c. VI, art. I, requires "any person appointed or commissioned to any judicial, executive, military, or other office under the government" to take and subscribe the oath prescribed by Mass. Const. Amend. VI "before such persons and in such manner as from time to time shall be prescribed by the legislature." By Res. 1780, October Session, c. 58, the Legislature provided: —

Resolved, That the Governor, Lieutenant-Governor, or any two of the Council, or any other person or persons especially appointed by the Governor and Council, be, and they hereby are empowered, to administer the oaths or affirmations required by the constitution of this Commonwealth to all officers commissioned under the said constitution or form of government, until further provision shall be made by the General Court of the Commonwealth aforesaid.

The provision of this resolution for the appointment of commissioners to administer such oaths has been continued through Rev. Stats., c. 13, § 57, Gen. Stats., c. 14, § 40, Pub. Stats., c. 18, § 7, to R. L., c. 17, § 8, which provides as follows: —

The governor, with the advice and consent of the council, shall appoint commissioners to administer to public officers the oaths of office required by the constitution. Such commissioners shall, upon administering such oaths, forthwith make return thereof, with the date of the same, to the secretary of the commonwealth.

These commissioners perform a function prescribed by the Constitution. It is of so high and important a character that, under Res. 1780, c. 58, it might be discharged by the Governor, Lieutenant-Governor or "any two" of the Council. This provision clearly indicates that women were not intended by the Legislature to be included in the "persons" who might be appointed as commissioners under that resolution. Indeed, it may be doubted whether the word "persons," as used in Mass. Const., Pt. II, c. VI, art. I, was intended to include women. See Opinion of the Justices, 107 Mass. 604; Opinion of the Justices, 150 Mass. 586; Opinion of the Justices, 165 Mass. 599. Moreover, there is no indication that the Legislature, in con-
tinning and re-enacting the provisions of Res. 1780, c. 58, for
the appointment of commissioners, intended, even if it had the
power, to broaden the scope of that resolution so as to permit
the appointment of women. Both the constitutional and legis-
slative history of R. L., c. 17, § 8, strongly indicate that women
are not eligible.

The authorities point to the same result. A woman has
been held ineligible to appointment as a justice of the peace,
(Opinion of the Justices, 107 Mass. 604), or as a notary public
(Opinion of the Justices, 150 Mass. 586, Opinion of the Justices,
165 Mass. 599), or to the office of truant officer under R. L.,
c. 46, § 12, (III Op. Atty.-Gen. 444), or to the office of
deputy collector of taxes (opinion of the Attorney-General
to the Committee on Taxation dated Feb. 27, 1908). It
has also been held that, under St. 1876, c. 197, a woman
could not be examined for admission to the bar (Robinson's
Case, 131 Mass. 376), though this was later changed by St.
1882, c. 139. So, also, she cannot participate in a party caucus
Gen. 389). Indeed, it has been held that the Legislature had
no constitutional power to authorize the appointment of women
as notaries public under Mass. Const. Amend. IV, Opinion of
the Justices, 165 Mass. 599, though women are now made eli-
gible by Amend. LVII. So, also, the Legislature has no constitu-
tional power to provide that the persons entitled to vote on the
ratification or rejection of constitutional amendments shall in-

On the other hand, it has been held that the Constitution,
which is wholly silent on the subject, does not exclude women
602. And a provision for the appointment of "nine persons
who shall constitute a state board of health, lunacy and
charity" has been held to authorize the appointment of a
woman where other parts of the act and prior legislation indi-
cated that such was the intent of the Legislature. Opinion of
the Justices, 136 Mass. 578. Thus, when the Legislature has
intended that women should be eligible, it has usually made-
express provision therefor (Robinson's Case, 131 Mass. 376, 379, 381), as in R. L., c. 17, § 5. The omission of any such provision from R. L., c. 17, § 8, is a further indication of the legislative intent that women should not be eligible.

I therefore advise you that women are not eligible to appointment under R. L., c. 17, § 8.

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**Animals — Killing of Wild Birds and Animals on State Reservations — Power of Commissioner of Conservation to License.**

Under St. 1909, c. 362, § 1, the Commissioner of Conservation cannot authorize, within any State reservation under his jurisdiction, the hunting, taking or killing, during the open season, of any birds or animals which were protected by law at the time when that act took effect.

You inquire whether the Commissioner of Conservation may lawfully authorize, during the open season, the hunting and killing of wild birds or animals on a State reservation under his jurisdiction, if such birds or animals were, on June 6, 1909, protected by law during a part of the year.

St. 1909, c. 362, entitled “An Act to provide for the establishment of refuges for birds and game,” reads, in part, as follows:

**Section 1.** No person shall hunt, pursue, take, kill or in any manner molest or destroy any wild bird or game within the exterior boundaries of any state reservation, park, common or any land held in trust for public use, except that the authorities or persons having the control and charge of such reservations, parks, commons or other lands may in their discretion, and with such limitations as they may deem advisable, authorize persons to hunt, take or kill within said boundaries any wild birds or animals which are not now protected by law. . . .

The words "not now protected by law" would seem to make the exception in said section apply only to such birds and animals having no protection whatever. The use of the word "now" is significant. Without it, it might well be argued that hunting could be licensed during an open season, but by its
use it indicates an intention to prohibit the killing of any birds and game which receive protection under the laws of the Commonwealth. This construction is supported by the title of the act, which declares State reservations to be refuges for certain birds and animals. Prior to its passage, it would have been unlawful to hunt protected birds and animals during the close season on State land as well as on private property; and if the act were held to permit the killing of certain birds and animals on a State reservation during the open season, such reservations would not be refuges.

I therefore advise you that only such birds and animals as were entirely unprotected by law on June 6, 1909, when the statute took effect, may lawfully be killed under a license of the persons having charge of State reservations.

Maximum Prison Sentence — Date of Expiration.

A maximum sentence to prison for five years from June 15, 1916, expires at midnight on June 14, 1921.

You have requested my opinion as to whether the maximum sentence to prison for five years from June 15, 1916, expires on June 14 or June 15, 1921.

In computing time the law does not recognize a fraction of a day. Each day being in contemplation of law indivisible, it has become a recognized rule, and it has been so held in this Commonwealth, that a person attains the age of majority on the day preceding the twenty-first anniversary of his birth. The *terminus a quo* is the day of his birth. *Bardwell v. Purrington*, 107 Mass. 419.

The term of sentence of a prisoner begins when his sentence has been imposed by the court. From that time he is in confinement, although he may not be removed to the place where he is to serve his sentence until the next day or even a later date. A sudden illness or other sufficient reason might prevent his removal, but, in contemplation of law, he begins to serve his sentence from the time when the sentence is imposed.
It follows, from the foregoing, that if a prisoner served a maximum sentence of five years imposed on June 15, 1916, the sentence would expire at midnight on June 14, 1921.

Constitutional Law — Fourteenth Amendment — State Constitution — Power to fix charge of Employment Agency.

A proposed bill which fixes the maximum charge which may be exacted by an employment agency from an applicant for a position in the public schools would violate the Fourteenth Amendment to the Federal Constitution and also those provisions of the State Constitution which guarantee life, liberty and property to the same extent as does the Fourteenth Amendment.

You inquire whether House Bill No. 431, relative to the fees that may be charged for obtaining positions for school teachers, would, if enacted, be constitutional. The bill amends St. 1911, c. 731, § 2, by providing that “no person, firm, corporation, or association shall demand or accept from any applicant for the position of a teacher in the public schools” a fee exceeding $2, or shall charge, if a position be obtained for the applicant, a sum exceeding 3 per cent of the salary of the teacher for the first year. St. 1911, c. 731, § 4, provides that any violation of the act shall be punished by a fine of not less than $50 nor more than $500. The fundamental question raised by this bill is whether the Legislature has power to fix the maximum fee to be charged by an employment agency to an applicant for its service.

The Fourteenth Amendment to the Federal Constitution provides: “... nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”


All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.
See also Articles X, XII and XXIX of the Declaration of Rights.

It has been held that these provisions of the Massachusetts Constitution guarantee "life, liberty and property" to the same extent as does the Fourteenth Amendment. Opinion of the Justices, 220 Mass. 627, 630; Wyeth v. Cambridge, 200 Mass. 474, 478. It will not, therefore, be necessary to consider the two constitutions separately. Each independently guarantees a right to "life, liberty and property," and each correspondingly limits the power of the Legislature.

The extent to which the Legislature may regulate a lawful business without infringing the constitutional right to liberty and property is affected by the relation of the business to the public. If the business be affected with a public use, the Legislature may require those who engage in it to serve the public for a reasonable price. Munn v. Illinois, 94 U. S. 113; German Alliance Ins. Co. v. Kansas, 233 U. S. 389. Railroads, telephone and telegraph companies, gas and electric light companies and many others are familiar examples of businesses affected with a public use, whose charges may be thus regulated. In all these cases the service has become important, or even essential to the public. The company has generally attained such a dominating position that competition is not a sufficient safeguard against overcharge and discrimination. Economically the citizen stands at such disadvantage that if the matter be left to private bargain he must take the service upon the terms imposed by the company. Under such circumstances, one who professes to render the service to the public indiscriminately has no constitutional right to prescribe at pleasure what the public must pay. The business has, in fact, become affected with a public use, and is subject to regulation accordingly. Munn v. Illinois, 94 U. S. 113; German Alliance Ins. Co. v. Kansas, 233 U. S. 389. The Legislature cannot, it is true, require the service to be given for less than a fair and reasonable return. Denver v. Denver Union Water Co., 246 U. S. 178. But in the case of public service companies the right to prescribe a reasonable rate is unquestioned.
The constitutional distinction between a business affected with a public use and private transactions between man and man is fundamental. It is true that changing conditions may carry a business originally private across the line into the classes of service which are deemed to be public. *Munn v. Illinois*, 94 U. S. 113; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. But until that occurs, a private business is entitled to the full measure of protection guaranteed by the Constitution to private persons.


It was said in *Coppage v. Kansas*, 236 U. S. 1, at page 14: "Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

Moreover, labor or service is "property," within the meaning of the Constitution, and is entitled to protection as property. *Bogni v. Perotti*, 224 Mass. 152, 155; *Adair v. United States*, 208 U. S. 161, 173–175; *Coppage v. Kansas*, 236 U. S. 1, 10. The principle is thus stated in *Bogni v. Perotti*, 224 Mass. 152, 154:

That the right to work is property cannot be regarded longer an open question. It was held in *Cornellier v. Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, at page 560, that "The right to labor and to
its protection from unlawful interference is a constitutional as well as a common law right.” It was said in State v. Stewart, 59 Vt. 273, 289, “The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property.” In the Slaughter-House Cases, 16 Wall. 36, 127, in the dissenting opinion of Mr. Justice Swayne, but respecting a subject as to which there was no controversy, occur these words: “Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty.” It was settled that the right to labor and to make contracts to work is a property right by Adair v. United States, 208 U. S. 161, 173-175, and Coppage v. Kansas, 236 U. S. 1, 10. Controversy on that subject before this court must be regarded as put at rest by these decisions. The right to work, therefore, is property. One cannot be deprived of it by simple mandate of the Legislature. It is protected by the Fourteenth Amendment to the Constitution of the United States and by numerous guaranties of our Constitution. It is as much property as the more obvious forms of goods and merchandise, stocks and bonds.

The business of an employment agency is a lawful private calling. Adams v. Tanner, 244 U. S. 590, 593; Ex parte Dickey, 144 Cal. 234, 236; Spokane v. Macho, 51 Wash. 322, 324. As was said in Adams v. Tanner, 244 U. S. 590, 593:—

But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living.

Like other lawful private callings, the business of employment agencies is subject to a reasonable measure of regulation for the common welfare. Brazee v. Michigan, 241 U. S. 340. It is competent for the Legislature to require that such agencies be licensed and to forbid sending applicants to an employer who has not applied for labor. Brazee v. Michigan, 241 U. S. 340. But in essence the business is merely a purchase and sale of private personal service. From a constitutional standpoint the transaction does not differ from a sale of service by a professional man or a laborer. It is entitled to the same measure of constitutional protection. As the contract is incident to, and indeed, the very essence of, the exercise of a lawful calling, the making of that contract is within the constitutional guarantee of “liberty.” Since the contract involves a sale and purchase
of service, which is property, it is within that measure of protection which the Constitution extends to property, whether tangible or intangible. It is beyond the power of the Legislature either to abolish the business or to require that the service be rendered without charge to "workers," even though the agency is left free to exact a fee from the employer for the service rendered to him. *Adams v. Tanner*, 244 U. S. 590.

The Legislature may to some extent regulate even contracts between man and man for a sale of labor or service in order to protect the safety, health and morals of the public. If the employment be dangerous, like mining, it may prescribe reasonable hours of service. *Holden v. Hardy*, 169 U. S. 366, 373. On the other hand, a statute which prohibits males of full age to labor for more than ten hours a day in an ordinarily healthful occupation is an unlawful interference with the constitutional right of both employers and employed to contract for the sale of labor on such terms as they deem best. *Lochner v. New York*, 198 U. S. 45; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206; but see *Bunting v. Oregon*, 243 U. S. 426. So, also, a statute which forbids an employer to require the employee, as a condition of employment, to refrain from membership in a labor union, is in violation of the constitutional right to sell and purchase labor. *Adair v. United States*, 208 U. S. 161; *Coppage v. Kansas*, 236 U. S. 1. On the other hand, a statute which provides that the basic day in a mill or factory shall be ten hours, with a proviso that employees may work overtime not more than three hours in any one day if they receive time and a half, the regular wage for such overtime, has been upheld as a reasonable health regulation in view of the nature of the work, the provision for additional overtime pay being construed, not as a regulation of wages, but as a deterrent upon the use by the employer of the overtime privilege. *Bunting v. Oregon*, 243 U. S. 426; see also *Wilson v. New*, 243 U. S. 332. It is true that changed conditions and perhaps fuller knowledge of what public welfare requires may render reasonable and proper a regulation which, on a different state of facts, would have been beyond the power of the Legislature.
This creates the illusion of a growing legislative power, which constantly tends to eat away constitutional guaranties. Such is not the case. The extent of the power and the scope of the guaranties remains unaltered. It is merely that a change in the conditions upon which both the power and the guarantee operate may bring within the scope of legislative power what was not formerly within it, just as changed conditions may affect with a public use a business which formerly was private. The constitutional rule remains unchanged that, unless the safety, health or morals of the public are reasonably involved, the Legislature has no power to prescribe the conditions under which labor or private service shall be bought and sold by men of full age. Adair v. United States, 208 U. S. 161; Coppel v. Kansas, 236 U. S. 1; Lochner v. New York, 198 U. S. 45; Commonwealth v. Boston & Maine R.R., 222 Mass. 206.

To prescribe the maximum price at which a private individual shall sell his labor or service manifestly has a less direct relation to the safety, health or morals of the public than a regulation of the hours which he may work. The Supreme Judicial Court leaves it doubtful whether a compulsory minimum wage law, even for women, would be valid (see Holcombe v. Creamer, 231 Mass. 99), although statutes which reasonably regulate the hours of labor of women and minors are upheld for reasons of health. Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383; Commonwealth v. Riley, 210 Mass. 387, affirmed 232 U. S. 671. Be that as it may, no question either of health or hours of labor is involved in the present case. The service of an employment agency is not measured by time. The price to be charged depends primarily upon the views of the contracting parties as to its value. Such a sale differs in no essential respect from a sale of a house or of a sack of potatoes. If the Legislature could regulate the price of that intangible property known as private labor or private service, it might equally fix the price of every commodity of daily life from a shoestring to a mansion. To hold that it possesses this power would in effect abolish the settled constitutional distinction between private business and a business affected with a public use.
In *Commonwealth v. Perry*, 155 Mass. 117, a statute which in effect required manufacturers to agree to pay the same wage for good and for imperfect weaving was held to infringe the liberty of contract guaranteed by the Constitution. In II Op. Atty.-Gen., 264, 266, the Attorney-General, in advising that a statute which required counties, cities and towns to pay more than the prevailing rate of wages to those employed upon public work was unconstitutional (see also *in accord, Street v. Varney Electrical Supply Co.*, 160 Ind. 338; *People v. Coler*, 166 N. Y. 1; *contra, Malette v. Spokane*, 77 Wash. 205), said:—

It would scarcely be disputed, I apprehend, that a law containing such provisions, affecting private individuals and corporations, would be a violation of the liberties and privileges of citizens under the Declaration of Rights of the Massachusetts Constitution and under the Fourteenth Amendment to the Federal Constitution. In the exercise of the police power conferred by the Constitution, many laws limiting the rights of citizens in the making of contracts, and even prohibiting certain contracts, have been enacted by the General Court and sustained as constitutional by the Supreme Judicial Court. *Opinion of Justices*, 163 Mass. 589. But, so far as I am aware, since the beginning of constitutional government no attempt has been made to fix by legislation an arbitrary price of any commodity, including labor, that may properly be the subject of contract between parties. It may well be assumed that any such interference with the rights of individuals and private corporations would be pronounced to be beyond the scope of legislative power.

It is true that the Legislature has a special contractual authority to regulate the manner in which contractors engaged upon public work for the State shall deal with the laborers employed in performing it (see *Atkin v. Kansas*, 191 U. S. 207; *Heim v. McCall*, 239 U. S. 175; *Lee v. Lynn*, 223 Mass. 109; *Woods v. Woburn*, 220 Mass. 416) which it does not possess in the case of a purely private sale and purchase of labor. *Lochner v. New York*, 198 U. S. 45; *Truax v. Raich*, 239 U. S. 33, 43. But this contractual authority does not reach to the present case. The employment agency does not contract with the State in respect of applicants for the position of teacher in the public schools. The transaction is a purely private contract between private persons for a sale and purchase of private service. It
has been squarely held that the State has no power to prescribe the compensation which an employment agency shall exact from applicants for its service. *Ex parte Dickey*, 144 Cal. 234. The conclusion reached by this decision seems to follow inevitably from the authorities already considered. I am therefore of opinion that House Bill No. 431 would, if enacted, infringe upon both the liberty of contract and the right to private property guaranteed by both the Massachusetts Constitution and the Fourteenth Amendment.

There is a further constitutional objection which might well be urged against the present bill. It purports to regulate the charges to be made by the agency only in the case of applicants for the position of teacher in the public schools. It therefore makes a special regulation applicable only to the persons who serve such applicants. Such a classification may well be so arbitrary as to deny to those within it the equal protection of the laws. See Commonwealth v. Boston & Maine R.R., 222 Mass. 206, 208; Bogni v. Perotti, 224 Mass. 152, 156.

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**Constitutional Law — "Borrowed Money" — Proceeds of Dry Dock Built in Part by Outstanding Bonds.**

Where the cost of a public work is in part defrayed by bonds issued by the Commonwealth, and while part of the bonds so issued are outstanding such public work is sold, so much of the purchase price as represents property paid for by the proceeds of the bonds so issued and outstanding is still "borrowed money," within the meaning of Mass. Const. Amend. LXII, § 4, and must be used either for the purpose for which such bonds were issued or to repay the loan. The extent to which the $3,107,366.93, received as the purchase price of the Boston Dry Dock, is the proceeds of outstanding bonds issued under St. 1911, c. 748, § 17, examined and determined.

That part of the purchase price of the Boston Dry Dock which is the proceeds of outstanding bonds issued under St. 1911, c. 748, § 17, and therefore borrowed money, which under Mass. Const. Amend. LXII, § 4, is being held to repay such bonds at maturity, may lawfully be invested in other bonds of the Commonwealth which fall due prior to the due date of the bonds to be repaid.

You inquire whether and to what extent the $3,107,366.93 which will be received from the Federal government as the purchase price of the Boston dry dock may legally be considered a receipt into the general fund of the Commonwealth, and so
be available to meet current appropriations made by the General Court.

I have received from various departments the following information in regard to this dry dock. It cost $3,107,366.93, which is the price at which it is sold to the United States. Of this amount $778,805.34 came from available funds in the treasury of the Commonwealth, and the balance, namely, $2,328,561.59, was paid out of the $9,000,000 issue of bonds authorized by St. 1911, c. 748, § 17. Of that issue $1,300,000 has been repaid out of general funds, leaving $7,700,000 of bonds still outstanding. It is clear, therefore, that a certain proportion of the price received from the United States is the proceeds of bonds which are still outstanding and unpaid.

Amendment LXII, § 4, of the Constitution provides as follows:

Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan.

It is a well-recognized principle of sound finance that capital, and especially borrowed capital, should not be used for current expenses. The amendment, in my opinion, adopts this principle. It limits the purposes for which borrowed money may be used. Such money may not be used save for the purpose for which it was borrowed or to repay the loan. Clearly, if a million dollars of the amount received for the port development bonds issued under St. 1911, c. 748, § 17, were still in the treasury, that money could not be used for current expenses. Over $2,000,000 of money received for port development bonds has gone into this dry dock. The sale of the dry dock turns it back into money. That money is as clearly the proceeds of the loan as any unexpended balance of the loan which may be still in the treasury. In my opinion, it is borrowed money still, within the meaning of the constitutional amendment. Were it otherwise, borrowed money could be relieved from the constitutional purpose impressed upon it by simply turning it into property and then back again into money by a sale of the property. I cannot believe that the salutary restriction imposed by the
amendment is so easily satisfied. I am therefore of opinion that in so far as the money received for the sale of the dry dock is the proceeds of bonds still outstanding and unpaid, it must be used either for the purpose for which the bonds were issued or to repay the loan.

The first question is as to the amount of those proceeds which were derived from the outstanding bonds which are still unpaid. It appears that $2,328,561.59, or about one-quarter of the $9,000,000 borrowed, went into the dry dock, but of this $9,000,000 there has been paid the sum of $1,300,000. The amount of bonds so paid which is fairly apportionable to the dry dock would, therefore, be represented by that fraction of $1,300,000 which has as its numerator 2,328,561.59 and has as its denominator 9,000,000. This amount when computed is $336,347.74. Add to this the $778,805.34 which was paid out of available funds, and the amount of the proceeds of the dry dock subject to use for current expenses is $1,115,153.08. If this sum be deducted from the $3,107,366.93 which is received from the sale of the dry dock, we find that $1,992,213.85 is the proceeds of the bonds still outstanding and unpaid. This amount, therefore, is still charged with the constitutional restriction, and may not be used save for the purposes for which the money was borrowed or to repay the loan.

The next question is as to the purpose for which the money was borrowed. The loan was authorized by St. 1911, c. 748, § 17, "to meet the expenses incurred under this act." That act provided for a comprehensive scheme for the development of the port of Boston. It is proposed to appropriate for such purposes this year the sum of $600,000, to be taken from certain permanent funds established by statute. I see no legal reason why this amount may not be taken instead from the $1,992,213.85 and an equivalent amount transferred to the general fund from the permanent port funds established by statute. It would require a special act to do this, but, as these special funds are the creature of statute and are not within Amendment LXII, they may be modified by statute. Another item which may lawfully be met out of the $1,992,213.85 is the $250,000 to be used to pay port development bonds which fall due this year.
Add this to the $600,000 and it makes a total of $850,000, which, if deducted from the $1,992,213.85, leaves $1,142,213.85 still subject to the constitutional restriction.

The next question is as to how this $1,142,213.85 shall be held pending its use either to pay the port development loan or for purposes within the scope of St. 1911, c. 748. The principal of the port development loan falls due at the rate of $250,000 each year. There are still $7,700,000 outstanding, and $250,000 mature each year, but as the bonds were issued at different times, for a term not exceeding forty years, the final maturity is not until 1957. There is nothing in the Constitution which requires that the $1,142,213.85 shall either be held in the treasury or deposited in banks to await the time when it will be needed for the retirement of the loan. It is not only lawful but good business policy to invest it in proper securities which will yield a larger income return than bank deposits. It has been suggested that, in view of the heavy State tax to be anticipated this year, capital expenditure for highways be met by bonds instead of by current revenue. It is suggested further that $1,000,000 be borrowed for this purpose. If the term of the bonds to be issued for this purpose be so fixed that the principal will fall due in time to retire the port development bonds, I see no reason why $1,000,000 out of the $1,142,213.85 may not be invested in those bonds. Such investment is not a diversion of the fund to highways, but simply a lawful investment of a special fund. The balance, or $142,213.85, remains available for Boston port development or to be applied to the $250,000 of port bonds which mature next year.

To summarize:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost of dry dock</td>
<td>$3,107,366.93</td>
</tr>
<tr>
<td>Amount met from general funds</td>
<td>$778,805.34</td>
</tr>
<tr>
<td>Amount of dry dock bonds paid from general funds</td>
<td>336,347.74</td>
</tr>
<tr>
<td>Amount of proceeds of dock available for general purposes</td>
<td>1,115,153.08</td>
</tr>
<tr>
<td>Balance of proceeds of dock paid out of $9,000,000 loan</td>
<td>$1,992,213.85</td>
</tr>
</tbody>
</table>
Port development purposes this year . . $600,000 00  
Port development bonds payable this year . 250,000 00

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount to be spent for purposes for which the money was borrowed, and so payable out of loan proceeds</td>
<td>$850,000 00</td>
</tr>
<tr>
<td>Amount still remaining in trust fund</td>
<td>$1,142,213 85</td>
</tr>
<tr>
<td>Appropriation for highways for current year to be bonded and bonds bought by Commonwealth out of trust fund</td>
<td>1,000,000 00</td>
</tr>
<tr>
<td>Balance in trust fund</td>
<td>$142,213 85</td>
</tr>
</tbody>
</table>

In conclusion, I may suggest that the determination of the question submitted to me by your committee must depend ultimately upon the principles of sound finance rather than upon the legal principles involved. By that I mean that whether the Commonwealth has or has not the power under the Constitution to transfer money borrowed for the capital account to the income account and to use it for current expenses should not determine the course to be pursued by your committee. The General Court has power under the Constitution to raise the entire amount required for the expenses of the year by a bond issue, making any State tax unnecessary, and passing on to future taxpayers the burden of paying the budget for the current year. To use money received from the sale of the property of the Commonwealth, which property has not yet been paid for, is an indirect way of accomplishing the same result. If the principle of using the proceeds of the sale of the dry dock for current expenses is sound, a sale of the Commonwealth Pier to the Federal government for $5,000,000, and of other property acquired by the port development loan, would make it possible to do away with the State tax altogether, or reduce it to an inconsiderable sum. The motive which has constrained the General Court to make provision for current expenses from current income is as cogent to prevent passing on the burden to future taxpayers indirectly by a sale of the property of the Commonwealth acquired with borrowed money as directly by means of a bond issue.

In the foregoing opinion I have suggested certain methods
by which the proceeds of the sale of the dry dock may legally be expended and invested in such manner as to reduce the amount of the State tax for the current year below what would otherwise be required. In answer to inquiries made by members of the committee I have pointed out that $600,000 of certain permanent port funds may legally be transferred to the general fund by appropriate legislation, and that the proceeds of the sale of the dry dock may be invested in bonds issued to provide for capital expenditure for highways. In what I have said I would not be understood to recommend either the transfer of permanent funds to the general fund or the issue of bonds. I have endeavored only to suggest what methods may legally be pursued by your committee to avoid the serious constitutional question which would be raised by appropriation of the entire proceeds of the dry dock to current expenses.

Taxation — Discharge in Bankruptcy.

Taxpayers who have received their discharge from the bankruptcy court are liable for unpaid taxes, since they are not provable debts.

You have asked my opinion as to the proper procedure to collect unpaid taxes against taxpayers who have gone into bankruptcy, and whether you may proceed against such taxpayers after they have received a discharge from the bankruptcy court.

Section 17 of the Bankruptcy Act of 1898, as amended by the act of Feb. 5, 1903, provides, by section 17a, that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; . . . ."

A tax, therefore, is not a provable debt, but section 64a of the act requires the court to order the trustee to pay all taxes "legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of
the payment of dividends to creditors.” This has been con-
strued as placing on the trustee the obligation to pay the tax
first of all, even ahead of other debts which have priority.
But taxes are not provable debts, and need not be proved in
the bankruptcy court, and it is the duty of the trustee to pay
them whether they are proved or not.

Section 9a of the act provides that “a bankrupt shall be
exempt from arrest upon civil process except in the following
cases: (1) when issued from a court of bankruptcy for con-
tempt or disobedience of its lawful orders; (2) when issued
from a State court having jurisdiction, and served within such
State, upon a debt or claim from which his discharge in bank-
ruptcy would not be a release, and in such case he shall be
exempt from such arrest when in attendance upon a court of
bankruptcy or engaged in the performance of the duty imposed
by this act.” Since taxes are not provable debts, a bankrupt
cannot be discharged from his taxes, and therefore neither
while he is in bankruptcy nor after he is discharged is there
any prohibition of his arrest for failure to pay taxes.

As a matter of policy, however, I think it unwise to arrest
taxpayers prior to their discharge, or, at any rate, until you
have had an opportunity, from the examination of their returns,
to find out whether there are sufficient assets in the hands of
the trustee to pay taxes, which are an obligation which must
be met first of all. If you find that there are no assets, or
assets entirely inadequate to meet your claim for taxes, and
believe that arrest will result in payment of the tax, you are
warranted in taking such procedure, having due regard to the
necessary conditions which must be complied with in making
an arrest.

Under the conditions stated, I see no reason why you should
not have warrants issued against taxpayers who have received
their discharge from bankruptcy and have not, in the mean-
time, either individually or through the trustee in bankruptcy,
made payment.
Constitutional Law — Aliens — Right to possess Shotguns or Rifles.

The statute prohibiting certain aliens from possessing shotguns and rifles is a law for the protection of wild animals and birds; hence, fines received for violation thereof are to be divided equally between the Commonwealth and the county in which prosecution is made.

You ask my opinion "as to whether a violation of the latter half of section 1 of chapter 240 of the General Acts of 1915 (possession of firearms by an alien, with no apparent or proven intent to hunt) is to be construed as a violation of the game laws; and whether any fine imposed in such case is to be paid over in accordance with St. 1908, c. 330."

Gen. St. 1915, c. 240, § 1, reads, in part, as follows: —

It shall be unlawful for any unnaturalized foreign born resident, unless he owns real estate in this commonwealth to the value of not less than five hundred dollars, to hunt, capture or kill any wild bird or animal, either game or otherwise, of any description, excepting in defence of the person, and it shall be unlawful for any such unnaturalized, foreign born resident within this commonwealth to own or have in his possession or under his control a shotgun or rifle of any make.

The provisions of St. 1908, c. 330, direct that all fines, penalties and forfeitures recovered in prosecutions under the laws relative to fisheries or to birds, animals and game, with certain exceptions not here important, shall be divided equally between the county in which such prosecution is made and the Commonwealth, with a further proviso that if the prosecution is directed by a deputy, appointed by the Commissioners on Fisheries and Game and receiving compensation from the Commonwealth, all fines, penalties and forfeitures shall be paid into the treasury of the Commonwealth.

I assume that the reason for your inquiry is that in some cases the complaint filed with the court does not allege that the defendant alien was hunting or killing any wild game, but that such person owned or had in his possession or under his control a shotgun or rifle.

The object of the 1915 statute is described in its title as
being, “An Act to provide further protection for wild birds and quadrupeds.” Under section 3 of the same act it is provided that notice of the seizure of firearms shall be sent to the Commissioners on Fisheries and Game, and that such firearms shall be sold at the discretion of said commissioners. In section 4 the commissioners and their deputies are given authority to arrest without a warrant any such person with a shotgun or rifle in his possession. The act is essentially one of game protection. Were it otherwise there might be a doubt as to its constitutionality, by reason of the Fourteenth Amendment to the Federal Constitution, which provides:

... nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The constitutionality of an almost identical statute was raised in the case of Commonwealth v. Patsonc, 231 Pa. St. 46, affirming 44 Pa. Superior Ct., 129. It was there held that the act —

... defines two several and independent offences: first, the hunting of game by an alien; second, for an alien either to own or be possessed of a shotgun or rifle of any make. The primary subject of the act is the preservation of wild birds, animals and game, and under all our authorities the privilege of hunting and taking game is limited, under defined restrictions, to our own citizens. Since long-range firearms — shotguns and rifles — are generally used in killing wild birds and animals, it is clear that the Legislature, in prohibiting a foreign-born, unnaturalized resident from hunting game, intended to make the hunting of game by an alien the more difficult by taking away from such persons the means by which game is usually killed. This prohibition against having deadly and long-range firearms does not in any way deprive the alien of property without due process of law, but simply defines and limits his right to use firearms by restricting such right to the use of short-range firearms — revolvers and pistols — and such other weapons as may be necessary for defence of his person and property.

The decree in this case was affirmed in Patsonc v. Pennsylvania, 232 U. S. 138.

It is my opinion, therefore, that inasmuch as the act in question has for its primary purpose the protection of wild
animals and birds, any fines or forfeitures derived from the authority therein conferred should be paid over in accordance with the provisions of St. 1908, c. 330.

CIVIL SERVICE — FEMALE VETERAN — CERTIFICATION.

The word "veteran" as used in Gen. St. 1919, c. 150, § 1, includes women who possess the qualifications prescribed by that act.

Where a civil service list is certified in answer to a requisition calling for women, a woman who passes the appropriate civil service examination and who is a veteran, within the meaning of Gen. St. 1919, c. 150, § 1, is entitled to be certified ahead of women who are not veterans, even though the latter have obtained a higher percentage in the examination.

You request my opinion on the following questions: —

1. Does the word "veteran," as defined in Gen. St. 1919, c. 150, § 1, include women?

2. If the answer to the first question is in the affirmative, under section 2 of that act are the names of women who are "veterans," and who pass the appropriate civil service examinations, to be placed "above the names of all other applicants," and in answer to a requisition calling especially for women are their names to be certified ahead of women who are not veterans but who have obtained a higher percentage in the examinations?

1. Gen. St. 1919, c. 150, § 1, provides as follows: —

The word "veteran" as used in this act shall mean any person who has served in the army, navy or marine corps of the United States in time of war or insurrection and who has been honorably discharged from such service or released from active duty therein, provided that such person was a citizen of this commonwealth at the time of his induction into such service or has since acquired a settlement therein; and provided further that any such person who at the time of entering the said service had declared his intention to become a subject or citizen of the United States and withdrew such intention under the provisions of the act of congress approved July ninth, nineteen hundred and eighteen, and any person designated as a conscientious objector upon his discharge shall not be deemed to be a "veteran" within the meaning of this act.

The Legislature has in this act used the comprehensive word "person." The word "person" is broad enough to include
women unless a contrary intent appears in the statute. Robinson's Case, 131 Mass. 376, 377; Opinion of the Justices, 150 Mass. 586; see also Opinion of the Justices, 226 Mass. 607, 610. It is suggested, however, that the word "his," which is used throughout this section, indicates an intention to confine the word "person" to persons of the masculine gender. But R. L., c. 8, § 4, provides:—

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the general court, or repugnant to the context of the same statute; that is to say:—

. . . . . . . . . . . . . . . . . . . . . . . . . .

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

The provision of section 2 as to a requisition "not especially calling for women;" the provision of section 3 as to employment of veterans in the labor service of cities and towns not subject to civil service rules "in preference to all other persons except women;" and the provision of section 4 that that section "shall not apply to requisitions calling for women," do not, in my opinion, narrow the word "person." Those provisions do not directly qualify the definition of veteran contained in section 1. They merely prescribe certain rules as to those who are veterans within the meaning of that section. The question is not free from doubt, but it seems to me that the word "veteran" as used in section 1 includes women as well as men. See V Op. Atty.-Gen. 366, and opinion of the Attorney-General to the Treasurer and Receiver General, Oct. 11, 1919, which also point to this conclusion.

2. In my opinion, the answer to your second question follows from the answer to the first. Women who are veterans are to be placed upon those lists to which they are eligible above all other applicants who are not veterans, and, in answer to a requisition calling for women, women who are veterans are
entitled to be certified ahead of women who are not veterans, even though the latter attained a higher percentage in the examination. The provision as to certification “upon receipt of a requisition not especially calling for women,” while somewhat obscure, is, in my judgment, intended to prevent the preference to veterans from overriding a sex limitation in the request itself.

CONSTITUTIONAL LAW — LEGISLATURE — POWER TO DEFINE WORDS USED IN CONSTITUTION — LEGAL VOTER.

The meaning of words used in the Constitution presents a judicial question. An act defining the term “legal voter,” as used in the Constitution, if not unconstitutional as an attempted exercise of judicial power, would be, at most, a declaration of legislative opinion which would not foreclose the question of the meaning of those words.

You submit a proposed bill entitled “An Act to define the term ‘legal voter.’” It appears from the letter which accompanies it that the proposed bill is intended to define the term “legal voter,” as used in Mass. Const. Amend. XXI and XXII, for the guidance of the Secretary of the Commonwealth in taking the decennial census required by those amendments. You inquire in substance: —

1. Can the Legislature define what is meant by the words “legal voters” as used in said amendments?
2. What is meant by the words “legal voters” as used in said amendments?

The Bill of Rights, Article XXX, provides as follows: —

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

There can be no question that the meaning of any words used in the Constitution presents in the last analysis a judicial
question. Marbury v. Madison, 1 Cranch, 137; Capen v. Foster, 12 Pick. 485; Blanchard v. Stearns, 5 Met. 298, 301; Opinion of the Justices, 5 Met. 591, 592; Kinneen v. Wells, 144 Mass. 497; Opinion of the Justices, 226 Mass. 607; Monongahela Navigation Co. v. United States, 148 U. S. 312, 337. The courts, and the courts alone, can finally declare what the true construction is. Marbury v. Madison, 1 Cranch, 137; Monongahela Navigation Co. v. United States, 148 U. S. 312, 337; Kinneen v. Wells, 144 Mass. 497; Opinion of the Justices, 226 Mass. 607. Yet both the Legislature and the executive also construe the Constitution. Every time the Legislature passes a statute it necessarily decides that the proposed enactment is within its constitutional powers. Kendall v. Kingston, 5 Mass. 524, 533. Officials charged with executive duties may find it necessary to determine what the Constitution means in order to obey its mandate. Attorney-General v. Apportionment Commissioners, 224 Mass. 598; Donovan v. Apportionment Commissioners, 225 Mass. 55; McGlue v. County Commissioners, 225 Mass. 59; Brophy v. Apportionment Commissioners, 225 Mass. 124. Neither the Legislature nor the executive invades the judicial function when either construes the Constitution in order to exercise an authority conferred by law. Yet if the Legislature attempts to decide a judicial question and to declare its decision by statute, it does invade the judicial function and its act is void. Denny v. Mattoon, 2 Allen, 361; Forster v. Forster, 129 Mass. 559; see also Kilbourn v. Thompson, 103 U. S. 168. Indeed, it has been intimated that the Legislature has no power to declare retroactively that the meaning of a statute was different from that placed upon it by the court. Cambridge v. Boston, 130 Mass. 357. In the present case the proposed statute undertakes to declare what shall be the meaning of two words in the Constitution. The definition stands alone, and is in no way incident to legislation otherwise valid. It is open to grave question whether this statute is not an attempt by the Legislature to exercise judicial power contrary to Article XXX of the Bill of Rights.

But putting that question aside, the bill would, at most,
be only a declaration of legislative opinion, which could not foreclose the question. Mass. Const., c. I, § II, art. II, and c. I, § III, art. IV, as modified by Amendments III, XVII, XX, XXVIII, XXX, XXXI, XXXII and XL, define the qualifications of the electorate. These qualifications cannot be modified by statute. Kinneen v. Wells, 144 Mass. 497; Blanchard v. Stearns, 5 Met. 298, 301; Opinion of the Justices, 5 Met. 591, 592; Opinion of the Justices, 226 Mass. 607. It is true that the Legislature, as an incident of its power to provide for elections, may also provide for the registration of those qualified to vote upon due proof of the qualifications prescribed by the Constitution. Capen v. Foster, 12 Pick. 485. In defining those entitled to such registration, it has enumerated the constitutional qualifications for the vote without apparently usurping judicial power. Capen v. Foster, 12 Pick, 485; Stone v. Smith, 159 Mass. 413; see also R. L., c. 11, § 12. But such enumeration, even as a part of an otherwise valid election law, is invalid if it conflicts with the constitutional definition. Kinneen v. Wells, 144 Mass. 497; Opinion of the Justices, 226 Mass. 607. It is true that Amendments XXI and XXII do not define "legal voters" with the fulness and precision with which the qualifications for the ballot are defined by the articles heretofore enumerated. Yet the term "legal voters" possesses a definite constitutional meaning which must be determined from the Constitution as a whole. It follows, therefore, that the proposed bill, if enacted, could not foreclose the question or stand unless the definition therein contained should exactly conform to the construction of those words ultimately adopted by the Supreme Judicial Court. In my opinion, the Legislature should not volunteer a legislative expression of opinion upon a judicial question, especially in view of the serious doubt whether the proposed bill would not amount to a usurpation of judicial power.

The answer to your first question renders it unnecessary, in my opinion, for me to answer your second question. I do not feel that I ought to frame a definition of "legal voter" for the purpose of the proposed bill.
Constitutional Law — Infamous Punishment — Sentence to State Prison upon Complaint.

In so far as Gen. St. 1916, c. 187, § 1, authorizes any district court or trial justice to impose a sentence to the State Prison upon complaint, it violates Article XII of the Bill of Rights, which requires that a sentence to the State Prison shall not be imposed except upon an indictment duly presented by a grand jury.

You inquire whether, in view of St. 1911, c. 176, Gen. St. 1916, c. 187, confers upon a district court or trial justice authority to sentence to the State Prison an inmate, transferred from that prison to the Prison Camp and Hospital, who escapes from the latter institution and is later recaptured.

Gen. St. 1916, c. 187, § 1, amends St. 1904, c. 243, § 2, so as to read as follows:

A prisoner who escapes, or attempts to escape, from the land or buildings of said camp, now known as the prison camp and hospital, or from the custody of an officer while being conveyed thereto, or therefrom, or while employed therein, may be pursued and recaptured; and upon complaint before any district court or trial justice may be punished for such escape, or attempt to escape, by a sentence of imprisonment at the institution to which he was originally sentenced for not less than one year nor more than five years. The expense of supporting such prisoner shall be paid by the institution to which he is sentenced, and the expense of committing him shall be paid by the prison camp and hospital.

St. 1905, c. 355, authorized the prison commissioners to establish a hospital prison at Rutland. Section 2 of that act authorized the prison commissioners, under certain conditions, to remove "any male prisoner in the state prison" to such hospital prison. By St. 1906, c. 243, the hospital prison and the temporary industrial camp for prisoners were consolidated into one institution to be known as the Prison Camp and Hospital. Construing Gen. St. 1916, c. 187, § 1, in connection with these other statutes, it seems plain that it purports to confer power upon any district court or trial justice, upon complaint, to sentence to the State Prison any inmate of the Prison Camp and Hospital who was originally sentenced to the State Prison and who escapes or attempts to escape from the Prison Camp and Hospital.
Viewed as a question of construction, the authority which Gen. St. 1916, c. 187, § 1, purports to confer upon any district court or trial justice cannot be limited by St. 1911, c. 176, § 1. The earlier enactment must yield to the later enactment if the later enactment be constitutional. Moreover, the provisions of St. 1911, c. 176, § 1, which in effect deny authority to police, district and municipal courts to sentence to the State Prison, and limit the sentence which they may impose to not exceeding two years in the house of correction, are expressly confined to that act. For both reasons St. 1911, c. 176, cannot be held to limit Gen. St. 1916, c. 187.

The serious question is whether Gen. St. 1916, c. 187, § 1, is constitutional in view of Article XII of the Declaration of Rights, which provides: —

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

The objection that Gen. St. 1916, c. 187, provides for a sentence to the State Prison without trial by jury is met by the right of appeal to the Superior Court, where a jury trial may be had. Jones v. Robbins, 8 Gray, 329. But such right of appeal leaves untouched the further objection that the trial in the Superior Court will be had upon the complaint authorized by Gen. St. 1916, c. 187, and not upon an indictment duly presented by a grand jury. Jones v. Robbins, 8 Gray, 329. It is now settled law that Article XII of the Bill of Rights requires that the crime shall be charged by an indictment duly presented by a grand jury, if, upon conviction, the accused may
be sentenced to the State Prison, since such a sentence is an "infamous punishment," within the meaning of that article. *Jones v. Robbins*, 8 Gray, 329; *Nolan's Case*, 122 Mass. 330; *Commonwealth v. Horregan*, 127 Mass. 450; *Commonwealth v. Harris*, 231 Mass. 584; *Opinion of the Justices*, 232 Mass. 601. It is true that trial upon information or complaint, even for murder, is "due process of law," within the meaning of the Fourteenth Amendment to the Federal Constitution. *Hurtado v. California*, 110 U. S. 516. But this decision cannot be held to alter the construction which our court has placed upon Article XII of the Bill of Rights. I am therefore constrained to advise you that Gen. St. 1916, c. 187, is unconstitutional in so far as it attempts to authorize a district court or trial justice to impose a sentence to the State Prison.

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**Constitutional Law — Street Railway — Fixing Fare of Blind Person accompanied by Sighted Guide.**

A proposed bill which would require street railways to carry a blind person for half fare and a sighted guide who accompanies him for full fare would be unconstitutional.

I have given careful consideration to the bill transmitted with the order of the Honorable Senate, dated March 12, 1920, which reads as follows: —

*Ordered, That the Senate require the opinion of the Attorney-General as to the constitutionality of Senate Bill No. 201, relative to the transportation of blind persons accompanied by guides on street, steam or elevated railroads or railways.*

A question arises as to the construction of the proposed bill. Under section 1 it is by no means clear whether the intention is that the blind person and his sighted guide shall each pay half fare, or whether the blind person shall pay half fare and the sighted guide full fare. But taking the language of section 1 and section 2 together, the more natural construction seems to be the latter, viz.: that the blind person shall pay half fare
and the sighted guide shall pay full fare. Assuming that this is the true construction, the bill in substance provides that a blind person whose name appears upon the register of the Massachusetts Commission for the Blind, who obtains from that Commission the prescribed identification card upon payment of a fee, who is obliged to travel from place to place in pursuance of his legitimate occupation, and who is accompanied by a sighted guide for safety and protection, shall pay one-half the regular fare charged by street, steam or elevated railroads or railways to other passengers for the same service.

In my opinion, this bill is open to several constitutional objections.

1. In its present form the bill is not limited to regulation of rates of fare in intrastate commerce. The power to regulate rates of fare in interstate commerce is possessed by Congress alone. Unless, therefore, the bill is amended to confine its operation to fares to be charged for travel wholly within the Commonwealth, it will be clearly unconstitutional upon this ground.

2. There is a further question whether the bill, which requires carriers to grant a reduced rate to a particular class, may not be confiscatory. There is no question that the Commonwealth has power to prescribe reasonable rates of fare to be charged by carriers for travel wholly within the Commonwealth. Whether a rate is confiscatory is a mixed question of law and fact, to be determined in each particular case upon all the facts.

It is well known that many steam and electric roads at the present time are not able at the present rates of fare to earn more than operating expenses, and in numerous instances they are not earning operating expenses. Any statute which would require a carrier to lower the rate of fare to a certain class of the traveling public would be confiscatory, and therefore unconstitutional, if it resulted in reducing the return to the carrier below that reasonable minimum to which it is entitled.

3. The ordinary rule of law is that public service companies shall serve all who apply, without discrimination, at a reasonable rate. A law which provides a special rate to a particular
class purports to authorize a discrimination in favor of that class. It may well be that the cost of the discrimination must be made up by charging a larger rate to the rest of the traveling public in order to produce that reasonable return to which the carrier is entitled. Even the Legislature has a very limited power to provide for a discrimination in favor of a particular class of the traveling public at the expense of the traveling public as a whole. *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684. An arbitrary classification cannot be made. *Chicago, R. I. & P. Ry. v. Ketchum*, 212 Fed. Rep. 986. In my opinion, a valid classification must be adapted to promote a sufficient public purpose. Thus the law granting a half fare to school children and other persons traveling to and from schools maintained by the public, and private schools of a like kind, was sustained by the court against the contention that such a classification was arbitrary, on the ground that that classification tended to promote a public purpose, namely, education. *Commonwealth v. Interstate Consolidated Ry.*, 187 Mass. 436; *Commonwealth v. Connecticut Valley St. Ry.*, 196 Mass. 309; *Commonwealth v. Boston & Northern St. Ry. Co.*, 212 Mass. 82. The Interstate Railway Case *(supra)* was affirmed by the Supreme Court of the United States in 207 U. S. 79, on the very narrow ground that as the statute was in force at the time when the company received its charter, that company could not complain of it. See also *San Antonio T. Co. v. Altgelt*, 200 U. S. 304.

On the other hand, a statute which requires carriers to grant a reduced rate to a particular class upon private grounds peculiar to that class is clearly invalid. Thus a statute which requires a railroad to grant free transportation to one who accompanies a shipment of cattle is arbitrary and void. *Atchison, etc.*, R. Co. v. *Campbell*, 61 Kan. 439; *McCully v. Chicago, B. & Q. R.R.*, 212 Mo. 1; *George v. Chicago, R. I. & P. Ry. Co.*, 214 Mo. 551. The reasoning of these cases is to the effect that where a reasonable rate has been prescribed, the Legislature cannot prescribe a reduction from that rate to some private class of travelers selected by the Legislature. The present bill
seems to fall within this principle. It prescribes a reduced rate for a particular class of blind persons. Unless the classification rests upon a public purpose sufficient to justify it, this bill could not stand. It would open the door to laws designed to afford special rates to almost any class which the Legislature might select for special favors to be rendered by carriers at the carriers' expense. Such a principle substitutes legislative discrimination for corporate discrimination.

For the foregoing reasons the bill under consideration would be unconstitutional.

I am of opinion, however, that if there should be substituted for the present compulsory bill a proper permissive bill, applicable to intrastate commerce only, the constitutional objections pointed out above might be avoided. Any railroad which might choose to avail itself of such permission to carry a blind person and a sighted guide for a single fare, in order to lessen the chance of accident, with possible liability for damages, could not object that such a bill was either arbitrary or confiscatory, or, on the ground of such voluntary action, ask to raise ordinary fares. Such permissive legislation might be supported also by the precedent of the Federal railroad law, and the regulations of the Interstate Commerce Commission thereunder, which permit but do not require a special rate to certain designated classes of persons, such as ministers.

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**Constitutional Law — "Anti-aid" Amendment — Religious Worship — State Institutions.**

The expenditure of money at the various insane hospitals and other State institutions for the purpose of affording inmates therein the opportunity for worship is not prohibited by the provisions of Article XLVI of the Amendments to the State Constitution.

You state that the Legislature is in the habit of appropriating funds for religious instruction at the various insane hospitals and other State institutions. These funds are then paid by the
institutions to Protestant, Catholic and Jewish clergymen. At several of the penal institutions there is an official called a chaplain, who is appointed by the superintendent and who receives an annual salary from the Commonwealth for religious work. You request my opinion as to whether this practice of paying for religious instruction at public expense is in accordance with the provisions of Article XLVI of the Amendments to the Constitution.

Under the provisions of Article XLVI, section 2, "... no grant, appropriation or use of public money ... shall be made or authorized by the commonwealth ... for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, ..."

As the institutions referred to in your communication are neither schools nor institutions of learning, the provisions of said section, as above quoted, do not apply.

Said section 2 further prohibits the expenditure of public moneys "for the purpose of founding, maintaining or aiding ... any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers ..."

As the institutions in question are publicly owned and under the exclusive control, order, and superintendence of public officers, they are exempt from the provisions of section 2.

Section 4 of said Article XLVI provides: —

Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; ... 

Construing together sections 2 and 4 of Article XLVI, I am of opinion that the broad purpose intended by the amendment was to prevent the use of public money to build up private denominational institutions, or schools and institutions of learning, whether under public control or otherwise, where any denominational doctrines were being inculcated. It was not
intended to banish all forms of religious worship from State institutions or to prohibit the incidental expenditure of public money for religious worship in such institutions, simply because these institutions were being maintained out of the public funds.

I therefore advise you that the expenditure of money by these institutions for the purpose of affording inmates therein the opportunity for worship is a legitimate expenditure out of the funds appropriated for the maintenance of these institutions, or directly out of the funds of the Commonwealth.

STATE SANATORIA — CITIES AND TOWNS — PAYMENT FOR CLOTHING SUPPLIED TO INDIGENT PATIENTS.

Cities and towns which pay the price fixed by St. 1907, c. 474, § 10, for the support of patients in State sanatoria, cannot be made to supply clothing to said patients who, on account of their indigent condition, are unable to provide clothing for themselves.

You request my opinion as to whether cities and towns where patients of State sanatoria have legal settlement can be required to provide clothing for such of said patients as are in dire need of clothing, and who, because of their indigent condition, are unable to provide it for themselves.

St. 1907, c. 474, provides for the establishment of State sanatoria for tubercular patients. The money necessary for their maintenance is appropriated annually by the Legislature from the ordinary revenue of the Commonwealth.

There is no liability on the part of cities and towns for the payment of charges for the support of patients in these sanatoria except as provided by section 10 of said chapter, and except in so far as cities and towns are liable for the support of all poor and indigent persons lawfully settled therein, as provided by R. L., c. 81, § 1, which provides: —

Every city and town shall relieve and support all poor and indigent persons lawfully settled therein, whenever they stand in need thereof.

St. 1907, c. 474, § 10, provides: —
The charges for the support of each inmate in a state sanatorium shall be four dollars a week, and shall be paid quarterly. Such charges for those not having known settlements in the Commonwealth shall be paid by the Commonwealth, and may afterward be recovered by the treasurer and receiver general of the patients, if they are able to pay, or of any person or kindred bound by law to maintain them, or of the place of their settlement subsequently ascertained; but for those having known settlements in this Commonwealth, the charges shall be paid either by the persons bound to pay them, or by the place in which such inmates had their settlement, unless security to the satisfaction of the trustees is given for their support. If any person or place refuses or neglects to pay such charges the treasurer and receiver general may recover the same to the use of the sanatorium, as provided in section seventy-nine of chapter eighty-seven of the Revised Laws. A city or town which pays the charges for the support of an inmate of a state sanatorium shall have like rights and remedies to recover the amount thereof, with interest and costs, from the place of his settlement or from such person of sufficient ability, or from any person bound by law to maintain him, as if such charges had been incurred in the ordinary support of such inmate.

The price to be charged for the support of each patient is definitely fixed in said section at $4 per week. The liability of cities and towns is also fixed at $4 per week, as the words "the charges," as used in that part of said section which provides for payment by cities and towns, refer to the words "four dollars per week," stipulated in the first sentence of said section 10 as the amount of the charges.

As the sum to be paid by cities and towns is definitely fixed, and as said payment is to be made for the support of the patient, the real query is whether or not, in addition to the payment of the said sum of $4, cities and towns are liable for moneys expended for clothing supplied to such of said patients as are unable, because of their indigent condition, to provide necessary clothing for themselves.

This depends upon the meaning of the word "support," as used in St. 1907, c. 474, § 10.

In the case of Gould v. City of Lawrence, 160 Mass. 232, the question before the court was whether cities and towns are liable to the Commonwealth for moneys expended for clothing
supplied to paupers confined in the lunatic asylum at Danvers. Mr. Justice Knowlton said:—

The word "support" is often used in our statutes, and in its ordinary signification it includes not merely board, but everything necessary to proper maintenance.

In that case it was held to include clothing.

There is nothing to indicate that the Legislature intended to limit the use of the word "support" in this statute to mere board and lodging, or so as to have a meaning other than that which it has commonly acquired.

As the word "support" is used in the same sense in St. 1907, c. 474, § 10, as in R. L., c. 81, § 1, and as supplying necessary clothing would be included within the meaning of the word "support," as used in said section 10, I am of the opinion that cities and towns which pay the price fixed by St. 1907, c. 474, § 10, for the support of patients in State sanatoria cannot be obliged to supply clothing to said patients who, on account of their indigent condition, are unable to provide clothing for themselves.

INToxicating LIQuOR - Eighteenth Amendment - EFFECT ON STATE LEGISLATION - DRUGGIST'S LICENSE.

Neither Article XVIII of the Amendments to the Federal Constitution nor the Volstead Act passed by Congress to enforce the same nullifies those provisions of our State law which provide for the issue of licenses to druggists to sell liquor for medicinal purposes, but such a license issued under State law does not relieve the druggist from the duty to comply with the Federal law also.

You ask my opinion on the following:—

This office has been in receipt of several inquiries regarding the State liquor laws. The claim has been made by various persons that the prohibition amendment to the Constitution of the United States renders any State law regarding liquors null and void. . . .

It has been our contention and also the contention of the Boston licensing board that the State laws are in full force and effect in such sections as do not conflict with prohibition laws and liquor regulations of the government.
If the claim of these persons is correct, that the State liquor laws have been rendered null and void, of course our revenue from liquor license certificates will cease April 30.

Your inquiry is, in substance, whether Article XVIII of the Amendments to the Constitution of the United States and the act of Congress passed pursuant thereto suspend or nullify those portions of our State laws which provide for the issue of licenses to druggists to sell liquor for medicinal purposes.

The material portion of Article XVIII provides as follows:—

Sect. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sect. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

The first section of this amendment prohibits certain acts, including the sale of liquor for beverage purposes. It does not prohibit the sale of liquor for medicinal purposes. It follows that those portions of our State law which provide for the sale of liquor by druggists for medicinal purposes are not in conflict with the amendment and are not suspended or nullified thereby. Any doubt which might remain upon this point is removed by the express provisions of the act of Congress, known as the Volstead Act, in regard to the sale of liquor by druggists for medicinal purposes.

The second question is whether legislation by Congress under this amendment nullifies State laws inconsistent therewith. I am of the opinion that it does not. Section 2 of the amendment provides that Congress and the several States shall have "concurrent" power to enforce the amendment by appropriate legislation. In my opinion, this provision permits both the States and Congress to adopt independently any laws in regard to liquor which do not violate the prohibitions contained in section 1 of the amendment. The States cannot nullify any valid law which Congress may pass. Congress, on the other
hand, cannot nullify any valid law which shall be in force in or be passed by the several States. Each system of legislation stands independent of the other. Each must be obeyed by the citizen. Compliance with the Federal law will not excuse a breach of the State law, nor will compliance with the State law excuse a breach of the Federal law. A violation of both laws would be an offence under each. As a practical matter, that law, Federal or State, which is most severe and which most restricts the liberty of the citizen in regard to liquor, is the law which marks the limit beyond which he may not go without being guilty of an offence. If, however, the State law and the Federal law each permit an act, but prescribe different conditions, the act is unlawful unless the citizen complies with the conditions prescribed by each law.

I am therefore of opinion that the so-called Volstead Act does not nullify the provisions of our State law in regard to druggists' licenses. But a State license does not in any way relieve druggists from the necessity of procuring in addition a license under the Federal law. A State license only authorizes the sale of liquor for medicinal purposes in so far as the law of this Commonwealth is concerned. The druggist must in addition comply with the Federal law.

State Examiners of Plumbers — Master Plumber's License — Renewal — Refusal because Applicant is not actively engaged in Business.

Under St. 1909, c. 536, the State Examiners of Plumbers cannot refuse to renew a master plumber's license because said plumber is not actively engaged in business at the time of the application for renewal.

You request my opinion as to whether the State Examiners of Plumbers can refuse to renew a master plumber's license because the owner of such license is not actively engaged in business at the time of the application for renewal.

St. 1909, c. 536, creates a board to be known as the State
Examiners of Plumbers, provides for examinations to be given to persons desiring to engage in the business of plumbing as master plumbers, and for the issuance of licenses to such persons as successfully pass said examinations.

Section 4 provides: —

... Licenses shall be issued for the term of one year, and shall be renewable on or before the first day of May in each year upon the payment of the required fee. Each holder of a master plumber's certificate or of a license shall register his name and business address with the board of health of the city or town where the holder thereof desires to engage in the business of plumbing as a master plumber; ...

Section 3 provides: —

... The fees for examination, and for renewals shall be fifty cents each. ...

A license issued to a master plumber is merely a permit or authority to engage in the plumbing business and to perform plumbing work either by himself or by journeymen plumbers in his employ. It may be exercised or not, as the licensee sees fit. The mere failure to engage in the business authorized under the permit would not, under the provisions of the statute, either revoke or terminate the said license.

A renewal of a license is, to all intents and purposes, equivalent to an original issue of the license, except that the person to whom the renewal is to be granted, having passed an examination prior to the original issue of the license, is not obliged to undergo another examination.

I am therefore of opinion that the State Examiners of Plumbers cannot refuse to renew a master plumber's license because the owner is not actively engaged in business at the time that he makes application for the renewal of his license.
FISH AND GAME — POSSESSION OF TROUT AND CERTAIN BIRDS DURING THE CLOSED SEASON.

The prohibition against having trout, ruffed grouse or woodcock in one's possession during the closed season bars the importation of the same into the State during that period.

You ask my opinion as to whether the laws relating to trout, quail and grouse prohibit their being brought into Massachusetts from another State during the closed season here.

The laws involved are as follows: —

St. 1909, c. 377, as amended by St. 1910, c. 469: —

It shall be unlawful for a person at any time to buy or sell or offer for sale a trout except as hereinafter provided, or to take or have in possession trout or salmon between the first day of August in any year and the first day of April of the year following. . . .

St. 1911, c. 236, as amended by Gen. St. 1919, c. 153, § 1: —

It shall be unlawful, excepting only between the twentieth day of October and the twentieth day of November of each year, both dates inclusive, to hunt, pursue, take or kill a ruffed grouse, commonly called partridge, or a woodcock, or to have the same, or any part thereof, in possession, whenever or wherever the same may have been taken or killed; . . .

St. 1911, c. 356, as amended by Gen. St. 1919, c. 153, § 2: —

It shall be unlawful excepting only between the twentieth day of October and the twentieth day of November of each year, both dates inclusive, to hunt, pursue, take or kill a quail or to have the same, or any part thereof, in possession. . . .

The fish and game laws above mentioned are clearly intended to prevent the unlawful taking or killing of fish and game included in the prohibition during the closed season, and, in furtherance of this object, the having in possession of such fish or game is also made an offence. Without this provision, in many cases it would, obviously, be difficult to secure a conviction, as the burden would be on the Commonwealth to establish the fact that fish or game found in one's possession was caught or killed within the Commonwealth. It is fair to
assume that the Legislature intended to prevent the evasion of the law, and thus made it unlawful to have such fish and game in one's possession during the closed season. The language used is clear, and there is no reason to doubt that such was the intention.

CITIES AND TOWNS — NOTES.

A vote of a town appropriating a sum of money in excess of the amount called for by the warrant for the meeting is invalid, and town notes may not be issued thereunder.

You ask whether you should certify town notes under a vote of the town authorizing an appropriation in excess of the amount called for by the article in the warrant, which was as follows:—

To see if the town will vote to raise and appropriate the sum of three thousand dollars to be used in reconstructing Salem Street, as recommended by the Massachusetts Highway Commission, or what action it will take thereon.

The vote was an appropriation of $7,500 for the purpose of reconstructing a street, and provided that a part of said sum be borrowed on town notes.

I am of the opinion that the vote is invalid. The article in the warrant might have read, "to see if the town will reconstruct Salem Street and make an appropriation therefor." In that event, notice to the town would have been sufficiently given that the purpose of the article was to secure the reconstruction of Salem Street, and even without the words "make an appropriation therefor," it would have been proper to have made an appropriation under the article. Blackburn v. Walpole, 9 Pick. 97; Avery v. Stewart, 1 Cush. 496, 502.

In the case before me, however, the voters had notice of the proposal to raise and appropriate $3,000 for specified purposes, and the voters thus had the right to assume that no larger appropriation would be voted. There not having been a
sufficient notice given, the appropriation of $7,500 was unwarranted, and you are not authorized to certify the town notes issued thereunder.

ELECTIONS — PRESIDENTIAL PRIMARIES — GROUP VOTING.

No provision is made for group voting for delegates in presidential primaries, and candidates must be voted for by a cross opposite the name of each candidate.

You have asked my opinion as to whether in printing the ballots for the presidential primary you should cause to be placed over a group of candidates a circle, with instructions that the voter may vote for such group by placing a cross therein.

If a circle is to be placed over a group of candidates it is authorized only by the reference implied in St. 1913, c. 835, § 142, to section 108 of the same act.

Section 108, in part, provides: —

A cross (X) marked against a name shall constitute a vote for the person so designated. A cross in the circle at the head of a group of candidates for ward committees or for delegates to a state convention shall count as a vote for each candidate therein.

Section 142 is as follows: —

The provisions of law relating to primaries not inconsistent with the three preceding sections shall apply to presidential primaries so far as is practicable.

Section 140 of the same act provided for the manner of electing candidates in presidential primaries. This act was amended by Gen. St. 1916, c. 16, entitled “An Act to change the method of voting in presidential primaries,” by striking out said section 140 and inserting the following detailed provisions: —

The secretary of the commonwealth shall cause to be placed upon the official ballot for use in primaries at which delegates to national conventions of political parties are elected, under separate headings, and in the follow-
ing order, the names of candidates for delegates at large, alternate delegates at large, district delegates, and alternate district delegates. The names of candidates appearing in nomination papers which contain nominations for all the places to be filled shall be placed first on said ballot, arranged in groups and in the same order as in the nomination papers. The names of candidates appearing in nomination papers which contain nominations for less than all the places to be filled shall follow, alphabetically arranged. The ballot shall also contain a statement of the preference, if any, of each candidate for delegate as to a candidate for nomination for president, provided that such statement appears in his nomination papers; but no such statement or preference by any candidate for delegate shall appear upon the ballot unless such candidate for nomination for president files his written assent thereto with the secretary of the commonwealth on or before five o'clock of the last day for filing nomination papers. Such assent may be communicated by telegraph or cable. Upon the receipt of the records of votes cast at presidential primaries, the city or town clerk or election commissioners shall forthwith canvass the same and make return thereof to the secretary of the commonwealth, who shall forthwith canvass such returns, determine the results thereof, and notify the successful candidates.

Section 140, as amended by Gen. St. 1916, c. 16, is included in that portion of St. 1913, c. 835, which appears under the title "Provisions applying to presidential primaries."

It clearly appears that there is no express authorization for voting for a group of candidates by a cross in a circle at the head of the group, as provided in the case of groups of candidates for ward committees and for delegates to a State convention, under section 108 of the act.

Provision is made for the arrangement upon the ballot of candidates in groups in those cases where the names of candidates have appeared in groups on the nomination papers. Section 140, as amended, contains no provision as to the method of voting, and there is no express provision as to the method of voting in any of the sections included under the title "Provisions applying to presidential primaries."

The method of voting in presidential primaries is, therefore, governed by section 142, which provides that "the provisions of law relating to primaries . . . shall apply to presidential primaries so far as is practicable."

There is no provision of law relating to primaries which
permits voting for a group of candidates by a single cross in a circle which has any general application. The only provision of law which authorizes voting for a group of candidates by a single cross is contained in section 108, to which reference has already been made, and is expressly limited to "a group of candidates for ward committees or for delegates to a state convention."

As it clearly appears there is no provision of law relating to primaries which authorizes the use of a single mark in a circle, except in voting for a group of candidates for ward committees or for delegates to a State convention, I am constrained to advise you that the candidates in the presidential primaries must be voted for by a cross against the name of each candidate.

JURISDICTION — CRIMES COMMITTED ON FEDERAL PROPERTY.

The courts of the Commonwealth have no jurisdiction over a crime committed on the premises of the Watertown Arsenal, which is the property of the United States of America.

You have asked my opinion as to whether the courts of the Commonwealth have jurisdiction over a certain crime committed on the premises of the Watertown Arsenal. The crime referred to is a violation of R. L., c. 56, § 55 and St. 1907, c. 216, and from your letter I understand that the defendant is specifically charged with a violation of the law in regard to a sale of milk. This sale took place on the premises of the Watertown Arsenal, which is the property of the United States of America, over which our courts have no jurisdiction except as to service of process, to prevent such property from becoming a haven for those desiring to avoid suit or prosecution to which service of process is a prerequisite.

The case of Commonwealth v. Clary, S Mass. 72, has been followed or cited with approval in several cases, and is the law in this Commonwealth. It is my opinion, therefore, that our courts have no jurisdiction over the offence charged, and that the defendant's contention is correct.
Schools — Attendance — Requirements.

Under Gen. St. 1915, c. 81, as amended by Gen. St. 1919, c. 281, children between fourteen and sixteen years of age are required to attend school only in case they do not possess such ability to read, write and spell the English language as is required to complete the sixth-grade course.

You ask my opinion on the following:

Gen. St. 1915, c. 81, § 1, as amended by Gen. St. 1919, c. 281, provides, in part as follows:

Every child between seven and fourteen years of age, every child under sixteen years of age who does not possess such ability to read, write and spell in the English language as is required for the completion of the sixth grade of the public schools of the city or town in which he resides . . . shall attend a public day school in said city or town or some other day school approved by the school committee, . . .

The question raised is whether or not a child, before receiving a certificate, should be required to complete the course in reading, writing and spelling of the sixth grade, or whether it is sufficient if, in the opinion of the superintendent, a child possesses the ability to read, write and spell in the English language equivalent to completing the sixth-grade course.

The statute divides school children into two classes, according to age. Those between seven and fourteen years of age are required to attend school until they reach the age of fourteen years, even if they advance beyond the requirements of the sixth grade. In the case of children between fourteen and sixteen years of age attendance only in case the child does not possess such ability to read, write and spell in the English language as is required to complete the sixth grade. This test is, in my opinion, a mental one. The condition of receiving the certificate is not the completion of the sixth grade, but the possession of sufficient knowledge of English to complete it. Between seven and fourteen years the test is an age test only; between fourteen and sixteen years the test is the possession of the ability to read, write and spell English in accordance with the statutory requirement.
Treasury — Collection of Revenue — Abandonment of Contract — Payment of Penalty by Bonding Company.

Under the provisions of Mass. Const. Amend. LXIII, § 1, providing that "all money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof," a sum of money received from a bonding company, reimbursing the Commonwealth for the excess amount expended in completing a work upon a contractor's abandoning the same, should be paid directly into the treasury of the Commonwealth.

You request my opinion upon the following set of facts: —

Chapter 50 of the Resolves of 1918 appropriated to the Department of Mental Diseases the sum of $385,000 for the construction of a male infirmary group at the Boston State Hospital. A contract for this work was awarded to a contractor for the sum of $250,000. The said contractor abandoned the work early this year, and the Commonwealth, with the assent of the surety on the contractor's bond, proceeded to complete the work. It is now estimated by the architects that there will be needed approximately $6,585 in excess of the contract price. This excess is to be paid to the Commonwealth in due course by the surety company. The specific question you ask is whether or not it will be necessary to obtain an additional appropriation, or can the amount when received from the bonding company be applied directly to the payment of bills incurred in the completion of the infirmary.

Mass. Const. Amend. LXIII, § 1, provides that "all money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof."

Accordingly, it is my opinion that the amount that the bonding company is to pay should, when received, go directly into the treasury of the Commonwealth, and, therefore, the sum necessary to complete the building in excess of the appropriation should go into the coming supplementary budget.
COMMISSIONER OF BANKS — CORPORATION — CORPORATE NAME
— USE OF WORD "BANKERS."

St. 1908, c. 590, § 16, as amended by St. 1914, c. 610, does not prohibit a corporation using the word "bankers" as a part of its corporate name.

You request my opinion as to whether a corporation can use the word "bankers" as a part of its corporate name.

St. 1908, c. 590, § 16, provides, in part, that no corporation shall make use of any printed paper having thereon any name or other word or words indicating that such business is the business of a savings bank. The use of the word "bankers" is not prohibited by this prohibition.

It is to be noted that said section 16 was amended by St. 1914, c. 610, which provides, in substance, that no one thereafter should transact business under any name or title which contains the words "bank" or "banking" as descriptive of said business.

It is further to be noted that section 17, which authorizes the Commissioner to examine the accounts, books, papers, etc., of any one doing a banking business or of any corporation, person, partnership or association which has the words "bank," "banking" or "trust" in the name under which its business is conducted, was amended by Gen. St. 1918, c. 44, in part, by inserting after the word "banking," in the fifth and sixth lines, the words "banker" and "bankers." The effect of this latter amendment in this connection was to give the Commissioner authority to examine the accounts, etc., not only of any corporation which had the word "bank" and "banking" in the name under which its business was conducted, but also similarly to examine any corporation which had the words "banker" or "bankers" in its name. However, the Legislature did not at that time amend the last part of section 16 by inserting after the words "bank" or "banking" the words "banker" or "bankers," with the result that, in my opinion, it is still possible for any person, partnership, corporation or association to transact business under a name or title which contains the
words "banker" or "bankers." If this situation is one that should be corrected it will be necessary for the Legislature to amend the last part of said section 16 along the lines indicated.

Constitutional Law — Taxation — Appropriation of Public Funds — Public Purpose — State House — Assignment of Rooms — Furnishing, Upkeep and Maintenance of Rooms — United Spanish War Veterans.

A bill providing for the assignment of a room or rooms in the State House for the free use of the United Spanish War Veterans would be constitutional, if enacted, for the assignment of a room or rooms for this purpose is for a public purpose.

There is nothing in Mass. Const. Amend. XLVI, the so-called anti-aid amendment, nor in Article LXII of the Massachusetts Constitution, that prevents the Commonwealth assigning rooms for this purpose.

Under the provisions of the bill, that the use of the rooms is "for the storing and preserving the records and other property of the said department and relics and mementoes of the war," the Commonwealth may appropriate money for the furnishing, upkeep and maintenance of such rooms.

You have requested my opinion upon certain questions in connection with House Bill No. 1445, relative to the assigning of quarters in the State House for the use of the United Spanish War Veterans. Your committee desires an opinion as to whether or not the Commonwealth may, consistently with the so-called anti-aid amendment to the Constitution (Article XLVI), and Article LXII, assign a room or rooms in the State House for the free use of the United Spanish War Veterans, to be under the charge of the State commander of the department, and may appropriate money for the furnishing, upkeep and maintenance of such room or rooms.

House Bill No. 1445 provides as follows: —

Section 1. The superintendent of buildings, with the approval of the governor and the council, is hereby authorized and directed to assign a room or rooms, suitably furnished, in the state house for the use of the United Spanish War Veterans, to be under the charge of the state commander of the department. The headquarters thus established shall be used for storing and preserving the records and other property of the said department and relics and mementoes of the war. The records shall be
accessible at all times, under suitable rules and regulations, to members of
the department and others engaged in collecting historical information.

Section 2. Whenever the United Spanish War Veterans cease to exist
as a department or organization, the records, papers, relics, and other
effects of whatever character belonging to the said department, shall be-
come the property of the commonwealth.

It is my opinion that there is nothing in section 2 of Article
XLVI, the so-called anti-aid amendment, and nothing in
Article LXII, which forbids the giving or loaning of the credit
of the Commonwealth to any private enterprise, that prevents
the Commonwealth from assigning a room or rooms in the State
House for the purposes set forth in the House bill in question.

The real question raised is as to whether or not an assignment
of a room in the State House for this purpose is for a public
purpose.

The reasonable use of public money for similar purposes has
been sanctioned by several different statutes, and has been
upheld by the courts as a public purpose, in that the Common-
wealth thus recognized valuable services given in war and thus
promoted loyalty and patriotism.

It is to be noted that the provisions of the present bill
follow closely the provisions of R. L., c. 10, § 21, which pro-
vides for the assignment of a room in the State House to the
Grand Army of the Republic, and that the language is exactly
the same as Spec. St. 1919, c. 246, relative to the assignment of
quarters in the State House for the use of the Massachusetts
branch of the American Legion.

It is also my opinion that the Commonwealth may appro-
priate money for the furnishing, upkeep and maintenance of
such room or rooms, in view of the fact that the use of the
room or rooms by the terms of the proposed bill is defined to
be “for the storing and preserving the records and other prop-
erty of the said department and relics and mementoes of the
war.”
Employees—Discharge—Hearing—Veteran Fireman on Boston Police Boat.

A civilian fireman employed under authority of St. 1906, c. 291, § 8, upon the police boat operated by the police department of the city of Boston, is a State employee.

Such civilian fireman, if a veteran, is entitled to a hearing upon his discharge before the Associate Commissioners of Labor and Industries instead of before the city council of Boston.

You ask my opinion upon the following case:

The police boat operated by the police department of Boston performs the functions of a floating patrol wagon. At present the firemen employed upon this boat are civilians, who are employed by the police commissioner under authority of St. 1906, c. 291, § 8. It is proposed to replace these civilian firemen with members of the police force, in order to increase the police strength of this floating patrol wagon. One of these civilian firemen is a veteran who is entitled to a hearing upon his discharge. Under R. L., c. 19, § 23, as amended by St. 1910, c. 500, the hearing must be before the city council if he is a city employee, and before the State Board of Conciliation and Arbitration (now succeeded by the Associate Commissioners of Labor and Industries, see Gen. St. 1919, c. 350, §§ 69-72) if he is a State employee. You inquire whether he is a State or a city employee.

St. 1878, c. 244, provided that the mayor of Boston should appoint three police commissioners, who should have charge of the police department. St. 1885, c. 323, provided that the commissioners should be appointed by the Governor, with the advice and consent of the Council. All the powers of the former police commissioners, except as otherwise provided, were transferred to the new commission. Commonwealth v. Plaisted, 148 Mass. 375. This statute contained no express authority to employ civilian employees, but no question can be made that it impliedly conferred such power. See Sims v. Police Commissioner, 193 Mass. 547. In that case the police commissioners having discharged such an employee without
assigning any cause for his removal, as required by St. 1885, c. 266, § 5, in the case of a discharge by boards and officers of the city of Boston, the employee sought reinstatement. In holding that the employee was not entitled to the rights of a city employee the court said:

... The St. of 1885, c. 323, contains nothing to prevent the board of police of Boston from discharging one of their employees whenever in their judgment it might be advisable to do so; nor has our attention been called to any subsequent legislation having this effect, unless it be found in the statutes regulating the civil service and fixing the right of veterans presently to be considered. O'Dowd v. Boston, 149 Mass. 443; Attorney-General v. Donahue, 169 Mass. 18.

The petitioner was not protected by the provisions of St. 1885, c. 266, § 5, that officers and boards of the city of Boston may remove their subordinates "for such cause as they may deem sufficient and shall assign in their order for removal," because the police commissioners were not officers or a board of the city of Boston, but were appointed by and were responsible to the Governor of the Commonwealth. Commonwealth v. Plaisted, 148 Mass. 375, 383, et seq.; Phillips v. Boston, 150 Mass. 491, 494. ...

St. 1906, c. 291, § 7, provides for the appointment of a single police commissioner by the Governor, with the advice and consent of the Council, to succeed the former board of three commissioners similarly appointed. Section 10 confers upon such commissioner all the powers and duties of the former board, except as otherwise provided. Section 8 further provides, in part:

... The city of Boston shall provide all such accommodations for the police of said city as said police commissioner may require. All buildings and property used by said police shall be under control of said police commissioner.

Said police commissioner may employ such clerks, stenographers and other employees as he may deem necessary for the proper performance of the duties of his office.

All expenses for the maintenance of buildings, the pay of the police, clerks, stenographers and other employees, and all incidental expenses incurred in the performance of the duties of said commissioner or in the administration of said police shall be paid by the city of Boston upon the requisition of said police commissioner.
The employee in question is, I understand, employed under this provision. If the employee in the Sims case was a State employee there would seem to be little question that the present employee is a State employee likewise. See opinion of the Attorney-General to the police commissioner for the city of Boston, dated Sept. 16, 1919.

I therefore advise you that the hearing should be held before the Associate Commissioners of Labor and Industries (see Gen. St. 1919, c. 350, §§ 69-72), and not before the city council.

**CONSTITUTIONAL LAW — STATE BONDS — CONTRACT WITH BONDHOLDER — SINKING FUND PROVISIONS.**

A bond issued by the Commonwealth, which provides that it "shall be deemed a pledge of the faith and credit of the Commonwealth," constitutes a contract with the holder faithfully to perform the sinking fund provisions contained in R. L., c. 6, §§ 69, 70 and 71, which contract is within U. S. Const., art. I, § 10. Although neither the obligation of the bond itself nor the obligation of the contract relative to the maintenance of the sinking fund to pay it can be enforced in court by any person against the Commonwealth without its own consent, unanswerable considerations of public policy, of duty to the taxpayers and of public honor require that both obligations be punctually and strictly performed.

I have considered your inquiry of April 6. As bearing upon this inquiry you call my attention to R. L., c. 6, §§ 69, 70 and 71, which provide as follows:—

**Section 69.** The income or any surplus of funds belonging to or in the custody of the commonwealth shall, unless otherwise provided, be added to the principal.

**Section 70.** When the accumulations of a sinking fund of the commonwealth are sufficient to extinguish at maturity the indebtedness for which it was established, its subsequent accumulations may be added by the treasurer to any sinking fund which is not sufficient to meet the indebtedness for which it was established.

**Section 71.** The treasurer, instead of selling any of the stocks or securities belonging to funds over which the commonwealth has exclusive control to meet maturing liabilities, may transfer them to any other of such funds upon terms and conditions approved by the governor and council.
As a typical example of a sinking fund provision you mention St. 1894, c. 497, § 8, which authorizes a State highway loan of $300,000 for a period of thirty years at a rate not exceeding 4 per cent, provides that the bonds issued therefor "shall be deemed a pledge of the faith and credit of the commonwealth," and further provides:

... The treasurer and receiver general shall, on issuing any of said scrip or certificates of indebtedness, establish a sinking fund for the payment of said bonds, into which shall be paid any premiums received on the sale of said bonds, and he shall apportion thereto from year to year, in addition, amounts sufficient with the accumulations to extinguish at maturity the debt incurred by the issue of said bonds. The amount necessary to meet the annual sinking fund requirements and to pay the interest on said bonds shall be raised by taxation from year to year.

You then inquire, in substance, what constitutional vested right the holder of a bond issued under these or substantially similar provisions has in the maintenance and application of the sinking fund so established.

Some State Constitutions contain special provisions relative to the creation and preservation of sinking funds to pay State bonds. *Graham v. Horton*, 6 Kan. 343; *Park v. Candler*, 113 Ga. 647; *Park v. Candler*, 114 Ga. 466; *McReynolds v. Smallhouse*, 8 Bush (Ky.), 447, 36 Cyc. 899. As our Constitution does not contain similar provisions these cases may be laid aside. There remains the question whether our statutory provisions for creation and application of a sinking fund constitute a contract with the bondholder within the meaning of section 10 of Article I of the Federal Constitution, which provides:

No state shall ... pass any ... law impairing the obligation of contracts.

If a State attaches to its bonds some special privilege, such as a provision that the bonds and coupons when due shall be receivable in payment of taxes and other demands due to the State, such provision constitutes a contract with the bondholder which the State may not impair by subsequent legisla-
tion. Hartman v. Greenhow, 102 U. S. 672; Royall v. Virginia, 116 U. S. 572; Sands v. Edmunds, 116 U. S. 585; McGahey v. Virginia, 135 U. S. 662; McCallough v. Virginia, 172 U. S. 102. An express pledge of property or of income to secure the bonds is within the protection of the constitutional prohibition. Trustees of the Wabash & Erie Canal Co. v. Beers, 2 Black. 448; Opinion of the Justices, 190 Mass. 605. If the State authorizes a municipal corporation to issue bonds, it impliedly confers a general authority to impose taxes in order to pay principal and interest, which authority cannot be subsequently revoked. Ralls County Court v. United States, 105 U. S. 733. If a statute authorizes the municipality to issue the bonds and expressly requires the levy of an annual tax to pay interest, any surplus to be applied to principal, and further expressly devotes the proceeds of the tax to those purposes, such grant of authority enters into the contract with the bondholder and cannot later be withdrawn. Von Hoffman v. Quincy, 4 Wall. 535; Louisiana v. Pillsbury, 105 U. S. 278; Mobile v. Watson, 116 U. S. 289; Graham v. Folsom, 200 U. S. 248, 252. Provisions for the creation and maintenance of a sinking fund by the municipality in order to meet the bonds have likewise been held to be within the constitutional guarantee. Warwick v. Rhode Island Hospital Trust Co., 38 R. I. 517. A statute which authorizes an issue of State bonds, and requires that a five and a half mill tax shall be levied annually to pay interest and redeem the bonds until all the bonds are discharged, has been held to create a contract with the bondholders, especially where a subsequent constitutional amendment expressly recognized a contractual relation. Louisiana v. Jumel, 107 U. S. 711, 719. I am not, of course, unmindful that such a contract cannot be enforced by any court against a sovereign State without its own consent, but this is equally true of the bonds themselves. Louisiana v. Jumel, 107 U. S. 711; Hans v. Louisiana, 134 U. S. 1; North Carolina v. Temple, 134 U. S. 22; Louisiana v. New York Guaranty and Indemnity Co., 134 U. S. 230.

On the other hand, a statute which authorizes a municipality to issue bonds and to levy a tax to pay them does not prevent a
subsequent modification of the taxing provision which does not render the security insufficient. *Gilman v. Sheboygan*, 2 Black. 510. And where a statute authorized a city to issue bonds to meet the cost of a waterworks, provided for a sinking fund, and further directed that the price of water should be so regulated, if practicable and reasonable, as to produce a sufficient sum to pay the principal and interest of the bonds, it was held that the latter provision did not constitute a pledge of the water rates to pay the bonds. *Sinclair v. Fall River*, 198 Mass. 248; see also I Op. Atty.-Gen., 263, 266. It is evident, therefore, that the question whether and to what extent a given statute constitutes a contract with the bondholder requires a very careful consideration of the circumstances of each case.

The question whether the Massachusetts sinking fund provisions constitute a contract is very close. It appears that it is customary to provide that the bonds "shall be deemed a pledge of the faith and credit of the commonwealth." Perhaps these words, if taken alone, might be so narrowly construed as to exclude the sinking fund provision from the security upon which the bondholder might legally rely, even though the usual sinking fund provision would seem broad enough to devote that fund to the payment of the bonds without further express words of pledge. The usual form of bond is merely an acknowledgment of indebtedness in a specified sum on a specified date, with interest at a specified rate, but it has generally been the custom to refer specifically to the act which authorizes the issue, thus calling to the attention of the bondholder the provisions for sinking fund, if any. Under all the circumstances, it seems that the pledge of the "faith" of the Commonwealth in addition to the pledge of its "credit" is broad enough to import an obligation faithfully to perform the sinking fund requirements and to administer that fund according to law. In any event, it can scarcely be doubted that bondholders have purchased Massachusetts bonds in reliance upon honorable observance of those provisions.

In my judgment, the question in the last analysis is not one of narrow legal construction. The duty to preserve the sinking
funds, like the express promise to pay the bonds, rests upon the honor of the Commonwealth. The very fact that neither duty can be enforced by any court without the consent of the Commonwealth strengthens the obligation to keep faith. Moreover, strict observance of the obligation is in accord with sound business policy. Massachusetts has had occasion to borrow large sums in the past. Similar occasions will doubtless arise in the future. Any action which might call in question the good faith of the Commonwealth must inevitably be reflected not only in a higher interest rate but also in a restricted market for the bonds themselves. Moreover, the duty to preserve the sinking funds is owed not only to the creditors of the Commonwealth but also to the citizens. The sinking fund provisions provide a means whereby the burden of discharging the public debt is spread over a considerable period of years. To preserve the sinking funds protects taxpayers who must ultimately discharge the debt. In the *Sinking-Fund Cases*, 99 U. S. 700, the Supreme Court, in speaking of a statute which established a sinking fund to meet the bonds of certain railroads, said: —

All that has been done is to make it the duty of the company to lay by a portion of its current net income to meet its debts when they do fall due. In this way the current stockholders are prevented to some extent from depleting the treasury for their own benefit, at the expense of those who are to come after them. This is no more for the benefit of creditors than it is for the corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest of a faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

These words are equally applicable to the sinking fund of a State. Aside from any constitutional restrictions, unanswerable considerations of public policy, of duty to the taxpayers, and of public honor require that the sinking funds be kept intact and be applied to the debts which they were created to pay.
Regulation of Fire Escapes — Door as an Obstacle to Means of Exit.

A door of a lodging room in a hotel which may at any time be locked or otherwise fastened, and which is the only means of egress to an outside fire escape, constitutes an obstacle that may interfere with the means of exit from the hotel in case of fire, within the meaning of St. 1914, c. 795.

I duly received your letter of March 8, in which you state as follows: —

There is in the city of Boston a hotel of first-class construction, eight stories in height, having two wings, and at the end of each wing a fire escape has been installed, by direction of the building commissioner of the city of Boston, as one of the necessary means of egress.

The only egress to each of the fire escapes in question is through either one of two rooms, both rooms in each wing being used as lodging rooms, and the doors, therefore, liable to be locked at any time, day or night.

Since the receipt of your letter a representative of the hotel in question has explained to me at some length the conditions with respect to the fire escapes at said hotel, and I have conferred with you in regard to the facts and the question upon which you request my opinion.

The specific question, as stated in your letter, on which you desire an opinion, is whether a door to a room in use as a lodging room, and liable to be occupied day or night, so that such door may be at any time locked or otherwise fastened, which door provides the only means of exit to an outside fire escape that must be reached through the room in question, constitutes an obstacle that may interfere with the means of exit from the hotel in case of fire.

St. 1914, c. 795, which is the statute upon which you derive your authority in the premises, provides, in part, as follows: —

Section 13. In addition to the powers given by sections one to twelve, inclusive, the commissioner shall have power to make orders and rules relating to fires, fire protection and fire hazard binding throughout the metropolitan district, or any part of it, or binding upon any person or class of persons within said district, limited, however, to the following subjects: —
D. Causing obstacles that may interfere with the means of exit to be removed from floors, halls, stairways and fire escapes.

The fire escapes provided for the hotel constitute a necessary means of egress in case of fire. As the only means of egress to each of the fire escapes is through one of two lodging rooms, as above described, the door opening into the selected room, when locked or otherwise fastened, constitutes an obstacle which clearly interferes with the means of exit to said fire escapes.

When these doors are located upon floors of the hotel from which fire escapes are required by law, as they may prevent exit to the fire escapes from the halls and stairways of the hotel, I am of the opinion that they constitute obstacles, within the meaning of St. 1914, c. 795.

In reaching this decision I do not pass upon the question whether or not, if these doors were provided with some ready means by which in case of fire a person on the outside could remove any fastening, and if the exit to the fire escape was clearly indicated, and notice posted how to open the door, this might constitute a sufficient means of access to the fire escape, within the purpose and intent of the statute.

Public Health — Common Drinking Cup.

The use of a common cup in communion services in churches is not a violation of St. 1910, c. 428, § 1.

You ask my opinion whether or not the use of a common cup in giving communion in the Lutheran church would come under St. 1910, c. 428.

Section 1 of the act in question provides as follows: —

In order to prevent the spread of communicable diseases, the state board of health is hereby authorized to prohibit in such public places, vehicles or buildings as it may designate the providing of a common drinking cup, and the board may establish rules and regulations for this purpose.
It will be observed that no offence is committed by the use of a common cup unless the place of alleged violation has been designated by the Department as a public place. The Department has not so designated a church.

I believe that you might designate a church a public place in so far as to prevent the use there of a water tank with a cup hanging beside it, which is the sort of thing that the statute aimed at.

But as to communion, only a limited number of persons, who are duly qualified under church rules, participate therein. In my opinion, the communion is of a private rather than a public nature, and the use of the communion cup is not such a use as the Legislature had in mind when it gave to the State Board of Health authority to prohibit the use of a "common drinking cup." A church may be a public place in the sense that its usual services are open to the public, but if communion service is participated in only by church members and others who may be admitted to the service, it may well be regarded as a ceremony of a private nature.

I may also direct your attention to the fact that not only may your Department designate what shall be "public places, vehicles or buildings," within the meaning of the act, but that the statute is not mandatory, as it merely authorizes your Department to take action in accordance with its terms.

CIVIL SERVICE — ASSISTANT TREASURER AND ASSISTANT COLLECTOR OF THE CITY OF FALL RIVER.

The appointment of a clerk as assistant treasurer or assistant collector for the city of Fall River, under the provisions of St. 1920, c. 80, is not subject to the civil Service Law and Rules.

While a clerk so designated or appointed may be removed as assistant treasurer or assistant collector without reference to the Civil Service Law and Rules, the latter govern his removal from the position of clerk.

You ask my opinion upon the following case: —

St. 1920, c. 80, provides as follows: —

SECTION 1. The city treasurer and the city collector of the city of Fall River shall each appoint one of their male clerks as assistant treasurer
and assistant collector, respectively. The said assistants shall, in cases which will not admit of delay, perform the duties and exercise the authority imposed or conferred by law or ordinance upon their respective chiefs, in case of their absence or disability, or of a vacancy in the office.

Section 2. The appointing officer shall in each case file notice of the appointment with the mayor and city clerk, and the appointment shall continue in force until revoked by the appointing officer.

The clerical force and employees in the aforesaid offices are classified under the civil service by St. 1913, c. 548. You ask:—

1. Is the appointment of an assistant treasurer and an assistant collector under St. 1920, c. 80, subject to the Civil Service Law and Rules?

2. If the answer to question 1 is in the affirmative, must a person properly appointed to and holding the position be discharged in accordance with the laws relating to the discharge of civil service employees?

1. St. 1920, c. 80, § 1, requires the city treasurer and the city collector to "appoint" one of their male clerks as assistant treasurer and as assistant collector, respectively. But such appointment carries no increase in salary. It imposes no regular duties upon the appointee. The appointee does not act except when the office is vacant or in case of the absence or disability of his chief. Even then he may not act except "in cases which will not admit of delay." See Dimick v. Barry, 211 Mass. 165. Moreover, under section 2 "the appointment shall continue in force until revoked by the appointing officer." The natural meaning of this provision is that the appointment is revocable at pleasure. Under these circumstances I am of opinion that the "appointment" does not operate as a promotion to an office, but is merely a designation of an employee to discharge the duties of the office in case of emergency. The situation differs from that presented by Attorney-General v. Tillinghast, 203 Mass. 539, where the appointment of an assistant auditor, to assist the auditor in his duties, was subject to confirmation by the city council. I am therefore constrained to advise you that neither the "appointment" nor the revocation thereof is within the provisions of the civil service law.
2. The answer to your second question follows from the first. Under St. 1913, c. 548, the civil service law and the rules and regulations established thereunder apply to the clerks and employees in the office of the collector of taxes and in the office of the city treasurer of Fall River. The status of the male clerk who may be "appointed" under St. 1920, c. 80, remains unchanged by that "appointment." He is a clerk still, and within the protection of the civil service so far as his clerkship is concerned. The revocation of the "appointment" terminates the authority to act in case of emergency, but leaves his status as clerk entirely unaffected.

SUNDAY SPORTS — METROPOLITAN PARK SYSTEM.

St. 1920, c. 240, which legalizes amateur sports on Sunday under certain conditions, applies not only to parks under the control of cities and towns, but also to those under control of the Metropolitan District Commission.

You inquire whether St. 1920, c. 240, applies to parks under the control of the Metropolitan District Commission, successor, under Gen. St. 1919, c. 350, §§ 123 to 129, to the Metropolitan Park Commission.

St. 1920, c. 240, §§ 1, 2, 3 and 6, provide as follows:—

SECTION 1. In cities and towns which accept the provisions of this act it shall be lawful to take part in or to witness any amateur athletic outdoor sport or game on the Lord's Day between the hours of two and six in the afternoon as hereinafter provided.

SECTION 2. Such sports or games shall take place on such public playgrounds, parks or other places as may be designated for that purpose in a permit or license issued by the mayor and city council or body exercising similar powers in cities or by the selectmen in towns: provided, that if, under any statute or ordinance a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, further, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

SECTION 3. The said sports or games shall be conducted subject to
such regulations and restrictions as shall be prescribed by the mayor and city council or body exercising similar powers in cities and by the selectmen in towns, and the same shall be stated in the license or permit.

SECTION 6. The respective authorities described in section two may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of this act, or any regulation or restriction prescribed under section three, is being or will be violated.

The statute makes lawful any amateur athletic outdoor sport or game on the Lord's Day between the hours of two and six in the afternoon, "in cities and towns which accept the provisions of this act." It further authorizes the use of parks and public playgrounds for such sports, subject to license and regulation by the proper authorities. The metropolitan parks system is the great park system of the metropolitan district. It serves thirty-nine cities and towns. It is maintained for outdoor sport and recreation. The Legislature has introduced one geographical qualification into the act by limiting its operation to those cities and towns which accept its provisions. To except the metropolitan parks from its operation introduces a further geographical qualification which might unduly restrict the operation of the act in those cities and towns which accept it. If the Legislature had intended to make this further geographical qualification it would probably have done so by express words.

I find myself unable to concur in the suggestion that the language of the act is not broad enough to include the metropolitan parks system. Section 1 is certainly broad enough to apply thereto. Section 2, after providing for licenses by city or town officials, as the case may be, adds the following proviso: —

provided, that if, under any statute or ordinance a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority.

The words "any statute" can scarcely be restricted so as to exclude the statutes which place the metropolitan parks system
under the exclusive charge of the Metropolitan District Commission.

I am unable to concur in the narrow and restrictive construction of St. 1920, c. 240, § 3, which is suggested.

St. 1893, c. 407, § 4, provides, in part, as follows: —

Said board shall have power to acquire, maintain and make available to the inhabitants of said district open spaces for exercise and recreation; . . . In furtherance of the powers herein granted, said board may employ a suitable police force, make rules and regulations for the government and use of the public reservations under their care, and for breaches thereof affix penalties not exceeding twenty dollars for one offence, to be imposed by any court of competent jurisdiction; and in general may do all acts needful for the proper execution of the powers and duties granted to and imposed upon said board by the terms of this act. . . .

This authority is transferred to the Metropolitan District Commission by Gen. St. 1919, c. 350, § 123. It is clearly broad enough to authorize regulation of sports and games in the metropolitan parks. Brodbine v. Revere, 182 Mass. 595; Whitney v. Commonwealth, 190 Mass. 531; Teasdale v. Nevell & Snowling Cons. Co., 192 Mass. 440; I Op. Atty.-Gen., 598; II Op. Atty.-Gen., 56, 84, 292, 363, 376, 454; III Op. Atty.-Gen., 14, 96. I understand that for twenty-seven years weekday sports and games in the metropolitan parks have been regulated thereunder. I cannot believe that it is not broad enough to apply to the Sunday sports and games which are made lawful by St. 1920, c. 240. Section 2 of that act makes the Metropolitan District Commission the licensing authority for the metropolitan parks. Section 3 requires that the regulations or restrictions imposed “shall be stated in the license or permit.” The case of Teasdale v. Nevell & Snowling Cons. Co., 192 Mass. 440, constrains me to the conclusion that it was not the intention of section 3 to withdraw the power to regulate Sunday sports in the metropolitan parks from the Metropolitan District Commission and to vest it in the city or town authorities as the case may be. If so, section 3 does not require a construction of section 2 which would exclude the metropolitan parks system.
The Teasdale case, supra, does not require such a narrow construction of St. 1920, c. 240. All that that case decided was that R. L., c. 102, § 69, did not subject the Metropolitan Park Commission, in its management of the parks as the representative of the State, to the regulating authority conferred by that statute upon local boards of health. It is not an authority for the proposition that St. 1920, c. 240, exempts the metropolitan parks system from a legislative enactment which is applicable to all other parks and relates to the use of them for the very purpose for which they were established, namely, outdoor sport and recreation. It is one thing to hold that the Legislature did not intend to subject the metropolitan parks to regulation by local boards of health; it is quite another to hold that a direct legislative regulation is not intended to apply to them. I am therefore constrained to advise you that in my opinion St. 1920, c. 240, is applicable to the metropolitan parks system.

To avoid misconception, however, let me add that St. 1920, c. 240, does not, in my opinion, impair the authority of the Metropolitan District Commission to make reasonable regulations for the government of the parks and of Sunday sports therein. What is a reasonable regulation as applied to known facts is a question of law. Whitney v. Commonwealth, 190 Mass. 531, 535; Commonwealth v. Plaisted, 148 Mass. 375. Without in any way attempting to prejudge any case which may hereafter arise, I feel that the following suggestions may be helpful. The act is operative only in those cities and towns which accept it in the manner therein provided. For this reason Sunday sports which are within the scope of the act should not be permitted in those parks or portions of parks which lie within towns or cities which do not accept the act. Since the intent of the act is to legalize certain Sunday sports to the extent therein provided, regulations which would be reasonable with respect to similar sports on week days would seem to be equally applicable to such sports on Sundays. It is unnecessary to consider at the present time whether the possible presence of unusual crowds on Sundays, or other conditions peculiar to Sundays, would render special Sunday regulations reasonable and valid.
Insurance — Automobile Insurance — Discrimination — Rebates — Rate for One or More Automobiles — Floating, Open and Blanket Policies.

St. 1912, c. 401, § 1, providing, in part, that "no insurance company . . . shall pay or offer to pay or allow in connection with placing or attempting to place insurance any valuable consideration or inducement not specified in the policy . . . or any rebate of premium . . . or any special favor or advantage in the dividends or other benefits to accrue thereon . . ." prohibits an insurance company giving a lower rate to an insurant of several automobiles than to a person who insures a single automobile.

The issuance of the so-called floating, open and blanket policies to an automobile manufacturer, covering a large number of new automobiles, either in his factory, in warehouses or in transit, is not prohibited by St. 1912, c. 401, § 1.

You have requested my opinion upon the following question of law: —

It has been represented that certain insurance companies in connection with automobile insurance allow a person to insure a number of cars at a lower rate than a person who insures a single car. Your specific question is whether these facts constitute a violation of the provisions of St. 1912, c. 401, entitled "An Act to prohibit discrimination or rebates of premiums for policies issued by insurance companies other than life."

This act is a revision of St. 1908, c. 511, which is similarly entitled.

Section 1 of the 1912 act provides: —

No insurance company . . . shall pay or offer to pay or allow in connection with placing or attempting to place insurance any valuable consideration or inducement not specified in the policy contract of insurance, or any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon; or give, sell or purchase or offer to give, sell or purchase in connection with placing or attempting to place insurance anything of value whatsoever not specified in the policy.

The thought suggests itself, of course, that if an insurance company gives a lower rate to a person who insures, say, three or four automobiles than to a person who insures a single car, it does thereby give a special favor or advantage in the benefits
to accrue thereon. The evil sought to be eliminated by chapter 401 is discrimination between individuals properly members of the same class. Generally speaking, a situation that results in an insurant obtaining in any way, directly or indirectly, an advantage over any other insurant of the same class is contrary to the provisions of chapter 401. Consequently, the giving of a lower rate to an insurant of several automobiles than to a person who insures a single car is prohibited by this statute.

On the other hand, it is my opinion that it was not intended that chapter 401 should prevent the further issuance of the so-called floating, open and blanket policies. The issuance of such insurance to an automobile manufacturer covering a large number of new automobiles, either in his factory, in warehouses, or in transitu in freight trains, and so on, is proper. The question of just where the line of demarcation between the two situations lies is a difficult one. Each case will have to be decided upon its own facts.

Department of Public Safety — Garage License — Appeal to Commissioner.

Under Gen. St. 1919, c. 350, § 109, an appeal lies to the Commissioner of Public Safety in respect of licenses to construct a garage and store gasoline therein, granted under the provisions of St. 1913, c. 452. The system of appeals to the Commissioner of Public Safety created by Gen. St. 1919, c. 350, § 109, is not confined to licenses granted in the metropolitan district, under the provisions of St. 1914, c. 795, but also applies to licenses granted outside the metropolitan district under the provisions of St. 1913, c. 452.

You request my opinion upon the following facts: —

Under the provisions of St. 1913, c. 452, and amendments thereof and additions thereto, the city council of Lawrence granted a license for the construction of a garage in that city, and the chief of the fire department of said city, also acting under the provisions of said chapter 452, granted a permit for said garage, the chief of the fire department being the official designated for that purpose by the chief of the district police. Certain abutters have objected, and desire to appeal to you
under the provisions of Gen. St. 1919, c. 350, § 109, which provides that —

Any person affected by an order of the department or of a division or office thereof, may, within such time as the commissioner may fix, which shall not be less than ten days after notice of such order, appeal to the commissioner, who shall thereupon grant a hearing, and after such hearing may amend, suspend or revoke such order. Any person aggrieved by an order approved by the commissioner may appeal to the superior court: provided, such appeal is taken within fifteen days from the date when such order is approved. The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department, and upon petition of the commissioner to enforce all valid orders issued by the department. Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy.

Your question is whether or not, under this section, you are obliged to grant a hearing to the objecting abutters.

St. 1914, c. 795, which applied to fire prevention and the storage of inflammable fluids in the metropolitan district therein defined, provided by section 4 that the Fire Prevention Commissioner, created by the act, might delegate the granting of licenses and permits and certain other duties “to the head of the fire department or to any other designated officer in any city or town of the metropolitan district.” In this respect the power of the Fire Prevention Commissioner of the metropolitan district resembled the powers conferred upon the detective and fire inspection department of the district police by St. 1904, c. 370, and acts in amendment thereof, including St. 1913, c. 452. But St. 1914, c. 795, § 18, further provided: —

The commissioner shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons, acting or purporting to act under authority of the commissioner, done or made or purporting to be done or made under the provisions of this act, and shall make all necessary and proper orders thereupon, and any person aggrieved by any such action of the head of a fire department or other person shall have an absolute right of appeal to the commissioner.

In an opinion rendered to you on Jan. 26, 1920 (V Op. Atty.-Gen., 454), I advised you that this “absolute right of appeal to the commissioner,” whose successor you are, under Gen. St. 1919,
c. 350, §§ 99, 104, was preserved with respect to the metropolitan district by section 109, which is quoted above. St. 1904, c. 370, and amendments thereof, including St. 1913, c. 452, which originally applied to fire prevention throughout the Commonwealth, but subsequently ceased to apply to the metropolitan fire district created by St. 1914, c. 795, contain no provision for appeal similar to St. 1914, c. 795, § 18, quoted above. The question is, therefore, whether Gen. St. 1919, c. 350, § 109, intended to continue this purely geographical discrimination.

Gen. St. 1919, c. 350, §§ 99, 100, created the Department of Public Safety, under the supervision and control of a Commissioner of Public Safety, abolished not only the district police force, including the detective and fire inspection department of the district police, but also the Fire Prevention Commissioner of the metropolitan district, and transferred to the Department of Public Safety the rights, powers, duties and obligations of the district police and of other boards and offices so abolished. Section 101 provides that the Department of Public Safety shall be organized in three divisions, one of which shall be the Division of Fire Prevention, under charge of a director to be known as State Fire Marshal. Section 104 provides that such director shall have the powers and perform the duties of the Fire Prevention Commissioner of the metropolitan district, and also the duties of the district police and of the deputy chief of the detective and fire inspection department under certain statutes with respect to the keeping and storing of inflammable liquids and combustible compounds. The general effect of these provisions is to place the duties imposed by law with respect to fire prevention upon the Department of Public Safety, which operates throughout the Commonwealth.

Under these circumstances, I am of the opinion that the Legislature did not intend, by Gen. St. 1919, c. 350, § 109, to grant a system of appeal to the Commissioner which should operate only within the former metropolitan fire district, and to deny that same system of appeal to the rest of the Commonwealth. Accordingly, I advise you that you are required to grant a hearing to the abutters in the instant case.
COMMONWEALTH — DEPARTMENT OF PUBLIC WORKS — COMMISSIONERS — RETIREMENT ASSOCIATION — EMPLOYEES.

The provisions of the Retirement Act, St. 1911, c. 532, do not apply to the commissioners constituting the Department of Public Works.

You have requested my opinion as to whether or not you and your four associate commissioners, constituting the Department of Public Works, are members of the Retirement Association as provided for by St. 1911, c. 532, and subsequent amendments.

Paragraph (c) of section 1 of said chapter 532, as amended by St. 1912, c. 363, provides that —

The word "employees" means permanent and regular employees in the direct service of the commonwealth or in the metropolitan district service, whose only or principal employment is in such service.

Among the rulings made by the Board of Retirement is the following, numbered 4: —

Officials appointed by the Governor for definite terms are "permanent and regular employees," and if their "only or principal" employment is in the service of the Commonwealth, they become members of the Retirement Association.

Paragraph (4) of section 4 of said chapter 532 provides, in part, that the "board of retirement shall have power to make by-laws and regulations not inconsistent with the provisions of this act."

Our decisions recognize a distinction between a public office and a public employment. *Attorney-General v. Drohan*, 169 Mass. 534; *Attorney-General v. Tillinghast*, 203 Mass. 539. The word "employee" may be used in a sense which includes "officers." Opinion of the Attorney-General to the Metropolitan District Commission, Feb. 4, 1920. It may be used in a restrictive sense, so as to exclude them. Opinion of the Attorney-General to Department of Labor and Industries, Dec. 16, 1919. To such a word the language of Mr. Justice Holmes in *Towne v. Eisner*, 245 U. S. 418, 425, is peculiarly applicable: —

A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used.

Officials appointed by the Governor, with the advice and consent of the Council, who exercise some part of the sovereign power, are "officers" who are not within the scope of the word "employee" when used in its restrictive sense. Opinion of the Attorney-General to Department of Labor and Industries, *supra*; *Attorney-General v. Tillinghast*, 203 Mass. 539. In determining whether the word "employee," as used in this act, was intended to include such officers, regard must be had to the purpose which the act was intended to accomplish. *Holy Trinity Church v. United States*, 143 U. S. 457, 459-462.

St. 1911, c. 532, and amendments thereof, established a contributory retirement system for the several employees of the Commonwealth, the fundamental idea of which is that one-half of the retirement allowance shall be purchased by the savings of the employee, which have been deducted from his salary during the term of his employment, and one-half shall be contributed by the Commonwealth. The purpose was to establish a pension system containing provision for contribution by the employee, and to have the pension become effective after a protracted service for the Commonwealth, in one case where a member reaches the age of sixty years and has been in the continuous service of the Commonwealth for fifteen years preceding his retirement, and in another case where a member has
completed a period of thirty-five years of continuous service. There is also, of course, the provision that any member who reaches the age of seventy must retire.

In the case, however, of yourself and your four associate commissioners you are appointed to your official positions by the Governor, with the advice and consent of the Council, for short and definite terms of a few years. In my opinion, the provisions of the Retirement Act do not apply to your situation, as it is apparent that almost without exception members of such a Commission serve the Commonwealth but temporarily, and return to private life long before they reach the advanced age of sixty or seventy years, and before they have completed thirty-five years of continuous service.

If the provisions of the Retirement Act did apply to you and your associate commissioners, it would mean that you would make your contributions over a short period of time, and, upon ceasing to be a member of the Department, would receive a refund of the money paid in, with the interest earned thereon. Under these circumstances, the Commonwealth would be acting as an institution for savings, and, in my judgment, this was not intended by the establishment of the retirement system. I have come to this conclusion despite an opinion to the contrary by one of my predecessors in office. See IV Op. Atty.-Gen. 105.

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**Division of Registration in Medicine — Right to Summon — Felony Outside of Practice of Medical Profession.**

The Division of Registration in Medicine has a right, under the provisions of Gen. St. 1917, c. 55, § 1, to summon before it a registered physician who has been convicted of a felony committed by him outside of the practice of his profession.

You request my opinion as to whether your Board has a legal right to summon before it, under the provisions of Gen. St. 1917, c. 55, § 1, a registered physician who has been convicted of perjury in connection with testimony given by him.
at a court hearing on a motion for alimony for his wife, in view of said conviction being of a felony committed by him outside of the practice of his profession.

Gen. St. 1917, c. 55, § 1, so far as it applies to your inquiry, provides as follows:

... Said board, after hearing, may by unanimous vote revoke any certificate issued by it and cancel the registration of any physician who has been convicted of a felony or of any crime in the practice of his profession...

By the use of the word "felony" and the words "any crime," and from the construction of the language used, "in the practice of his profession," which modifies the words "any crime" and has no relation to, or bearing on, the word "felony," it is quite clear that the Legislature intended that the provisions of said section 1, as above quoted, shall apply to the conviction of registered physicians of crimes committed both outside of and in connection with the practice of their profession. In case of the former, the conviction is limited to a felony, but in the latter case the conviction may be for either a felony or a misdemeanor.

Had the Legislature intended to limit the application of the provisions of said section, as above quoted, to a conviction of a physician of a crime committed solely in the practice of his profession, it would have had no occasion to use the word "felony," inasmuch as said word is included within the statutory definition of the words "any crime."

R. L., c. 215, § 1, provides:

A crime which is punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

I am therefore of the opinion that though the felony of which the physician was convicted was committed outside of the practice of his profession, your Board has the right to summon the physician before it for a hearing, and may, upon a unanimous vote, either revoke his certificate or cancel his registration.
I desire to direct your attention to Gen. St. 1918, c. 257, § 285, which amends the present provisions of Gen. St. 1917, c. 55, § 1, by striking out said section and substituting therefor a new section, in which the words "or of any crime in the practice of his profession" do not appear. This amendment is to take effect on Feb. 1, 1921.


A mutual fire insurance company may not conduct in this Commonwealth the system of business outlined in St. 1907, c. 576, § 49, unless it not only was organized prior to May 21, 1887, but also was lawfully doing business upon the plan set forth in said section 49 at the time St. 1907, c. 576, took effect, namely, July 28, 1907.

You request my opinion upon the following question of law:—

St. 1907, c. 576, § 48, provides, in part:—

Mutual fire insurance companies, except as provided in the following section, shall charge and collect upon their policies a full mutual premium in cash, or notes absolutely payable.

Section 49 provides:—

Mutual fire insurance companies organized prior to the twenty-first day of May in the year eighteen hundred and eighty-seven and now lawfully doing business upon the plan of taking deposit notes for a percentage of the amount insured by its policies, and making a call or assessment thereon for expenses and for the payment of losses only after such losses are incurred, may continue such system of business, and such deposit notes shall constitute the entire liability of their members.

A company is seeking admission to this Commonwealth which does business upon the plan outlined in section 49, and is also allowed under its charter to issue policies for a cash premium but without the features peculiar to mutual insurance companies of dividends or liability for assessment. This company was organized prior to the twenty-first day of May, 1887.

Your specific questions are as follows:—
1. Can the company, in view of sections 48 and 49, be admitted, inasmuch as the character of its insurance is such that a domestic mutual company could not be organized to write business in the same manner?

2. Does the fact that this company was organized prior to the twenty-first day of May in the year 1887 make it possible to admit it to this Commonwealth under the provisions of section 49?

My answer to both of your questions is in the negative. Unless a mutual fire insurance company is doing business as set forth in section 48, namely, charging and collecting upon its policies a full mutual premium in cash, or notes absolutely payable, it cannot be admitted unless it falls within the exceptions set forth in section 49. The company must not only have been organized prior to the twenty-first day of May, 1887, but also lawfully doing business upon the plan therein set forth at the time said St. 1907, c. 576, took effect, namely, July 28, 1907. In my opinion, the words "now lawfully doing business" are to be construed to mean lawfully doing business on that date within the Commonwealth of Massachusetts.

Salaries of Officers and Employees of the Commonwealth — Increases — Deputy Supervisor of Administration.

Under Gen. St. 1919, c. 320, § 1, recommendations for increases in the salaries of all officers and employees who are within the provisions of Gen. St. 1918, c. 228, § 1, except those whose salaries are or shall be fixed by statute, must be presented in the first instance to the Supervisor of Administration.

Gen. St. 1919, c. 320, § 1, repeals by implication provisions of prior statutes which require increases to be approved by the Governor and Council.

The provisions of Gen. St. 1916, c. 296, § 2, which authorizes the Supervisor, with the consent of the Governor and Council, to appoint a deputy or deputies, and to determine their salaries, is so modified by Gen. St. 1919, c. 320, § 1, that the Supervisor has the power to increase the salary of a deputy without consent of the Governor and Council.

It is suggested that the Supervisor, in formulating rules and regulations, may include some provision for submitting certain increases for the approval of the Governor and Council.

You have requested my opinion as to whether an increase in salary for your deputy, for which a sufficient appropriation has been made, must be approved by the Governor and Council before becoming effective.
Gen. St. 1916, c. 296, § 1, abolished the Commission on Economy and Efficiency and the State Board of Publication, and transferred the rights, powers, duties and obligations of both said Commission and said Board to the Supervisor of Administration established by said act. Section 2 provides, in part:

The supervisor . . ., with the consent of the governor and council, may appoint a deputy or deputies and determine their salary and duties except as is otherwise hereinafter provided. Any deputy may be removed for cause by the supervisor with the consent of the governor and council. The supervisor may also appoint a secretary and such experts, clerks and other assistants, and may pay them such salaries and may incur such other expenses, including traveling expenses, not exceeding such sums as may be appropriated therefor by the general court, as he may deem necessary and proper, subject, however, to the approval of the committee on finance of the council or of the governor and council where such approval is required by law.

Section 3 provides, in part, as follows:

The committee on finance of the council shall act as a board of advisers of the supervisor and shall hear appeals from the decisions of said officer as provided in this act. . . .

Gen. St. 1918, c. 228, §§ 1 and 2, provide as follows:

Section 1. All appointive offices and positions in the government of the commonwealth, except those in the judicial and legislative branches, shall be classified by the supervisor of administration, subject to the approval of the governor and council, in services, groups and grades according to the duties pertaining to each office or position. Such classification shall be established by specifications defining for each grade the titles, duties and responsibilities, and minimum qualifications for entrance and promotion. The titles so designated shall be the official title of positions included therein, and shall be set forth on all pay rolls. The term "group" as used in this act and in said classification shall be construed to include positions in a separate profession, vocation, occupation or trade involving a distinctive line of work which requires special education, training or experience. The term "grade" shall be construed to mean a subdivision of a group, and to include all positions with substantially identical authority, duties and responsibility as distinct from all other grades in that group. The term "advancement" shall be construed to mean an increase from one salary rate to another salary rate within a grade. The term "promo-
tion" shall be construed to mean a change from the duties of one grade to the duties of a higher grade, and shall involve a change in salary to the rates of the higher grade.

Section 2. The supervisor of administration shall have authority to make rules and regulations, subject to the approval of the governor and council, providing for the application and administration of the classification and the specifications established under the provisions of this act.

Gen. St. 1919, c. 320, struck out section 3 of Gen. St. 1918, c. 228, and substituted therefor a section reading, in part, as follows: —

Recommendations for increases in the salaries of officers and employees of the commonwealth who are subject to the provisions of this act, except officials and employees whose salaries are now or shall be regulated by statute, shall be submitted in the first instance to the supervisor of administration, and if approved by him shall take effect upon notice by the supervisor to the civil service commission and the auditor of the commonwealth. If the supervisor does not approve a proposed increase in salary, he shall report the recommendation of the department or institution with his own recommendation to the governor and council whose decision shall be final, except that the governor and council shall not grant an increase in salary greater than that recommended by the department or institution. Increases in salaries granted under the provisions of this section shall conform to such standard rates as may be established by rule or regulation in accordance with the provisions of section two. No increase in salary shall be granted under the provisions of this section unless an appropriation sufficient to cover such increase has been granted by the general court in accordance with estimates for the budget filed as required by law.

Gen. St. 1919, c. 350, § 15, provides: —

The office of supervisor of administration, existing under authority of chapter two hundred and ninety-six of the General Acts of nineteen hundred and sixteen, and acts in amendment thereof and in addition thereto, shall continue to be under the governor and council, as now provided by law.

The meaning of these statutes is by no means clear. Apparently, Gen. St. 1919, c. 320, § 1, is intended to apply to all officers or employees who are to be classified under Gen. St. 1918, c. 228, § 1, "except officials and employees whose salaries are now or shall be regulated by statute." The word "regu-
lated” in this phrase must, in my opinion, be held to mean “fixed.” In a broad sense the classification prescribed by Gen. St. 1918, c. 228, § 1, is a regulation by statute. If the word “regulated” be construed broadly enough to include such a regulation, it would insert an exception which is as broad as the statute, and in effect make the act nullify itself. I am therefore of opinion that recommendations for increases in the salaries of all officers and employees who are within the provisions of Gen. St. 1918, c. 228, § 1, except those whose salaries are or shall be fixed by statute, either in some definite sum or by a sliding scale which is automatically effective, must be presented “in the first instance” to the Supervisor of Administration. Such increases become effective if and when the Supervisor notifies the Civil Service Commission and the Auditor.

It is true that this construction apparently repeals by implication that provision of statutes enacted prior to Gen. St. 1919, c. 320, which requires increases, in certain cases, to be approved by the Governor and Council. On the other hand, Gen. St. 1919, c. 350, which is subsequent to Gen. St. 1919, c. 320, restores this provision in a number of instances. The result is that Gen. St. 1919, c. 320, supersedes this provision in prior statutes, but, of course, yields to subsequent statutes which restore it.

On the other hand, the provision that recommendations for increases which are within the scope of Gen. St. 1919, c. 320, shall be submitted “in the first instance” to the Supervisor of Administration does not necessarily require that he shall pass upon the increase without recourse to the Governor and Council. The classification required by Gen. St. 1918, c. 228, § 1, is to be approved by them. Under section 2 of the same act the rules and regulations for the application and administration of such classification are likewise subject to their approval. Moreover, under Gen. St. 1916, c. 296, § 3, the finance committee of the Council acts as a board of advisers to the Supervisor. Clearly, there is nothing in the act which prevents the Supervisor from consulting the finance committee as to the propriety of any increase upon which he is to pass “in the first
instance." It may well be that rules and regulations might be adopted which require him to submit recommendations for increases in certain classes of cases to the Governor and Council before he acts thereon. In a word, the authority to make rules and regulations with the approval of the Governor and Council affords an opportunity for clarifying certain obscurities in the act.

The provision of Gen. St. 1916, c. 296, § 2, which authorizes the Supervisor, with the consent of the Governor and Council, to appoint a deputy or deputies, and to determine their salaries, is, in my opinion, so modified by Gen. St. 1919, c. 320, § 1, that the Supervisor has power to increase the salary of such deputy without submitting the increase to the Governor and Council, provided, of course, that the other provisions of the latter section are complied with.

It is to be borne in mind, however, that when this power was conferred on the Supervisor the General Court had previously provided, in Gen. St. 1918, c. 228, that rules and regulations made by the Supervisor, providing for the application and administration of the classification and specifications established under the provisions of that act, should be subject to the approval of the Governor and Council, and that section 3 of chapter 296 of the General Acts of 1916, making the committee on finance of the Council a board of advisers of the Supervisor, was continued in full force and effect. How far the Supervisor should seek the advice of the committee on finance in the matter of salary increases is left by the statute undetermined, and may well be the subject of mutual consideration and agreement by the Supervisor and the finance committee. The office of deputy in your department is one conferring executive and managerial duties upon the incumbent. It may well be that, in formulating rules and regulations under the provisions of Gen. St. 1918, c. 228, some provision might be included for submitting for the approval of the Governor and Council increases in salary of those officials who exercise executive or managerial functions.
Taxation — Franchise Tax on Domestic Corporation — Deductions — Mortgage of Real Estate held as Collateral Security.

The value of a real estate mortgage held by a domestic corporation as collateral security for a debt due to it is not to be deducted, under St. 1909, c. 490, Pt. III, § 41, cl. 4, in determining the franchise tax upon such corporation, assuming that the corporation has paid no local tax upon such mortgage.

You have asked my opinion as to whether a deduction under the provisions of St. 1909, c. 490, Pt. III, § 41, cl. 4, should be permitted to a corporation on the following state of facts.

A Massachusetts corporation holds as collateral security for a loan a mortgage on Massachusetts real estate. The mortgagor is the borrower from the corporation, and the mortgagee has nothing to do with the transaction.

St. 1909, c. 490, Pt. III, § 41, cl. 4, reads as follows: —

In case of corporations subject to the requirements of the preceding section, other than railroad corporations, telegraph, telephone, street railway and electric railroad companies, whether chartered or organized in this commonwealth or elsewhere, and of domestic business corporations, the value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated.

For the purposes of this section the tax commissioner may take the value at which such works, structures, real estate, machinery, poles, underground conduits, wires and pipes are assessed at the place where they are located as the true value, but such local assessment shall not be conclusive of the true value thereof.

In Firemen’s Fire Ins. Co. v. Commonwealth, 137 Mass. 80, the court decided that in figuring the franchise tax the Tax Commissioner should deduct from the aggregate value of the shares of the corporation the value of mortgages of real estate held by it and subject to local taxation; and later, in Brooks v. West Springfield, 193 Mass. 190, at page 194, the court, in discussing this case says: —

Our system of taxation is purely statutory, and the conditions which underlie the exemption are plainly stated. They are, that the debt must be secured by a mortgage of realty, and that the mortgagee’s interest must be taxed as real estate.
In *Firemen's Fire Ins. Co. v. Commonwealth*, supra, the court, at page 81, states:—

Pub. Sts., c. 13, §§ 39-41. The whole scope of these provisions shows that the object of the Legislature, in requiring the deduction from the aggregate value of the shares named in section 40, was to prevent double taxation in fact if not in form, and to insure that property of a corporation which, under the laws, was subject to local taxation, should not be included in the valuation upon which the excise on the franchise is based.

Applying these tests to the case submitted, I am of the opinion that a deduction for mortgages given as collateral should not be allowed. While it might be said that such a mortgage is held by the corporation, it is not held within the meaning of the decisions, as a mortgage held as collateral has no necessary relation to an investment in real estate, and it is not property of the lender, who holds such mortgage merely as collateral. The object of the exemption granted is to avoid double taxation, and such exemption must be strictly construed.

By St. 1909, c. 490, Pt. I, §§ 16 and 18, it is provided that a mortgage "given to secure the payment of a fixed and certain sum of money . . . shall be assessed as real estate . . .; and the mortgagor shall be assessed only for the value of such real estate after deducting the assessed value of the interest therein of such mortgagee." For the purpose of taxation mortgagors and mortgagees are deemed joint owners until the mortgagee takes possession, but section 17 permits the assessment of the entire tax to the mortgagor unless a statement in regard to the mortgage is filed; and as a matter of practice this method is always followed, and the mortgagee, if a corporation, is amply protected against double taxation by the decision in *Firemen's Fire Ins. Co. v. Commonwealth*, supra. In answering your query I have assumed that the corporation to whom the mortgage is pledged as collateral pays no local tax on such mortgage.

To extend the corporate mortgagee's deduction to a corporation holding mortgages as collateral would not be justified as avoiding double taxation, because it would give to such corporation not a proper deduction but a real exemption, based not on the loan but on the amount of the collateral, which is not the
property of the corporation. By continually pledging and repledging a mortgage as collateral, total tax deductions of many times the face of the mortgage could be secured by successive corporate creditors. A construction permitting this result is not to be entertained unless clearly implied, and the wording of the statute does not require such a construction.

Metropolitan District Commission — Power to adopt Regulations prohibiting Discharge of Gasoline into Metropolitan Sewer System.

The Metropolitan District Commission, created by Gen. St. 1919, c. 350, §§ 123–129, has authority to adopt reasonable regulations forbidding the discharge of gasoline from local sewers into the metropolitan sewer system, which regulations, if reasonable, may be enforced in equity.

You request my opinion upon the following question: —

What department, board, commission or public authority — State, municipal or otherwise — has the power, authority and duty to prevent gasoline from entering city and town sewers which are connected with and empty into metropolitan sewers?

In relation to the power and duty of the Metropolitan District Commission, which, under Gen. St. 1919, c. 350, §§ 123–129, succeeded to the rights, powers, duties and obligations of the Metropolitan Water and Sewerage Board, existing under St. 1901, c. 168, and acts in amendment thereof and in addition thereto, you refer me to the following statutes: —

St. 1889, c. 439, § 1, created a board to be known as the Metropolitan Sewerage Commissioners. Section 3 provided that said board should "construct, maintain and operate" for Boston and certain other designated cities and towns "such main sewers and other works as shall be required for a system of sewage disposal for said cities and towns"; and also "another such system" for Boston and certain other named cities and towns. Sections 9 and 16 further provided as follows: —

Section 9. Any city or town within whose limits any main sewer shall have been constructed under the provisions of this act shall connect
its local sewers with such main sewer, subject to the direction and control
of said board, and any person, firm or corporation may, subject to the
direction, control and regulation from time to time of said board, and
subject to such terms, conditions and regulations as each city or town may
prescribe, connect private drains with said main sewer.

Section 16. The supreme judicial court shall have jurisdiction in
equity to enforce the provisions of this act, and shall fix and determine
the compensation of all commissioners appointed by said court under the
provisions hereof.

St. 1895, c. 406, provided that said board should construct
a system of sewage disposal for the Neponset River Valley. Sections 9 and 21 of said act contain provisions similar to sec-
tions 9 and 16 of St. 1889, c. 439.

St. 1899, c. 424, provided that said board should construct
a high level gravity sewer for the relief of the Charles and Neponset River Valleys. Section 8 contains provisions similar
to those in St. 1889, c. 439, § 9, and further provides: —

The sewerage systems of all drainage areas not now drained by the south
metropolitan system, which are constructed after the passage of this act,
shall be constructed in accordance with the so-called separate system of
sewerage.

Section 21 is similar to section 16 of St. 1889, c. 439.
Gen. St. 1915, c. 150, amends St. 1889, c. 439, § 9, so as to
read as follows: —

Any city or town within whose limits any main sewer shall have been
constructed under the provisions of this act shall connect its local sewers
with such main sewer, subject to the direction, control and regulation of
said board, and any person, firm or corporation may, subject to the direc-
tion, control and regulation from time to time of said board, and subject
to such terms, conditions and regulations as each city or town may pre-
scribe, connect private drains with said main sewer.

Gen. St. 1915, c. 147, makes a similar amendment to St. 1899,
c. 424, § 8.

Where statutes are parts of a general system relating to the
same class of subjects, and rest upon the same reasons, they
should be so construed, if possible, as to be uniform in their
application and in the results which they accomplish. *Hyde v. Fall River*, 189 Mass. 439, 441; *Sheldon v. Boston & Albany R.R.*, 172 Mass. 180, 182. The statutes referred to above fall within this principle. St. 1901, c. 168, abolished the metropolitan sewerage commissioners and transferred all their powers, rights, duties and liabilities to the Metropolitan Water and Sewerage Board. Gen. St. 1919, c. 350, § 123, abolished the Metropolitan Water and Sewerage Board and transferred all its rights, powers, duties and obligations to the Metropolitan District Commission created by that act. Section 127 of that act further provides:—

The commission shall have and exercise over the public property hereby transferred to its charge and control from the metropolitan water and sewerage board, in addition to the power and authority of said board, all the power and authority which the metropolitan park commission has over open spaces for exercise and recreation under chapter four hundred and seven of the acts of eighteen hundred and ninety-three, and acts in amendment thereof and in addition thereto, so far as such power and authority may be exercised consistently with the purposes for which the metropolitan water and sewerage systems were created and are maintained.

In my opinion, the Metropolitan District Commission has authority to adopt reasonable regulations forbidding the discharge of gasoline into the metropolitan sewer system. See *Commonwealth v. Whitney*, 190 Mass. 531, 535; *Teasdale v. Newell & Snowling Cons. Co.*, 192 Mass. 440, 442. Under St. 1889, c. 439, § 16, St. 1895, c. 406, § 21, and St. 1899, c. 424, § 21, such regulations, if reasonable, may be enforced in equity. But this authority does not confer jurisdiction over the local sewers which are connected with the metropolitan system. Jurisdiction over the local sewers is vested in that public body which is charged by law with the duty to make and maintain them. R. L., c. 49, §§ 1-36. Sections 12 and 36 provide:—

Section 12. The mayor and aldermen of a city and the sewer commissioners, selectmen or road commissioners of a town may lay, make and maintain particular sewers from common sewers to the street line, which shall be the property of the city or town. The owner of any land benefited
thereby shall pay to the city or town for the permanent privilege of using the same, such reasonable amount as said boards determine, which may be fixed at the estimated average cost of all such particular sewers within the territory for which a system of sewers has been built or adopted. Said boards may, upon request of the owner of land and payment by him of the actual cost thereof, construct a particular sewer from the street line to a house or building; and may make regulations for the construction and use of all particular sewers and impose penalties not exceeding twenty dollars for their violation.

Section 36. The superior court shall have jurisdiction in equity to restrain the use of the public sewers or the placing or depositing of any materials therein or the making of any unlawful connections therewith.

Thus, R. L., c. 49, §§ 12 and 36, appear to confer upon the proper authorities of a city or town a control over local sewers similar to that exercised by the Metropolitan District Commission over the metropolitan sewerage system. If, therefore, a city or town should persist in discharging gasoline into the metropolitan sewerage system through the local sewers, in defiance of a reasonable regulation of the Metropolitan District Commission forbidding such discharge, the Metropolitan District Commission would have an immediate remedy in equity against the municipal offender, and the proper municipal authority could in turn invoke against the individual offender both the penalty authorized by R. L., c. 49, § 12, and the equitable remedy conferred by R. L., c. 49, § 36. Whether the Metropolitan District Commission could in case of persistent violation by the municipal authority proceed to seal up the offending local sewer at the point where it joins the metropolitan system, and whether the municipal authority could in turn proceed to seal the particular sewer of a persistent individual offender, need not now be decided.

It may be, also, that with the co-operation of the Commissioner of Public Safety another remedy might be had directly against the individual offender. St. 1904, c. 370, § 2, as amended by St. 1905, c. 280, § 1, provides as follows: —

The detective and fire inspection department of the district police may make regulations, except as hereinbefore provided, for the keeping, storage,
use, manufacture, sale, handling, transportation or other disposition of
gunpowder, dynamite, crude petroleum or any of its products, or explosive
or inflammable fluids or compounds, tablets, torpedoes, or any explosives
of a like nature, or any other explosives, except fireworks and fire crackers,
and may prescribe the materials and construction of buildings to be used
for any of the said purposes.

Section 3 of said chapter 280 provides, in case of violation of
such regulation, for a fine of not more than $100 or for im-
prisonment for not more than one month, or for both such fine
and imprisonment.

In my opinion, a regulation forbidding the use or storage of
gasoline in such a manner as to permit it to get into the sewers
would be valid. Violation of such a regulation would bring
the offender within the penalty provided by section 3.

Bank Commissioner — Taking Possession of Bank—
Liquidation or Resumption of Business.

Under St. 1910, c. 399, as amended, the Bank Commissioner has an option whether
to proceed to liquidate the affairs of a bank of which he has taken possession,
or to allow it to resume business.

Unless and until the Bank Commissioner decides to liquidate, he is not required to
make and file an inventory of assets, to give notice in regard to proof of claims,
or to file in court lists of claims as provided in sections 7, 8 and 9.

In 1919 the then Bank Commissioner, acting under the
authority conferred by St. 1910, c. 399, took possession of the
property and business of the Old South Trust Company. He
made no decision as to whether the trust company should be
liquidated or allowed to resume business, and as yet you have
not decided this question. You desire to know, prior to making
such decision, (1) whether you should file an inventory of
assets with the clerk of the Supreme Judicial Court; (2) whether
you should file a list of claims with the clerk of the Supreme
Judicial Court; (3) whether you should publish and mail no-
tices in regard to claims.

St. 1910, c. 399, entitled "An Act relative to proceedings
against and the liquidation of delinquent corporations and
individual bankers subject to the supervision of the Bank Commissioner,” as amended by St. 1912, c. 472, and by St. 1913, c. 177, provides in section 2, in part: —

Whenever it shall appear to the bank commissioner that any bank under his supervision . . . is conducting its business in an unsafe . . . manner, . . . the bank commissioner may take possession forthwith of the property and business of such bank and may retain possession thereof until the bank shall resume business or until its affairs shall finally be liquidated as herein provided. . . .

Section 3 provides, in part, as follows: —

. . . Such bank may, with the consent of the bank commissioner, resume business upon such conditions as he may approve: provided, however, . . . he may retain in behalf of the bank the control, prosecution or defence of any undetermined suits or claims brought in behalf of or against the bank under the provisions of section five of this act during the time when the bank was in his charge, . . .

Section 7 is as follows: —

Upon taking possession of the property and assets of such bank, the bank commissioner shall make an inventory of the assets of the bank in duplicate, one to be filed in the office of the bank commissioner and one in the office of the clerk of the supreme judicial court for the county in which the principal office of the bank is located.

Section 8 is as follows: —

The bank commissioner shall cause to be published weekly for three consecutive months, in such newspapers as he may direct, a notice calling on all persons who may have claims against such bank to present the same to the bank commissioner and to make legal proof thereof at a place and in a time, not earlier than the last day of publication, to be therein specified. The bank commissioner shall mail a similar notice to all persons whose names appear as creditors upon the books of the bank, so far as their addresses are known. If the bank commissioner doubts the justice and validity of any claim, he may reject the same and serve notice of such objection upon the claimant either by mail or person. An affidavit of service of such notice, which shall be prima facie evidence thereof, shall be filed with the bank commissioner. An action upon the claim so rejected shall not be entertained unless brought within six months after such service. Claims presented after the expiration of the time
specified in the notice to creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the bank commissioner equitably applicable thereto.

Section 9 is as follows:

Upon the expiration of the time fixed for the presentation of claims, the bank commissioner shall make in duplicate a full and complete list of the claims presented, including and specifying such claims as have been rejected by him. One of said lists shall be filed in the office of the bank commissioner and the other in the office of the clerk of the supreme judicial court for the county in which the principal office of the bank is located. Thereafter the bank commissioner shall make and file in said offices, at least fifteen days before every application to the court for leave to declare a dividend, a supplementary list of the claims presented since the last preceding list was filed, including and specifying such claims as have been rejected by him, and, in any event, he shall make and file the said list at least once in every six months after the filing of the original list, so long as he shall remain in possession of the property and business of the bank. Said inventory and said list shall be open to inspection at all reasonable times.

Sections 10 and 11 relate to matters arising only out of liquidation of a bank. Section 14 deals with liquidation of a bank by vote of the stockholders. Section 15 provides the method for dealing with dividends and unclaimed deposits remaining after the order for final distribution. Section 16 gives the Supreme Judicial Court jurisdiction in equity to enforce the provisions of the act. Section 17 repeals sections 9, 10 and 11 of chapter 590 of the Acts of 1908.

Reading the act as a whole, it is evident that most of its provisions deal with the duties and authority of the Bank Commissioner after he has started to liquidate the affairs of the bank. In section 2, however, the Bank Commissioner is given power to retain possession until the bank shall resume business, and section 3 also mentions the possibility of the bank resuming business. These are the only two references to resumption of business, and, as our Supreme Court said in Greenfield Savings Bank v. Commonwealth, 211 Mass. 207, at page 209 —
Whether these will be resumed or the corporation be extinguished is matter of doubt, although the main part of the provisions of said chapter 399 look toward final liquidation.

The first sentence of section 4 is as follows: —

Upon taking possession of the property and business of such bank, the bank commissioner shall have authority to collect moneys due to the bank, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate its affairs as hereinafter provided.

This sentence does not impose a duty on the Bank Commissioner to liquidate the affairs of the bank, as he is specifically given an option, under section 2, whether he shall proceed to liquidation or allow a bank to resume business. But the sections following section 4, which compose the main body of the act, deal primarily with liquidation. The Bank Commissioner may take possession of the bank's property and business without any court action, but he cannot liquidate the affairs of the bank without going to the Supreme Judicial Court. There can be no question that unless there is a liquidation, sections 8 and 9 impose upon the Bank Commissioner the duty of doing vain acts, as it would be foolish to give notices in regard to proof of claims and to file in court lists of claims presented unless such claims would be paid, and unless your duties in respect to the bank made it incumbent on you to take court action. Until and unless you decide to liquidate the affairs of the bank, the provisions of sections 8 and 9 do not control your conduct.

The construction of section 7 is more difficult. That section provides as follows: —

Upon taking possession of the property and assets of such bank, the bank commissioner shall make an inventory of the assets of the bank in duplicate, one to be filed in the office of the bank commissioner and one in the office of the clerk of the supreme judicial court for the county in which the principal office of the bank is located.

If you were to proceed to liquidation you would act under this section. The question is whether you must follow its
provisions before you have made a decision as to whether the bank is to liquidate or to resume business. The wording of the section is unambiguous, and there can be no doubt that it is your duty to "make an inventory of the assets of the bank in duplicate." But is it necessary for you to file one of these in the office of the clerk of the Supreme Judicial Court for the county in which the principal office of the bank is located? And if it is necessary, on what date must such list be filed? It is my opinion that until you make a decision as to resumption or liquidation you are under no duty to file the list in court. To take over the property and business of the bank, and then to turn it back to the bank when it is ready to resume business, requires no application to any court. It is only in case of liquidation that the approval of the court must be sought, and there seems no sound reason for filing in court a list of claims as to which the court has no jurisdiction until liquidation proceedings are started.

It would seem that the words "hereinafter provided," at the end of the first sentence of section 4, qualify the clause "shall proceed to liquidate its affairs," and are not to be read as modifying the other provisions of that sentence.

The construction given to section 7 is strengthened by an examination of the law existing prior to the passage of St. 1910, c. 399, repealed by that act. Sections 9, 10 and 11 of chapter 590 of the Acts of 1908 in substance provided that when the continuance of a bank was hazardous, the Commissioner could apply to the Supreme Judicial Court for an injunction, and "upon making such application the commissioner may forthwith take possession of the property and business of the bank, and retain possession thereof pending the action of the court." The court could appoint receivers, who were to make schedules of property, a copy of which was to be delivered to the Commissioner, who had a right to examine the bank's officers and also the accounts of the receivers.

Under these provisions the court, and not the Bank Commissioner, determined whether or not there should be a liquidation, but pending court action the Commissioner had possession
of the property and business of the bank, and continued to hold the same until receivers should be appointed. The appointment of receivers foreshadowed liquidation; but unless a liquidation seemed likely, the Bank Commissioner handled the difficulty until the bank could resume business. This general idea is carried out more elaborately in St. 1910, c. 399, and it is my opinion that the proper construction of the act requires a negative answer to all of your questions.

Bonds — Purchase of Port Development Bonds — Treasurer and Receiver-General — Governor and Council.

Under St. 1920, c. 225, § 4, the Governor and Council must approve each purchase of bonds made under that section by the Treasurer and Receiver-General.

You inquire, in substance, whether the Governor and Council, under St. 1920, c. 225, § 4, must approve each specific purchase of bonds by the Treasurer and Receiver-General, or whether the Governor and Council may fix a rate at which bonds may be purchased, and authorize the Treasurer and Receiver-General to purchase at his discretion at that rate or one more favorable to the Commonwealth.

St. 1920, c. 225, § 4, provides as follows: —

For purchasing from time to time, at a price not exceeding the fair market value, with the approval of the governor and council, outstanding serial bonds of the loan for the development of the port of Boston authorized by section seventeen of chapter seven hundred and forty-eight of the acts of nineteen hundred and eleven, and acts in amendment thereof and in addition thereto, the treasurer and receiver-general is hereby authorized to expend, and there is hereby appropriated from, and upon the receipt from the United States of the proceeds from the sale of the Boston dry dock, a sum not exceeding two million seventy-eight thousand five hundred and sixty-one dollars and fifty-nine cents. All bonds so purchased shall be cancelled. Pending the purchase of said serial bonds, the treasurer and receiver-general, with the approval of the governor and council, is hereby authorized to invest and reinvest the said sum or any part thereof, from time to time, in other bonds or notes of the commonwealth.
In my opinion, the words, "with the approval of the governor and council" modify the word "purchasing." To fix the rate in advance, and then to authorize the Treasurer and Receiver-General to purchase such amounts of bonds as he from time to time may deem best, at the rate so fixed or at a rate more favorable to the Commonwealth, is not equivalent to approving each purchase. It leaves the Treasurer and Receiver-General to fix the amount of bonds to be purchased and also the time of purchase, both of which are essential ingredients of each contract of purchase. If it had been the intent of the General Court that the approval of the Governor and Council should be required only as to the price to be paid for the bonds, this could have been made to appear from the language of the statute. It should have provided "for purchasing from time to time, at a price not exceeding the fair market value, which shall be approved by the governor and council." By the express terms of the statute it must be assumed that the General Court intended the Governor and Council to have a voice in deciding not only the price at which the bonds should be purchased, but in what amounts and at what times such purchases should be made. If the Governor and Council were of the opinion that the bonds could be purchased to better advantage at a subsequent time, they might withhold their approval. Doubtless, the Treasurer and Receiver-General may make a tentative contract of purchase contingent upon subsequent approval by the Governor and Council, but such contract will not bind the Commonwealth unless and until such approval be given.
Corporations — Increase of Capital Stock — No Par Value Stock — How to be valued for filing Fee Purposes.

St. 1920, c. 349, § 9, requiring a filing fee of one-twentieth of 1 per cent of the amount of stock with par value, and 5 cents a share for all shares without par value, by which the capital is increased, is an excise tax, and as such reasonable.

The Secretary of the Commonwealth, in respect to assessing the above excise, shall not be required to examine into the actual value of the shares where an increase of no par value stock is to be authorized, but shall consider shares of no par value as having a par value of $100.

St. 1920, c. 349, entitled "An Act relative to the issue of capital stock by business corporations," permits the issue of stock without par value, with certain restrictions as regards issue, voting, stockholders' liability and fees. Certain corporations desire to file with you articles of amendment changing their capital stock from shares of par value to shares without par value, under the provisions of St. 1920, c. 349, §§ 6 and 7.

You have asked my opinion whether you should accept such articles of amendment on payment of the fee fixed by St. 1903, c. 437, § 89, or whether you should receive a larger fee, under the provisions of St. 1920, c. 349, § 9.

St. 1920, c. 349, § 9, which amends St. 1903, c. 437, § 89, is as follows:

The fee for filing and recording the certificate required by section forty-two providing for an increase of capital stock shall be one-twentieth of one per cent of the amount of stock with par value and five cents a share for all shares without par value, by which the capital is increased.

St. 1920, c. 349, § 8, contains similar provisions in regard to the original issue of capital stock; and section 7, in amending St. 1903, c. 437, § 47, reads, in part, as follows:

Such report of a corporation which has a capital stock of one hundred thousand dollars or more, for this purpose counting shares without par value as though of a par value of one hundred dollars each, shall be accompanied by a written statement. . . .

Gen. St. 1918, c. 235, in providing for an excise on foreign corporations, amends St. 1909, c. 490, Pt. III, § 56, by adding thereto —
Provided, that for the purpose of assessing the excise upon corporations whose stock was issued without a par value one hundred dollars shall be considered par.

St. 1920, c. 349, § 1, provides that where shares with par value are to be issued the total amount of capital stock shall be not less than one thousand dollars, and where shares without par value are to be issued the number of shares without par value shall be not less than ten. Section 3, amending St. 1903, c. 437, § 27, provides, in part:

The provisions of law relating to the issue of shares of capital stock with par value shall apply to the issue of shares without par value.

Prior to the passage of the 1920 act the fees for filing and recording articles of organization and for the certificate providing for an increase of capital stock were based entirely upon the par value, without any reference to the value of the stock.

From the provisions cited it is clear that the Legislature intended, so far as fees were concerned, that the Secretary of the Commonwealth should consider shares of no par value as if they had a par value of $100, and that he should not be required to examine into the actual value of the shares.

The provisions of sections 4 and 5 of the 1920 act, which limit the shareholders' liability to the value of the shares of no par value at the time of issuance, do not, in my opinion, require that for the purpose of levying an excise a similar rule should be followed. An excise need not be proportional but must be reasonable, and to require that a fee of 5 cents for each share without par value issued shall be paid to the Commonwealth is not, in my opinion, unreasonable legislation.

On the facts submitted to me it is my opinion that before accepting for filing articles of amendment you should receive a fee in accordance with the provisions of St. 1903, c. 437, § 89, as amended by St. 1920, c. 349, § 9, and not merely the fee required by St. 1903, c. 437, § 90.
LAbor — Hours of Service — Employee of Railroad engaged in Interstate Commerce.

Where a woman receives and transmits orders which affect train movements in both interstate and intrastate commerce, her hours of service are governed by the Federal Hours-of-Service Act (act of March 4, 1907; 34 Stat. 1415) and not by Gen. St. 1919, c. 113.

You inquire whether Gen. St. 1919, c. 113, or the Federal Hours-of-Service Act (act of March 4, 1907; 34 Stat. 1415), governs the hours of labor of a woman employed by a railroad engaged in interstate commerce, "who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders to or affecting train movements."

The answer to your question is, in my opinion, determined by Erie R.R. Co. v. New York, 233 U. S. 671, to which you call my attention. That case, like Northern Pacific Railway v. Washington, 222 U. S. 370, decided that the Federal Hours-of-Service Act superseded State legislation relative to the hours of service of persons employed by railroads in interstate commerce. I understand that, in the case which you put, the woman in question is engaged in interstate commerce to a greater or less extent. It is clearly impossible to govern her hours of labor in intrastate commerce by State law and her hours of labor in interstate commerce by Federal law. The two are so inextricably intermingled that separation cannot be made. In such a case the State law yields to the paramount power of Congress over interstate commerce. New York Central R.R. Co. v. Winfield, 244 U. S. 147; Houston & Texas Ry. v. United States, 234 U. S. 342; Minnesota Rate Cases, 230 U. S. 352.
CITIES AND TOWNS — AMERICANIZATION CLASSES — REIMBURSEMENT BY COMMONWEALTH.

Cities and towns maintaining schools or classes to promote Americanization, under Gen. St. 1919, c. 295, are not entitled to further reimbursement under the provisions of Gen. St. 1919, c. 363, on account of expenditures for teachers employed in such schools or classes.

You request my opinion as to whether cities and towns maintaining schools or classes to promote Americanization, under Gen. St. 1919, c. 295, are entitled to further reimbursement under the provisions of Gen. St. 1919, c. 363, on account of expenditures for teachers employed in such schools or classes.

Gen. St. 1919, c. 295, provides for the establishment of schools or classes for the education of persons over twenty-one years of age who are unable to speak, read or write the English language. Section 2 of said chapter 295 provides as follows: —

Any city or town desiring to obtain the benefits of this act may apply therefor to the board, shall conduct the educational work herein provided for in conjunction with the board and shall be entitled to receive from the commonwealth, at the expiration of each school year and on the approval of the board one half of the sums expended by it in carrying out the provisions hereof. Teachers and supervisors who are employed by cities and towns for the above purpose shall be chosen and their compensation shall be fixed by the local school committee, subject to the approval of the board.

Gen. St. 1919, c. 363, provides for the reimbursement, in part, of cities and towns “for expenditures for salaries of teachers, supervisors, principals, assistant superintendents, and superintendents of schools, for services rendered in the public day schools.”

Inasmuch as the provisions of said chapter 363 are to apply solely to services rendered by teachers in the “public day schools,” the question raised by your inquiry is whether or not Americanization schools or classes can be said to be included within the meaning of that phrase.

The phrase “public schools,” as used in the Constitution and the laws of this Commonwealth, has acquired a common and
well-settled meaning. It refers and is limited to schools which form a part of the general system of education for the children of the Commonwealth, and which are the kind of schools that cities and towns are by statute required to maintain as a part of our system of common education (R. L., c. 42, § 1), and that children of legal school age are obliged to attend (R. L., c. 44, § 1).

Schools or classes established and maintained for the instruction of voluntary pupils in certain specified branches of education which do not form a part of the general system of education which the law requires cities and towns to maintain, are not included within the meaning of said term. *Merrick v. Amherst*, 12 Allen, 500; *Jenkins v. Andover*, 103 Mass. 94; III Op. Atty.-Gen. 75.

As the schools or classes referred to in said Gen. St. 1919, c. 295, are to be established for persons over twenty-one years of age, for instruction therein of certain specified subjects, and as both the establishment of such schools by cities and towns and the attendance on the part of the persons for whose benefit they are established are purely optional, I am of the opinion that such schools or classes cannot be said to be a part of the public school system of the cities and towns in which they are established and maintained. Not being a part of the public school system, they necessarily cannot be included within the meaning of the phrase "public day schools," which constitute a component part of the public school system.

I am therefore of the opinion that the provisions of said Gen. St. 1919, c. 363, do not apply to said chapter 295 of the acts of that year, and that cities and towns conducting schools or classes under the provisions of said chapter 295 are not entitled to additional reimbursement, under the provisions of said chapter 363, on account of salaries paid to teachers in the said schools.
Constitutional Law — Police Power — Interference with Interstate Commerce — Commissioner of Public Safety — Regulation of Sale, Lease, Loan or Use of Motion-picture Films.

A bill prohibiting the selling, leasing, loaning or using for public exhibition or commercial purposes of any motion-picture film, unless the film has been submitted to and approved by the Commissioner of Public Safety, would be unconstitutional if enacted into law, as it would violate that clause of section 8 of Article I of the Constitution of the United States which gives Congress the power to regulate commerce among the several States.

Your Excellency has requested my opinion upon the constitutionality of House Bill No. 1540, entitled "An Act relative to the approval and public exhibition of motion-picture films." Section 2 of said bill provides: —

On and after January first, nineteen hundred and twenty-one, it shall be unlawful for any person to sell, lease, loan or use for public exhibition or commercial purposes any motion-picture film unless the said film has been submitted to and approved by the commissioner.

The language of this section is not limited to the inspection and approval of motion-picture films to be used for public exhibition within the Commonwealth, and, in this respect, it goes farther than the motion-picture censorship laws which were upheld in Mutual Film Co. v. Industrial Commission of Ohio, 215 Fed. Rep. 138, affirmed, 236 U. S. 230, and Mutual Film Corp. v. Kansas, 236 U. S. 248. It is my opinion that this section is so broad that it would apply to a sale, lease or loan in this Commonwealth of a motion-picture film made in this State and on its way into another State, and would also apply to a film in the original package in which it might be shipped into this State from another State or from a foreign country. If so, it is to that extent in conflict with that clause of section 8 of Article I of the Constitution of the United States which confers on Congress power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Brown v. Maryland, 12 Wheat. 419; Leisy v. Hardin, 135 U. S. 100; Schollenberger v. Pennsylvania,
171 U. S. 1. I am therefore of opinion that said section 2 is an attempt directly to regulate interstate commerce, and is, accordingly, unconstitutional.

I would also call your attention to section 4, which provides for an appeal to the Superior Court sitting in equity. While I feel that there is a strong probability that the constitutional requirement that one shall have a right to trial by jury where the value in controversy exceeds $20 is complied with, in that the remedy in equity is not necessarily exclusive, nevertheless, in my judgment it would have been advisable to add to the section some provision stating that it should not be construed to deprive any person of the right to pursue any other lawful remedy. If this section is constitutional, it would be so because of an interpretation of its meaning made by a court rather than by the clear wording of the section itself. In its present form the question of its constitutionality might be raised.

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Regular academic teachers of the city of Boston, who are members of the retirement system for Boston public school teachers and who are employed on a part-time basis in vocational schools, are not obliged, under the provisions of St. 1914, c. 494, to enroll as members of the State retirement system. Teachers who enter the service of the city of Boston, employed on a part-time basis in vocational schools operating under the provisions of St. 1911, c. 471, and who are also employed in the academic courses in the public schools of the city of Boston, are not obliged to enroll as members of the State retirement system, as said teachers must, under the provisions of St. 1908, c. 589, become members of the retirement system for the Boston public school teachers.

You state that the city of Boston has recently established certain schools operating under St. 1911, c. 471, in which schools some of the regular academic teachers of the city of Boston, who are members of the retirement system for Boston public school teachers, are employed on a part-time basis.

You request my opinion as to whether it will be necessary, by virtue of the provisions of St. 1914, c. 494, to enroll these teachers as members of the State teachers' retirement system,
J. WESTON ALLEN, ATTORNEY-GENERAL.

provided they never served in the public schools of Massachusetts prior to July 1, 1914, and, if it is so necessary, whether they will be required to pay assessments on their total salary or only on the salary received for vocational work.

You further desire my opinion as to whether it will be necessary for a teacher who enters the service of the city of Boston in the future, employed on a part-time basis in vocational schools and also in the academic courses, to become a member of the State system, and whether, if so required, the assessments will be based on the total salary or only on the salary received for the vocational work.

The Massachusetts retirement system was established by the Legislature under the provisions of St. 1913, c. 832. Teachers employed in the public schools of the city of Boston were exempt from becoming members of this system by paragraph (3) of section 3 of said chapter 832, which provides as follows: —

Teachers in the service of the public schools of the city of Boston shall not be included as members of the retirement association.

The reason for this exemption was due, no doubt, to the fact that the city of Boston already had a local teachers' pension system of its own, established under the provisions of St. 1908, c. 589.

This remained a law of the Commonwealth until the Legislature enacted St. 1914, c. 494, which provides as follows: —

Section 1. Teachers employed by the city of Boston prior to the thirtieth day of June, nineteen hundred and fourteen, in schools operating under the provisions of chapter four hundred and seventy-one of the acts of the year nineteen hundred and eleven and of chapter eight hundred and five of the acts of the year nineteen hundred and thirteen, may become members of the teachers' retirement association, as established by chapter eight hundred and thirty-two of the acts of the year nineteen hundred and thirteen, in the manner prescribed by paragraph (2) of section three of said chapter; and all teachers employed in the said schools for the first time after the first day of July, nineteen hundred and fourteen, shall thereby become members of the said retirement association as prescribed by paragraph (1) of said section three.
Section 2. Paragraph (3) of section three of said chapter eight hundred and thirty-two shall not be construed as applying to the teachers described in section one of this act.

It is quite clear that in enacting said statute the Legislature intended to differentiate between the regular public schools of the city of Boston and the schools to be conducted by that city under the provisions of St. 1911, c. 471. As regards the former, Boston teachers were to continue to become members of the Boston system, while as regards the latter, they were to enroll as members of the State system; the reason for the change being apparently due to the fact that the latter schools were receiving State aid, and that these teachers were not eligible to membership in the Boston system.

St. 1913, c. 832, § 12, provides as follows: —

(1) No person required to become a member of the association under the provisions of paragraph (1) of section three of this act shall be entitled to participate in the benefits of any other teachers' retirement system, supported in whole or in part by funds raised by taxation, or to a pension under the provisions of chapter four hundred and ninety-eight of the acts of the year nineteen hundred and eight, or chapter five hundred and eighty-nine of the acts of the year nineteen hundred and eight, as amended by chapter six hundred and seventeen of the acts of the year nineteen hundred and ten.

(2) No member of the retirement association shall be eligible to receive any pension as described in section six of this act, who is at the time in receipt of a pension paid from funds raised in whole or in part from taxation under the provisions of chapter four hundred and ninety-eight of the acts of the year nineteen hundred and eight, or chapter five hundred and eighty-nine of the acts of the year nineteen hundred and eight, as amended by chapter six hundred and seventeen of the acts of the year nineteen hundred and ten, or of any other act providing pensions for teachers, providing that this paragraph shall not be construed as applying to the Boston Teachers' Retirement Fund Association.

Under the provisions of this section a teacher who is a member of the Boston system on becoming a member of the State system would forfeit her right to participate in the benefits of the Boston system.

To hold, therefore, that under the provisions of St. 1914,
c. 494, a teacher employed by the city of Boston in the academic department of the public schools, who is a member of the retirement system for Boston public school teachers, must, on being employed in the vocational schools or courses, established under the provisions of said chapter 494, also enroll as a member of the State teachers' retirement system, would work an injustice to said teachers, as they would be obliged to continue to pay their assessments as members of the Boston system and yet would not be entitled to receive the benefits therefrom.

Since the retirement systems were established to benefit the public school teachers and not to penalize or to impose burdens upon them, I am of the opinion that the Legislature had no intention to include within the provisions of said chapter 494 teachers who, upon entering their employment as part-time teachers in the vocational schools, were in addition thereto employed by the city of Boston as teachers in the regular public schools thereof, and entitled to participate in the benefits of the Boston teachers' retirement system. I am therefore of the opinion that it will not be necessary, by virtue of the provisions of St. 1914, c. 494, to enroll regular academic teachers of the city of Boston, who are members of the retirement system for Boston public school teachers, as members of the State teachers' retirement system upon their being employed on a part-time basis as teachers in schools conducted by the city of Boston and operating under the provisions of St. 1911, c. 471.

Since teachers employed by the city of Boston for the first time after July 1, 1914, in the academic courses of the regular public schools, being regularly employed on a full or on a part-time basis, must, under the provisions of St. 1908, c. 589, become members of the Teachers' Retirement Association established under the provisions of said chapter, and inasmuch as such teachers would lose the benefits that they would be entitled to as members of said association upon being enrolled as members of the State system, I am of the opinion that the word "teachers," as used in said St. 1914, c. 494, was intended to apply only to teachers who at the time of entering the voca-
tional schools, either on a whole or on a part time basis, were not to be employed, in addition thereto, in the regular academic courses of the Boston public schools. I am therefore of the opinion that it will not be necessary for a teacher who enters the service of the city of Boston in the future, employed on a part-time basis in a vocational school operating under the provisions of St. 1911, c. 471, and who is also employed in the academic courses, to become a member of the State system.

SCHOOLS — CONTINUATION SCHOOLS — REIMBURSEMENT OF CITY OR TOWN FOR EXPENDITURES.

Continuation schools are not public day schools. Cities and towns which maintain continuation schools are not entitled, on account of such schools, to the reimbursement provided in Gen. St. 1919, c. 363, § 2, on account of expenditures for public day schools.

You ask my opinion as to whether cities and towns maintaining continuation schools under the provisions of Gen. St. 1919, c. 311, are entitled to further reimbursement under the provisions of Gen. St. 1919, c. 363, on account of expenditures for teachers employed in such schools.

Gen. St. 1919, c. 311, provides for the establishment and maintenance of continuation schools by cities and towns for employed minors under sixteen years of age.

Paragraph (4) of section 1 of said chapter 311, provides that,—

... when established, the said continuation schools or courses shall be considered a part of the public school system of the municipality wherein the minors attending the same are employed.

Section 2 of said chapter 311 provides as follows: —

Cities and towns maintaining such continuation schools or courses of instruction as are approved by the board of education as to organization, control, situation, equipment, courses of study, qualifications of teachers, methods of instruction, conditions of admission, employment of pupils and expenditures of money, shall receive reimbursement from the treasury of the commonwealth to an amount equal to one half the total sum raised by local taxation and expended for the maintenance of such schools or courses of instruction.
Gen. St. 1919, c. 363, §§ 1 and 2, provide as follows: —

Section 1. The treasurer and receiver general shall, on or before the fifteenth day of November, nineteen hundred and nineteen, and annually thereafter, set aside from the proceeds of the income tax a sum of money sufficient to provide for the purposes of Part I of this act, and which shall be available therefor without further appropriation by the general court.

Section 2. The treasurer and receiver general shall, as herein provided, distribute said sum on or before the fifteenth day of November, nineteen hundred and nineteen and annually thereafter, to the several cities and towns of the commonwealth as reimbursement, in part, for expenditures for salaries of teachers, supervisors, principals, assistant superintendents, and superintendents of schools, for services rendered in the public day schools during the year ending on the thirtieth day of June next preceding.

Under the provisions of said chapter 363 the reimbursement to which cities and towns are entitled is limited to expenditures for salaries of teachers, supervisors, principals, assistant superintendents and superintendents of schools for services rendered in the public day schools, and is based upon a fixed scale determined by the salaries paid.

Previous to the enactment of Gen. St. 1919, c. 311, continuation schools were held not to be a part of the public school system, and as public day schools were a part of the public school system, it is quite evident that continuation schools could not have been included within the meaning of the phrase "public day schools." As said chapter 311 explicitly provides that continuation schools, when established shall be considered a part of the public school system, the question therefore arises as to whether, under this provision, continuation schools may also be said to be included within the meaning of the phrase "public day schools."

Though both the "public day schools" and the "continuation schools" now form a part of the public school system, it is quite evident that they are not synonymous. The term "public day school" long prior to the passage of said chapter 311 had acquired a common and well-understood meaning, and included such day schools as cities and towns were obliged to establish
and maintain for children of school age, and such as children, on the other hand, were obliged to attend.

Up to the year 1913 all children between the ages of seven and fourteen years, with certain exceptions not here material, were obliged to attend these schools (R. L., c. 44, § 1). That year the Legislature enacted chapter 779, section 1 of which provides, with certain exceptions not here material, that "every child under sixteen years of age who has not received an employment certificate as provided in this act . . . shall attend a public day school." As to children between the ages of fourteen and sixteen years who became regularly employed and did receive employment certificates, the Legislature, the same year, under the provisions of chapter 805, established continuation schools or classes.

While the public day school was under the sole jurisdiction of the school committee of the city or town in which it was established, the continuation schools, under the provisions of St. 1913, c. 805, and of Gen. St. 1919, c. 311, were "to be approved by the board of education as to organization, control, situation, equipment, courses of study, qualifications of teachers, methods of instruction, conditions of admission, employment of pupils and expenditures of money."

That the Legislature intended to differentiate between these schools is further apparent from Gen. St. 1919, c. 311, § 1, par. (2), which provides "that upon application of the parent or guardian of the minor involved, instruction in the regular schools shall be accepted as instruction equivalent to that provided for by this act." By the term "regular schools" the Legislature referred to the public day schools as distinguished from the continuation schools.

Gen. St. 1919, c. 311, § 1, provides for State reimbursement of cities and towns which maintain continuation schools, to an amount equal to one-half the total sum raised by local taxation and expended for the maintenance of such schools or courses of instruction. This act applies to continuation schools only. It does not apply to public day schools. Gen. St. 1919, c. 363, provides a different scheme of reimbursement
in respect to "public day schools." If this term should be held to include continuation schools, it would make both schemes of reimbursement applicable to such schools, although but one scheme of reimbursement would apply to regular public day schools. The regular public day schools are, however, the principal public school system, to which the continuation schools are merely a supplement. A construction of Gen. St. 1919, c. 363, which would apply both schemes of reimbursement to the supplementary system, and only a single scheme of reimbursement to the principal system, is so unreasonable that it should not be adopted unless the language of the act plainly requires it. I find nothing in Gen. St. 1919, c. 363, which constrains me to reach so unsatisfactory a conclusion. On the contrary, the Legislature, in enacting Gen. St. 1919, c. 363, seems to have employed the phrase "public day schools" in order to distinguish those schools from the continuation schools, because the latter schools are, under Gen. St. 1919, c. 311, to be considered, for certain purposes, a part of the public school system. I am therefore of opinion that cities and towns which maintain continuation schools are not entitled, on account of such schools, to the reimbursement provided in Gen. St. 1919, c. 363, on account of expenditures for public day schools.

COLD STORAGE—REPORTS TO DEPARTMENT OF PUBLIC HEALTH—LIABILITY TO CRIMINAL PROSECUTION.

A person holding in cold storage any article of food for a period longer than twelve calendar months, without the consent of the Department of Public Health, violates St. 1912, c. 652, § 5, as amended by Gen. St. 1917, c. 149, § 3, and is liable for such violation, whether or not a report is thereafter made to the Department.

You have asked my opinion as to whether a warehouseman, reporting to your Department that food has been kept in cold storage for twelve calendar months, is because of such report relieved from liability to criminal prosecution under the provisions of St. 1912, c. 652, as amended by Gen. St. 1917, c. 149, and by Gen. St. 1919, c. 28.
St. 1912, c. 652, § 5, as amended by Gen. St. 1917, c. 149, § 3, is as follows:—

No person, firm or corporation shall hold any article of food in cold storage within this commonwealth which has been in cold storage for a period longer than twelve calendar months, except with the consent of the state department of health. The said department may, upon application, grant permission to extend the period of storage beyond twelve months for a particular consignment of goods, if the goods in question are found, upon examination, to be in proper condition for further storage at the end of twelve months. The length of time for which further storage is allowed shall be specified in the order granting the permission. A report on each case in which such extension of storage is permitted, including information relating to the reason for the action of the department, the kind and the amount of goods for which the storage period was extended, and the length of time for which the continuance was granted, shall be included in the annual report of the department.

St. 1912, c. 652, § 9, is as follows:—

The state board of health may make rules and regulations to secure a proper enforcement of the provisions of this act, including rules and regulations with respect to the use of marks, tags or labels and the display of signs, and may fix penalties for the breach thereof.

Under the authority of this section you have made rules and regulations, under date of May 5, 1917. Rule 3 is as follows:—

When articles of food have been kept in cold storage for twelve calendar months, report of such fact shall be made to the State Department of Health by the persons having custody of such articles, and such articles shall not be removed from cold storage by the owners until they have been inspected by the agents of the State Department of Health, and released by order of the Department.

The authority of the Department of Public Health, which has succeeded to the powers of the State Board of Health, under section 9, above cited, is limited to making "rules and regulations to secure the proper enforcement of the provisions" of said chapter 652, and fixing penalties for the breach thereof. It necessarily follows that it is beyond the scope of the authority of the Department, by any rule or regulation, to nullify
the prohibition contained in section 5 of said chapter 652, as amended by Gen. St. 1917, c. 149, § 3.

If a person, firm or corporation has held in cold storage any article of food for a period longer than twelve calendar months without the consent of the Department of Public Health, such person, firm or corporation has violated the provisions of the act above cited, and is liable for such violation, whether or not a report is thereafter made to the Department of Public Health by the persons having custody of such articles.

The language of the statute, "no person, firm or corporation," is not controlled by any words of limitation, and is broad enough to include the owners of the goods in cold storage and the warehouseman in whose custody they are held.

The purpose of rule 3 is to require the warehouseman to give notice to the Department of Public Health of articles held in cold storage more than a year, in order that the articles may be inspected, and to require their detention until such time as they have been inspected by the agents of the Department and duly released. The rule applies equally to goods which have been held in cold storage beyond the period of twelve calendar months by permission of the Department, as well as to goods which have been held longer than the prescribed period without the knowledge and permission of the Department.

Without passing upon the validity of rule 3 of the rules and regulations established under date of May 5, 1917, as applied to a case where the required report discloses a violation of law, I am of opinion that compliance by the warehouseman with said rule 3 in no respect relieves the warehouseman of liability for any offence disclosed by said report.
Schools — Superintendency Unions — Superintendent — Minimum Salary.

Previous service in one superintendency union established under R. L., c. 42, § 43, and amendments thereof, is not to be counted in determining the minimum salary which another union must pay to the same superintendent under R. L., c. 42, § 45, as amended by St. 1920, c. 371.

You ask my opinion upon the following case: —

R. L., c. 42, § 43, provides that, under certain circumstances, two or more towns shall form a union for the purpose of employing a superintendent of schools. Section 45 of the same chapter provided that when certain conditions had been satisfied the Commonwealth should contribute on account of such union the sum of $1,250, of which three-fifths, or $750, should be paid for the salary of said superintendent, and the remainder distributed in certain proportions among the towns which formed such union. By Gen. St. 1918, c. 109, the Legislature amended said section 45 by substituting therefor a new section, which provided, in substance, that when it was duly certified that the towns had unitedly employed a superintendent of schools and had expended for his salary for the school year ending June 30 "a sum not less than eighteen hundred dollars," the sum of $1,250 should be apportioned among the towns forming such union, in proportion to the amounts paid by them for the salary of such superintendent, and should be expended for the support of the public schools. By St. 1920, c. 371, the Legislature further amended said section 45 by substituting therefor a new section, which contains the following provision: —

(a) The salary of the superintendent in such a union shall be not less than the amounts provided in the following schedule: Twenty-two hundred dollars for the first year of service, twenty-three hundred dollars for the second year, twenty-four hundred dollars for the third year, twenty-five hundred dollars for the fourth year. In case his salary is not in excess of twenty-nine hundred dollars, he shall also be reimbursed for his actual travelling expenses incurred in the discharge of his duties, but such reimbursement may be limited by the school committee to four hundred dollars a year.

You inquire whether a union which employs for the first time a superintendent of schools who has already served four
years in another union in this State must pay such superintendent a minimum salary of $2,200 or of $2,500.

The act, as amended, does not prescribe the salary of the superintendent of a union. It prescribes a minimum below which that salary must not fall. The union may pay as much more as it sees fit or as the parties may agree upon. The single question, therefore, is whether previous service in one union is to be considered in determining the minimum salary to be paid by another union.

A town is a political subdivision of the State. This act is in effect a legislative grant which places a burden upon towns, a part of which is borne by the State. In case of doubt, such an act is to be construed in favor of the State and of the town. *Butchers Slaughtering, etc., Assn. v. Boston*, 214 Mass. 254, 258. There is no express provision that previous service in another union is to be considered in determining the minimum salary which a union must pay. If such was the intention of the Legislature, it would have been easy to have so provided in unmistakable terms. To reach this result by construction not only resolves a possible doubt against the State and the towns, but also seems to require the addition of words by implication. The payment is made for service "in such a union." The increase is for further years of service therein. Full effect is given to the language used if service in the particular union is alone considered. I am not unmindful that by R. L., c. 8, § 4, par. 4, "words importing the singular number may extend and be applied to several persons or things," unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute. But I do not find that this provision is applicable. I am therefore of opinion that previous service in another union is not to be considered in fixing the minimum salary of a superintendent, and that in the case which you put the minimum salary is $2,200 rather than $2,500.
FISHERIES AND GAME — ACT OF FISHING — ROWING BOAT FOR ANOTHER TO TROLL.

A man who is rowing a boat for his wife, while she is fishing by means of trolling, cannot be prosecuted for fishing without a license.

If he also engaged in landing the fish, or otherwise assisted in the fishing operation, he might well be held to be engaged in fishing.

You have requested my opinion as to whether or not, under the provisions of Gen. St. 1919, c. 296, relative to hunting and fishing licenses, a man who is rowing a boat for his wife, while she is fishing by means of trolling, needs a fishing license. You point out that under section 8 a woman is not required to take out a license to fish, and therefore you wish to know whether or not, if her husband rows a boat for his wife while she is fishing, he could be prosecuted for fishing without a license.

Gen. St. 1919, c. 296, provides that it shall be unlawful for any person to hunt or to fish in any of the inland waters of the Commonwealth without having first obtained a certificate of registration.

So far as your question is concerned, all that the statute makes unlawful is fishing without a license, and applies only to the act of fishing. In my judgment, the statute cannot be construed to include a man who rows a boat for his wife, who is trolling for fish, any more than it would apply to an owner of a motor boat who for hire operated the boat on inland waters in order to enable a woman to fish therein.

Just what constitutes "fishing," within the prohibition of the act, is a question of fact to be determined in view of all the circumstances in each individual case. If the person rowing the boat also engaged in landing the fish, or otherwise assisted in the fishing operation, he might well be held to be engaged in fishing.
FISHERIES AND GAME — SHORT LOBSTERS — SEARCH WITHOUT A WARRANT — HOTEL KITCHEN, ICE BOX, CONNECTING PARTS OF BUILDING.

Under St. 1904, c. 367, as amended by St. 1910, c. 548, officers of the Division of Fisheries and Game can, if there is reason to believe that short lobsters are being held, search without a warrant a hotel kitchen, ice box and such parts of connecting buildings as are not occupied for dwelling purposes.

You have requested my opinion as to whether or not, under the provisions of St. 1904, c. 367, as amended by St. 1910, c. 548, your officers would be justified in searching without a warrant for short lobsters in a hotel kitchen, ice box or such parts of connecting buildings as are not used for sleeping quarters.

The original statutory provision in point is found in R. L., c. 91, § 91. It deals with the right of search for short lobsters, and reads as follows: —

For the purpose of enforcing the provisions of section eighty-eight (legal length of lobsters), any one of the commissioners on fisheries and game or their deputy or any member of the district police may search in suspected places for, seize and remove lobsters which have been unlawfully taken, held or offered for sale.

Subsequently the Legislature passed a general law relative to the right of search relating to any game or fish. This statute is St. 1904, c. 367, as amended by St. 1910, c. 548, and reads as follows: —

SECTION 1. Any commissioner on fisheries and game, deputy commissioner on fisheries and game, or member of the district police, may, with or without a warrant, search any boat, car, box, locker, crate or package, and any building, where he has reason to believe any game or fish taken or held in violation of law is to be found, and may seize any game or fish so taken or held, and any game or fish so taken or held shall be disposed of by the commissioners on fisheries and game as they may deem advisable for the best interests of the commonwealth: provided, however, that this section shall not authorize entering a dwelling house, or apply to game or fish which is passing through this commonwealth under authority of the laws of the United States.

SECTION 2. A court or justice authorized to issue warrants in criminal
cases shall, upon complaint under oath that the complainant believes that any game or fish unlawfully taken or held is concealed in a particular place, other than a dwelling house, if satisfied that there is reasonable cause for such belief, issue a warrant to search therefor. The search warrant shall designate and describe the place to be searched and the articles for which search is to be made, and shall be directed to any officer named in section one of this act, commanding him to search the place where the game or fish for which he is required to search is believed to be concealed, and to seize such game or fish.

It is not necessary to make any extended argument to establish the fact that lobsters are included within the designation "fish" in section 1 of the general act. The general law relating to fisheries, comprising R. L., c. 91, contains the provisions relative to lobsters, and section 91 of that chapter is undoubtedly superseded by St. 1904, c. 367.

The remaining question is whether the provision in the statute which exempts dwelling houses from the right of search without a warrant makes it unlawful to search without a warrant a hotel kitchen, ice box or such parts of connecting buildings as are not used for sleeping quarters. The distinction, as correctly indicated by your question, is not between a hotel and a dwelling house, but between such parts of a hotel as are not used for dwelling purposes; and the line of demarcation, generally speaking, is between those parts of a hotel which are occupied by the guests, and which have the privacy of a dwelling house, and those parts of a hotel which are public, where the privacy of a person living in a hotel would not be invaded. There can be no question that a restaurant could be searched, and it should make no difference whether the restaurant is conducted as a part of a hotel or without provision for lodging guests. In the same way a room which might be exempt from the right of search when used by a guest would not be exempt from search if it was not in use by a guest but was being used as a storeroom by the proprietor.

I am, accordingly, of the opinion that your officers would be justified in searching a hotel kitchen, ice box or such parts of connecting buildings as are not occupied for dwelling purposes.
PARDONING POWER — DISCHARGE OF A PERSON COMMITTED TO THE STATE HOSPITAL AT BRIDGEWATER AFTER TRIAL FOR MURDER.

The pardoning power does not extend to one confined at the State Hospital at Bridgewater when such person has been committed after having been found not guilty of murder on account of insanity. Such person may be discharged, however, by the Governor, with the advice and consent of the Council, when, after an investigation by the Department of Mental Diseases, the Governor is satisfied that the person so confined may be discharged without danger to others.

My opinion is requested by Your Excellency upon the question whether the Governor and Council have authority to consider an application for release from the Bridgewater State Hospital. The applicant was found not guilty of murder on account of insanity, and was committed for life to the Bridgewater State Hospital on Oct. 9, 1916. He now applies for pardon on the ground that his sanity is restored.

First of all, I am of opinion that this is not a case for the exercise of the pardoning power. Mass. Const., Pt. II, c. II, § 1, art. VIII, places "the power of pardoning offences" in the Governor, by and with the advice of the Council. The applicant in this case was found "not guilty" by the jury before whom he was tried; he has therefore committed no offence for which he may be pardoned.

Relative to the question of discharge from confinement, as distinguished from pardon, St. 1909, c. 504, § 104, provides: —

If a person who is indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital for the insane during his natural life, and he may be discharged therefrom by the governor, with the advice and consent of the council, when he is satisfied after an investigation by the state board of insanity that such person may be discharged without danger to others.

The meaning of this statute is made very clear in the case of Gleason v. Inhabitants of West Boylston, 136 Mass. 489, 490, where the following language appears: —

The practical effect of the St. of 1873 is to provide that, in case of an indictment for homicide, the insanity of the defendant is not a defence
which entitles him to an unconditional acquittal, but that he shall be detained in confinement until it appears to the Governor and Council that he may be discharged and set at large without danger to others. He is not committed to the hospital for the purposes of treatment as a lunatic. He is not held there as other inmates are held; he cannot be discharged, as others can be, by the trustees, or by a court upon proof that he is not insane, or, if insane, can be sufficiently provided for by himself or his friends, or the town of his settlement. Pub. Sts. c. 87, § 40. He is confined in the hospital as a place of detention, because his being at large would be dangerous to the peace and safety of the community.

Gen. St. 1916, c. 285, § 1, provides: —

The state board of insanity . . . is hereby abolished. All the rights, powers and duties of said board are hereby transferred to . . . the commission on mental diseases. . . .

Gen. St. 1919, c. 350, § 79, provides that "the department of mental diseases shall consist of the Massachusetts commission on mental diseases. . . ."

It appears, therefore, that the investigation provided for by St. 1909, c. 504, § 104, above quoted, is to be made by the Department of Mental Diseases.

It is my opinion that Your Excellency, with the advice and consent of the Council, has authority to consider the application for discharge from the institution, but that no discharge can be granted unless, after an investigation by the Department of Mental Diseases, Your Excellency is satisfied that the applicant may be discharged without danger to others.
INTERSTATE RENDITION — INFORMATION — SWORN EVIDENCE OF FLIGHT FROM JUSTICE.

An information is neither an indictment nor “an affidavit made before a magistrate charging the person demanded” with crime, one of which is required by § 5278 of the Revised Statutes of the United States as a condition of compliance with a requisition for the surrender of a fugitive from justice.

Transcripts of testimony are not “sworn evidence” that the person demanded is a fugitive from justice, as required by R. L., c. 217, § 11.

You have referred to this Department for examination and report a requisition of the Governor of Vermont, with accompanying papers, for the arrest and extradition of certain alleged fugitives from justice charged with the crime of adultery.

Pursuant to a request of counsel for the alleged fugitives, a hearing was held at this office on the first day of July, 1920. No testimony or argument was submitted at the hearing tending to show that the requisition of the Governor of Vermont should not be complied with. One of the alleged fugitives stated that she was “probably” in Vermont on the day when the crime is alleged to have been committed, namely, the first day of April, 1919; and the other alleged fugitive stated that he was not in Vermont on that day, but admitted that he was there later in the month of April, 1919, and at various other times before and after the first day of April, 1919. This testimony on the part of the demanded persons themselves tended to support rather than contradict the proof accompanying the demand that the persons demanded are fugitives from justice of the State of Vermont.

I am of opinion, however, after a careful examination of all the papers, that Your Excellency would not be justified in complying with the demand of the Governor of Vermont so long as it is based upon the complaint which now accompanies it.

Except for certain provisions of our local statutes, which are procedural in their nature and supplemental to Federal law, the statutory law of interstate rendition is to be found in section 2 of Article IV of the Constitution of the United States and in the Revised Statutes of the United States, § 5278 (Compiled Statutes, § 10126). The latter provides:—
Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

Your Excellency will observe that the statute requires the executive authority of the demanding State to produce "a copy of an indictment found or an affidavit made before a magistrate, charging the person demanded" with crime. The Governor of Vermont has produced a complaint. In my opinion this complaint is not an affidavit, and therefore the demand of the Governor of Vermont is not brought within the terms of the Federal statute above quoted.

In Cyclopedia of Law and Procedure, volume 2, page 4, an affidavit is defined to be "a declaration on oath, reduced to writing, and affirmed or sworn to by affiant before some person who has authority to administer oaths." The complaint before me purports to be made by Ernest E. Moore, State's Attorney, "on his oath of office," and does not appear to have been sworn to before the magistrate whose signature authenticates it. Said magistrate does not state that it was sworn to before him, but states, on the contrary, that it "was exhibited to the court" on a date named. As appears from a certificate of the Governor of Vermont, which accompanies the requisition, the State's Attorney has forwarded his oath of office to the Executive Department of the State; but it does not appear that this oath was taken before the magistrate whose name appears upon
the complaint, or that it was taken with reference particularly to the facts alleged therein. I am of opinion, therefore, that the complaint does not come within the above-quoted definition of an affidavit.

The document before me is an information rather than an affidavit. The State's Attorney, who executed it, does not profess to have any personal knowledge that would justify him in making an affidavit to the facts. This construction is supported by the following quotation from an affidavit made by the State's Attorney, which accompanies the requisition: —

That the court then directed that the matter be brought to the attention of the State's Attorney for prosecution. That no grand jury has been in session in Windsor County since said trial, and the matter has never been before the grand jury.

The trial referred to was held upon a petition for divorce, out of which the prosecution for adultery arose, and the State's Attorney was not a witness in that proceeding. Moreover, the State's Attorney stated in conversation at the hearing in this office that he had no personal knowledge of the alleged crime, and had made his complaint at the suggestion of the court before whom the said trial of divorce was heard.

Substantially the very question herein discussed was raised in State v. Richardson, 34 Minn. 115, and was decided by the Supreme Court of Minnesota in accordance with the view above expressed. At page 117 the court said: —

But a complaint is not necessarily an affidavit, nor are they in legal practice or contemplation understood as convertible terms. For, though a complaint may be reduced to writing and subscribed, it need not necessarily be certified by the magistrate, for the fact may otherwise appear by his records. And so a complaint may be merely formal, and made or entered by one who has but little, if any, knowledge about the facts, and the examination consist of the deposition of other witnesses [State v. Armstrong, 4 Minn. 251 (355)], while an affidavit, as the term is ordinarily used in such cases, is understood to be a sworn statement of facts or a deposition in writing, and to include a jurat, which means a certificate of the magistrate, showing that it was sworn to before him, including the date and sometimes, also, the place. Young v. Young, 18 Minn. 72 (90).
In this class of cases it will be implied from the executive authentication that the certifying officer is such magistrate.

To the same effect is *Ex parte Hart*, 63 Fed. Rep. 249.

A second objection to compliance with the demand may possibly be raised. R. L., c. 217, § 11, provides that “such demand or application shall be accompanied by sworn evidence that the person charged is a fugitive from justice. . . .” The testimony of the demanded persons at the hearing in this office was not taken under oath. The only sworn evidence before Your Excellency, therefore, upon the flight from justice is a transcription of the evidence heard by the court in the divorce trial above referred to. By tending to prove the adultery charged in the complaint, this evidence tends to prove also that the demanded persons were in Vermont at or about the time when the crime is alleged to have been committed, and that they are therefore fugitives from justice. I am of opinion, however, that this transcription, though doubtless correct and accurate in all respects, is a record or report of sworn evidence rather than sworn evidence itself. Had the witnesses in the divorce proceeding appeared before Your Excellency and testified under oath to the same effect as upon the trial of divorce, or had they made affidavits to the same facts as to which they had testified at said trial, Your Excellency would have had before him the sworn evidence directed by the statute. As the matter stands, however, Your Excellency has before him merely what the court reporter certifies to have been the testimony of certain persons in a proceeding entirely distinct from this extradition proceeding. This, in my opinion, is hearsay evidence not sworn to, and is not the “sworn evidence” which the Legislature has said the Governor shall have before him. A certified copy of an affidavit, while perhaps as persuasive as the affidavit itself, would not be “sworn evidence,” and the transcript of testimony annexed to the demand of the Governor of Vermont is open to the same objection.
INSURANCE — DISCRIMINATION — TRUST FUND OF UNERNAED PREMIUM ON RETROCEDED BUSINESS.

A plan by which an insurance company accepts reinsurance from direct writing companies, and then retrocedes all but a small part of such reinsurance to companies allied with it, under a contract by which such retrocessionaire is bound to hold the premium paid in advance upon the retroceded business in trust to pay over such premium to itself as and when earned, the unearned portion of such premium to be applied to procure reinsurance of the retroceded business in some other company, in case the retrocessionaire becomes insolvent or suffers an impairment of its capital, is in conflict with the policy declared by St. 1908, c. 151, and may involve a discrimination forbidden by St. 1912, c. 401, § 1, and therefore should not be approved by the Commissioner of Insurance.

I have the honor to acknowledge your letter in which you request my opinion on the following questions of law: —

Under chapter 151 of the Acts of 1908 loss claims in the case of insolvency of a domestic fire insurance company are deemed to be preferred claims over claims for return premiums on uncompleted contracts. It is a not uncommon feature of contracts for reinsurance that the company which cedes reinsurance retains the unearned premiums as a deposit which, as the premiums are earned, enures to the benefit of the company accepting the reinsurance. Now that several reinsurance companies have been formed in this State, the question becomes of importance as to whether these companies, which are bound by the provisions of the statute above cited, can allow the unearned premiums upon the reinsurance ceded to them to be held in a special deposit, either in the hands of the ceding company or in the hands of trustees, with the proviso that only so much of the funds should be deliverable to the reinsuring company as exceeds the unearned premium reserve on the business ceded. The Insurance Commissioner is aware of no provision of law which definitely forbids the writing of insurance by a stock company upon the principle that the premium shall be paid over only when and as it is earned, although the form of annual statement set forth in section 101 of chapter 576 of the Acts of 1907 provides for the reporting of gross and net premiums and of unearned premiums.

The question, therefore, which is submitted is whether a Massachusetts company may write reinsurance upon the basis outlined above.

I understand that your inquiry arises as a result of the submission to you for approval by the Eagle Fire Insurance Company of Newark, N. J., of a proposed agreement to be entered
into by the Eagle Fire Insurance Company and certain Massachusetts reinsuring companies as retrocessionaires. The plan proposed by the Eagle Fire Insurance Company is to accept reinsurance from direct writing companies and then to relieve itself of all but a small fractional part of the risks so assumed by retrocession to allied companies, under a form of reinsurance treaty which requires the retrocessionaires to hold unearned premiums as a trust fund for the reinsurance of the business placed with them by the Eagle Company, to be used in the event of the insolvency of the retrocessionaire or of the impairment of its capital. The evident purpose of this plan is to place the Eagle Company in a position where it will receive a preference with respect to unearned premiums upon the business ceded, as compared with creditors of the retrocessionaire, on account of actual fire losses.

St. 1908, c. 151, reads as follows: —

When a domestic fire insurance company, whether stock or mutual, becomes insolvent, or is unable to pay in full its liabilities as set forth in section eleven of chapter five hundred and seventy-six of the acts of the year nineteen hundred and seven, unpaid losses arising from the contingencies insured against by its contracts shall, in the distribution of its assets, whether liquidation is effected by a receiver or otherwise, be deemed and treated as preferred claims over claims for return premiums on uncompleted contracts. But nothing in this act shall impair the obligations now or hereafter imposed by law upon the officers of a mutual company to make assessments to pay all legal obligations of the company.

I am informed by you that it is the usage of insurance companies to collect premiums in advance for the full period of each original policy, but that this usage does not invariably govern contracts of reinsurance. The effect of this usage is to create two classes of creditors, namely, creditors on account of actual fire losses, and creditors on account of the premium which has been already paid although not earned. The purpose of St. 1908, c. 151, is to give fire loss claimants a priority over creditors on account of the premium which has been paid but not earned. The purpose of the proposed agreement is to avoid the operation of this statute, in that the premiums upon the retro-
ceded business, although paid in advance, are held in trust and
paid over absolutely to the retrocessionaire only as and when
earned. The unearned portion of such premium is repaid to
the Eagle Company in the event that the retrocessionaire be-
comes insolvent or suffers an impairment of its capital. This
plan, when coupled with the custom of collecting premiums
for the whole period of the policy in advance, results in making
the premiums collected in advance from other parties available
to pay losses which may be sustained upon the insurance pro-
cured from the retrocessionaire by the Eagle Company, al-
though the Eagle premiums are not available to pay the fire
losses of those who have thus paid in advance, except in so far
as the Eagle premiums have been actually earned. Even if
the proposed plan does not conflict with the letter of St. 1908,
c. 151, it is, in my opinion, in conflict with the policy therein
declared.

But putting aside St. 1908, c. 151, another question is
whether the provisions of the proposed agreement can be recon-
ciled with St. 1912, c. 401, § 1, which reads as follows: —

No insurance company transacting in this commonwealth any of the
kinds of business specified in section thirty-two of chapter five hundred
and seventy-six of the acts of the year nineteen hundred and seven, and
no agent, sub-agent or broker shall pay or offer to pay or allow in connec-
tion with placing or attempting to place insurance any valuable considera-
tion or inducement not specified in the policy contract of insurance, or
any rebate of premium payable on the policy, or any special favor or ad-
vantage in the dividends or other benefits to accrue thereon; or give, sell,
or purchase or offer to give, sell or purchase in connection with placing or
attempting to place insurance anything of value whatsoever not specified
in the policy.

The purpose of this act is to prohibit discrimination between
those who procure insurance upon substantially similar condi-
tions. In respect to collection of premiums in advance, is
there any solid distinction between a direct contract of fire
insurance and a contract of reinsurance? The two contracts
differ in the nature of the interest insured. In the case of a
direct contract of insurance against fire the insurable interest is
an interest in the property exposed to the risk of fire. In the case of a contract of reinsurance the insurable interest is a contract of insurance previously made by the company which procures the reinsurance. But if a fire occurs, the payment is made in each case on account of the loss suffered by reason of such fire. So far as payment of premium in advance is concerned, I do not discern any solid ground of distinction between direct insurance and reinsurance by reason of the difference in the insurable interest already pointed out. In any event, there certainly seems to be no reasonable distinction between contracts of reinsurance procured by the Eagle Company and contracts of reinsurance procured by other companies. If other companies which procure reinsurance pay the reinsurance premium in advance, and so take the risk of insolvency or of impairment of capital on the part of the retrocessionaire, the Eagle Company surely obtains a discrimination if, through the plan already described, it avoids that risk upon the business ceded by it.

I am therefore of opinion that the plan described is not only in conflict with the policy declared by St. 1908, c. 151, but also may involve a discrimination forbidden by St. 1912, c. 401, § 1, and should, therefore, not be approved.
Taxation — War Poll Tax — Exemption — Persons summoned in Draft who were discharged before being mustered into the Federal Service — Abatement of Three Dollar Poll Tax — How to be certified and allowed.

A state of war continues to exist in point of law until terminated by a treaty of peace or by a proclamation of peace, even though an armistice has ended actual hostilities.

Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, continues in force until the war is terminated either by a treaty of peace or by a proclamation of peace.

The exemption from all poll taxes granted by Gen. St. 1919, c. 9, does not include persons summoned in the draft who reported for duty but were discharged before they were mustered into the Federal service.

St. 1920, c. 609, does not extend to those within its provisions the exemption from all poll taxes conferred by Gen. St. 1919, c. 9.

St. 1920, c. 609, does not extend to those within its provisions a right to the abatement of the war poll tax of $3 imposed by Gen. St. 1919, c. 283, § 9, but application for such abatement must be made within ninety days of the date of the tax bill, as required by St. 1920, c. 608, § 2.

Abatements of the war poll tax of $3, made under Gen. St. 1919, c. 283, § 9, to those within the provisions of St. 1920, c. 609, may be certified and allowed under St. 1920, c. 552.

In your letter of June 14, 1920, you ask my opinion upon the following questions:

1. Is Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, still in force?

2. Are persons summoned in the draft, who duly reported for duty but who were discharged by reason of physical or mental disability before being mustered into the Federal service, entitled to the exemption from all poll taxes granted by said Gen. St. 1919, c. 9?

3. Are persons within the provisions of St. 1920, c. 609, entitled to an abatement of war poll taxes under Gen. St. 1919, c. 283, § 9, and if so must the application be made as required by St. 1920, c. 608, § 2?

4. May the abatements made under Gen. St. 1919, c. 283, § 9, pursuant to St. 1920, c. 609, be certified and allowed under St. 1920, c. 552?

1. Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, applies "during the continuance of the war." The latter act was approved on Feb. 17, 1919, over three months subsequent to the armistice. The phrase "during the continuance of the war" cannot, therefore, be construed to mean continuance of hostilities. It must refer to the legal termination of the war.
A state of war legally continues until terminated by a treaty of peace or by a proclamation of peace. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161; *Hijo v. United States*, 194 U. S. 315, 323. Neither of these events has as yet occurred. It follows that Gen. St. 1919, c. 9, was still in force on April 1, 1920, and operated to exempt those within its terms from the $5 poll tax imposed under Gen. St. 1919, c. 283, § 10. To avoid misconception, I may add that a discharge from the service prior to April 1, 1920, does not affect the operation of the act. The clause “and thereafter up to and including the year of their discharge” refers to a discharge subsequent to the termination of the war.

2. Gen. St. 1919, c. 9, applies to those “engaged in the military or naval service of the United States.” In my opinion those who have not been mustered into the service are not “engaged” therein, within the meaning of this provision. Those who were sent to camp but failed to pass the physical tests, and so were not mustered into the service, are not entitled to the exemption from poll taxes conferred by Gen. St. 1919, c. 9.

3. St. 1920, c. 609, § 1, provides as follows:—

Every person who was enlisted or inducted into the military service or who was called into the naval service of the United States during the war with Germany and who reported for duty at a mobilization camp, cantonment or naval station subsequent to February third, nineteen hundred and seventeen, and prior to November eighteenth, nineteen hundred and eighteen, shall be deemed to have been mustered into the federal service and to have reported for active duty within the meaning of section two of chapter two hundred and eighty-three of the General Acts of nineteen hundred and nineteen, notwithstanding the fact that such person was subsequently discharged from the draft or from further service on account of physical or mental disability, and if otherwise qualified shall be entitled to the benefits of said chapter two hundred and eighty-three: *provided*, that no benefit shall accrue under this act to a person who was discharged from the said service within thirty days after reporting for duty at such mobilization camp, cantonment or naval station.

I cannot find in St. 1920, c. 609, anything which extends to those within its provisions the exemption from taxation conferred by Gen. St. 1919, c. 9. Exemptions from taxation are
not to be lightly inferred, but must appear plainly, either from the express words or necessary intendment of the statute. *Milford v. County Commissioners*, 213 Mass. 162, 165; *Wheelwright v. Tax Commissioner*, 235 Mass. 584. Every section of St. 1920, c. 609, confers on the persons therein defined "the benefits of" Gen. St. 1919, c. 283. No section refers to Gen. St. 1919, c. 9. If it was the intention of the Legislature to confer as well the exemption from taxation granted by the latter act, it would have been easy to have so provided in unmistakable terms. In my opinion, the provision of St. 1920, c. 609, § 1, that the persons therein defined "shall be deemed to have been mustered into the federal service," was inserted for the limited purpose of extending to such persons the benefits of Gen. St. 1919, c. 283, and is not broad enough to include the exemption from taxation conferred by Gen. St. 1919, c. 9.

4. Assuming that St. 1920, c. 609, is constitutional, those persons who come within its terms are "entitled to the benefits of" Gen. St. 1919, c. 283, provided that such persons either actually possess the qualifications prescribed by the latter act or are "deemed" to possess them under the provisions of St. 1920, c. 609. Gen. St. 1919, c. 283, §§ 9 and 10, provide for the levy of a poll tax of $5 in the years 1920, 1921, 1922 and 1923, which is in effect an additional war poll tax of $3 levied during those years. Gen. St. 1919, c. 283, § 9, further provides, in part: —

Any person entitled to the benefits of this act shall, upon application to the board of assessors of the city or town in which he resides, receive an abatement of the additional war poll tax assessed upon him under the provisions of this section.

Clearly, the right to apply for and receive an abatement of this war poll tax of $3 is one of the benefits of Gen. St. 1919, c. 283. I am therefore of opinion that all persons to whom those benefits are extended by St. 1920, c. 609, are entitled to apply for and receive such abatement.

St. 1920, c. 608, § 2, provides as follows: —

No application for an abatement under this act, and no application for abatement made by a veteran of the world war under section nine of
chapter two hundred and eighty-three of the General Acts of nineteen hundred and nineteen, shall be considered unless made within ninety days from the date of the tax bill.

It places a limitation upon the right to abatement conferred by Gen. St. 1919, c. 283, § 9. It may be that the word "veteran" is not altogether apt as applied to some, at least, of the persons to whom St. 1920, c. 609, extends the benefits of Gen. St. 1919, c. 283. But those who thus receive the benefits of section 9 of said chapter 283 must take them subject to the limitation placed thereon by section 2 of said chapter 608.

I am therefore of opinion that those who by virtue of St. 1920, c. 609, claim the abatement permitted by Gen. St. 1919, c. 283, § 9, must apply within the ninety days prescribed by St. 1920, c. 608, § 2.

St. 1920, c. 552, expressly applies to abatements granted under Gen. St. 1919, c. 283, § 9. St. 1920, c. 609, grants to those within its terms the benefit of the abatement conferred by Gen. St. 1919, c. 283, § 9. I am of opinion that abatements made under said section 9, pursuant to St. 1920, c. 609, may be certified and allowed under St. 1920, c. 552.

Public Health — Tuberculosis Hospitals — Construction by Counties — Temporary supplying of Hospital Facilities — Counties of less than 50,000 Population.

Gen. St. 1916, c. 286, § 2, gives temporary authority to the county commissioners of any county to make an original contract for the care of tuberculosis patients up to April 1, 1921.

Gen. St. 1916, c. 286, § 5, gives permanent authority which may be exercised subsequently to April 1, 1921, by counties having a population of less than 50,000.

You ask for a construction of Gen. St. 1916, c. 286. You state that "the Department of Public Health maintains that section 2 is to be considered a temporary measure which enables a county to contract for the care of its tubercular citizens for the period until the county may build its own hospital. The
J. WESTON ALLEN, ATTORNEY-GENERAL.

Department also maintains that section 5 is to be a permanent arrangement for the counties whose population is less than 50,000. The county commissioners of Middlesex County have taken the ground that section 2 applies only to the counties mentioned in section 5, namely, those whose population is under 50,000, and that therefore they could not legally contract for the care of their tubercular citizens, under section 2, as their population is over 50,000." You request an interpretation of these two sections.

Section 2 reads as follows:—

A contract entered into before January first of the year nineteen hundred and seventeen for a term of years not less than five nor more than twenty-five, and approved by the state department of health after a petition made to the said department and a public hearing thereon, between (a) boards of county commissioners of two adjoining counties, or (b) boards of county commissioners of any county and the legally constituted authorities of any city within the same county, or (c) either county commissioners or the legally constituted authorities of cities of fifty thousand or more inhabitants and the trustees or authorities of any existing or future privately endowed tuberculosis institution, or the trustees of any fund available for the purpose of supplying hospital facilities for persons suffering from consumption, for the express purpose of supplying, within a reasonable time as provided in the conditions of approval of the state department of health, and guaranteeing adequate hospital provision for consumptives coming under the provisions of this act, shall be held to be satisfactory compliance with the provisions of this act for such counties, sections of counties, or for such cities or classes of individuals, as the case may be, as are designated in the contract; and such contracts shall, subject to the approval of the state department of health, be renewable upon such terms as shall be satisfactory to the contracting parties: provided, however, that if such contracts are not renewed and approved by the state department of health at least nine months before their expiration, or if the contracts are renewed and the state department of health shall refuse approval on the ground that by reason of changed circumstances the contract will be inadequate properly to protect the public health of the communities affected by it, and the contracting parties fail within six months before the time when the previous contract expires to agree to a renewal of the contract upon terms approved by the state department of health, the duties and obligations relative to supplying adequate hospital care for such counties, or sections of counties, cities or classes of individuals imposed upon county commissioners and city governments by this act shall be in full force and effect.
In my opinion, section 2 authorizes the county commissioners of any county to make an original contract for the care of tuberculosis patients up to the expiration of the period provided in said section, which was Jan. 1, 1917. This date has, however, been extended by Gen. St. 1919, c. 32, § 1, to April 1, 1921. The clause of said section which reads, "or the legally constituted authorities of cities of fifty thousand or more inhabitants," applies, in my opinion, to cities alone. This view is in accord with two opinions rendered by my predecessor to the Commissioner of Health on June 29, 1916, and July 6, 1916, respectively.

The question then arises whether Gen. St. 1916, c. 286, § 5, limits this authority. Section 5 reads as follows: —

County commissioners are authorized and directed, subject to the approval of the state department of health, to erect one or more hospitals within their respective counties to carry out the provisions of this act, or they may in the case of counties having a total population of less than fifty thousand inhabitants, as determined by the latest United States census, arrange to obtain tuberculosis hospital care for those consumptives coming within their jurisdiction by entering into a contract with a tuberculosis institution in a neighboring county in accordance with the provisions of section two. No new tuberculosis hospital shall be erected under the provisions of this act having a total capacity of less than fifty beds.

In my opinion this section does not affect the temporary authority which may be exercised under section 2 by all counties. It does provide a permanent authority which may be exercised subsequently to the date fixed by section 2, or any extension thereof, by counties having a population of less than 50,000. This special grant of authority to counties of less than 50,000 cannot be construed to repeal by implication the more general authority conferred by section 2.

I therefore advise you that the county commissioners of Middlesex County have authority to make an original contract for the care of tuberculosis patients up to April 1, 1921.
CONSTITUTIONAL LAW — APPROPRIATION BY LEGISLATURE—
DATE OF GOING INTO EFFECT.

An act of the Legislature, authorizing the payment of an annuity, which contains
no provision declaring it to be an emergency law, and which provides for the
payment of the annuity out of a particular item of an appropriation previously
made, is not an appropriation of money, within the meaning of Mass. Const.
Amend. XLVIII, The Referendum, Pt. III, § 2, and does not go into effect
until ninety days after it becomes a law.

You request my opinion as to the date on which Res. 1920,
c. 56, takes effect. Said chapter 56 provides as follows: —

Resolved, The metropolitan district commission may pay the sum of
six hundred dollars a year for three years to Isabel M. Ellis, wife of James
B. Ellis, a police officer in the employ of the commission, but now incapacitated from the further performance of active duty; also the sum of
six hundred dollars a year for three years to Catherine F. McCarthy,
widow of Richard M. McCarthy, who died December eighteen, nineteen
hundred and eighteen, from illness contracted in the performance of
his duties as a member of the metropolitan park police force. Should
Catherine F. McCarthy die leaving any minor child or children before
the expiration of three years, any balance remaining shall be paid to the
 guardian of such child or children to the end of the term. The amounts
provided for in this resolve shall be paid out of item six hundred and
thirty-five of the general appropriation act for the current year.

Mass. Const. Amend. XLVIII, The Referendum, Pts. I and
II, provide as follows: —

I. No law passed by the general court shall take effect earlier than
ninety days after it has become a law, excepting laws declared to be
emergency laws and laws which may not be made the subject of a refer-
endum petition, as herein provided.

II. A law declared to be an emergency law shall contain a preamble
setting forth the facts constituting the emergency, and shall contain the
statement that such law is necessary for the immediate preservation of
the public peace, health, safety or convenience. . . .

Mass. Const. Amend. XLVIII, The Referendum, Pt. III, § 2,
provides: —

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

Res. 1920, c. 56, authorizes the payment of annuities by the Metropolitan District Commission to the wife of a former employee of the Commission and to the widow of another employee of the said Commission. It does not set aside any money with which to pay these annuities. It makes reference to a particular item of appropriation previously made by the Legislature (St. 1920, c. 225, item 635), and thereby merely designates a particular appropriation out of which the money may be paid. I am of the opinion that such designation is not within the constitutional provision of Mass. Const. Amend. XLVIII, The Referendum, Pt. III, § 2, and that said Res. 1920, c. 56, does not appropriate money, within the meaning of said section.

As the said resolve contains no provision declaring it to be an emergency law, and as it has no relation to any of the excluded matter contained in said section 2, I am of the opinion that Res. 1920, c. 56, does not go into effect until ninety days after it became a law.

Elementary, Junior High and High Schools — Compulsory Courses in Civics and History.

Under the provisions of St. 1920, c. 411, all pupils in the elementary schools in the Commonwealth are obliged to take a course in history and a course in civics prior to their graduation from said schools, and at least one course in each of said subjects during their attendance at the public high school. The first two grades of the "junior high schools," so called, are considered as a part of the elementary schools, and the last grade as being a part of the public high schools.

You request my opinion as to the meaning of St. 1920, c. 411, which provides as follows: —

There shall be taught in all public elementary and high schools in the commonwealth courses in American history and civics for the purpose of promoting civic service and a greater knowledge of American history.
and of fitting the pupils, morally and intellectually, for the duties of citizenship. All pupils attending the said schools shall be required to take one or more of the courses herein specified at some time during their attendance at said schools.

Under the provisions of R. L., c. 42, § 1, the teaching of American history in the public elementary schools was required, while the teaching of civics in such schools was left within the discretion of the local school committees. These provisions were amended by Gen. St. 1917, c. 169, by virtue of which civil government was removed from those courses which were discretionary with the school committee and made a required course, the same as American history. As pupils in the elementary schools are obliged to take all of the courses given therein, the effect of the amendment was to make it obligatory upon all pupils therein to take a course of each of said subjects prior to their graduation from said schools.

As regards the public high schools, until the enactment of said chapter 411 the teaching of American history and civics was entirely discretionary with the school committee of each city and town. The intention of the Legislature, therefore, in enacting St. 1920, c. 411, was to extend the provisions of Gen. St. 1917, c. 169, so as to apply also to the public high schools. That being so, I am of the opinion that the word "courses," as used in the first sentence of said chapter 411, was unquestionably intended by the Legislature to mean at least one course in American history and at least one course in civics, rather than more than one course in American history and civics combined.

As the words "said schools," in the second sentence of said chapter 411, refer to the public elementary and to the public high schools, and as the courses specified are American history and civics, I am further of the opinion that all pupils attending the public elementary schools must take at least one course in both subjects during their attendance at such schools, and at least one course in both of said subjects during their attendance at the public high schools.

No provision for the establishment of junior high schools
is made in our statutes. Their establishment is of recent date, and is entirely discretionary with the local school committees. As at present constituted, the said schools consist of a three-year course. The first two years are equivalent to the two highest grades of the elementary schools, and the courses of study given therein are the same as those provided for in the said upper grades. The last year is equivalent to the first year in the high school and the courses of study are similar to those given in the first year of the high school. In the city of Boston these schools are known as intermediate schools. The mere fact that these schools are called junior high schools in some of the cities and towns of the Commonwealth does not necessarily constitute them high schools within the common and well-understood meaning of the said term and as the term is used in said act.

They are, in fact, a combination of the elementary and high schools, and inasmuch as the first two grades are equivalent to the two upper grades of the elementary schools, I am of the opinion that the first two upper grades of the said schools are to be considered as a part of the elementary schools, and included within the provisions of the said act which apply to the elementary schools, and the last grade as being a part of the public high schools, and included within the provisions of the said act which apply to the high schools.

State Police — Pension — Consolidation Act.

The provisions of St. 1911, c. 675, § 1, apply to former officers of the district police who are appointed to the State Police under the provisions of Gen. St. 1919, c. 350, § 101.

You have requested my opinion as to whether or not the provisions of St. 1911, c. 675, § 1, apply to officers appointed by you under the provisions of Gen. St. 1919, c. 350, § 101.

St. 1911, c. 675, § 1, provides: —

Any member of the district police who, in the judgment of the governor, is disabled for useful service in that department, and who is certified
by a physician, designated by the governor, to be permanently incapacitated either physically or mentally, by injuries sustained through no fault of his own, in the actual performance of his duty, for the further performance of his duty in the department, and any member of the said department who has performed faithful service for the commonwealth for not less than twenty years, and is, in the judgment of the governor, incapacitated for further service as a member of the said department, shall, if he so requests, be retired, and shall annually receive a pension equal to one half of the compensation received by him at the time of his retirement.

Gen. St. 1919, c. 350, § 101, provides: —

The commissioner shall be the executive and administrative head of the department. He shall have charge of the administration and enforcement of all laws, rules and regulations which it is the duty of the department to administer and enforce, and shall direct all inspections and investigations except as is otherwise provided herein. He shall organize the department in three divisions, namely, a division of state police under his own immediate charge, a division of inspection under the charge of a director to be known as chief of inspections, and a division of fire prevention under the charge of a director to be known as state fire marshal. The state fire marshal and the chief of inspections shall be appointed by the governor, with the advice and consent of the council, for the term of three years, and may, with like approval, be removed. The directors shall receive such annual salary, not exceeding four thousand dollars, as the governor and council may determine. The commissioner may, subject to the civil service law and rules where they apply, appoint, transfer and remove officers, inspectors, experts, clerks and other assistants, and, subject to the provisions of chapter two hundred and twenty-eight of the General Acts of nineteen hundred and eighteen, and the rules and regulations made thereunder, and to the approval of the governor and council where that is required by law may fix the compensation of the said persons.

Section 4 of said chapter 350 provides as follows: —

Persons who, at the time when this act takes effect, are appointed to or employed by an office, board, commission or other governmental organization or agency abolished by this act, and are appointed to positions in any of the departments established hereby, shall retain all rights to retirement with pension that shall have accrued or would thereafter accrue to them, and their services shall be deemed to have been continuous, as if this act had not been passed. This act shall not be construed to
reduce the compensation of present employees who are appointed to positions under the terms of the act where the compensation of such employee is specifically fixed by statute.

Accordingly, it is my opinion that the provisions of said section 1 of chapter 675 do apply to those officers appointed by you under section 101 of said chapter 350, said officers having been appointed by you to take the place of the district police force which was abolished by section 99 of said chapter 350.


St. 1920, c. 424, § 1, which increases the salary of certain officers, is not an act which "appropriates money for the current or ordinary expenses of the Commonwealth or for any of its departments, boards, commissions or institutions," within the meaning of Mass. Const. Amend. XLVIII, The Referendum, Pt. III, § 2.

An appropriation act defined.
An act which contains no emergency preamble and which may be the subject of a referendum petition takes effect ninety days after it becomes a law.

You request my opinion as to whether St. 1920, c. 424, being an act relative to the practice of dentistry, which was approved by His Excellency the Governor on May 7, 1920, is subject to the ninety-day clause of the Constitution.

St. 1920, c. 424, § 1, provides:—

Chapter three hundred and one of the General Acts of nineteen hundred and fifteen is hereby amended by striking out section three and substituting the following: — Section 3. The chairman and secretary of the board of dental examiners shall each receive an annual salary of eight hundred dollars, and the other members of the board shall each receive an annual salary of six hundred dollars. Each member of the board shall receive in addition to his salary his necessary travelling expenses actually incurred in attending meetings of the board: provided, that he files an itemized account thereof with the auditor of the commonwealth. The said salaries and expenses shall be paid out of the treasury of the commonwealth. . . .

Mass. Const. Amend. XLVIII, The Referendum, Pts. I and II, provide as follows: —
I. No law passed by the general court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

II. A law declared to be an emergency law shall contain a preamble setting forth the facts constituting the emergency, and shall contain the statement that such law is necessary for the immediate preservation of the public peace, health, safety or convenience.


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

The mere passage of an act by the Legislature, the carrying out of which will necessitate the expenditure of moneys from the treasury of the Commonwealth, does not of itself constitute an appropriation. What is necessary is explicit language setting apart or making available a sum of money to be applied towards the carrying out of the particular purposes of the act, or a general appropriation bill in which a sum of money is set apart or made available to be applied towards expenditures in a particular department or for a particular purpose, as mentioned therein.

St. 1920, c. 424, § 1, increases the salary of the chairman, secretary and members of the Board of Dental Examiners. It does not set aside or make available any money with which to pay these increases. If no further steps had been taken the additional salaries could not be paid. This additional step was later taken by St. 1920, c. 225, item 405. By this later enactment the Legislature recognized that St. 1920, c. 424, § 1, is not an act which "appropriates money," within the constitutional provision.
As St. 1920, c. 424, § 1, is not an emergency measure and does not contain any provision which fixes the date when the increases shall take effect, and as it does not come within any of the excluded matters contained in said section 2 of Part III, quoted above, and is therefore the subject of a referendum petition, I am of the opinion that this statute does not take effect until ninety days after it became a law, and that the increases do not become effective until that time.

CONSTITUTIONAL LAW — POLITICAL PARTY — OFFICES — WOMEN.

Members of ward, town and city committees and delegates to State conventions are not public officers, and the selection of such members and delegates is subject to no constitutional inhibition.

St. 1913, c. 835, as amended by Gen. St. 1919, c. 269, does not prohibit the selection of women to be members of ward, town or city committees or delegates to State conventions.

Under U. S. Const., art. II, § 1, cl. 2, a State Legislature may permit the appointment of a woman as a presidential elector, or to be a delegate to a convention which nominates such electors.

You have requested my opinion as to the right of women to be members of ward and town committees and to be delegates to a State convention.

St. 1913, c. 835, § 89, as last amended by Gen. St. 1919, c. 269, § 9, provides: —

Each political party shall, in every ward and town, elect at the primaries before each biennial state election, a committee to be called a ward or a town committee, to consist of not less than three persons, who shall hold office for two years from the first day of January next following their election and until their successors shall have organized.

The members of the several ward committees of a political party in a city shall constitute a committee to be called a city committee.

Each town committee shall, between the first day of January and the first day of March next following their election, and each ward and city committee shall, within thirty days after the beginning of its term of office, meet and organize by the choice of a chairman, a secretary, a treasurer and such other officers as it may decide to elect. At such meeting the committee may add to its numbers.
The secretary of each city and town committee shall, within ten days after its organization, file with the secretary of the commonwealth, with the city or town clerk and with the secretary of the state committee of the political party which it represents, a list of the officers and members of the committee.

A vacancy in the office of chairman, secretary or treasurer of a city, ward or town committee shall be filled by the committee, and a vacancy in the membership of a ward or town committee shall be filled by such committee, and a statement of any such change shall be filed as in the case of the officers first chosen.

St. 1913, c. 835, § 92, provides: —

A state, city or town committee may make rules and regulations, not inconsistent with law, for its proceedings and relative to caucuses called by it, and may fix the number of persons of whom it shall consist, which number shall be announced in the call for the meeting at which they are to be chosen. Each city or town committee may make reasonable regulations, not inconsistent with law, to determine membership in the party, and to restrain persons not entitled to vote at caucuses from attendance thereat or taking part therein. But no political committee shall prevent any voter from participating in a caucus of its party for the reason that the voter has supported an independent candidate for political office. A state committee may make rules and regulations, not inconsistent with law, for calling conventions.

Section 126 of said chapter 835 reads as follows: —

A political party may, upon the call of its state committee, but not earlier than one week nor later than two weeks, after the holding of the primaries, hold a state convention for the purpose of adopting a platform, electing such number of members at large of the state committee as may be fixed by the state committee, nominating presidential electors, and for such other purposes not inconsistent with this act as the state committee or the convention may determine. Such convention shall consist of the delegates elected at the state primary (in number not less than one for each ward and town), the members of the state committee, the United States senators from Massachusetts who are members of the party, the nominees of the party for all offices to be filled at the state election, and in years in which no elections are held for such offices, the incumbents of those offices who are members of the party.

Ward, town and city committees are political committees in which is vested a share of the government of a political party;
but since the members of such committees exercise no portion of the sovereign power, they are not public officers, and the fact that the Legislature regulates their conduct by statute does not make them public officers. *Attorney-General v. Drohan*, 169 Mass. 534. Lewis and Putney Handbook on Election Law, § 18.

The election laws, which include the regulation of political committees, are intended "to enable those who have the elective franchise to exercise it freely and safely and to make it certain that the will of the electors thus exercised shall be truly ascertained and given effect." *Jaquith v. Selectmen of Wellesley*, 171 Mass. 138, 142. Delegates to a State convention also exercise a share in the government of a political party, but are not entrusted with any portion of the sovereign power.

Broadly speaking, the convention is the judge of its membership. Our statutes in the case of both local committees and State conventions provide that the party shall control the membership in such committees and conventions. St. 1913, c. 835, §§ 92 and 126. Such statutory regulations as exist go no farther "than to prevent error and fraud, to secure order and regularity in the conduct of elections, and thereby give more security to the right itself." *Capen v. Foster*, 12 Pick. 485; *Kinneen v. Wells*, 144 Mass. 497; *Commonwealth v. Rogers*, 181 Mass. 184.

The Constitutions both of the United States and of the Commonwealth of Massachusetts are concerned with public officers and the right of the elective franchise by which certain public officials are chosen, but they contain no mention of political parties or the committees or conventions thereof. Except as limited by the provisions of the Fifteenth Amendment to the Constitution of the United States, the qualifications of voters are determined either by our own Constitution or, in certain special cases, by statute. *Kinneen v. Wells*, 144 Mass. 497; *Opinion of the Justices*, 115 Mass. 602; II Op. Atty.-Gen. 469. But as the officers in question are not public, and as the incumbents thereof are not public officials, it is clear that there is no constitutional inhibition against choos-
ing as a committeeman or delegate whatever person the party members desire. The person so chosen exercises in the performance of his duties and privileges no elective franchise.

Since there is no constitutional objection to women serving on ward or town committees or as delegates to a State convention, we must examine the statutes to see if they are in any way precluded thereby from acting as such.

St. 1913, c. 835, § 89, quoted above, provides that the committee shall consist of "not less than three persons," and section 92 provides that "such committee may make regulations not inconsistent with law for its proceedings and to determine membership in the party."

The word "person" is not made the subject of special definition in the election laws, and so has no narrow and technical signification. The provisions as to the elective franchise depend not upon membership in a political party but upon being a "voter," which is defined as a "registered male voter."

Mass. Const. Amend. III; St. 1913, c. 835, § 1.

The word "person," like the word "citizen," is broad enough to include both men and women. See Minor v. Happersett, 21 Wall. 162. I find no good reason for reading a sex limitation into the present section. But cf. Op. Atty.-Gen., Vol. V, 479. In some instances the rules and regulations adopted by the committee or convention may be so drawn as to exclude women, but that is a matter for it to decide.

It is therefore my opinion that neither the Federal nor the State Constitution nor the laws of the Commonwealth forbid women to be members of ward or town committees or delegates to a State convention.

Assuming that women delegates have been elected, a question might arise as to their right to nominate presidential electors. This question is not directly raised by your inquiry, but the answer thereto is pertinent to the issue already considered in this opinion.

U. S. Const., art. II, § 1, par. 2, provides that "each state shall appoint, in such manner as the legislature thereof may direct," electors for president and vice-president. As this
power is conferred upon the States by the Federal Constitution, it must be exercised in conformity therewith. But a wide choice as to the mode of exercise is given to the State Legislatures. Such appointment may be made by the Legislature directly or by popular vote in districts or by general ticket, as the Legislature may provide. McPherson v. Blacker, 146 U. S. 1. As a practical matter, most of the States appoint such electors by popular vote, either by districts or by general ticket, some States having one provision and some the other.

Under the doctrine of McPherson v. Blacker, supra, the Legislature might, in my opinion, appoint a woman as a presidential elector. It might equally permit the people to appoint her by their ballots. If so, it seems clear that the Legislature may permit a woman to sit and vote in the convention which nominates such electors. It has already been shown that our Legislature allows the party to determine who shall sit in the party convention. It follows that women may sit as delegates if the party so permits. I am therefore of opinion that the appointment of an elector could not successfully be assailed because women participated as delegates in the convention which nominated such elector. Moreover, unless a candidate actually lost the nomination as elector through the votes of women delegates, he would have no ground for complaint. Mansfield v. Hutchings (House, 1886); Howard v. Neill (Senate, 1889); Andrews v. Gardner (House, 1900); all reported in Massachusetts Election Cases. And if he did complain it would seem that the action of the convention in seating such delegates may well be conclusive. Walling v. Lansdon, 15 Ida. 282; State v. Liudahl, 11. N. D. 320; In re Fairchild, 151 N. Y. 359. On all grounds, therefore, it is my opinion that women may be admitted by a party to its party convention, and if so admitted, may lawfully participate in nominating presidential electors.
Taxation — Income Tax — Stock Dividend.

A stock dividend paid before Jan. 1, 1919, omitted from a taxpayer's return, is taxable after the passage of St. 1920, c. 352, exempting stock dividends received in 1919 and thereafter. There is nothing in the Federal law or decisions forbidding this Commonwealth to tax stock dividends.

A foreign corporation declared on Nov. 30, 1917, a stock dividend in new common stock of the same company. A Massachusetts taxpayer who received this stock omitted to include it in his tax return for 1918, and the omission has been discovered by a recent audit. You ask my opinion as to whether he is now taxable on account of said dividend.

In 1918, Gen. St. 1916, c. 269, § 2, par. (b), was in force. This paragraph, in combination with the first sentence of section 2, reads, in part, as follows:—

Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum:

(b) Dividends on shares in all corporations . . . organized under the laws of any state . . . other than this commonwealth, except . . .

The constitutionality of this provision was upheld in Tax Commissioner v. Garfield, 227 Mass. 522. In that case a stock dividend, declared out of an accumulation of earnings invested, prior to the passage of the income tax act in permanent plant additions, was held taxable as income, within the meaning of Mass. Const. Amend. XLIV.

On March 8, 1920, the Supreme Court of the United States, in deciding the case of Eisner v. Macomber, 252 U. S. 189, followed the reasoning of Towne v. Eisner, 245 U. S. 418, and held that dividends in stock of the issuing corporation were not income, within the meaning of the Sixteenth Amendment to the Constitution of the United States.

On April 23, 1920, chapter 352 of the Acts of 1920 was approved by the Governor. This act amended paragraph (b) supra, so as to read:—
Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations . . . organized under the laws of any state . . . other than this commonwealth, except . . .

Section 2 of the same act provided:—

This act shall take effect as of the first day of January, nineteen hundred and twenty, and shall apply to dividends received in the year nineteen hundred and nineteen as well as in the current year and in all subsequent years.

From the limitation in section 2 it is clear that the provisions of paragraph (b) of section 2 of the 1916 act, so far as they provide for the taxation of stock dividends, are not repealed but are made inoperative only as regards such dividends received in 1919 and subsequent years; and that the taxpayer mentioned in your letter is liable for a tax under the provisions of the 1916 law unless Eisner v. Macomber overrules Tax Commissioner v. Garfield.

Although "the Massachusetts income tax amendment . . . is substantially identical with the Federal amendment" (dissenting opinion of Justice Brandeis, Eisner v. Macomber), the majority of the court, while refusing to accept the reasoning in the cases of Tax Commissioner v. Putnam and Tax Commissioner v. Garfield, 227 Mass. 522, remarked that "the Massachusetts court was not under any obligation like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction." Earlier in their opinion the majority discussed at some length the "other constitutional provisions" (Federal Income Tax Service, 1920, §§ 2584 to 2588, inclusive), and also distinguished the case of Swan Brewery Co., Ltd. v. Rex (1914), A. C. 231.

The Garfield case determined the meaning of the word "income," as used in our State Constitution. That is a question of State law upon which the Supreme Court accepts the decision of the State court. Smiley v. Kansas, 196 U. S. 447, 455. The Federal question which would then arise under the Garfield case is whether the State Constitution, as so construed by
the State court, is in conflict with the Federal Constitution. *Eisner v. Macomber* does not decide that question, and does not warrant any inference that the Federal Constitution forbids Massachusetts to tax stock dividends.

It therefore follows that the taxpayer referred to should be required to pay a tax on such stock, and should be assessed therefor under the provisions of Gen. St. 1916, c. 269, § 14.

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**Taxation — Income Tax — Exemption — Stock Dividend by Trust, the Beneficial Interest in which is represented by Transferable Shares.**

St. 1920, c. 352, exempts from taxation as income a stock dividend declared in 1919 by an association, the beneficial interest in which is represented by transferable shares.

An association, the beneficial interest in which is represented by transferable shares, issued in 1919 a dividend in new stock of the association. The association has not filed an agreement to pay taxes, and dividends paid to shareholders are taxable in accordance with the provisions of Gen. St. 1916, c. 269, § 2, par. (c). You have asked my opinion whether the stock dividend declared in 1919 is taxable.

The material portion of Gen. St. 1916, c. 269, § 2, pars. (b) and (c), prior to the amendment of said section by St. 1920, c. 352, provided as follows:—

Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum.

. . . . . . . . . . . . . . . . . . . . . .

(b) Dividends on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, except, . . .

(c) Dividends on shares in partnerships, associations or trusts, the beneficial interest in which is represented by transferable shares, except . . .

In *Tax Commissioner v. Putnam*, 227 Mass. 522, decided in June, 1917, it was held that a stock dividend paid in new stock
of the corporation issuing the same was "income," within the meaning of Mass. Const. Amend. XLIV, and was taxable under this section.

The material portion of St. 1920, c. 352, entitled "An Act to exempt stock dividends from taxation as income," provides as follows:—

SECTION 1. Section two of chapter two hundred and sixty-nine of the General Acts of nineteen hundred and sixteen, as amended by chapters seven and one hundred and twenty of the General Acts of nineteen hundred and eighteen and as affected by chapter one hundred and fifty of the General Acts of nineteen hundred and eighteen, is hereby further amended by inserting after the word "dividends," in the first line of paragraph (b), the words: — other than stock dividends paid in new stock of the company issuing the same, — so that said paragraph will read as follows: — (b) Dividends, other than stock dividends paid in new stock of the company issuing the same, on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, . . .

SECTION 2. This act shall take effect as of the first day of January, nineteen hundred and twenty, and shall apply to dividends received in the year nineteen hundred and nineteen as well as in the current year and in all subsequent years.

It will be observed that said chapter 352 in terms amends paragraph (b) of section 2 of said chapter 269, and is silent as to paragraph (c) of said section.

The stock dividend in question was paid in 1919 by an association described in paragraph (c). The question, therefore, is whether the exemption conferred by St. 1920, c. 352, includes by implication stock dividends paid in the shares of the partnership, association or trust which issues them.

Exemptions from taxation are not to be lightly inferred but must appear plainly, either from the express words or necessary intendment of the statute. Milford v. County Commissioners, 213 Mass. 162, 165; Wheelwright v. Tax Commissioner, 235 Mass. 584. But the manifest intention of the Legislature, as gathered from its language, considered in connection with the existing situation and the object aimed at, is to be carried out. Moore v. Stoddard, 206 Mass. 395, 398; Bergeron, Peti-
The title of the act (Wheelwright v. Tax Commissioner, supra) and the state of the law prior to its passage (Bergeron, Petitioner, 220 Mass. 472, 475) may both be considered in order to ascertain the legislative purpose. If that intent can be determined with reasonable certainty, and a literal construction of the act would produce an unreasonable and unjust result, inconsistent with such intent, the intent must prevail over the strict letter. Stanie1s v. Raymond, 4 Cush. 314, 316; Somerset v. Dighton, 12 Mass. 383, 384; Burlingame v. Bell, 16 Mass. 318, 319; Church of Holy Trinity v. United States, 143 U. S. 457, 461.

The state of the law prior to the passage of St. 1920, c. 352, is very significant. As has already been pointed out, Tax Commissioner v. Putnam, 227 Mass. 522, decided in June, 1917, held that stock dividends paid by a corporation in its own stock were "income," and were taxable under Gen. St. 1916, c. 269, § 2. Towne v. Eisner, 245 U. S. 418, decided in January, 1918, held that such stock dividends were not "income," within the meaning of the Federal income tax act of Oct. 3, 1913, 38 Stat. 114, 166, 167, and were not taxable thereunder. Eisner v. Macomber, 252 U. S. 189, held that such stock dividends were not "income," within the meaning of the Sixteenth Amendment to the Federal Constitution, and could not constitutionally be taxed thereunder. The reasoning of the court in both cases was that such stock dividend does not enrich the stockholder, since it leaves unchanged his proportional interest in the corporation, and simply evidences a transformation of surplus and undivided profits into capital by additional stock certificates. Neither decision, of course, controls or modifies Tax Commissioner v. Putnam, supra, since neither determines the power of Massachusetts to tax income under its own Constitution. The result, therefore, was that Massachusetts taxed such stock dividends, while the United States did not.

St. 1920, c. 352, was approved on April 23, 1920, about seven weeks after the decision in Eisner v. Macomber, supra, was rendered. It is entitled "An Act to exempt stock divi-
dends from taxation as income.” The language of the title is broad enough to include stock dividends issued by partnerships, associations and trusts having transferable shares. The words inserted by the amendment, namely, “other than dividends paid in new stock of the company issuing the same,” in no way exclude stock dividends paid by partnerships, associations and trusts, since the word “company” is broad enough to apply both to incorporated and unincorporated associations. These circumstances, and the broad language of both title and amendment, indicate, in my opinion, that the intention of the Legislature was to exempt all stock dividends from taxation as income, and thereby to bring our tax law into harmony in this respect with the Federal income tax law.

To construe the exemption as applicable to stock dividends paid by corporations and joint stock companies only would produce results so unjust and unreasonable that such an intention should not be imputed to the Legislature, if it can be avoided. A stock dividend paid by a partnership, association or trust in its own shares differs in no essential particular from a similar dividend paid by a corporation or joint stock company. Under this narrow construction the one would be taxable as “income,” the other would not be taxable as “income.” The distinction would be based, not upon any difference in the nature of the dividend or in the nature of the property from which it is derived, but solely upon the legal form of the organization which pays it. If the tax were upon the organization, such a distinction may be supported. *Eliot v. Freeman*, 220 U. S. 178. But where the tax is upon the thing paid and not upon the party who makes the payment, a distinction which makes the taxability of stock dividends depend upon whether the organization which pays them does or does not possess a charter or franchise is not to be supported if the act is susceptible of a more just construction.

Indeed, such a construction would raise a very serious constitutional question. *Mass. Const. Amend. XLIV* provides, in part:

Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter pro-
vided. Such tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements.

The tax on dividends is a tax upon income derived from invested capital. It is therefore a tax upon income derived from property. The amendment permits the tax to be "at different rates upon income derived from different classes of property," but requires that it be uniform "upon income derived from the same class of property." See Tax Commissioner v. Putnam, 227 Mass. 522, 531, 532. The construction suggested does not classify stock dividends with reference to the nature of the property from which they are derived, but with reference to whether the organization which pays them is incorporated or unincorporated. It may well be that such a classification is not permitted by Amendment XLIV. Conceivably, also, such a classification might be held to be arbitrary, under the Fourteenth Amendment to the Federal Constitution. As the evident purpose of the Legislature was to rectify what it deemed to be an injustice, I do not feel justified in placing upon the act a construction which not only lays it open to serious constitutional attack, but also perpetrates a still greater injustice.

I therefore advise you that, in my opinion, the "necessary intendment" of St. 1920, c. 352, is to exempt stock dividends paid by partnerships, associations and trusts in the shares of the company issuing the same, and therefore that the dividend in question is not taxable.
Public Health — Notice of Contagious Diseases — Physician.

The notice of contagious disease, required by R. L., c. 75, § 50, to be given by the attending physician, should be given to the authorities of the city or town in which the patient is under treatment, rather than to the authorities of the city or town where the patient resides.

R. L., c. 75, § 50, as amended by St. 1907, c. 480, § 1, provides: —

If a physician knows that a person whom he is called to visit is infected with smallpox, diphtheria, scarlet fever or any other disease declared by the state board of health to be dangerous to the public health, or if one or both eyes of an infant whom or whose mother he is called to visit become inflamed, swollen and red, and show an unnatural discharge within two weeks after the birth of such infant, he shall immediately give notice thereof in writing over his own signature to the selectmen or board of health of the town; and if he refuses or neglects to give such notice, he shall forfeit not less than fifty nor more than two hundred dollars for each offence.

In reply to your question whether the report required shall be made to the authorities of the town where the physician practices or of the town where the patient dwells, I am of opinion that it should be made to the authorities of the town where the patient is under treatment. The purpose of the act is to afford protection to a community against an infection, and so safeguard the public health, and it is therefore clear that the information should be given to the selectmen or board of health of the town in which he is attending the patient.
Wrentham State School — Temporary Leave of Absence — Discharge.

An inmate who is permitted to leave the Wrentham State School temporarily, in the custody of her father, and who willfully absents herself from such custody within one year, remaining absent from the school for more than a year, is not deemed to be discharged under the provisions of St. 1909, c. 504, § 75, as amended.

You state the following facts: An inmate of the Wrentham State School is permitted to leave the institution temporarily, in charge of her father, and before the expiration of a year she absents herself from her father’s home and custody and remains absent until more than a year has elapsed since she left the school. You request my opinion whether she shall be deemed to be discharged.

St. 1909, c. 504, § 75, as finally amended by Gen. St. 1917, c. 48, § 1, provides: —

The superintendent or manager of any hospital or receptacle described in section seven may permit any inmate thereof temporarily to leave such institution in charge of his guardian, relatives, friends, or by himself, for a period not exceeding twelve months, and may receive him when returned by any such guardian, relative, friend, or upon his own application, within such period, without any further order of commitment. The superintendent may require as a condition of such leave of absence, that the person in whose charge the patient is permitted to leave the institution shall make reports to him of the patient’s condition. Any such superintendent, guardian, relative or friend may terminate such leave of absence at any time and authorize the arrest and return of the patient. The officers mentioned in section eighty-six shall cause such a patient to be arrested and returned upon the request of any such superintendent, guardian, relative or friend. Any patient who has not returned to the institution at the expiration of twelve months shall be deemed to be discharged therefrom.

Assuming that the superintendent was informed of the escape, if I may call it that, before the expiration of a year, and promptly attempted to recover custody of the former inmate, the superintendent would be deemed to have terminated the leave of absence, within the meaning of the statute, and when he located the patient he could resume custody of her without
further proceedings. Her situation after termination of her leave of absence would be the same as that of any other escaped inmate.

Assuming, however, that the superintendent did not take steps to recover the girl until he learned of her whereabouts, perhaps more than a year after her departure from the school, I should still be of opinion that he might resume custody of her. The quoted statute permits the superintendent to substitute for his own active control the control of a parent, guardian, relative or friend; the patient is not discharged by the temporary release, but the superintendent's control over her is qualified while she remains absent. An escape from this qualified control is still an escape. The statute plainly contemplates that the period of release not exceeding one year shall be passed by the patient in the charge of the person designated by the superintendent and under the qualified control of the superintendent, so that she may be closely observed and her leave of absence terminated if her best interests so require. A year passed under conditions that do not permit this observation and do not permit any control whatever by the superintendent or the person designated by him to be in charge of the patient does not satisfy the requirements of the statute.

PARKS AND RESERVATIONS — DELEGATION OF DUTY TO ENFORCE GAME LAWS.

The officials in charge of reservations, parks, etc., cannot delegate to the Division of Fisheries and Game the duty imposed upon them by St. 1909, c. 362, § 2, to prevent hunting without a license in such reservations, parks, etc. But the Division of Fisheries and Game must enforce the game laws in such reservations, parks, etc., as in other parts of the Commonwealth.

St. 1909, c. 362, § 1, provides that no person shall hunt or destroy wild birds or game "within the exterior boundaries of any state reservation, park, common or any land held in trust for public use," except that the authorities having control of such lands may issue licenses to hunt birds or game
"not now protected by law." Section 2 provides that "the boards, officials and persons having charge of reservations, parks, commons and lands held for public use shall enforce the provisions of this act." You request my opinion whether such boards, officials and persons may delegate their authority and duty to enforce the act to the Division of Fisheries and Game.

I am of opinion that the duty imposed by the statute upon officials in charge of public parks and other public lands is unconditional and very definite, and that such officials cannot delegate their statutory duty to the Division of Fisheries and Game or any other agency. If the law were otherwise, any public officer could avoid performing his duties by the expedient of delegating them to some other person or agency, perhaps even to a private individual. Moreover, the provisions of our Constitution and statutes relative to the duties of public officers, departments and boards and to the distribution of governmental powers would be set at naught, and various persons would be exercising governmental powers with no legislative authority therefor. I think there is no escape from the principle that public officers who have duties imposed upon them by law must perform those duties, and persons who do not have duties imposed upon them by law are not authorized to perform the duties imposed upon others.

This does not mean, however, that the Division of Fisheries and Game has no jurisdiction to protect wild birds and game within the boundaries of public parks and similar lands. R. L., c. 91, § 4, provides: —

The commissioners and their deputies, members of the district police and all officers qualified to serve criminal process may arrest without warrant any person whom they find violating any of the fish or game laws, except that persons engaged in the business of regularly dealing in the buying and selling of game as an article of commerce shall not be so arrested for having in possession or selling game at their usual places of business.

It will be observed that this statute contains no words excepting from its operation the lands in question. It will also
be observed that the act of 1909 does not impose upon persons in charge of public parks and similar lands a duty to enforce the game laws, but rather a duty to prevent any killing of wild birds within the boundaries of lands controlled by them, whether such killing is or is not done in violation of the game laws. It follows that the Division of Fisheries and Game, which is the legal successor of the Commissioners on Fisheries and Game, may exercise within the boundaries of public parks, reservations, et cetera, whatever powers it has to enforce the game laws, although, if the game laws are not violated, only the persons in charge of parks, reservations, et cetera, have power to prevent the killing thereon of wild birds and game.

Taxation — War Poll Tax — Abatement — Persons who receive Bonus payable to Dead Soldier or Sailor, had he lived.

A person who becomes entitled under Gen. St. 1919, c. 283, § 3, to the bonus to which a dead soldier or sailor would have been entitled under section 2 of said act if he had lived, is not entitled to the $3 abatement of war poll taxes allowed by section 9 of said act.

You inquire whether persons who, under Gen. St. 1919, c. 283, § 3, receive the $100 bonus which would have been payable, had he lived, to a person within the provisions of section 2 of said act, are entitled to the $3 abatement of war poll taxes allowed by section 9 of said act.

Section 2 of said act provides as follows:

Upon application, as hereinafter provided, there shall be allowed and paid out of the treasury of the commonwealth, to each commissioned officer, enlisted man, field clerk and army or navy nurse duly recognized as such by the war or navy department, who was mustered into the federal service and reported for active duty subsequently to February third, nineteen hundred and seventeen and prior to November eleventh, nineteen hundred and eighteen, and to each commissioned officer, warrant officer, nurse and enlisted man, who enlisted or was enrolled in, or was mustered into the federal service and who had been called and reported for active duty in the United States Navy, United States Naval Reserve
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Forces, United States Marine Corps, United States Coast Guard, or the National Navy Volunteers, subsequently to said February third, and prior to said November eleventh, and to every man who served during the war in the regular army, navy or marine corps, or to the dependents or heirs at law of the persons above enumerated, as provided in section three, the sum of one hundred dollars: provided, that every person on account of whose service the application is filed had been a resident of the commonwealth for a period of not less than six months immediately prior to the time of his entry into service; and further provided, that no benefits shall accrue under this act because of the service of any person appointed to or inducted into the military or naval forces who had not reported for duty on or prior to November eleventh, nineteen hundred and eighteen at the military cantonment or the naval station to which he was ordered, or who was discharged from service or relieved from active duty and not recalled to the colors prior to January fifteenth, nineteen hundred and eighteen, but in all cases of death in service or discharge for physical incapacity received in the line of duty the full amount of one hundred dollars shall be payable notwithstanding the provisions of this section.

Section 3 of said act provides as follows: —

In the case of the decease of any person who would if alive be entitled to the benefits of this act, the sum named therein shall be paid to his dependents, if any, and otherwise to his heirs-at-law: provided, that if there is more than one dependent, or heir-at-law, payments shall in either case be made in such proportions as the treasurer and receiver-general shall determine, and in determining the order of precedence so far as practicable the following order shall be observed: wife and children, mother or father, brother or sister, other dependents; provided, however, that no right or payment under this act shall be subject to the claims of creditors, capable of assignment, regarded as assets legal or equitable of the estate of the deceased or made the basis for administration thereof.

The material portion of section 9 of said act provides: —

... Any person entitled to the benefits of this act shall, upon application to the board of assessors of the city or town in which he resides, receive an abatement of the additional war poll tax assessed upon him under the provisions of this section.

Section 10 amends St. 1909, c. 490, Pt. I, § 1, so as to read as follows: —


In and for the years nineteen hundred and twenty, nineteen hundred and twenty-one, nineteen hundred and twenty-two and nineteen hundred and twenty-three a poll tax of five dollars and thereafter a poll tax of two dollars shall be assessed on every male inhabitant of the commonwealth above the age of twenty years, whether a citizen of the United States or an alien.

The precise question, therefore, is whether the person or persons who under sections 2 and 3 receive the bonus which would have been payable to the dead soldier or sailor, had he lived, are persons "entitled to the benefits of this act," within the meaning of section 9.

There can be no question as to the class for whose benefit the act was passed. It is entitled "An Act to provide suitable recognition of those residents of Massachusetts who served in the army and navy of the United States during the war with Germany." The title is, in a legal sense, a part of every act, and may be considered in determining its construction. Wheelwright v. Tax Commissioner, 235 Mass. 584. The title is reinforced by the preamble, which declares that the purpose of the act is "to provide prompt recognition of Massachusetts men upon their discharge from the military and naval forces of the United States." Section 1 further declares:

In order to promote the spirit of patriotism and loyalty, in testimony of the gratitude of the commonwealth, and in recognition of the services of certain residents of Massachusetts in the army and navy of the United States during the war with Germany, to the full extent of the demands made upon them and of their opportunity, the payments hereinafter specified are hereby authorized.

Section 2 requires that the recipient of the bonus, in his own right, shall have been actually mustered into or enrolled in certain designated branches of the Federal service, and have reported for active duty subsequent to Feb. 3, 1917, and prior to Nov. 11, 1918, and further, must not have been discharged therefrom prior to Jan. 15, 1918, except by death or on account of physical incapacity received in line of duty. See opinion rendered to you under date of July 8, 1920 (Op. Atty.-Gen., Vol. V, 601). Taking these provisions together, it
is plain, in my opinion, that the Legislature intended that those who, in their own right, should be entitled to the benefits of the act should be those who were mustered into the Federal service and reported for active duty therein.

The right to the bonus conferred by section 3 is of purely derivative character. Those within this section have not rendered the active service which the Legislature intended to recognize and reward. They must claim, either as dependents or heirs-at-law, under one "who would if alive be entitled to the benefits of this act." By this significant phrase the Legislature has, in my opinion, distinguished between those who by reason of active service are entitled "to the benefits of this act" and those who receive the bonus or some part thereof in a purely representative capacity.

This representative right to the bonus is not absolute. If there be more than one dependent or heir-at-law, the Treasurer and Receiver-General determines not only who shall receive the bonus, but the proportions in which it shall be paid. Until he acts no one is "entitled" to anything. I cannot believe that the Legislature intended that a discretionary award of some part of the bonus to a relative, conceivably quite remote in point of blood, should carry as an incident an exemption from the war poll tax. Indeed, a contrary conclusion might well cause the derivative right to rise higher than its source. The dead soldier or sailor would have been entitled, had he lived, to an abatement of his own war poll tax only. If the bonus be distributed among several relatives and carry to each, as an incident, a right to the abatement of the war poll tax, several abatements might well be engrafted on the single original stem.

Finally, we may inquire what was the purpose of the abatement authorized by said section 9. Section 9 provides for special taxes to raise part of the $20,000,000 required to meet the bonus. Among these special taxes was a "civilian war poll tax" of $3 which, under section 10, is to be levied in the years 1920, 1921, 1922 and 1923. The plain intent is to place a special tax upon those males of twenty years and upwards
who stayed at home for the benefit of those Massachusetts residents who went to war. Those who take under section 3 are civilians who, if males of over twenty, would be required to pay this additional poll tax unless exempted. Exemptions from taxation are not to be lightly inferred, but must appear plainly from the express words or necessary intendment of the statute. *Milford v. County Commissioners*, 213 Mass. 162, 165; *Wheelwright v. Tax Commissioner*, 235 Mass. 584. I am unable to reach the conclusion that the necessary intendment of the act is to exempt these civilians simply because they profit financially through the death of some soldier or sailor upon active service.

I therefore advise you that those who receive the bonus, or some part thereof, under section 3 are not entitled to the abatement allowed by section 9.

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**Retirement — Veteran.**

A veteran, as defined in St. 1920, c. 574, is eligible to remain a member of the Retirement Association established by St. 1911, c. 532. One who is eligible to retire both under St. 1920, c. 574, and under St. 1911, c. 532, must elect as to whether he will retire under the one or under the other. If a veteran eligible to retire under St. 1920, c. 574, is also a member of the Retirement Association established by St. 1911, c. 532, and elects to retire and is retired under St. 1920, c. 574, he is entitled to the refund granted by St. 1911, c. 532, § 6, par. A, cl. (a).

You request my opinion as to whether a person who is a member of the Retirement Association established by St. 1911, c. 532, as amended, is eligible to remain a member of said association if he is a veteran, as defined by St. 1920, c. 574, and if he is not, whether the Board of Retirement is required to release his membership and refund to him the money paid in by him as a member of said association.

By St. 1911, c. 532, and subsequent amendments, a contributory retirement system was established for the civil employees of the Commonwealth. All employees of the Commonwealth on the date when the system was established were
enabled to become members thereof, if they so desired. Unless said employees notified the Insurance Commissioner, in writing, within thirty days of the date when the system was established, that they did not desire to join the association, said employees automatically became members thereof. All employees who entered the service of the Commonwealth after the date when the retirement system was established, with certain exceptions which it is unnecessary here to enumerate, became members of the Retirement Association after completing ninety days' service in the employ of the Commonwealth.

St. 1911, c. 532, § 3, pars. (3), (4) and (5), provide:—

(3) No officer elected by popular vote may become a member of the association, nor any employee who is or will be entitled to a pension from the commonwealth for any reason other than membership in the association.

(4) Any member who reaches the age of sixty years and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board of retirement upon recommendation of the head of the department in which he is employed, and any member who reaches the age of seventy must so retire.

(5) Any member who has completed a period of thirty-five years of continuous service may retire, or may be retired at any age by the board of retirement upon recommendation of the head of the department in which he is employed, if such action be deemed advisable for the good of the service.

The question, therefore, is whether an employee who is also a veteran, within the meaning of St. 1920, c. 574, § 4, "is or will be entitled to a pension for any reason other than membership in the retirement association," within the meaning of said St. 1911, c. 532, § 3, par. (3).

The pension conferred upon veterans by St. 1920, c. 574, § 4, is non-contributory. But the right to it is not absolute, and does not necessarily become absolute even upon completion of the term of service prescribed. Under sections 2 and 3 the veteran is not retired save upon his own petition or request. Under sections 1, 2 and 3 the approval or consent of the retiring authority is in each case required. Under sections 1 and 2, also, no pension can be paid if the total income of the
veteran from all sources, exclusive of such pension, exceeds $500. One or more of these conditions may never be fulfilled. Thus, while such veteran may become entitled to such non-contributory pension if all conditions are fulfilled, I am of opinion that it cannot presently be said that he "either is or will be entitled" thereto within the meaning of St. 1911, c. 532, § 3, par. (3). It follows that he is not presently rendered ineligible to membership in the Retirement Association established by said St. 1911, c. 532.

In my opinion, St. 1920, c. 574, confers a right of choice upon the veteran. He may, and indeed must, retain his membership in the Retirement Association established by St. 1911, c. 532, until the time for retirement arrives. But when that time comes he must choose between the two systems. He cannot retire under both, even assuming that he can qualify under both. If he chooses to retire and is retired under St. 1911, c. 532, he gives up any right to retire under St. 1920, c. 574. If, however, he elects to retire and is retired under St. 1920, c. 574, he may, in my opinion, claim the refund granted by St. 1911, c. 532, § 6, par. A, cl. (a), which provides as follows: —

Should a member of the association cease to be an employee of the commonwealth for any cause other than death before becoming entitled to a pension, there shall be refunded to him all the money paid in by him under section five, (2) A, with regular interest.


Under the act of March 2, 1907, § 2, 34 Stat. at L., 1228, U. S. Comp. Stats., 1916, § 3959, an American citizen forfeits his citizenship by taking the oath of allegiance to any foreign State at a time when this country is not at war.

An American citizen who, prior to the entry of the United States into the war, entered the military or naval service of a foreign nation, and as an incident thereof took an oath of allegiance to such nation, forfeited his citizenship.

Quaere, whether entry into the military or naval service of a foreign nation, but without taking an oath of allegiance, would forfeit American citizenship.

An American citizen who, after the entry of the United States into the war, entered the military or naval service of a foreign nation, and as an incident thereof took an oath of allegiance to such nation, did not forfeit his American citizenship.

The act of May 9, 1918, c. 69, § 1, cl. 12, 40 Stat. at L., 542, 545, U. S. Comp. Stats., 1916, Supp. 1919, § 4352, cl. 12, provides a summary method of regaining American citizenship lost in the manner above set forth.

You ask my opinion upon the following questions:

1. Are men who, while citizens of Massachusetts and before the entry of the United States into the war, entered the military or naval service of an allied nation still to be regarded as citizens of this Commonwealth, and as such entitled to vote?

2. Are men who, while citizens of Massachusetts, after the entry of the United States into the war and after having been rejected for military or naval service by the United States because of physical disability, entered the military or naval service of an allied nation still to be regarded as citizens of this Commonwealth, and as such entitled to vote?

3. What steps must be taken by these men in order that they may again be regarded as citizens and entitled to the right to vote?

1. There is authority to the effect that, at common law, a man could not expatriate himself without the consent of his country and thereby renounce his allegiance to and citizenship in such country. See Miller v. The Resolution, 2 Dall. 1; McIlwaine v. Coxe, 4 Cranch, 209, 213—214; Shanks v. Dupont, 3 Pet. 242, 246—247; Ainslie v. Martin, 9 Mass. 454, 461; Ex
Parte Griffin, 237 Fed. Rep. 445, 449. But the right of expatriation has definitely been established by Federal statute. Act of July 25, 1868, c. 249, 15 Stat. 223, R. S. § 1999; In re Look Tin Sing, 21 Fed. Rep. 905; Mackenzie v. Hare, 239 U. S. 299. Prior to the passage of the act of March 2, 1907, 34 Stat. 1228, U. S. Comp. Sts. 1916, §§ 3958, 3959, there was conflict as to whether or not expatriation was effected by taking the oath of allegiance to a foreign power. Van Dyne Naturalization, p. 338; Browne v. Dexter, 66 Cal. 39, 4 Pac. 913 (1884). Prior to the passage of said act the weight of authority seems to have been that merely entering the military or naval service of a foreign State did not of itself work expatriation. Van Dyne Naturalization, p. 358; Calais v. Marshfield, 30 Me. 511; State v. Adams, 45 Ia. 99; see also The Santissima Trinidad, 7 Wheat. 283. But it has also been held that one who took the oath of allegiance to a foreign country and thereafter entered its military service thereby lost his citizenship. Juando v. Taylor, 2 Paine, 652; Fed. Cas. No. 7558 (1818).

The act of March 2, 1907, § 2, 34 Stat. 1228, U. S. Comp. Stats. 1916, § 3959, provides as follows:—

Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

This statute expressly provides that taking the oath of allegiance to any foreign State works expatriation. The act is silent, however, as to the effect of entering the military or naval service of another nation. It may be that the authorities
which hold that merely entering such service does not effect expatriation remain unshaken. But these authorities do not aid any citizen of this country who takes an oath of allegiance to a foreign State or sovereign as an incident of such enlistment. In *Ex Parte Griffin*, 237 Fed. Rep. 445 (D. C. N. Y. 1916), it was held, under this very act, that an American citizen who in 1916 went to Canada, enlisted in the Canadian Expeditionary Forces, and as an incident of such enlistment took the oath of allegiance to the King of Great Britain, thereby forfeited his American citizenship and might be deported as an undesirable alien when he deserted from such forces a few days later and attempted to return to this country. See also *Browne v. Dexter*, 66 Cal. 39, 4 Pac. 913 (1884); *Juando v. Taylor*, 2 Paine, 652; Fed. Cas. 7558 (1818). I therefore advise you that any citizen of this Commonwealth who, prior to the date when this country declared war (April 6, 1917), took the oath of allegiance to any foreign king or State, whether as an incident of enlistment in the military or naval forces of such State or not, thereby expatriated himself, lost his American citizenship, and ceased to be entitled to vote in this State.

2. You further inquire as to the effect of such foreign enlistment subsequent to April 6, 1917, the date when war was declared upon Germany. The act of March 2, 1907, § 2 (*supra*), contains the following proviso:—

And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

In view of this proviso, I am of opinion that after war was declared American citizens lost the power to expatriate themselves by taking the oath of allegiance to a foreign government. I understand that this is the view taken by the Federal Immigration Bureau. It follows that those American citizens who subsequent to April 6, 1917, enlisted in any foreign army or navy, and as an incident of such enlistment took an oath of allegiance to such foreign king or State, could not and did not thereby terminate their citizenship or lose their right to vote.
3. On Oct. 5, 1917, Congress passed an act (40 Stat. 340) which provided a summary method by which those who had lost their American citizenship by reason of taking the oath of allegiance to "any foreign state engaged in war with a country with which the United States is at war," in order to enter the military or naval service of such State, might regain their citizenship without complying with the usual requirements for naturalization. This act was expressly repealed by the act of May 9, 1918, c. 69, § 1, cl. 12, 40 Stat. 542, 545, U. S. Comp. Stats. 1916, Supp. 1919, § 4352, cl. 12, which provides as follows:

Any person who, while a citizen of the United States and during the existing war in Europe, entered the military or naval service of any country at war with a country with which the United States is now at war, who shall be deemed to have lost his citizenship by reason of any oath or obligation taken by him for the purpose of entering such service, may resume his citizenship by taking the oath of allegiance to the United States prescribed by the naturalization law and regulations, and such oath may be taken before any court of the United States or of any State authorized by law to naturalize aliens or before any consul of the United States, and certified copies thereof shall be sent by such court or consul to the Department of State and the Bureau of Naturalization, and the Act (Public fifty-five, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen), is here repealed.

The Federal Bureau of Immigration informs me that as a condition precedent to taking the oath of allegiance prescribed by this section the applicant must produce satisfactory proof that at the time of his enlistment in the foreign military or naval service he was an American citizen, either by birth or naturalization, and that he was honorably discharged from such foreign service. If he complies with these requirements and takes the prescribed oath, he immediately resumes his American citizenship. His right to vote then depends upon whether he possesses the qualifications required by our Constitution and laws. Your third question assumes that such person was a duly qualified voter of this Commonwealth at the time of his temporary loss of citizenship. If so, his right to vote immediately revives if he either is registered or registers anew, if that
be necessary. *Capen v. Foster*, 12 Pick. 485. His temporary loss of citizenship does not necessarily affect any residence which he may previously have had in this Commonwealth. An alien may be a resident of this State. *Kinneen v. Wells*, 144 Mass. 497. His residence or continued residence must be proved by competent evidence. But he fulfills the residence requirements of Mass. Const. Amend. III, if at the time he registers (if that be necessary) he has resided in this State for one year, and in the city or town in which he claims the right to vote for six months, even though he has become naturalized within thirty days prior to such registration. *Kinneen v. Wells*, 144 Mass. 497. I therefore advise you that when such temporary alien has complied with the act of May 9, 1918, *supra*, and has thereby recovered his citizenship, his residence is to be determined according to the ordinary rules of law. His temporary loss of citizenship is simply one circumstance to be considered in connection with all the other facts of each particular case.

**Constitutional Law — Amendment to Federal Constitution — When it becomes operative.**

A proposed amendment to the Federal Constitution becomes operative when ratified by three-fourths of the States.

Proclamation of such ratification by the Secretary of State of the United States certifies that ratification has already taken place, and is not itself a condition precedent to the adoption of the amendment.

You inquire whether the proposed suffrage amendment to the Federal Constitution will, if ratified, become operative upon ratification by the thirty-sixth State or upon official proclamation of such ratification.

U. S. Const., art. V., provides in part as follows:

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when rati-
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fied by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by congress; . . .

Congress did not in this case "propose" that ratification should be by convention in the several States. The proposed amendment will, therefore, "be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states." As there are at present forty-eight States, it follows that the proposed amendment will become a part of the Federal Constitution when duly ratified by the Legislatures of thirty-six States. See Hauke v. Smith, 253 U. S. 221; Rhode Island v. Palmer, 253 U. S. 350; opinion of the Attorney-General to the Senate, Jan. 21, 1920.

When a State ratifies the amendment, that fact is officially certified to the Secretary of State of the United States. When the requisite number of ratifications have been thus certified, the Secretary of State officially proclaims that the amendment has become a part of the Federal Constitution. I find nothing in the Constitution which in any way makes the validity of the amendment depend upon such proclamation. In my opinion, the proclamation simply certifies to a fact which already exists. In this respect it is not unlike the registration of a voter, which officially establishes that he already possesses the constitutional qualifications for the ballot. See Capen v. Foster, 12 Pick. 485. It is for you to determine, in the exercise of a sound discretion, what preparations shall be made in advance in order to comply with this amendment, in the event of its adoption. Until the Secretary of State makes official proclamation that the amendment has become a part of the Federal Constitution, your Department will have no official knowledge of that fact. In the performance of your official duties you should not assume that it has become a part of the Federal Constitution until the Secretary of State shall so proclaim.

The provisions of St. 1908, c. 649, § 2, relative to certain railroad corporations selling commutation tickets at certain prices, are inconsistent with the provisions of St. 1913, c. 784, § 22, which vested in the Board of Railroad Commissioners (now the Department of Public Utilities) complete power to regulate and establish fares on railroads, and to determine the just and reasonable rates, fares and charges to be charged. Being inconsistent, such provisions of St. 1908, c. 649, § 2, were repealed by the provisions of St. 1913, c. 784, § 29.

The provisions of St. 1906, c. 463, Pt. II, § 137, regulating the abandonment of passenger stations by a railroad corporation, and the following section, § 138, relative to the relocation of passenger stations and freight depots by a railroad corporation, are inconsistent with the provisions of St. 1913, c. 784, § 23, which gave the Board of Railroad Commissioners (now the Department of Public Utilities) unconditional authority to correct equipment, appliances and service which is unjust, unreasonable or inadequate. Being inconsistent, said sections 137 and 138 of Part II of chapter 463 of the Acts of 1906 were repealed by St. 1913, c. 784, § 29.

You request my opinion upon the following questions of law:—

1. Does St. 1913, c. 784, repeal or modify in any way St. 1908, c. 649, § 2, and if so, to what extent?

St. 1908, c. 649, § 2, reads as follows:—

Every railroad corporation which has a terminus in Boston, except the Boston, Revere Beach and Lynn Railroad Company, shall sell a commutation ticket good for not more than twelve rides between Boston and each station on its lines within fifteen miles of its terminal station in Boston, at a price not exceeding the average rate for each trip which was charged between said points for the twenty-five-ride commutation tickets in use on the first day of January in the year nineteen hundred and eight, excepting that the minimum fare shall be five cents. The said tickets, before issuance, shall be subject to approval by the board of railroad commissioners both as to the rate of fare and the conditions named therein. So far as is practicable, the rates of fare on all roads for like distances from their terminal stations shall be equal. In any city or town where the said twelve-ride ticket shall exceed in price the price now charged per trip for the twenty-five-ride ticket, then thereafter in the said city or
town the said railroad companies shall continue to have for sale a twenty-five-ride ticket at the existing price.

St. 1913, c. 784, § 29, reads, in part, as follows: —

This act shall be deemed and construed as a remedial act and in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the commission any jurisdiction, powers or discretion with respect to any subject or matter treated in this act. Except as above provided all acts and parts of acts inconsistent with any provision of this act, and all acts and parts of acts which would in any way limit or prevent the exercise to the fullest extent of any of the jurisdiction, powers, authority or discretion delegated herein to the commission are hereby repealed: . . .

In your letter you state that —

Tickets issued under the provisions of the act of 1908 were abrogated by the United States Railroad Administration. Obviously, the United States while operating the railroads could charge whatever the Railroad Administration saw fit, but if the 1908 act was not repealed by the Public Service Commission act it would seem that upon the complete return of the railroads to the control of the railroad companies the commutation tickets must be restored at the same rates as were in effect prior to the taking over of the control of the railroads by the United States government.

In answer to your question I direct your attention to the language used by Chief Justice Rugg in the case of Arlington Board of Survey v. Bay State Street Railway Co., 224 Mass. 463, at 469, where he said: —

That act (St. 1913, c. 784) marked a radical change in the policy of the Legislature in the regulation of street railways. It conferred upon the Public Service Commission far greater powers over the operation and accommodations to be provided by such common carriers than had been vested in any board by earlier acts. Summarily stated, it clothed the commission with full power to require safe, reasonable and adequate service to the public from all common carriers. The authority of the commission as to supervision and regulation in other respects is ample. It is manifest that such broad powers justly cannot be exercised to the extent conferred by the words used except when joined either with equally full power to regulate charges, rates and fares, or with freedom of action by the carrier in these respects, so as to enable the carrier to receive a fair return for the service required. This power expressly is conferred by sec-
tion 22, which after subjecting the rates and fares actually charged or demanded to their supervision, enacts that whenever the commission is of opinion "that the rates, fares or charges or any of them chargeable by any such common carrier are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine the just and reasonable rates, fares and charges to be charged" and shall fix the same by order binding upon the carrier. That these words were intended to be interpreted according to their full natural scope is obvious from the provision of section 29. . . . It is impossible to give the act a narrow or construed construction as to the subject of fares.

Accordingly, it is my opinion that the provisions of St. 1913, c. 784, give complete powers to the Board of Railroad Commissioners (now the Department of Public Utilities, Gen. St. 1919, c. 350) over the regulation and establishment of fares on railroads, to determine the just and reasonable rates, fares and charges to be charged, and to fix the same by appropriate order, and, in my judgment, the provisions of St. 1908, c. 649, § 2, are inconsistent with this complete power, and, accordingly, under the provisions of section 29 of chapter 784, being inconsistent, were thereby repealed.

2. Do the provisions of St. 1913, c. 784, § 29, repeal the provisions of St. 1906, c. 463, Pt. II, §§ 137 and 138?

Sections 137 and 138 read as follows:—

Section 137. A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station, unless it is relocated under the provisions of the following section, nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad. The supreme judicial court, upon an information filed by the attorney-general at the relation of ten legal voters of the city or town in which such station is located, shall have jurisdiction in equity to restrain the violation of the provisions of this section.

Section 138. A railroad corporation may relocate passenger stations and freight depots, with the approval in writing of the board of railroad commissioners and of the board of aldermen of the city or the selectmen of the town in which such stations or depots are situated.

St. 1913, c. 784, § 23, reads in part as follows:—
Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier, now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations and practices, thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby.

Section 137 of Part II of said chapter 463 forbids the abandonment of a station which has been maintained for five years, unless the same is relocated. But if such station must be relocated it is in effect merely moved, and not abandoned. Moreover, such relocation cannot be made without the consent of the bodies described in said section 138. Section 137 further forbids absolutely the curtailment of trains which stop at such station as compared with other stations on the same road. In other words, the train service at any station cannot be diminished unless the train service at other stations is curtailed at the same time. Such a provision necessarily restricts the power to rearrange train service in order to meet the reasonable needs created by changed conditions. But section 23 of said chapter 784 vests in the Commission an unconditional authority to correct service which is "unjust, unreasonable or inadequate." Excessive train or station service at any one point is clearly unjust or unreasonable service. It is necessarily an unjust or unreasonable burden upon the road. It may cause either inadequate service elsewhere or else higher rates. The conditions imposed by said sections 137 and 138 of Part II of chapter 463 are clearly "inconsistent" with the broad and unconditional authority conferred by section 23 of said chapter 784. In my opinion, section 29 of said chapter expressly repeals said sections 137 and 138.
FISHERIES AND GAME—NUISANCE—DESTRUCTION OF FISH BY CHEMICALS.

Deposits of poison in great ponds, which destroy fish life, may be a public nuisance which the Division of Fisheries and Game has no right to authorize.

You have asked whether an ice company has the right to treat a pond with copper sulphate for the purpose of removing algae from the water, which has resulted in the past in wholesale destruction of fish in the pond.

You further inquire if there is any authority vested in the Department of Conservation to grant a permit to any persons to place chemicals in a great pond where the Board has reason to believe injury to the fish life will result.

The Supreme Judicial Court has said in Hittinger v. Eames, 121 Mass. 539, that—

By the law of Massachusetts, great ponds, not appropriated before the Colony Ordinance of 1647 to private persons, are public property, the right of reasonably using and enjoying which, for taking ice for use or sale, as well as for fishing and fowling, boating, skating, and other lawful purposes, is common to all, and in the water or ice of which, or in the land under them, the owners of the shores have no peculiar right, except by grant from the Legislature, or by prescription, which implies a grant.

In the case of Fay v. Salem & Danvers Aqueduct Co., 111 Mass. 27, the court declared not only that great ponds were public property, but that their use for “taking water or ice, as well as for fishing, fowling, bathing, boating or skating, may be regulated or granted by the Legislature at its discretion.” In the case referred to I assume that there has been no act of the Legislature taking away from the public the right of fishing in the pond in question.

The poisoning of waters stocked with fish, thereby killing the fish, was held to be a public nuisance in People v. Truckee Lumber Co., 116 Cal. 397. Whether the use of poison, which results in the killing of a few fish of no particular value, would constitute a nuisance may be a matter of doubt, but it is a question of fact to be determined in every case. The creating and maintenance of a public nuisance, however, is an indict-

It is my opinion that the deliberate deposit of copper sulphate or other poisonous substance in a great pond containing fish, with knowledge or reasonable expectation of fatal results to the fish therein, may well be a public nuisance and an indictable offence. But, as above indicated, there must be some real injury in order to constitute a nuisance. There is no authority in your Department to authorize the commission of a nuisance anywhere; hence your second question must be answered in the negative.

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**Soldiers' Home in Massachusetts — Money paid out for Work — Vouchers — Approval by Majority of Trustees.**

Where work has been done at the Soldiers' Home in Massachusetts, it is necessary that a majority of the trustees of said Soldiers' Home shall have personally passed upon and approved the required vouchers before money can be paid out under the appropriation act, St. 1920, c. 629, item 147.

You ask my opinion as to whether money paid out under St. 1920, c. 629, item 147, for work at the Soldiers' Home in Massachusetts, must be on vouchers approved by a majority of the trustees.

It is my opinion that you would not be justified in accepting the approval of persons other than a majority of the trustees, even if such persons might be authorized to act by the trustees. The act specifically confers this duty and power upon the trustees. They cannot delegate such authority. *Dillon, Municipal Corporations, 5th ed.*, § 244. Where joint authority is conferred upon public officers, in order to have a valid act a majority must approve. *R. L.*, c. 8, § 4, as amended by Gen. St. 1919, c. 301, § 1. The physical act of approving, of course, may be done by a clerk of the trustees, provided that a majority of the trustees personally pass upon and approve the voucher. The responsibility is placed upon the trustees and cannot be undertaken by any one else.
Taxation — Interest Rate — Additional Rate by Way of Penalty.

The additional rate of interest of 2 per cent per annum imposed on taxes unpaid after three months from the date on which they become payable applies only to those taxes in excess of $200 assessed to any taxpayer in any one city or town; but taxes assessed in a fire, water, watch or improvement district, placed for convenience upon the tax bill of a city or town, are not to be considered in computing the $200 limit.

The additional 2 per cent runs from the date on which the taxes were payable. Where payments on a tax exceeding $200 are made so that the balance at the end of the three months is less than $200, the balance is not subject to the 2 per cent penalty.

In accordance with the provisions of St. 1909, c. 490, Pt. III, § 5, you have requested my opinion as to certain questions raised by the Massachusetts Tax Collectors' Association, which I will quote and answer. All of these questions relate to the provisions of St. 1920, c. 460. This act reads as follows: —

Taxes shall be payable in every city and town and in every fire, water, watch or improvement district in which the same are assessed, and bills for the same shall be sent out, not later than the fifteenth day of October of each year, unless by ordinance, by-law or vote of the city, town or district, an earlier date of payment is fixed. On all taxes remaining unpaid after the expiration of seventeen days from said October fifteenth, or after such longer time as may be fixed by any city, town or district which fixes an earlier date for payment, but not exceeding thirty days from such earlier date, interest shall be paid at the following rates computed from the date on which the taxes become payable: — At the rate of six per cent per annum on all taxes and, by way of penalty, at the additional rate of two per cent per annum on the amount of all taxes in excess of two hundred dollars assessed to any taxpayer, in any one city or town, if such taxes remain unpaid after the expiration of three months from the date on which they became payable, but if, in any case, the tax bill is sent out later than the day prescribed, interest shall be computed only from the expiration of such seventeen days or said longer time. In no case shall interest be added to taxes paid prior to the expiration of seventeen days from the date when they are payable, nor shall any city or town so fix an earlier date of payment and longer time within which taxes may be paid without interest as would permit the payment of any taxes without interest after the first day of November in the year in which they are due. Bills for taxes assessed under the provisions of section eighty-five of Part I shall be sent out not later than December twenty-sixth, and such taxes shall be payable not later than December thirty-first. If they
remain unpaid after that date, interest shall be paid at the rates above specified, computed from December thirty-first until the day of payment, but if, in any case, the tax bill is sent out later than December twenty-sixth, the said taxes shall be payable not later than ten days from the date of the bill, and interest shall be computed from the fifteenth day following the date when the tax becomes due. In all cases where interest is payable it shall be added to and become a part of the tax.

1. On what class of taxes is the additional 2 per cent rate of interest to be applied?

The provisions of chapter 460 on this point are that interest shall be paid at the following rates computed from the date on which the taxes become payable:—

At the rate of six per cent per annum on all taxes and, by way of penalty, at the additional rate of two per cent per annum on the amount of all taxes in excess of two hundred dollars assessed to any taxpayer, in any one city or town, . . .

Penal statutory provisions of this character are to be construed strictly, and not extended by implication to any taxes not clearly within their provisions. It is clear, from the language of the statute, that the additional rate of 2 per cent per annum, by way of penalty, applies only to those taxes in excess of $200 assessed to any taxpayer in any one city or town. It does not, in my opinion, apply to taxes assessed in a fire, water, watch or improvement district. It follows, therefore, that if such taxes are for convenience placed upon the tax bill of a city or town they are not to be considered in computing the $200 limit.

2. Does the additional 2 per cent run from the date on which the taxes were payable, or only from the expiration of the three months mentioned in the act?

From an examination of the wording of the above provision it appears that the 2 per cent rate of interest is a penalty which attaches to taxes in excess of $200 which are not paid within three months from the due date, and that such penalty is to be figured back to such due date. The collection of taxes is
so essential to the support of government that the Legislature may pass very strict laws in regard to their collection. No man has a right to postpone the payment of his taxes and, prior to the passage of St. 1920, c. 460, the penalty was a uniform 6 per cent. The apparent object of the 1920 act is to secure the payment of the great bulk of the taxes within a reasonable time after they are due. It is my opinion that the Legislature has aptly provided that the 2 per cent penalty shall attach as of the due date of the tax, provided that the tax exceeds $200 and remains unpaid for three months.

3. A person assessed for taxes in one municipality for over $200 makes payments under the provisions of St. 1909, c. 490, Pt. II, § 19, as amended by Gen. St. 1916, c. 20, so that at the expiration of three months less than $200 remains unpaid. Is this amount subject to the 2 per cent penalty?

In my opinion, it is not. The penalty attaches to all taxes in excess of $200 assessed to any taxpayer which remain unpaid after the expiration of three months from the due date. As there is no amount in excess of $200 unpaid at the expiration of three months, I do not see how the amount less than $200 can be held subject to the penalty provision. The act treats all alike on taxes up to $200, but to say that because a man originally had a $300 tax, on which $100 had been paid, he should pay a penalty, while a man with an original $200 tax, on which nothing had been paid, should pay no penalty for more than three months’ delay in payment, would be a discrimination which I believe the Legislature cannot be presumed to have intended.

This answer applies with equal force to the case where a taxpayer was assessed a tax exceeding $200 on several parcels of real estate and had paid off on certain parcels so that the tax remaining unpaid was less than $200.

4. Does interest on taxes of 1919 and prior years remaining unpaid at the date when chapter 460 goes into effect come within these provisions?

The act was approved May 14, 1920, and takes effect ninety days after its passage, as it contains no emergency preamble.
The act merely substitutes a new section 71 for the original section 71 in Part I of chapter 490 of the Acts of 1909. The title is, "An Act relative to interest on unpaid taxes," which indicates an intention that it is an act of general applicability. Any taxpayer owing taxes assessed prior to the passage of the act has ninety days from May 14, 1920, in which to pay his taxes with 6 per cent interest. Taxes which have been assessed and remain unpaid in an amount exceeding $200 at the date when the act goes into effect bear interest at the rate of 6 per cent to the date when the act goes into effect, and at the increased rate of 8 per cent thereafter.

SIGNATURES — USE OF RUBBER STAMP FACSIMILE.

Judges of probate have authority to use a rubber stamp facsimile of signature on commitment papers of insane persons.

You ask if a judge of probate can lawfully use a rubber stamp facsimile of his signature on commitment papers of insane persons.

In an opinion rendered to the Secretary of the Commonwealth on July 21, 1903, by the Attorney-General, it was held that the Secretary of the Commonwealth might affix his signature to licenses by means of a stamp. The word "signature" is defined in Sweet's Law Dictionary as follows: —

In the primary sense of the word, a person signs a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary person, "signature" is commonly performed by subscribing his name to the document, and hence "signature" is frequently used as equivalent to "subscription," but any mark is sufficient if it shows an intention to be bound by the document.

In the case of In re Covington Lumber Company, 225 Fed. Rep., 444, the court said: —

Signatures adopted by persons are sufficient to give validity to instruments, and it is immaterial whether the signature be printed or not, if it is adopted and recognized as the signature of the party. 36 Cyc. 448.
In the case of orders of commitment, about which you inquire, the statute makes the incumbent of the office of judge of probate the magistrate empowered with the authority to sign commitment papers, and I am of the opinion that in such capacity the signature made by the use of a rubber stamp is a lawful signature, and that it is the duty of the State hospital authorities to honor orders of commitment so signed, unless they have reason to believe that the signature has not been affixed by the magistrate.

**Public Charitable Institution — Boston Consumptives' Hospital.**

The words "public charitable institution," as used in St. 1920, c. 306, should be confined to charitable institutions supported by the State, county or municipality to which persons are committed.

You have asked my opinion as to whether the words "public charitable institution," as used in St. 1920, c. 306, include the Boston Consumptives' Hospital.

St. 1920, c. 306, amends R. L., c. 75, § 48, in certain particulars not pertinent to your inquiry. Section 48, as amended, reads, in part, as follows:

An inmate of a public charitable institution or a prisoner in a penal institution who is afflicted with syphilis, gonorrhcea or pulmonary tuberculosis shall forthwith be placed under medical treatment, ... If, at the expiration of his sentence, he is afflicted with syphilis, ... or if, in the opinion of the attending physician of the institution ... his discharge would be dangerous to public health, ... he shall be ... cared for ... in the institution where he has been confined. ... The expense of his support ... shall be paid by the place in which he has a settlement. ...

R. L., c. 75, § 48, is based on St. 1891, c. 420. Section 1 of that act reads, in part, —

Any person who is confined in, or an inmate of, any state penal or charitable institution, a common jail, house of correction or municipal or town almshouse. ...
The definition of "public charitable institution" must be derived from the context of the statute. The words have no fixed meaning. Taken alone one might give to them a far broader definition than would be warranted by the language of the statute in which they were used. Of the word "institution" alone one will find almost as many definitions as there are cases, and it has been held that the term "institution" implies a foundation by law, and that a private school or college may not be called an institution because one cannot properly be said to "institute it." *Dodge v. Williams*, 46 Wis. 70. In New York a statute conferring on the State Board of Charities the right of visitation and inspection of all charitable institutions was held by the court to be limited to those charitable institutions which received public money raised by taxation for the support and maintenance of indigent persons. *People v. New York Society for the Prevention of Cruelty to Children*, 162 N. Y. 429.

In St. 1920, c. 306, the expressions "at the expiration of his sentence," "in the institution where he has been confined" and "inmate" indicate that the act is limited to prisons and other institutions where a person is subject to a greater or less legal restraint in his personal liberty, and St. 1891, c. 420, except for prisons, refers only to State charitable institutions and municipal and town almshouses. The wording of this statute and its later amendments all indicate that the words "public charitable institution" should be confined to charitable institutions supported by the State, county or municipality to which persons are committed and are usually known as "inmates."

Unless persons in the Boston Consumptives' Hospital are subject to a certain legal restraint and are there as paupers, State charges or by court commitment, St. 1920, c. 306, does not give the hospital either the right or the duty to apply the provisions of the act to patients therein.
Land owned by the Commonwealth is not subject to assessment by a city for benefits.

The city of Lowell has assessed the Commonwealth for betterments in the form of sidewalks abutting on land owned by the Commonwealth and held through the Homestead Commission under authority of Gen. St. 1917, c. 310. You have asked my opinion as to whether you should authorize the payment of these bills.

R. L., c. 12, § 5, par. 2, reads:—

The following property and polls shall be exempted from taxation:—

Second. The property of the commonwealth, except real estate of which the commonwealth is in possession under a mortgage for condition broken.

It is clear from the language of the statute that the Commonwealth is not liable for real property taxes assessed by a city (Corcoran v. Boston, 185 Mass. 325), but there is no case deciding the point as to betterments.

In Worcester County v. Worcester, 116 Mass. 193, the court held that the court house and jail, the property of Worcester County, were not liable for a sewer assessment levied by the city of Worcester. Devens, J., at page 194, argues:—

As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication. This property of the petitioners is not, indeed, in legal form, the property of the Commonwealth, but the authority by which the county holds it is derived from the statutes by which the duty is imposed upon the various counties of providing suitable court houses, jails and houses of correction.

The court house and jail were property appropriated to a public use, but it would seem that land purchased by the Commonwealth through the Homestead Commission, under
authority of the Legislature, was also appropriated to a public use, in view of Mass. Const. Amend. XLIII.

The reasoning, therefore, of Devens, J., would apply with greater force to the present case, where the land is owned directly by the Commonwealth and not by a county. As the only remedy given for collection of the assessment is by sale of the property, the courts have hesitated to subject estates of the Commonwealth or its political subdivisions to liens for taxes unless the intent of the Legislature to do so is clear. Worcester County v. Worcester, 116 Mass. 193; Burr v. Boston, 208 Mass. 537; I Op. Atty.-Gen. 606.

It is therefore my opinion that you should not authorize payment of the tax bills.

Support of an Inmate of a County Training School.

When a boy has been committed to a training school under an order of court directing that the parents pay the cost of his support while in said school, the provision of St. 1920, c. 40, which requires a city or town from which a boy is committed to pay $2 per week toward his support, does not apply.

You state that St. 1920, c. 40, provides that a city or town shall pay $2 per week for the support of a boy committed from such city or town to a county training school. You then draw my attention to a case where a boy has been committed to such a school under an order of the court, entered pursuant to St. 1913, c. 779, § 9, directing that the boy's parents pay the cost of his support while in said school; and you request my opinion whether the said provision of chapter 40 applies in this case.

Chapter 40, amending the last paragraph of section 1 of chapter 46 of the Revised Laws, as amended, provides: —

The city or town from which an habitual truant, absentee or school offender is committed to a county training school shall pay to the county or counties maintaining the same two dollars a week toward his support, and reports of the condition and progress of its pupils in said school shall be sent each month to the superintendent of schools of such city or town; but the town of Winthrop and the cities of Revere and Chelsea shall pay
to the county of Middlesex, for the support of each child committed to
the training school of said county, two dollars and fifty cents a week,
and such additional sums for each child as will cover the actual cost of
maintenance.

St. 1913, c. 779, § 9, amending R. L., c. 46, § 6, provides: —

The court or magistrate by whom a child has been committed to a
county training school may make an order relative to the payment by
his parents to the county of the cost of his support while in said school,
and may from time to time revise and alter such order or make a new
order as the circumstances of the parents may justify.

Chapter 40, like other statutory provisions, must be con-
strued so as to effectuate the intent of the Legislature. The
chapter does not merely impose a charge of $2 a week for each
boy committed, but it provides that the money shall be paid
“toward his support.” If the boy is already being supported
by his parents, pursuant to an order of court, it is difficult
to see how the city of his residence should pay $2 per week
more “toward his support.” I am of opinion that the Legis-
lature intended a city to pay $2 per week toward the support
of a boy being maintained by the county, but not toward the
support of a boy being maintained by his parents.

I am confirmed in this view by the last clause of chapter 40,
which provides that Winthrop, Revere and Chelsea shall pay
to the county of Middlesex, for each child committed to the
training school, $2.50 per week, “and such additional sums for
each child as will cover the actual cost of maintenance.” This
clause is a further indication that the charge is imposed to
provide support not otherwise provided for, and for no other
purpose.
Sealers of Weights and Measures — Authority to seal
Computing-measuring Device — Arithmetical Correctness of Price computed to the Nearest Cent.

Under St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1, a sealer of weights and measures may lawfully seal for use in this Commonwealth a device designed to measure fabrics in eighths of yards, and to indicate the price of the fabric so measured, if he finds that said device indicates the linear measure correctly, and correctly computes the corresponding price to the nearest cent.

The computation of price may be found to be arithmetically correct, even though the odd fraction of a cent is not indicated, if that odd fraction of a cent is apportioned to dealer or customer in accordance with the arithmetical test prescribed by commercial custom.

You inquire whether, under St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1, and construed in Moneyweight Scale Co. v. McBride, 199 Mass. 503, a sealer of weights and measures may lawfully seal a computing-measuring device of the description hereinafter set forth, assuming that all indications of linear measurement are accurate, and that corresponding prices are correctly indicated to the nearest cent. The device is described in your letter as follows:

An instrument designed to be used for the determination of linear measure of textile fabrics in yards and eighth yards only, including a chart to be used in establishing a money value or sales price for any number of yards or eighth yards up to twelve yards, this being the maximum capacity of the device. In operation the quantity of fabric measured is indicated upon a dial, while the money value of the quantity measured is shown by figures upon a chart which revolves in conjunction with the measuring mechanism. There are no figures, graduation lines, or other indicating marks upon the dial which would permit measurements other than yards and eighths of yards to be made. Computations of value appear upon chart at intervals of eighth yards only, all fractions of one-half cent or over being figured as one cent.

St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1, provides:

The provisions of chapter sixty-two of the Revised Laws relating to the adjusting, testing and sealing of weights, measures and balances shall apply to all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight or
measure of the commodity offered for sale. All such computing devices shall be tested as to the correctness of both weights or measures and values indicated by them.

Moneyweight Scale Co. v. McBride, supra, decided, first, that under St. 1907, c. 535, the duty and authority to determine whether or not a computing scale was correct as to weights and corresponding values was vested in the several sealers of weights and measures; second, that St. 1907, c. 535, was constitutional in that the accuracy of computing scales as to weight was to be determined by the standard weights prescribed by law, and the accuracy of such computing scales as to corresponding values was to be tested by arithmetic. In this connection the court said, at page 515:

For these reasons we are of opinion that the General Court when it enacted St. 1907, c. 535, by which the correctness of self-computing scales and the other devices therein mentioned was committed to the final decision of the sealers of weights and measures for the several cities and towns of the Commonwealth, must (in our opinion) have intended that the values to be placed on such charts should be arithmetically correct. So construed, St. 1907, c. 535, is a valid statute, and the decree dismissing the bill must be affirmed.

The computing-measuring device in question here is designed to measure fabrics in yards and eighths of yards, and at a given price per yard to indicate to the nearest cent the corresponding value of the goods so measured. The smallest fraction of a yard which can be measured is one-eighth of a yard, and the corresponding values are indicated to the nearest cent for eighths of yards only. It is not designed to perform the converse operation, namely, to determine how much fabric the seller shall deliver, at a given price per yard, for a designated sum in money. Indeed, I am informed that fabrics are seldom if ever sold in this manner. For both reasons the difficult questions incident to determining the "commercial" accuracy of a device designed to indicate how much cloth the merchant should deliver, at a given price per yard, in exchange for a fixed sum are entirely eliminated. The sole question is whether a device
which measures the length of the fabric in eighths of yards and indicates the corresponding values to the nearest cent may lawfully be tested, and, if found to be accurate, may be sealed under authority of St. 1907, c. 535, § 1, as amended by Gen. St. 1917, c. 8, § 1.

Our smallest coin is one cent. If the price of goods sold includes a fraction of a cent, the settled commercial custom is to pay to the nearest cent. If the fraction be less than a half cent it is disregarded. If the fraction equal or exceed one-half cent it is treated as a cent, and the customer pays accordingly. This custom is recognized in the Moneyweight Scale case. It obtains, whether the price be computed with pencil and paper or by a mechanical device. Since the purpose of computation either with pencil and paper or mechanically is to determine the number of cents which the customer should pay, the device is, in my opinion, arithmetically accurate, within the meaning of the Moneyweight Scale case, if the price be determined correctly in accordance with the commercial custom above described. It is true that the statute confers no discretion upon the sealer. He must test the device according to the rules of arithmetic. Those rules determine the number of even cents in the price to be paid. The custom, which has the force of law, determines by a strictly arithmetical test what disposition shall be made of the additional fraction of a cent. The test to be applied does not cease to be a purely arithmetical one or involve any exercise of discretion because the arithmetical rule imposed by the custom is applied in order to determine the proper disposition of the fraction of a cent involved. I therefore advise you that if the computing-measuring device correctly measures the length of the fabric in accordance with the standards prescribed by law, and correctly computes the price for each eighth of a yard which is measured, in accordance with the commercial custom above described, such computing-measuring device may lawfully be sealed for use in this Commonwealth.
Savings Banks — Power to establish Safe Deposit Department — Power to make a Business of receiving Securities for Safekeeping.

A savings bank is not authorized to establish a safe deposit department.
A savings bank is not authorized to make a business of receiving securities for safekeeping except to the extent and under the conditions prescribed by Gen. St. 1919, c. 60.

You have asked my opinion as to the right of savings banks to establish safe deposit departments. The formation and conduct of savings banks are primarily regulated by St. 1908, c. 590, with numerous amendments thereof and additions thereto. This act contains over seventy sections and goes into great detail in regard to incorporation, management, deposits and investments. I find no provision of law which expressly or impliedly authorizes a savings bank to establish a safe deposit department, although section 69, subsection 9, expressly regulates the purchase of a suitable site and the erection of a suitable building for the convenient transaction of its business. This omission is very significant in view of the fact that R. L., c. 116, which regulates trust companies, expressly authorizes by section 12 the receipt on deposit and storage of stocks, bonds, jewelry and valuable papers, and by section 38 defines in detail the procedure for collecting the unpaid rent of safe deposit boxes. The effect of this omission is emphasized by Gen. St. 1919, c. 60, which provides as follows:

Savings banks and institutions for savings may, with the written permission of and under regulations approved by, the bank commissioner, receive and hold for their depositors any securities issued by the United States.

If savings banks had implied or incidental power to establish a safe deposit department, or even to make a business of receiving securities for safekeeping, Gen. St. 1919, c. 60, would have been wholly superfluous. I am therefore constrained to advise you that in my opinion savings banks are not authorized to establish a safe deposit department, or even to make
a business of receiving securities for safekeeping, except, of course, to the extent permitted by Gen. St. 1919, c. 60. You do not ask, and I do not decide, whether, under exceptional circumstances, as a matter of accommodation, a savings bank might receive securities for temporary safekeeping until they could be placed in safety elsewhere.

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**Chiropody — Registration — Failure to register before Date set by Statute — Requirements for Registration and Issuance of Certificate.**

Under Gen. St. 1917, c. 202, § 5, as amended by Gen. St. 1918, c. 15, a person who had been engaged in the practice of chiropody in this Commonwealth for a period of more than two years prior to the passage of Gen. St. 1917, c. 202, and who failed to make application for registration on or before May 1, 1918, is obliged to comply with the provisions of Gen. St. 1917, c. 202, § 5, par. (3), before being registered and receiving a certificate as a chiropodist.

You request my opinion on the following:—

Paragraphs (1), (2) and (3) of section 5 of chapter 202 of the General Acts of 1917, as amended by chapter 15 of the General Acts of 1918, read as follows:—

Registration under this act shall be granted as follows:— (1) Any chiropodist who shall furnish the board with satisfactory proof that he is twenty-one years of age or over, and of good moral character, who shall make application for registration on or before the first day of May, nineteen hundred and eighteen, and who proves to the satisfaction of the said board that he has been engaged in the practice of chiropody in this commonwealth for a period of two years or more next prior to the passage of this act, shall, upon the payment of a fee of ten dollars, be registered without examination, and shall receive a certificate as a chiropodist registered under this clause, signed by the chairman and secretary of the board.

(2) Any person who is engaged in the practice of chiropody in this commonwealth at the date of the passage of this act, but who has so been engaged for a period of less than two years next prior to the said date shall, upon furnishing the board with satisfactory proof that he is twenty-one years of age or over, and of good moral character, and upon the payment of a fee of fifteen dollars, be examined as provided in sections three and eight of this act, and if found qualified, shall be registered, and shall
receive a certificate as a chiropodist registered under this clause, signed by the chairman and secretary.

(3) Any person not entitled to registration as aforesaid, who shall furnish the board with satisfactory proof that he is twenty-one years of age or over, and of good moral character, and that he has received a diploma or certificate from a reputable school of chiropody, or from some other institution of equal standing, having a minimum requirement of one year's course of at least eight months shall, upon payment of a fee of fifteen dollars, be examined as provided in sections three and eight of this act, and if found qualified, shall be registered, and shall receive a certificate as a chiropodist registered under this clause, signed by the chairman and secretary.

At the time of the passage of this act, on April 24, 1917, a woman residing in Lowell had been practicing chiropody in this Commonwealth for a considerable number of years, but had neglected to make application for registration until she was complained of for violating the law, and she now desires to be examined under paragraph (2) rather than under paragraph (3), which requires that an applicant for registration shall have received a diploma or certificate from a reputable school of chiropody or from some other institution of equal standing having a minimum requirement of one year's course of at least eight months.

The Legislature, by the provisions of paragraphs (1) and (2), made provision for those persons engaged in the practice of chiropody at the date of the passage of the act. They were divided into two groups, those who had been engaged in practice for a period of two years or more next prior to the passage of the act, and those who had been engaged for a period of less than two years. Those falling in the first group, who made application before the first day of May, 1918, were entitled to be registered without examination upon the payment of a fee of $10, and note here that the act placed the date on or before which applicants in this class should register as on or before Oct. 1, 1917. This date was later extended by Gen. St. 1918, c. 15, to May 1, 1918, and for those persons absent from the Commonwealth by reason of military or naval service, by Gen. St. 1919, c. 316, to Oct. 1, 1919.
Those persons who were engaged in practice for less than two years at the date next prior to the passage of the act were entitled to be examined upon the payment of a fee of $15, and, if found qualified, to be registered.

The person in question came within the first group, as she had been engaged in practice for more than two years next prior to the passage of the act, and, under the provisions of paragraph (1), she should have made application on or before the first day of May, 1918, to receive the privileges of that paragraph. The provisions of paragraph (2) in no way apply to her. Not having availed herself of the privileges of paragraph (1), she must now comply with the provisions of paragraph (3).

Credit Unions — Membership — Corporations — Loans.

A corporation cannot be a member of a credit union organized under the provisions of Gen. St. 1915, c. 268.

A credit union must confine its membership to individuals, and, as it must limit its loans to its own members, it cannot loan money to a corporation.

You request my opinion on the question as to whether or not a Massachusetts corporation may be a member of a credit union established under the provisions of Gen. St. 1915, c. 268, and if such a corporation, as a member, could legally borrow money from such a credit union.

In the by-laws of a certain credit union, a business corporation is set forth as a member of the credit union. Being set forth as a member, the corporation has been borrowing money from the credit union, the practice having been to lend the surplus funds to the corporation on demand notes at current rates. The clerk of the credit union reports that the corporation now holds $1,900 of the outstanding loans of the credit union which amount in all to $2,811. Another loan to the corporation is being considered, and the clerk desires to know if there is any advisable limit to the percentage of the funds of the union which may be loaned to the corporation.
The law of this Commonwealth relative to credit unions provides that the capital, deposits and surplus funds may be invested in loans to members where approved by the credit committee, and any excess over approved loans shall be deposited or invested only in accordance with certain regulations set forth in the act. (Gen. St. 1915, c. 268, § 11.) Under no circumstances may loans be made to persons who are not members of the union.

An examination of the history and purpose of credit unions and the provisions of the present law of the Commonwealth relative thereto clearly indicates that it was not intended that corporations should be included in the membership. The fundamental principles of credit unionism contemplate the association of individuals for the purpose of promoting thrift among members.

The pamphlet which you have furnished me, in which your Department outlines the growth of the credit union, quite plainly points to this proposition. For instance:—

The association shall be one of men and not of shares.

As loans are made only to members, and as any member may become a borrower, care must be taken to admit to membership only men and women of honesty and industry.

Personal knowledge of the character of the members is essential.

In making loans it should be recognized that character and industry are the basis of credit.

Members must be scrutinized as to character before they are admitted.

The credit committee must examine into the habits of the borrower in order to ascertain his ability and willingness to repay the loan. Unless the moral security is good, the loan should be refused in order that the necessity for honest, industrious and respectable living should be brought home to the members.

Turning to the provisions of chapter 268, further evidence may be adduced to establish the intent that membership shall be limited to individuals.

Section 6 provides, in part, that the by-laws—

shall prescribe ... the conditions of residence or occupation which qualify persons for membership.
Section 24 provides, in part, that the board of directors may expel any member —

who has been convicted of a criminal offence ... or whose private life is a source of scandal, or who habitually neglects to pay his debts, or who shall become insolvent or bankrupt, or who shall have deceived the corporation or any committee thereof with regard to the use of borrowed money.

It is further to be observed that membership in the board of directors of the credit committee and the supervisory committee is restricted to members of the credit union.

If a director or a member of any of these committees ceases to be a member of the credit union, his office shall thereupon become vacant. (See section 14.)

No provision is made for a representation either upon the board of directors or upon the committees by corporations.

It is further provided that —

Unless the number of members of a credit union is less than eleven, no member of said board shall be a member of either of said committees . . .

If corporations were eligible to membership, a credit union of eleven members, a majority of which were corporations, could not effect its organization.

Upon the foregoing considerations, I am of the opinion that a corporation may not be a member of a credit union organized under the provisions of Gen. St. 1915, c. 268.
Election Law — Political Designation by Independent Candidates.

A candidate whose name appears on an official ballot through nomination papers cannot attach the name of a political party thereto unless he receives a nomination by such party.

The following inquiries relative to election laws have been received from your Department: —

Gen. St. 1917, c. 250, § 1, amending St. 1913, c. 835, § 201, provides that "if a candidate is nominated otherwise than by a political party, the name of a political party shall not be used in his political designation. . . ."

1. Under this provision of law, can a regular republican candidate, having been nominated by a political party, use the designation "democratic independent" on nomination papers as a candidate for the same office?

2. Can a woman sign nomination papers for candidates for public office?

St. 1913, c. 835, § 198, provides: —

Nominations of candidates for any offices to be filled by all the voters of the commonwealth may be made by nomination papers, stating the facts required by section two hundred and one and signed in the aggregate by not less than one thousand voters for each candidate. Nominations of all other candidates for offices to be filled at a state election, and of all candidates for offices to be filled at a city election, except in Boston, and in other cities where city charters provide otherwise, may be made by like nomination papers, signed in the aggregate, for each candidate, by two voters for every one hundred votes cast for governor at the preceding annual state election in the electoral district or division for which the officers are to be elected, but in no case by less than fifty nor more than one thousand qualified voters. In Boston the nomination of candidates for any municipal elective office to be voted for at the municipal election in said city shall be made by nomination papers, prepared and issued by the election commissioners, signed in person by at least five thousand registered voters in said city qualified to vote for such candidates at said election. Nominations of candidates for offices to be filled at a town election may be made by nomination papers, signed by at least one voter for every fifty votes polled for governor at the preceding annual state election in such town, but in no case by less than twenty voters. . . .
1. The statute above quoted was enacted to prevent independent candidates for public office from securing undue advantages over candidates nominated by parties in the regular manner. The intention of the law is clear, that no person shall be entitled to use a political party designation after his name unless he receives a nomination by such political party. Thus, an independent candidate is not entitled to attach the name "republican" or "democrat" to his political designation. The fact that a candidate has received a party nomination cannot entitle him to use the political designation of another party when filing independent nomination papers.

2. The law provides that nomination papers shall be signed by qualified voters. The Nineteenth Amendment to the Federal Constitution provides that the right of citizens of the United States to vote shall not be denied or abridged on account of sex. St. 1920, c. 579, which took effect upon the ratification of the Nineteenth Amendment, has extended to women who possess the requisite qualifications the right to vote. I am of opinion that the right to vote includes as an incident a right to participate in the nomination of candidates, and therefore to sign nomination papers. I therefore advise you that a woman who has been duly registered as a voter may sign such papers.

Trust Company — Savings Department — Extra Dividend — Payment.

A savings department of a trust company cannot pay an extra dividend other than under and in accordance with St. 1908, c. 590, § 63. The provisions of St. 1908, c. 590, § 63, do apply where an extra dividend was declared prior to the date that St. 1920, c. 563, became operative, and which was payable subsequent to that date.

You ask my opinion on the following questions: —

1. May the savings department of a trust company pay an extra dividend other than as provided by St. 1908, c. 590, § 63?
2. Would said section 63 affect an extra dividend declared prior to the date that St. 1920, c. 563, became operative, and which was payable subsequent to that date?

St. 1920, c. 563, § 6, provides, in regard to savings departments of trust companies, in part as follows:—

Ordinary dividends in such a department shall not exceed the rate of five per cent a year, and extra dividends may be paid as by savings banks, under and in accordance with section sixty-three of chapter five hundred and ninety of the acts of nineteen hundred and eight.

It is evident from this provision of St. 1920, c. 563, that the answer to question 1 is in the negative.

Prior to the enactment of St. 1920, c. 563, no express provision had been made by statute for payment of dividends by the savings department of a trust company. The authority to pay interest or dividends upon savings deposits must be found in the general provisions relating to the payment of dividends by trust companies, or implied from St. 1908, c. 520, § 5, which provides:—

All income received from the investment of funds in said savings department, after deducting the expenses and losses incurred in the management thereof and such sums as may be paid to depositors therein as interest or dividends, shall accrue as profits to such corporation and may be transferred to its general funds.

By St. 1920, c. 563, § 6, the distinction is made between ordinary and extra dividends. Prohibition is put upon payment of ordinary dividends in excess of 5 per cent, and a provision is made that extra dividends may be paid under the same provisions governing payment of extra dividends by savings banks. The payment of extra dividends is not made compulsory, as in the case of savings banks, under the provisions of St. 1908, c. 590, § 63, but it is the clear intent of the statute that no extra dividend shall be paid by the savings departments of trust companies other than under the same conditions which obtain in the case of savings banks.
The answer to your second question is to be found in the language of the statute, which determines when and under what conditions extra dividends "may be paid," and it follows that any dividend paid subsequent to the time that St. 1920, c. 563, became operative could be paid only under the authority of that act. Dividends declared are not dividends paid, and if a dividend is paid contrary to the statutory limitations governing payment, it can make no difference when the dividend was declared. It follows that the answer to your second question must be in the affirmative.

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Optometry, Practice of — Assistance in Use of Eyeglass Tester.

Where one possesses an appliance and lends manual assistance in the operation of the same, which requires no technical knowledge of the science of optometry, said assistance being rendered to a customer in the use of the appliance by turning a disc to enable the customer to look through a series of lenses, it cannot be said that the lending of such assistance constitutes the practice of optometry, within the meaning of St. 1912, c. 700, § 1.

The use of such an appliance, and its operation as indicated, by a seller does not come within the prohibition of St. 1912, c. 700, if neither advice nor instruction is given the customer.

You state certain facts relating to the use of an appliance called the auto eye tester, and request my opinion upon the following question of law:

Does the fact that the possessor of this appliance provides a "method or means" of making an examination of the eyes mean that the seller is thereby practicing optometry?

It appears from the papers accompanying your letter that a complaint was received by the Division of Optometry to the effect that a firm dealing in spectacles or eyeglasses was using an appliance called the auto eye tester, and was advertising that by the use of the appliance persons could fit their eyes to glasses. Investigation by the State Police, at the instance
of your Division, confirmed the statements contained in the complaint, and also disclosed the fact that clerks employed by this firm assisted customers in the use of the appliance by turning a disc to enable the customer to look successively through a series of lenses.

It is the contention of the manufacturer that the use of this appliance by customers to assist them in determining what eyeglasses are suited to their eyes does not constitute a violation of law, in that its use by the customer is not, in any legal aspect, different from the use by the customer of numerous pairs of eyeglasses in trying the lenses to make a selection.

The company claims that it merely facilitates the selection of eyeglasses best suited to the customer.

St. 1912, c. 700, § 1, reads as follows:—

The practice of optometry is defined to be the employment of any method or means other than the use of drugs for the measurement of the powers of vision and the adaptation of lenses for the aid thereof.

It is further provided in section 5 of said chapter that no person shall practice optometry until he shall have passed an examination and shall have received a certificate of registration. Certain persons are exempted from the provisions of the act under section 10, including "persons who neither practice nor profess to practice optometry, but who sell spectacles or eyeglasses or lenses, either on prescription . . . or as merchandise from permanently located and established places of business." No question is raised upon the record that the seller has a permanently located and established place of business, and that the persons who sell the spectacles or eyeglasses do not profess to practice optometry.

The question submitted to me, therefore, turns upon what is meant by "practicing optometry." Obviously there is no restraint imposed by the statute upon a customer trying on any number of pairs of glasses for the purpose of testing which one most assists the vision. No objection could be made to the use by the customer of a series of trial glasses, with dif-
ferent lenses and numbers, furnished by the seller to enable the customer to test his vision. There is no valid distinction between the use by the customer of a series of eyeglasses in testing the vision, and the use of an appliance containing a series of lenses which enables the customer to make a selection with greater facility.

Nor does it make any difference that the seller assists the customer in the use of the appliance by turning a disc to present the lenses in succession. If this were true, a child could practice optometry, and it would cease to be a skilled profession.

It is not necessary to attempt to lay down an exact rule to determine in all cases what is or is not included in the practice of optometry. It is sufficient in the present case to say that manual assistance in the operation of a mechanism which requires no technical knowledge of the science does not constitute the practice of optometry, within the meaning of the act. I am of the opinion that the use of this appliance and its operation by the seller does not come within the prohibition of the statute if neither advice nor instruction is given to the customer.

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**Insurance — Mutual Fire Insurance Company — By-laws — Election of Directors — Rights of Policyholders and Guaranty Stockholders in Such Election.**

A by-law of a mutual fire insurance company, which provides that the board of directors shall be chosen, one-half by and from the policyholders, and one-half by and from the guaranty stockholders, is invalid because it is in conflict with the provisions of St. 1907, c. 576, § 43, as amended by Gen. St. 1915, c. 7.

The policyholders and the guaranty stockholders of a mutual fire insurance company have equal rights in electing the entire board of directors.

You request my opinion on the following question of law: A mutual fire insurance company having a guaranty capital of $100,000, in accordance with the provisions of St. 1907, c. 576, § 45, has had since 1872 a by-law as follows, viz.: —
There shall be elected by ballot a board of not less than eight nor more than twelve directors, one-half of whom shall be chosen by and from the members and one-half by and from the stockholders.

Your question is as to whether or not this by-law and the election of directors, half by and from the policyholders and half by and from the guaranty stockholders, is the proper mode of procedure.

A fundamental and one of the most important features of a mutual fire insurance company is the provision that every person insured by such a company is a member while his policy is in force, and entitled to one vote for each policy that he holds. The power of such a member to vote as to whom he desires to be upon the board of directors of such a company is an essential feature of the mutual fire insurance business.

The statutory provisions pertinent thereto are found in St. 1907, c. 576, § 43, as amended by Gen. St. 1915, c. 7. Said section 43, as amended, provides, in part, as follows:—

Every person insured by a mutual fire insurance company shall be a member while his policy is in force, entitled to one vote for each policy he holds, and shall be notified of the time and place of holding its meetings by a written notice.

Every such company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business.

A majority at least of the directors shall be citizens of this commonwealth, and, after the first election, members only shall be eligible, but no director shall be disqualified from serving the term for which he was chosen by reason of the expiration or cancellation of his policy: provided, that, in companies with a guaranty capital, one-half of the directors shall be chosen from the stockholders.

The provisions as to companies with a guaranty capital are found in section 45 of said chapter 576.

The guaranty stockholders' power to vote, as provided in the above section, is as follows:—

Shareholders and members of such companies shall be subject to the same provisions of law relative to their right to vote as apply respectively
to shareholders in stock companies and policy holders in purely mutual companies.

It is my opinion that the provisions of the by-law of the insurance company in question are not in accord with the requirements of the statute. The policyholders and the guaranty stockholders of a mutual fire insurance company have equal rights in electing the entire board of directors. It is true that the policyholders of such a company greatly outnumber the guaranty stockholders, and doubtless this was the reason that the proviso was added to clause 8 of section 43 of said chapter 576, requiring that in companies with a guaranty capital, one-half of the directors should be chosen from the stockholders.

To go further and attempt to read into the statute a right of the guaranty stockholders to elect the stockholder directors, without participation in the vote by the policyholders, is not only to make an implication that is not warranted, but it violates the rights secured to the policyholders by the statute, because "every person insured" is a member "entitled to vote" in the election of directors. If the Legislature had intended that one-half of the directors should be chosen from and by the stockholders, it would have so provided.

Citizenship—Status of American Women Married to Aliens Prior to March 2, 1907.

American women married to aliens prior to March 2, 1907, retain their American citizenship, while those subsequently married to aliens take the nationality of their husbands.

You request my opinion as to whether a woman who was an American citizen, and who, prior to March 2, 1907, married an alien, retains her American citizenship and is entitled to register and vote.

On March 2, 1907, Congress enacted a statute, the third section of which provides:—

That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she
may resume her American citizenship, if abroad, by registrating as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

The question you have raised, namely, what is the status of an American woman who married a foreigner prior to the statute of 1907, has been the subject of more or less controversy for many years, and there has been no judicial determination of this precise point by the highest court of either this Commonwealth or the United States.

In the case of Shanks v. Dupont, 3 Pet. 242 (1830), the plaintiff, a woman, under age, resided with her father in Charleston, S. C., when that city was captured by the British forces in 1780. She married a British officer in 1781, left America with him the following year, went to England, and remained there until her death in 1801. The question of her citizenship was involved, and the court held that her removal from the United States operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British Crown by the Treaty of Peace of 1783.

The question presented by your inquiry was not before the court, but Mr. Justice Story, in his opinion, after stating that the capture and possession of Charleston did not annihilate or destroy the allegiance of the captured inhabitants, said: —

Neither did the marriage with Shanks produce that effect, because marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is that no persons can by any act of their own, without the consent of the government, put off their allegiance and become aliens.

The rule stated by Mr. Justice Story, that no person, by any act of his, without the consent of the government, can put off his allegiance and become an alien, was declared otherwise by Congress in the act of July 27, 1868, now U. S. Rev. St. § 1999, which reads as follows: —
Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

In 1883 it was held by the United States Circuit Court that a French woman who had become naturalized under the statute by a marriage with an American citizen will again become an alien by a second marriage to a French citizen residing in this country. *Pequignot v. Detroit*, 16 Fed. Rep., 211 (C. C. 1883).

In that case Judge Brown expressed doubt as to the binding force of *Shanks v. Dupont*, in view of the act of July 27, 1868, which expressly recognizes the inherent right of expatriation, and of the act of Feb. 10, 1855, which provides that any woman married to an American citizen should be deemed a citizen, and observed that —

> It seems to me ... that we ought to apply the maxim "cessante ratione, cessat lex" to this case, and are not bound to treat it as controlling authority.

He added: —

We should regard the sections above quoted as announcing the views of Congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case where an alien woman marries an American citizen.

The reasoning of Judge Brown, however, has not met with approval in later decisions. In *Comitis v. Parkerson*, 56 Fed. Rep., 556 (C. C. 1893), the plaintiff, a native citizen of Louisiana, married a native-born subject of Italy, who had come to
Louisiana and engaged in business. The husband never became naturalized, but they resided in Louisiana until his death, and the plaintiff thereafter continued to reside there. The court, referring to the act of July 27, 1868, said:—

But even if Congress, in the preamble to the act of 1868, had meant to declare that there might be expatriation effected in connection with other means than by naturalization abroad, the settled doctrine as to expatriation would prevent the plaintiff from being regarded as expatriated. Expatriation must be effected by removal from the country. It cannot be denied that whatever right of expatriation Congress meant to declare by the act of 1868 is in the express language of the preamble based entirely upon the inborn right to seek happiness by free removal from one country to another. It could not, therefore, have been intended by Congress in that act that citizens should expatriate themselves, and remain permanently within the country. .

My conclusion, therefore, is that . . . even if Congress meant to imply that expatriation from the United States might be effected by means other than naturalization in a foreign country, it must have meant that it should be conditioned upon actual departure from the country.

It does not affect the conclusion that the domicile of the wife was controlled by that of the husband. Whether decided by her or by one whom she had authorized to decide for her, the fact of her residence here, with the purpose on the part of her husband and herself to remain here always, is, as it seems to me, both upon principle and authority, an insuperable obstacle in the way of her ceasing to be considered a citizen of the United States.

The court referred to Pequignot v. Detroit, supra, and said:—

But in that case the facts characterizing the residence of the husband and wife may have made it what the public writers term temporary residence, whereas the intent of the plaintiff and her husband (in this case) was to remain in the United States always.

The question at issue was referred to in the case of Ruckgaber v. Moore, 104 Fed. Rep., 947. The precise point involved in this case, which was before the Circuit Court of New York, was the status of a native-born American woman marrying a citizen of France and removing with him to his country; and the court held that her citizenship followed that of her husband. In the discussion of the case, however, the court said:—

By the several statutes of America, France, and Great Britain, the marriage of a citizen of such country with an alien wife confers upon the
latter the citizenship of the husband; and this policy of three great powers, in connection with section 1999 of the Revised Statutes, which proclaims that expatriation is an inherent right, establishes that the political status of the wife follows that of her husband, with the modification that there must be withdrawal from her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage.

In 1908 the United States Circuit Court in Nebraska heard the case of Wallenburg v. Mo. Pac. Ry. Co., 159 Fed. Rep., 217, involving the citizenship of an American woman who had married an alien prior to 1907 and remained in this country. The court, after citing authorities, said: —

Without undertaking to review the reasons given for the conclusions reached in each of the foregoing cases, I am clearly of the opinion that a woman, a citizen of the United States, does not lose that citizenship by marriage to an alien, at least so long as she continues to reside in the United States. . . .

It will be observed that the foregoing case was decided after the passage of the act of 1907, but dealt with a situation arising before that year.

The case of Mackenzie v. Hare, 239 U. S., 299, decided in 1915, involved the status of an American woman who married an alien after the passage of the act of March 2, 1907, but continued to reside in the United States. It was argued by the plaintiff, who sought to be registered as a voter in California, that her American citizenship was an incident to her birth in the United States, and that under the Constitution and laws it became a right, privilege and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation. In holding that under the act of March 2, 1907, the plaintiff, by her marriage to an alien, had elected to give up her American citizenship, even though both the plaintiff and her husband continued to reside here, the court said: —

Only voluntary expatriation, as she defines it, can divest a woman of her citizenship, she declares; the statute provides that by marriage with a foreigner she takes his nationality. . . . There need be no dissent from
the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy (March 2, 1907) does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. . . . The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the government into embarrassments, and, it may be, into controversies. It is as voluntary and distinctive as expatriation, and its consequence must be considered as elected.

Upon a consideration of the foregoing cases, even if we put aside Shanks v. Dupont as inapplicable because of the act of July 27, 1868, the weight of authority seems to establish that an American woman who, prior to March 2, 1907, married an alien but still continued to reside in this country did not lose her citizenship.

It may be observed that, giving to the language of the statute of March 2, 1907, its ordinary signification, it appears to refer to future marriages. The words are "any woman who marries a foreigner." There is nowhere in the statute any indication that it was intended to be retroactive, and the rule of construction, that a statute will not be held to be retroactive unless such a purpose appears in the statute itself, must apply. Nor is there anything in the language of the statute to indicate that it was intended to be declaratory of the then existing law.

The provisions for the resumption of citizenship, after the termination of the marital relation, make a change in existing law.

Until the Supreme Court of the United States shall declare otherwise, I am of the opinion that the case of Wallenburg v. Mo. Pac. Rwy. Co., supra, following the weight of authority and decided after the passage of the statute in respect to a marriage which took place before the passage of the statute, must be held to declare the then existing law, and should be followed.
I therefore advise you that an American woman who, prior to March 2, 1907, married an alien, if she has continued to reside in this country, retains her American citizenship, and is entitled to register and vote if domiciled here and otherwise qualified.

Set-off — Defunct Trust Company — Set-off of Deposit in Commercial Department against Debt due to Commercial Department — Set-off of Deposit in Savings Department against Debt due to Commercial Department — Set-off of Deposit in Commercial Department against Debt due to Savings Department — Time when Set-off may be made by Commissioner of Banks — Equitable Set-off.

The principle upon which set-off rests is that in all final adjustments between debtor and creditor the actual balance, after setting off all mutual demands against each other, is the true debt.

A set-off does not constitute a preference.

The rules of set-off are applicable to a trust company in process of liquidation under St. 1910, c. 399.

Where a trust company is in process of liquidation under St. 1910, c. 399, a deposit in the commercial department may be set off against a debt due to the commercial department, in accordance with the rules prescribed by R. L., c. 174, §§ 1-11.

Under similar conditions a deposit in the savings department may be set off against a loan due to the commercial department.

Since St. 1908, c. 520, makes the depositors in the savings department of a trust company preferred creditors with respect to deposits in such department and the investments or loans of such deposits, a deposit in the commercial department of a trust company in process of liquidation under St. 1910, c. 399, cannot be set off against a loan due to the savings department of such trust company.

Where a trust company is in process of liquidation under St. 1910, c. 399, a set-off which is otherwise proper may be made at any time if it results in a debt due to the trust company, but if the allowance of the set-off would result in a dividend to the creditor, it cannot be made until the provisions of St. 1910, c. 399, §§ 8 and 11, are complied with.

By letters supplemented by oral interviews you state that, pursuant to authority conferred by St. 1910, c. 399, you have taken possession of certain trust companies and are proceeding to liquidate the same. You then make the following inquiries:
1. Is a depositor in the commercial department of such a trust company entitled to set off such deposit against a debt presently due to such department?

2. Is a depositor in the commercial department entitled to set off that deposit against a loan presently due to the savings department?

3. Is a depositor in the savings department entitled to set off such deposit against a loan presently due to the commercial department?

4. If set-off is required in any or all of these cases, may the depositor require that the set-off be made now, or may the Commissioner postpone it until after claims have been duly proved in accordance with St. 1910, c. 399, § 8?

1. The principle upon which set-off rests is "that in all final adjustments between debtor and creditor the actual balance, after setting off all demands against each other, is the true debt." Commonwealth v. Phoenix Bank, 11 Met. 129, 137, per Shaw, C.J. It is a principle of wide application. It had its origin in equity, but has been applied by statute (R. L., c. 174, §§ 1-11) to actions at law. It applies to commercial transactions between banker and customer (Wood v. Boylston Bank, 129 Mass. 358; National Mahaiwe Bank v. Peck, 127 Mass. 298), as well as to actions at law between them. Commonwealth v. Phoenix Bank, 11 Met. 129; Demmon v. Boylston Bank, 5 Cush. 194; Colt v. Brown, 12 Gray, 233; Clark v. Northampton Bank, 160 Mass. 26. But if business is carried on upon the assumption that the net obligation, after setting off mutual demands, constitutes the true debt, it would be unjust if the principle ceased to apply in case one party or the other becomes bankrupt or insolvent. If one party must pay his obligation in full, while receiving in return only a dividend upon the obligation due to him, the amount of the true debt would be increased by the bankruptcy or insolvency. Such is not the law. The principle of set-off was applied expressly to insolvency proceedings by R. L., c. 163, § 34, and still governs in bankruptcy under section 68 of the Federal bankruptcy act. A set-off, therefore, does not constitute a preference either in bankruptcy or under the State insolvency act, which was superseded by the Federal law.

Banks were expressly excepted from the State insolvency law
(R. L., c. 163, § 143) and are now excepted from the operation of the Federal bankruptcy act by section 4. Formerly insolvent banking corporations under State jurisdiction were liquidated under statutes which authorized a petition in equity praying for the appointment of receivers. Atlas Bank v. Nahant Bank, 23 Pick. 480, 3 Met. 581; Hubbard v. Hamilton Bank, 7 Met. 340. In such proceedings the principle of set-off has been uniformly applied, even though no statute expressly made it applicable. Commonwealth v. Phoenix Bank, 11 Met. 129; Colt v. Brown, 12 Gray, 233; see also Commonwealth v. Shoe & Leather Dealers Ins. Co., 112 Mass. 131; Jones v. Arena Publishing Co., 171 Mass. 22, 28, 29; Merrill v. Cape Ann Granite Co., 161 Mass. 212. Generally the court followed the analogy of set-off at law (see cases last cited), but it possesses inherent power as a court of equity to apply the principle of equitable set-off more broadly in order to prevent injustice. Merrill v. Cape Ann Granite Co., 161 Mass. 212, 217. In the case of insolvent savings banks there is an express statutory provision authorizing set-offs (St. 1878, c. 261; R. L., c. 113, § 37; St. 1908, c. 590, § 49), but this enactment has been held to be merely declaratory. Barnstable Sav. Bank v. Snow, 128 Mass. 512; North Bridgewater Sav. Bank v. Soule, 129 Mass. 528. The procedure provided by St. 1910, c. 399, is a substitute for the proceeding in equity referred to above. In my opinion, the analogy of set-off at law (see R. L., c. 174, §§ 1-11), which was applicable to the equity proceeding, is still applicable to the liquidation proceeding under St. 1910, c. 399.

To avoid misconception, let me add that I leave for future consideration the question as to whether any particular set-off would be proper. That must be decided under the particular circumstances of each case, considered in the light of R. L., c. 174, §§ 1-11. I further suggest that if in any case the somewhat broader principles of equitable set-off should be invoked (see Merrill v. Cape Ann Granite Co., 161 Mass. 212), it would be proper to refer the matter to the court for its determination.

2. Savings banks are forbidden to occupy the same or even
a connecting office with a national bank, trust company or other bank of discount, and must not have certain executive officers in common with any such banking institution (St. 1908, c. 590, §§ 19, 20). St. 1908, c. 520, § 1, permits trust companies to maintain a savings department, but subject, nevertheless, to the stringent restrictions upon the management of the assets of such department which are imposed by sections 2, 3, 4 and 5 of said act. In Old Colony Trust Co. v. Commonwealth, 220 Mass. 409, 410, the court, by Chief Justice Rugg, said:—

The conduct of savings departments by trust companies is regulated by St. 1908, c. 520. All deposits made in such departments with the accounts relating thereto must be kept distinct from the general business of the corporation, except that the net profits accruing may be transferred to the general funds. All such deposits must be maintained separate from other deposits and invested in accordance with laws governing the investment of deposits in savings banks.

And the restrictions upon loans by a savings department of a trust company have been considered in III Op. Atty.-Gen., 454; IV Op. Atty.-Gen., 8. Although there is no doubt that the relation between the savings department and depositors therein is that of debtor and creditor (see J. S. Lang Eng. Co. v. Commonwealth, 231 Mass. 367), it is also clear that such depositors are preferred creditors with respect to the assets of the savings department. Section 3 of said chapter 520 provides as follows:—

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

Construing the restrictions imposed upon trust companies by St. 1908, c. 520, §§ 1 to 5, in regard to the management of the savings departments which they are thereby permitted
to establish, in the light of the prohibitions which St. 1908, c. 590, §§ 19 and 20, impose upon savings banks, I am of opinion that a trust company holds the assets of its savings department in a special capacity for special purposes, which purposes are not accomplished until the savings depositors are paid in full.

Set-off at law is in essence a cancellation of mutual credits. It is a mode of making a settlement between the parties. It cannot be applied so as to prejudice third parties or to deprive them of any rights. A credit due to A in his personal capacity cannot be set off against or canceled by a debt owed by A in his representative capacity. R. L., c. 174, § 6; Seaver v. Weston, 163 Mass. 202; Rochester Tumbler Works v. Mitchell Woodbury Co., 215 Mass. 194, 198. To do so would in effect make A’s beneficiary pay A’s debt. These considerations are, in my opinion, decisive of your second question. To permit the owner of a deposit in the commercial department of a trust company in liquidation to set it off at law against a debt due to the savings department would deplete the assets of the savings department to the possible prejudice of other savings depositors, since the two obligations would be canceled either wholly or pro tanto without restoring to the savings department the money borrowed from it. It may be that in a proper case a court of equity might direct that the amount ultimately due in liquidation to the commercial depositors should be transferred to the savings department in order to reduce the depositors’ indebtedness to it pro tanto. See Merrill v. Cape Ann Granite Co., 161 Mass. 212, 217; Perry v. Pye, 215 Mass. 403; Cromwell v. Parsons, 219 Mass. 299. But this is not a cancellation of cross demands which is a substitute for payment, but an actual payment. I am therefore of opinion that in the ordinary case, unmodified by special circumstances, a debt due from A to the savings department of a trust company in liquidation cannot be canceled at law by a deposit due to A in the commercial department of the same trust company.

3. Other considerations govern the converse case of a deposit in the savings department and a debt due to the commercial...
department. In this case no prejudice to the savings department can result from a cancellation of one debt against the other. Indeed, the savings depositors benefit, since the obligations of the savings department are reduced by the set-off and cancellation without any corresponding reduction of the assets of the savings department. Nor can the other savings depositors complain because this particular savings depositor obtains the benefit of the face value of his obligation, while they, perhaps, receive less by way of dividend. A set-off, for the reasons already given, is not open to the objection that it operates as a preference. Nor can the depositors in the commercial department successfully object. St. 1908, c. 520, § 4, provides as follows:

The capital stock of such corporation with the liabilities of the stockholders thereunder shall be held as security for the payment of such deposits, and the persons making such deposits or entitled thereto shall have an equal claim with other creditors upon the capital and other property of the corporation in addition to the security provided for by this act.

Savings depositors have "an equal claim with other creditors of the corporation upon the capital and other property of the corporation, in addition to the security provided by" said St. 1908, c. 520. The fact that savings depositors are preferred over commercial depositors with respect to the assets of the savings department does not confer upon commercial depositors a corresponding preference over savings depositors with respect to the other assets of the trust company. I am therefore of opinion that in the ordinary case, unmodified by special circumstances, a deposit by A in the savings department of a trust company in liquidation may be set off against a debt due from A to the commercial department.

4. Your fourth inquiry raises the question when a set-off, if proper, may be made. The material provisions of St. 1910, c. 399, are found in sections 4, 8 and 11, which read as follows:

Section 4. Upon taking possession of the property and business of such bank, the bank commissioner shall have authority to collect moneys
due to the bank, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate its affairs as hereinafter provided. He shall collect all debts due and claims belonging to it, and upon the order or decree of the supreme judicial court, or any justice thereof, may sell or compound all bad or doubtful debts, and on like order or decree may sell all, or any part of, the real and personal property of the bank on such terms as the court shall direct; and he may, if necessary to pay the debts of any such trust company, enforce the individual liability of the stockholders.

Section 8. The bank commissioner shall cause to be published weekly for three consecutive months, in such newspapers as he may direct, a notice calling on all persons who may have claims against such bank to present the same to the bank commissioner and to make legal proof thereof at a place and in a time, not earlier than the last day of publication, to be therein specified. The bank commissioner shall mail a similar notice to all persons whose names appear as creditors upon the books of the bank, so far as their addresses are known. If the bank commissioner doubts the justice and validity of any claim, he may reject the same and serve notice of such objection upon the claimant either by mail or person. An affidavit of service of such notice, which shall be prima facie evidence thereof, shall all be filed with the bank commissioner. An action upon the claim so rejected shall not be entertained unless brought within six months after such service. Claims presented after the expiration of the time specified in the notice to creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the bank commissioner equitably applicable thereto.

Section 11. At any time after the expiration of the date fixed for the presentation of claims the supreme judicial court, upon the application of the bank commissioner, may authorize him to declare out of the funds remaining in his hands, after the payment of expenses, one or more dividends, and, after the expiration of one year from the first publication of notice to creditors, the bank commissioner may declare a final dividend, such dividends to be paid to such persons, in such amounts, and upon such notice as may be directed by the supreme judicial court for the county in which the principal office of such bank was located, or as may be directed by a justice of said court. Objections to any claim not rejected by the bank commissioner may be made by any person interested by filing a copy of such objections with the bank commissioner, who shall present the same to the supreme judicial court at the time of the next application for leave to declare a dividend. The court to which such application is made shall thereupon dispose of said objections, or may refer them to a master for that purpose, and should the objections
to any claim be sustained by the court or by the master no dividend thereon shall be paid by the bank commissioner until the claimant shall have established his claim by the judgment of a court of competent jurisdiction. The court may make proper provision for unproved or unclaimed deposits.

I am of opinion that the question when a set-off, if proper, may be made depends upon whether the effect of the set-off, if made, will or will not result in a dividend to the depositor. Section 4, it will be observed, authorizes the commissioner "to collect moneys due to the bank." If the true debt is the net amount due after making such set-off as may be proper, it seems plain that the authority to collect it must also include authority to determine the amount thereof and to allow such set-off as may be proper as an incident of collection. I am confirmed in this view by the consideration that the debtor might force such set-off by refusing to pay and compelling the commissioner to sue, in which case he, as the defendant, might plead any set-off permitted by R. L., c. 174, §§ 1-11, inclusive. On the other hand, it is plain that no dividend can be paid to any creditor of the trust company until St. 1910, c. 399, §§ 8 and 11, have been complied with. If, therefore, all proper set-offs, if made, leave an amount still due to the depositor, he must, in order to collect, comply with section 8, and cannot collect except in the manner provided by section 11. Any set-off must be made in those proceedings. I am therefore of opinion that the question when a proper set-off may properly be made depends upon whether the result of it is to leave the trust company a debtor or a creditor of the depositor. It may be made at any time as an incident of collecting a debt due to the trust company; it cannot properly be made except in connection with the payment of a dividend pursuant to sections 8 and 11, if it results in a debt due from the trust company.

I may add that the opinion rendered to your Department by my predecessor on Jan. 15, 1920, may well be confined to the latter situation.

I therefore advise you in answer to your specific questions as follows:—
1. In the absence of special circumstances, the answer to your first question is "Yes." I may add that, in view of R. L., c. 113, § 37, as re-enacted in St. 1908, c. 590, § 49, like considerations govern the set-off of a deposit in the savings department against a debt due to that department.

2. In the absence of special circumstances, the answer to your second question is "No." I may add, however, that the court, in the exercise of its equity powers, might, through its control of the parties before it, work out some form of equitable set-off even in such a case, if justice required it.

3. In the absence of special circumstances, the answer to your third question is "Yes."

4. In my opinion, the question as to when a proper set-off should be made depends upon whether it results in a debt to or a debt from the trust company. If it results in a debt to the trust company, it may be made at any time pursuant to the power to collect moneys due to the trust company, which is conferred by St. 1910, c. 399, § 4. If it results in a debt due from the trust company, it can only be made in connection with the payment of a dividend pursuant to St. 1910, c. 399, §§ 8 and 11.

TRUST COMPANY — RELATION OF COMPANY TO HOLDER OF SAFE DEPOSIT BOX — RIGHT TO HOLD CONTENTS OF SAFE DEPOSIT BOX TO MEET CONTINGENT LIABILITY TO COMPANY.

In view of R. L., c. 116, § 38, and St. 1910, c. 399, § 12, the relation between a trust company and the holder of a safe deposit box is that of landlord and tenant. The contents of a safe deposit box rented from a trust company are not in the possession of the trust company.

Where the Commissioner of Banks has taken possession of a trust company under St. 1910, c. 399, he cannot refuse to a director of such trust company, who has rented a safe deposit box, permission to remove the contents of such box, upon the ground that such director may be subject to directors' liability.

You have asked my opinion upon the following case: —

A director in a trust company rented a safe deposit box from the trust company and placed in it certain securities and
personal property, the nature of which is unknown to you. The rental agreement provides that the relation of the trust company to the boxholder shall be that of landlord and tenant, and expressly disclaims any possession of the contents of the box, either as bailee or otherwise. The trust company reserves a right, in case possession of the box is not surrendered at the end of the term, to open the box forcibly, remove the contents and hold the same as a special deposit for safekeeping, and, in that event, claims a lien upon the contents for rent due and for its fair charges for storing the contents. Access to the box is obtained by simultaneous use of two different keys, one of which is kept by the trust company and one by the boxholder. Neither the trust company nor the boxholder can unlock the box without employing the key which is held by the other. You state that you have taken possession of the trust company under the authority conferred by St. 1910, c. 399, and that you have reason to believe that the director in question, who has rented the box, may be liable to the trust company by reason of his acts as director, but do not further indicate the nature or extent of such possible liability. You inquire whether you can properly deny to such director permission to remove the contents of such box, in order to retain such contents as security for or as an offset to such possible liability.

R. L., c. 116, § 38, authorizes corporations "organized for the purpose of letting vaults, safes or other receptacles" to take certain steps in case the "amount due for rent" is not paid. St. 1910, c. 399, § 12, authorizes the Bank Commissioner, after he has taken possession of the trust company, to take certain steps to cause the owner of any property deposited in such rented box or safe to remove the same. In my opinion, these provisions are a clear statutory recognition that the relation between the trust company and the boxholder is that of landlord and tenant. If so, the contents of the box are in no sense in the possession of the trust company by reason of that relation, nor can the trust company, or the commissioner in possession thereof, successfully maintain a right of lien upon the contents of said box, or a right of set-off against them, in
order to satisfy a supposed liability of the boxholder to the trust company as director of such company.

Other considerations confirm me in this conclusion. The so-called banker's lien upon the general deposit of a customer is really a right of commercial set-off. In the absence of some special agreement to the contrary, the banker may apply a general deposit to any matured debt of the customer which the banker may select, unless such debt is already fully secured by collateral. Furber v. Dane, 203 Mass. 108, 117, 118. But he cannot retain a general deposit or apply it in order to reduce an indebtedness not yet due. Wiley v. Bunker Hill National Bank, 183 Mass. 495; Spaulding v. Backus, 122 Mass. 553. So, also, collateral pledged to a bank to secure a specified demand cannot, in the absence of agreement, be held for other demands against the same debtor. Hathaway v. Fall River National Bank, 131 Mass. 14; Brown v. New Bedford Institution for Savings, 137 Mass. 262. And a bank which has a mere naked custody of notes, without authority to sell or dispose of them, cannot set them off even against a debt already due. Stetson v. Exchange Bank, 7 Gray, 425.

On the facts given it appears that the supposed liability has not been determined to exist. In this aspect of the case the trust company can scarcely stand better than if it held a definite but unmatured obligation. So, also, the trust company has not even a naked custody of the contents of the director's safe deposit box. In this view of the matter the trust company is in a weaker position than the bank in the Stetson case. I am therefore constrained to advise you that no ground has been shown for retention of the contents of this director's safe deposit box.

I leave for future consideration the question whether the trust company could reach and apply the contents of such a box in equity under the provisions of R. L., c. 159, § 3, cl. 7, in order to satisfy a "debt" presently due and payable. Hoshor-Platt v. Miller, 190 Mass. 285; Hopedale Mfg. Co. v. Clinton Cotton Mills, 224 Mass. 193.
SET-OFF — TRUST COMPANY IN POSSESSION OF COMMISSIONER OF BANKS.

Where a depositor in a trust company in the possession of the Commissioner of Banks under St. 1910, c. 399, is indebted to the company in a sum less than the amount of his deposit, the Commissioner may in his discretion permit a set-off to the amount of the debt before the time limited for proof of claims.

In connection with the opinion rendered to you on Oct. 14, 1920, you have orally requested my opinion on the following case: —

The Commissioner of Banks has taken possession of a trust company pursuant to authority conferred by St. 1910, c. 399. A is presently indebted to the commercial department of the trust company upon a note for $1,000, secured by collateral. A has a deposit of $1,050 in the commercial department of the trust company. Can the Commissioner of Banks set off $1,000 of such deposit against the note, and release the collateral, prior to the time when claims are proved and a dividend allowed under sections 8 and 11 of said act, or must he wait until the claim is proved under section 8 and a dividend is payable under section 11 before making any set-off whatsoever?

In the opinion rendered Oct. 14, 1920, I advised you that if, in a case where set-off was proper, the set-off, if made, would result in an indebtedness from the customer to the trust company, the Commissioner, as an incident of collecting such indebtedness, might allow such set-off without waiting for proof of claims under section 8. I further advised you that if, in a case where set-off was proper, the set-off, if made, would result in a dividend to the depositor, the set-off could not be made until sections 8 and 11 were complied with and the liquidation was ripe for the payment of a dividend. The case which you now put is the case where a portion of the debt due from the trust company is sought to be canceled against the whole debt due to the trust company, leaving the balance due from the trust company as the net claim to be proved on account of dividends. This is in accordance with the principle upon which set-off rests, namely, “that in all final adjustments between
debtor and creditor, the actual balance, after setting off all mutual demands against each other, is the true debt.” Commonwealth v. Phoenix Bank, 11 Met. 129, 137. It is not, in my opinion, forbidden by section 8. The provision of section 8 which prescribes that the notice shall call on claimants to make legal proof of claims “at a place and in a time not earlier than the last day of publication, to be therein specified” should in my opinion, be held to be directory, rather than a limitation upon the power of the Commissioner, in the exercise of a sound discretion, to allow a claim which is presented at an earlier date. Nor is it in conflict with section 11, since the partial set-off in question results in no dividend. Assuming, therefore, that the set-off is otherwise proper, I am of opinion that the Commissioner of Banks, in the exercise of a sound discretion, may make the partial set-off in question before the expiration of the time limited by the notice given under section 8 for the proof of claims. On the other hand, he may, in any case where he deems it expedient, postpone the set-off until claims have been proved and the claim in question is ripe for dividend.


Being present at a place where preparations are being made for the exhibition of the fighting of birds, which is made a crime subject to fine or imprisonment by R. L., c. 212, § 86, is not cruelty to animals, under R. L., c. 212, § 76. The Massachusetts Society for the Prevention of Cruelty to Animals is not entitled, under R. L., c. 212, § 76, to any part of fines collected from defendants upon convictions under R. L., c. 212, § 86, upon complaint of an agent of the Massachusetts Society for the Prevention of Cruelty to Animals for being present at a place where preparations were being made for the exhibition of the fighting of birds.

A number of defendants were found guilty and fined under R. L., c. 212, § 86, upon complaint of an agent of the Massachusetts Society for the Prevention of Cruelty to Animals that they were present “at a certain place . . . where preparations
were being made for the exhibition of the fighting of birds." You inquire whether such fines are payable to the said society, under R. L., c. 212, § 76, which provides as follows: —

Sheriffs, deputy sheriffs, constables and police officers shall prosecute all violations of the provisions of sections seventy to seventy-three, inclusive, which come to their notice, and upon all convictions for cruelty to animals the fines collected upon or resulting from the complaint or information of an officer or agent of the Massachusetts Society for the Prevention of Cruelty to Animals shall, except as provided in the following section, be paid over to said society after deducting therefrom for the expense of prosecution such amount as the court or trial justice shall order.

St. 1868, c. 212, being an act entitled "An Act for the more effectual prevention of cruelty to animals," defined and prescribed punishment for certain offences now included in R. L., c. 212, §§ 70, 71 and 73. Section 8 of said act of 1868 provided, in substance, that fines collected upon information or complaint of any officer or agent of said society "under this act" shall be paid over to said society. St. 1868, c. 212, was repealed, except as to prosecutions then pending thereunder and offences theretofore committed, by St. 1869, c. 344, which act bore the same title, more fully defined, and punished similar offences, and contained a similar provision for payment to said society of the fines and forfeitures "under this act" resulting from the complaint or information of any officer or agent of said society. St. 1869, c. 344, was codified in Pub. Sts., c. 207, §§ 52, 53, 54, 55 and 59, but such verbal changes as may have been incident to such codification are presumed not to have changed the meaning of the laws then in force, unless the intention to change clearly appears. Wright v. Dressel, 140 Mass. 147, 149. It follows that under Pub. Sts., c. 207, § 59, the Society for the Prevention of Cruelty to Animals was not entitled to receive the fines resulting from a complaint by an officer or agent of that society unless the conviction was obtained under Pub. Sts., c. 207, §§ 52–55, to which sections R. L., c. 212, §§ 70, 71 and 73, now correspond.

The right of said society to receive the fines upon a convic-
tion resulting from the complaint or information of an officer or agent of said society was, however, enlarged by St. 1891, c. 304, which provides as follows:—

In all cases of prosecution for cruelties inflicted upon dumb animals, the fines collected upon or resulting from the complaint or information of any officer or agent of the Massachusetts Society for the Prevention of Cruelty to Animals shall be paid to said society, less a sum equal to the expense of prosecution, which sum shall be determined by the court or trial justice.

To this statute must be traced the provision of R. L., c. 212, § 76, that “upon all convictions for cruelty to animals the fines collected upon or resulting from the complaint or information of an officer or agent of” said society should be paid to said society. This requires that the words “cruelty to animals,” as used in said section, be construed to mean “cruelties inflicted upon dumb animals.” But these more restricted words can scarcely be held to include the offence of being “present” at a place where preparations are being made for the fighting of birds, for which offence these defendants were convicted under R. L., c. 212, § 86. While such preparations may ultimately lead to the infliction of cruelty upon the birds, that point has not yet been reached. Such a conclusion is by no means satisfactory, since it deprives a society organized to prevent cruelty to animals of fines which result from its vigilance in preventing such cruelty. The remedy must, however, be sought from the Legislature. I am therefore constrained to advise you that said society is not entitled to the fines in question.

I may add that, in view of R. L., c. 212, § 77, the words “cruelty to animals,” as used in section 76, cannot be construed to include the offence defined by section 72.
Elections — Absent Voters' Ballots — When to be Cast.

Under the provisions of Gen. St. 1919, c. 289, an absent voter's ballot can neither be cast nor counted unless it arrives at the proper polling place upon the day of election, in time for delivery to the election officers before the polls are declared closed.

You state that you have received from the board of election commissioners of the city of Boston an inquiry which reads as follows:

Can absent voters' ballots received at this office up to 5 p.m. Tuesday, November 2, the day of the State election, said 5 p.m. being the time for closing the polls of Boston, be then sent to the several precincts of the city, to be cast and counted by the election officers of the several precincts?

The ballots in many cases would not reach the precincts until one-half to one hour after the polls are closed.

This applies to section 9 of Gen. St. 1919, c. 289, entitled "An Act to permit absent voters to vote at state elections."

You ask my opinion in regard to this question.

The provisions for absent voting are contained in Gen. St. 1919, c. 289. Section 7 provides, in part, as follows:

A voter who has executed and filed an application for an official absent voting ballot with the clerk of the city or town in which he is a registered voter, or, in the case of voters coming within the provisions of section five, with such city or town clerk or the secretary of the commonwealth, may, after his application is certified as provided in the preceding section, vote by mailing to such city or town clerk an official absent voting ballot, prepared under the provisions of section two.

Section 8 provides that all ballots cast under the provisions of section 7 "shall be mailed on or prior to the day of election." Section 9 requires the city or town clerk to attach the application to the ballot, and further provides:

Upon election day before the hour for the closing of the polls the said clerk shall deliver all envelopes received by him to the election officials in the several voting precincts in which the voters named therein assert the right to vote.
Section 10 provides that "immediately after the closing of the polls, and after the ballots cast have been removed from the ballot box, the warden or his deputy in each polling place" shall verify the envelopes and applications in the manner therein prescribed, and if he finds them to be correct "he shall make public announcement of the names of the absent voters, . . . and . . . shall deposit the ballots in the ballot box."

Section 11 provides that "all ballots received by mail shall be subject to challenge when and as cast," for the causes defined in said section. Section 14 provides as follows:—

All envelopes received by clerks of cities and towns after the hour fixed for the closing of the polls on the day of election shall be retained by them unopened until the time set by law for the destruction of ballots cast at the state election, at which time the envelopes shall likewise be destroyed, unopened and unexamined.

Section 18 provides that the terms "city clerk" and "registrars of voters" shall in Boston apply to the board of election commissioners.

The act leaves the question submitted in considerable doubt. Sections 9, 10 and 11 support a construction which would exclude all absent voting ballots which are not delivered to election officials at the several polling places prior to the hour fixed for the closing of the polls. The provisions of these sections cannot, as a practical matter, be complied with if the ballots of absent voters can be delivered to the several polling places after the polls close. It is to be observed that the act makes no provision for recording the moment of receipt by the city or town clerk. The absence of such a provision would indicate that the polling place is the depository of the ballots of all voters, present or absent, and that no ballots of either present or absent voters can be cast at any other place than the polling place, and the closing of the polls is effective to prevent the receipt of ballots of present or absent voters. The provision that the warden or his deputy at each polling place shall verify the envelopes and applications immediately after the closing of the polls obviously could not be complied with unless the envelopes
and applications were in hand at the closing of the polls, and
the right to challenge ballots received by mail when and as
cast, upon public announcement of the names of absent voters,
would be seriously affected if the polls were open for an indefinite period to receive the ballots of absent voters. An injury
to the messenger on the way to the polling place might prevent
delivery of the ballots for hours after the other ballots had been
counted and the returns made to the city or town clerk.

I am therefore of the opinion that the provisions of section
14 cannot operate to control the clear import of sections 9, 10
and 11. The absent voter takes the risk of delay in the mails,
and, as the final depository of the ballot is the polling place,
he also takes the risk of delay in delivery by the city or town
clerk, or, in the case of the city of Boston, by the election com-
mmissioners, to the warden or his deputy at the polling place.
It follows that the ballots of absent voters which do not arrive
at the polling place in time for delivery before the polls are
declared closed can neither be cast nor counted, but should be
returned, to be held by the city or town clerk, or in Boston by
the election commissioners, and destroyed unopened and un-
examined, under the provisions of section 14.

Salaries — State Boxing Commission — State Police Of-
ficer.

The compensation received by one who is deputized by the State Boxing Com-
mission under St. 1920, c. 619, is not "salary," within the meaning of R. L.,
c. 18, § 11, providing that "a person shall not at the same time receive more
than one salary from the treasury of the commonwealth."

R. L., c. 6, § 58, forbids payment of extra compensation to an employee or officer
for special work done in regular working hours, but does not forbid extra com-
pensation for overtime service.

You have asked my opinion upon the following: —

St. 1920, c. 619, establishes a State Boxing Commission.
Section 2 provides in part as follows: —

The chairman of the commission may deputize one or more persons
to represent the commission and to be present at any match or exhibi-
tion authorized to be held as hereinafter provided, who may receive such compensation for actual service as shall be fixed by rule or regulation of the commission, together with their travelling expenses actually and necessarily incurred in the discharge of their duties.

You inquire whether, under this provision, you may deputize a member of the State Police and pay him the special compensation therein provided.

R. L., c. 18, § 11, provides: —

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

The compensation received by one who is deputized by the State Boxing Commission is not "salary," within the meaning of this provision. See Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 4; II Op. Atty.-Gen. 21. It is rather in the nature of a fee paid for special service. Payment of such extra compensation for special service to one who already receives a salary from the Commonwealth is therefore not forbidden by this section. II Op. Atty.-Gen. 21; ibid., 309.

R. L., c. 6, § 58, provides in part: —

Salaries payable from the treasury of the commonwealth . . . shall be in full for all services rendered to the commonwealth by the persons to whom they are paid.

This provision forbids payment of extra compensation to an employee or officer for special work done in regular working hours, but by immemorial custom does not forbid extra compensation for overtime service. II Op. Atty.-Gen. 309. It is for you to determine in each case, in the exercise of a sound discretion, whether in point of fact the State police officer, in acting as deputy for the State Boxing Commission, is simply doing special work in regular working hours, or is rendering overtime service which he ought not reasonably to be asked to perform as a part of his regular duties. I see no objection to deputizing him in either case, but his right to extra compensation must depend upon whether the service is or is not overtime service. It is, of course, plain that you should
not deputize a State police officer to perform overtime service for extra compensation if another officer may be called upon to perform the same service as a part of his regular duties. That is also a question of fact which you must determine in each case in the exercise of a sound discretion.

**DIRECTOR OF A DIVISION OF A STATE DEPARTMENT — SALARY — MEMBER OF ADVISORY BOARD OF SAME DEPARTMENT — ADDITIONAL COMPENSATION.**

A person who has been appointed director of a division of a State department, and receives therefor a yearly compensation, may not receive any additional compensation for services rendered to the Commonwealth as a member of the advisory board of that department, unless such services as a member of the advisory board are rendered outside of working hours, or unless his duties as director are not sufficient to require his continuous service in that position.

You request my opinion as follows: —

Please give me, as a member of the finance committee of the Council, an opinion as to whether or not the paying to Leslie R. Smith of a per diem compensation of $10 a day as a member of the advisory board of the Department of Agriculture is contrary to the provisions of the Revised Laws prohibiting the receiving of two salaries by a State official. Mr. Smith, besides being a member of the advisory board, is the Director of the Division of Reclamation, Soil Survey and Fairs.

Under the provisions of Gen. St. 1919, c. 350, § 35, the Governor appointed Mr. Smith a member of the advisory board of the Department of Agriculture. Section 36 of said chapter 350 provides in part that the advisory board "shall receive ten dollars a day while in conference and their actual traveling expenses incurred in the performance of their official duties." Under the provisions of section 37 the Commissioner of Agriculture appointed Mr. Smith Director of the Division of Reclamation, Soil Survey and Fairs. His compensation has been fixed by the Commissioner, with the approval of the Governor and Council, at $4,000 a year.

R. L., c. 18, § 11, reads as follows: —
A person shall not at the same time receive more than one salary from the treasury of the commonwealth.

One of my predecessors in office, referring to this provision of the Revised Laws, made this statement:—

The undoubted intention of that statute was to prevent a person from being employed in two positions at the same time, receiving salary from each one. It does not prevent the payment of compensation for extra services not rendered during the usual hours of employment in the position for which the person is employed. It has been the immemorial practice in the State House to permit the employment of those receiving salaries, during extra hours and for extra compensation. This, of course, would not apply to general State officers, but only to clerks, whose contract ordinarily is for services during regular office hours. II Op. Att'y-Gen. 309.

It will not be disputed that the compensation of $4,000 a year received by Mr. Smith as Director of the Division of Reclamation, Soil Survey and Fairs is a salary which he receives from the Commonwealth, within the meaning of R. L., c. 18, § 11. It is not necessary to quote authorities in defining what is meant by the word "salary" other than to point out that it is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called "piece work" basis, and are more frequently subject to deductions for loss of time. As thus defined, Mr. Smith's compensation on a per diem basis as a member of the advisory board of the Department of Agriculture is a wage paid him for the limited time in which he is engaged upon this special work.

A further question arises, however, which has not been considered in the opinions previously rendered, to which reference has been made, but which follows naturally from the language employed by my predecessor in that portion of the opinion which has been quoted.

By the provisions of R. L., c. 6, § 58, salaries payable from
the treasury of the commonwealth "shall be in full for all services rendered to the commonwealth by the persons to whom they are paid." The clear intent of this statute would prohibit a person holding a salaried position which, by statutory enactment or because of the duties devolving upon him, required full-time service, from receiving compensation for any other services rendered during the usual hours of employment in the salaried position which he occupies.

There are, however, certain offices and commissions which do not, in law or in fact, require all the time of the incumbents in the performance of the required duties. There is no valid reason why officials and employees of whom only part-time service is required should not engage in other work, and receive compensation therefor, during their unemployed time; and, while they may not accept another salaried position from the Commonwealth, there is no prohibition on receiving other compensation for services rendered to the Commonwealth outside of the hours required in performing the duties in the salaried position.

I am therefore of opinion that, subject to the limitation that a person may not hold two salaried positions in the service of the Commonwealth, any person engaged in work which requires full-time service may receive additional compensation for additional work performed outside of the usual working hours of his employment, and a person holding a position in the service of the Commonwealth which requires only part-time service may receive additional compensation for services to the Commonwealth during the time not required in the full performance of the duties of his position.

Applying this general principle to the special subject of your inquiry, it follows that Mr. Smith may not receive any additional compensation for services rendered to the Commonwealth as a member of the advisory board of the Department of Agriculture unless such services are rendered outside of working hours, or unless his duties as Director of the Division of Reclamation, Soil Survey and Fairs are not sufficient to require his continuous service in that position.
To the Commissioner of Insurance.

November 1


A fire insurance company authorized to write insurance against fire in this Commonwealth cannot attach to the Massachusetts standard form of policy, established by St. 1907, c. 576, § 60, a rider which bases the liability of the company, not upon the value of the property at the time of the fire, but upon the replacement value of the property.

You have requested my opinion upon the following question of law: —

Can a company authorized to write insurance against fire in this Commonwealth attach to the standard form of policy established by St. 1907, c. 576, § 60, a rider making the company liable for a sum in excess of the actual value of the building at the time any fire shall occur, and representing the sum required to restore the building or erect a new building, in accordance with the requirements of ordinances, statutes, building laws or orders of city authorities, of like size and character for purposes of occupancy or occupancies similar to the purposes for which the building may be occupied at the time any loss prescribed in the policy shall occur? In other words, can a company base its liability not upon the value of the property at the time of the fire, but on the replacement value of the property?

You point out that the provisions of the standard policy limit the liability of the company to the actual value of the insured property at the time any loss or damage happens, but the provisions of the standard policy may be modified by rider or endorsement written on the margin or across its face. The first clause of section 32 of chapter 576 authorizes companies to insure against loss or damage by fire, and you state that the question would appear to be as to whether this authority is large enough to warrant the writing of insurance based upon the replacement value of the property.

Our statute relative to the use of the standard form of fire policy is St. 1907, c. 576, § 60, which reads as follows: —
No fire insurance company shall issue fire insurance policies on property in this commonwealth, other than those of the standard form herein set forth, except as follows:

Seventh, A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form.

In the standard form of policy there is to be found this clause: "This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens."

Your Department has on file a ruling of this Department, rendered some time ago, that the standard form of policy set forth in said section 60 was not intended to be the sole permissible form of contract.

A former Attorney-General, in an opinion to the Insurance Commissioner under date of Oct. 31, 1904, said:—

The Legislature has not attempted to make the provisions of the standard form compulsory upon insurer or insured, nor to make such form the sole permissible form of contract. Section 60 does not forbid the making of a special contract embodying terms inconsistent with the terms contained in the standard form; indeed, it provides for such modifications of the standard form as the parties may choose to make (cl. 7). The apparent purpose of the Legislature was to establish an approved form of contract, upon which the insured might confidently rely without the necessity of considering special stipulations which might be obscure or of doubtful import as to the obligations or limitations of the contract. II Op. Atty.-Gen. 545.

The seventh excepting clause permits such additions to or modifications of the standard form as may be permissible on general principles of law. I Op. Atty.-Gen. 104.

The present inquiry, therefore, resolves itself into a question as to whether or not the modification of the clause, that the company shall not be liable beyond the actual value of the insured property, by substituting a replacement value for such actual value, is permissible under the general principles of our
insurance law. In this connection I would call your attention to St. 1907, c. 576, § 57, which reads as follows: —

No insurance company shall knowingly issue any fire insurance policy upon property within this commonwealth for an amount which with any existing insurance thereon exceeds the fair value of the property, . . .

If buildings insured against loss by fire, and situated within this commonwealth, are totally destroyed by fire, the company shall not be liable beyond the actual value of the insured property at the time of the loss or damage; . . .

It is not, therefore, in my opinion, permissible for an insurance company writing insurance against fire in this Commonwealth to modify our standard policy by substituting the replacement value for the actual value of the property at the time the loss occurs. The cost of replacing real property has been held in some jurisdictions to furnish a fair criterion for estimating the amount of loss. *Ælta Ins. Co. v. Johnson*, 21 Am. Rep. 223; *Holter L. Co. v. Firemen's Fund Ins Co.*, 45 Pac. 207. In Richards on Insurance Law it is pointed out that this line does not give a true measure of present value of damage in the case of an old building, citing the cases of *Scott v. Security Fire Ins. Co.*, 98 Ia. 67, and *Hilton v. Phoenix Assurance Co.*, 42 Atl. 412. Richards, "Insurance Law," p. 297.

In a recent case in this Commonwealth, where there was a total loss, our Supreme Judicial Court held that the referees were justified in refusing to take into account as elements of loss the increased cost to the plaintiff of rebuilding after the fire, due to the fact that under the building laws the new structure must be of more expensive materials. This element of loss contended for was held to have no relation to the actual value of the insured property. *Second Soc. of Universalists v. Royal Ins. Co.*, 221 Mass, 518, 523. Considerations which might be germane to an inquiry as to the amount of damage resulting from a partial destruction of the building insured have no place where there is a total destruction by fire. *Hewins v. London Assurance Corp.*, 184 Mass. 177.
Abatement of Tax — Duty of Collector.

A city collector of taxes is bound to accept a certificate for abatement direct from the county commissioners; he is not justified in conditioning his acceptance upon similar acceptance by the local assessors.

You ask if it is within the jurisdiction of the collector of taxes of a city to accept a certificate for abatement direct from the county commissioners, regardless of the local board of assessors.

St. 1909, c. 490, Pt. I, §§ 76 and 82, would seem to be so clear as to require no opinion from this Department. Section 76 provides for an appeal to the county commissioners by a party aggrieved by the refusal of assessors to abate the tax, and further provides that the said county commissioners, if the board finds the property has been overrated, shall make a reasonable abatement and an order as to costs. Section 82 sets forth that a person whose tax has been abated shall be entitled to a certificate thereof from the assessors, clerk of the commissioners or other proper officer.

In the case of Inhabitants of Great Barrington v. County Commissioners, 112 Mass. 218, the court held, in substance, that the findings by the county commissioners on matters of fact are conclusive. In the case of Lowell v. County Commissioners, 152 Mass. 372, 379, the court said: —

The final judgment of the county commissioners is conclusive upon all the world as to the valuation to be put upon the property, for the purpose of the assessment for which the value is determined. . . .

The county commissioners are substantially an appellate court, and their order of abatement supersedes any order by the lower tribunal. Hence, the collector of taxes is required to accept, and act accordingly upon, an order of abatement from said commissioners.

A corporation which sold all its assets in March, 1920, is liable, under St. 1910, c. 187, § 1, five days before such sale, to pay the taxes imposed by Gen. St. 1919, c. 355, and by St. 1920, c. 550, as amended by St. 1920, c. 600.

In a recent letter you state the following facts: —

A domestic business corporation sold all its assets on March 16, 1920, receiving in consideration of such sale three hundred shares of the stock of another corporation. On April 9, 1920, it filed its return as of April 1, showing its assets to be said three hundred shares of stock, and also showing its net income as reported to the Federal government for the year ending Dec. 31, 1919. Subsequent to April 1 the corporation voted to dissolve.

You state a second case, which is precisely like the preceding except that the vote to dissolve was taken prior to April 1, 1920.

The question arising upon both cases is the same, that is to say, — are these corporations liable to pay the excises provided by Gen. St. 1919, c. 355, and by St. 1920, c. 550, as amended by chapter 600 of the acts of the same year?

St. 1910, c. 187, § 1, as amended by Gen. St. 1919, c. 349, § 19, provides: —

The sale or transfer, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the corporation's business, of any part or the whole of the assets of a corporation which is subject to the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, and acts in amendment thereof and in addition thereto, and which is liable to taxation thereunder, shall be fraudulent and void as against the commonwealth, unless such corporation shall, at least five days before the sale or transfer, notify the tax commissioner of the proposed sale or transfer and of the price, terms and conditions thereof, and of the character and location of said assets. Whenever such a corporation shall make such a sale or transfer, the tax imposed by said chapter, or by acts in amendment thereof or in addition thereto, shall become due and payable at the time when the tax commissioner is so notified, or, if he is not so notified, at the time when he should have been notified.
This section seems to answer your question so far as the tax provided by Gen. St. 1919, c. 355, is concerned. Five days before each corporation's sale of its assets the excise became due; that is, on March 11, 1920.

St. 1920, c. 550, as amended, imposes a further tax of three-fourths of 1 per cent on the net income shown in the corporation's Federal return filed next prior to April 1, 1920, and provides, further, that the tax so imposed shall be "applicable to the net income of said corporations for the period covered by their return of income to the federal government next prior to the first day of April of the current year."

In March, 1920, therefore, when these corporations sold their assets, the income upon which their taxes were to be measured, that is, their income for the year ending Dec. 31, 1919, had accrued, and its amount had become fixed. Under the provisions of the section above quoted the tax provided by said chapter 550, like the excise provided by Gen. St. 1919, c. 355, became due on March 11, 1920.

Schoolhouse — Building occupied by Young Men's Christian Association of New Bedford — License for Operator of Moving Pictures.

That portion of premises occupied by the Young Men's Christian Association of New Bedford which is used for educational purposes is a schoolhouse, within the meaning of St. 1914, c. 791, § 17, and a special license may be granted, as provided therein, for the operation of a moving-picture machine in connection with the educational classes conducted on the premises.

You state that one of the employees of the Young Men's Christian Association at New Bedford, which holds evening classes in different subjects during the winter months, where several classes of foreign-born persons are given instruction in English and other kindred subjects, has made application for examination as a moving-picture operator, claiming such application to be under the provisions of St. 1914, c. 791, § 17.

You request my opinion as to whether this association, under these circumstances, can be said to be a school, within the meaning of St. 1914, c. 791, § 17.
Section 1 of said chapter 791 places certain restrictions on the use of cinematographs or similar apparatus "in or upon the premises of a public building, public or private institution, schoolhouse, church, theatre, special hall, public hall, miscellaneous hall, place of assemblage, or place of public resort."

Section 17 of said chapter 791 provides as follows:—

Notwithstanding any of the provisions of this act, the chief of the district police may grant special licenses for operators of moving pictures in churches, schoolhouses, or public institutions in the cities and towns of the commonwealth, except Boston, which, in his opinion, are in safe condition for said exhibitions, and he may prescribe regulations for the proper conduct of the same. A fee of two dollars shall accompany each application for such special license.

The intention of the Legislature in permitting the granting of special licenses, under suitable regulations, for operators of moving pictures in churches, schoolhouses and public institutions, as distinguished from other places of public resort enumerated in section 1, was to favor the work or activity carried on therein rather than the moving-picture operator or the type or kind of a building in which the pictures are to be shown. By the use of the term "schoolhouse" the Legislature intended not a school building, that is, a building used solely for school purposes, but any premises where instruction is given in art, sciences, language or any species of learning.

I am of the opinion that such portion of the premises of the Young Men's Christian Association of New Bedford as is used for educational purposes, as stated in your communication, is included within the meaning of the term "schoolhouse" as used in said section 17. Moving pictures shown in connection with or as part of the educational classes carried on therein form a part of the school curriculum.

I am therefore of the opinion that in so far as the applicant for an operator's license is to limit his work to the operation of a moving-picture machine in connection with the educational classes conducted on the premises, he may apply for an examination for a special license, under the provisions of said section 17.
INTERSTATE RENDITION — PROOF OF FLIGHT FROM JUSTICE.

A requisition for the surrender of an alleged fugitive from the justice of another State should be accompanied by evidence that the person demanded is in fact such fugitive from justice.

I acknowledge receipt of a letter dated Nov. 23, 1920, addressed to Your Excellency by the Governor of the State of New York, and referred to this Department.

In his letter the Governor of the State of New York states his dissent from the opinion rendered to Your Excellency by this Department on Nov. 20, 1920, to the effect that the requisition of the Executive of the State of New York for the rendition of an alleged fugitive from justice could not lawfully be complied with. That opinion was based upon the fact that the usual affidavit containing proof of the flight from justice did not accompany the requisition.

It is unnecessary to state that I have given earnest and respectful consideration to the views expressed by the Governor of the State of New York. Yet, with all deference, I feel constrained to adhere to my former opinion.

The requisition was, indeed, accompanied by an indictment in due form, and by a petition, addressed by the district attorney of Columbia County to the Governor of the State of New York, in which it was stated that the accused could not be found in Columbia County and was in fact within this Commonwealth. Nevertheless, one may be indicted for and convicted of a crime for which he cannot be extradited because he was not within the demanding State at the time when said crime, or some part of it, was committed. In re Cook, 49 Fed. Rep. 833; Roberts v. Reilly, 116 U. S. 80. A case of that type is where A, in Massachusetts, shoots B, who is standing across the line in New Hampshire. Another is where A, in Massachusetts, makes false representations to B, who, subsequently returning to New York, parts with his money or his goods as a result of the false and fraudulent representations made by A. It may be added that proof that the demanded person cannot be found in the demanding State at the time of the requisition
is not proof that he was in the demanding State when the alleged crime was committed.

It is not sufficient to say that Your Excellency is always justified in requiring proof of the flight from justice; an alleged fugitive arrested on an extradition warrant issued without such proof would be discharged upon his petition for \textit{habeas corpus}. \textit{Ex parte Reggel,} 114 U. S. 642; \textit{Roberts v. Reilly,} 116 U. S. 80; \textit{McNichols v. Pease,} 207 U. S. 100.

A statute of this Commonwealth provides that a demand for rendition “shall be accompanied by sworn evidence that the person charged is a fugitive from justice . . .” \textit{R. L.,} c. 217, § 11. Whether this statute be mandatory or directory only, I do not now deem it necessary to express an opinion, for it appears from the cases above cited that \textit{some} proof, whether sworn or otherwise, must be presented to the Executive upon whom a demand is made before that demand may lawfully be complied with.

The letter of the Governor of the State of New York states that “the Lieutenant Governor and Acting Governor of this State, after a careful examination of the papers, certified to you that this man was a fugitive from the State of New York. . . .” As the requisition has been returned to the Governor of the State of New York, it has not been possible to examine it again, but a recent and similar requisition has been examined, in which the Lieutenant-Governor and Acting Governor of the State of New York certified that the accompanying papers were “authentic and duly authenticated in accordance with the laws of this State,” and that the offence charged was “crime under the laws of this State,” but which, with reference to the flight from justice, certified only that it had \textit{been represented} to me” that the demanded person was a fugitive from the justice of the State of New York. This recital does not appear to be a certification, made upon the knowledge and responsibility of the Executive of the State of New York, that the person demanded was a fugitive from justice. In practice, a recital of the type last quoted, rather than a certification by the demanding Executive that the demanded person is a fugi-
itive from justice, is usual; the flight from justice is usually shown by an accompanying affidavit made by some person having knowledge of the whereabouts of the alleged fugitive at the time the alleged crime was committed.

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TUITION OF STATE MINOR WARDS — PAYMENT BY TOWN — REIMBURSEMENT OF TOWN BY COMMONWEALTH.

It is unconstitutional for a town to appropriate money for the tuition of children in a private institution.

A town may not be reimbursed by the Commonwealth for money expended by the town for tuition of State minor wards in a private institution.

You have requested my opinion on the following question:

Can the Commonwealth legally reimburse the town of Monson for the cost of tuition for two State minor wards placed therein by this Department?

It appears that these two wards have been in attendance at Monson Academy, a private institution located in the town of Monson; that the town of Monson, by specific exemption granted by the State Board of Education under St. 1914, c. 556, was relieved of the necessity of maintaining a public high school; and that the town of Monson has been using the Monson Academy in lieu of a public high school.

I assume that the request for reimbursement is made under Gen. St. 1919, c. 291, which provides, in clause (b), for payment by the Commonwealth to cities and towns for tuition in the public schools of children placed in such cities and towns by the State Board of Charity; and further provides, in clause (d):

A child placed by the state board of charity or trustees of the Massachusetts training schools, or trustees for children of the city of Boston in a town which does not maintain a public high school offering four years of instruction, may attend the high school of another city or town under the same conditions that apply to a child whose parent or guardian resides in such town, except that the tuition of such child shall be paid as provided in paragraph (b) of this section, and that the commonwealth
or the city of Boston, as the case may be, may reimburse the town in which the child is placed for the whole cost of his transportation.

Obviously, this statute does not require or authorize payment by the Commonwealth for the tuition of such a child in any other school than a public school.

To determine the question whether the Commonwealth can lawfully make such payment it is not necessary to resort to inference or reasoning from general principles. The State Constitution itself contains the answer. Mass. Const. Amend. XLVI, § 2, provides, in part, as follows:—

All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the Commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; . . .

Section 3 of said Article XLVI is as follows:—

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

Assuming, as I do from your statement, that Monson Academy is not conducted under the order and superintendence of the town authorities, this amendment makes payment by the town of Monson for tuition in Monson Academy illegal, and forbids expenditure out of the treasury of the Commonwealth for the purpose of repaying money so spent. I am confirmed in this opinion by the exception contained in section 3, which expressly authorizes payment of compensation by the Commonwealth, or any political subdivision thereof, to privately controlled hospitals, infirmaries or institutions for the deaf, dumb or blind, for care or support actually rendered or furnished. Private schools are not included in this exception,
which purports to state what payments may be made to institutions for the benefit of public charges. With respect to education the Commonwealth makes no distinction between such persons and others. Equal opportunity is given to all for education at the public expense in the public schools, but not elsewhere.

This question has been considered and a like conclusion reached in former opinions of this Department.

In an opinion given in 1896 (I Op. Atty.-Gen. 321) it was held that in the light of Mass. Const. Amend. XVIII (containing the identical language quoted above from Mass. Const. Amend. XLVI, § 2), an act of the Legislature (St. 1895, c. 94, § 1) was unconstitutional which provided as follows: —

Any town in which a high school is not maintained, but in which an academy of equal or higher grade is maintained, may grant and vote money to pay the tuition of children residing in such town and attending such academy: provided, such academy is approved for that purpose by the state board of education.

In the course of his opinion he said: —

The purpose of the constitutional amendment was to prohibit the use of public funds for the education of the children of the Commonwealth in any institution, however conducted, and whether sectarian or not, the control of which is not in the municipal authorities. If the expenditure be for the purpose of the education of the children of the town, it is within the spirit of the prohibition of the amendment.

... If this statute is allowed to stand, the policy of paying the tuition of school children may be further extended, and it might even be possible to provide for the education of all the children of a town in sectarian schools and at the public expense, — a proposition which the people of the Commonwealth would be slow, I apprehend, to accept, and against which, indeed, the amendment in question may be said to have been principally directed.

In another opinion on a similar question (II Op. Atty.-Gen. 98), it was held that —

If the town sees fit to expend money for tuition which it is not compelled to, it cannot ask reimbursement therefor from the treasury of the Commonwealth.
My predecessor, in an opinion dated May 18, 1918 (V Op. Atty.-Gen. 204), following the reasoning in the opinions above quoted from, stated: —

It seems to me plain, therefore, that under the later amendment (Article XLVI) cities and towns will have no constitutional right to appropriate funds for the maintenance of an academy not under the order and superintendence of the school committee, or to pay the tuition of pupils resident in such town and attending such an academy.

As I have stated, I am of the opinion that the Commonwealth may not reimburse the town of Monson for the cost of tuition of the two State minor wards placed therein by your Department.

Taxation — Corporation — Franchise Tax.

The value of real estate purchased by a corporation after April 1, under an agreement made prior to April 1, providing that the corporation should pay the local taxes assessed thereon to the vendor, is not deductible in determining the amount of the franchise tax to be paid by the corporation.

You have assessed a franchise tax for the year 1920 upon the New England Trust Company, having estimated the fair cash value of all the shares of stock constituting its capital on the first day of April, 1920, and having deducted therefrom the value of certain real estate owned by the corporation in the city of Boston and subject to local taxation, all as provided in St. 1909, c. 490, Pt. III, § 41. The trust company made application to you to deduct also the value of certain other real estate, purchased by it within the year 1920. You declined to make the deduction, and the trust company appealed to the board of appeal. The board of appeal desires my opinion as to whether the value of this real estate should have been deducted from the value of the corporate franchise.

The trust company is clearly taxable under the provisions of the said statute (Pt. III, §§ 40, 41 and 43). These sections require the Tax Commissioner to estimate the fair cash value of all the shares constituting the capital stock of a corporation subject to the act on the preceding first day of April (which value shall be taken as the true value of its corporate fran-
chise), and to deduct therefrom, in the cases covered by section 41, clause 4, which include trust companies, the "value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated."

The material facts relating to the purchase of the property by the New England Trust Company, as set forth in your letter and by counsel for the company, are as follows:

The trust company entered into an agreement prior to April 1, 1920, for the purchase of the property, agreeing to take over the property on or before April 15, 1920, and to pay the local taxes assessed thereon. The deed was signed on April 2, 1920. Delivery of the deed and payment of the purchase price were made on April 8, 1920, after the passage on April 7, 1920, of an act (St. 1920, c. 265) authorizing the New England Trust Company to hold additional real estate, and the trust company took possession on that date. This property was taxed locally to the vendor. The trust company paid the tax pursuant to its agreement.

On this statement of facts the person who was the owner of the property on April 1 was clearly the vendor, who was, therefore, primarily liable for the full amount of the tax. Consequently, the assessment of the tax to the vendor by the city was not only proper, but was the only method of assessment possible under the law. *Hill v. Bacon*, 110 Mass. 387; *Richardson v. Boston*, 148 Mass. 508; *Webber Lumber Co. v. Shaw*, 189 Mass. 366.

The phrase appearing in clause 4 of section 41 — "the value as found by the tax commissioner of their works, structures, real estate, machinery, underground conduits, wires and pipes, subject to local taxation wherever situated" — clearly means taxation to the corporation as owner. The purpose of the deductions provided by section 41 is to avoid the double taxation which would result from the levying of a tax on the whole amount of the fair cash value of the stock of a corporation owning as a part of its assets property in the Commonwealth for which it was liable to be taxed.
In *Firemen's Insurance Co. v. Commonwealth*, 137 Mass. 80, 81, 83, the court said, with reference to a similar provision for deductions in an earlier statute, that the object of the Legislature was "to prevent double taxation in fact, if not in form," and hence "to provide that the corporation should not be taxed, under the form of an excise upon its franchise, for any property on which it pays a local tax." The court accordingly held that the Tax Commissioner should deduct the value of mortgages on real estate held by the corporation for the local taxes on which it was liable. See also *Tremont & Suffolk Mills v. Lowell*, 178 Mass. 469; *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, 160: II Op. Atty.-Gen. 556.

The fact that the corporation agreed in this instance to pay the taxes for 1920 makes no difference, either technically or as a matter of fairness. That agreement merely affected the consideration to be paid. The fact remains that the property was not the corporation's "real estate . . . subject to local taxation," within the meaning of the said statute, and that the tax on this property was assessed to the vendor and not to the trust company, both because on April 1, 1920, the real estate afterwards purchased was not a part of the trust company's assets, affecting the value of its shares on which the amount of the franchise tax was computed, and because that real estate was taxed to the vendor and not to the trust company. It is not a case of double taxation.

I am therefore of opinion that the deduction asked for should not be made.

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**Boxing Exhibitions — Licenses not required from Municipalities.**

The State Boxing Commission has exclusive authority to grant licenses for boxing exhibitions.

You inquire if a license to hold a boxing exhibition is required from the municipal authorities under the provisions of R. L., c. 102, § 172, and in Boston under St. 1908, c. 494, as
amended by Spec. St. 1915, c. 348, in addition to the license required under the boxing law (St. 1920, c. 619).

The first-mentioned law reads in part as follows:

The mayor and aldermen of a city or the selectmen of a town may . . . grant a license for theatrical exhibitions, public shows, public amusements and exhibitions of every description . . . upon such terms and conditions as they deem reasonable . . .

The law with reference to Boston is not essentially different on the question at issue.

The boxing law, when accepted by a city or town, provides that no boxing exhibition for a prize or fund at which admission is charged shall take place except in pursuance of a license granted by the Commission. Provision is made in the law that after payment of expenses incurred under the act the money received shall be distributed to the cities and towns in proportion to the amounts received (§§ 3, 19).

There is no provision for the repeal or limitation of the laws above referred to which regulate the licensing of amusements by municipal authorities, because these laws are still operative to control the granting of licenses for all other public amusements.

A city or town may accept the provisions of the boxing law if certain preliminary steps are taken and a majority of the votes cast on the proposition are in favor. Thus the law is permissive, not mandatory, and there is no attempt to limit the application of the principle of home rule by the act. As the boxing law makes ample provision for the licensing of these exhibitions, and as the municipalities receive a portion of the money derived from the license, it would appear that the former statutes were not intended to apply to boxing exhibitions. The receipts under the new act are in lieu of the license fees which, in the case of other public amusements, are paid directly to the municipality.

There is no implied intent in St. 1920, c. 619, to extend the operation of the early statutes to boxing exhibitions. Such an intent must clearly appear.
It may be observed in this connection that without an acceptance of the boxing law no licenses can be granted by any one for boxing exhibitions. The municipalities lose no authority by the act, for the local officials have no present right to license boxing exhibitions unless it can fairly be said that, while no authority can grant a license unless the law is accepted by a city or town, if accepted the law thereupon requires two licenses by two different boards before such exhibition can be held. I am of the opinion that such is not the true construction of the law, and that the State Boxing Commission alone has the right to grant licenses of this character.

Fire Prevention — License to store Gasoline — Decision on Application — "Order" — Right of Appeal to Commissioner of Public Safety.

The action of the State Fire Marshal in confirming the decision of a board of street commissioners, relative to an application for a license to store gasoline, falls within the definition of the word "order," as that word is used in Gen. St. 1919, c. 350, § 109, which gives a right of appeal to the Commissioner of Public Safety to any person affected by an order of the Department or of a division or office thereof.

St. 1913, c. 577, as amended by St. 1914, c. 119, regulates the erection and maintenance of garages in the city of Boston. The provisions are distinct and separate matters from those in St. 1914, c. 795, § 3, and are not repealed thereby.

You desire my opinion on the following question:—

A corporation applied to the board of street commissioners of Boston for a license to keep, store and sell gasoline in South Boston. After a public hearing before the board of street commissioners the applicant was given leave to withdraw. Acting under the authority of Gen. St. 1916, c. 138, the applicant then placed the matter before the city council of Boston, who approved the action of the street commissioners in rejecting the application. The mayor then disapproved the action of the city council in approving the action of the street commissioners. The applicant then appealed to the State Fire Marshal from the decision of the street commissioners, and the
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State Fire Marshal approved the decision of the street commissioners. The applicant now appeals to you, as Commissioner of Public Safety, for a hearing relative to the decision of the State Fire Marshal affirming the denial of the board of street commissioners to issue said license.

Your specific questions are as follows:—

1. Was the action of the State Fire Marshal in confirming the decision of the board of street commissioners an "order," within the meaning of Gen. St. 1919, c. 350, § 109?

2. Did the board of street commissioners of the city of Boston act solely under delegated authority, or does it have rights of its own granted to it by St. 1913, c. 577, and St. 1914, c. 119, or are these two acts repealed by St. 1914, c. 795, § 3?

By the enactment of St. 1914, c. 795, the powers relative to the prevention of fires in the metropolitan district were transferred to and vested in the Fire Prevention Commissioner, and, as bearing particularly on the present question, all powers to license persons or to grant permits to keep, store or sell crude petroleum, or any of its products, were by section 3 of said chapter 795, transferred to and vested in said Commissioner. By section 4 of that chapter power was given the Fire Prevention Commissioner to delegate the granting and issuing of any licenses or permits authorized by this act to the head of the fire department or to any other designated officer in any city or town in the metropolitan district.

Proceeding under this section, the Fire Prevention Commissioner on Sept. 10, 1915, delegated the power to license the manufacture, keeping and sale of gasoline to the mayor and board of street commissioners of the city of Boston, and on the same date delegated the power to issue permits for the keeping, storage, use and sale of gasoline within the city of Boston to the fire commissioner of Boston.

Section 18 of said chapter 795 provides that the Fire Prevention Commissioner "shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons, acting or purporting to act under authority of the commissioner, done or made or purporting to be done or
made under the provisions of this act, and shall make all necessary and proper orders thereupon, and any person aggrieved by any such action of the head of a fire department or other person shall have an absolute right of appeal to the commissioner."

Gen. St. 1919, c. 350, § 104, provides that the director (State Fire Marshal) in charge of the Fire Prevention Division shall perform the duties of the Fire Prevention Commissioner for the metropolitan district. Section 109 of said chapter 350 provides:

Any person affected by an order of the department or of a division or office thereof, may, within such time as the commissioner may fix, which shall not be less than ten days after notice of such order, appeal to the commissioner, who shall thereupon grant a hearing, and after such hearing may amend, suspend or revoke such order.

Taking up your first question as to whether or not the action of the State Fire Marshal in confirming the decision of the board of street commissioners in this case is to be construed as an order, within the meaning of said section 109, it is my opinion that the decision of the State Fire Marshal falls within the language of an order. This decision is arrived at in the light of the provisions of section 18 of the fire prevention act, which gave an absolute right of appeal to the Fire Prevention Commissioner, not only from orders of the Department instructing certain things to be done or not to be done relative to fire protection, but also to acts and decisions of persons acting or purporting to act under the authority of the Fire Prevention Commissioner.

As to your second question, as to whether or not the board of street commissioners is acting solely under the authority delegated to it by the Fire Prevention Commissioner on Sept. 10, 1915, or is also acting under authority of St. 1913, c. 577, as amended by St. 1914, c. 119, and further, whether these two acts were repealed by section 3 of the metropolitan district fire prevention law, I would state that this question was covered in an opinion rendered by a former Attorney-General,
under date of June 28, 1915. That opinion read in part as follows: —

The statute of 1913, as amended by St. 1914, c. 119, deals with the construction of garages. It makes it impossible for a garage to be erected within the limits of the city of Boston without the approval of the street commissioner. In him is lodged the authority of determining whether in a given location it is expedient for a garage to be constructed. He may lawfully refuse to license the erection of such a building in a residential, business or other section if he believes it to be detrimental to the interests of the community. This is true, even though the garage be intended for the use of electric motor cars or for the storage of other automobiles containing no gasoline. The act of 1913 is a distinctly home rule measure, and in its enforcement the State officials have no concern. If such a garage is constructed and the occupant seeks to store gasoline therein, either in bulk or in the tank of a car, then, and not until then, is the Fire Prevention Commissioner given power to act.

It is clear that St. 1913, c. 577, as amended by St. 1914, c. 119, was not repealed by section 3 of the fire prevention law. The duties and powers of the board of street commissioners, proceeding under St. 1913, c. 577, as amended, and the duties and powers delegated to it under the fire prevention law, are two separate and distinct matters. So far as this particular question at hand is concerned, we are only dealing with the action of the street commissioners as bearing upon their decision as to whether or not they would grant to the corporation in question a license to keep, store and sell gasoline at a point within the city of Boston. The power to make this decision has been delegated to them by your Department, and the applicant in turn has appealed to the State Fire Marshal, who has made a decision confirming the action of the street commissioners. But this decision is to be construed as an order, as pointed out above, and, accordingly, the applicant, under the provisions of Gen. St. 1919, c. 350, § 109, now has the right to appeal to you for a hearing.
CIVIL SERVICE—STATE AID AND PENSIONS—OFFICERS—APPROVAL OF GOVERNOR AND COUNCIL.

The words "offices hereby established," as used in Gen. St. 1918, c. 164, § 2, exempting incumbents from the civil service laws, are used to designate the three clerks and eight agents whose appointment was provided for in section 1 of that act.

The offices of the clerks and agents whose appointment was provided for by Gen. St. 1919, c. 190, § 1, are not the offices created by Gen. St. 1918, c. 164, § 1, and are subject to the civil service laws.

The clerks and agents who, under Gen. St. 1919, c. 190, § 1, may be appointed with the approval of the Governor and Council, are not officers whose appointment is subject to confirmation by the Executive Council, within the meaning of R. L., c. 19, § 9, exempting such officers from classification under the Civil Service Rules.

You ask me to review the opinions rendered by a former Attorney-General, dated July 11, 1919, and Aug. 13, 1919, relating to positions in the office of the Commissioner of State Aid and Pensions. These opinions involved a consideration of St. 1914, c. 587, § 1, Gen. St. 1918, c. 164, and Gen. St. 1919, c. 190.

St. 1914, c. 587, is entitled "An Act relative to State and military aid and to the burial of indigent soldiers and sailors." Section 1 states the powers, duties and salaries of the Commissioner of State Aid and Pensions and of the deputy commissioner. It then continues:

The commissioner may appoint a chief clerk at a salary of fifteen hundred dollars a year, one agent at a salary of fourteen hundred dollars a year, one agent at a salary of thirteen hundred dollars a year, one agent at a salary of eleven hundred dollars a year, one special agent at a salary of nine hundred dollars a year, one clerk at a salary of twelve hundred dollars a year, one clerk at a salary of one thousand dollars a year, and two clerks each at a salary of not more than one thousand dollars a year.

Gen. St. 1918, c. 164, § 1, amends section 1 of the former act as follows:

Section one of chapter five hundred and eighty-seven of the acts of nineteen hundred and fourteen is hereby amended . . . by striking out all after the word "year", in the thirty-seventh line, and substituting the words: — three clerks at salaries of not more than twelve hundred dollars a year each; and eight agents to be employed during the present war and for one year following its termination, at salaries of thirteen hundred dollars a year each, — so as to read as follows: — . . .
The remaining portion of said section consists of a restatement of section 1 of the former act in its amended form. The words following the word "year," in the thirty-seventh line of the former act, which were stricken out by this section were as follows: "and two clerks each at a salary of not more than one thousand dollars a year."

Section 2 of Gen. St. 1918, c. 164, is as follows:

The offices hereby established shall not be subject to the civil service laws.

Gen. St. 1919, c. 190, § 1, provides:

Chapter five hundred and eighty-seven of the acts of nineteen hundred and fourteen, as amended by chapter one hundred and sixty-four of the General Acts of nineteen hundred and eighteen, is hereby further amended by striking out section one and substituting the following:

The remaining portion of said section 1 is the substituted section 1 of the former statute (St. 1914, c. 587). It states the powers, duties and salaries of the Commissioner of State Aid and Pensions and of the deputy commissioner. It then proceeds as follows:

The commissioner may, with the approval of the governor and council, appoint a chief clerk and not exceeding five other clerks and stenographers, and twelve agents. The salaries of said chief clerk, clerks, stenographers and agents shall be fixed in accordance with the provisions of chapter two hundred and twenty-eight of the General Acts of nineteen hundred and eighteen and within the limit of the amount annually appropriated by the general court.

Gen. St. 1918, c. 228, referred to in said substituted section 1, is entitled "An Act to provide for the classification of certain positions in the Commonwealth and to regulate promotion therein." It provides for the classification of "all appointive officers and positions in the government of the commonwealth, except those in the judicial and legislative branches," regulates the fixing of salaries attached to such offices and positions and contains, in section 5, the following provision:

Nothing contained herein shall be construed as placing employees of the commonwealth outside the civil service laws, rules and regulations.
The opinion of my predecessor was in substance that section 2 of Gen. St. 1918, c. 164, exempted from the civil service laws all the offices established by section 1 of St. 1914, c. 587, as amended, and that said section 2, not having been repealed, had the same effect upon the offices established by the 1919 statute.

The first question to be considered is as to the meaning of the words “the offices hereby established,” in section 2. There are several possible interpretations of these words:—

1. The word “offices” may be used in the restricted sense as opposed to “employments.” In this sense “offices” would probably include the positions of the commissioner and deputy commissioner, but not of the clerks and agents. Brown v. Russell, 166 Mass. 14, 26; Attorney-General v. Tillinghast, 203 Mass. 539, 543; I Op. Atty.-Gen. 72; III Op. Atty.-Gen. 158.

But in the Civil Service Rules the word “office” is used in a different sense, in contradistinction to positions involving mere manual labor; and in statutes relating or referring to those rules the words are used in that broader sense. Gardner v. Lowell, 221 Mass. 150, 152; III Op. Atty.-Gen. 158, 160. Note St. 1911, c. 624; Gen. St. 1919, c. 350, § 11. I am of opinion that the word “offices” in Gen. St. 1918, c. 164, § 2, is used in the broader sense, which includes the positions of clerks and agents.

2. The words “offices hereby established” may refer to all the offices mentioned in section 1 of St. 1914, c. 587, as amended by section 1 of Gen. St. 1918, c. 164. This was the opinion of my predecessor. But the act of 1918 merely amended by the act of 1914, so far as is related to offices thereby established, by striking out the provision for the appointment of two clerks and substituting one for the appointment of three clerks and eight agents.

3. It is therefore my opinion that no offices were established by the act of 1918 beyond those of three clerks and eight agents.

The effect of the act of 1919 must now be considered. By this act section 1 of St. 1914, c. 587, as amended by Gen. St.
1918, c. 164, § 1, is entirely stricken out and a new section substituted. In this new section the offices of the three clerks and eight agents at certain definite salaries, not subject to the civil service laws, disappear, and in place of the offices of those clerks and agents and of other clerks and agents at certain definite salaries, referred to in the earlier statute and subject to the civil service laws, provision is made for the appointment of a "chief clerk and not exceeding five other clerks and stenographers, and twelve agents," whose salaries are to be fixed in accordance with the provisions of Gen. St. 1918, c. 228.

I am of opinion that the offices thus referred to in the act of 1919 are none of them offices established by the act of 1918, and that therefore the provisions of section 2 of Gen. St. 1918, c. 164, have no application whatever. I am confirmed in this opinion by the provision that the salaries of the chief clerk, clerks, stenographers and agents shall be fixed in accordance with the provisions of Gen. St. 1918, c. 228, which contains the provision, above quoted, that "nothing contained herein shall be construed as placing employees of the commonwealth outside the civil service laws."

It remains to consider the effect of the words "with the approval of the governor and council," limiting the Commissioner's power of appointment, as provided in the act of 1919.

Under R. L., c. 19, § 9, "officers . . . whose appointment is subject to confirmation by the executive council" are exempt from classification under the Civil Service Rules. The word "officers" is there used in the restricted sense to designate persons holding public office as opposed to public employment. Attorney-General v. Tillinghast, 203 Mass. 539; III Op. Atty.-Gen. 158. In my judgment, the clerks and agents who, under Gen. St. 1919, c. 190, may be appointed by the Commissioner with the approval of the Governor and Council are not such officers, and therefore R. L., c. 19, § 9, is inapplicable. This construction is supported by the further provision in said section 9 expressly exempting "heads of principal departments of the commonwealth," justifying the inference that subordinates in those departments were not exempted, and by Gen.
St. 1919, c. 350, § 11, which, recognizing that subordinates in departments may be "appointed to office by the governor with the advice and consent of the council," provides that "the heads of divisions of departments established by or under authority of this act shall be exempt from the civil service law and the rules and regulations made thereunder," justifying a like inference. It is therefore not necessary to consider whether the words "with the approval of the governor and council" in the act of 1919 have the same significance as the words "subject to confirmation by the executive council" in said section 9. See in this connection III Op. Atty.-Gen. 129.

Bank — Fraudulent or Misleading Advertising — Power of Commissioner of Banks.

If the Commissioner of Banks finds as a fact that a bank is soliciting deposits by means of advertising which is either false and fraudulent or intentionally misleading, he can find that such bank is conducting its business in an unsafe and unauthorized manner, within the meaning of St. 1910, c. 399, § 2 (G. L., c. 167, § 22), even though the bank has not as yet impaired its capital or brought itself into an unsafe condition to transact its business.

The Attorney-General advises upon questions of law; he cannot decide questions of fact, or control the exercise of a discretion vested by law in another officer.

You have requested an opinion upon certain facts, which I understand from your oral statements are in substance as follows:—

Successive advertisements have been published by a "bank," as defined in St. 1910, c. 399, § 1. You have evidence tending to show that statements in certain of these advertisements are not in accordance with the facts, and other statements are of a character likely to mislead the public as to material matters connected with the business of the bank.

You inquire whether, if the series of advertisements contain false and misleading statements, you would be warranted in finding that said bank is conducting its business "in an unsafe or unauthorized manner," within the meaning of St. 1910, c. 399, § 2, even though it does not appear that its
capital is impaired or "that such bank is in an unsound or unsafe condition to transact the business for which it is organized," within the meaning of said section 2.

Before advising you in answer to your inquiry, it will clarify the situation to determine your duty and the duty of the Attorney-General in regard to it. St. 1910, c. 399, § 2, confers broad powers upon the Commissioner. He must determine the truth of the evidence before him. When the truth of the evidence has been determined, there arises the question whether it is sufficient in law to warrant a finding that the conditions required by section 2 are satisfied, — e.g., that the corporation is conducting its business "in an unsafe or unauthorized manner." If that issue is decided in the affirmative, the Commissioner must then determine, in the exercise of a sound discretion, what action he shall take in the premises. The Attorney-General can neither decide questions of fact nor assume to determine what action the Commissioner shall take in the exercise of the discretion conferred upon him. The statute imposes both those duties upon the Commissioner. The Attorney-General can advise you only upon the question of law, namely, whether certain evidence, if true, is sufficient to warrant a finding that the conditions required by section 2 have been satisfied.

Banking is founded upon credit. Credit rests upon mutual trust between bank and customer. Mutual trust between bank and customer cannot exist if either ceases to believe in the honesty, sound judgment and solvency of the other. Neither can long believe in the honesty or sound judgment of the other if that other ceases to be honest and to judge soundly. These two qualities enter into and mainly determine the "moral hazard" of every business transaction. No one will question that honesty and sound judgment on the part of the bank are essentials of "safe" banking, both in actual experience and under the statute. Solvency is not a substitute for either, and cannot long endure without both.

It is essential to every bank to secure and to retain a sufficient number of depositors and a sufficient amount of deposits. An ordinary deposit constitutes a debt due from the bank to
the depositor. Advertisements designed to secure new deposits are intended to persuade individuals to become creditors of the bank. Proof that an individual has obtained a loan by means of a representation of fact known by him to be false would warrant a conviction for larceny. R. L., c. 208, § 26; Commonwealth v. Lincoln, 11 Allen, 233; Commonwealth v. Coe, 115 Mass. 481; Commonwealth v. Howe, 132 Mass. 250. It is no defence that the defendant intended to repay (Commonwealth v. Coe, 115 Mass. 481; Spaulding v. Knight, 116 Mass. 148), promised to repay and did in fact repay. Commonwealth v. Coe, 115 Mass. 481. It cannot be that a bank is "authorized" to do what, if done by an individual, would constitute larceny. Moreover, public disclosure of such facts could be found to be destructive of the bank's credit. I am therefore of opinion that, if you find that a bank is attempting to procure deposits by means of false and fraudulent advertising, you would be warranted in finding that such bank "is conducting its business in an unsafe and unauthorized manner," within the meaning of said section 2.

Similar considerations govern in the case of advertising which, while not actually false and fraudulent, is intentionally misleading. It differs only in degree from advertising which is false and fraudulent. The public does not draw fine distinctions. It is misled in either case, and will probably not stop to analyze the precise means by which the false impression is created. Banking experience has demonstrated how easily a run may be started and how quickly a panic spreads. A bank which intentionally misleads its customers is doing business upon a charged mine. A casual word or even an unconsidered act may cause an explosion at any moment, and if public confidence is once destroyed, it is difficult if not impossible to regain it. I therefore advise you that, if you find that advertisements published for the purpose of securing deposits are intentionally misleading, even though not actually false and fraudulent, you would be warranted in finding that the bank is conducting its business in an "unsafe" manner, within the meaning of section 2.
I am confirmed in these conclusions by the language of St. 1910, c. 399, § 2, which reads as follows:—

Whenever it shall appear to the bank commissioner that any bank under his supervision has violated its charter or any law of the commonwealth, or is conducting its business in an unsafe or unauthorized manner, or that its capital is impaired, or if it shall refuse to submit its books, papers and concerns to the inspection of said commissioner or of his duly authorized agents, or if any officer of such bank shall refuse to be examined upon oath by the commissioner or his deputies touching its concerns, or if it shall suspend payment of its obligations, or if from an examination or from a report provided for by law the bank commissioner shall have reason to conclude that such bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, the bank commissioner may take possession forthwith of the property and business of such bank and may retain possession thereof until the bank shall resume business or until its affairs shall finally be liquidated as herein provided.

It will be observed that said section 2 enumerates several conditions, any one of which, if found by the Commissioner to exist, authorizes him to take possession forthwith of the property and business of the bank. The conditions expressly enumerated include the case where the bank is conducting its business in an unsafe or unauthorized manner, as well as the case where its capital is impaired and the case where such bank is in an unsound or unsafe condition to transact the business for which it is organized. A construction of the statute which would leave the Commissioner without power to act until the bank had either impaired its capital or was already in an unsound or unsafe condition to transact the business for which it is organized would render meaningless the authority to act if the bank was conducting its business in an unsafe or unauthorized manner. The latter provision was clearly intended to give power to prevent the mischief from being done, and therefore cannot be so construed as to tie the hands of the Commissioner until after the mischief has already occurred.

I am therefore of opinion that if the Commissioner finds that a bank is conducting its business in an unsafe or unauthorized
manner he has power to act, even though the bank has not as yet impaired its capital or brought itself into an unsound or unsafe condition to transact the business for which it is organized.

As already pointed out, it is neither the function nor the duty of the Attorney-General to control the exercise of any discretion vested in the Commissioner by law. But, in view of the broad powers vested in you by said section 2, a suggestion may be made as to the exercise of this discretion. Section 2 authorizes the Commissioner to take possession of the property and business of a bank if it shall "appear" that one of the conditions enumerated in said section has been satisfied.

This power is given for the protection of the public rather than to punish any wrongful or improper conduct on the part of the bank. For this reason the action taken should be examined from the public viewpoint, and should not be more drastic than proper protection of the public demands. Each case must, of course, be determined upon its own facts, but it may well be that if a bank is still in sound condition, in spite of conduct found by you to be improper, and the situation does not require that the bank be closed in order to protect the public from the consequences of such conduct, a warning that continuance of such conduct may result in the exercise of the power conferred by section 2 may be all that the exercise of a sound discretion would require. It may be suggested that such warning, if it can be given with due regard for the interest of the public, would place the Commissioner in a stronger position if he later determined that more drastic action was necessary. But, as I have already pointed out, the decision of this question rests in your discretion,—a discretion which it is not within the province of the Attorney-General to direct or control.
Prisoners — Female Life Prisoner — Power to Bind out to Domestic Service.

A female prisoner who is serving a life sentence cannot be bound out to domestic service under the provisions of G. L., c. 127, §§ 85 and 86.

You have orally inquired whether a female prisoner, sentenced to death for murder, whose sentence was commuted to imprisonment for life in the Reformatory for Women at Shirley, born December 29, may be bound out to domestic service under R. L., c. 225, §§ 69 and 70, which, on Jan. 1, 1921, is replaced by G. L., c. 127, §§ 85 and 86. Section 85 provides as follows:

The commissioner may, with the consent of a woman serving a sentence in the reformatory for women or in a jail or house of correction, and with the consent of the county commissioners if she is in a jail or house of correction, contract to have her employed in domestic service for such term, not exceeding her term of imprisonment, and upon such conditions, as he considers proper with reference to her welfare and reform. If in his opinion her conduct at any time during the term of the contract is not good, he may order her to return to the prison from which she was taken.

Section 86 in substance provides that if the woman leaves her place of service, or, if ordered to return to prison, neglects or refuses so to do, she shall be deemed to have escaped from prison and may be arrested, convicted and sentenced to an additional term of not less than three months nor more than one year.

After careful consideration, I am of opinion that female life prisoners are excluded by implication from these provisions. A life sentence differs in kind from a sentence for a definite term. It is imposed only for the most abhorrent crimes, and because the safety of the public in such cases requires that the prisoner be permanently confined. It is the only sentence which the prisoner never completes — death overtakes him in the expiation of his crime. To such a sentence the provisions of law which authorize the parole board to grant permits to be at liberty do not apply. See G. L., c. 127, §§ 128–149. To bind a female prisoner out to domestic service is in effect to
permit her to be at liberty upon condition that she remain in that service. It is in effect a part of the parole system, and must rest upon the same considerations of public policy. I cannot believe that the Legislature intended that female life prisoners should be eligible to be bound out to service, when at the same time it denied parole to all life prisoners.

I am confirmed in this conclusion by the provision for punishment in case of an escape. A life sentence cannot be increased. There can be no additional term. To the life prisoner the provision for an additional sentence in case of escape is a nullity. I therefore advise you that neither R. L., c. 225, §§ 69 and 70, nor G. L., c. 127, §§ 85 and 86, are applicable to a female prisoner who is serving a life sentence.

Board of Registration in Medicine — Quasi-judicial Body — Expense of securing Testimony for Hearings under Gen. St. 1917, c. 218 — Conduct of Hearings.

The Board of Registration in Medicine, acting in its quasi-judicial capacity, is not authorized to expend money in the hire or employment of detectives for the procuring of evidence to formulate or support charges to be heard by it. The functions of investigating, prosecuting and hearing charges should not be vested in the same person or persons.

You have requested my opinion on the following question: —

May the Board of Registration in Medicine incur the expense of securing testimony to be used at a hearing held under the provisions of Gen. St. 1917, c. 218?

Gen. St. 1917, c. 218, § 1, provides, in substance, that the Board of Registration in Medicine, and certain other boards, may, by majority vote, suspend or revoke any certificate, registration, license or authority issued by the board "if it appears to the board" that the holder of such certificate is insane or is guilty of certain offences described in the act. Said section further provides: —

The different boards may make such rules and regulations as they deem proper for the filing of charges and the conduct of hearings.
Section 2 authorizes said boards to summon witnesses in the manner therein defined, and further provides: —

Any person against whom charges are filed may appear at the hearing thereof with witnesses and be heard by counsel.

Section 3 provides: —

The said boards shall not defer action upon any charge before them until the conviction of the person accused, nor shall the pendency of any charge before any of the said boards act as a continuance or ground for delay in a criminal action.

Section 4 provides: —

The supreme judicial court may, upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, enter a decree revising or reversing the decision of the board, if it should appear that the decision was clearly wrong; but prior to the entry of such decree, no order shall be made or entered by the court to stay or supersede any suspension, revocation or cancellation of any such certificate, registration, license or authority.

In my opinion, the boards named in this statute act in a quasi-judicial capacity. Each board has authority to revoke or suspend any certificate issued by it if it appears to the board that the holder of such certificate is either insane or has been guilty of any of the offences defined in section 1. But this authority is to be exercised in an orderly and judicial manner, though not with the technical precision of a trial at law. Unless the accused has left the Commonwealth or cannot be found, he is entitled, under section 2, to a hearing, at which he may appear with witnesses and be heard by counsel. While the Board may adopt rules for the filing of charges and the conduct of hearings and may summon witnesses, I find nothing in the statute which imposes upon the Board a duty to prepare and press the charge which it is to hear and decide. To do so would combine the conflicting functions of prosecutor and judge. I am therefore of opinion that the statute does not authorize the Board to expend money for the services of
detectives in order to formulate charges to be brought before it, or to support charges to be heard by it.

I may add that R. L., c. 76, § 6, which requires the Board to investigate certain classes of complaints and to "report the same to the proper prosecuting officers," would seem, by implication, to exclude complaints upon which the Board is itself to pass in its quasi-judicial capacity. A different construction of the act might raise serious constitutional questions. See Bill of Rights, art. XXIX.

I am not unmindful that the public interest may suffer if the prosecution of charges before the Board is left to the public spirit and initiative of private complainants who may, and in many instances would, be reluctant to press charges. But this consideration cannot justify a procedure which might deprive the person charged with an offence of the right to have the charge heard and determined by an impartial tribunal. Efficient protection of the public would seem to require additional legislation which would require some officer of experience and special training to investigate possible offences, and, if investigation gave reasonable cause to believe that an offence had been committed, to prosecute the same before the Board. I see no reason why this duty might not be imposed upon the secretary or any other official of the Board, provided that in investigating complaints made to the Board such official is not subject to the control or direction of the Board. Such legislation would, in my opinion, preserve the impartial character of the quasi-judicial body which is to hear and determine the charges, and, at the same time, give effect to what may well have been the intention of the Legislature in establishing this and similar registration boards, namely, to provide for efficient investigation as well as the prosecution of complaints before the Board, in order to protect the public.
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APPLE GRADING LAW — Continued. having reasonable ground for believing that the packages of apples with which he is dealing have been packed in violation of law.

If the apples in the possession of the middleman have been inspected by the State authorities, under the provisions of section 10, and he has been notified that they are not packed in accordance with law, he cannot, after such notice, be said to be acting in good faith, within the meaning of section 15 of the aforesaid act.

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The Attorney-General has as much power in investigating alleged criminal acts as any other official, but has no power to enforce the attendance of witnesses or the giving of testimony, that power being restricted solely to the grand jury.

The Attorney-General has power equal to that of a district attorney in presenting evidence to the grand jury.

Under R. L., c. 7, § 17, the Attorney-General, when present, has control of all cases, both civil and criminal, enumerated in that section.

AUTOMOBILE—Registration—Substitution of Motors—Change in Maker’s Number . . . 436

Where an automobile has been registered, and where the maker’s number was affixed to the motor therein, and subsequently another motor was substituted, with the result that the maker’s number on the substituted motor would not then correspond with the maker’s number on the registration card, there should be issued a new registration card bearing the maker’s number appearing upon the substituted motor.

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BAKERS—Hours of Employment—Constitutional Law . . . 327

A law regulating the hours of employment of bakery workers which has no reasonable relation to the public health, safety or morals is unconstitutional.

BALLOT—Instructions—Secretary of the Commonwealth—Petition for Referendum—Public Opinion 404

Under the provisions of St. 1913, c. 519, the Secretary of the Commonwealth must, on a petition properly signed and filed with him, place on the official ballot, for submission to the voters of a senatorial or representative district, instructions to the senators and repre-

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sentatives of such districts to vote for certain legislation, if in the opinion of the Secretary it is a question of public policy.

BANK—Fraudulent or Misleading Advertising—Power of Commissioner of Banks . . . 726

If the Commissioner of Banks finds as a fact that a bank is soliciting deposits by means of advertising which is either false and fraudulent or intentionally misleading, he can find that such bank is conducting its business in an unsafe and unauthorized manner, within the meaning of St. 1910, c. 399, § 2 (G. L., c. 167, § 22), even though the bank has not as yet impaired its capital or brought itself into an unsafe condition to transact its business.

The Attorney-General advises upon questions of law; he cannot decide questions of fact, or control the exercise of a discretion vested by law in another officer.

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BANKS AND BANKING—State Banks—Repeal of Law authorizing Formation . . . 117

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2. — Collections—Right of Collecting Bank to become Debtor for Sum collected—Money on Storage—Defunct Trust Company . . . 460

Where a draft is transmitted to a trust company for collection and is collected by it while the trust company is still solvent and open for business, the proceeds of such draft constitute a debt, and cannot be recovered in specie, under St. 1910, c. 399, § 12, as money “in its . . . possession for storage or safekeeping,” even though the trust company is closed by the Commissioner of Banks under authority of St. 1910, c. 399, § 2, before the treasurer’s check, transmitted in payment of the proceeds of said draft, is presented to the trust company for payment.

Semble that, if the draft had been collected after the trust company had closed its doors or was known by its officers to be insolvent, the proceeds thereof would be held in trust and could be recovered in specie by the owner of the draft.

Semble that where a draft is transmitted to a trust company for collection the trust company holds it in a fiduciary capacity until collected.
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BIRTHS AND MARRIAGES — Vital Statistics — Transmission of Returns by City or Town Clerks to the Secretary of the Commonwealth more often than Once a Year . . . . . . . 258
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BOARD OF REGISTRATION IN MEDICINE — Quasi-judicial Body — Expense of procuring Evidence for Hearings under Gen. St. 1917, c. 218 — Conduct of Hearings . 732

BOARD OF REGISTRATION IN MEDICINE — Continued.
The Board of Registration in Medicine, acting in its quasi-judicial capacity, is not authorized to expend money in the hire or employment of detectives for the procuring of evidence to formulate or support charges to be heard by it.
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3. — Of Railroads taken over by United States — Savings Bank Investments . . . . . . 281
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2. — Mayor — Police Commissioner — Police . . . . 399
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BOSTON ELEVATED RAILWAY COMPANY — Public Service Commission — Filing of Schedule of Fares . . . . . . . 259
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The act providing for the public operation of the Boston Elevated Railway Company (Spec. St. 1918, c. 159) removes the control and regulation of its fares from the Public Service Commission.
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2. — Constitutional Law—Public Operation of Street Railway—Service at Cost—Zones . . . 409
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CHIROPODY—Failure to register before Date set by Statute—Requirements for Registration and Issuance of Certificate 662
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2. — Bureau of Statistics—Serial Bond or Note Issue—Temporary Loan 200
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3. — Bureau of Statistics—Certification of Town Notes—Repairs . 397
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4. — Sale of Intoxicating Liquors—Payment of Part License Fee to Commonwealth . . 424
   Under the provisions of R. L., c. 100, § 2, malt liquors, cider and light wines containing more than 1 per cent alcohol by volume at 60° F. are intoxicating liquors, and, under section 45 of said chapter, the treasurer of a town issuing a license for the sale of such liquors is obliged to pay one-fourth of all of
CITIES AND TOWNS — Continued.
the moneys received for said licenses to the Treasurer and Receiver-General of the Commonwealth.

5. — State Sanatoria — Payment for Clothing supplied to Indigent Persons . . . . . . . 512

Cities and towns which pay the price fixed by St. 1907, c. 474, § 10, for the support of patients in State sanatoria, cannot be made to supply clothing to said patients who, on account of their indigent condition, are unable to provide clothing for themselves.

6. — Notes . . . . . . . 519
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7. — Americanization Classes — Reimbursement by Commonwealth . 573
Cities and towns maintaining schools or classes to promote Americanization, under Gen. St. 1919, c. 295, are not entitled to further reimbursement under the provisions of Gen. St. 1919, c. 363, on account of expenditures for teachers employed in such schools or classes.

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9. — Aid to Dependents of Persons drafted . . . . . . . 135
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11. — Power of — Maintenance and Distribution of Necessaries — Power of General Court . . . . . . . 195
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12. — Commonwealth — Troy Weight 343
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13. — Public Service Commission — Motor Vehicles — Rules and Regulations . . . . . . . 369
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14. — Schools — Transportation of Pupils living on Islands . . . . . . . 435
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15. — Continuation Schools — Reimbursement . . . . . . . 580
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CITIZENSHIP — Expatriation — Taking Oath of Allegiance to Foreign State — Entering Military Service of Foreign State — Effect of War upon Right of Expatriation — Summary Method of Regaining Lost American Citizenship . 637

CITIZENSHIP — Continued.

Under the act of March 2, 1907, § 2, 34 Stat. at L., 1228, U. S. Comp. Stats., 1916, § 3959, an American citizen forfeits his citizenship by taking the oath of allegiance to any foreign State at a time when this country is not at war.

An American citizen who, prior to the entry of the United States into the war, entered the military or naval service of a foreign nation, and as an incident thereof took an oath of allegiance to such nation, forfeited his citizenship.

Query, whether entry into the military or naval service of a foreign nation, but without taking an oath of allegiance, would forfeit American citizenship.

An American citizen who, after the entry of the United States into the war, entered the military or naval service of a foreign nation, and as an incident thereof took an oath of allegiance to such nation, did not forfeit his American citizenship.

The act of May 9, 1918, c. 69, § 1, cl. 12, 40 Stat. at L., 542, 545, U. S. Comp. Stats., 1916, Supp. 1919, § 4552, cl. 12, provides a summary method of regaining American citizenship lost in the manner above set forth.

2. — Status of American Women married to Aliens prior to March 2, 1907 . . . . . . . 674

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CIVICS AND HISTORY —
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CIVIL SERVICE — Certificate of Positive Merit — Six Months' Probationary Period — Promotions 233

The statutory provision (St. 1914, c. 605, § 6) for promotion of clerks and stenographers in the service of the Commonwealth upon a certificate of merit from the head of a department refers only to persons in the permanent service of the Commonwealth, and does not
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affect civil service rule 26, relating to persons in the six months' probationary period.

The Civil Service Commission has no authority to review a certificate of positive merit filed by the head of a department in making a promotion to a higher grade, under said section 6.

2. — Fire Department — Height required for Firemen . 244

St. 1896, c. 424, does not restrict the power of the Civil Service Commission to certify persons for appointment as firemen to those who are 5 feet 5 inches in height or over, but prevents them from requiring any greater height.

3. — Fire Department — Promotion . 469

Under St. 1913, c. 487, as amended, and Civil Service Rule 34, a call captain of the fire department may not be promoted directly to the position of captain of the permanent force.

4. — Female Veteran — Certification . 500

The word "veteran" as used in Gen. St. 1919, c. 150, § 1, includes women who possess the qualifications prescribed by that act.

Where a civil service list is certified in answer to a requisition calling for women, a woman who passes the appropriate civil service examination and who is a veteran, within the meaning of Gen. St. 1919, c. 150, § 1, is entitled to be certified ahead of women who are not veterans, even though the latter have obtained a higher percentage in the examination.

5. — Assistant Treasurer and Assistant Collector of the City of Fall River . . . . 537

The appointment of a clerk as assistant treasurer or assistant collector for the city of Fall River, under the provisions of St. 1920, c. 80, is not subject to the civil service law and rules.

While a clerk so designated or appointed may be removed as assistant treasurer or assistant collector without reference to the civil service law and rules, the latter govern his removal from the position of clerk.

6. — State Aid and Pensions — Officers — Approval of Governor and Council . . . . 722

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CIVIL SERVICE COMMISSION — Power to revoke Certification obtained by Fraud or Misrepresentation . . . . 267

The Civil Service Commission has power to revoke its certification of a person as eligible to appointment to a position in the classified civil service, even after such person has been appointed to the position, if such certification was obtained through fraud or misrepresentation.

CIVIL SERVICE LAWS AND RULES — Application of — Employees of Commonwealth drafted into Military Service . . . . 148

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CLUB CHARTER — Cause for Revocation by Secretary of Commonwealth . . . . 137

A conviction under the provisions of R. L., c. 100, § 85, does not warrant action by the Secretary of the Commonwealth under R. L., c. 100, § 80, relating to the revocation of club charters.

CLUBS — Treasurer and Receiver-General — Intoxicating Liquors — License Fees . . . . 190

See License Fees. 1.

COLD STORAGE — Reports to Department of Public Health — Liability to Criminal Prosecution . . . . 583

A person holding in cold storage any article of food for a period longer than twelve calendar months, without the consent of the Department of Public Health, violates St. 1912, c. 652, § 5, as amended by Gen. St. 1917, c. 149, § 3, and is liable for such violation, whether or not a report is thereafter made to the Department.

COLLECTIONS — Right of Collecting Bank to become Debtor for Sum collected — Money on Storage . . . . 460

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COMMISSIONER OF BANKS — Taking Possession of Bank — Liquidation or Resumption of Business . . . . 563

Under St. 1910, c. 399, as amended, the Bank Commissioner has an option whether to proceed to liquidate the affairs of a bank of which he has taken possession, or to allow it to resume business.

Unless and until the Bank Commissioner decides to liquidate, he is not required to make and file an inventory of assets, to give notice in regard to proof of claims, or to file in court lists of claims as provided in sections 7, 8 and 9.

2. — Corporation — Use of Word "Bankers" . . . . 525

See Bankers.

3. — Fraudulent or Misleading Advertising . . . . 726

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See Great Pond.

COMMONWEALTH — Property of — Sidewalk Assessment . 201, 342
The Commonwealth is not liable for a sidewalk assessment levied by a town for a sidewalk constructed in front of an armory owned by the Commonwealth in that town.

2. Cities and Towns — Troy Weight 343
Under the provisions of R. L., c. 62, §§ 11 and 12, as amended, the Commonwealth is not obliged to furnish standard Troy weights and measures to cities and towns.

COMMONWEALTH FLATS — Authority of Commission on Waterways and Public Lands to authorize Lessee to keep or sell Gasoline . 131
The Commission on Waterways and Public Lands may lease portions of the Commonwealth Flats, so called, in South Boston, but cannot authorize the keeping or sale of gasoline by the lessee without the approval of the Fire Prevention Commissioner.

COMMUTATION TICKETS — Regulation and Establishment of Fares — Abandonment of Passenger Stations — Regulation of Equipment — Repeal of Inconsistent Acts . . . . . . . . 643
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COMPUTING-MEASURING DEVICE — Scales of Weights and Measures — Authority to seal . 658
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CONGRESS — Acts of — Commissioner of Animal Industry — Orders and Regulations . 334
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CONSTITUTIONAL CONVENTION — Oath of Office . . . . . 94
Members of the Constitutional Convention are not required by law to take any oath of office.

2. Incompatibility of Offices . . . . . 20
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CONSTITUTIONAL LAW — Constitutional Convention — Incompatibility of Offices . . . . 20
The position of delegate to the Constitutional Convention, provided for by Gen. St. 1916, c. 98, is a "place under the authority of the commonwealth" which the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court are precluded from holding by Mass. Const., pt. 2d, c. VI, art. II.

The position of delegate to the Constitutional Convention is not an "office under the

CONSTITUTIONAL LAW — Continued government of this commonwealth" within the meaning of article XIII of the Amendments to our Constitution, and the holding of the office of justice of any court of the Commonwealth, other than the Supreme Judicial Court, is not incompatible with the holding by the same person of the position of such delegate.

Members of the General Court, councillors, officers of the Commonwealth, other than Governor and Lieutenant-Governor, elected by vote of all the people, and senators and representatives from this Commonwealth in the Congress of the United States are eligible under our Constitution to hold the position of delegate to the Constitutional Convention provided for by Gen. St. 1916, c. 98.

2. Office of District Attorney — Power of General Court to provide for Investigation . . . 27
Under Mass. Const., pt. 2d, c. I, § 1, art. IV, the General Court has the power to prescribe and determine the methods and basis for the entry of nolle prosequi and filing of criminal cases by a district attorney, and for that purpose it may provide for the appointment of a commission to investigate as to what has been done in the past in this regard in a particular district, this power being in no way limited by article XIX of the Amendments to the Constitution.

3. Effect of Unconstitutionality of Part of Statute upon Remaining Parts . . . . . 55
A statute which exempts agreements between farmers or agriculturists relative to the sale of their crops from the operation of a general act, prohibiting combinations in restraint of trade, is unconstitutional.

If such exemption was contained in a statute independent of the general act, its unconstitutionality would not affect the validity of the general act.

4. Equal Protection of the Laws — Due Process of Law — Licensing of Milk Contractors . . . . 56
A bill prohibiting the buying of milk or cream within the Commonwealth from producers, for the purpose of shipping it to any other city or town for sale or manufacture, unless such business is transacted regularly at an office or station within the State, and unless the vendor is licensed by the State Board of Agriculture and furnishes security conditioned upon the prompt payment by him for milk or cream purchased, would be unconstitutional if enacted into law, as it would violate the Fourteenth Amendment to the Constitution of the United States.

5. Corporations — Issue of New Stock — Right of Stockholders to participate proportionately . 77
CONSTITUTIONAL LAW — Continued.

A statute which purports to authorize a railroad corporation to issue certain preferred stock, exchangeable for common stock, without the consent of certain stockholders who are denied the right to participate in such issue, is unconstitutional in so far as it affects the value of the shares of such stockholders by reducing their interest in the property of the corporation.

6. — Equal Protection of the Laws — Exemption of Farmers or Agriculturists from General Anti-trust Act

A general anti-trust bill which exempts agreements between farmers or other persons engaged in agricultural pursuits, relative to the sale of products of their own lands, would be unconstitutional if enacted into law, as denying to all persons within the State the equal protection of the laws, in violation of article XIV of the Amendments to the Constitution of the United States.

7. — Compulsory Workmen's Compensation Act — Right to Trial by Jury — Police Power

A statute making it compulsory for all employers in this Commonwealth to take out insurance under the workmen's compensation act (St. 1911, c. 751), but allowing employees to claim their common law rights under the existing compensation act, would be unconstitutional, as an unreasonable exercise of the police power.

A workmen's compensation act compulsory alike upon employer and employee would be constitutional, if limited to extra-hazardous occupations and excluding persons engaged in interstate commerce, although making no provision for a trial by jury.

8. — Maintenance and Distribution of Necessaries — Power of General Court — Power of Cities and Towns — Statutes, Construction of

Under article XLVII of the Amendments to the Constitution of the Commonwealth, although the General Court may in the first instance determine what rates are reasonable for the distribution of necessaries, its determination is subject to review by the courts.

The power given to the General Court by this article of amendment can be exercised only when a time of war, public exigency, emergency or distress actually exists, but during these times the General Court may determine when this power is to be exercised.

Cities and towns have no power to exercise the public functions declared in article XLVII of the Amendments to the Constitution of this Commonwealth except as provided by the General Court.

House Bill No. 1400, authorizing cities and towns to exerise the powers enumerated in article XLVII of the Amendments to the Constitution of the Commonwealth, is con-

CONSTITUTIONAL LAW — Continued.

strued as not affecting powers of officials of the United States or of officials acting directly for the Commonwealth.

9. — Legislature — Delegation of Legislative Power — Size of City Council

It is unconstitutional for the Legislature to delegate to the voters of any city the unrestricted right and power to determine the size of its city council.

10. — Educational Institutions — Tuition — Appropriation of Funds for

Under article XLVI of the Amendments to the Constitution of this Commonwealth it still remains unconstitutional for cities and towns to appropriate funds for the maintenance of an academy not under the order and superintendence of the school committee, or to pay the tuition of pupils resident in such town and attending such academy.

It is unconstitutional for cities and towns to appropriate funds to reimburse parents for tuition they may pay for pupils attending a school of their own choice, such choice including an academy not under the order and superintendence of the school committee.

11. — Registration of Certain Aliens — Registration Fee — Treaties

A proposed bill requiring "every male alien twenty years and over, unless enrolled in the military or naval service of the United States, who has resided in this commonwealth for twelve months prior to the first day of May in the current year," to register with the city or town clerk of his residence and file a written statement of certain facts concerning his history, and requiring that "said statement shall be accompanied by a registration fee of five dollars," is inconsistent with the provisions of treaties entered into between the United States and various other nations. Treaties entered into by the United States protect resident aliens against the imposition of fees and excises because of their alienage. Therefore, such a bill if enacted, would be unconstitutional and void.

12. — Appropriation by Legislature — Private Institutions

An appropriation by the Legislature, in furtherance of a pre-existing agreement to provide moneys for a term of years to certain private institutions of learning is valid, under article XLVI of the Amendments to the Constitution.


The payment of moneys to the New England Asylum for the Blind, later changed to the Perkins Institution and Massachusetts School for the Blind, under the provisions of St. 1829,
CONSTITUTIONAL LAW — Continued.
c. 113, and under subsequent legislation, does not constitute a contractual obligation on the part of the Commonwealth, and as the management of the institution is not under the exclusive control of the Commonwealth, further payments to it by the Commonwealth are prohibited under the provisions of the “anti-aid” amendment.

14. — Public Buildings — Mercantile Purposes
A law providing for the erection of buildings by cities and towns to be used for both public and mercantile purposes is unconstitutional.

15. — Alien — Eligibility to Public Office 333
A law providing that an alien who claimed exemption from military service during the World War shall never be eligible to hold public office is unconstitutional.

16. — Class Legislation — Delivery Vehicles . . . . . 338
A law regulating the dimensions of motor vehicles, with their loads, operated upon the public highways, which exempts vehicles owned by manufacturers or dealers in boxes or barrels, is unreasonable class legislation, denies equal protection of the laws, and is, therefore, unconstitutional.

17. — General Court — Delegation of Powers . . . . . 362
The Legislature cannot delegate to cities and towns the powers granted to it by article LX of the Amendments to the Constitution, limiting the use or construction of buildings to specified districts.

18. — Right to withdraw Petition for Referendum 400
A completed petition for a referendum on Gen. St. 1919, c. 116, after it has been filed with the Secretary of the Commonwealth cannot be withdrawn by one of its signers.

19. — Capital Stock of Street Railway Company — Eminent Domain . 412
The Legislature may authorize the taking of shares of the capital stock of a street railway company in the exercise of the right of eminent domain.

20. — Secretary of the Commonwealth — Liquor License — Printing on Ballot 415
Under the provisions of St. 1913, c. 835, § 419, the Secretary of the Commonwealth is bound to place on the ballots sent to towns the question, “Shall licenses be granted for the sale of intoxicating liquors in this town?” as nothing therein contained is in violation of the prohibition amendment or the national prohibition act.

CONSTITUTIONAL LAW — Continued.
21. — Provisions for raising Tax to pay Bonds no Contract with Bondholder or Taxpayer — Taxes not Borrowed Money — Application of Tax to Different Purposes . 465
Money raised by taxation to repay a loan is not “borrowed money,” within the meaning of Mass. Const. Amend. LXII, § 4.

The provisions of Gen. St. 1919, c. 283, § 9, with respect to the manner in which money shall be raised by State taxation to pay the bonds authorized by that act, do not constitute a contract with the bondholder.

The provisions of Gen. St. 1919, c. 283, § 9, that the purpose of the tax thereby imposed shall be stated upon the tax bill, do not constitute a contract with the taxpayer that the tax shall be applied to such purpose.

There is no constitutional provision which requires that the taxes raised under Gen. St. 1919, c. 283, § 9, shall be applied to the purpose stated therein.

The Legislature may constitutionally provide that payment of the $10 bonus, authorized by Gen. St. 1917, c. 211, shall be made out of taxes raised under Gen. St. 1919, c. 283, to pay the $100 bonus authorized by that act.

22. — Public Office — Commissioner to qualify Civil Officers — Woman 479
Under R. L., c. 17, § 8, and the Constitution of the Commonwealth a woman may not be appointed as commissioner to qualify civil officers.

23. — Fourteenth Amendment — State Constitution — Power to fix Charge of Employment Agency . 484
A proposed bill which fixes the maximum charge which may be exacted by an employment agency from an applicant for a position in the public schools would violate the Fourteenth Amendment to the Federal Constitution and also those provisions of the State Constitution which guarantee life, liberty and property to the same extent as does the Fourteenth Amendment.

24. — “Borrowed Money” — Proceeds of Dry Dock built in Part by Outstanding Bonds . 491
Where the cost of a public work is in part defrayed by bonds issued by the Commonwealth, and while part of the bonds so issued are outstanding such public work is sold, so much of the purchase price as represents property paid for by the proceeds of the bonds so issued and outstanding is still “borrowed money,” within the meaning of Mass. Const. Amend. LXII, § 4, and must be used either for the purpose for which such bonds were issued or to repay the loan.

The extent to which the $3,107,366.93, received as the purchase price of the Boston Dry Dock, is the proceeds of outstanding bonds issued under St. 1911, c. 748, § 17, examined and determined.
CONSTITUTIONAL LAW — Continued.
That part of the purchase price of the Boston Dry Dock which is the proceeds of outstanding bonds issued under St. 1911, c. 748, § 17, and therefore borrowed money, which under Mass. Const. Amend. LXII, § 4, is being held to repay such bonds at maturity, may lawfully be invested in other bonds of the Commonwealth which fall due prior to the due date of the bonds to be repaid.

25. — Aliens — Right to possess Shotguns or Rifles

The statute prohibiting certain aliens from possessing shotguns and rifles is a law for the protection of wild animals and birds; hence, fines received for violation thereof are to be divided equally between the Commonwealth and the county in which prosecution is made.

26. — Legislature — Power to define Words used in Constitution — "Legal Voter"

The meaning of words used in the Constitution presents a judicial question. An act defining the term "legal voter," as used in the Constitution, if not unconstitutional as an attempted exercise of judicial power, would be, at most, a declaration of legislative opinion which would not foreclose the question of the meaning of those words.

27. — Infamous Punishment — Sentence to State Prison upon Complaint

In so far as Gen. St. 1916, c. 187, § 1, authorizes any district court or trial justice to impose a sentence to the State Prison upon complaint, it violates article XII of the Bill of Rights, which requires that a sentence to the State Prison shall not be imposed except upon an indictment duly presented by a grand jury.

28. — Referendum — Appropriation Act 612 St. 1920, c. 424, § 1, which increases the salary of certain officers, is not an act which appropriates money for the current or ordinary expenses of the Commonwealth or for any of its departments, boards, commissions or institutions, within the meaning of Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2.

An appropriation act defined.

An act which contains no emergency preamble and which may be the subject of a referendum petition takes effect ninety days after it becomes a law.

29. — Amendment to Federal Constitution — When it becomes operative

A proposed amendment to the Federal Constitution becomes operative when ratified by three-fourths of the States.

Proclamation of such ratification by the Secretary of State of the United States certifies that ratification has already taken place, and is not itself a condition precedent to the adoption of the amendment.

CONSTITUTIONAL LAW — Continued.
30. — Public Operation of Street Railway

See Street Railway. 5.

31. — Bakers — Hours of Employment

See Bakers.

32. — Public Operation of Street Railway — Service at Cost

See Street Railway. 7.

33. — Street Railway — Fixing Fare of Blind Person

See Street Railway. 8.

34. — "Anti-aid" Amendment — Religious Worship — State Institutions

See Religious Worship.

35. — Taxation — State House — Assignment of Rooms

See Spanish War Veterans.


See State Bonds.

37. — Police Power — Interference with Interstate Commerce — Motion-picture Films

See Motion-picture Films.

38. — Appropriation by Legislature — Date of going into Effect

See Appropriation. 1.

39. — Political Party — Offices — Women

See Women. 2.

CONTAGIOUS DISEASE — Notice

Public Health — Physician

The notice of contagious disease, required by R. L., c. 75, § 50, to be given by the attending physician, should be given to the authorities of the city or town in which the patient is under treatment, rather than to the authorities of the city or town where the patient resides.

CONTRACT — Tax to pay Bonds no Contract with Bondholder or Taxpayer — Taxes not Borrowed Money

See Constitutional Law. 21.

CONVICT — Board of Parole — Permits to be at Liberty — Cannot be voted to a Convict while actually confined in Insane Hospital

See Board of Parole.

CONVICTION — Hunting License — Forfeiture

Under Gen. St. 1919, c. 296, a hunting license is automatically forfeited upon the conviction of the holder thereof, regardless of
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whether or not the officer procuring the conviction has obtained a surrender of the license, as required by law.

2. — Fish and Game Laws—Surrender of Certificate . 401
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CO-OPERATIVE BANKS—Matured Shares—Dues Capital 340
Matured shares of a co-operative bank held by it under the provisions of St. 1914, c. 646, § 6, are to be treated as "dues capital."

2. — Right to borrow Money . 390
A co-operative bank has no right to borrow money from national banks or trust companies for any purpose other than to meet an unusual demand by its depositors for withdrawals.

CORPORATIONS—Increase of Capital Stock—Filing Fee 169
The Secretary of the Commonwealth is not authorized to return to a corporation the filing fee paid by it on filing a certificate of increase of capital stock, even though the stock may in fact never be issued. Upon the filing of the certificate the authority to increase the capital stock is complete, and it is for that right that the fee is required.

2. — Increase of Capital Stock—No Par Value Stock—Value for Filing Fee Purposes . 570
St. 1920, c. 349, § 9, requiring a filing fee of one-twentieth of 1 per cent of the amount of stock with par value, and 5 cents a share for all shares without par value, by which the capital is increased, is an excise tax and as such reasonable.

The Secretary of the Commonwealth, in respect to assessing the above excise, shall not be required to examine into the actual value of the shares where an increase of no par value stock is to be authorized, but shall consider shares of no par value as having a par value of $100.

3. — Issue of New Stock—Right of Stockholders to participate . 77
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2. — Political Committees—Expenditure of Money . 449
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COUNTY COMMISSIONER—Effect of Death of Person elected before qualifying . 9
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COUNTY OFFICERS AND EMPLOYEES—Increase in Compensation—Basis on which Percentage is to be determined—Who entitled to receive it . 238

Gen. St. 1918, c. 260, providing a temporary increase of 10 per cent in salaries not previously increased and not exceeding $2,500, applies to all persons in the public service whose salaries are paid from the treasuries of the several counties, although they may not be strictly county officers or employees.

Gen. St. 1918, c. 211, establishing the salaries of clerks of police, district and municipal courts at three-quarters of the salary received by the justice of such court, to take effect as of June 1, 1917, effected an increase in pay only in the cases where the previous act (Gen. St. 1917, c. 340) had not already been adopted by the county commissioners.

The increase provided by the statute is to be computed upon the amount which the officer or employee was receiving on July 1, 1917, but is to be added to the salary actually established on July 1, 1918. The county commissioners have power to correct certain discriminations.

2. — Increase in Compensation—Salaries of Clerks and Justices increased during Year—Court Stenographers . 271

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A court stenographer whose salary is $2,500 is entitled to this temporary increase, although there is a possibility of additional compensation from extra work done as such stenographer in behalf of the county.

COURT STENOGRAPHERS—County Officers and Employees—Increase in Compensation . 271
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CREDIT UNIONS — Powers of — Security required for Loans . 37
Credit unions incorporated under Gen. St. 1915, c. 268, may loan money to their members upon mortgages of real estate generally, and the sufficiency of the property mortgaged is left entirely to the discretion of the credit committee, under the provisions of section 17 of this act, except as to loans secured by mortgages upon farm lands, which are restricted by section 18 to 50 per cent of the value of the property pledged.
A credit union may not loan money to a person not a member.

2. — Who can be Members — Loans . 269
A credit union must confine its membership to individuals, and cannot include corporations or associations, and must limit its loans to its own members.

3. — Membership — Corporations — Loans . 664
A corporation cannot be a member of a credit union organized under the provisions of Gen. St. 1915, c. 268.
A credit union must confine its membership to individuals, and, as it must limit its loans to its own members, it cannot loan money to a corporation.

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The power of a district attorney over a criminal case arising within his district is as complete before it reaches the Superior Court as after, and the statutory requirement (R. L., c. 7, § 17) as to certain appearances in the Superior Court does not in any way lessen his power to appear in the inferior courts.

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The mere use of the prefix "Dr." or "Doctor" by a person not in possession of a degree from an institution having the power to grant degrees is not a violation of R. L. c. 208, § 75.

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A drug corporation operating a chain of stores may establish a central prescription department in one of them, provided each store is conducted in accordance with law.

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A candidate whose name appears on an official ballot through nomination papers cannot attach the name of a political party thereto unless he receives a nomination by such party.

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A promise made by a candidate for office of representative in the General Court to donate his salary, if elected, to the Red Cross would be a violation of the corrupt practices act.

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4. — Absent Voters' Ballots — When to be cast . . . . 695

Under the provisions of Gen. St. 1919, c. 289, an absent voter's ballot can neither be cast nor counted unless it arrives at the proper polling place upon the day of election, in time for delivery to the election officers before the polls are declared closed.

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A producing and distributing electric company may substitute for its producing plant a proper and sufficient contract for the purchase of electricity.

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A producing and distributing electric company which substitutes for its producing plant a proper and sufficient contract for the purchase of electricity need not retain such plant in order to guard against a failure of the selling company to furnish electricity according to its contract, if such failure is not reasonably to be anticipated.

If a producing and distributing electric company has substituted for its producing plant a proper and sufficient contract for the purchase of electricity, a sale of such plant without first obtaining the consent of the Legislature does not violate St. 1914, c. 742, § 51.

If sale of such plant be proper, St. 1914, c. 742, § 51, does not forbid a contract of conditional sale which provides that immediate possession shall be given to the purchaser, who is bound to pay the purchase price by instalments during a term of years.

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EMPLOYMENT AGENCY — Fourteenth Amendment — State Constitution — Power to fix Charge of Employment Agency . . . . 484

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EMPLOYMENT OF MINORS — Selling Newspapers and practising Other Street Trades — Employment Certificate . . . . 172

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pledge or promise presented is made in good faith by or in behalf of a bona fide employer; if he is not so satisfied, he should decline to approve and file the pledge or promise, and refuse to issue the certificate.

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2.—Increase of Capital Stock—No Par Value. See Corporations. 2.

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FIRE ESCAPES—Door as an Obstacle to Means of Exit. A door of a lodging room in a hotel which may at any time be locked or otherwise fastened, and which is the only means of egress to an outside fire escape, constitutes an obstacle that may interfere with the means of exit from the hotel in case of fire, within the meaning of St. 1914, c. 795.


FIRE INSURANCE COMPANY—Right to do more than One Class of Business. See Insurance. 9.

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upon a plea of nolo contendere, or upon a plea

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Fireworks
and
Firecrackers
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of

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The

Fire Prevention Commissioner has no
power under St. 1914, c. 795, to restrain or
prohibit the sale or use of fireworks or firecrackers, except where such restraint or prohibition is reasonably necessary for the pre-

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fires.

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the lower portions of apartment buildings of
extreme height, so long as the requirement is
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applies to all buildings of the same class thereafter to be constructed.

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the city or town granting the license is situated,
or in the waters of an adjoining county lying
within three miles of the county in which said
city or

town

is

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IN

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2.

3.

for

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rowing a boat for his wife,
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be prosecuted for fishing without a license.
If he also engaged in landing the fish, or
otherwise assisted in the fishing operation, he
might well be held to be engaged in fishing.
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to troll

A man who

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Under the provisions of St. 1920, c. 411, all pupils in the elementary schools in the Commonwealth are obliged to take a course in history and a course in civics prior to their graduation from said schools, and at least one course in each of said subjects during their attendance at the public high school. The first two grades of the "junior high schools," so called, are considered as a part of the elementary schools, and the last grade as being a part of the public high schools.

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2. — Operators of Motor Vehicles — Revocation and Renewal of Licenses 385
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HOSPITALS FOR CONSUMPTIVES — State Subsidy — County Hospitals See Cities and Towns. 1.

HOTEL — Regulation of Fire Escapes — Door as an Obstacle to Means of Exit 535 See Fire Escapes.

HOURS OF LABOR — Employee of Railroad engaged in Interstate Commerce 572
Where a woman receives and transmits orders which affect train movements in both interstate and intrastate commerce, her hours of service are governed by the Federal Hours-of-Service Act (act of March 4, 1907, 34 Stat. 1415) and not by Gen. St. 1919, c. 113.

2. — Work under Contract with the Federal Government in Time of War 46
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3. — Bakers 327 See Bakers.


HOUSE OF CORRECTION — Parole of Prisoners 432
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HUNTING — Killing of Wild Birds and Animals on State Reservations — Power of Commissioner of Conservation to license 482
Under St. 1909, c. 362, § 1, the Commissioner of Conservation cannot authorize, within any State reservation under his jurisdiction, the hunting, taking or killing, during the open season, of any birds or animals which were protected by law at the time that act took effect.

HUNTING LICENSE — Forfeiture 411 See Conviction. 1.

ILLEGITIMATE CHILDREN — Inmates of Boston State Hospital or Massachusetts School for the Feeble-Minded 125 See Settlement. 1.
IMMIGRATION. BUREAU OF —  “Anti-Aid” Amendment — Americanization Classes . . . . 407 See Anti-Aid Amendment. 1.

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2. — Stock Dividend . . . . . . 619

See Taxation. 11.

3. — Exemption — Stock Dividend by Trust . . . . . . 621

See Taxation. 12.

INCOMPATIBILITY OF OFFICES — Associate Members of Legal Advisory Boards . . . . . . 165

Associate members of legal advisory boards do not hold office under authority of the United States, within the meaning of article VIII of the Amendments to the Massachusetts Constitution, so as to disqualify them as members of the General Court.

INDUSTRIAL SCHOOL OF SHOE-MAKING AT LYNN — Cost of Establishment, Equipment and Maintenance . . . . . . 183

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INFLAMMABLE LIQUID — License to store . . . . . . 454

See License to store Inflammable Liquid.

INFLUENZA EPIDEMIC — Authority of Governor to incur Expense in combating . . . . . . 266

See Public Defence. 2.


INMATE OF PUBLIC INSTITUTION — Acquiring a Settlement . . . . . . 388

See Settlement. 2.

INSANE PERSON — Surgery — Right to operate on Insane Patient without Consent — Quarantine without Consent, of Insane Patient who is Dangerous or afflicted with a Contagious Disease — Vaccination of Insane Patient . . . . . . 463

The superintendent of a State insane hospital has no authority to draw small quantities of blood and spinal fluid from a patient for purposes of diagnosis and treatment unless the patient, if competent, or his guardian, if he is incompetent, consents.

If a patient be dangerous or afflicted with a contagious or infectious disease, he may be quarantined, even against his will or the will of his guardian.

If the conditions prescribed by R. L., c. 75, § 138, are satisfied, a patient may be vaccinated against his will or that of his guardian.

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2. — Discharge of a Person committed to the State Hospital at Bridgewater after Trial for Murder . . . . 591 See PARDONING POWER.

INSURANCE — Form of Policy — Duty of Insurance Commissioner in approving . . . . . . 2

Whether the issuance by an insurance company of a policy of accident insurance containing no provision for cancellation by the company is a violation of St. 1910, c. 493, quare.

The fact that the Insurance Commissioner approved the form of such a policy does not constitute evidence either of incompetency or failure to act honestly or in good faith.

2. — Reinsurance of “Full Coverage” Automobile Policy — Fire Insurance on Automobile wherever located . . . . . . 15

Each of the particular hazards included in a “full coverage” automobile policy may be reinsured in a company authorized to insure against that particular hazard, even though such company is not itself authorized to issue a “full coverage” automobile policy under St. 1907, c. 576, § 32, cl. 2.

Insurance against fire upon movable risks of the sort specified in St. 1907, c. 576, § 32, cl. 2, may be written, either by a fire insurance company or by a marine insurance company. If such a policy is written by a fire or fire and marine insurance company it must be in the standard form prescribed by section 60 of this statute, so far as that form is applicable, but if such a policy is written by a marine insurance company it need not be in the standard form prescribed by section 60.

3. — Status of Alien Enemy — Situation of German Insurance Companies in Event of Declaration of War between this Country and Germany . . . . . . 41

The Insurance Commissioner would be justified, under St. 1907, c. 576, § 7, in revoking the certificate of authority granted to a German insurance company, its officers and agents, in the event of a declaration of war between this country and Germany.

An alien enemy cannot enforce the payment of debts in the courts of this country during the continuance of the war, but his liabilities may be enforced against him, provided assets can be found here to meet such liabilities.

It seems that payments to an agent of a German insurance company resident in this country may legally be made by a policyholder in the absence of an act of Congress prohibiting such payment, and that such policyholder may properly receive payment of claims from such resident agents.

4. — Circumstances under which Agreement by Automobile Association to furnish Attorney or guarantee Credit may not be Contract of Insurance . . . . . . 206
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INSURANCE—Continued.

An agreement by an automobile association to furnish attorney’s services, or to guarantee the credit of a member under certain conditions up to $25, is not a contract of insurance; but an agreement to reimburse a member for reasonable charges which he may be obliged to pay to an attorney is a contract of insurance.

5.—Fraternal Benefit Societies—Reserve Requirement—Financial Condition—Surrender Values and Withdrawal Equities . 255

A fraternal benefit society whose rates are based upon a table of mortality lower than the American Experience Table is not authorized to grant paid-up protection or cash surrender values, even though at a particular moment its reserve may equal that required by the American Experience Table.

The requirement of St. 1911, c. 628, as to accumulating and maintaining a reserve by a fraternal benefit society, refers to the general financial strength and permanent system of the organization, and not to a financial condition which may be temporary.

6.—Criminal Law—Aiding Unlicensed Agent . 262

An insurance company does not incur criminal liability under the insurance law (St. 1907, c. 576) by issuing a contract of insurance with knowledge that it has been negotiated through the efforts of a person not licensed to act as an insurance agent or broker.

A statute which fully regulates certain transactions, and in terms imposes a penalty upon one party to such transactions if carried on without a license, is not to be construed as creating a criminal responsibility upon other parties to such transactions who are not specifically mentioned.

7.—Inducement not specified in Policy Loans and Insurance . 344

A provision by an insurance company that the issuance of a policy should be dependent upon the policyholder making a loan, or the making of a loan dependent upon the borrower taking out a policy, is a violation of the provisions of St. 1907, c. 576, § 69.

8.—Life Insurance Companies—Loans to Policyholders—Home Purchase Plan . 391

A life insurance company may constitute the taking out of a policy of insurance a condition precedent to the making of a loan, provided such condition is stated in the policy and made available to all policyholders of the same class.

9.—Fire Insurance Companies—Right to do more than One Class of Business—Reinsurance . 426

Under St. 1907, c. 576, § 34, a foreign insurance company, admitted to this Commonwealth since the date mentioned therein, is not permitted to carry on more than one class or

INSURANCE—Continued.

combination of classes of business mentioned therein.

A purely mutual fire insurance company may not qualify to issue policies by a contract of reinsurance by it of the business of another existing company. Before such a company may issue policies it must have subscriptions for at least four hundred separate risks of direct insurance upon property located within the Commonwealth, and amounting to not less than $1,000,000.

10.—Automobile Insurance—Discrimination—Rebates—Rate for One or More Automobiles—Floating, Open and Blanket Policies . 543

St. 1912, c. 401, § 1, providing, in part, that “no insurance company . . . shall pay or offer to pay or allow in connection with placing or attempting to place insurance any valuable consideration or inducement not specified in the policy . . . or any rebate of premium . . . or any special favor or advantage in the dividends or other benefits to accrue thereon . . .” prohibits an insurance company giving a lower rate to an insured of several automobiles than to a person who insure a single automobile.

The issuance of the so-called floating, open and blanket policies to an automobile manufacturer, covering a large number of new automobiles, either in his factory, in warehouses or in transit, is not prohibited by St. 1912, c. 401, § 1.

11.—Mutual Fire Insurance—Premium Charge—Deposit Notes—Excepted Companies . 551

A mutual fire insurance company may not conduct in this Commonwealth the system of business outlined in St. 1907, c. 576, § 49, unless it not only was organized prior to May 21, 1887, but also was lawfully doing business upon the plan set forth in said section 49 at the time St. 1907, c. 576, took effect, namely, July 28, 1907.

12.—Discrimination—Trust Fund of Unearned Premium on Retroceded Business . 597

A plan by which an insurance company accepts reinsurance from direct writing companies, and then retrocedes all but a small part of such reinsurance to companies allied with it, under a contract by which such retrocessionaire is bound to hold the premium paid in advance upon the retroceded business in trust to pay over such premium to itself as and when earned, the unearned portion of such premium to be applied to procure reinsurance of the retroceded business in some other company, in case the retrocessionaire becomes insolvent or suffers an impairment of its capital, is in conflict with the policy declared by St. 1908, c. 151, and may involve a discrimination forbidden by St. 1912, c. 401, § 1, and therefore should not be approved by the Commissioner of Insurance.
INSURANCE — Continued.


A by-law of a mutual fire insurance company, which provides that the board of directors shall be chosen, one-half by and from the policyholders, and one-half by and from the guaranty stockholders, is invalid because it is in conflict with the provisions of St. 1907, c. 576, § 43, as amended by Gen. St. 1915, c. 7.

The policyholders and the guaranty stockholders of a mutual fire insurance company have equal rights in electing the entire board of directors.


A fire insurance company authorized to write insurance against fire in this Commonwealth cannot attach to the Massachusetts standard form of policy, established by St. 1907, c. 576, § 60, a rider which bases the liability of the company, not upon the value of the property at the time of the fire, but upon the replacement value of the property.

15. — Workmen’s Compensation Act — Counties or Municipalities to insure liability under . . . . 73

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INTEREST — Earned and Collected — Savings Deposits . . . . 442

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2. — Additional Rate by Way of Penalty . . . . 649


INTERNATIONAL LAW — Taxation — Property owned by a Foreign Government . . . . 445

See Taxation. 7.

INTERSTATE COMMERCE — Employee of Railroad engaged in — Hours of Labor . . . . 572

See Hours of Labor.

2. — Constitutional Law — Police Power — Regulation of Sale, Lease, Loan or Use of Motion-picture Films . . . . 573

See Motion-picture Films.

INTERSTATE RENDITION — Information — Sworn Evidence of Flight from Justice . . . . 593

An information is neither an indictment nor "an affidavit made before a magistrate charging the person demanded" with crime, one of which is required by § 5278 of the Revised Statutes of the United States as a condition of compliance with a requisition for the surrender of a fugitive from justice.

Transcripts of testimony are not "sworn evidence" that the person demanded is a fugitive from justice, as required by R. L., c. 217, § 11.

2. — Proof of Flight from Justice . . . . 709

A requisition for the surrender of an alleged fugitive from the justice of another State should be accompanied by evidence that the person demanded is in fact such fugitive from justice.

INTOXICATING LIQUOR — Sale to Minor — Sixth-class Licenses — Certificates of Fitness . . . . 36

The sale of intoxicating liquor upon a physician’s prescription to a minor by a druggist operating under a sixth-class license would be a violation of the conditions of such license. Such a sale by a druggist operating under a certificate of fitness, as provided by St. 1913, c. 413, would subject him to the penalties prescribed by R. L., c. 100, § 62, and would constitute sufficient cause for the revocation of the certificate of fitness by the Board of Registration in Pharmacy.

2. — Delivery by Railroad . . . . 104

Under R. L., c. 100, § 49, as amended by St. 1912, c. 201, a railroad company may lawfully deliver at its railroad station intoxicating liquors to the actual person shown upon the package as the purchaser or consignee.

3. — Eighteenth Amendment — Effect on State Legislation — Druggist’s License . . . . 514

Neither article XVIII of the Amendments to the Federal Constitution nor the Volstead Act passed by Congress to enforce the same nullifies those provisions of our State law which provide for the issue of licenses to druggists to sell liquor for medicinal purposes, but such licenses issued under State law do not relieve druggists from the duty to comply with the Federal law also.

4. — License Fees — Clubs . . . . 190

See License Fees. 1.

5. — License Fees — Distribution . . . . 424

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ISLANDS — Great Pond — Title — Commission on Waterways and Public Lands . . . . 378

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JOINT SCHOOL COMMITTEE—Election of Superintendent—Length of Term. 422
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JURISDICTION—Crimes committed on Federal Property. 522
The courts of the Commonwealth have no jurisdiction over a crime committed on the premises of the Watertown Arsenal, which is the property of the United States of America.

2.—Justice of the Peace—Notary Public. 166
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JUSTICE OF THE PEACE—Notary Public—Jurisdiction. 166
No person appointed a justice of the peace or notary public in this Commonwealth can act as such when outside the jurisdiction of the Commonwealth. A justice of the peace or notary public can continue to act as such although he is at the same time in the service of the United States Army, provided that when he acts as such he is within the Commonwealth.

KINDLING WOOD—Sale of, without measure—Weights and Measures. 188
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LABOR AND INDUSTRIES—State Board—War Emergency Industrial Committee. 224
The State Board of Labor and Industries has authority to remove certain members of the War Emergency Industrial Committee established by Gen. St. 1917, c. 342, § 24, but has no authority to nullify or veto its acts.

2.—State Board—Employment of Nurses—Factories and Shops. 350
Under Gen. St. 1918, c. 110, the State Board of Labor and Industries has no authority to require persons, firms and corporations operating a factory or shop, in which machinery is used, to furnish a nurse or other person in attendance on its employees.

LABOR LAWS—Application to Employer performing Work under Contract with the Federal Government in Time of War. 46
An employer in this Commonwealth who is furnishing war supplies under contract with the Federal government is subject to the provisions of St. 1913, c. 758, except when the performance of such contract, independent of other work, requires the employment of labor in a manner contrary to the provisions of that chapter.

LABORERS—Regularly employed by Cities and Towns for more than a Year—Determination of Who are. 152
A person whose employment has not been terminated for more than a year, and which is of such a nature as to require the services of such person the usual number of hours a day throughout the year, is "regularly employed" for more than a year, within the meaning of St. 1914, c. 217, § 1, even though he has been absent from his work for some time during the year on account of sickness or other cause.

2.—Weekly Wages. 417
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LABORERS, WORKMEN AND MECHANICS
See Workmen's Compensation Act. 2.

LEASE OF QUARTERS—Division of Highways—Governor and Council. 443
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LEAVE OF ABSENCE—State Institution—Discharge. 627
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See Incompatibility of Office.

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LEGISLATURE—Recess Committee—Appropriation for Services. 377
The Legislature may lawfully appropriate money to pay members of a recess committee appointed to consider the work being done by a commission to revise the laws of the Commonwealth.

2.—Delegation of Legislative Power—City Council. 263
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3.—Electric Company—Sale of Plant—Consent. 437
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6. — Master Plumbers . . . 516
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7. — Boxing Exhibitions — Municipalities . . . 716
   See Boxing Exhibitions.

LICENSE FEES — Treasurer and Receiver-General — Intoxicating
   Liquors — Clubs, 190
One-fourth of the fees received by a city or town from liquor licenses issued to clubs should be paid to the Treasurer and Receiver-General, under the provisions of R. L., c. 100, § 45.

2. — Sale of Intoxicating Liquors — Payment to Commonwealth . . . 424
   See Cities and Towns. 4.

LICENSE TO STORE GASOLINE —
   Fire Prevention — Decision on Application — “Order” — Right of Appeal to Commissioner of Public Safety . . . 718

The action of the State Fire Marshal in confirming the decision of a board of street commissioners, relative to an application for a license to store gasoline, falls within the definition of the word “order,” as that word is used in Gen. St. 1919, c. 350, § 109, which gives a right of appeal to the Commissioner of Public Safety to any person affected by an order of the Department or of a division or office thereof.

St. 1913, c. 577, as amended by St. 1914, c. 119, regulates the erection and maintenance of garages in the city of Boston. The provisions are distinct and separate matters from those in St. 1914, c. 795, § 3, and are not repealed thereby.

LICENSE TO STORE INFLAMMABLE LIQUID — Appeal to Commissioner of Public Safety from Order of State Fire Marshal . . . 454

Under Gen. St. 1919, c. 350, § 109, a person “affected” by an order of the State Fire Marshal, made under St. 1914, c. 795, § 18, by which the State Fire Marshal affirmed a permit to store a volatile inflammable liquid, granted by the license commissioners of Cambridge, may appeal to the Commissioner of Public Safety, who shall grant a hearing upon such appeal.

LIFE INSURANCE COMPANIES —
   Loans to Policyholders — Home Purchase Plan . . . 391
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LIQUIDATION OF BANK — Taking Possession of Bank . . . 563
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3. — Credit Unions — Members . . . 269
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4. — Insurance — Inducement not specified in Policy . . . 344
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5. — Life Insurance Companies — Policyholders — Home Purchase Plan . . . 391
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   See Street Railway. 2.

MANUAL TRAINING IN EDUCATIONAL INSTITUTIONS —
   Minors — Hazardous Employment . . . 423
Under St. 1913, c. 831, § 27, the Board of Education or the school committee of a city or town must, on an application of the Co-operative School of Engineering of Northeastern College for approval of the manual training or industrial education in that school, give its approval or disapproval.

MASSACHUSETTS REFORMATORY —
   Officer of — Retirement Association — Contributions to Annuity Fund . . . 230
   See Retirement Association. 4.

MASSACHUSETTS SCHOOL FUND —
   Method of Distribution of Income — Definition of “School Tax” and of “Whole Tax” — Figures used in Arriving at Distribution . . . 178
Under the provisions of St. 1903, c. 456, which directs the method of distribution of the income of the Massachusetts School Fund, the words “school tax” mean the amount appropriated for school purposes which is included by the assessors in making up the local tax
MASSACHUSETTS SCHOOL FUND — Continued.
rate. The "whole tax" rate of a city or town, as those words are commonly employed, is the rate made necessary by the inclusion of the State and county taxes. The figures to be used under the provisions of the aforesaid statute are those of the same calendar year as that in which was accumulated the income which is to be distributed.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS — Cruelty to Animals — Disposition of Fines.

Being present at a place where preparations are being made for the exhibition of the fighting of birds, which is made a crime subject to fine or imprisonment by R. L., c. 212, § 86, is not cruelty to animals, under R. L., c. 212, § 76.

The Massachusetts Society for the Prevention of Cruelty to Animals is not entitled, under R. L., c. 212, § 76, to any part of fines collected from defendants upon convictions under R. L., c. 212, § 86, upon complaint of an agent of the Society for being present at a place where preparations were being made for the exhibition of the fighting of birds.


MASTER PLUMBER'S LICENSE — Renewal — Refusal because Applicant is not actively engaged in Business.

Under St. 1909, c. 536, the State Examiners of Plumbers cannot refuse to renew a master plumber's license because said plumber is not actively engaged in business at the time of the application for renewal.

MATURED SHARES — Co-operative Banks — Dues Capital.

See Co-operative Banks. 1.

MECHANIC'S LIEN — Laborers — Weekly Wages.

A lien filed in due season by a laborer for work performed either prior to the recording of a mortgage or in connection with the erection, alteration, repair or removal of a building or structure, which erection, alteration, repair or removal was begun prior to the recording of the mortgage, takes precedence over the mortgage.

Where the erection, alteration, repair or removal of a building or structure is commenced after the recording of the mortgage, the only remedy of a workman who has done work in connection with such erection, alteration, repair or removal is against the contractor, either civilly for wages owed or criminally for failure to pay weekly.

MEDICATED ALCOHOL — Recording of Sales.

See Pharmacy. 1.

MEDICINE — Division of Registration.

— Right to Summon — Felony outside of Practice of Medical Profession.

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— Arrest for Nonpayment of Taxes.

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See Soldiers and Sailors.

MILITARY OR NAVAL SERVICE — Assessment upon Members — Retirement Association.

See Retirement Association. 1.

MILITARY SERVICE — Absent Voters.

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2. — State Employees — Extra Compensation.

See State Employees. 3.

3. — State and Federal — Service Medal.

See Service Medal.

MILITIA — State Guard — Status of Appropriations for.

See State Guard. 1.

2. — State Guard — Advances from State Treasury.

See State Guard. 3.


See Constitutional Law. 4.

MINIMUM WAGE COMMISSION — Authority to issue Special Licenses — Women Physically Defective.

Under the provisions of St. 1912, c. 706, § 9, the Minimum Wage Commission is warranted in issuing to women special licenses permitting their employment at less than the legal minimum wage fixed for women in their
MINIMUM WAGE COMMISSION — Continued.
occupation, provided they are physically defective to such an extent as to make them incapable of doing an amount of work required to entitle them to the minimum wage determined. The Minimum Wage Commission is not warranted in issuing such licenses to women incapacitated solely by reason of mental defects.

2. — Powers — Minimum Wage Board . 305
   The Minimum Wage Commission has no power to qualify or to limit the application of any determination made by a wage board.

MINOR WARDS — Tuition — Payment by Town — Reimbursement . 711
   See Tuition.

MINORS — Selling Newspapers and practising Other Street Trades — Employment Certificate . 172
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MONEY ON STORAGE — Defunct Trust Company — Collections — Right of Collecting Bank to become Debtor . . . 460
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MORTGAGE OF REAL ESTATE — Collateral — Franchise Tax — Deductions . . . 557
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MOTION-PICTURE FILMS — Constitutional Law — Police Power — Interference with Interstate Commerce — Regulation of Sale, Lease, Loan or Use . . . 575
   A bill prohibiting the selling, leasing, loaning or using for public exhibition or commercial purposes any motion-picture film, unless the film has been submitted to and approved by the Commissioner of Public Safety, would be unconstitutional if enacted into law, as it would violate that clause of section 8 of article I of the Constitution of the United States which gives Congress the power to regulate commerce among the several states.

MOTOR VEHICLES — Registration of — Operator's License — Status of Automobiles owned by Federal or State Government and used for Military Purposes . . . 49

MOTOR VEHICLES — Continued.
The laws of this Commonwealth do not require the registration of motor vehicles owned by the United States and used in the military service, or of motor vehicles owned by the Commonwealth or by its militia or home guard when such organizations are called out for active duty by the Commander-in-Chief, nor are the operators of such motor vehicles required to be licensed while operating them for military purposes.

2. — Registration of — Used by the Federal or the State Government for Military Purposes — Licensing of Operators of . . . 109
   Motor vehicles which are loaned to the Federal or the State government for military purposes are not required to be registered, nor the operators thereof to be licensed, while such vehicles are actually being used for military purposes and operated by persons in the military service of the Federal or State government in the performance of their duty.

3. — Public Service Commission — Rules and Regulations — Cities and Towns . . . . . . . . . . 369
   Under the provisions of Gen. St. 1918, c. 226, the Public Service Commission, upon an appeal, is limited in its power relative to the operation of motor vehicles either to approving or disapproving the orders, rules and regulations adopted by local cities and towns.

4. — Operators of — Revocation and Renewal of Licenses . . . 385
   Under Gen. St. 1916, c. 290, the Massachusetts Highway Commission may, within one year of the time of conviction of an operator of a motor vehicle for violation of a law which provides for the surrender and revocation of a license, issue a new license where, on appeal, the district attorney has made an entry of nolle prosequi, but may not do so where, on appeal, a plea of nolo contendere is accepted by the court and the case is placed on file.

5. — State Employees — Liability Insurance in Connection with the Operation of . . . 290
   See State Employees. 4.

6. — Class Legislation — Delivery Vehicles . . . . . . . . . 358
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MOTORS—Substitution of—Automobiles — Change in Maker's Number . 436
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  See Labor and Industries. 2.

NURSES’ CORPS—State Benefits—World War
  Under Gen. St. 1918, c. 92, members of the nurses’ corps who saw active service in the World War are entitled to the benefits provided for by Gen. St. 1917, cc. 211 and 332.

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OFFICE BUILDING ON STATE PROPERTY—Right of Governor and Council to erect and remove . . . . . . 247
  See Public Defence. 1.

OFFICERS—Matrons and Subordinate Employees in the Prison Service—Compensation . . . . . . 227
  The term “officers in the prison service of the several counties,” as used in Gen. St. 1918, c. 240, does not include all subordinate employees, clerks or assistants, but only persons who as a regular and substantial part of their duties have charge and control of prisoners, and apparently does not include matrons.
  Whether or not any particular individual is to be regarded as an “officer” under this section is a question of fact to be decided in the first instance by the county treasurer, whose determination ought not to be set aside unless it is clearly wrong.

2.—Civil Service—State Aid and Pensions . . . . . . 722
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OFFICERS’ TRAINING CAMPS—War Service—Employees of Commonwealth—Whether mustered into the Military Service of the United States . . . . . . 146
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OFFICES—Incompatibility of—Constitutional Convention . . . . . . 20
  See Constitutional Law. 1.

OPTOMETRY, PRACTICE OF—Assistance in Use of Eyeglass Tester . . . . . . 670
  Where one possesses an appliance and lends manual assistance in the operation of the same, which requires no technical knowledge of the science of optometry, said assistance being rendered to a customer in the use of the appliance by turning a disc to enable the customer to look through a series of lenses, it cannot be said that the lending of such assistance constitutes the practice of optometry, within the meaning of St. 1912, c. 700. § 1.
  The use of such an appliance, and its operation as indicated, by a seller does not come within the prohibition of St. 1912, c. 700, if neither advice nor instruction is given the customer.

PARDONING POWER—Discharge of a Person committed to the State Hospital at Bridgewater after Trial for Murder . . . . . . 591
  The pardoning power does not extend to one confined at the State Hospital at Bridgewater when such person has been committed after having been found not guilty of murder on account of insanity.
  Such person may be discharged, however, by the Governor, with the advice and consent of the Council, when, after an investigation by the Department of Mental Diseases, the Governor is satisfied that the person so confined may be discharged without danger to others.

PARKS AND RESERVATIONS—Enforcement of Game Laws . . . . . . 628
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PAROLE—Permits to be at Liberty—Issuance to Inmates of the State Prison who have been transferred to the Prison Camp and Hospital 174
  The Board of Parole of the Massachusetts Bureau of Prisons has the authority to issue permits to be at liberty to inmates of the State Prison who have been transferred to the Prison Camp and Hospital, subject, however, to the provisions of St. 1911, c. 451.

2.—Release of Prisoner after Expiration of Minimum Term of Sentence—Authority of the Warden of the State Prison . . . . . . 235
  The Board of Parole is authorized, under R. L., c. 225, § 115, to determine whether a prisoner has observed the rules of the prison during the minimum term of his sentence, and, if he has, to permit him to be at liberty for the remainder of the sentence, upon such reasonable terms and conditions as it may prescribe. The warden of the State Prison is not at liberty to release any prisoner under this section of the law except upon a permit granted by the Board of Parole, after an investigation.
3.—Permits to be at Liberty — Convict
in Insane Hospital . . . 141
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4.—House of Correction — Release of
Prisoners . . . . 432
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PAUPERSTATIONS—Reloca-
tion — Commutation Tickets —
Regulation and Establishment of
Fares — Regulation of Equip-
ment, Appliances and Service —
Repeal of Inconsistent Acts . 643
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Tickets.

PAUPERS—Loss of Settlement —
Domicil . . . . 380
Absence of paupers from cities or towns in
which they have a residence, in order to con-
stitute a loss of settlement, must be for five
consecutive years and of such a character as
to constitute a change of domicil.

PENSION—Supervisor of Loan Agencie
—Removal — Refund . . . . 192
See Retirement Association. 2.

2.—State Police — Consolidation Act . 610
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PERMANENT OR TEMPORARY
EMPLOYMENT—State Employ-
ees — Military Service —
Extra Compensation . . . . 274
See State Employees. 3.

PERSONALESTATE—List of —
Abatement . . . . 122
See Taxation. 4.

PHARMACIST—Unregistered — Right
to do Business . . . . 306
An unregistered person lawfully actively
engaged in the business of pharmacy as a
copartner or stockholder prior to the passage
of St. 1913, c. 720, may thereafter actively
engage in the drug business if associated with
a registered pharmacist.

PHARMACY, Board of Registration in
—Medicated Alcohol — Record-
ing of Sales . . . . 170
Medicated alcohol containing ingredients
rendering the compound poisonous does not
fall within the prohibition of our laws relative
to intoxicating liquors. It is not necessary
that the sale of such a non-beverage alcohol
shall be recorded in the liquor record book,
under the provisions of R. L, c. 100, § 26.

2.—Registered Pharmacist—Certificate of
Fitness — Suspension or Rev-
ocation of . . . . 218
The suspension or revocation of certificates
of fitness to registered pharmacists by the
Board of Registration in Pharmacy or by the

PHARMACY—Continued.
licensing authorities of cities and towns need
not be for cause, but such suspension or revoca-
tion must be made in good faith.

PHYSICIAN — Division of Registration
in Medicine — Right to Summon
— Felony outside of Practice of
Medical Profession . . . . 549
The Division of Registration in Medicine
has a right, under the provisions of Gen. St.
1917, c. 55, § 1, to summon before it a regist-
ered physician who has been convicted of a
felony committed by him outside of the prac-
tice of his profession.

2.—Member of Local Board of Health . 285
See Health, Local Boards. 2.

3.—Board of Registration in Pharmacy
—Certificate of Fitness — War
Prohibition . . . . 374
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4.—Public Health — Notice of Con-
tagious Disease . . . . 626
See Contagious Disease.

POLICE—City of Boston — Mayor —
Police Commissioner . . . . 399
See Police Commissioner. 2.

POLICE COMMISSIONER — City of
Boston — Duties — City Council 394
The Boston city council has no power to
impose duties upon the Police Commissioner
of its city other than those which incidentally
arise from his responsibility to enforce the law.

2.—City of Boston — Mayor — Police 399
St. 1885, c. 323, § 6, is still in force and applicable
to the Police Commissioner for the city of Boston.
In ease of action by the mayor under its provisions, the internal
administration and personnel of the police force
remain solely under the direction and control of the Commissioner.
The mayor of Boston has no authority to
direct the reinstatement of any police officer
removed by the Commissioner.
Under the provisions of Gen. St. 1919,
c. 150, a war veteran is eligible to appointment
to the police force of the city of Boston if he
is a resident of this Commonwealth.

POLICE POWER — Applicability to
State Institutions — Hours of
Labor . . . . 365
Gen. St. 1919, c. 113, reducing the hours of
labor of women and children, does not apply
to the industrial department of the Reforma-
tory for Women.

2.—Workmen’s Compensation Act —
Trial by Jury . . . . 83
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POLITICAL PARTY — Constitutional Law — Offices — Women . . 614
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POLLY TAX — Exemption — Merchant Marine — Arrest for Nonpay- ment . . . . 429
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2. — War — Persons summoned in Draft who were discharged before being mustered into the Federal Service — Abatement . . . . 601
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2. — Discrimination — Trust Fund of Unearned Premium on Retro- ceded Business . . . . 597
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PRESIDENTIAL PRIMARIES—Group Voting . . . . 520
See Elections. 3.

PRISON SERVICE — Officers, Matrons and Subordinate Employees . 227
See Officers.

PRISONERS — Release on Parole — Board of Parole — House of Correction . . . . 432
A prisoner sentenced to the house of correction, the terms of which are maximum and minimum, can be released under the provisions of R. L., c. 223, § 121, as amended by St. 1902, c. 227, and St. 1912, c. 158. St. 1911, c. 451, does not apply.
Under R. L., c. 221, § 123, the county commissioners, except in the county of Suffolk, where the authority is conferred upon the commissioner of penal institutions of the city of Boston, are authorized to discharge a prisoner from the house of correction.
The Board of Parole of the Department of Correction has no jurisdiction over prisoners serving in the house of correction save in the special case provided for in Gen. St. 1918, c. 214.

PRISONERS — Continued.
2. — Sentence — Discharge of Common Night Walker from House of Correction . . . . 447
The authority conferred by R. L., c. 225, upon the county commissioners, or, in the city of Boston, upon the penal institutions commissioner, to release persons sentenced to a house of correction, is confined to persons sentenced as common night walkers under R. L., c. 212, § 55.

3. — Female Life — Power to bind out to Domestic Service . . . . 731
A female prisoner who is serving a life sentence cannot be bound out to domestic service under the provisions of G. L., c. 127, §§ 85 and 86.

4. — Release of — Expiration of Mini- mum Term of Sentence — Authority of the Warden of the State Prison . . . . 235
See Parole. 2.

PRIVATE DETECTIVE — Definition of Term . . . . 425
By the words "private detective," as used in Gen. St. 1919, c. 171, is meant any person who generally engages in or solicits the business of seeking out and discovering evidence for use in civil or criminal proceedings.

PRIVATE INSTITUTIONS — Pay- ments by Commonwealth — "Anti-Aid" Amendment . . . . 315
See Constitutional Law. 13.

PROBATION OFFICER — Salary — District Court — Superior Court 186
A probation officer of a district court, who has been temporarily employed in connection with the probation work of the Superior Court during the disability of a probation officer of that court, is entitled to receive compensation from the county for the latter services.

PROMOTIONS — Certificate of Positive Merit — Six Months' Proba- tionary Period . . . . 233
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PROPERTY OF COMMONWEALTH — Taxation — Exemption — In- terest . . . . 655
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PUBLIC CHARITABLE INSTITU- TION — Boston Consumptives' Hospital . . . . 653
The words "public charitable institution," as used in St. 1920, c. 306, should be confined to charitable institutions supported by the State, county or municipality to which persons are committed.
PUBLIC DEFENCE — Right of Governor and Council to erect and remove Temporary Office Building on State Property . . 247

The Governor and Council have authority to erect a temporary building on the State House grounds for use as office room for the Committee on Public Safety and the Food and Fuel Administration.

In the absence of legislative direction, the Governor and Council have authority to request that such a building be taken down at least six months after the close of the war.

Under the provisions of Gen. St. 1917, c. 342, relating to the public safety or defence, and Mass. Const., pt. 2d, c. 11, § I, art. VII, the Governor may use any property of the Commonwealth for the defence of the Commonwealth, and, with the approval of the Council, may take possession of private property in case of such necessity. In the absence of direction by the Legislature, the power of the Governor in this respect is full and complete.

2.— Authority of Governor to incur Expense in combating Influenza Epidemic 266

The power of the Governor to incur emergency expenses incident to the war, under Gen. St. 1918, c. 278, authorizes incurring expenses to combat the influenza epidemic.

PUBLIC HEALTH — Tuberculosis Hospitals — Construction by Counties 604 See Tuberculosis Hospitals. 1

2.— Notice of Contagious Diseases — Physician . . . . 626 See Contagious Disease.

PUBLIC OFFICE — Appointment to fill an Anticipated Vacancy . . 116 See Vacancy in Office. 2

2.— Eligibility to — Constitutional Law — Alien . . . . 333 See Constitutional Law. 15.

3.— Commissioner to qualify Civil Officers — Woman . . . . 479 See Constitutional Law. 22.

PUBLIC OFFICERS — Trustees of the New Bedford Textile School — Corporation . . . . 278

The trustees of the New Bedford Textile School, appointed under Gen. St. 1918, c. 246, have the same duties and obligations as those previously exercised by the original corporation, but are a board of public officers and not a legal corporation.

PUBLIC PROPERTY — Taxation of . . 18 See Taxation. 1.

PUBLIC SAFETY, Department of — Garage License — Appeal to Commissioner . . . . 544 See Garage License.

PUBLIC SCHOOLS — Americanization Classes — Reimbursement by Commonwealth . . . . 573

See Cities and Towns. 7.

PUBLIC SERVICE COMMISSION — Jurisdiction of Appeal by a Street Railway Company from City Regulations, in Certain Cases . . 251

The Public Service Commission has no jurisdiction of an appeal by a street railway company from the rules and regulations of a city relating to the licensing of public vehicles, when the city has not accepted the provisions of Gen. St. 1916, c. 293, and the vehicles in question are not owned or operated by a street railway company.

2.— Jurisdiction over a Street Railway — Receiver appointed by Federal Court . . . . 291 See Street Railway. 3.

3.— Motor Vehicles — Rules and Regulations . . . . 369 See Motor Vehicles. 3.

4.— Grade Crossings — Public and Private Railroads . . . . 419 See Grade Crossing.

PUBLIC TRUSTEE — Street Railway — Limitation of Stock Issue . . 355 See Street Railway. 6.

PUBLIC WAREHOUSEMAN . . . . 1

A department store which has a cold-storage department for the storage of furs of its customers is required to file a bond and procure a license as a public warehouseman, under the provisions of Gen. St. 1915, c. 98, if it makes a charge for such storage or if such storage was not part of the arrangement entered into when the furs were purchased by the customer; otherwise it is not required to do so.


QUARANTINE — Insane Patient who is Dangerous or afflicted with a Contagious Disease . . . . 463 See Insane Person. 1.

QUASI-JUDICIAL BODY — Board of Registration in Medicine — Hearings . . . . 732 See Board of Registration in Medicine.

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2.—Public and Private—Public Service Commission—Limitation of Grade Crossings . . . 419
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RAILROAD COMMUTATION TICKETS—Public Utilities—
Price of Fares—Regulation and Establishment of Fares—Abandonment of Passenger Stations—Relocation of Passenger Stations and Freight Depots—
Regulation of Equipment, Appliances and Service—Repeal of Inconsistent Acts . . . 643

The provisions of St. 1908, c. 649, § 2, relative to certain railroad corporations selling commutation tickets at certain prices, are inconsistent with the provisions of St. 1913, c. 784, § 22, which vested in the Board of Railroad Commissioners (now the Department of Public Utilities) complete power to regulate and establish fares on railroads, and to determine the just and reasonable rates, fares and charges to be charged. Being inconsistent, such provisions of St. 1908, c. 649, § 2, were repealed by the provisions of St. 1913, c. 784, § 29.

The provisions of St. 1906, c. 463, pt. II, § 137, regulating the abandonment of passenger stations by a railroad corporation, and the following section, § 138, relative to the relocation of passenger stations and freight depots by a railroad corporation, are inconsistent with the provisions of St. 1913, c. 784, § 23, which gave the Board of Railroad Commissioners (now the Department of Public Utilities) unconditional authority to correct equipment, appliances and service which is unjust, unreasonable, or inadequate. Being inconsistent, said sections 137 and 138 of part II of chapter 463 of the Acts of 1906 were repealed by St. 1913, c. 784, § 29.

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REFERENDUM—Existing Law—Effect of Ratification on Subsequent Amendment . . . 421
A petition for referendum on an existing law, subsequently amended, suspends operation both of the law and the amendment thereto, pending action thereon by the voters; and its approval by them carries with it the approval of the amendment.

2.—Right to withdraw Petition . . 400
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3.—Public Opinion—Printing on Ballot . . . . 404
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4.—Appropriation Act . . . 612
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REGISTRARS OF VOTERS—Power of Assistant City Clerk to act as Member of in Place of City Clerk 30

Where a city has not adopted the provisions of St. 1913, c. 835, § 24, the city council is not authorized, under R. L., c. 26, § 16, to provide by ordinance that the assistant city clerk shall perform the duties of registrar of voters in place of the city clerk when the clerk is unable personally to perform such duties.

REGISTRATION—Motor Vehicles—
Military Purposes . . . 109
See Motor Vehicles. 2.

2.—Useful Occupation Act . . 236
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3.—Substitution of Motors—Change in Maker’s Number . . . 436
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REGISTRATION FEE—Registration of Certain Aliens . . . . 210
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REGULATIONS—Supervisor of Plans—Fireproof Construction . . . 347
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RELIGIOUS WORSHIP—Constitutional Law—“Anti-Aid” Amendment—State Institutions . . . 510
The expenditure of money at the various insane hospitals and other State institutions for the purpose of affording inmates the opportunity for worship is not prohibited by the provisions of article XLVI of the Amendments to the State Constitution.

REPEAL BY IMPLICATION . . . . 69
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REPLACEMENT VALUE — Fire Insurance — Massachusetts Standard Policy . . . . 702

RETIREMENT ASSOCIATION — Assessment upon Members in Military or Naval Service
The assessments to be made upon members of the Retirement Association who have been mustered into the military or naval service of the United States, and who are receiving from the Commonwealth the payments provided by Gen. St. 1917, c. 301, should be in the same amount as before the members were mustered into the federal service.

2. — Supervisor of Loan Agencies — Removal — Refund — Pension. 192
Under the provisions of the statutes governing the retirement system for the employees of the Commonwealth, where a person was appointed Supervisor of Loan Agencies on Jan. 1, 1912, and at the expiration of his three-year term of office failed to receive reappointment but was removed, and thereafter, in accordance with his request, his deposits as a member of the Retirement Association remained in the annuity fund for a period of two years, the only course open to him after that is to accept a refund of his payments.

Any member of the association who ceases to be an employee after he has acquired voluntary retirement rights is not entitled to a refund of his payments. The only course open to him upon leaving the service is to exercise his retirement rights and to accept a pension.

3. — Employees in Institutions taken over by Commonwealth — Annuities and Pensions. 222
Employees of certain educational institutions taken over and operated by the Commonwealth forthwith become employees of the Commonwealth, and their membership in the Retirement Association is made compulsory.

Any pension dependent on prior service is to be computed in such cases precisely as if the employee had entered the service of the Commonwealth at the time when he in fact entered the service of the institution.

The Board of Retirement has no authority to allow such employees to make up previous annuity assessments.

4. — Officer of Massachusetts Reformatory employed after June 7, 1911 — Contributions to Annuity Fund. 230
A person employed in the Lyman School for Boys, who was transferred to the Massachusetts Reformatory as an officer subsequent to June 7, 1911, does not become entitled to the non-contributory pension provided by St. 1908, c. 601, and must, therefore, continue

RETIREMENT ASSOCIATION — Continued.
to make payments as a member of the Retirement Association.

5. — Employee who leaves the Service and later returns to it. 456
Where a member of the State Retirement Association leaves the service of the Commonwealth and receives a refund of the amount contributed by him to the association, in accordance with St. 1911, c. 532, § 6, par. 2, but returns to the service of the Commonwealth within five months, being then under fifty-five years of age, he begins a new term of employment in respect of which he is not entitled to credit because of his former employment, either for the purpose of reinstatement in the association or for the purpose of determining the period of service which will entitle him to retire with a pension.

6. — Department of Public Works — Commissioners — Employees. 547
The provisions of the retirement act, St. 1911, c. 532, do not apply to the commissioners constituting the Department of Public Works.

7. — Retirement — Veteran. 634
A veteran, as defined in St. 1920, c. 574, is eligible to remain a member of the Retirement Association established by St. 1911, c. 532.

One who is eligible to retire both under St. 1920, c. 574, and under St. 1911, c. 532, must elect as to whether he will retire under the one or under the other.

If a veteran eligible to retire under St. 1920, c. 574, is also a member of the Retirement Association established by St. 1911, c. 532, and elects to retire and is retired under St. 1920, c. 574, he is entitled to the refund granted by St. 1911, c. 532, § 6, par. A, cl. (a).

8. — Boston School Teachers — Part-time Employment. 576
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REVENUE — Collection of — Abandonment of Contract — Penalty by Bonding Company. 524
See Treasury.

ROOMS IN STATE HOUSE — Constitutional Law—United Spanish War Veterans. 526
See Spanish War Veterans.

RULES AND REGULATIONS — State Boards and Commissions — General Scope. 282
Rules and regulations of State boards and commissions are general in scope, within the meaning of Gen. St. 1917, c. 307, when they apply to all the citizens of the State, although they prohibit the doing of an act only in a certain locality.
SAFE DEPOSIT BOX — Savings Banks 661
   See Savings Banks. 2.

2. Trust Company — Relation of Company to Holder of Safe Deposit Box
   See Trust Company. 5.

SAALARY — Effect of Classification by Supervisor of Administration upon those fixed by Statute 287
   Gen. St. 1918, c. 228, providing for the classification by the Supervisor of Administration of certain offices and positions in the government of the Commonwealth, has no effect upon salaries established by statute.

2. State Boxing Commission — State Police Officer
   The compensation received by one who is deputized by the State Boxing Commission under St. 1920, c. 619, is not "salary," within the meaning of R. L., c. 18, § 11, providing that "a person shall not at the same time receive more than one salary from the treasury of the commonwealth."

   R. L., c. 6, § 58, forbids payment of extra compensation to an employee or officer for special work done in regular working hours, but does not forbid extra compensation for overtime service.

3. Director of a Division of a State Department — Member of Advisory Board of Same Department — Additional Compensation 699
   A person who has been appointed director of a division of a State department, and receives therefor a yearly compensation, may not receive any additional compensation for services rendered to the Commonwealth as a member of the advisory board of that department, unless such services as a member of the advisory board are rendered outside of working hours, or unless his duties as director are not sufficient to require his continuous service in that position.

4. Probation Officer 186
   See Probation Officer.

5. County Officers and Employees — Increase 238
   See County Officers and Employees. 1.

6. County Officers and Employees — Clerks, Justices and Court Stenographers 271
   See County Officers and Employees. 2.

7. Increases — Deputy Supervisor of Administration 552
   See Supervisor of Administration. 2.

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8. School Unions — Superintendent 586
   See Schools. 6.

SALE — Itinerant Vendor 62
   See HAWKER AND PEDLER. 1.

2. Street Railways 101
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SALE, CONDITIONAL — Electric Company — Substitution for Producing Plant of Contract to purchase Current — Sale of Plant without Consent of Legislature 437
   See Electric Company.

SALE OF ASSETS — Business Corporation — Taxation 706
   See Taxation. 16.

SALE TO MINOR — Sixth-class Licenses 36
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SAVINGS BANKS — Bonds of Railroads taken over by the United States Government — Legal Investments 281
   Under St. 1908, c. 590, § 68, with certain exceptions, the bonds of railroad corporations which have been taken over by the United States government are not legal investments for savings banks.

2. Power to establish Safe Deposit Department — Power to make a Business of receiving Securities for Safekeeping 661
   A savings bank is not authorized to establish a safe deposit department.

   A savings bank is not authorized to make a business of receiving securities for safekeeping except to the extent and under the conditions prescribed by Gen. St. 1919, c. 60.

SAVINGS DEPOSITS — Trust Company — Interest — Earned and collected 442
   Interest collected in advance on a note which runs for a period beyond the date of declaring interest on savings deposits is not income earned during the next preceding period.

SCHOOL PERMITS — Minors — Domestic Service 308
   Under the provisions of R. L., c. 44, § 1, a girl between the ages of fourteen and sixteen must first receive a permit from the superintendent of schools in order legally to leave school and engage in domestic duties in her own home.

SCHOOL TAX — Massachusetts School Fund — Distribution of Income 178
   See Massachusetts School Fund.
SCHOOL TEACHERS—Boston—Part-time Employment—Retirement Systems

Regular academic teachers of the city of Boston, who are members of the retirement system for Boston public school teachers and who are employed on a part-time basis in vocational schools, are not obligated, under the provisions of St. 1914, c. 494, to enroll as members of the State retirement system.

Teachers who enter the service of the city of Boston employed on a part-time basis in vocational schools operating under the provisions of St. 1911, c. 471, and who are also employed in the academic courses in the public schools of the city of Boston, are not obligated to enroll as members of the State retirement system, as said teachers must, under the provisions of St. 1908, c. 589, become members of the retirement system for the Boston public school teachers.

SCHOOL UNION—Joint School Committee—Election of Superintendent—Length of Term

See Schools. 1.

2. Superintendent—Minimum Salary 586

See Schools. 6.

SCHOOLHOUSE—Building occupied by Young Men's Christian Association of New Bedford—License for Operator of Moving Pictures

That portion of premises occupied by the Young Men’s Christian Association of New Bedford which is used for educational purposes is a schoolhouse, within the meaning of St. 1914, c. 791, § 17, and a special license may be granted, as provided therein, for the operation of a moving-picture machine in connection with the educational classes conducted on the premises.

SCHOOLS—Election of Superintendent—Joint School Committee—Length of Term

Under R. L., c. 42, § 44, as amended by St. 1911, c. 384, § 1, a superintendent of schools elected by a joint school committee of a school union must be employed for a three-year term, regardless of when the employment begins.

2. Transportation of Pupils living on Islands—Authority of Department of Education and of Cities and Towns

Unless some statute requires it, a city or town need not provide transportation to and from school, or board in lieu thereof, for children of school age living upon islands within such city or town which are not provided with schools. R. L., c. 25, § 15, is permissive, not mandatory.

The Department of Education, which under Gen. St. 1919, c. 350, § 56, is the successor of the State Board of Education, is authorized by Gen. St. 1919, c. 292, § 5, if the facts warrant it, to furnish such transportation in all cases where some statute does not place this duty upon the city or town.

Gen. St. 1919, c. 292, § 9, authorizes the Department of Education, in a proper case, to require a town to furnish transportation to and from school to children living upon islands within the town which are not provided with schools.

3. Teaching of Thrift

R. L., c. 42, § 1, as amended by St. 1908, c. 181, and St. 1910, c. 324, permits but does not require that thrift shall be taught in the public schools.

4. Attendance—Requirements

Under Gen. St. 1915, c. 81, as amended by Gen. St. 1919, c. 281, children between fourteen and sixteen years of age are required to attend school only in case they do not possess such ability to read, write and spell the English language as is required to complete the sixth grade course.

5. Continuation Schools—Reimbursement of City or Town for Expenditures

Continuation schools are not public day schools.

Cities and towns which maintain continuation schools are not entitled, on account of such schools, to the reimbursement provided in Gen. St. 1919, c. 363, § 2, on account of expenditures for public day schools.

6. Superintendency Unions—Superintendent—Minimum Salary

Previous service in one superintendency union established under R. L., c. 42, § 43, and amendments thereof, is not to be counted in determining the minimum salary which another union must pay to the same superintendent under R. L., c. 42, § 45, as amended by St. 1920, c. 371.

7. Teachers in Private Schools—State Aid

See Teachers Retirement Association. 2.

8. Superintendent—Joint Employment—Termination of Agreement

See Towns.

SEARCH WARRANT—Fisheries and Game—Short Lobsters—Hotel Kitchen, Ice Box, Connecting Parts of Building

Under St. 1904, c. 367, as amended by St. 1910, c. 548, officers of the Division of Fisheries and Game can, if there is reason to believe that short lobsters are being held, search without a warrant a hotel kitchen, ice box and such parts of connecting buildings as are not occupied for dwelling purposes.
SETTLEMENT—Continued.
An illegitimate child whose mother died prior to the passage of St. 1911, c. 669, retains the settlement, if any, which it had under the law as it previously stood.
St. 1911, c. 669, § 2, applies to persons admitted to the Psychopathic Department of the Boston State Hospital or the school department of the Massachusetts School for the Feeble-minded.

2. — Inmate of Public Institution . 388
Under the provisions of St. 1911, c. 669, the time spent by a pauper as an inmate in any public institution at public expense, irrespective of the source from which the public funds come, is to be counted in computing the time for acquiring a settlement unless he tenders reimbursement within two years of the time of receiving such relief.

3. — Loss of Settlement — Domicil . 380
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SHERIFFS AND DEPUTIES — Fees . 288
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The clerks and agents who, under Gen. St. 1919, c. 190, § 1, may be appointed with the approval of the Governor and Council, are not officers whose appointment is subject to confirmation by the Executive Council, within the meaning of R. L., c. 19, § 9, exempting such officers from classification under the Civil Service Rules.

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Although neither the obligation of the bond itself nor the obligation of the contract relative to the maintenance of the sinking fund to pay it can be enforced in ejectment by any person against the Commonwealth without its own consent, unanswerable considerations of public policy, of duty to the taxpayers and of public honor require that both obligations be punctually and strictly performed.

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of certain employees of the Commonwealth,
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apportioned to each of the monthly payments
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The maximum increase in salary of an em-
ployee coming within Gen. St. 1917, c. 323, § 3,
is one-half of the maximum increase of $100
provided for by section 2 of that act.

An employee of the Commonwealth who
comes within the provisions of St. 1914, c. 605,
by accepting the temporary increase provided
by Gen. St. 1917, c. 323, waives the benefit of
any increase in salary received under said chap-
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By the term "cost of service" as used in
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Gen. St. 1919, c. 320, § 1, repeals by implication provisions of prior statutes which require increases to be approved by the Governor and Council.

The provision of Gen. St. 1916, c. 296, § 2, which authorizes the Supervisor, with the consent of the Governor and Council, to appoint a deputy or deputies, and to determine their salaries, is so modified by Gen. St. 1919, c. 320, § 1, that the Supervisor has the power to increase the salary of a deputy without consent of the Governor and Council.

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6. — Exemption — Merchant Marine — Arrest for Non-payment of Taxes — Administrator, Executor, Trustee in Bankruptcy . . . . 429

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A trustee in bankruptcy is an officer in the
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bankruptcy court. He cannot be arrested for the non-payment of a tax due from the estate.
Neither an executor nor an administrator can be arrested for non-payment of a tax assessed in the estate or to him as said executor or said administrator, except as provided for in St. 1909, c. 490, pt. II, § 34.

7. — International Law — Property owned by a Foreign Government.
It is a settled principle that jurisdiction is not asserted by a nation against foreign sovereigns or their sovereign rights.
In the light of this principle the tax statutes of the Commonwealth must be construed as not asserting any power to tax against a foreign sovereign.

8. — Discharge in Bankruptcy.
Taxpayers who have received their discharge from the Bankruptcy Court are liable for unpaid taxes, since they are not provable debts.

9. — Franchise Tax on Domestic Corporation — Deductions — Mortgage of Real Estate held as Collateral Security.
The value of a real estate mortgage held by a domestic corporation as collateral security for a debt due to it is not to be deducted, under St. 1909, c. 490, pt. III, § 41, cl. 4th, in determining the franchise tax upon such corporation, assuming that the corporation has paid no local tax upon such mortgage.

10. — War Poll Tax — Exemption — Persons summoned in Draft who were discharged before being mustered into the Federal Service — Abatement of Three Dollar Poll Tax — How to be certified and allowed.
A state of war continues to exist in point of law until terminated by a treaty of peace or by a proclamation of peace, even though an armistice has ended actual hostilities.
Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, continues in force until the war is terminated either by a treaty of peace or by a proclamation of peace.
The exemption from all poll taxes granted by Gen. St. 1919, c. 9, does not include persons summoned in the draft who reported for duty but were discharged before they were mustered into the Federal service.
St. 1920, c. 609, does not extend to those within its provisions the exemption from all poll taxes conferred by Gen. St. 1919, c. 9.
St. 1920, c. 609, does extend to those within its provisions a right to the abatement of the war poll tax of $3 imposed by Gen. St. 1919, c. 283, § 9, but application for such abatement must be made within ninety days of the date of the tax bill, as required by St. 1920, c. 608, § 2.

TAXATION — Continued.
Abatements of the war poll tax of $3, made under Gen. St. 1919, c. 283, § 9, to those within the provisions of St. 1920, c. 609, may be certified and allowed under St. 1920, c. 552.

A stock dividend paid before Jan. 1, 1919, omitted from a taxpayer's return, is taxable after the passage of St. 1920, c. 352, exempting stock dividends received in 1919 and thereafter.
There is nothing in the Federal law or decisions forbidding this Commonwealth to tax stock dividends.

12. — Income Tax — Exemption — Stock Dividend by Trust, the Beneficial Interest in which is represented by Transferable Shares.
St. 1920, c. 352, exempts from taxation as income a stock dividend declared in 1919 by an association, the beneficial interest in which is represented by transferable shares.

13. — War Poll Tax — Abatement — Persons who receive Bonus payable to Dead Soldier or Sailor, had he lived.
A person who becomes entitled under Gen. St. 1919, c. 283, § 3, to the bonus to which a dead soldier or sailor would have been entitled under section 2 of said act if he had lived, is not entitled to the $3 abatement of war poll taxes allowed by section 9 of said act.

14. — Interest Rate — Additional Rate by Way of Penalty.
The additional rate of interest of 2 per cent per annum imposed on taxes unpaid after three months from the date on which they become payable applies only to those taxes in excess of $200 assessed to any taxpayer in any one city or town; but taxes assessed in a fire, water, watch or improvement district, placed for convenience upon the tax bill of a city or town, are not to be considered in computing the $200 limit.
The additional 2 per cent runs from the date on which the taxes were payable.
Where payments on a tax exceeding $200 are made so that the balance at the end of the three months is less than $200, the balance is not subject to the 2 per cent penalty.

15. — Exemption — Property of Commonwealth — Betterments.
Land owned by the Commonwealth is not subject to assessment by a city for benefits.

A corporation which sold all its assets in March, 1920, is liable, under St. 1910, c. 187, § 1, five days before such sale, to pay the taxes imposed by Gen. St. 1919, c. 355, and by St. 1920, c. 550, as amended by St. 1920, c. 600.
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18. — Money raised by — Contract — with Bondholder or Taxpayer — Taxes not Borrowed Money . 465
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2. — Teachers in Private Schools — Forty-sixth Amendment — State Aid . . . . 297
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TIDEWATER — Compensation for Displacement . . . . 63
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apply where an extra dividend was declared prior to the date that St. 1920, c. 563, became operative, and which was payable subsequent to that date.

4 — Set-off of Deposit in Commercial Department against Debt due to Commercial Department — Set-off of Deposit in Savings Department against Debt due to Commercial Department — Set-off of Deposit in Commercial Department against Debt due to Savings Department — Time when Set-off may be made by Commissioner of Banks — Equitable Set-off

The principle upon which set-off rests is that in all final adjustments between debtor and creditor the actual balance, after setting off all mutual demands against each other, is the true debt.

A set-off does not constitute a preference.

The rules of set-off are applicable to a trust company in process of liquidation under St. 1910, c. 399.

Where a trust company is in process of liquidation under St. 1910, c. 399, a deposit in the commercial department may be set off against a debt due to the commercial department, in accordance with the rules prescribed by R. L., c. 174, §§ 1-11.

Under similar conditions a deposit in the savings department may be set off against a loan due to the commercial department.

Since St. 1908, c. 520, makes the depositors in the savings department of a trust company preferred creditors with respect to deposits in such department and the investments or loans of such deposits, a deposit in the commercial department of a trust company in process of liquidation under St. 1910, c. 399, cannot be set off against a loan due to the savings department of such trust company.

Where a trust company is in process of liquidation under St. 1910, c. 399, a set-off which is otherwise proper may be made at any time if it results in a debt due to the trust company, but if the allowance of the set-off would result in a dividend to the creditor, it cannot be made until the provisions of St. 1910, c. 399, §§ 8 and 11, are complied with.

5. — Relation of Company to Holder of Safe Deposit Box — Right to hold Contents of Safe Deposit Box to meet Contingent Liability to Company

In view of R. L., c. 116, § 38, and St. 1910, c. 399, § 12, the relation between a trust company and the holder of a safe deposit box is that of landlord and tenant.

The contents of a safe deposit box rented from a trust company are not in the possession of the trust company.

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Gen. St. 1917, c. 332, extends the benefits conferred by c. 211 to any non-commissioned officer or enlisted man who enlists or re-enlists as a resident of this Commonwealth in the regular or volunteer forces of the United States Army, Navy or Marine Corps subsequent to Feb. 3, 1917, and who has been for at least six months legally domiciled in the Commonwealth, although such enlistment or re-enlistment actually takes place in another State.

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The computation of price may be found to be arithmetically correct, even though the odd fraction of a cent is not indicated, if that odd fraction of a cent is apportioned to dealer or customer in accordance with the arithmetical test prescribed by commercial custom.

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