Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1937

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The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 19, 1938.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1937.

Very respectfully,

PAUL A. DEVER,
Attorney General.

PROPERTY STATE OF MASSACHUSETTS

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1937	$151,451 64
Balance brought forward from 1936 appropriation	397 58
Appropriation for small claims	8,000 00
Appropriation under G. L. (Ter. Ed.) c. 12, § 3B	12,000 00
	$171,849 22

Expenditures.

For salary of Attorney General	$8,000 00
For salaries of assistants	61,731 30
For salaries of all other employees	37,789 74
For sheriffs' fees, court stenographers and all other special services	31,833 91
For law library	886 00
For office expenses and travel	9,362 43
For court expenses	809 44
For small claims	7,949 64
For claims under G. L. (Ter. Ed.) c. 12, § 3B	12,149 31
Total expenditures	$170,511 77
Balance	$1,337 45

Financial statement verified.
Approved.

GEO. E. MURPHY,
Comptroller.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL.

State House.

Attorney General.

PAUL A. DEVER.

Assistants.

James J. Ronan.
Henry P. Fielding.[1]
Edward O. Proctor.[2]
Roger Clapp.
John S. Derham.
Arthur V. Sullivan.
Maurice M. Goldman.
Edward McPartlin.
Walter W. O'Donnell.
Raymond H. Favreau.
James J. Bacigalupo.
Raymond E. Sullivan.
William J. Landergan.[3]
Donald R. Simpson.[4]
Mary Sienkiewicz Dumas.

Cashier.

Harold J. Welch.

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[1] Resigned January 6, 1937.
[2] Appointed January 5, 1937.
[3] Appointed December 1, 1936.
[4] Resigned October 31, 1937.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 19, 1938.

To the Honorable Senate and House of Representatives.

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

The cases requiring the attention of this Department during the year ending November 30, 1937, to the number of 8,161 are tabulated below:

Corporate franchise tax cases		659
Extradition and interstate rendition		128
Land Court petitions		74
Land-damage cases arising from the taking of land:		
Department of Public Works		390
Department of Mental Diseases		2
Department of Conservation		4
Department of the Adjutant General		4
Metropolitan District Commission		52
Metropolitan District Water Supply Commission		40
Miscellaneous cases		582
Petitions for instructions under inheritance tax laws		67
Public charitable trusts		443
Settlement cases for support of persons in State hospitals		21
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth		5,673
Indictments for murder, capital cases		22
Disposed of	11	
Now pending	11	

Suggested Amendment to the Law relative to Criminal Investigations and Related Matters.

In order that the pending investigation growing out of organized crime, so called, gangsters and their associates, may be carried on speedily, unremittingly and effectively, as the Attorney General, I am respectfully requesting that in the present emergency I be vested with power, which now is not entrusted to me, to conduct an immediate investigation of matters concerning public peace and public safety, without which an exhaustive investigation designed to check and remedy existing evils cannot be expeditiously conducted.

New and effective modes of procedure must be installed by the General Court to meet the present threat of organized professional criminals, and the law enforcement officers must immediately be given adequate power to carry on their investigations and activities.

For these reasons, I am submitting herewith drafts for legislation which would empower me to carry on *ex parte* investigations concerning the commission of crimes and abuses of a criminal nature, and, as incident thereto, give me the power to summon witnesses and to examine them under oath in any independent inquiry the Attorney General may institute, with authority to delegate the carrying on of the whole or any portion of such inquiry to any of my staff or any of the District Attorneys whom I may select. This legislation would give to me or to those to whom I may delegate it, the authority to grant immunity from prosecution to witnesses who give testimony relative to the commission of certain criminal acts. Obviously no exhaustive or effective investigation designed to remedy any of the existing evils to which I have alluded can be conducted effectively by the Attorney General unless he has such power.

I respectfully call your attention to the fact that there is a precedent for such power. In recent years the Attorney General was given this authority in the so-called Garrett investigation, and more recently, in 1936, the courts were given this power by chapter 242 of the Acts of 1934. I have suggested in this legislation that this power be terminated in January of 1939, and have made this suggestion in view of the fact that I feel this power necessary only in the present emergency.

I am also requesting the Legislature to liberalize the law concerning the change of venue. The theory and practice prevailing in England at the time of the settlement of this Commonwealth were to secure indictments and to conduct the trial in the county where the crime was committed. The trial court, however, always had authority to transfer the trial to another county if the interests of justice so required. It is settled in this Commonwealth that the Superior Court has the power to grant a change of venue. *Crocker* v. *Justices of the Superior Court*, 208 Mass. 162. The exercise of that power in capital cases is recognized by G. L., c. 277, § 51.

While the power to change the place of trial is inherent in the Superior Court, yet it has been sparingly exercised, and only then when it is shown that a fair and impartial trial cannot be had in the county in which the alleged crime was committed. Usually it has been the defendant who has requested a change of venue. There, however, are instances where the Commonwealth, in the interest of justice, should be granted a change in the place of trial. Such a change should be made, unless cause to the contrary be shown, if the Attorney General acting upon his solemn responsibility makes oath that the ends of justice necessitate a

change in the place of trial. No inconvenience or injustice will be imposed upon a defendant by compelling him to stand trial in some remote county of the Commonwealth, as the bill now suggested is limited to a transfer to an adjoining county.

I am therefore recommending the enactment of legislation covering this subject.

This program is indispensable to the effective administration of our laws. It is, however, in no way intended to relieve local police units of their responsibility. There is no intention on the part of the Attorney General to supersede any local authority in a community which has a police force which has not broken down. These powers, if granted, will be used in co-operation with local officials. Their responsibility is primary and binding.

In view of the recent situation which has been uncovered in Revere, evidence of which is already in my possession, of glaring malfeasance, misfeasance and nonfeasance in the administration of the Mayor's office, action for his removal appears to be absolutely necessary. Under the present law no method of removal exists. A deplorable state of affairs appears to be now existing and to have existed for the past two and one half years. A decadent civic spirit and a degenerate municipal consciousness cannot help but remain passive under the present circumstances.

I am suggesting, therefore, an amendment to the law which would give a majority of the justices of the Supreme Judicial Court the right to remove from office the mayor of any city if after hearing sufficient cause therefor is shown, and it appears that the public good so requires.

I am also submitting a draft for legislation which would authorize the setting up of a special grand jury drawn from the entire Commonwealth for the hearing of criminal cases which in the opinion of the Attorney General could be more effectively disposed of by such a state-wide jury. This recommendation follows somewhat the situation in the neighboring State of New York, where the District Attorney of the County of New York has the right to select his own grand jury and petit jury in the trial of criminal cases of a nature similar to those with which we are dealing.

An Act relative to Certain Investigations by the Attorney General concerning the Commission of Crimes and Criminal Activities.

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

Be it enacted, etc., as follows:

The attorney general may, if in his judgment the public interest so requires, conduct ex parte investigations concerning the commission of crimes and criminal activities of organized crime, and incidental thereto shall have the power to require by summons the attendance and testimony of witnesses, and the production of books and papers relating in any way to such investigation, in the manner provided in chapter two hundred and thirty-three of the General Laws. No person shall be excused from attending and testifying in the course of such investigation or from producing any books, papers or documents before the attorney general on the ground that his testimony or evidence, documentary or otherwise, may tend to criminate him or subject him to a penalty or forfeiture, but he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any action, matter or thing as to which he may be required to testify or

produce evidence, documentary or otherwise, in the course of such investigation, except for perjury committed in such testimony.

The attorney general shall have authority to delegate any of the powers herein conferred upon him to any assistant attorney general and to any of the several district attorneys whom he may appoint to assist him in the conduct of such investigation, who shall thereupon have the same powers as are herein conferred upon the attorney general, but subject always to his direction and control.

Nothing in this act shall be construed as diminishing the powers and duties of district attorneys and other prosecuting agencies fixed by law. The powers granted to the attorney general under this act shall be terminated as of January fifteenth, nineteen hundred and thirty-nine.

An Act relative to the Change of Venue in Criminal Cases.

Be it enacted, etc., as follows:

Chapter two hundred and seventy-seven of the General Laws is hereby amended by inserting after section fifty-one the following new section: —

Section 51A. The superior court upon the petition of the attorney general supported by his affidavit that he is of the opinion that the trial of an indictment or complaint then pending before said court should be transferred to an adjoining county shall grant such petition unless good cause to the contrary is shown by the person or persons named in the said indictment or complaint, and thereupon the provisions of sections fifty-two, fifty-three and fifty-four of said chapter two hundred and seventy-seven shall apply to the trial of the case in the county to which it has been transferred.

An Act providing for the Removal of Mayors of Cities by the Justices of the Supreme Judicial Court in Certain Cases.

Be it enacted, etc., as follows:

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

An Act providing for Special Grand Juries.

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

Be it enacted, etc., as follows:

Chapter two hundred and seventy-seven of the General Laws is hereby amended by striking out section two A and inserting in place thereof the following: —

Section 2A. The clerk of courts of each county, and in Suffolk the clerk of the superior court for criminal business, shall, upon the written request of the attorney general, accompanied by a certificate that public necessity requires such action, signed by the chief justice of the superior court, issue writs of venire facias for two grand jurors from

their respective counties for service as a special grand jury, consisting of twenty-eight grand jurors, to hear, consider and report on such matters as the attorney general may present, and in such county as the attorney general may designate for a hearing. Said jurors shall serve for a period of six months unless sooner discharged by the attorney general or by the said chief justice, and shall have the same powers and receive the same compensation as grand jurors under the provisions of sections four to fourteen.

All expenses incurred in carrying out the provisions of this act shall be paid from the treasury of the commonwealth.

Music and Entertainment furnished with Meals on the Lord's Day.

There has been considerable doubt and misunderstanding by licensing authorities as to the correct application of the provisions of G. L., c. 136, § 4, to concerts of music and entertainment provided for patrons of hotels, restaurants, clubs and similar establishments where food or drink is sold on the Lord's Day.

The said section in its present form provides:

> Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, in keeping with the character of the day and not inconsistent with its due observance, to which admission is to be obtained upon payment of money or other valuable consideration; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing.

It is plain that the section in its present form is limited to entertainments for which an admission is charged, and in hotels and restaurants the music and other entertainment furnished guests are a kind of service furnished to patrons for which payment is included in the purchase price paid for the food and commodities served to the patrons, and the patrons pay for such food and other commodities but pay nothing on account of being permitted to enter the establishment where the music or other entertainment is provided.

If it be the desire of the General Court to require that the furnishing, on the Lord's Day, of such music or entertainment with meals, by hotels, restaurants, clubs and other similar establishments should be subject to a license, an amendment to said section 4 should be enacted clarifying its present provisions and making them by specific terms applicable to such concerts and entertainments to which no actual admission fee is charged by the proprietors.

Investigation in the Matter of Abuse of Process by Deputy Tax Collectors and Constables.

As a result of numerous complaints made to this Department an investigation was undertaken of the methods employed by deputy tax collectors and constables throughout the Commonwealth in collecting poll, excise and old age assistance taxes. This investigation revealed flagrant abuses of power by many deputy tax

collectors and constables, whose actions in many instances seem to have been condoned, and in other instances openly approved, by the various city or town collectors appointing them.

It was found that many deputy tax collectors and constables are totally unfitted to fairly and impartially perform the duties of their office. Hiding their nefarious practices behind the badge of their office, they intimidate taxpayers into paying to them illegal and extortionate fees. They are not principally motivated in their actions by a desire to aid in the collection of the public revenues, but are concerned primarily in increasing the profits inuring to themselves through the "fees" they extract "under threat of arrest and imprisonment" for the collection of these taxes. These deputy tax collectors are appointed by the various city and town tax collectors, who aid them in many instances under suspicious arrangements. Many cases were brought to light during the course of the investigation of collectors themselves collecting the taxes, including the deputy's fees, for the various deputies they themselves appointed, using the facilities of the cities and towns therefor, yet charging the taxpayer for non-existent services of the deputies, — services which the collector himself performed, but for which the taxpayer was forced to pay added fees never intended nor contemplated by law.

Upon the receipt of a tax warrant the deputies in many instances intentionally and maliciously neglected to send the taxpayer notice thereof, being actuated by a greedy desire for the additional fees which they receive if the taxpayer is "arrested" or alleged to be "arrested" and taken into custody, knowing that by law the nonreceipt of the notice of warrant will not prevent its execution. Nor do they keep records of the notices sent, and, in fact, few records of any description at all are kept by them.

They collect these taxes armed with a most potent weapon, — the power to arrest and commit the taxpayer to jail, and they use this power for purposes never prescribed by law.

Their practice is to go to the home of the taxpayer, usually late at night, accompanied by what they call a "witness" who is, however, armed with "twisters," handcuffs and similar instruments designed to bring pressure to bear upon the taxpayer and to frighten him into paying whatever is demanded. Deputies work in consort with these so-called witnesses, who are generally other deputies, and divide the fees collected. They immediately, without previously ascertaining whether the taxpayer is willing to pay the tax, or searching for his goods and chattels upon which to levy, as provided by law, place him under arrest and threaten him with immediate commitment to jail unless he pays them the sums they demand, refusing him a reasonable opportunity to furnish bonds.

Because of their menacing tactics many a terrified taxpayer, not apprised of his legal rights, pays the extortionate sums demanded, even if, as it appeared in some instances, he has already paid the tax but has not retained his receipts.

In such cases a warrant may still be issued by the collector for his arrest, and protests on the part of the taxpayer are met with obdurate and reiterated threats and demands for the payment of the taxes, together with the fees demanded, without regard to the possibility that they are extorting from him payment for a tax which he no longer owes.

The practice of not filling out the required returns upon the warrants entrusted to the deputies is general, and, if done at all, is done in such a perfunctory and grossly negligent manner as to leave the returns meaningless and inadequate as a

means of ascertaining the action taken by the officer thereunder. Deliberate falsifications of these returns were found, with erasures being made thereon in an attempt to conceal the officer's actions thereunder.

Thus, in some cases the warrant returned showed that the taxpayer had been arrested upon a date when he was not within the Commonwealth, or that he had not been arrested when, in fact, he had paid the deputy six dollars for arrest and custody, plus the mileage charges.

In many instances the deputies immediately upon the receipt of these warrants filled in the amount of their fees in advance, including those for arrest, custody and mileage, before ascertaining what action would have to be taken to collect the taxes. Demanding the tax, together with these illegal predetermined fees as soon as they contact the taxpayer, they refuse to itemize the amount demanded, since they realize that they are guilty of the crime of extortion in thus demanding in advance, under color of their office, fees which are not yet due. They insist upon payment of whatever they demand under threat of immediate commitment to jail.

Many instances were found where property of the taxpayer of a value far in excess of the amount of the tax was seized without any notice whatsoever to the taxpayer, sold by a deputy to a friend of his, and the low amount received, excepting the amount of the tax, taken by the deputy by the process of adding fictitious costs and fees to the tax, to the end that the taxpayer received nothing from the sale of his property.

Where a deputy tax collector has in his possession several warrants against the same taxpayer, all are usually executed at the same time with separate charges made on each for warrant, notice, arrest, custody, and mileage. Or, in the alternative, the deputy executes each warrant on successive days, but making these same charges on each. Thus where the deputy seeks to collect two excise taxes amounting to six dollars in the aggregate, the amount he demands may be in excess of thirty dollars, of which twenty-four dollars may finally be retained by the deputy tax collector for his own services.

A more severe instance of excessive and unjust charges is where the deputy seeks to collect an old age assistance tax amounting to two dollars in the aggregate, on which he may demand, and, under threat of immediate commitment to jail, receive, more than seventeen dollars, of which fifteen dollars may be retained by him as his fees for collecting the original old age assistance tax of two dollars.

Many taxpayers victimized by the methods employed by these deputies and constables turn to this Department upon their failure to otherwise obtain relief, and hundreds of complaints are in its possession. Others have preferred charges against these deputies and constables, but have requested that their names be not divulged, so that they may avoid publicity and keep from their friends and neighbors the knowledge of their arrest for nonpayment of taxes.

I delegated an assistant attorney general to conduct an investigation into this matter, instructing him, among other things, to appear before the association of these deputy tax collectors, in an endeavor to persuade them to curb immediately these abuses.

They formulated a plan to do so, which was never carried out, but, on the contrary, continued with their ruthless practices.

Therefore, in order to alleviate this situation, this Department preferred to the Commissioner of Corporations and Taxation charges of gross misconduct in the

performance of their duties against twenty deputy tax collectors, requesting immediate hearings, and their removal forthwith, under the provisions of G. L., c. 60, § 92, advising the Commissioner that similar charges would be brought against many others similarly derelict and grossly malfeasant in the performance of their duties. Of those thus named, lengthy hearings have been completed in the cases of three deputies.

In order to effect permanent relief and to safeguard the liberties of the citizens of this Commonwealth from unnecessary arrests and harassments by deputies and constables, and in order to aid in the more effective collection of the public revenues, I recommend that legislation be enacted changing the present system of collecting automobile excise taxes to provide that upon the failure to pay such tax, upon notice by a collector of taxes of a city or town, the Registrar of Motor Vehicles shall revoke a taxpayer's registration and license, or the Registrar of Motor Vehicles shall refuse to register an automobile unless evidence of the payment of prior taxes is exhibited, as the Legislature may see fit to enact, to the end that the collection of excise taxes shall no longer be enforced by the arrest and imprisonment of the taxpayer, and that these abuses shall be permanently eliminated. By the adoption of either of these methods there will be a substantial increase in the revenues accruing to the Commonwealth.

I further recommend that in the collection of poll taxes and old age assistance taxes no arrests be permitted whatsoever, but that the taxes shall be collected by court action, preferably in our small claim court, so called, wherein jurisdiction is manifestly present.

This should be done in an effort to prevent the promiscuous and unnecessary addition of charges to the original tax by decreasing the amount personally to be gained by the deputies and constables.

Further, since the collection of these taxes is essentially a local matter, they should be collected by constables and deputy collectors operating within the locality in which the taxpayer lives. There is no need for a deputy tax collector from the city of Boston to travel to North Adams to collect either a two dollar excise tax or a one dollar old age assistance tax, increasing the costs to the taxpayer.

Therefore, I recommend that these taxes be collected only by local officers who know local persons and conditions. I believe that such changes, if accompanied by the more general appointment of deputy collectors and constables of a higher caliber, will permanently eliminate and prevent the recurrence of these abuses.

Small Loan Agencies.

I again direct the attention of the Legislature to a present abuse existing under the operation of G. L., c. 140, § 96, which was enacted to protect the borrower from paying excessive rates of interest on small loans. Small loans have been defined by this act as loans of three hundred dollars or under. G. L., c. 140, §§ 96 to 111, inclusive.

Agencies engaged in the so-called small loan business hold themselves out to the public as being bonded, licensed and under the supervision of the Department of Banking and Insurance, yet are able to defraud small borrowers by means of schemes which they have evolved to defeat the purposes of the act.

When a wage earner, forced by urgent necessity, attempts to borrow money at one of these agencies, he does so thinking that they are under the complete

supervision of the Commonwealth. He thinks only of the principal sum he needs, and, because of his dire necessity, makes no inquiry as to the interest to be charged, believing that the rates will be in accordance with the law of our Commonwealth because of the fact that the agency holds itself out as being under the supervision and control of the Commonwealth.

These agencies realize this, and with a view to defeating the very purpose of the statute, and to depriving the borrower of the protection which the Legislature has attempted to grant him, make to him a loan of three hundred and one dollars, thus taking the loan out of the operation of the act and permitting them, without any regulation and supervision whatsoever, to charge him whatever interest thereon his necessity forces him to pay. The borrower does not and cannot realize that his loan is no longer under the supervision of the Department of Banking and Insurance, but continues to believe that since the agency has so held itself out, he is being charged only such rates of interest as are determined by the Commissioner of Banks.

These practices have caused great suffering and hardship to many unfortunates whose sole misfortune is their need of ready money with which to pay for the necessaries of life, while the agencies are thus afforded the opportunity of obtaining usurious charges.

I therefore recommend the enactment of legislation changing the amount of three hundred dollars to at least five hundred dollars, as defined by G. L., c. 140, §§ 96 and 110, as the business of making small loans.

This change will result in added protection to the small borrower and prevent the present evasion of the law by these small loan agencies.

Nurses' Employment Agencies.

As a result of numerous complaints, the attention of this Department has been directed to the operation in this Commonwealth of the so-called Nurses' Registries. Investigation has revealed that, due to a lack of any supervision whatsoever by governmental authority, most of these agencies have, by common concert, adopted deleterious and iniquitous methods of doing business which seriously injure and hamper those persons engaged in the nursing profession, and consequently threaten to impair and endanger the health and welfare of the citizens of this Commonwealth.

These agencies make it their practice to prey upon the unsuspecting nurse, and, because they command the market for such professional services, are able to force those desiring employment in this profession to register with them. For this registration, they require in advance the payment of the so-called registration fees, which are exorbitant and unreasonable, and payable regardless of whether or not any aid is rendered to the registrant by way of finding her a position. Not content with these registration fees, they also charge the registrant a fee for each case upon which she works. This "per case fee" amounts to a large proportion of the total sum which the nurse receives for her professional services rendered in the case, and is exacted even though she is recalled to the same patient without the aid of the agency, but solely because of her own ability and merit.

Besides these registration and per case fees, most of the agencies also maintain living quarters for these nurses. These the nurse is forced to occupy as a condition attached to her registration. But the board and lodgings furnished are inferior in quality to those which might be obtained elsewhere, yet the prices charged the

registrant therefor are far in excess of their true value. Because of these registration fees, per case fees, and board and lodging charges the registrant is constantly in debt to the agency, which is the desired purpose of the agency. They then furnish the nurse with sufficient work to pay at least part of the sum due the agency, but no more.

Thus the profession of nursing is being exploited by these employment agencies for their sole profit and gain without regard for the future advancement and even continuance of the profession within this Commonwealth. The common, grievous methods employed by these agencies force those who would engage in this profession to comply with their outrageous demands.

The nursing profession is a necessary and vital adjunct to the medical profession. And the maintenance of its status as an independent profession is essential to the health of the people of this Commonwealth. This exploitation of those engaged in so earnestly and capably striving to serve the public weal should be stopped.

I therefore recommend — and in this recommendation the Massachusetts Technical and Commercial Employment Association joins — that chapter 140 of the General Laws be amended in such a manner as to provide for state supervision and regulation of the activities of those agencies within the Commonwealth engaged in securing employment for nurses, to the end that the current abuses may be curbed.

Advertising Accounts for Sale.

I repeat my recommendation of last year that legislation be enacted to prevent the advertising of "accounts for sale" wherein the names and addresses of the debtors and the nature and amount of the alleged indebtedness are listed. This method by agencies was intended to shame the debtor into paying even an unjust obligation, and tends to deprive him of an opportunity to set up a legal defence. (See Reports of the Attorney General, 1935, 1936, Public Document No. 12.)

Amendment to the Taxing Law.

G. L., c. 65, § 2, dealing with the imposition of a succession tax upon the exercise and nonexercise of the power of appointment, is in immediate need of amendment on account of the decision in *Binney* v. *Long*, 299 U. S. 280. It was decided in that opinion that a nontestamentary transfer of taxable property by an instrument dated prior to September 1, 1907, but containing a power of appointment which in fact was never exercised, could not be taxed under the section above referred to, as that would result in a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

That case also held that property passing on account of the nonexercise of the power of appointment under a will of a person who deceased in 1891 could not be joined with other property that passed upon the death of the donee of the power. There is a further contention made in two cases which are now pending in the Supreme Judicial Court for the Commonwealth that the nonexercise of the power by the donee under a will similar to that of 1891 is tax exempt on the ground that the decision above referred to strikes down our taxing act on account of the arbitrary period of time therein mentioned in the determination whether the property passing under the exercise or nonexercise of the power should be assessed as if

it belonged to the donee, or because the instrument was dated subsequent to September 1, 1907, as if it were the property of the donor of the power.

Under the existing law, the Commonwealth is liable to refund taxes to the amount of several hundred thousand dollars, and, if it has a constitutional right to reach the transfer of property arising from the nonexercise of the power, of taxes aggregating many million dollars, unless the taxing statute is amended to meet the objections pointed out by the Supreme Court of the United States.

I accordingly recommend the adoption of the following statute:

An Act imposing an Inheritance Tax on Property passing by the Exercise and Nonexercise of the Power of Appointment.

Be it enacted, etc., as follows:

Section two of chapter sixty-five of the General Laws is hereby amended by striking out the words "prior to September first, nineteen hundred and seven" and substituting therefor the following: — either before or after the passage of this act, — so that the said section as amended shall read as follows: — *Section 2.* Whenever any person shall exercise a power of appointment, derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

Collection Agencies.

In September, 1935, an investigation was begun by this Department into the affairs of every collection agency operating within the Commonwealth. This investigation revealed that unscrupulous collection agencies, by improper and illegal practices, were collecting more than one million dollars a year in excessive charges, fictitious costs, and other false expenses from unfortunate debtors who in the main were composed of those earning low wages.

In the 412 collection agencies investigated our Department found that 81 per cent were engaged in both the illegal practice of law and in operating in a fraudulent and reprehensible manner.

The results of this investigation are as follows:

412[1] collection agencies investigated:

392 collection agencies enjoined by order of Court, or abandoned their operations in this Commonwealth.

12 collection agency cases awaiting decision by the Full Court upon their appeal from an adverse decision.

8 collection agency cases awaiting trial by court or master.

412

[1] See Reports of the Attorney General for the years ending November 30, 1935 and 1936, Public Document No. 12.

No new collection agencies have come into this Commonwealth since our investigation began, and every case tried by this Department was successful.

Suggestion of Amendment of Law relative to Taking of Property for Public Use.

There are now several claims pending against the Commonwealth for damages for land taken by eminent domain in which it would seem that the owners are justly entitled to compensation, but by reason of the fact that through delays due to efforts to settle, or various similar causes, the petitioners have failed to begin court proceedings within the period of a year from the taking, they are under our present law barred from obtaining those damages which, if accurately ascertained, they would seem to be justly entitled to receive.

In some such cases there are not adequate reasons to excuse the owners from having filed their petitions in time. In others such reasonable excuses exist, and it would seem as if, when persons are found to belong to the latter class, some form of redress should be open to them so that they may have their day in court. In order to accomplish this, I recommend legislation to provide for a body to review these claims and to afford a means of access for those who should in all fairness be allowed to try the question of the amount of damages which they have received by reason of the taking of their land by eminent domain.

I recommend the passage of legislation amending the present law in accordance with a draft of a bill which I am submitting.

Suggested Amendments to Chapter 79 and Chapter 12 of the General Laws for the Relief of Persons who have been damaged by Takings by Eminent Domain and who have not filed their Petitions in the Superior Court within One Year from the Date of Such Takings.

Be it enacted, etc., as follows:

Section 1. Chapter seventy-nine of the General Laws is hereby amended by inserting therein the following new section: —

Section 16A. Any person who fails to file a petition for the assessment of damages under section fourteen within the time prescribed in section sixteen, who otherwise would have a claim for damages under this chapter, may file a request with the board of review for leave to file such a petition in the superior court notwithstanding the provisions of said section sixteen. The board shall hold a hearing upon such request and, if it determines that the person filing such request is justly entitled to damages, it shall make an order that such person may have leave to file such a petition in the superior court notwithstanding the provisions of said section sixteen. The board shall furnish such person with a certified copy of its finding and thereafter, if such person shall within six months from the date of such order file the same with a petition for the assessment of damages in the superior court, such petition shall be entered in such court and shall be heard notwithstanding the provisions of said section sixteen.

Section 2. Chapter twelve of the General Laws is hereby amended by inserting therein the following new section: —

Section 31A. There shall be a board of review which shall receive and determine requests for leave to file petitions for the assessment of damages, notwithstanding the provisions of said section sixteen of said chapter seventy-nine of the General Laws serving in the department of the attorney general and consisting of the attorney general or his representative, the commissioner of the department which made the taking relative to which the petition for assessment of damages is to be made or his representa-

tive, and the treasurer and receiver general or his representative. Any designation may be revoked at any time and may run for such period as the designating officer may prescribe. The members of the board and persons designated shall serve without compensation. The attorney general or his representative shall be the chairman of the board.

The board may appoint and remove a secretary and fix his compensation.

All expenditures incurred under this section shall be paid by the department which made the taking.

Any member of the board shall have power to summon and compel the attendance and testimony of witnesses and the production of books, records and documents, and may administer oaths.

Installment Sales.

I direct the attention of the Legislature to certain oppressive and injurious activities of those engaged in the business of making conditional sales of furniture, household effects and similar chattels under the so-called easy payment plan. Because of the widepsread use of this system, the welfare and security of the citizens of this Commonwealth are threatened and their future financial independence gravely imperiled.

Although the sale of goods and chattels upon condition may be one method of assuring to the people of the Commonwealth an opportunity to obtain a high degree of material comfort, nevertheless, the unnecessary and avaricious development of abuses in this system should not be permitted to destroy the economic stability of wage earners solely because of a lack of protection which the Commonwealth has power to afford. The method of selling goods upon conditional sale originated as a means of fostering the well-being of the citizens; its use as an instrument of oppression should not be countenanced.

When a person desires to purchase necessary goods but finds that he is unable to pay for them at once because he lacks the total purchase price, he may buy them upon the so-called installment plan, thereby obtaining the present use of these goods in exchange for his promise to pay for them in small payments out of his future earnings. However, unless he is told at the outset the total amount which he will be required to pay, he may, and because of the present abuses often does, encumber his future earnings without hope of the eventual absolute ownership of the goods purchased or freedom from debt. Only if the total price is revealed to him has he the means of ascertaining whether or not the present value of these goods to him is equal to the future loss of income for a definite length of time. His ability to plan for the future is conditional upon his knowing the true extent of the obligation which he is about to assume; if this be kept from him, then he agrees *in vacuo* to bind his economic future for a length of time of much greater duration than he has been lead to believe.

Thus, if he is told that the cost to him of the goods which he desires to purchase will be four hundred dollars, and that he may purchase them on an installment basis of two dollars paid at the time of entering into the contract and one dollar per week thereafter, the impression has thus been conveyed to him that the sole cost to him will be four hundred dollars, and that at a certain definitely ascertainable time he will have paid that sum to the vendor. But he is not told that, under this contract, he is bound to pay service charges and a usual interest charge of one and one-half per cent per month on the original four hundred dollars. He thus promises to discharge at the rate of fifty-two dollars per year an obligation which is increasing at the rate of seventy-two dollars per year. Instead of decreasing

the amount of his indebtedness, he has been enmeshed in an inextricable net which draws him deeper into debt with the passage of time. His contract, therefore, amounts to a promise, secured by his future earnings, to pay to the vendor fifty-two dollars each year for the remainder of his life. In effect, it is a promise to pay "interest" on the original cost of the goods (probably less than two hundred dollars) at the rate of more than twenty-five per cent per year forever.

The future welfare of its citizens is of vital concern to the Commonwealth; its clear duty lies in preserving them from economic bondage. If these practices are permitted to continue, in the years to come the citizens of this Commonwealth will be forced to forego the very necessities of life, because they have assumed obligations under these contracts, as to the onerous implications and requirements of which they have been misinformed.

I recommend that legislation be enacted to provide that, whenever such goods and chattels are offered for sale, a duty be placed upon the vendor to inform the purchaser of the total cost of such goods, including all charges and interest, which must be paid by the purchaser before title may vest in him.

Contractors on Public Works should be Required to Carry Workmen's Compensation Insurance.

There is a tendency upon the part of some of those who enter into contracts for the construction of highways, bridges and public buildings and the performance of other public work to substitute various forms of insurance for the payment of losses arising from accidents incurred by their employees. Some contractors desire to eliminate insurance for certain claims which do not approximate a certain amount and to adjust and settle those claims themselves, and only to carry insurance covering risks of a more serious nature. They thereby reduce the cost of insurance without furnishing adequate protection to their employees.

Recently an employee of a contractor engaged in the construction of a state highway was so permanently and severely injured that damages in the amount of twenty thousand or twenty-five thousand dollars would not be deemed excessive if they were measured by a verdict of the jury. The contractor company was insolvent and had permitted the workmen's compensation policy to lapse. Attempts by the employee to reach the bond furnished for the completion of the work were unavailing. Recourse to the bond might be had for the payment of wages and materials but not for injuries or death incurred by an employee. A judgment which might be secured against the contractor would not be satisfied and paid. The employee is remediless. Crippled for life, he must spend his remaining days as a public ward.

There is no law requiring such a contractor to carry workmen's compensation insurance. The objection that a law which would compel all employers to furnish such insurance would be void does not apply here, where the State has a right to determine the conditions upon which it will enter into engagements for the performance of public works. The aim of the Legislature has been to induce all employers to secure such insurance by taking from them certain common law defences. That object can be directly accomplished in the case of contracts for the performance of public works by requiring the contractor to secure and provide such insurance. Accordingly, I recommend the adoption of the following legislation:

An Act requiring Contractors on Public Works to secure Workmen's Compensation Insurance.

Be it enacted, etc., as follows:

Chapter one hundred and forty-nine of the General Laws is hereby amended by inserting after section thirty-four the following new section: —

Section 34A. Every contract for the construction, alteration or repair of highways or bridges, or for the construction and repair of, or additions to, public buildings or other public works, to which the commonwealth or any county, city or town is a party, shall contain a provision requiring the contractor to secure and maintain during the performance of the contract workmen's compensation insurance of the kind and character defined in chapter one hundred and fifty-two of the General Laws and amendments thereof and additions thereto. Failure to secure and maintain such workmen's compensation insurance shall be deemed a material breach of the contract and shall thereupon render such contract null and void, and thereupon the contractor shall be barred from recovering any compensation or damages for and on account of the aforesaid contract.

Lotteries.

The endless chain system of selling merchandise has been frequently utilized in perpetrating fraudulent schemes upon the public. Sometimes they are under the disguise of a legitimate plan to stimulate sales and are represented to be a mere matter of advertising. At times their existence is predicated upon a desire of a dealer or a manufacturer to "introduce" his goods in a certain territory and to create a market for his product. The element of fraud inherent in these schemes varies. In some, the purchaser gets something for his money; in others, all he gets is a chance to participate in a venture which is nothing more or less than a gambling enterprise.

Last fall the public was invited to purchase so-called discount books for ninety-five cents. Each purchaser was required to furnish two other purchasers and so were all subsequent purchasers. When the name of a purchaser reached the top of a direct line of one hundred and twenty-eight purchasers, then the next subsequent purchaser bought another and different discount book for $5.00 from the promoter, who in turn paid this sum of $5.00 to the preceding purchaser. Each purchaser, therefore, for his investment of $5.95 was entitled to receive $5.00 on each of the one hundred and twenty-eight occasions when every purchaser subsequent to him in turn became the head of a new chain of one hundred and twenty-eight subsequent purchasers. In order for the original purchaser to receive a total of $640, which was the limit any purchaser was permitted to receive, his respective chain would have to include over thirty-one thousand members. The promoter would have received ninety-five cents from each member, or a gross profit of approximately $30,000. He simply paid the rent for the headquarters (which were leased only for a few months), clerk hire and telephone charges. None of the money paid for the original discount books went to those who joined the chain, and none went to the merchants designated in the books. They permitted the books to be issued and each contained coupons entitling the purchaser to a discount with these so-called merchants. These merchants, in the main, were small dealers who could not handle any considerable volume of business. An investigation showed that one had a small watch repairing shop and a stock of only a few hundred dollars' worth of jewelry. He received nothing from the promoter, and never had a single coupon holder present any discount check. One dealer had three such coupons presented. The fact is that the purchaser did not intend to use these so-called discount books, but paid ninety-five cents for the chance of securing $640.

In order for a thousand members to each receive the last-mentioned amount there would have to be over three million members. Those who had entered the scheme at the very beginning had a chance to get something, but last comers had no chance whatever to secure a dollar. The plan was illusory, and the only one who could profit was the promoter, who simply furnished the facilities for the operation of the scheme. The plan was a plain fraud. The members were warned not to use the mails, but to do their business personally at the office. This was a precautionary measure to avoid prosecution for violation of the Acts of Congress imposing a penalty for using the mails in the perpetration of a fraudulent scheme.

The aid of an old statute was invoked by this Department, and upon the filing of a petition in the Supreme Judicial Court a temporary receiver was appointed; the business was closed; and its assets taken over in the custody of the court through its receiver. Whether that particular statute was applicable to the proceedings which were had and could be stretched to cover a scheme as herein described has never been passed upon by our courts. Fortunately, the scheme was intercepted before thousands of our people were cheated and defrauded.

Because of previous rulings of our courts intimating that a chance based upon the action of subsequent purchasers might not be such a chance as is an essential element in a lottery makes it imperative that our statutes should be broadened and extended to include endless chain enterprises of the kind hereinabove described.

I therefore recommend the enactment of the following bill:

An Act making Certain Endless Chain Transactions a Lottery.

Be it enacted, etc., as follows:

Chapter two hundred and seventy-one of the General Laws is hereby amended by inserting after section seven thereof the following new section: —

Section 7A. Whoever sets up and promotes a plan by which goods or anything of value is sold to one for a consideration, and upon the further consideration that the purchaser shall secure one or more persons to participate in the plan by making a similar purchase, and who in turn agree to secure one or more persons to join in the said plan, each purchaser being given the right to secure money credits, goods or something of value, depending upon the number who join in the plan, shall be guilty of setting up and promoting a lottery and shall be punished as provided for in the preceding section. The supreme judicial court shall have jurisdiction upon a petition filed by the attorney general to enjoin the further prosecution of any such plan and to appoint receivers to secure and distribute the assets.

Amendment of Laws relating to Savings Banks.

I repeat my recommendation made in 1935 that the laws relating to savings banks should be amended by providing that no executive or administrative officer, or member of the board of investment of such banks, should act as counsel therefor.

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

the Department instances of fees so charged, which lend color to a conclusion that the fees in fact constituted inducements to the officer of the bank.

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

(See Report of the Attorney General, 1935, Public Document 12.)

The Division of Collections.

I am pleased to report that due to the activities of the Division of Collections within the Department of the Attorney General there has been collected the sum of $107,348.63. This Division was established during the first year of my incumbency as Attorney General. During the year next preceding the establishment of this Division the sum of $46,822.33 was collected by the Department.

The work of this Division is illustrative of the soundness of the contention that true economy often consists in the judicious expenditure of public funds.

Official Opinions.

The Department has rendered 144 written opinions.

An Appreciation.

In conclusion, I want to pay tribute to the zeal, ability, acumen and industry of my co-workers in the administration of the chief law office of the Commonwealth. The several Assistant Attorneys General, the office personnel, and the several departments of the state government have all co-operated in a sincere effort to serve the Commonwealth.

Respectfully submitted,

PAUL A. DEVER,
Attorney General.

Details of Capital Cases.

1. Disposition of indictments pending Nov. 30, 1936:

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

Joseph Pisani.

Indicted September, 1936, for the murder of John Oliver, at Somerville, on Aug. 16, 1936; arraigned May 12, 1937, and pleaded not guilty; trial June, 1937; verdict of not guilty by reason of insanity; thereupon committed to Worcester State Hospital.

John W. Skoog.

Indicted September, 1936, for the murder of Fritz B. Nelson, at Bedford, on July 27, 1936; arraigned Oct. 5, 1936, and pleaded not guilty; Dec. 22, 1936, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to the house of correction for two and one half years.

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

Sidney S. Reich.

Indicted in Bristol County, November, 1936, for the murder of Hartley Wood, at New Bedford, on Oct. 5, 1936; arraigned Nov. 24, 1936, and pleaded not guilty; June 25, 1937, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

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

Eli Bonda, *alias*.

Indicted November, 1936, for the murder of Gregory Krevdick, *alias*, on Oct. 25, 1936; arraigned Nov. 16, 1936, and pleaded not guilty; trial January, 1937; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life.

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

George E. Parks.

Indicted in Berkshire County, July, 1936, for the murder of Anna Leahey, at New Marlborough, on April 24, 1936; arraigned July 24, 1936, and pleaded not guilty; June 11, 1937, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

2. Indictments found and dispositions since Nov. 30, 1936:

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

Frank Mangano.

Indicted January, 1937, for the murder of Martin Tompkins, at Cambridge, on Dec. 3, 1936; arraigned Jan. 8, 1937, and pleaded not guilty; June 11, 1937, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not more than five years and not less than two and one half years.

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

Lorenzo Scola, *alias*, and Salvatori Scola.

Indicted in Barnstable County, April, 1937, for the murder of Antone Elias Malhado; arraigned April 23, 1937, and each pleaded not guilty; Nov. 15, 1937, each retracted his former plea; Lorenzo Scola pleaded guilty to murder in the second degree,

which was accepted, and he was thereupon sentenced to State Prison for life; Salvatori Scola pleaded guilty to assault, which was accepted, and he was thereupon sentenced to the house of correction for two years.

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

Avoelino Furtado, *alias*.

Indicted December, 1936, for the murder of Edith Stokes, on June 1, 1936; arraigned Jan. 21, 1937, and pleaded not guilty; trial January, 1937; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life.

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

Frederick D. Rayno.

Indicted in Berkshire County, January, 1937, for the murder of Timothy Mahoney, at Cheshire, on Aug. 1, 1936; arraigned Jan. 26, 1937, and pleaded not guilty; June 10, 1937, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

William Wrobel.

Indicted in Hampden County, December, 1936, for the murder of Mary Wrobel, at Chicopee, on Dec. 3, 1936; arraigned Feb. 17, 1937, and pleaded not guilty; June 23, 1937, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

3. Pending indictments and status:

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

George Parks.

Indicted September, 1937, for the murder of George Parks, the younger of that name, at Lynn, on Aug. 14, 1937; Nov. 27, 1937, committed to Danvers State Hospital for observation.

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

Frank DiStasio and Anthony DiStasio.

Indicted May, 1935, for the murder of Daniel Crowley, at Hudson, on May 6, 1935; arraigned May 9, 1935, and each pleaded not guilty; trial October, 1935; verdict of not guilty by order of the court as to Anthony DiStasio, and verdict of guilty of murder in the first degree as to Frank DiStasio; April 7, 1936, rescript "Judgment on the verdict" on claim of appeal of Frank DiStasio; May, 1936, Anthony DiStasio indicted as accessory before the fact to murder in the first degree; arraigned May 25, 1936, and a plea of not guilty was ordered by the court upon refusal of the defendant to plead; trial June, 1936; verdict of guilty of being accessory before the fact to murder in the first degree; May 28, 1937, rescript "Judgment on the verdict" on claim of appeal of Anthony DiStasio; July 7, 1937, motion for new trial denied; Dec. 2, 1937, rescript "Judgment affirmed"; petition for certiorari filed by Frank DiStasio denied by the Supreme Court of the United States on Oct. 11, 1937, and petition for certiorari filed by Anthony DiStasio denied by the Supreme Court of the United States on Dec. 20, 1937; execution of the sentence of death has been respited by the Governor and Council to permit the Supreme Court of the United States to pass on these two petitions; last respite expires on Jan. 17, 1938.

Edward P. Simpson, *alias*.

Indicted June, 1937, for the murder of Henry G. Bell, at Watertown, on Aug. 22, 1937; arraigned Sept. 22, 1937, and pleaded not guilty; trial November, 1937; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution; claim of appeal pending.

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

Frank Grabowski.

Indicted in Franklin County, November, 1937, for the murder of Anthony Ruggeri, at Greenfield on July 28, 1937; arraigned Nov. 15, 1937, and pleaded not guilty.

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

Oscar Bartolini.

Indicted in Norfolk County, September, 1936, for the murder of Grayce M. Asquith, at Weymouth, on Sept. 20, 1936; arraigned Oct. 30, 1936, and pleaded not guilty; trial September, 1937; verdict of guilty of murder in the first degree; Nov. 10, 1937, motion for new trial denied.

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

Gene Burns, Tadius Makara and Stephen Tarsa.

Indicted in Bristol County, November, 1937, for the murder of Louis Larochelle; arraigned Nov. 22, 1937, and each pleaded not guilty.

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

Stephen L. Mabey.

Indicted March, 1936, for the murder of Mildred L. Bosse, on Jan. 26, 1936; arraigned March 17, 1936, and pleaded not guilty; trial April, 1937; verdict of guilty of murder in the second degree; thereupon sentenced to State Prison for life; claim of appeal pending.

Joseph Pimental.

Indicted September, 1937, for the murder of Chester John Harris, on Oct. 30, 1936; arraigned Sept. 15, 1937, and pleaded not guilty.

OPINIONS.

Insurance Company — Bond to secure Repayment of Premiums.

DEC. 3, 1936.

Hon. FRANCIS J. DECELLES, *Commissioner of Insurance.*

DEAR SIR: — You have laid before me certain bonds with individual sureties, which it is proposed to give to you under the provisions of G. L. (Ter. Ed.) c. 175, § 73, to secure the repayment of any premiums paid to a certain insurance company. With relation to these bonds you have asked me the following question: "If this company were to default in its obligations, could this bond be readily realized upon by me in order to refund moneys to the original subscribers?"

Accompanying each of these bonds is a certificate, signed by the surety, showing the extent of equity owned by him in certain designated real estate. It is within your power to require security in such form, as well as in such amount, as in your sound judgment seems best for the purpose for which it is intended, and your judgment as to the sufficiency of the bonds in their present form and amount should govern.

For your assistance in passing upon this matter and in answer to your question, it is my opinion that this form of security could not be "readily realized upon" by you. In its present form the security consists of several bonds of different makers, and the possibility of litigation with more than one surety is a point to be considered.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Chief of Archives Division — Retirement — Age of Seventy.

DEC. 4, 1936.

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

DEAR SIR: — You have asked my opinion as to whether the Chief of the Archives Division in the Department of the Secretary of the Commonwealth, appointed by you under G. L. (Ter. Ed.) c. 9, § 2, is one of the "employees" of the Commonwealth, as the quoted word is used in G. L. (Ter. Ed.) c. 32, and whether the provisions of said chapter 32, requiring the retirement of "employees" at the age of seventy, apply to such official.

I am of the opinion that such official is embraced within the term "employees" as used in said chapter 32 and is by its provisions required to retire at the age of seventy.

Irrespective of his manner of appointment and tenure of office, the "chief of the archives division" does not occupy a position fundamentally different in character from that of very many other minor officials of the Commonwealth. He is not an "officer elected by popular vote," such as is by statutory provision specifically excepted from those who are to be members of the State Retirement Association, nor does he come within any other stated exception to such membership; nor do the duties or powers of his position appear to be such as to exclude him from the status

of one of the "employees" of the Commonwealth, as the word "employees" is defined in said chapter 32, section 1, by the following terms: —

"'Employees', persons permanently and regularly employed in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service; . . ."

Very truly yours,
Paul A. Dever, *Attorney General.*

State Police Detective — Retirement — Age of Seventy.

Dec. 4, 1936.

Hon. Paul G. Kirk, *Commissioner of Public Safety.*

Dear Sir: — You have asked my opinion as to whether a State police detective who began service prior to July 1, 1921, is exempt from the necessity of retiring upon reaching the age of seventy.

I must answer your inquiry to the effect that such State police detective must retire at the age of seventy.

The said detective became a member of the State Retirement Association on or before July 1, 1921. The fact that he became entitled to the advantages of the provisions of G. L. (Ter. Ed.) c. 32, § 68, with relation to a pension, did not prevent his becoming a member of said association. All employees of the Commonwealth become members of such association, with certain enumerated exceptions, and all such members must retire "after reaching the age of seventy." G. L. (Ter. Ed.) c. 32, § 2 (2).

The detective in question has the advantage of electing whether he will retire and receive the benefits provided for members of the association, or, if he is entitled so to do, retiring under the terms of G. L. (Ter. Ed.) c. 32, § 68, and receiving the pension provided for by said section 68.

It may have been thought that because the said detective was entitled to the advantages of said section 68 he thereby did not become a member of the State Retirement Association, because it is provided in G. L. (Ter. Ed.) c. 32, § 2 (3), that no "employee who is or will be entitled to a non-contributory pension from the commonwealth" may be a member of the association.

It has been held in a number of opinions of the Attorneys General that one placed with regard to a pension as is this detective by the terms of said section 68 cannot be said to be an "employee who is or will be entitled to a non-contributory pension from the commonwealth." By the provisions of said section 68 the said detective may become entitled to a pension thereunder, but it cannot be said at the present that he "is or will be so entitled." Before it can be said that he is or will be so entitled he must have met certain conditions and done certain acts, and certain other acts resting in judgment or discretion must have been performed by other officials. These are set forth in section 68, which reads: —

"Any officer or inspector of the department of public safety, who began continuous service prior to July first, nineteen hundred and twenty-one, if in the judgment of the commissioner of public safety he is disabled for useful service in the department and a physician designated by said commissioner certifies that he is permanently incapacitated, either physically or mentally, for the further performance of his duty in the department, by injuries sustained through no fault of his own in the actual performance of his duty, or any such officer or inspector of said department

who has performed continuous faithful service for the commonwealth for not less than twenty years, if in the judgment of said commissioner he is incapacitated for further service as a member of the department, shall, if he so requests, be retired, and shall annually receive a pension from the commonwealth equal to one half the compensation received by him at the time of his retirement. Said commissioner may in an emergency call upon any person so pensioned for such temporary service as a member of the department as he may be fitted to perform, and during such service there shall be paid to him the difference between the rate of full pay for such employment and the rate of pension received by him. Any former inspector of the district police transferred to the state board of labor and industries under authority of section eight of chapter seven hundred and twenty-six of the acts of nineteen hundred and twelve shall, for the purposes of this section, be deemed an inspector of the department of public safety."

Section 93 of said chapter 32 does not affect the detective's status in this respect. He is a member of the retirement association and so must retire at seventy. V Op. Atty. Gen. 534; VIII *ibid.*, 547, 549; Attorney General's Report, 1932, p. 67.

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

Education — Vocational Training — Aid furnished for Training outside the State.

DEC. 4, 1936.

HON. JAMES G. REARDON, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion in the following terms: —

"A question has arisen as to whether or not the State Board for Vocational Education may provide aid during a rehabilitation program to a resident of Massachusetts who is pursuing a course of vocational training under the supervision of the State Board beyond the borders of the Commonwealth of Massachusetts, *i.e.*, New York City."

G. L. (Ter. Ed.) c. 74, § 22B, provides: —

"Said state board for vocational education may expend, under rules and regulations made by it and approved by the governor and council, such sums, not exceeding ten thousand dollars, as may be annually appropriated therefor, for the purpose of furnishing aid during rehabilitation to such persons as it shall deem able to profit by training.

The department of public welfare shall, upon request of said board, make an investigation of the circumstances of persons, actually in training afforded by said board, who apply for aid during rehabilitation under the provisions of this section, and shall make a report of its findings to said board."

I am of the opinion that if a resident of Massachusetts is pursuing a course of vocational training under the supervision of the State Board for Vocational Education, such Board may aid him under the provisions of said section 22B, subject to such rules and regulations as may have been made, if any, applicable to such a situation, even if such course is being taken in another State.

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

Alcoholic Beverages — Licenses for Package Stores — Separate Stores.

Dec. 4, 1936.

Alcoholic Beverages Control Commission.

Gentlemen: — You have in effect asked my opinion as to whether a local licensing authority may properly reject any and all applications for licenses for "package stores," so called, under the provisions of G. L. (Ter. Ed.) c. 138, § 15, as amended, merely because other commodities are sold upon the licensed premises.

The Legislature has set forth no provision which forbids such licenses to be issued under the foregoing conditions nor requiring that the premises where such licenses are to be exercised must be "separate stores" maintained for the sole purpose of selling alcoholic beverages in packages.

Discretion is vested in the local licensing authorities in granting licenses under section 23 of said chapter 138, as amended, but such discretion may not be used arbitrarily and must be used within the scope of the act as set forth by the General Court. A general rule by a local licensing authority that it would grant no license except one to be used in a "separate store" would not, in my opinion, be such a "reasonable requirement which they may from time to time make with respect to licenses" as a local authority is authorized to make by said section 23.

It may be that under particular circumstances a license should not be issued to be used on premises where certain forms of occupations were carried on, and in such an instance the application might properly be refused, but such procedure would be something essentially different from action by local licensing authorities such as you have referred to, which, in my opinion, is outside the reasonable exercise of their authority.

Very truly yours,

Paul A. Dever, *Attorney General.*

State Retirement Association — Transfer of Membership from a County or Municipal Retirement System.

Dec. 7, 1936.

Hon. Charles F. Hurley, *Chairman, State Board of Retirement.*

Dear Sir: — You have in effect asked my opinion as to whether the amendment of G. L. (Ter. Ed.) c. 32, by St. 1936, c. 318, allows "an employee" over fifty-five years of age, who enters the Commonwealth's service from that of a political subdivision, to become a member of the State Retirement Association by transfer of "membership from a county or municipal" retirement system.

I am of opinion that, under the circumstances you describe, such an employee over fifty-five years of age does not become a member of the State Retirement Association by force of said chapter 318.

G. L. (Ter. Ed.) c. 32, § 2 (2), provides: —

"All persons who are members of the teachers' retirement association at the time of entering the service of the commonwealth, and persons who were or are in the employment of a department or institution formerly administered by a city, county or corporation when taken over by the commonwealth shall become members of the association, irrespective of age, but no such person shall remain in the service of the commonwealth after reaching the age of seventy. Except as provided in paragraph (3)

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

In 1934, by section 2 of chapter 360 of the acts ot that year the Legislature made an amendment to the retirement law somewhat to the same effect as that made by the said St. 1936, c. 318, though not of quite so broad a scope, which in its applicable parts reads: —

"Paragraph (2) A (*c*) of section four of said chapter thirty-two, as so appearing, is hereby amended by adding at the end thereof the following: — In case any member of a contributory retirement association established in accordance with law for employees of a county, city or town in the commonwealth and maintained by public funds shall, not later than ten days after the date of termination of his county, city or town service, enter the service of the commonwealth or of the metropolitan district commission *and shall become a member of this association,* such county, city or town shall, upon written notice from the state board of retirement, pay to the state treasurer, and he shall receive, the full amount of any account of such member in the annuity fund of the county, city or town retirement association, and this account shall thereby become part of his deposits in the annuity fund of this association and shall be treated in all respects the same as his deposits under paragraph (2) A of this section."

The effect of this amendment was not to allow a transferred employee over fifty-five to become a member of the State Retirement Association, for the provision relative to the transfer of his account was specifically conditioned upon the fact that he "shall become a member of this association," which he could not accomplish by reason of the age limit set up in said section 2 (2).

In view of its prior enactments carefully guarding the State Retirement Association from the presence of members over fifty-five and the language employed in the amendment of 1936, it cannot be said that in such amendment there is manifested a legislative intent to force the inclusion of transferred employees over fifty-five into the membership of the State Retirement Association.

The applicable section, section 37D, inserted in G. L. (Ter. Ed.) c. 32, by said St. 1936, c. 318, reads as follows: —

"Any member of any contributory retirement system established under the provisions of this chapter or any special act, which is maintained by public funds, upon leaving a position in the service of a county or municipality or of the commonwealth, or as a teacher in the public schools, as defined in sections six and seven, which entitles him to be such a member, *and accepting a position which entitles him to become a member of any other system in any such service,* may transfer his membership to such other system; provided, that the full amount of his accumulated deductions plus regular interest shall be transferred to the system of which he then becomes a member.

When a member who so transfers from one system to another is retired, any pension which shall be part of his retirement allowance shall be paid by the system of which he was formerly a member, and by the system to which he transfers, as directed and in such proportion as may be directed by the commissioner of insurance on the basis of actuarial determination."

It cannot fairly be said that the words "and accepting a position which entitles him to become a member of any other system" were intended by the Legislature to grant membership in the State Retirement Association to a transferred employee over fifty-five, as the position which he took in the Commonwealth's service did not entitle him to become a member of the State Retirement Association or system, because such position carried with it the qualification that the holder, if over fifty-five, though working for the Commonwealth, might not be a member of its Retirement Association or system.

I am of the opinion that the Legislature did not intend by the terms of said section 37D to change or alter the existing rule as to age in favor of a particular group of transferees who might come into the Commonwealth's service.

Very truly yours,
Paul A. Dever, *Attorney General.*

Voter — Married Woman living apart from Her Husband.

Dec. 8, 1936.

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

Dear Sir: — You have set forth certain facts and have asked me two questions with relation to the following matter: —

"The provisions of the last sentence of the first paragraph of section 1 of G. L. (Ter. Ed.) c. 51, are as follows: — 'A married woman dwelling or having her home separate and apart from her husband shall for the purpose of voting and registration therefor be deemed to reside at the place where she dwells or has her home.'

The facts pertaining to the specific question are briefly as follows: —

A married woman now living apart from her husband, not divorced and not living apart from him for justifiable cause within law but merely at her own wish and for her own convenience, maintains a residence in this Commonwealth. Her husband has a voting residence in the State of New York, due to the fact that his business takes him there, and for business reasons he deems it necessary to maintain this residence outside of Massachusetts.

Under the above-stated facts, can the married woman be registered and permitted to vote in the town of her residence in this Commonwealth?

Your opinion is also respectfully requested in answer to the following question: —

May a married woman, not living apart from her husband, maintain a residence and be permitted to register and vote in a town other than that in which the husband votes, both living within the Commonwealth?"

In answer to your first question: You state in effect that the married woman in question actually lives apart from her husband and maintains a separate residence. If her husband does not in fact live with her and make a home with her in the residence which he maintains (and I assume that he does not, because you speak of her as "living apart from her husband"), then a married woman may be registered and permitted to vote in the town where she resides in this Commonwealth.

I answer your second question in the negative.

Very truly yours,
Paul A. Dever, *Attorney General.*

Prisoners — County Commissioners — Permits to be at Liberty.

Dec. 14, 1936.

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

Dear Sir: — You have asked me the following question relative to G. L. (Ter. Ed.) c. 127, § 128: —

"May I ask your opinion as to whether or not the above section permits county commissioners to vote a release of an inmate in their respective institutions, regardless of the length of time that an inmate has served of his sentence. As an illustration, a man received a sentence of eighteen months. Have the county commissioners authority under the above section to release this man after he has served five or six months of his sentence?"

I am of the opinion that county commissioners have no authority to grant a permit to be at liberty to a prisoner in a jail or house of correction until such prisoner's term has reached an end by reason of a proper deduction from the original term by reason of good conduct, as such deduction is provided for under G. L. (Ter. Ed.) c. 127, § 130.

The history of the legislation now embodied in said sections 128 and 130 shows that it was not the intent of the Legislature, in using the language employed in said section 130, to give to county commissioners a general power of jail delivery. The power given them under said section 128 was intended by the Legislature to apply only to giving permits to be at liberty to such prisoners as were entitled to be released because of good conduct under said section 130.

The original statute upon this subject, St. 1880, c. 218, included in one chapter the general provisions now appearing in sections 128 and 130 of said chapter 127, and was entitled "An Act to provide for the release of prisoners for good conduct." The context thereof clearly shows the intent of the General Court to limit the authority of county commissioners in the manner above set forth, and the same intent has been plainly manifested in subsequent amendments.

The intent is, obviously, still the same, and the power of the commissioners is not enlarged in this respect by the language employed and the arrangement of sections in the codification of the General Laws.

Very truly yours,

Paul A. Dever, *Attorney General.*

Commission on Administration and Finance — Confidential Employee.

Dec. 16, 1936.

Hon. Charles P. Howard, *Chairman, Commission on Administration and Finance.*

Dear Sir: — You have asked my opinion as to the legality of the employment of a confidential employee by your Commission as such, or by you as chairman.

The provisions of the applicable statute, G. L. (Ter. Ed.) c. 30, § 7, are as follows: —

"Each commissioner in charge of a bureau of the commission on administration and finance and the officer in charge of the division of personnel

and standardization of said commission, and each officer, board and commission, other than the aforesaid commission, having supervision and control of an executive or administrative department, including the adjutant general and each officer, board and commission, mentioned in section seventeen of chapter six, may, subject to the approval of the governor and council, employ a person to serve in a confidential capacity and may, with like approval, remove him. Such employee shall receive such compensation as shall be fixed by the officer, board or commission employing him and approved by the governor and council."

It is obvious from the language of the statute that the chairman of the Commission, who is not a "commissioner in charge of a bureau of the . . . commission," is not entitled to employ "a person to serve in a confidential capacity."

As to the Commission itself, although it is among those offices "mentioned in section seventeen of chapter six" and so might appear, in view of some of the language of the said section, to be entitled to appoint a confidential employee, yet the specific exclusion of this Commission from the exercise of such power to appoint ("and each officer, board and commission, other than the aforesaid commission," *i.e.*, the Commission on Administration and Finance) is controlling in the interpretation of the section in this respect.

Accordingly, I am of the opinion that the confidential employee as to whom you inquire is not lawfully employed as such by you or by your Commission.

Very truly yours,
Paul A. Dever, *Attorney General.*

Governor and Council — Contracts of Sale — Commission on Administration and Finance.

Dec. 19, 1936.

Hon. Charles F. Hurley, *Treasurer and Receiver General.*

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

"We understand that the Executive Council, on December 11, 1936, voted to remit certain deductions made by the Commission on Administration and Finance in the form of penalties imposed upon certain coal companies for alleged substandard coal furnished to the Commonwealth.

Reference is made to a letter of the Massachusetts Federation of Taxpayers Associations Incorporated, dated December 11, 1936, addressed to George E. Murphy, Comptroller, a copy of which we understand has been sent to you.

Your opinion is respectfully requested on the legality of such payments being made on the warrant of the Governor and Council."

The vote of the Governor and Council, to which you refer, is embodied in the form of an order in a letter transmitted to the Commission on Administration and Finance, which has been laid before me and which reads as follows: —

"THE COMMONWEALTH OF MASSACHUSETTS,
COUNCIL CHAMBER, BOSTON, December 12, 1936.

Commission on Administration and Finance, State House, Boston, Massachusetts.

Attention: Mr. Charles P. Howard, Chairman.

GENTLEMEN: — His Excellency the Governor and Council have heard and considered a petition from the Carter Coal Company, the Old Colony Coal & Wharf Co., Inc. and the Commonwealth Fuel Co., Inc., represented by Joseph W. Gorman, being an appeal from the action of the Commission on Administration and Finance assessing penalties on coal delivered to the Commonwealth under contract by said coal companies between April 1, 1935, and April 1, 1936.

At a meeting of the Governor and Council held Friday, December 11, 1936, it appearing that said penalties, above referred to, had been imposed wrongfully and without authority of law, it was

Ordered that the Commission on Administration and Finance be and hereby is directed to cause to be refunded to said Carter Coal Company, Old Colony Coal & Wharf Co., Inc. and the Commonwealth Fuel Co., Inc., above mentioned, the amount assessed in penalties against each as follows:

Carter Coal Company	$5,399.66
Old Colony Coal & Wharf Co., Inc.	5,473.44
Commonwealth Fuel Co., Inc.	8,623.09
Total	$19,496.19

Adopted in Council December 11, 1936.

(Signed) WILLIAM L. REED,
Executive Secretary."

Before the proposed payment to the above-named contracting coal companies in the sum mentioned in said order could come before the Governor and Council for action it would have to be authorized and approved by the Chairman of the Commission on Administration and Finance, by whose department the contract was made, pursuant to the provisions of G. L. (Ter. Ed.) c. 29, § 20; and after the same had been so approved, if an appropriation from which it could be paid was in existence, it would then require to be certified by the Comptroller, under the terms of G. L. (Ter. Ed.) c. 29, § 18, and placed upon a warrant, which warrant would subsequently issue from the Governor.

It thus appears that you have no present duty to perform in the premises. The opinion of the Attorney General cannot be required as of right by any State official excepting in connection with the performance of an immediate and existing duty concerning which he is obliged to act. You set forth facts sufficient to indicate that the question you raise may become real and actual rather than speculative and moot. Under such circumstances, an opinion may be furnished without doing great violence to the long established policy of this department.

The power of the Governor and Council is not unlimited nor the scope of their authority unbounded even in regard to the administrative service of the Commonwealth. The Governor and the members of the Council are constitutional officers, enjoying the privileges and prerogatives and

subject to the obligations and responsibilities which the Constitution itself attaches thereto. The Legislature may, in any manner not inconsistent with the Constitution, prescribe the qualifications, determine the tenure and compensation and regulate the duties of such officers as the public exigency may require or public policy demand. *Opinion of the Justices*, 117 Mass. 603; *Opinion of the Justices*, 216 Mass. 605; *Attorney General* v. *Tufts*, 239 Mass. 458, 480.

The Governor and Council are authorized to review and set aside the action of the Commission only if they are so empowered by the Constitution or by statute. Ordinarily, when the Legislature has placed upon a public officer or commission the duty of seeing that money appropriated is properly expended and the Governor and Council are not made specifically responsible therefor, except in so far as the Governor is required to sign warrants for payments from applicable appropriations, the Governor and Council have no authority to command, order or direct such officer or commission as to how he or it shall perform such duty, nor can they themselves make or cause to be made expenditures of such money.

It is familiar law that where the duties and powers of public officers are wholly defined by statute such officers are not subject to the directions of any other authority in the administration and performance of their official obligations. *Cox* v. *Segee*, 206 Mass. 380; *Dowling* v. *Board of Assessors of Boston*, 268 Mass. 480, 484; *Tuckerman* v. *Moynihan*, 282 Mass. 562.

The adoption on November 5, 1918, of Mass. Const. Amend. LXVI required the consolidation of the various administrative boards into not less than twenty departments. This article reads as follows: —

"On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law."

In accordance with this constitutional mandate, the Legislature provided that the Commission on Administration and Finance shall "serve directly under the governor and council within the meaning of Article LXVI of the amendments to the constitution of the commonwealth." G. L. (Ter. Ed.) c. 7, § 2.

The question to be decided is whether, by virtue of this last-mentioned statute, the Governor and Executive Council were empowered to review the conduct of the Commission in deducting from the contract price on certain purchases of coal various amounts found by the Commission to be due to the Commonwealth on account of the coal falling below the contract requirements; to determine, notwithstanding the decision of the Commission, that no deductions should be made; and to order the Commission to cause the amounts so deducted to be paid to the vendors.

The Commission on Administration and Finance was created by St. 1922, c. 545, and the authority originally imposed has been in all respects continued. If this statute can rightly be construed as accomplishing any more than providing for the proper allocation of the Commission in pursuance to the article of amendment, then it did not, either expressly or by implication, transfer to the Governor and Council the authority theretofore imposed upon the Commission; and neither did it empower the Governor and Council to limit or curtail the power of the Commission in

dealing with matters which, by a complete and elaborate statutory system, still continued to be vested in this Commission. It is apparent that the Legislature perceived nothing in section 2 inconsistent with the full exercise of the specific authority continued to be granted to the Commission in the other sections of chapter 7, which impose various definite duties and obligations upon the Commission. The power of this body in these particulars has remained unimpaired and unaffected by section 2. This section must be construed with the other pertinent statutes so as to compose a workable and harmonious statutory system. *Decatur* v. *Auditor of Peabody*, 251 Mass. 82; *Goodale* v. *County Commissioners*, 277 Mass. 144.

Section 2 can be fairly and reasonably construed as granting to the Governor and Council the right "to see that the money appropriated is properly expended therein." See III Op. Atty. Gen. 226, 230, an opinion which distinguishes the duty of the Governor in the investigation of the expenditures of money by departments under his immediate supervision and such expenditures by all other departments. The instant section cannot be stretched so as to warrant the substitution by the Governor and Council of their judgment and discretion for that of the Commission in the determination of questions which are by law entrusted to the Commission.

The general authority to contract for supplies, which by statute is imposed upon this statutory board, includes within its scope every other power reasonably necessary and incidental to the full and complete exercise of such authority. The form and substance of every such contract is exclusively within the province of this Commission. No other statutory board or official has any right whatever to fix or define the conditions, terms or provisions of such a contract. The requirements of the statute are clear and must be respected. The Legislature posited this right in the Commission alone.

On the other hand, there is no provision of the Constitution nor of the statutes that authorizes the Governor and Council to make such contracts or to alter or amend their terms. The duties and powers of the Executive Council have been frequently alluded to in the opinions of the Supreme Court. There is nothing contained in these opinions that would warrant the slightest intimation that the Governor and Council possess the power now under consideration. Furthermore, a search of the records of this department does not disclose any precedent for the present action of the Governor and Council. An examination of the debates of the Constitutional Convention which framed the said article of amendment to the Constitution is barren of anything indicating that there should be any transfer of the power in question from the statutory body then having such authority, or that, upon the creation by the Legislature of the present Commission on Administration and Finance, there then should be any such transfer.

There are certain matters set forth in chapter 7 concerning which the Commission must function, subject to the approval of the Governor and Council or in conjunction with the Governor, but there is no such participating provision in reference to the expenditure of money on contracts. The Legislature, therefore, by implication at least, intended that in such matters the Commission alone should act. Besides, the omission to give the Governor and Council any joint control or approval in the making of contracts for supplies is of persuasive significance, especially where, as here, the only authority expressly granted is to approve the rules and regulations of the Commission governing such contracts.

The Commonwealth is not without remedy in case the Commission honestly goes beyond the orbit of the law, for in that event, no contractual relations have been created and no liability has thereby been incurred. Where the Commission has been shown to have acted in bad faith, contracts so made may be easily avoided and the offending Commissioners may thereby merit disciplinary action. Where, however, they are acting in good faith and within the scope of their authority, then their determination of facts is final, and in all such instances the Governor and Council are without authority to supersede their judgment and discretion for that of the Commission. No hardship can result to those selling supplies to the Commonwealth. They are presumed to know the authority of the public agency with which they execute contracts. If their rights have been impaired by the unwarranted action of this agency, or if their contracts have been breached to their damage, then they may have recourse to the courts, as the Commonwealth has already by appropriate legislation consented in such cases to be impleaded in the courts.

The testimony adduced at the hearings held before the Governor and Council has not been reviewed. No transcript of the evidence has as yet been made. It is not necessary to determine whether or not the decision of the Governor and Council is supported by the evidence. That would only be important if the Governor and Council had the right to hear the matter. Accordingly, the correctness of that decision is not material, because the Governor and Council never had any right to make any decision whatever.

It must therefore be held that the Governor and Council had no authority whatever to adopt the vote of December 11, 1936, that the proceedings which resulted in such a vote were without sanction of law, and that the resulting decision is a mere nullity.

Very truly yours,

Paul A. Dever, *Attorney General.*

Alcoholic Beverages — Wholesalers' and Importers' Licenses — Vote of Town.

Dec. 21, 1936.

Alcoholic Beverages Control Commission.

Gentlemen: — You have asked my opinion as follows: —

"This Commission desires to obtain your opinion upon certain questions that have come to it regarding the granting of licenses to wholesalers and importers in the city of Medford and towns of Wakefield and Milton, arising because of the vote in those places on November 3, 1936. All three places voted 'No' on questions 1 and 2, and 'Yes' on question 3. At the present time there are two wholesalers' and importers' licenses for the sale of alcoholic beverages exercised in Medford, and one such license exercised in Milton, and one such license exercised in Wakefield. All four of these licensees indicate their desire to apply for renewals of their several licenses.

The question upon which we desire your opinion is whether this Commission may issue, in accordance with G. L. (Ter. Ed.) c. 138, § 18, as amended, licenses to individuals or corporations properly qualified as wholesalers and importers in the places mentioned, irrespective of the votes of those places upon questions 1 and 2, hereinbefore stated."

I answer your question to the effect that if a town has voted "Yes" upon question 3, which appeared upon ballots under the authority of G. L. (Ter. Ed.) c. 138, § 11, as amended by St. 1936, c. 207, § 1, your Commission may issue licenses to wholesalers and importers in such towns, under the provisions of section 18 of said chapter 138, as amended; and you may do so irrespective of the fact that the town voted "No" upon questions 1 and 2, also provided for by said section 11, as amended.

Question 3 reads as follows: —

"3. Shall licenses be granted in this city (or town) for the sale therein of all alcoholic beverages in packages, so called, not to be drunk on the premises?"

YES	
NO	

Very truly yours,
Paul A. Dever, *Attorney General.*

Schools — Transportation of Pupils — Private Schools.

Dec. 23, 1936.

Hon. James G. Reardon, *Commissioner of Education.*

Dear Sir: — You have asked my opinion upon four questions concerning transportation of pupils attending private schools, as permitted by G. L. (Ter. Ed.) c. 40, § 5 (2), as amended by St. 1936, c. 390, which, in its portion added by the amending statute of 1936, reads: —

"Pupils attending private schools of elementary and high school grade, except such schools as are operated for profit, in whole or in part, shall be entitled to the same rights and privileges as to transportation to and from school as are provided herein for pupils of public schools."

Said G. L. (Ter. Ed.) c. 40, § 5 (2), before the above-mentioned portion was added read: —

"For the support of public schools authorized or required by law, and for conveying pupils to and from the public schools, or, if it maintains no high school or public school of corresponding grade, but affords high school instruction by sending pupils to other towns, for the necessary transportation expenses of such pupils, the same to be expended by the school committee in its discretion."

It is to be borne in mind that the private school pupil, as regards his transportation to and from the private school which he attends, is entitled to the *same* rights and privileges as the pupil attending a public school is granted as incidental to the execution of the first part of said clause 2 as last above quoted.

Those rights and privileges, as regards pupils of schools of elementary grades, appear to be such as are protected by G. L. (Ter. Ed.) c. 71, § 68, as amended; and as regards pupils of schools of high school grade by section 6 of said chapter 71.

Your first question reads: —

"Shall the towns and cities provide transportation to private school pupils who live over two miles from both a public and private school?"

1. I answer your question to the effect that cities and towns should provide transportation to private school pupils who live over two miles

from the private school which they attend, irrespective of how far they may live from a public school.

Your second question reads: —

"Shall the towns and cities base their two-mile limit from the private school the pupil is attending or the one which the parents desire him to attend, irrespective of its location?"

2. The pupil is entitled to attend any private school of the class named in the added portion of said clause 2, and is entitled to transportation to and from such school, irrespective of its location, so long as it is within the limits of the town where he resides, if it be a school of elementary grades. If it be a school of high school grade, he will be entitled to transportation to it if in the town where he resides; and if it be outside the town of his residence, then the same general conditions exist as would entitle a pupil desirous of attending a public high school outside his town of residence to transportation there under the provisions of G. L. (Ter. Ed.) c. 71, §§ 5 and 6.

Your third question reads: —

"If the answer to question numbered 1 is yes, does this limit transportation to the nearest public school even though the private school pupil has to walk a total of over two miles, say partly before reaching the school bus stop, and partly after leaving public school grounds?"

3. I answer this question in the negative. The pupil is entitled to transportation to the private school which he attends, not merely to the nearest public school.

In view of the opinion given by me to the Joint Committee on Education, on February 17, 1936 (Attorney General's Report, 1936, p. 40), relative to the general subject matter embodied in the said amendment to G. L. (Ter. Ed.) c. 40, § 5 (2), there is no occasion for me to render a further opinion upon the constitutionality of said amendment, as you request.

Very truly yours,
Paul A. Dever, *Attorney General.*

Inspector of Animals — Municipality — Appointment.

Dec. 23, 1936.

Hon. Howard H. Murphy, *Commissioner of Agriculture.*

Dear Sir: — You have called my attention to a situation which has arisen with relation to the nomination and appointment of an inspector of animals for a certain city.

You inform me that by the terms of the charter of such city "any person appointed to a position for service in the city . . . shall have resided in the city for six consecutive months prior to the date of the appointment."

You also advise me in effect that there is no registered veterinary surgeon resident in said city, and that only one inspector is appointed for such city.

By the provisions of G. L. (Ter. Ed.) c. 129, § 15, it is specifically provided that: —

"In cities at least one such inspector shall be a registered veterinary surgeon."

This provision of the General Laws is binding upon both State and municipal authorities. No appointment for this position, under the circumstances which you describe, can be made contrary to this provision. Hence, one who is not a veterinary surgeon may not be appointed to the position.

On the other hand, the terms of the city charter to which you have called my attention are likewise legislative enactments and limit the authority of the appointing officer. The latter has no power to appoint a person in violation of the specific charter prohibition. These two legislative enactments are not in and of themselves in conflict, but a situation appears to have arisen in which, since the appointing officer is without authority to make the only form of appointment which the provisions of G. L. (Ter. Ed.) c. 129, § 15, allow him to make, because of existing conditions over which he has no control, it has become impossible for him to make any appointment to fill the vacancy in said position. In the absence of any saving clause in said section 15 providing for appointment under unusual circumstances in some manner other than that specified by the language of the said section, and in view of the limited authority vested in the municipal appointing officer by the city charter, no appointment can lawfully be made. *Copeland* v. *Springfield*, 166 Mass. 498; *Logan* v. *Lawrence*, 201 Mass. 506.

Very truly yours,

Paul A. Dever, *Attorney General.*

Public Utilities — Jurisdiction to inspect and approve Containers for Gas.

Dec. 28, 1936.

Commissioners of the Department of Public Utilities.

Gentlemen: — You have asked my opinion as to whether you are correct in your view that you have no jurisdiction to inspect and approve two holders for illuminating gas of a corporation in Salem which does not engage in the manufacture and distribution of gas. I am of the opinion that the view which you express in the letter, to the effect that you have no jurisdiction in this matter, is correct.

The jurisdiction of your department in relation to such matters is limited, under the terms of G. L. (Ter. Ed.) c. 164, to those gas companies which are organized under the laws of the Commonwealth for the purpose of making and selling, or distributing and selling, gas made in the Commonwealth.

You advise me that this corporation is not organized for such a purpose and does not engage in the manufacture and distribution of gas. This being so, jurisdiction to inspect and approve holders of gas which this corporation may have on its grounds is not part of your duties.

Section 105A of said chapter 164, inserted by St. 1932, c. 119, to which you refer, which gives authority to regulate the storage, transportation and distribution of gas and the pressure under which these operations may be carried on, read in connection with the entire context of chapter 164, does not extend your authority to such regulation and control over companies which do not engage in the manufacture and distribution of gas.

Since this matter is not within your jurisdiction, it would seem that the inspection and approval of the tanks to which you refer would come within the province of the Department of Public Safety, and that it would be the duty of that department, through the Fire Marshal, to con-

trol the tanks in question, under the provisions of the rules made by the State Fire Marshal and approved by the Commissioner of Public Safety and by the Governor and Council on August 22, 1935.

Very truly yours,

Paul A. Dever, *Attorney General.*

State Hospital — Superintendent — Retirement Age.

Dec. 30, 1936.

His Excellency James M. Curley, *Governor of the Commonwealth.*

Sir: — Your Excellency has requested my opinion in the following communication: —

"The Commissioner of Mental Diseases . . . is desirous of appointing as superintendent of the Boston State Hospital Dr. J. V. Thuot, of New Bedford.

The Associate Commissioners have raised objections on the ground that Doctor Thuot is over seventy years of age, the doctor being about seventy-one, according to the records. I am desirous for an opinion . . . as to whether the Commissioner has the right to appoint, or whether the Associate Commissioners are right in their contention that the law does not permit the appointment of a person who is over seventy years of age."

I am of the opinion that the appointment of a man over seventy years of age as superintendent of a State hospital may not properly be made.

The statutes require the retirement from the service of the Commonwealth of one occupying such a position after "reaching the age of seventy." It follows that the appointment of one over seventy to such a position is not contemplated by our laws, and would be a futile act inasmuch as the appointee could not remain in the service.

With relation to the State Retirement Association and to the Commonwealth's service, it is set forth in G. L. (Ter. Ed.) c. 32, § 2 (2), as follows: —

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

A person who occupies the position of superintendent of a State hospital would not fall within that class of officers excepted by the terms of paragraph (3) of said section 2, nor is he for any other reason excluded from the above-quoted provisions of said section 2.

It has been held in many opinions of the Attorneys General that persons occupying positions in the Commonwealth's service comparable to that of superintendent of a State hospital are "employees" of the Commonwealth, as the quoted word is used in said G. L. (Ter. Ed.) c. 32, and are required to leave its service when they attain the age of seventy. See opinion of the Attorney General to the Secretary of the Commonwealth, dated December 4, 1936 (*ante*, p. 25); Attorney General's Report, 1932, p. 42; *ibid.*, 1931, p. 132; VIII Op. Atty. Gen. 304. See also *Goodale* v. *County Commissioners of Worcester*, 277 Mass. 144.

Very truly yours,

Paul A. Dever, *Attorney General.*

Alcoholic Beverages — Local Licensing Authorities — Hours for Sales — Restaurants.

Dec. 30, 1936.

Alcoholic Beverages Control Commission.

Gentlemen: — You have requested my opinion as follows: —

"The Commission respectfully requests your opinion as to whether or not, in view of the provisions of sections 12 and 33 of the Liquor Control Act, local licensing authorities may on Sundays, during the period between one o'clock p.m. and eleven o'clock p.m., restrict the hours during which alcoholic beverages can legally be sold in hotels, restaurants and clubs."

Licensing authorities have the power to fix the hours during which sales of alcoholic beverages, under section 12 of G. L. (Ter. Ed.) c. 138, as amended, may be made, except as specific provisions have been set forth in said chapter by the Legislature with regard to certain periods of time.

On secular days the Legislature has provided that between 1 and 8 a.m. there shall be no sales, and that between 11 a.m. and 11 p.m. no restrictions shall be placed upon the time of sale. This leaves only the time between 8 a.m. and 11 a.m., and between 11 p.m. and 1 a.m. in which the local authorities may fix the hours for sale.

On Sundays the Legislature has specifically provided only that no sales may be made before 1 p.m., so that the local licensing authorities may fix the hours for sales during the remainder of Sunday.

These considerations answer your question. The local licensing authorities have also the added right, with relation to a "restaurant license" under said section 12, to determine when granting it whether it shall apply to secular days only or shall apply to Sundays as well.

The applicable portions of the statutes (G. L. [Ter. Ed.] c. 138, as amended by St. 1935, c. 468), read: —

"Section 12. . . . Upon an application for a restaurant license, the local licensing authorities may in their discretion grant such a license authorizing the sale of alcoholic beverages on all days of the week or one authorizing such sale on secular days only, . . .

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

. . . .

Section 33. . . . No holder of a tavern license . . . , no other licensee under section twelve shall sell any such beverages on Sundays before one o'clock post meridian, . . ."

Very truly yours,

Paul A. Dever, *Attorney General.*

Alcoholic Beverages — Number of Licenses for Package Goods — Stores in Boston.

Dec. 30, 1936.

Alcoholic Beverages Control Commission.

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

"Under the provisions of St. 1936, c. 245, the number of 'package goods' store licenses which could be granted in the city of Boston was reduced from 350 to 303. At the time when the bill from which this act resulted was reported to the Legislature, there were 303 such licenses outstanding in the city of Boston. After that time, but prior to the enactment stage, an additional license was issued bringing the total to 304. After the act had received the approval of His Excellency the Governor, but prior to its effective date, another such license was issued bringing the total number of 'package goods' store licenses to 305.

We respectfully request your opinion as to whether or not, in view of the circumstances above quoted, there may be granted in the city of Boston 305 licenses under the provisions of section 15 of the Liquor Control Act if all of the said licenses are renewals and not original licenses."

No more than 303 "package goods" store licenses, that is, licenses for the sale of alcoholic beverages not to be drunk on the premises, issued under G. L. (Ter. Ed.) c. 138, § 15, as amended, may be granted in the city of Boston.

It is immaterial that one or more of said licenses in excess of 303 were issued prior to the effective date of St. 1936, c. 245. Since that act, amending G. L. (Ter. Ed.) c. 138, § 17, as previously amended, became effective, its provisions relative to the number of such licenses which may be granted in Boston are controlling and limit such number to 303.

The applicable portion of G. L. (Ter. Ed.) c. 138, § 17, as amended, reads: —

". . . and provided, further, that in the city of Boston licenses under section twelve may be granted up to a total number not exceeding one thousand *and licenses under section fifteen up to a total number not exceeding three hundred and three* but no further original licenses under said section fifteen shall be granted in said city until the number of licenses outstanding thereunder shall have been reduced to less than two hundred and fifty . . ."

Very truly yours,
Paul A. Dever, *Attorney General.*

Governor and Council — Comptroller — Warrant — Certificate — Approval.

Jan. 4, 1937.

Mr. Karl H. Oliver, *Deputy Treasurer and Receiver General.*

Dear Sir: — You advise me that you are in receipt of a warrant of the Governor, approved by the Council, for the payment of $150,508.06 to the George A. Fuller Company, and that the said warrant does not bear the certificate of the Comptroller. You enclose a letter addressed to the Treasurer and Receiver General by the Emergency Public Works Commission, under date of December 29, 1936, and a copy of a letter dated

December 31, 1936, from that Commission to the Comptroller, the first setting forth various objections to the payment of this claim, and the second disclosing a vote of the Commission, on December 21, 1936, to the effect that such payment should not be made.

You request my opinion whether payment to the said company can now be legally made in accordance with the aforesaid warrant.

The George A. Fuller Company, on May 23, 1934, entered into a written contract with the Commonwealth for the construction of a portion of the Concord Turnpike, so called, for the sum of $364,652.43. The contract was included among the projects approved by the Emergency Public Works Commission, hereinafter referred to as the Commission, acting under and in accordance with the provisions of St. 1933, c. 365. This contract was completed on October 22, 1934, according to the records of the Department of Public Works, or on May 22, 1935, as disclosed by the records of the Emergency Public Works Commission. On November 10, 1936, a written estimate calling for the payment of $150,508.06 to the George A. Fuller Company, hereinafter called the Company, was signed by all three Commissioners of the Department of Public Works, hereinafter referred to as the Department. This estimate set forth the total value of the work done as $615,638.80, and that the previous payments amounted to $465,130.74, leaving a balance due of $150,508.06. There was attached to this estimate a second sheet, containing twenty-eight items totaling $135,000, and which was therein designated as "extra allowance." This estimate was delivered to the Comptroller, who transmitted it to the Commission, which on December 21, 1936, adopted the following vote: —

"R 5 — Arlington–Belmont–Lexington–Lincoln. The Commission considered at length the claim of the George A. Fuller Co. for further 'extra allowance' in the sum of $135,000 on Mass. State Project R 5. After consideration it was the unanimous opinion of the commission that the claim is in excess of the allocation for this project by approximately the amount of the 'extra allowance' of $135,000, that there are no funds available at present from the amounts borrowed by the Commonwealth and from grants from the Federal government for the increase in the allocation, that no increase in the allocation has been requested by the Public Works Department, and that although requested by the Commission in a letter, dated November 12th, to William F. Callahan, Commissioner of the Department of Public Works, no facts about this claim have been submitted by the Public Works Department, and that on the basis of all the facts in the possession of the commission the claim ought not on its merits to be paid."

Proceedings were then had before the Governor and Council which, as shown by the records of the Executive Secretary, were as follows: —

"*Meeting of Tuesday, December 29, 1936.*

A representative of the George A. Fuller Co. was heard with relation to a claim for 'extra allowance' on contract #2901, dated May 23, 1934. The matter was continued to Wednesday, December 30, 1936, at 1 P.M.

Meeting of Wednesday, December 30, 1936.

The hearing on the petition of the George A. Fuller Co. for 'extra allowance' on contract #2901, dated May 23, 1934, was continued, representa-

tives of said company, the Emergency Public Works Commission, and the Attorney General's office, being present. Following a lengthy discussion, a recess was had in order that the Department of Public Works and the Emergency Public Works Commission might confer with relation to the merits of the claim. Later William F. Callahan, Commissioner, Department of Public Works, and Mr. Henry Lefavour, Chairman of the Emergency Public Works Commission, appeared before the Council and stated that they had not arrived at an agreement as to the facts in said petition, and the matter went over.

Meeting of Thursday, December 31, 1936.

The Council received the following from the George A. Fuller Co.:

'DECEMBER 28th, 1936.

His Excellency, The Governor, Hon. JAMES M. CURLEY, *State House, Boston.*

GENTLEMEN OF THE GOVERNOR'S COUNCIL: — The George A. Fuller Company hereby appeals from the decision of a vote of the Emergency Public Works Commission, dated December 21st 1936, in reference to allowance of our claim for $135,000.

This appeal is made pursuant to the provisions of G. L., c. 30, § 5.

Respectfully submitted,
GEORGE A. FULLER COMPANY,
(Signed) WM. J. COLLINS.'

The following motion was then adopted: —

That the appeal of the Fuller Construction Company be honored and that we, by virtue of the powers and authority vested in the Governor and Council by the Constitution and the statutes of the Commonwealth, and with particular reference to chapter 30, section 5, that we, His Excellency the Governor and the Council, hereby determine that there is due and payable to the George A. Fuller Company from the Commonwealth the sum of One Hundred and Thirty-five Thousand Dollars ($135,000.00), and we do hereby annul the vote or order of the Emergency Public Works Commission as of December 21, 1936.

It was then voted to approve Treasurer's Warrant #290, entitled 'Emergency Public Works Commission,' in the sum of $150,508.06."

Before such final action was taken, the Comptroller, on December 31, 1936, notified the Governor and Council that he could not certify this account for payment as the Commission had refused to give its written approval to any changes or alterations in the contract, and, further, because he had been advised by an Assistant Attorney General that such approval was requisite before payment could be made. The Governor and Council were orally advised in open meeting on December 30, 1936, by this same Assistant Attorney General, whom they had invited to appear, that unless and until such written approval was had no payment could be authorized.

Although the original contract price was $364,652.43 and the contractor calls for payments which in all will amount to $615,638.80, the Governor and Council are apparently willing that the excess over the contract price, amounting to $250,986.36, should be paid to the Company. The Com-

pany claims the extra work and materials were ordered by the Department and that in effect the contract was so amended. Amendments are ordinarily subsidiary and incidental to the principal contract, but public contracts cannot be so substantially and essentially modified and altered as to virtually result in a substitution of a new contract for the old by the mere device of an amendment. Public policy prevents such a circumvention of the law. *Morse* v. *Boston*, 253 Mass. 247. Although the amount claimed as extra seems high in comparison with the contract price, no intimation is now made as to whether the whole transaction should be stricken down.

I now pass to a discussion as to the effect of the failure of the Commission to approve in writing alterations to the contract, the performance of which furnishes the basis for this claim for the extra allowance.

The contract in question, under the heading "Provisions Prescribed by the State Emergency Public Works Commission," contained the following clauses, to wit: —

"(3) After approval of plans and specifications has been obtained from this commission, no contracts shall be awarded for any work without the approval of this commission.

(4) Subsequent to approval of the contract, no changes in the plans or specifications shall be made, and no changes or alterations shall be made which may involve either extra costs or deductions from the contract price, without the written approval of this commission."

This contract was freely and voluntarily executed by the parties. There is nothing in the circumstances attending its execution savoring of mistake, fraud or duress. No such contention is made. The clauses formed an essential and material part of the contract and in substance were those frequently found in agreements for the completion of public undertakings.

It is in the interest of the general public that claims for extra work or materials should be seasonably made, in order that the details and items to be included therein should be checked and verified; and that authority to incur an obligation for such claims should be evidenced by documentary proof, usually assented to in writing by some responsible official or board, in order that disputes regarding the quantity, nature and prices of such extra work or materials might be eliminated, and so that the barriers created by the contract may be maintained and utilized to shield the public against demands of an excessive amount, of an unreasonable nature and of questionable character. No hardship is imposed upon the contractor by requiring of him strict observance of his contract. In insisting upon the production of a written approval to an amendment to the contract upon which he bases a claim, he is not obligated to do more than he is required to do by the terms of his contract, and by the terms of which he agreed, impliedly at least, to produce such approval in support of such a claim, if he presented one. Such provisions are reasonable and fair and have been upheld and enforced by the courts. *Plumley* v. *United States*, 226 U. S. 545; *Stuart* v. *Cambridge*, 125 Mass. 102; *Millen* v. *Boston*, 217 Mass. 471; *Crane Construction Co.* v. *Commonwealth*, 290 Mass. 249.

Speaking of similar clauses in a municipal contract, it was said that "such provisions are intended to protect the public treasury, are easily complied with by the contractor, are reasonable in their nature and are to be enforced." *Cashman* v. *Boston*, 190 Mass. 215, 219.

The allowance of the aforesaid estimate of November 10, 1936, by the Department did not preclude the Commission from exercising its right to grant or withhold its written approval as expressly provided for in the contract. The Department was not the only representative of the Commonwealth in the execution of this contract. The Commonwealth was represented by both the Department and the Commission, acting together. It is immaterial whether the power of the Commission, in the aspect of the contract now under consideration, was to permit in writing a change in the contract, acting independently and of its own accord, or to sanction a change desired by the Department, because in either event, until such an amendment, whether originating with the Department or the Commission, was approved in writing by the Commission, it could never become effective. *Millen* v. *Boston*, 217 Mass. 471, 472; *Simpson* v. *Marlborough*, 236 Mass. 210, 214; *Leroy* v. *Worcester St. Ry. Co.*, 287 Mass. 1.

The written approval of the Commission was a condition precedent to liability, and the failure of the contractor to secure it bars recovery.

There is nothing in the conclusions reached in the present opinion inconsistent or in any way at variance with the opinion given on November 5, 1935, to Henry Lefavour, Chairman, Emergency Public Works Commission, wherein it was stated that the Commission had no authority to approve payment of claims to contractors. The issue there was the statutory authority of the Commission in a single respect and not, as here, as to the effect of the failure of the Commission to give its written approval to a change in an existing contract, where, by the express terms of that contract, the power to give or withhold such approval was vested in the Commission. The lack of a grant of a particular authority by a statute is entirely different from the exercise of a different power granted by contract, and the legal incapacity to approve a payment actually due is distinct from the power of the Commission given by contract to refrain from doing an act the performance of which is essential before any liability to pay can attach.

The statutory basis upon which the Governor and Council purported to act now calls for attention.

It is evident that the proceedings of the Governor and Council, as shown by the records, which have been fully set forth above, were based upon G. L. (Ter. Ed.) c. 30, § 5, which reads as follows: — "In all cases where a question arises between executive or administrative departments, or officers or boards thereof, as to their respective jurisdictions or powers, or where such departments, or officers or boards thereof, issue conflicting orders or make conflicting rules and regulations, the governor and council may, on appeal by any such department or by any person affected thereby, determine the question, and order any such order, rule or regulation amended or annulled; provided, that this section shall not deprive any person of the right to pursue any other lawful remedy. The time within which such appeal may be taken shall be fixed by the governor and council."

That statute was first enacted as Gen. St. 1919, c. 350, § 10, which chapter was passed entirely for the purpose of rearranging the various executive and administrative agencies of the Commonwealth into not more than twenty departments, in accordance with the constitutional mandate expressed in the sixty-sixth article of amendment, which had been ratified and adopted by the people on November 5, 1918. The section in question is a precautionary measure, furnishing a means by which any conflicts

that might arise between the different departments in the operation of the new arrangement could be easily and expeditiously adjusted and settled. Notwithstanding the circumstances giving rise to the enactment of this legislation, if there still could be any doubt as to the aims and objects sought to be reached, then such doubt is dispelled by the title to the original chapter, which reads "An Act to organize in departments the executive and administrative functions of the Commonwealth." The title has been said to be a part of a legislative act and may be referred to in appropriate cases as an aid in the ascertainment of the intent of its framers. *Proprietors of Mills* v. *Randolph*, 157 Mass. 345; *Wheelwright* v. *Tax Commissioner*, 235 Mass. 584, 586.

The legitimate scope of the section in question does not rest entirely upon its legislative history. Its phraseology conclusively demonstrates that its operation is confined entirely to the harmonious functioning of the various departments, each in its own individual field and without interference with any other department. The settlement of interdepartmental controversies is its only applicable subject. It was enacted to quiet controversies between officials and boards which, in the absence of a similar statute, have at times received attention from the courts. *Bauer* v. *Mitchell*, 247 Mass. 522; *Dupuis* v. *Reed*, 289 Mass. 365.

However, it is clear that there is no attempt by one State board to usurp the power of another board. Neither is there any conflicting contention between State agencies as to the boundaries of their respective powers. The authority of the Department or of the Commission in the premises is not challenged. No rule or regulation of either is sought to be annulled or amended. Accordingly, a contractor cannot resort to this section for the accomplishment of a purpose entirely foreign to its legitimate aim and limited scope, and attempt thereunder to present for allowance to the Governor and Council a claim for extra work and materials under a contract which, on account of the admitted failure of the contractor to comply with its terms, negatives the validity of such claim.

The Governor and Council were entirely without jurisdiction to hear or determine this so-called appeal under said section 5. The issuance of the warrant as a result of such proceedings has no force or effect. It lacks every semblance of validity.

The failure of the Comptroller to certify the account is now considered.

The Commission was created by St. 1933, c. 365. Section 5 of this act expressly provides: —

"The state treasurer shall receive all moneys granted or loaned to the commonwealth under section two hundred and three of said Title II. Payment from the state treasury for expenditures incurred under this act shall be made upon vouchers filed with the comptroller in accordance with the procedure prescribed under section eighteen of chapter twenty-nine of the General Laws, and all other provisions of said chapter twenty-nine shall apply in the case of any project undertaken under this act or any expenditure necessary for carrying out the purposes hereof, except in so far as such provisions of law may be in conflict with applicable federal laws and regulations."

Payments, therefore, must be made in compliance with G. L. (Ter. Ed.) c. 29, and especially in accord with section 18, which, in so far as is now pertinent, provides that "no money shall be paid by the commonwealth without a warrant from the governor drawn in accordance with an appropriation then in effect, and after the demand or account to be paid has been certified by the comptroller."

The necessity of securing the certification of the Comptroller is further emphasized by the enumeration of specific instances, not including an account like that of the Company, wherein such certification is expressly exempted. No payment may be made even upon a warrant from the Governor unless the demand account to be paid upon the same has been certified by the Comptroller. The Constitution of Massachusetts provides (Part 2nd, c. II, § I, art. XI): —

"No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."

The section last mentioned was enacted pursuant to this constitutional authority, and so were its preceding legislative measures governing the same subject.

Prior to the enactment of St. 1923, c. 362, § 13, the duty laid upon the Comptroller in the above respect rested with the Auditor (G. L. c. 11, § 7), and the certification now required by G. L. (Ter. Ed.) c. 29, § 18, was formerly that of the Auditor.

Statutory provisions regulating the withdrawal of money from the public treasury have existed since 1849.

In 1866, the Governor and Council differed with the Auditor concerning the payment of an account and sought an opinion from the Supreme Judicial Court, as follows: "Does the power of finally judging upon and deciding such question rest with the governor and council, or with the auditor of accounts, under the constitution, pt. 2, c. 2, § 1, art. 11, and Gen. Sts. c. 15, §§ 3, 30, and any other provisions of the constitution or statutes bearing on the subject?" Gen. Sts. c. 15, § 30, referred to in the above question, provided, in so far as is now pertinent: "No warrant shall be drawn for the payment of any account or demand, except for the payrolls of the council, senate and house of representatives, unless the same is certified by the auditor."

The court remarked: "By Gen. Sts. c. 15, § 3, the legislature have provided that all accounts and demands against the state shall be examined and scrutinized by the auditor of accounts, who is required to make a certificate specifying the amount due on each demand, the law authorizing its payment, and the head of expenditures to which it is to be charged; which certificate he is required to transmit to the governor. And by § 30 of the same chapter it is further provided that no warrant shall be drawn for the payment of any account or demand, unless the same is certified by the auditor. Under these provisions of law, it is the opinion of the undersigned that no account or demand, which is required to be examined and scrutinized by the auditor, can properly come before the governor and council, for the purpose of payment, by a warrant under the hand of the governor unless the same be certified by the auditor, according to the requirements of the statutes." The court also answered that the Legislature could in any case provide for the issuance of warrants without a certificate of the Auditor, and that only in such cases could payment be made without such a certificate. *Opinion of the Justices*, 13 Allen, 593 594.

The language of the instant statute, G. L. (Ter. Ed.) c. 29, § 18, relative to the payment of money upon warrants, in view of the history of the legislation, indicates beyond question that the certification of the Comptroller is an essential prerequisite of the issuance of a valid warrant for the payment of money. A warrant issued for the payment of the Company's claim which the Comptroller has refused to certify does violence to the Constitution and repudiates the salutary provisions of the governing statute.

At the hearing before the Governor and Council, the Commission contended that there were not funds available to pay this extra allowance, so called. It appeared that funds in the amount of $1,265,000 had been allocated by the Commission for the performance of three road contracts, including the one in question, and that of this amount there now remains a credit balance of $30,256.25. The other two contracts have been completed and all payments have been made. Over one hundred and fifty projects have been approved by the Commission and their completion is now being undertaken. If the extra allowance now claimed by the Company is paid out of the funds entrusted to the Commission, it is evident that there will not be funds sufficient to complete these various projects. The Commission has no authority to exceed the appropriation made by the Legislature. G. L. (Ter. Ed.) c. 29, § 26. The fact that the Commission is now in possession of funds ample to pay this allowance is no justification for such payment if the Commission will thereby be unable to fully pay for undertakings for which it has already contracted. *Adams* v. *County of Essex*, 205 Mass. 189; *Dyer* v. *Boston*, 272 Mass. 265, 274.

The Governor and Council have no authority to amend or alter a contract executed by the appropriate public officials and a third person for the construction of public works, and they cannot accomplish the same result by ordering payment to be made notwithstanding the terms of the contract, which bars such payment. The contract itself provides for the method by which it might be amended so as to include extras. This power was reserved to the parties to the contract, and by implication negatives any presumption that such a power vests in some other official body.

Mere hardship is no justification to absolve a party from the performance of his contract. *Rowe* v. *Peabody*, 207 Mass. 226; *Morse* v. *Boston*, 260 Mass. 255, 263; *United States* v. *Spearin*, 248 U. S. 132, 136. And if the situation is such as to commend itself to the sense of fairness and to the discriminatory judgment of the body entrusted with the appropriation of public funds and payment is believed to be in the interests of the general welfare, then relief may be afforded, because the law does not forbid the Legislature from being "just in some cases where it is not required to be by the letter of paramount law." *Earle* v. *Commonwealth*, 180 Mass. 579, 583; *Allen* v. *Commonwealth*, 188 Mass. 59, 61. See *Friend* v. *Gilbert*, 108 Mass. 408; *Lawrence* v. *McAlvin*, 109 Mass. 311. But whatever limitations there may be upon the power of the Legislature to provide for the payment of public funds in satisfaction of obligations whose justness merits recognition, it is clear that the power to appropriate money for the payment of such claims is the exclusive prerogative of the General Court. The Governor and Council have no such power. "An underlying feature of our form of government is that the power to raise money, levy taxes and control the expenditure of public funds is vested in the General Court." *Opinion of the Justices*, Mass. Adv. Sh. (1936) 1285, 1290.

It is unnecessary to pause to consider other objections urged at the

hearing before the Governor and Council upon the allowance of the claim of the Company, since the result must be the same in any event.

It is therefore apparent that warrant No. 290 of the Governor, approved by the Council and purporting to direct the payment to the George A. Fuller Company of the sum of $150,508.06, is of no force and effect.

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

Search and Seizure — State Prison Colony — Watch Officers.

JAN. 8, 1937.

Hon. SEYMOUR H. STONE, *Deputy Commissioner of Correction, Acting Commissioner.*

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

"I should appreciate it if you would advise me whether or not watch officers at the State Prison Colony who have been appointed special State police officers, under authority of G. L. (Ter. Ed.) c. 127, § 127, would have the right in performing 'police duties about the premises' of the institution to stop private automobiles on the highways near the institution and search them.

This action would be necessary only at the time of an escape from the State Prison Colony."

The instant statute does not give to watch officers authority to stop private automobiles on the highways near penal institutions and to search them when there has been an escape from such an institution. Their powers in this respect are not greater than those of the ordinary citizen in like circumstances.

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

Governor and Council — Workmen's Compensation — Determination.

JAN. 22, 1937.

Department of Industrial Accidents.

GENTLEMEN: — You have asked my opinion as follows: —

"The department is in receipt of a communication from the Executive Department which reads as follows: —

'At a meeting of the Governor and Council, held Thursday, December 31, 1936, it was voted to approve the provisions of St. 1936, c. 403, so far as such action may be of legal effect.'

St. 1936, c. 403, provides, in part: 'The terms laborers, workmen and mechanics . . . shall include other employees except members of a police or fire force, regardless of the nature of their work, of the commonwealth . . . , to such extent as the commonwealth . . . acting . . . through the governor and council . . . shall determine, as evidenced by a writing filed with the department.'

The Industrial Accident Board, having considered the foregoing communication, voted to request the opinion of the Attorney General upon the following questions relative thereto:

1. Does the above-quoted communication, intended as the writing required by said chapter to be filed with the department, evidence a competent acceptance by the Governor and Council of the provisions of said St. 1936, c. 403?

2. If it is your opinion that said writing evidences a competent acceptance of said chapter 403, does such writing express a determination of the extent to which employees of the Commonwealth are included by such acceptance?"

St. 1936, c. 403, does not by its terms require to be "approved" or accepted by the Governor and Council. The act did require, however, that the Commonwealth, acting through the Governor and Council, should determine to what extent the terms "laborers, workmen and mechanics" should include other employees of the Commonwealth, such, for example, as foremen, subforemen, inspectors, superintendents, etc. The act further required that as evidence of the determination made by the Commonwealth, through its Governor and Council, as to those employees who should be included within the said terms a writing should be filed with your department, presumably by the Governor and Council.

I therefore answer your second question in the negative; and your first question to the effect that whether or not there was a competent acceptance of the said act is immaterial, since there was no necessity for any acceptance by the terms of said act, as I have already pointed out.

Very truly yours,

Paul A. Dever, *Attorney General.*

Armory — Plumbing — Local Ordinance.

Jan. 25, 1937.

Mr. Arthur F. Ford, *Superintendent of Armories.*

Dear Sir: — In reply to your oral request for the Attorney General's advice as to whether a local ordinance of the city of Holyoke, that no plumbing shall be done in that city without a permit from a local plumbing inspector given to a master plumber, requires the employment of a master plumber with such a permit to perform work in one of the Commonwealth's armories, let me say that such an ordinance has no application to work done upon the Commonwealth's own property. See Attorney General's Report, 1932, p. 86; *ibid.*, 1935, p. 38; *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440, 443.

Very truly yours,

Paul A. Dever, *Attorney General.*

Metropolitan District Commission — Erection of Bath House — Improvement of Location.

Jan. 29, 1937.

Hon. Eugene C. Hultman, *Commissioner, Metropolitan District Commission.*

Dear Sir: — Replying to your letter of recent date, with reference to your duties under the terms of St. 1936, c. 331, the building of a bath house at the given place is the main purpose of the said chapter 331. The making of improvements at the location is incidental thereto, for by the wording of the act they are to be "related" to the bath house and to be

made so as to make "the same" (and its approaches) "suitable and adequate for public bathing."

The terms of the statute are in such mandatory form as require you to do all the work therein referred to. If new conditions have arisen since the passage of the act, as you suggest, which make the building of the proposed bath house undesirable, you should immediately seek legislation for the repeal or amendment of the act; otherwise it will be your duty to proceed with the construction of the bath house with reasonable dispatch. You are not vested with such discretion, under the same chapter, as would warrant you in making improvements without building the bath house, as to which the improvements are to be related and subsidiary, as shown by the following language of the chapter —

"and to make such related improvements at the location of such bath house and approaches thereto as may be necessary to make the same suitable and adequate for public bathing."

In other words, the making of improvements is so closely connected with the erection of the bath house, by the context of the said chapter, that the Legislature has plainly shown an intention that the improvements shall not be made separate and apart from the erection of the bath house.

Very truly yours,

Paul A. Dever, *Attorney General.*

Department of Public Works — Special Police — Municipalities — Workmen's Compensation.

Jan. 29, 1937.

Hon. William F. Callahan, *Commissioner of Public Works.*

Dear Sir: — Replying to your letter of recent date relative to the form of article XXV of your standard specifications, as it relates to "special uniformed police," I am advised that the "special uniformed police" referred to therein are police appointed by, and serving under, town governments.

Such police are not employees of contractors; they are not, under the usual circumstances of their employment, servants of the Commonwealth, but are employees of towns. This was decided in a case heard in 1933 by the Industrial Accident Board, *Bradley* v. *Employers' Liability*, and with that decision I agree.

This being so, these special uniformed police, who are obtained from the town authorities by the contractor, are not his employees, although under some arrangement with such authorities he usually pays their wages. Consequently, he should not be required to provide coverage for them under a workmen's compensation policy, upon which, as to them, the insurer will deny liability, as has been done on various occasions in the past.

Accordingly, you should delete from your standard specifications all requirements obliging the contractor to have such special uniformed police who are town officers covered by workmen's compensation insurance, all agreements to reimburse the contractor for the premiums for coverage of such officers, and all requirements that the contractor should report the names of such police to his insuring company.

It would be advisable for your department, if it finds that some payment for possible injuries should be readily available to town officers who

may be hurt by reason of negligence while working in connection with a contractor's job, to ascertain whether some form of liability coverage will be written by casualty insurance companies, at a reasonable price, to insure the contractor against liability for injury to such officers, irrespective of the Workmen's Compensation Law.

If such form of coverage is available, your contracts might then be written so as to require those desiring to make contracts with the Commonwealth to take out policies of insurance giving such coverage.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Governor and Council — Appointments — Salary — Department of Corporations and Taxation.

FEB. 3, 1937.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — I am in receipt from you of four letters from the Chairman of the Commission on Administration and Finance, — two dated January 22, 1937, and January 25, 1937, respectively, and addressed to His Excellency; and the remaining two similarly dated and addressed to His Excellency and the Council. These letters deal with the appointment on January 6, 1937, of two assistant inheritance tax examiners to the positions of senior inheritance tax examiners in the Division of Inheritance Taxes of the Department of Corporations and Taxation, by the Commissioner thereof, at salaries of $3,240 and $3,360, respectively, which were approved by the Governor and Council; and of the appointment of an individual as an income tax assessor in the Income Tax Division, at a salary of $4,080; and five other persons as deputy income tax assessors, at various salaries ranging from $1,800 to $2,500, — all of whom were appointed by the Commissioner, and whose respective appointments and salaries were approved by the Governor and Council. These letters also call attention to the action of the Governor and Council on December 30, 1936, purporting to establish the salary of one Francis L. Cormack as income tax assessor at $3,720 a year; and approving the designation of Thomas P. Nugent as an income tax assessor at a salary of $3,180.

The said correspondence also raises the question as to whether or not the Governor and Council were authorized to fix the salary of the deputy commissioner from a minimum of $5,700 to a maximum of $6,600; that of the second deputy commissioner from a minimum of $4,800 to a maximum of $5,700; that of the assistant director, Corporation Tax Division, from a minimum of $3,600 to a maximum of $4,500; and that of the assistant director, Inheritance Tax Division, from a minimum of $3,600 to a maximum of $4,500, as the action of the Governor and Council, taken on December 30, 1936, purported to do. There is a further inquiry contained in the said correspondence as to the authority of the Governor and Council to authorize the appointment of a temporary fish inspector for the period of three months, at the rate of $150 per month, upon the requisition of the State Inspector of Fish, which requisition was approved by the Commissioner of Conservation.

You have requested my opinion as to the validity of each of the aforesaid appointments, and have also raised the question as to whether the Governor and Council had authority to fix the rates of salaries above enumerated.

Recourse must be had to the governing statute for the ascertainment of the correct decision of the questions now presented. The appointing power of the Commissioner of Corporations and Taxation is set forth in G. L. (Ter. Ed.) c. 14, § 4, which reads as follows: —

"The commissioner may, with the advice and consent of the governor and council, appoint and remove the following officers and subordinates in his department:

A deputy commissioner and a second deputy, each at such salary as may be fixed by the commissioner, with the approval of the governor and council;

Directors of divisions, at such salary as may be fixed by the commissioner, with the approval of the governor and council;

Such supervisors of assessors, assistants and examiners as the commissioner may deem necessary, subject to the approval of the governor and council, one income tax assessor for each district established by the commissioner for the assessment and collection of the income tax, and such deputy income tax assessors, who may be members of local boards of assessors as the governor and council may deem necessary;

A principal appraiser, at such salary as may be fixed by the commissioner, with the approval of the governor and council;

Such assistants to the director of accounts as may from time to time be necessary to carry out sections forty-four to forty-seven, inclusive, of chapter thirty-five and sections thirty-five to forty-three, inclusive, of chapter forty-four.

He may appoint two permanent clerks, and may appoint such assistants to the director of the income tax division, and such assistants and clerks to the income tax assessors, as the governor and council may deem necessary.

He may appoint from time to time such appraisers as may be necessary to appraise property subject to the inheritance tax or to assist him in determining land values under section thirteen of chapter fifty-eight.

He may appoint such additional officials, agents, clerks and other employees as the work of the department requires and may remove them."

That enactment not only measures the power of the Commissioner in respect to making appointments, but it also limits the exercise of this power in the particulars therein set forth in the statute.

An inspection of the statute last enumerated shows that the Commissioner of Corporations and Taxation is authorized to appoint a deputy commissioner and a second deputy commissioner, the directors of divisions and the supervisors of assessors, assistants and examiners, income tax assessors and deputy income tax assessors, and a principal appraiser, only with the approval of the Governor and Council, and that the latter body must also approve the salaries of each of these subordinates, with the exception of the supervisors, the assistants, the examiners, the income tax assessors, and the deputy income tax assessors. Not only is the power of selection of the Commissioner subject to the approval of the Governor and Council in the instances above mentioned, but he is also unable to fix the salaries in some of the offices mentioned in the statute without similar approval from the Governor and Council.

A general power of appointment has usually been held to include the right to fix the compensation of the appointees. The Commissioner of Corporations and Taxation, however, has no such general power of ap-

pointment, and in all cases, other than those where he has the right to fix the compensation subject to the approval of the Governor and Council, the right to fix the compensation of his appointees has been entrusted by law to the Division of Personnel and Standardization. G. L. (Ter. Ed.) c. 30, §§ 45–47.

It is therefore clear that the power to fix the compensation of subordinates in the Department of Corporations and Taxation is entrusted to the Commissioner, with the approval of the Governor and Council relative to those offices expressly set forth in the statute, and that as to all other subordinates their salaries are fixed by the Division of Personnel and Standardization.

We pass now to a consideration of the appointment of the two assistant inheritance tax examiners to the position of senior inheritance tax examiners. The Governor and Council approved the establishment of the salary for each of these individuals, in one case in the amount of $3,240, and in the second case in the amount of $3,360. The rules and regulations, however, of the Division of Personnel and Standardization fixed these salaries as ranging from $3,180 to $3,720. No attempt was made to modify these rules and regulations in so far as they pertain to fixing the salary of senior inheritance tax examiners. While it is true that under G. L. (Ter. Ed.) c. 14, § 4, the Governor and Council have the right to approve the appointment by the Commissioner of such examiners, if he deemed they were necessary, yet there is no provision in this section which authorizes the Governor and Council to approve the salaries, which must be fixed in accordance with the classification and specifications already set up and existing by virtue of authority vested in the Commission on Administration and Finance under G. L. (Ter. Ed.) c. 30, § 46.

The Governor and Council had no authority to override the powers of the Commission on Administration and Finance, carried on under their rules and regulations which have heretofore been approved, and the provisions for the establishment of such officials' salaries as are not specifically required to be approved by the Governor and Council must be fixed under the specifications by the Commission on Administration and Finance, in the first instance. It therefore follows that the establishment of the salaries of these two senior inheritance tax examiners was not made in accordance with the law, and that the action of the Governor and Council on January 6, 1937, in establishing such salaries is void and without legal effect.

The result is the same, whether the action of the Governor and Council attempted to create promotions in the case of these two individuals or attempted to create new appointments to original positions, because the Governor and Council were without any legal authority to approve the nominations of the Commissioner as promotions or to fix the salaries, as they attempted to do in their action of January 6, 1937.

In reference to the appointment of the six individuals, one as an income tax assessor at a salary of $4,080, and the other five as deputy income tax assessors at salaries ranging from $1,800, in some instances, to $2,500 in others, the same statute above mentioned applies in determining the legality of the action of the Governor and Council. The latter body had no right to fix these salaries, but they did have authority to approve the action of the Commissioner in naming these six new subordinates in his department. The Division of Personnel and Standardization fixed the salary of an income tax assessor in amounts ranging from $3,180 to $3,720,

and the compensation of the deputy income tax assessors from $2,100 to $2,820. These classifications were in full force and effect on January 6, 1937, when the Council voted to establish the salaries above mentioned. The establishment, however, of the salaries for each and all of these positions was required to be made under G. L. (Ter. Ed.) c. 30, §§ 45–50, by the Commission on Administration and Finance and in accordance with existing rules and regulations and specifications, none of which had been changed, as required by the last-mentioned section, to permit the establishment of salaries in the case of each of these six individuals to the amounts in which they purported to have been established.

The only function the Governor and Council had in reference to these six appointments was the approval of the appointment and not of the salary. It is therefore clear that so much of the action of the Commissioner as fixes salaries for these six appointments is void; and that so much of the action of the Governor and Council as approved these salaries is also of no force and effect.

Although the appointment of these six persons to office was not completed until the action approving the same by the Governor and Council on January 6, 1937, the original appointment having been made on November 30, 1936, the completed appointment taking place after the close of the fiscal year, there existed an appropriation, as I am informed by the Comptroller, made for the year 1936 generally, for the purpose of the maintenance of the office and work of the Commissioner of Corporations and Taxation, which was intended to, and did, cover provision for salaries of subordinates in the Department of Corporations and Taxation, without naming them seriatim.

I am therefore of the opinion that the appointment of these six persons was not contrary to the provisions of G. L. (Ter. Ed.) c. 29, § 27, because there was in fact an appropriation sufficient to cover the expenses of the salaries of all such persons, and that after the close of the fiscal year the Commissioner might continue expenditures from this general appropriation at the previously authorized rate until a new appropriation had been made. This being so, I am of the opinion that the appointment of these six persons was validly made and approved, but that their salaries have not been established according to law.

The correspondence also refers to the fixing, on December 30, 1936, by the Governor and Council, of increased compensation for the deputy commissioner, the second deputy commissioner, the assistant director, Corporation Tax Division, and the assistant director, Inheritance Tax Division.

The right to fix the salaries of the deputy commissioner and the second deputy commissioner is expressly entrusted to the Commissioner, with the approval of the Governor and Council, by the provisions of G. L. (Ter. Ed.) c. 14, § 4, notwithstanding that the amounts finally established might be excessive compared with the amounts of compensation paid to various other State officials. This being so, there is no question of law which arises on this phase of the matter.

The attempt, however, by the Governor and Council to raise the compensation of the assistant director, Corporation Tax Division, and the assistant director, Inheritance Tax Division, was not subject to approval by the Governor and Council, but came under the jurisdiction of the Division of Personnel and Standardization, whose rules and regulations set the salary in each instance from $3,300 to $4,020. For the reasons above mentioned the action of the Governor and Council in attempting

to increase the salary in these two instances was contrary to the provisions of said chapter 30, sections 45 *et seq.*, and consequently was of no force and effect.

On December 30, 1936, the Governor and Council purported to establish the salary of Francis L. Cormack, an income tax assessor, at $3,720 a year. Mr. Cormack was at this time receiving $3,540. On the same date the Council purported to approve the designation of Thomas P. Nugent, who was then a deputy income tax assessor, to the designation of income tax assessor, at a salary of $3,180.

In the first instance the action of the Governor and Council finds no warrant in law, because the determination of the salary of Mr. Cormack came within the exclusive jurisdiction of the Division of Personnel and Standardization, which, as the records show, took no part in the purported increase of this official's salary. The action relative to Nugent was virtually a promotion with a consequential increase of salary. Such was contrary to the provisions of G. L. (Ter. Ed.) c. 30, § 47. Therefore, the action of the Governor and Council with reference to both of these officials was invalid.

In reference to the action of the Governor and Council on January 6, 1937, purporting to authorize the appointment of a deputy inspector of fish for three months at the rate of $150 a month, it is clear from the record that no emergency existed incurring extraordinary expenses, the payment for which was not otherwise provided for, and consequently there was no authority for transferring $450 from the extraordinary expense account, as provided for in G. L. (Ter. Ed.) c. 6, § 8. In the next place, the Governor and Council were without authority to create this new office and to approve the salary at the above rate, or, in fact, at any rate, as that power was inherent in the Division of Personnel and Standardization. I am informed that no appointment has ever been made to this temporary position, and I would therefore advise immediate retransfer of the $450 to the extraordinary fund, simply as a matter of record, even though the original transfer was without validity.

In reviewing the action of the Governor and Council in each and every one of the instances above enumerated in this opinion, I pass no judgment as to the wisdom of making any of the said appointments or of the desirability of retaining any of the present incumbents in their present offices. It is beyond my province to express any opinion on such matters. My solemn obligation is to decide the questions presented in accordance with the pertinent principles of law. I have no duty to pass upon the policy of administrative offices, but I am entirely confined to determining whether the action of any appointive agency in making the appointments in question was within its power and authority. I am concerned only with the question of legal power and not of administrative policy.

I am, accordingly, of the opinion that the attempted promotion of the two assistant inheritance tax examiners was of no force and effect and that they still continue in their old positions; that the appointment of the six individuals — one as an income tax assessor and the other five as deputy income tax assessors — was valid and binding in so far as the appointments themselves were concerned, and that the salary for each is that fixed by the specifications, rules and regulations of the Division of Personnel and Standardization; that the action of the Governor and Council in attempting to increase the salary of Cormack and to promote Nugent from a deputy income tax assessor to an income tax assessor was without the force of law; that the attempt of the Governor and Council

to increase the salary of the assistant director, Corporation Tax Division, and that of the assistant director, Inheritance Tax Division, was contrary to the provisions of law; and that the appointment of a temporary inspector of fish was without legal support.

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

Department of Public Works — Grade Crossings — Orders — Amendments.

FEB. 3, 1937.

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

DEAR SIR: — You have requested my advice as follows: —

"This department has recently issued a number of decrees for the abolition of railroad grade crossings under G. L. (Ter. Ed.) c. 159, §§ 65–77, inclusive. It now appears that in two cases minor revisions of the decrees are necessary. In one case the revision consists of the taking of an additional easement from the railroad company, and in the other case the revision consists of a change in location of a railroad side track and a driveway leading to it.

The law does not specify the procedure to be followed in amending a decree which has been issued by this department, approved by the Department of Public Utilities, and filed.

Will you kindly advise me as to the general procedure to be followed."

I am of the opinion that your department has authority, under G. L. (Ter. Ed.) c. 159, §§ 65–77, to amend an order made by it determining the manner and limits of a grade crossing abolition, even after it has been consented to by the Department of Public Utilities and been filed in the office of said department and of the Department of Public Works, and copies thereof served in accordance with the provisions of section 70 of said chapter 159.

Authorities exercising an administrative or quasi-judicial authority have generally, under our laws, the inherent power to amend their findings or orders when it may become necessary. It is true that the instant statute does not specifically provide for such an amendment, yet, on the other hand, the statute does not state that the order of the Board shall be final.

When the power was lodged in the courts to deal with the abolition of grade crossings and to make decrees relative to the manner of apportioning the expenses thereof and the mode of doing the work of construction, the proceedings were carried on in equity, and a final decree was ultimately made by the court similar in kind to the order in question now made by the Commission under the instant statute. It was then held that such final decree in equity might be altered when necessity arose, through the medium of a bill of review, and that under such a bill the court might reform, change and amend the original decree so that it should be adapted to the requirements of justice and the legal rights of the parties, and that at a hearing upon such a bill of review all questions of present equity between the parties, whether arising in the original petition or from expenditures made in expectation of the enforcement of the original decree, would be open for consideration and adjustment. *Boston & Maine R.R.* v. *Greenfield*, 253 Mass. 391.

If a review of the final decree in a court of equity under the earlier statutes, which in effect was tantamount to an amendment of the order made by your department in the instant proceedings, was held to be proper and a necessary form of procedure under circumstances requiring a change in the original scheme, it would seem that a power so to amend your own order is vested in you.

In order to so amend your ruling you should prepare an amended order in the form in which you now desire to have it; you should hold public hearings thereon, giving due notice to such railroad corporations, counties, cities and towns as may be required by law to bear part of the cost of abolition as you were obliged to do upon your original hearing under said section 70; and thereafter make an amended order containing all determinations, including those which you now desire to add by amendment, procure the consent of the Department of Public Utilities to such amended order, file it in the office of that department and in your own department, and serve upon the various offices, corporations and political subdivisions as to which filing was required of the original petition under said section 70.

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

Civil Service — Disabled Veteran — Preference.

FEB. 5, 1937.

Hon. THOMAS H. GREEN, *Commissioner of Civil Service.*

DEAR SIR: — Replying to your letter of recent date regarding the proposed promotion of an intermittent school janitor to the position of a permanent full-time janitor, in Everett, the Attorney General does not pass upon questions of fact; that is the province of the Commissioner.

Assuming that the facts relative to the present situation are like those which existed in connection with an intermittent school janitor whose case you laid before me last summer, the law applicable to such situation is as stated in my opinion to you of July 10, 1936. Attorney General's Report, 1936, p. 78.

Accordingly, it would seem that the statement which you advise me you have made to the superintendent of schools of Everett, to the effect that a disabled veteran upon the eligible list for the position of a permanent full-time janitor must be appointed and employed in such position in preference to a person not a disabled veteran, who might be promoted thereto from the place of an intermittent janitor, is a correct statement as to the applicable law.

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

Legislative Agent — Legislative Counsel.

FEB. 5, 1937.

Mr. CHARLES O. HOLT, *Sergeant-at-Arms.*

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

"G. L. (Ter. Ed.) c. 3, § 39, defines 'legislative counsel' and 'legislative agent' as follows:

'''Legislative counsel'' any person who for compensation appears at any public hearing before any committee of the general court in regard to proposed legislation, and who does no other acts in regard to the same except such things as are necessarily incident to such appearance before such a committee;

''Legislative agent'', any person who for hire or reward does any act to promote or oppose legislation except to appear at a public hearing before a committee of the general court as legislative counsel.'

I respectfully request your opinion as to whether under said definitions a person who is manager of a public utility corporation, on an annual salary, may appear before a committee of the General Court in regard to proposed legislation affecting his corporation without registering with the Sergeant-at-Arms. The specific case I have in mind is that of a man whose duties do not specify or mention the fact that he shall so appear at any time, but who considers it part of his powers and duties to act in all matters affecting his corporation whenever he deems it advisable.

Would the president or vice-president of a corporation with similar powers and duties be required to register with the Sergeant-at-Arms if he should desire to appear before a committee of the General Court as aforesaid?''

It is immaterial in what form an individual receives ''compensation'' from his employer for performing the acts described, as appertaining to the work of a ''legislative counsel,'' in the above-quoted language of G. L. (Ter. Ed.) c. 3, § 39. He may receive it in the form of an annual salary applicable to various services or in the shape of a payment for specific work before legislative committees alone. In either case, he comes within all the provisions of said chapter 3 relative to a legislative counsel. See I Op. Atty. Gen. 31; III *ibid.*, 469.

Upon the facts as you have set them forth, it would appear that the manager of a public utility corporation, to whom you refer specifically in your communication, should be registered in your dockets like any other ''legislative counsel,'' under the provisions of said chapter 3, sections 39–42.

Under ordinary circumstances, the officers of corporations mentioned in your letter should likewise be so registered.

Very truly yours,

Paul A. Dever, *Attorney General.*

State Armory — Use by Organizations.

Feb. 9, 1937.

Brig. Gen. Charles H. Cole, *The Adjutant General.*

Dear Sir: — I am in receipt from you of a communication ''requesting an opinion as to whether rifle or pistol teams, composed of members of organizations of war veterans, may be allowed the use of the indoor ranges in State armories without charge, under the provisions of G. L. (Ter. Ed.) c. 33, § 48 (*a*), as amended.''

There is no specific provision made by the General Laws for the use of indoor ranges in State armories by members of organizations of war veterans.

G. L. (Ter. Ed.) c. 33, § 48 (*a*), as amended, does provide: —

"Any armory, . . . may be used, . . . without charge . . . for drill purposes by drill teams, bands or drum corps composed of members of organizations of war veterans. . . ."

I am of the opinion that the words "for drill purposes," as used in the context of said section 48 (*a*), cannot reasonably be construed so as to include shooting by rifle or pistol teams at the ranges in State armories.

While the word "drill" is sometimes used as meaning all parts of the training of a soldier, nevertheless it is more commonly employed to denote such portion of that training as consists in performing the manual of arms, exercising and marching. The employment of the words "drill purposes" in said section 48 (*a*) in connection with the words "drill teams," "bands" and "drum corps" appears to me to indicate the intent of the Legislature that the words in question as here used should have the more restricted meaning.

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

Old Age Assistance — Municipalities — Reimbursement.

FEB. 12, 1937.

Hon. WALTER V. MCCARTHY, *Commissioner of Public Welfare.*

DEAR SIR: — I understand from your recent communication that during the period from February 1 to August 31, 1936, certain cities and towns of the Commonwealth were granted sums of money directly by the Commonwealth for old age assistance, which money was previously received by the Commonwealth from the Federal government under the provisions of the Federal Social Security Act, Title 42, U. S. C. A. I understand further that during the same period the cities and towns expended moneys from their own treasuries for such old age assistance beyond the sums received from the State in the foregoing manner.

It appears by the provisions of G. L. (Ter. Ed.) c. 118A, § 3, in the form in which it was in effect between February 1 and August 31, 1936, that —

"In respect to all aged persons in receipt of assistance under this chapter, the town rendering the assistance shall, after and subject to approval of the bills by the department and subject otherwise to the provisions of section forty-two of chapter one hundred and twenty-one, *be reimbursed by the commonwealth for one third of the amount* of assistance given, or, if the person so aided has no settlement in the commonwealth, for the total amount thereof. If the person so aided has a legal settlement in another town, two thirds of the amount of such assistance given may be recovered in contract against the town liable therefor in accordance with chapter one hundred and seventeen."

I am informed that when the time came for reimbursement of the cities and towns they were directed by your department to render a bill to the Commonwealth showing an amount equal to one third of the moneys actually expended from their local treasuries, not including the sum of money paid to them from the Federal grant; and your inquiry, as I gather from your communication, is directed to ascertaining whether your procedure in this respect was correct.

I am of the opinion that such procedure is correct.

I understand that the various cities and towns claim that they are entitled to reimbursement from the Commonwealth in an amount equal to one third of the total of the amounts paid from their own treasuries plus the amount expended by them from the portion of the Federal grant allotted to them. I think that this position is incorrect, and that the repayment intended by the Legislature, as expressed in said chapter 118, section 3, — "be reimbursed by the commonwealth for one third of the amount of assistance given, or, if the person so aided has no settlement in the commonwealth, for the total amount thereof", — refers to a repayment by the Commonwealth to the cities and towns of the mentioned portion of money actually disbursed by them from their own funds, irrespective of any Federal money which may have been allotted to them.

For the Commonwealth to allot to a city a given amount of money received from the Federal government and then to be required to repay to the town such amount when spent by the town is not reimbursing the town, as the word "reimbursed" is used in the statute. The intent of the Legislature was that the town should be reimbursed for the amount of its own money originally in its treasury, unaugmented by any grant made to it. To hold otherwise would be to make such allotments of Federal money a permanent acquisition to the town's treasury, since its expenditure would be continually made good from the Commonwealth's treasury. Any such procedure was manifestly not within the intention of the Legislature in drawing the statute. The statute contemplates the reimbursement of such of the town's own funds as it has disbursed, and does not include the idea of repayment of expenditures made from special grants of money flowing from other sources than those of the ordinary revenue of the city or town.

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

State Armory — State Department or Division — Compensation for Use.

FEB. 12, 1937.

Brig. Gen. CHARLES H. COLE, *The Adjutant General.*

DEAR SIR: — I am in receipt from you of a communication "requesting an opinion as to whether a State department, or a division of a State department, may be allowed the use of a State armory *without charge,* under the provisions of G. L. (Ter. Ed.) c. 33, § 48 (*c*)."

G. L. (Ter. Ed.) c. 33, § 48 (*c*), to which you refer, specifically provides, in its applicable parts: —

" . . . armories may be used temporarily for the following public purposes:

A public meeting or hearing held by a state department or commission.

An examination conducted by the division of civil service. . . .

Compensation for the use of any armory under this subsection *shall be* fixed by the adjutant general . . . and shall not exceed a sum sufficient to cover all expenses of lighting, heating and guarding the armory, and similar expenses. Such compensation shall be paid to the adjutant general who shall pay the same to the commonwealth."

It was plainly the intention of the Legislature that the expense of conducting meetings of other branches of the State service should not be borne

by the branch in which you serve. Although the ultimate cost to the Commonwealth is not affected, a system of primary interdepartmental financial responsibility for the same has been established by the General Court under the said section, which you are not at liberty to disregard.

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

National Guard — License for Beano Games.

FEB. 19, 1937.

Brig. Gen. CHARLES H. COLE, *The Adjutant General.*

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

"Your opinion is requested as to whether a unit of the Massachusetts National Guard comes within the provisions of St. 1934, c. 371, provided the funds obtained from admission charges revert into the company fund of the National Guard unit, said funds being used to promote the educational, social and athletic activities of the unit."

Irrespective of the purposes to which funds received in connection with a game of beano, to which I assume your communication relates, are devoted, G. L. (Ter. Ed.) c. 271, § 22A, as amended by St. 1936, c. 222, provides specifically, with relation to the license necessary to conduct such game, that —

"No license under this section shall be granted except to a charitable, civic, educational, fraternal or religious organization."

A unit of the National Guard does not come within the description of any of the five classes of organizations which may be so licensed.

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

State Armory — Municipality — Compensation.

FEB. 19, 1937.

Brig. Gen. CHARLES H. COLE, *The Adjutant General.*

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

"Your opinion is requested as to whether the town of Adams may be allowed the use of the State armory at Adams without charge, under the provisions of G. L. (Ter. Ed.) c. 33, § 48 (*c*), in view of the fact that the town of Adams donated the land upon which the armory was built, and also donated the sum of $10,000 towards the cost of the construction of the armory."

The provisions of G. L. (Ter. Ed.) c. 33, § 48 (*c*), are mandatory in requiring that —

"Compensation for the use of any armory under this subsection shall be fixed by the adjutant general . . . and shall not exceed a sum sufficient to cover all expenses of lighting, heating and guarding the armory, and similar expenses. Such compensation shall be paid to the adjutant general who shall pay the same to the commonwealth."

As I said in my opinion to you of February 12, 1937 (*ante*, p. 62): —

"It was plainly the intention of the Legislature that the expense of conducting meetings of other branches of the State service should not be borne by the branch in which you serve."

This statement applies equally to the use of a State armory, under said section 48 (*c*), by a municipality. There is nothing in the said statute which shows any legislative intent to give the use of the armories for the purposes enumerated under said section 48 (*c*) to municipalities without the receipt of such compensation as is to be exacted from others. It is immaterial in this connection that a municipality may have donated land or money toward the erection of a State armory. No expressed or implied exception to the general rule relative to payment of compensation, laid down in said section 48 (*c*), exists in favor of such a municipality.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Metropolitan District Commission — Contract — "Change Orders" — Extra Work.

FEB. 24, 1937.

Metropolitan District Commission.

GENTLEMEN: — You have asked my opinion, in effect, as to whether or not the chief engineer of your Commission was acting within the scope of his authority when he issued "change orders," which I take to be orders for extra work, within the meaning of the contract provisions as shown in the specimen contract which you forwarded to me, and made a determination as to the amount and value of such extra work for the contractor.

In your contract appears the following paragraph with relation to "extra work." This paragraph binds the contractor and is notice to him of the scope of the authority of your engineer. Article XVII, on page 31 of the contract and specifications, reads, in its applicable parts, as follows: —

"The Contractor shall do any work not herein otherwise provided for, when and as directed in writing by the Engineer . . . and shall, when requested by the Engineer, so to do, furnish itemized statements of the cost of the work ordered and give the Engineer access to accounts, bills and vouchers relating thereto, . . . The determination of the Engineer shall be final upon all questions of the amount and value of extra work, but in no greater amount than is approved in writing by the Commission and the State Emergency Public Works Commission."

It is plain that the engineer is given authority to require the contractor to do such extra work as he shall determine necessary, and that the determination by the engineer as to the "amount and value" of the extra work is also within his authority. Such determination, however, is subject to approval, in writing, by your Commission and by the State Emergency Public Works Commission, jointly, of the maximum "amount."

I am of the opinion that, as disclosed by the context of said article XVII, the words "amount and value," in the last sentence, refer to the quantity of the work ordered by the engineer and to the cost thereof. These matters are determined by the engineer, as I have said. I am, however, of the opinion that the word "amount," in the next to the last line of said article, means the amount of money which is to be paid to the

contractor for the extra work done under the contract, and this amount cannot be greater than the sum approved jointly by the two Commissions, as I have said.

The first question which you ask me categorically reads as follows: —

"Did the Chief Engineer act within the scope of his authorities in issuing these change orders?"

In view of the considerations which I have outlined, I answer this question in the affirmative, reminding you that the determination of the price to be paid for the extra work is subject to the approval of the two Commissions.

Your second question is as follows: —

"Has the Emergency Public Works Commission, under its authority, the right to require the Metropolitan District Commission to approve these orders if properly issued by the Chief Engineer?"

I answer this question in the negative. Your Commission is bound by the orders of its chief engineer, in so far as he has required the contractor to do extra work, but you are not obliged to pay therefor any amount greater than is approved jointly by your Commission and the State Emergency Public Works Commission.

Very truly yours,
Paul A. Dever, *Attorney General.*

Public Utilities — Water Companies' Rates in Hingham and Hull.

Feb. 25, 1937.

Hon. A. C. Webber, *Chairman, Department of Public Utilities.*

Dear Sir: — You have requested my opinion in the following communication: —

"Has the Department of Public Utilities authority and jurisdiction over water companies to regulate the rates charged to their customers for the use of water in the towns of Hingham and Hull, or is that authority and jurisdiction still retained by, and exclusive in, the Supreme Judicial Court upon petition as provided by G. L. (Ter. Ed.) c. 92, § 16, notwithstanding general jurisdiction of the department over gas, electric and water rates under St. 1927, c. 316, now G. L. (Ter. Ed.) c. 164, § 94, and c. 165, § 2?

The jurisdiction of this department is challenged in an investigation by the department, on its own motion, as to the propriety of water rates charged by the Hingham Water Company at Hingham and Hull."

I am of the opinion that your department has authority and jurisdiction to regulate the rates charged by the Hingham Water Company at Hingham and Hull.

Irrespective of the right reserved to the water companies of Hingham and Hull to have jurisdiction of their rates vested in the Supreme Judicial Court, in contradistinction to other water companies, which in this respect were under the jurisdiction of your department prior to 1927, which right was specifically set forth in the compilation of the laws in 1921 and is stated in G. L., c. 92, § 16, said water companies of Hingham and Hull now come within your jurisdiction by virtue of St. 1927, c. 316, § 3, which, by implication, repealed the provisions of earlier enactments, including said

G. L., c. 92, § 16, so far as they deprived your department of jurisdiction over said companies in Hingham and Hull.

St. 1927, c. 316, was entitled: "An Act further extending public control and supervision in respect to *rates*, charges, forms of contract and quality of product of gas, electric and *water* companies."

Section 3 reads: "The provisions of this act shall apply to water companies."

It is not necessary to trace at length the history of antecedent statutes relative to the establishment and regulation of water rates in the metropolitan water supply district and in Hingham and Hull. Sts. 1895, c. 488; 1897, c. 336; 1909, c. 74; 1914, c. 787; Gen. St. 1917, c. 166; St. 1920, cc. 295, 583. It need only be said that the special provisions with relation to the rights of direct appeal by Hingham and Hull to the Supreme Judicial Court in relation to rates which arose under the antecedent statutes and were incorporated in G. L., c. 94, § 16, are incorrectly set forth in the Tercentenary Edition of the General Laws as an enforceable part of said section 16 of chapter 94, since such special provisions were repealed by implication in the enactment of said St. 1927, c. 316, which gave jurisdiction in relation to charges and rates of all water companies to your department. See *Salisbury* v. *Salisbury Water Supply Co.*, 279 Mass. 204, 206, and cases there cited.

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

Motor Vehicles — Municipal Regulations.

FEB. 25, 1937.

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

DEAR SIR: — You have laid before me a copy of an ordinance of the city of Newton which, by its terms, purports to restrict "the use and operation of heavy commercial vehicles" upon certain designated streets.

Inasmuch as this ordinance, by its terms, is applicable to all heavy commercial vehicles, it cannot be said as a matter of law to constitute "special regulations as to the speed of motor vehicles and as to the use of such vehicles altogether on certain ways" nor to "prohibit the use of such vehicles altogether on certain ways," within the meaning of the quoted words as they are employed in G. L. (Ter. Ed.) c. 90, § 18. This being so, it does not fall within the requirement of said section 18 that a certificate in writing from your department, made after a public hearing, setting forth that such regulation "is consistent with the public interests," shall be given in order that it may be effective. See IV Op. Atty. Gen. 7.

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

National Guard — Municipality — Permit for Beano Games.

MARCH 2, 1937.

Brig. Gen. CHARLES H. COLE, *The Adjutant General.*

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

"1. The question has been raised by the selectmen of Norwood regarding the legality of issuing a permit for beano games to G Company 101st

Infantry, in accordance with St. 1934, c. 371, as a civic organization. It is requested that an opinion on the matter be obtained from the Attorney General.

2. It is further requested that, inasmuch as neither the unit nor the State armory is in any way under the supervision or control of the town of Norwood, the question of the legality of a permit issued by the Commander-in-Chief for such beano games be submitted to the Attorney General for an opinion."

1. The opinion which I rendered you on February 19, 1937 (*ante*, p. 63), answers your first question. In it I stated that "a unit of the National Guard does not come within the description of any of the five classes of organizations which may be so licensed" to conduct beano games, under G. L. (Ter. Ed.) c. 271, § 22A, as amended. A unit of the National Guard is not a "civic organization"; it is a *military* organization.

2. In answer to your second question, it is enough to call your attention to the fact that no authority is vested by the statutes in the Commander-in-Chief of the military forces of the Commonwealth to issue permits for games of beano.

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

Civil Service — Examinations — Seniority.

MARCH 5, 1937.

Commissioners of Civil Service.

GENTLEMEN: — You have recently asked my opinion in the following language: —

"G. L. (Ter. Ed.) c. 31, § 3, gives authority to the Commission to make rules, and, under clause (*d*), provides that said rules shall include provisions for

'(*d*) Promotions, if practicable, on the basis of ascertained merit in the examination and seniority of service.'

Civil Service Rule 28 on promotion provides in section 1:

'In the official service, a promotion from one grade, as fixed by the rules or determined by the Commissioner, 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 noncompetitive examination, as the Commissioner may decide, except as otherwise provided by statute.' G. L. (Ter. Ed.) c. 31, § 20.

In view of the above, will you please give the Commission your official opinion on these questions:

(1) In the drawtender service of Boston, can the Commission insist that promotion be made on the basis of seniority in service, and allow the promotion of the senior man without examination?

(2) Can the Commission insist that the senior man be promoted after noncompetitive examination?"

The provision of your Rule 28 above quoted, which you have authority to make under G. L. (Ter. Ed.) c. 31, § 3, requires that there shall be a competitive or a noncompetitive examination before a promotion. Your rule does not itself touch upon the matter of seniority, but it was the obvious intention of the Legislature, in enacting G. L. (Ter. Ed.) c. 31, § 3,

that seniority was to be considered, as well as the result of an examination, in determining upon the availability of an employee for promotion. See *McDowell* v. *Hurley*, 291 Mass. 258.

Accordingly, I answer your first question in the negative and your second question in the affirmative, assuming that the senior man mentioned in said second question has passed his examination.

Very truly yours,
Paul A. Dever, *Attorney General.*

Shellfish — Certificate — Contamination.

March 10, 1937.

Hon. Ernest J. Dean, *Commissioner of Conservation.*

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

"Is it necessary for a person who transports or causes to be transported into this Commonwealth for consumption as food, scallops taken or dug from grounds outside the Commonwealth, or sells, causes to be sold, or keeps, offers or exposes for sale for consumption as aforesaid, any scallops so taken or dug, to have on file in the department of public health a certificate, approved by said department, in which such department of public health or a board or officer having like powers of the state, country or province where such grounds are located, stating that such grounds are free from contamination, and also a certificate, approved as aforesaid, in which such state board or department of health or other board or officer having like powers states that the establishment and equipment of the person shipping said scallops into this Commonwealth are in good, sanitary condition?"

I answer your question in the affirmative. G. L. (Ter. Ed.) c. 130, § 73, as enacted by St. 1933, c. 329, § 2, forbade the taking of shellfish without a bed certificate stating that the waters and flats from which they were taken within this Commonwealth were free from contamination. Section 74 of said chapter 130, as enacted by said St. 1933, c. 329, § 2, forbade the transportation into the Commonwealth and the sale therein of any shellfish taken or dug on grounds outside the Commonwealth unless there is on file with the Department of Public Health a certificate from the state wherein they were taken or dug, stating that the grounds from which they were taken in said state were uncontaminated.

By St. 1935, c. 117, said section 73 was amended by excepting scallops from its provisions. No amendment has been made by the Legislature of the provisions of said section 74 since their enactment in their present form in 1933. Therefore, the provisions of section 74 apply to scallops as well as other shellfish coming into Massachusetts from waters or grounds outside the Commonwealth, for the Legislature has not seen fit by specific change of the wording of said section 74, or by implication, to amend or alter its terms ("any shellfish"). No implication of amendment or change in the provisions of said section 74 can be derived from the specific alteration of the provisions of said section 73.

Very truly yours,
Paul A. Dever, *Attorney General.*

Civil Service — Fall River Employees.

March 16, 1937.

Hon. Thomas H. Green, *Commissioner of Civil Service.*

Dear Sir: — You have asked my opinion in the following communication: —

"I hereby request your opinion as to whether or not the position of industrial agent in the Fall River board of finance is classified under civil service. This Commission has ruled that this position is classified under Civil Service Rule 4, section 1, class 8, reading as follows: —

'Class 8. Claim agents, purchasing agents, and other agents whose duties may be in part clerical.'

The Fall River board of finance has called my attention to St. 1931, c. 44, § 16, contending that this section of the law exempts the employees of their board from civil service. St. 1931, c. 44, § 16, reads, in part, as follows: —

'The operation of such part of any statute as is inconsistent with the provisions of this act, in so far and to the extent that it applies to the city of Fall River or to any of its interests or affairs, shall be suspended so long as the powers and duties of the board continue to be in effect hereunder. Every reference in this act to any statute shall be construed to include all amendments thereto in force at the time of the passage hereof.'"

By St. 1931, c. 44, § 7, the Fall River board of finance was given authority to employ "such experts, counsel and other assistants, and incur such other expenses as it may deem necessary."

There would not appear to be anything in said chapter 44, section 7, concerning the employment of such persons as are mentioned therein, inconsistent with the provisions of the Civil Service Law. The provisions of section 9 of said chapter 44, with relation to the appointment of certain officials to designated offices, are so worded that they would be inconsistent with the provisions of the Civil Service Law, and, accordingly, by reason of section 16 of said chapter 44, which is set forth in your communication, the Civil Service Law could not be applied to such officials.

But with relation to those persons who are employed by virtue of the power given by said section 7, the terms of the Civil Service Law, as embodied in G. L. (Ter. Ed.) c. 31, as amended, are not inconsistent with the provisions of said section 7 regarding the employment of such persons, of whom I assume the "industrial agent," who is the subject of your letter, is one.

I am informed that in two prior instances employees of the Fall River board of finance have been dealt with under the civil service laws and rules and regulations, and I am of the opinion that such practice is correct and should be applied with relation to the instant case.

Very truly yours,

Paul A. Dever, *Attorney General.*

Civil Service — State Board of Housing — Employees.

MARCH 16, 1937.

Hon. THOMAS H. GREEN, *Commissioner of Civil Service.*

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

"I have ruled that the following positions under the State Board of Housing are classified under civil service: —

Research-stenographer.
Investigator.
Executive secretary.
Bookkeeper.
Cataloguer-stenographer.
Architectural adviser.

Mr. John Carroll, Chairman of the State Housing Commission, informed me, in a letter of February 15th, that he has taken this matter up with your office and that he has been given an unofficial opinion that the employees of the State Board of Housing do not come under civil service law and rules. He makes reference to St. 1935, c. 449, § 1A, amending G. L. (Ter. Ed.) c. 18, § 18. I do not find anything in this section of the law exempting the employees of this Board from civil service. . . .

Civil Service Rule 4, section 1, provides for the placing of the positions named above under civil service."

If the positions to which you refer were offices, the persons appointed to them by the State Board of Housing would be "officers" and would not be subject to the civil service rules and regulations, since their appointments would be subject to the approval of the Governor and Council (G. L. [Ter. Ed.] c. 18, as amended), and that being so, they would be exempt from the scope of the civil service rules and regulations by virtue of G. L. (Ter. Ed.) c. 31, § 5.

However, it is plain that the holders of the positions which you enumerate will not be "officers" but employees of the Commonwealth, and as such they are not exempt from the provisions of the civil service laws and rules and regulations, even if their appointment is subject to the approval of the Governor and Council. See Attorney General's Report, 1932, p. 44.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Boston Elevated Railway Company — Assessment upon the City of Revere — Operating Deficiency.

MARCH 18, 1937.

Hon. WILLIAM E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You have asked my opinion, in effect, as to whether you should assess upon the city of Revere any sum on account of the default of the Boston Elevated Railway Company on the subway rental provided for by St. 1930, c. 394. You advise me that heretofore Revere has not been assessed either for operating deficiency or for rental default of the company, because the railway did not operate in Revere prior to 1937.

St. 1932, c. 299, provided for the acquisition by the Boston Elevated

Railway Company of the property of the Eastern Massachusetts Street Railway Company in Revere and other places, and it was set forth in section 4 thereof as follows: —

"If any sale and purchase authorized by sections two and three is effectuated, the property so acquired shall be operated by the Boston Elevated Railway Company, hereinafter called the company, as a part of its entire system in the same manner as to fares and in all other respects as though it had been incorporated therein prior to July first, nineteen hundred and eighteen, and in respect thereof the company shall have all the powers and privileges and be subject to all the duties, liabilities, restrictions and provisions set forth in general and special laws now or hereafter in force and applicable to it except as in this act otherwise expressly provided."

Spec. St. 1918, c. 159, which provided for the public operation of the Boston Elevated Railway Company, contained sections relative to the making up of deficiencies in maintenance and operation of the railway by the Commonwealth (§§ 9 and 11), and for reimbursement of the Commonwealth for the same by the cities and towns "in which the company operates" (§ 14).

Said section 14 reads as follows: —

"In case the commonwealth shall be called upon to pay to the trustees or the company any amount under the provisions of sections eleven and thirteen, such amount with interest or other charges incurred in borrowing money for the purpose shall be assessed upon the cities and towns in which the company operates by an addition to the state tax next thereafter assessed in proportion to the number of persons in said cities and towns using the service of the company at the time of said payment, said proportion to be determined and reported to the treasurer and receiver general by the trustees from computations made in their discretion for the purpose."

St. 1930, c. 394, § 1, amending St. 1925, c. 341, provided for the reimbursement to the Commonwealth of amounts paid by the Commonwealth to take care of deficiencies in payments for rental of the Boston subway by the Boston Elevated Railway Company from certain cities and towns.

The applicable part of section 1 reads as follows: —

". . . In case the commonwealth shall be called upon to make any payments hereunder, the amount thereof, with interest or other charges incurred in borrowing money for the purpose, shall be assessed upon the cities and towns which paid assessments under the last preceding assessment under section fourteen of said chapter one hundred and fifty-nine in proportion to the amounts paid, and shall be assessed and collected in the manner provided in said section fourteen."

Subsequent amendments by St. 1935, cc. 99 and 100, have not affected the above provisions as to assessments upon cities and towns.

It is apparent from the above-quoted terms of said chapter 394 that only cities and towns "which paid assessments under *the last preceding assessment* under section fourteen of said chapter one hundred and fifty-nine" are to be assessed for rental deficiencies.

Since Revere, by reason of the nonoperation therein of cars by the Boston Elevated Railway Company, did not pay any assessment for

operating deficiency under the last preceding assessment under said section 14, it is not presently liable to be assessed for the proposed rental deficiency in 1937.

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

Civil Service — State Prison Colony — Employees — Transfers.

MARCH 18, 1937.

Hon. THOMAS H. GREEN, *Commissioner of Civil Service.*

DEAR SIR: — You have asked my opinion relative to the duty of your Commission under G. L. (Ter. Ed.) c. 127, § 11, with relation to the transfer of a prison officer.

G. L. (Ter. Ed.) c. 127, § 11, reads as follows: —

"An officer in a jail or house of correction may be transferred to the state prison, the Massachusetts reformatory, or the prison camp and hospital as a correction officer; and if the place in which he is employed is not in the classified civil service list, he shall be given a non-competitive examination as to his fitness, upon receipt from the warden of the state prison, the superintendent of the Massachusetts reformatory or the superintendent of the prison camp and hospital of a statement that the appointment of such officer is desired, and that he possesses particular qualifications for the work required of him."

The State Prison Colony was not created until after the enactment of said chapter 127, section 11, in the latter's present form, and hence is not referred to therein; nor is its superintendent named in the section with the officers in charge of the other penal institutions. The provisions of said section 11 apply to all the institutions under the control of the Department of Correction existing at the time when said section 11 was amended into its present form, except the State Farm and the Reformatory for Women.

Although the original statute creating the State Prison Colony (St. 1927, c. 289, § 1), now embodied in G. L. (Ter. Ed.) c. 125, § 41E, provides that "all provisions of law applying generally to the institutions under the control of the department of correction shall apply to the state prison colony," it cannot make applicable to the State Prison Colony nor to its superintendent the powers, with relation to requiring transfers of prison officers, vested in the heads of some of the other penal institutions, because the provisions of law vesting such powers do not "apply generally to the institutions under the control of the department" but apply to only three of the five others.

Again, it must be taken to have been the intent of the Legislature that the provisions of said section 11 should not be treated as embracing the State Prison Colony, for no amendment to said section has been passed since the creation of the colony to bring it specifically within the terms of said section 11; whereas section 12 of the same chapter, dealing with the removal of incompetent penal officers, was amended by the Legislature in 1929 so as specifically to include those of the State Prison Colony. St. 1929, c. 170, § 2.

It follows, therefore, that the superintendent of the State Prison Colony has not the authority to cause a transfer of an officer to the colony under

said chapter 127, section 11, nor are the Commissioners of Civil Service required to give an examination to effect such purpose at his request.

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

Governor and Council — Salary Ranges — Division of Personnel.

MARCH 22, 1937.

His Excellency the Governor, and the Honorable Council.

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

"At a meeting of the Governor and Council held Tuesday, March 16, 1937, consideration was given to certain communications from Charles P. Howard, Chairman of the Commission on Administration and Finance, under dates of March 9th and 10th, copies of which are attached hereto. Chairman Howard . . . and Henry F. Long, Commissioner of the Department of Corporations and Taxation, were heard with relation to the subject matter of said communications, following which the Council adopted the following votes: —

(1) *Moved:* That the Commission on Administration and Finance be notified that the salary ranges of the positions of assistant director of corporations, assistant director of inheritance taxes, income tax assessor and deputy income tax assessor are, as set forth in the opinion of the Attorney General dated February 3, 1937 (*ante,* p. 53), the ranges established by the Division of Personnel and Standardization.

(2) *Moved:* That, as recommended by the Chairman of the Commission on Administration and Finance, the salary range for the position of deputy commissioner of corporations shall be from $5,100 to $6,000, and that the salary range for the position of second deputy commissioner of corporations shall be from $4,200 to $5,100.

(3) *Moved:* To notify the Commissioner of Corporations and Taxation, the Commissioner of Insurance, and the Commission on Administration and Finance that the salaries of such appointees who are still in the service, whose names appear on a list which was prepared by the Division of Personnel and Standardization and which was submitted to the Governor and Council by the Chairman of the Commission on Administration and Finance on March 10, 1937, are, in accordance with the opinion of the Attorney General dated February 3, 1937, the salaries established for such positions by the Division of Personnel and Standardization.

The Governor and Council, being in doubt as to the scope of their authority under the Constitution and laws to so act, it was voted that the opinion of the Attorney General be requested as to the validity of any and all of the motions, three in number, above set forth.

Yours respectfully,
(Signed) WILLIAM L. REED,
Executive Secretary."

1. The Division of Personnel and Standardization had made rules and regulations for the application and administration of the classifications and specifications established by them under G. L. (Ter. Ed.) c. 30, §§ 40–46. The salaries of all officers and employees whose positions were

in such classifications and specifications, with certain exceptions, were required by said section 46 to be fixed in accordance with such classifications and specifications. Ranges of maximum and minimum salaries were established prior to December 30, 1936, for such positions, and increases in such salaries were required by law to be within such ranges (section 47). These rules and regulations had been properly approved, as set forth in my opinion of February 3, 1937 (*ante*, p. 53), the salaries of the officers mentioned in the first vote set forth in your letter were to be fixed in accordance with the rules and regulations embracing salary ranges set up by the Division of Personnel and Standardization, and the salaries or salary ranges for such positions created by the then Governor were without force or effect.

Inasmuch as such salary ranges for such positions are established by the Division under G. L. (Ter. Ed.) c. 30, §§ 45 and 46, and have been so established for a period antedating December 30, 1936, they are as a matter of law effective, and have been effective, and no notification of their existence is required to be made by the Governor and Council. Such salary ranges exist, and have continuously existed since their original approval, by force of the provisions of said G. L. (Ter. Ed.) c. 30, §§ 45, 46 and 47. Nothing can be added to their effectiveness by a vote of the Governor and Council, and the proposed vote would appear to be without effect in itself and without authorization in the statute.

2. As to the second proposed vote, relative to the establishment of salary ranges for the positions of deputy commissioner and second deputy commissioner of corporations, I am of the opinion that it is not within the authority of the Governor and Council.

The two named positions belong to that class which was expressly excepted from the provisions of G. L. (Ter. Ed.) c. 30, §§ 45 and 46, and such positions are thus withdrawn from the power of the Division of Personnel and Standardization to make rules and regulations which might establish salary ranges, because the salaries of the incumbents of these two positions "are required by law to be fixed by the Governor and Council."

While the Division of Personnel has authority to establish salary ranges for those offices and positions which come within the purview of their authority by virtue of classification and rules and regulations under said sections 45 and 46, which impliedly empower the division to create such ranges, yet the Legislature has given no power to the Governor and Council to establish *salary ranges* for those officers whose salaries are not controlled by the rules and regulations of the division but are specifically required to be approved by the Governor and Council. Within this class fall the deputy commissioner and second deputy commissioner of corporations.

The Legislature has provided, by G. L. (Ter. Ed.) c. 14, § 4, that —

"The commissioner may, with the advice and consent of the governor and council, appoint and remove the following officers . . . A deputy commissioner and a second deputy, each at such salary as may be fixed by the commissioner, with the approval of the governor and council; . . ."

Power to fix a salary and power to approve it do not authorize the creation of salary ranges. The Governor and Council are not warranted in depriving themselves of power to approve any salary for such positions which may be brought before them in the future, nor have they authority to bind succeeding Governors and Councils.

However important salary ranges may be in connection with the service of the Commonwealth, as is suggested in a letter which you have laid before me, addressed to you by the Chairman of the Commission on Administration and Finance, such salary ranges cannot be established except where they are authorized by law; and the Legislature has manifested a plain intent that salaries and not salary ranges shall be fixed by the Commissioner of Corporations and Taxation for his two deputies, and that such specific salaries so fixed by the Commissioner, and they only, shall be the subject of approval by the Governor and Council.

To attempt to go farther and establish, either by the Commissioner or by the Governor and Council, a *range* of salaries relative to these two deputies is to attempt to do something which is entirely without authorization in law.

3. In view of what I have already said, the third proposed vote is one having in itself no effect as a matter of law; and, since it deals with matters outside the scope of the authority of the Governor and Council, it cannot well be said that the Governor and Council have power to pass such a vote.

Very truly yours,
Paul A. Dever, *Attorney General.*

Governor — Special Commission — Membership.

March 22, 1937.

His Excellency Charles F. Hurley, *Governor of the Commonwealth.*

Sir: — Your Excellency has asked my opinion upon the following question with relation to the Special Commission to co-operate with the United States Constitution Sesquicentennial Commission, under the provisions of chapter 73 of the Resolves of 1936: —

"What is the present status of the persons constituting the Special Commission in this State under said resolve, and what additional steps should be taken to bring this resolve up to date in the present Legislature?"

The intent of the Legislature, as expressed by the context of this resolve, is that at any given time the then Governor, the Lieutenant Governor, the President of the Senate and the Speaker of the House shall be members of the Commission. This forms the first group, and fills itself automatically as any of the foregoing positions become vacant and are filled in accordance with other provisions of law, so that these four members are now: Charles F. Hurley, Francis E. Kelly, Samuel H. Wragg and Horace T. Cahill.

The second group is to consist of one member of the Senate, to be designated by the President thereof. The senator originally designated by the President of the Senate is a member of the Commission, by virtue of such appointment, as long as he holds a seat in the Senate. As long as he holds such a seat his position on this Commission does not become vacant because of a change in the President of the Senate. When he ceases to hold a seat in the Senate his position becomes vacant, and another member of the Senate should be appointed by the President thereof.

You advise me that Senator Moyse was appointed to this Commission in 1936 by the then President of the Senate. That being so, he continues as a member of the Commission and does not require to be reappointed by the present President of the Senate.

The same principle applies to the members of the House of Representatives designated by the Speaker to serve on this Commission. You advise me that in 1936 Horace T. Cahill was appointed one of these members by the then Speaker of the House. Inasmuch as said Horace T. Cahill has now become himself Speaker of the House and a member of this Commission *ex officio*, the position which he occupied as a member of the House of Representatives designate becomes vacant and it should be filled by the present Speaker of the House.

Of the other members designate of the House, namely, Messrs. Nelson, Sirois, Kelly and Dillon, who, you advise me, were appointed in 1936 by the then Speaker of the House, each of these retains his position as a member of this Special Commission if he is still a member of the House of Representatives. If in the interim he has ceased to be a representative, his position becomes vacant and a new appointment to fill it should be made by the Speaker of the House of Representatives.

As to the members of the third class forming this Commission, namely, "three persons to be appointed by the Governor, with the advice and consent of the Council," you advise me that Messrs. Barry, Myrick and Ehrlich were appointed to such positions in 1936 by the then Governor. I am of the opinion that their positions as members of the Commission do not become vacant upon the expiration of the term of the Governor who appointed them, and that, accordingly, they are now, all three, members of the Commission unless any of them has vacated such position by death or by failure to qualify within the time specified by law after the original appointment, or by any other cause which works a vacancy in a public office. As to such memberships in this group which may have become vacant, new appointments should be made by the present Governor.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Sales Representation — Fish.

MARCH 22, 1937.

HON. ERNEST J. DEAN, *Commissioner of Conservation.*

DEAR SIR: — You have asked me this question: —

"In your opinion, would a dealer . . . be violating" (G. L. [Ter. Ed.] c. 94, § 78) "if he caused to be printed on cartons containing frozen fish, the following words 'Ocean-fresh' ".

Such representation as to the character of frozen fish, expressed by means of the words "Ocean-fresh" printed on the cartons containing such frozen fish, is plainly a violation of the provisions of the law as set forth in said section 78.

The statement "Ocean-fresh" on the carton would, obviously, appear to be a representation for the purpose of sale of the fish contained therein. It represents such fish as being fresh. "Ocean-fresh" certainly means fresh, with perhaps an added implication that they are even fresher than others, but, at all events, it plainly means that the fish are fresh, when, as a matter of fact, as you advise me, such fish are frozen. Violation of the law in this matter seems obvious.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Public Health — Sewer — Water Supply — Pollution.

March 31, 1937.

Dr. Henry D. Chadwick, *Commissioner of Public Health.*

Dear Sir: — You have asked my opinion with relation to a proposed sewer in the town of Holden, from its high school, which you advise me is necessary to protect a source of water supply of the Metropolitan District now being polluted by reason of sewage from such high school being allowed to flow so as to pollute such source.

You advise me that the existing condition is in violation of the rules and regulations adopted by your department in accordance with G. L. (Ter. Ed.) c. 92, § 17, for the sanitary protection of the waters of said district.

Your first two questions are as follows: —

"Does section 27 of the said chapter 488 obligate the Metropolitan District Commission to pay for sewers from the high school in the town of Holden to connect with the trunk sewer constructed by the Metropolitan District Water Supply Commission under the provisions of St. 1932, c. 262, if the town sewers are located in public highways?

Would such a sewer constructed by the town as herein indicated be considered 'public works,' within the meaning of St. 1895, c. 488, § 27, and would the Metropolitan District Commission be obligated to pay for the expense of maintenance of such sewers to be constructed in the town of Holden?"

G. L. (Ter. Ed.) c. 92, § 20 (formerly St. 1895, c. 488, § 27), reads as follows: —

"The commission, and its employees designated for the purpose, shall enforce sections ten to nineteen, inclusive, and the rules, regulations and orders made thereunder, and may enter into any building, and upon any land for the purpose of ascertaining whether sources of pollution there exist, and whether said sections and the rules, regulations and orders made as aforesaid are complied with; and, where the enforcement of any such laws, rules, regulations or orders will require public works for the removal or purification of sewage, the commission shall not enforce the same until it has provided such works, and the amount paid therefor shall be considered as part of the expenses of construction of the metropolitan water works, and such works shall be maintained and operated as a part of said water works."

Said section 20, by its terms, prohibits the enforcement of the rules made by your Commission, which require public works for the removal or purification of sewage, until such public works have been supplied by the Metropolitan District Commission.

I am advised that, under the provisions of St. 1932, c. 262, the said Commission has constructed in the town of Holden the Rutland-Holden sewer, so called. One of the purposes of said chapter 262 is stated therein to be that such a main sewer or branch might be built to receive "the sewage from any sewerage system that may hereafter be constructed by the towns of Rutland and/or Holden."

It was not the intent of the Legislature in enacting said chapter 262 that the Commission should construct local sewerage systems in Holden

and Rutland, or single lines such as the proposed one to the high school, but an alleged main sewage line, with branches necessary to such a main line, for the purpose of receiving the sewage from Holden and Rutland. Such a sewer line was not to be a system for collecting the sewage of the town in its various parts but a main line with essential branches to receive and remove the town's sewage.

The construction of the Rutland-Holden sewage line by the Commission sufficiently supplies the "public works for the removal . . . of sewage," mentioned in said G. L. (Ter. Ed.) c. 92, § 20, and permits of the enforcement of those rules made by your Commission heretofore referred to, which appear to require the building by the town of the sewage line from the high school.

It cannot well be said that the line from the high school to the Rutland-Holden sewer is in the nature of "public works for the removal . . . of sewage," as those words are used in said section 20. It is, rather, a line for the purpose of "collecting" sewage which is removed by the Commission's sewer.

I am advised that the Commission will provide the necessary entrance for such line into its Rutland-Holden sewer so that the removal of this sewage from the high school may be effected.

The Attorney General does not pass upon questions of fact, and this opinion is based upon the assumption that the foregoing facts of which he has been advised have been correctly stated to him. It follows from the foregoing considerations that the expense of paying for the proposed sewage line from the high school to the Rutland-Holden sewer line should be borne by the town of Holden, and, accordingly, I answer your first two questions in the negative. This being so, your third question requires no answer.

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

Labor and Industries — Penal Institutions — Industrial Building.

MARCH 31, 1937.

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

DEAR SIR: — You ask my opinion as follows: —

"Will you kindly render me an opinion as to whether or not this statute" (G. L. [Ter. Ed.] c. 149, § 126) "applies to industrial buildings located within our several penal institutions."

I answer your question in the negative.

If the buildings to which you refer are in fact buildings of the Commonwealth or form a part of any of the penal institutions, the provisions of said section were not intended by the Legislature to be applicable to them, inasmuch as said chapter 149 was intended to relate to labor and industry in its normal form and not as carried on in connection with prisoners in penal institutions.

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

Governor and Council — Contract for Construction — Federal Funds.

April 7, 1937.

His Excellency the Governor, and the Honorable Council.

Gentlemen: — I have your communication relative to the payment of thirty thousand dollars, in accordance with a vote of February 2, 1937, of the Department of Public Works, to Coleman Bros. Corp., under its contract No. 2966 with the Commonwealth for the construction of a highway grade separation in the city of Boston and the town of Brookline, known as the Jamaicaway Overpass, and requesting my opinion upon the following questions: —

"1. Was authority given to erect the overpass in question by St. 1934, c. 380, as amended by St. 1935, c. 368, § 3?

2. Did the Federal government enter into any agreement with the Commonwealth of Massachusetts whereby the Federal government would finance the entire cost of the so-called Jamaicaway Overpass, and if so, under what date?

3. If the Federal government did agree to finance the entire cost of building and constructing the Jamaicaway Overpass, was it necessary to have their approval as to the cost of said building and constructing before a contract was let to the Coleman Bros. Corp., or any other successful bidder?

4. Would any changes or amendments in said contract between Coleman Bros. Corp. and the Commonwealth require the approval of the Federal government as a condition precedent to obligating the Federal government in expending additional moneys for financing said amendment or change in contract?

5. Did the Federal government approve the amendment or change in the contract between Coleman Bros. Corp. and the Commonwealth for so-called 'extra work,' wherein there was additional expenditure of approximately $65,292.50?

6. In the event that the Federal government did not approve the aforesaid amendment or change, has the Department of Public Works, by reason of this amendment, violated St. 1934, c. 380, as amended by St. 1935, c. 368, § 3, in so far as the entire cost to be borne by the Federal government is concerned?

7. Is the Federal government liable for the payment of this additional cost, namely, approximately $65,000, for said changes or 'extra work'?"

1. The construction of the overpass by the Department of Public Works, hereinafter called the department, was expressly authorized by St. 1934, c. 380, at a total cost not to exceed three hundred and twenty-five thousand dollars. This statute, however, was amended in the following year (St. 1935, c. 368) by striking out the above provision limiting the cost, and the original statute has since continued in effect as thus amended. The department was empowered to "make a contract or contracts for said work herein authorized if the federal authorities give proper assurance that the federal government will furnish the funds necessary to meet the cost of the construction involved in the work, notwithstanding the provisions of section twenty-seven of chapter twenty-nine of the General Laws."

The receipt of such assurance was a condition precedent to the award of any contract for construction and to the actual commencement of the

work. The department submitted to the Secretary of Agriculture a statement of various projects, including the construction of this overpass, which statement was approved by the Secretary and thereafter was recommended for approval by the United States District Engineer, and was approved on August 29, 1935, by the Federal Bureau of Public Roads. The department then advertised for bids and the contract was awarded to the lowest bidder, Coleman Bros. Corp., which executed a contract with the Commonwealth on September 24, 1935, after the award to this corporation had been approved by the Federal Bureau of Public Roads.

It is plain that the department was acting within the authority conferred by St. 1934, c. 380, as amended, in entering into the aforesaid contract for the construction of the overpass.

2. The power to grant Federal funds for the work in question was authorized by the Hayden-Cartwright Act, approved July 11, 1936 (39 Stat. 355), and as finally amended on June 18, 1934 (48 Stat. 993). This last-mentioned amendment incorporated therein section 204 of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195), providing for such payment to the highway department of the State. Acting in pursuance of these acts of Congress, a written project agreement, dated February 4, 1936, but actually executed on February 27, 1936, was made between the said department and the Secretary of Agriculture. This agreement did not require the Federal government to pay any fixed percentage of the cost of the overpass, but it did provide: —

"The United States pro rata share of the value of the labor and materials which shall be actually put into the construction of Section E of said project shall not in any event exceed the sum of Three hundred ninety thousand, three hundred eighty and 10/100 dollars ($390,380.10), certified to the Secretary of the Treasury as above mentioned, which does not exceed the authorized Federal pro rata share of Three hundred ninety thousand, three hundred eighty and 10/100 dollars ($390,380.10), the approved total estimated cost of Section E of said project."

The Federal government did not enter into any agreement to finance the entire cost, but it agreed to pay a sum not in excess of the last-mentioned amount for labor and materials expended in the performance of the contract.

3. As stated above, the Federal government did not agree to pay the total cost of the work. The awarding of this contract was approved before the contract itself was executed on September 24, 1935, between the department and Coleman Bros. Corp. The only written agreement between the Federal government and the department is the one above mentioned.

4. The written contract of February 27, 1936, is silent as to the making of amendments. Consequently, as matter of law and, I am informed, as a matter of practice, the written approval of the appropriate Federal official has always been secured if the payment for the additional expenses incurred by the allowance of the amendment was to be made in whole or in part by Federal funds. In fact, ten orders in the nature of amendments and totaling $10,487.56 have been so approved. Unless so approved, no payment will be made by the Federal government. Your fourth question, therefore, requires an answer in the affirmative.

5. The resident Federal engineer approved the amendment referred to in your fifth question, but with the distinct understanding that said ap-

proval would not in any way bind the Federal government to pay the additional cost thereby incurred. This limited approval is subject to review, but as yet no appeal has been taken therefrom, and, as long as it stands, the further expenditure of Federal funds in payment of the cost incurred by this amendment cannot be made.

6. The department has not violated the terms of St. 1934, c. 380, as amended, in making payments to the contractor. The mere fact that such departmental conduct was not contrary to the provisions of the statute authorizing the construction of the work is not material or decisive, as there are other considerations to which attention must be given in determining the legality of the action of the department in making payments to the contractor under its aforesaid contract.

At the commencement of the projects program it was necessary to have available funds for the purpose of starting the actual work under the various contracts and permitting the work thereunder to be continued until Federal funds were supplied from which the contractors could be paid and the Commonwealth reimbursed for the advances made. This was accomplished by the maintenance of a construction fund, amounting to five hundred thousand dollars, which was replenished from time to time by the highway trust fund, which was composed of allotments made by Federal grants. The use of this revolving fund of five hundred thousand dollars, which in the beginning consisted entirely of State funds and was used in making the initial payments to various contractors, including the one in question, was not contrary to the provisions of St. 1934, c. 380, under which the work was begun, provided that no more money was paid to the contractor than he was entitled to receive under the terms of his contract. If that limit were not exceeded, there would always be funds sufficient to repay the Commonwealth for the amounts advanced to the contractor and to pay the contractor in full, and the balance of the Federal funds remaining after the reimbursement of the Commonwealth ought to be the exact amount which the contractor by his contract was entitled to receive. Probably no complaint could be made of this method of operation so long as the advancement of State funds to the contractor was kept within the prescribed limit.

The company, however, was bound by the terms of its contract, and its total compensation could not exceed the amount forwarded by the Federal government for the performance of its work. The exclusive source of payment of this contract was Federal funds, and the contractor could not look to the Commonwealth for payment. It has been frequently held by our courts that a provision of a contract by which one obligates himself to look to a special source or fund for his compensation is valid, and it has been consistently upheld. *Hussey* v. *Arnold*, 185 Mass. 202; *McCarthy* v. *Parker*, 243 Mass. 465; *Baker* v. *James*, 280 Mass. 43.

The company is not, therefore, entitled to be paid for this extra, amounting to $65,292.50, unless and until Federal funds are made available for the purpose. Until that time arrives it cannot be stated with any degree of certainty how much the contractor is entitled to be paid. The risk, however, of securing Federal funds for this purpose was assumed by the contractor and not by the Commonwealth.

The method used in financing this contract by both State and Federal funds, which I am informed was the usual and ordinary manner employed by the department in all other similar projects, makes it difficult to determine with any degree of accuracy the amount of excess payments which

have been made to the contractor of State funds, until it is finally settled by the Federal authorities as to the total amount of money which they will allot for the payment of the contractor. Ordinarily that is not fixed until the contract is completed. I am advised that it has not as yet been done in the present case. Any amount received by the contractor above the sum actually allocated by the Federal government would represent State funds which the company was not legally entitled to receive under its contract.

When the amendment was executed on October 29, 1935, the department had notice that the Federal government would not then approve the amendment, and that it would not permit the payment for the work to be done thereunder by Federal funds. The department was without the authority of law to apply State funds for this purpose. The matter of payment, therefore, was settled by the contract, and the department should have allowed the matter to remain where the contract had placed it; that is, with the contractor. If the latter went ahead and performed the work under the amendment, then it had to rely entirely upon the allocation of Federal funds for payment of this work. It follows, therefore, that the department was not warranted in using State funds to pay for any work done under the amendment.

The good faith of all the parties in interest and the receipt of a benefit by the Commonwealth in accepting the work performed under the amendment are of no avail to the contractor. *Safford* v. *Lowell*, 255 Mass. 220; *Boston Electric Co.* v. *Cambridge*, 163 Mass. 64. The execution of the amendment without the written assent of the Federal government to pay the increased cost would not impose any liability on the Federal government, because it never became a party to the amendment and, in fact, has never entered into any contractual relations with the company. The Commonwealth, likewise, would not be bound, because the department could not, under the circumstances, transfer the financial burden from the Federal government to the State. No implied obligation upon the part of the Commonwealth to pay the contractor could arise from the action of the department so long as the original contract remained unaltered and unimpaired. *Agawam National Bank* v. *South Hadley*, 128 Mass. 503; *Brown* v. *Newburyport*, 209 Mass. 259.

St. 1934, c. 380, made no appropriation for the performance of the construction work, and, as a matter of fact, no specific appropriation for this particular project has ever been enacted. There would seem to be no practical difference to a contractor between a case where an appropriation has been exhausted and where, as here, the contributions made by a third party, and which are the only source from which payments may be made, are at present insufficient to pay the contractor in full for the work done. *Adams* v. *County of Essex*, 205 Mass. 189; *Dyer* v. *Boston*, 272 Mass. 265.

The present situation is one which the contractor has voluntarily assumed by the execution of its contract. If the contractor is damaged by the failure of the Federal government to allocate funds sufficient to adequately compensate it for the work done, yet it cannot complain, as the measure of compensation was fixed so as not to exceed the total amount granted in Federal funds for the completion of the work. "Although it seems a hardship for the petitioner not to be able to recover for the extra work which apparently it performed in good faith, yet such failure results from its not obtaining from the architect or his agents written authority

to perform the work, and from not complying with the other provisions of art. XVII of the contract." *Crane Construction Co.* v. *Commonwealth*, 290 Mass. 249, 254.

7. There is no liability upon the part of the Federal government to allocate $65,292.50 in payment for the work done under the amendment of October 29, 1935. Of course, the Federal government is free to make such an allocation of funds, but until it does so there is no liability therefor.

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

Alcoholic Beverages — Local Licensing Authorities — License Fee.

APRIL 7, 1937.

Joint Committee on Legal Affairs.

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

"Kindly advise us as to whether or not, in your opinion, the provisions of section 12 of the Liquor Control Act permit a local licensing authority to charge a license fee differing in amount from the fee charged for another license of the same kind and type issued under the said section.

Hotels, restaurants, clubs and taverns are licensed to sell alcoholic beverages under the provisions of G. L. (Ter. Ed.) c. 138, § 12, as amended. Are local licensing authorities required under this section to fix a uniform fee which shall be paid for all licenses of the same type?"

With relation to section 12 of chapter 138, as amended, it is apparent that the intention of the Legislature, as shown by the wording of said section, was to provide for uniform fees for the various types of licenses. It was not intended that the local licensing authority should have the power to charge unlike fees for similar licenses to different applicants.

I accordingly answer in the affirmative the specific question in the second paragraph of your communication.

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

Civil Service — Fire Department — Reserve Firemen.

APRIL 7, 1937.

Hon. THOMAS H. GREEN, *Commissioner of Civil Service.*

DEAR SIR: — Replying to your recent communication relative to reserve firemen, I am in accord with the opinion which you say was expressed informally in previous years by this department, and with which you concur, which is, in substance, to the effect that actual employment in the sense of delegation to immediate active participation in the work of the fire department is not necessarily essential to the fulfillment of the requirement of Civil Service Rule 17, section 2, for a reserve fireman.

The nature of the work of the reserve firemen is such that the general acceptance as such members and the assignment to duty as reserve firemen is the equivalent of the actual employment which is the criterion of the appointment under said section 2.

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

Alcoholic Beverages — License — Fee.

When the Alcoholic Beverages Control Commission itself issues a license for a package goods store, on account of the failure of a local board so to do under an order, the Commission may itself fix the fee for such license.

April 7, 1937.

Alcoholic Beverages Control Commission.

Gentlemen: — You have asked my opinion, in effect, as to whether your Commission, when it exercises the power vested in it under G. L. (Ter. Ed.) c. 138, § 67, as amended, and itself issues a package goods store license, established by section 15 of said chapter 138, as amended, may at the same time itself fix the fee to be charged for such license, irrespective of the prior establishment by a local board of a general fee purporting to be applicable to all licenses similar to that issued by the Commission.

I am of the opinion that when your Commission exercises its power to issue a license of the type provided for by said section 15, on account of the failure of a local board to comply with an order calling for such issuance, your Commission may itself fix the fee for such license.

Said section 67 provides, in its applicable part: —

"If the local licensing authorities fail to grant a license or to perform any other act when lawfully ordered so to do by the commission upon appeal or otherwise, within such time as it may prescribe, the commission may itself issue such license or perform such act, with the same force and effect as if granted or performed by the local licensing authorities."

When, after a hearing, your Commission has voted to sustain the appeal of an applicant for a license under said section 15, as amended, and has ordered a local board to grant the license, it becomes the duty of the local board to grant such a license and to fix the fee for such particular license under that portion of said section 15, as amended, which reads: —

"The local licensing authorities shall fix the amount of the license fee within the aforesaid limits, for the shop or other place of business designated in the license, such amount being subject to change from year to year by said authorities as they shall deem just and proper in view of the location of the licensee's place of business, his probable volume of sales, or of his actual volume of sales in the previous year."

The fact of a prior establishment by a local board of a general fee, applicable indiscriminately to all licensees of package goods stores of a certain class, does not as a matter of law fix the fee for the particular license which such board is ordered to grant by the Commission.

Inasmuch as in such a case the local board has not, as you state, issued the license which it was directed to grant nor has properly and specifically fixed any fee for such particular license, the duty falls upon your Commission to issue the license itself and to perform the act of properly and specifically fixing a fee for it, which the local board has not done.

The order of the Commission to the local board to issue a license for a particular package goods store comprehends within it as an integral part thereof, as a matter of law, an order to perform the act of fixing a particular fee for the specific license to be so issued. In lieu of performance by a local board of the acts of issuing the required license and of fixing a fee for that particular license, your Commission is charged with the duty

of performing both acts itself under said section 67, and the fee which the Commission then fixes for such license is the proper fee, and the same is to be accepted by your Commission and by the city or town treasurer, to whom your Commission will pay it over in full payment for said license.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Public Utilities — Electric Light Companies — Consolidation.

APRIL 8, 1937.

Hon. A. C. WEBBER, *Chairman, Department of Public Utilities.*

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

"Can an electric light company be consolidated with a company organized in this Commonwealth prior to 1908 'for the purpose of making and selling gas for light and for heating, cooking, chemical and mechanical purposes and generating and furnishing electricity for light and power?'"

Your question relates to the right of the Northern Berkshire Gas Company to consolidate with the Deerfield River Electric Company. You advise me that the necessary preliminary steps have been taken by such companies to effect a consolidation, and that a petition for such consolidation is before you for your approval.

You also advise me that —

"The Northern Berkshire Gas Company was organized in 1889 'for the purpose of making and selling gas for light and for heating, cooking, chemical and mechanical purposes and generating and furnishing electricity for light and power.'"

I assume that such organization was made under P. S. c. 106, § 11, in force in 1889. I also assume, from what you have written me, that the Deerfield River Electric Company is without doubt an "electric company," as those words are used in the applicable statutes.

G. L. (Ter. Ed.) c. 164, § 96, first effective in 1908 as section 2 of chapter 529 of that year, provides, among other things, that an electric company may consolidate with another electric company, the lines of which are in the same or contiguous municipalities. I assume, from the tenor of your communication, that both companies have their lines in contiguous municipalities, and that there are no legal obstacles to their consolidation if the Northern Berkshire Gas Company is an "electric company," as those words are used in said section 96; and that your question arises from a doubt upon the part of your Commission as to whether a company, originally organized prior to 1908 for the purposes of both selling gas and furnishing electricity, may be considered an "electric company," within the meaning of those words as used in said section 96.

I am of the opinion that the Northern Berkshire Gas Company may be so considered an "electric company," and I answer your question in the affirmative.

The pertinent part of said G. L. (Ter. Ed.) c. 164, § 96, reads as follows: —

"A gas company may purchase the property of another gas company whose gas mains are in the same or contiguous municipalities, or may con-

solidate with such other gas company, and such other gas company may sell and convey its property to, or may consolidate with, such first mentioned gas company; and *an electric company* may purchase the property of another electric company whose lines are in the same or contiguous municipalities, or of a combined gas and electric company whose gross receipts for the preceding financial year from the sale of electricity are at least three times its gross receipts from the sale of gas and whose lines are in the same or contiguous municipalities, or *may consolidate with such other electric company or such gas company,* and such other electric company or such gas company may sell and convey its property to, or may consolidate with such first mentioned electric company; . . ."

By section 1 of said chapter 164 "electric company" is defined as —

"a corporation organized under the laws of the commonwealth for the purpose of making by means of water power, steam power or otherwise and selling, or distributing and selling, electricity within the commonwealth, or authorized by special act so to do, even though subsequently authorized to make or sell gas."

In considering whether a company falls within this definition, the fact that it was organized, as was the Northern Berkshire Gas Company, at one and the *same time* to sell gas as well as to sell electricity is immaterial. Such company was, even so, organized to sell and distribute electricity, and thus falls under the terms of the definition. Accordingly, it is an "electric company" and authorized by the terms of said section 96 to consolidate with another electric company.

It is possible that because the Legislature has given no authority in said section to an electric company to consolidate with what is termed therein a "combined gas and electric company" some doubt has arisen in the minds of your Commission as to the right of the Deerfield River Electric Company to consolidate with the Northern Berkshire Gas Company.

No definition of a "combined gas and electric company" is given in said chapter 164. Those words appear to be used by the Legislature, in the above-quoted portion of said section 96, to describe with particularity a gas company which, *subsequent* to its organization, has been granted an added power of selling electricity, even though such company may also fall within the statutory definition of "electric company." Such a corporation is by no means precisely similar to one *originally* organized for, and authorized to do, both forms of business. Such subsequent authorization is provided for in section 23 of said chapter 164. The purchase of the franchise of a gas company by an electric company, except as provided in section 96, is forbidden by section 100 of said chapter 164, and the only authority for an electric company to purchase a gas company, given by section 96, is the authority to purchase a "combined gas and electric company" whose electric sales have grown to far exceed its gas sales. To interpret the quoted words as suggested above harmonizes the designated provisions of said sections 23, 96 and 100.

However, a corporation such as the Northern Berkshire Gas Company, organized as it was, is an "electric company," under the statutory definition, and not merely a "combined gas and electric company," as those words are employed in said section 96 to designate a particular type of gas or electric company. It follows that, being an electric company, it is explicitly empowered by the terms of section 96 to consolidate with an-

other electric company, and the fact that no such power of consolidation is specifically given by the section to what is therein designated as a "combined gas and electric company" is entirely irrelevant.

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

Mental Diseases — State Hospital — Hours of Work of Employees — Autopsy.

APRIL 8, 1937.

Dr. HAROLD F. NORTON, *Superintendent, Boston State Hospital.*

DEAR SIR: — In relation to the forty-eight-hour week for certain employees of the Commonwealth in State institutions you have asked my opinion upon the following question: —

"(1) Is the forty-eight-hour week limited to that week alone or can a person work more than forty-eight hours one week and less than forty-eight hours the next week; or can a person work more than eight hours one day and less than eight hours the following day, so that the ultimate total is an eight-hour day or a forty-eight-hour week?"

The applicable statute (G. L. [Ter. Ed.] c. 149, § 39) as most recently amended by St. 1935, c. 444, § 1, reads: —

"The hours of labor of laborers, workmen and mechanics, of ward attendants, ward nurses, industrial and occupational therapists and watchmen, and of employees in the kitchen, dining-room and domestic services, in state institutions, and of officers and instructors of state penal institutions, shall not exceed forty-eight in each week. Any person whose hours of labor are regulated by this section and whose presence is required at any such institution seven days a week shall be given at least four days off in each month, without loss of pay, in addition to the regular annual vacation. The words 'hours of labor' as used in this section shall not be deemed to include any period of time during which a person is in his living quarters wherever located although his presence there is required for the purpose of exercising a measure of supervision over patients or inmates through availability for duty during such time. This section shall not prevent the superintendent, warden, or executive officer from requiring the services of any person in any emergency where the health or safety of patients or inmates would otherwise be endangered, or in any extraordinary emergency, or in apprehending an escaped inmate, nor shall it apply to the hours of labor of any person whose position entitles him to family maintenance as a part of his compensation."

The words of the first sentence of the above-quoted section, "shall not exceed forty-eight in each week," refer to calendar weeks and do not permit a person, subject to the section, to work more than the designated number of hours in one week, even if he works less than such number in another week. The work of laborers, workmen and mechanics, if in such institutions, is also limited by the provisions of G. L. (Ter. Ed.) c. 149, § 30, as amended by St. 1936, c. 367, which restrict their labor to six days a week and "to eight hours in any one day." As to this latter class, they may not work more than the designated number of hours in one day even if they work less during any other. This limitation as to eight hours in any one day does not apply to other classes of employees mentioned in

such section, provided always that they do not work more than forty-eight hours in any one week, subject to the various other provisions mentioned in said section 39.

You have also asked my opinion upon another question, as follows: —

"(2) In the event that an individual dies in the Boston State Hospital, who has the right to give permission for an autopsy; or in the case of a patient dying who turns out to be an overseers' case, a patient without relatives, who has the right to give permission for an autopsy?"

If a patient dies at the Boston State Hospital and the body is not claimed by relatives or friends, the superintendent of the Boston State Hospital is the one who has the right to cause an autopsy to be made.

G. L. (Ter. Ed.) c. 113, § 5, provides as follows: —

"Before surrendering the body of any such person as provided in the four preceding sections, the chief medical officer of any institution named in section one may, if the cause of the death cannot otherwise be determined and if such body is unclaimed by relatives or friends, cause an autopsy to be made upon it."

Very truly yours,
Paul A. Dever, *Attorney General.*

Public Welfare — Department — Old Age Assistance — Rules — Local Bureaus.

April 13, 1937.

Hon. Walter V. McCarthy, *Commissioner of Public Welfare.*

Dear Sir: — You have asked me the following question with relation to section 7 of the "Rules Relating to the Administration of the Old Age Assistance Law," made by your department: —

"Is there anything inconsistent in section 7 . . . with the authority vested in the Department of Public Welfare by G. L. (Ter. Ed.) c. 118A, § 10? In other words, has the department gone beyond the scope of its authority in any degree in establishing the rule in question?"

Said section 7 of the aforesaid rules reads as follows: —

"A separate division must be established in each board of public welfare, designated as the Bureau of Old Age Assistance, as provided in section 2 of the law.

In cities and in towns assisting one hundred or more individuals under Old Age Assistance, the Bureau of Old Age Assistance must be provided with separate quarters.

The bureau shall be composed of three members, one of whom shall be an interested citizen elected by the other members of the bureau, and who is not a selectman or member of the board of public welfare.

In cities and in towns assisting one hundred or more individuals under Old Age Assistance, a supervisor of Old Age Assistance should be appointed by the bureau, who shall act as the executive officer of the bureau. In towns assisting less than fifty individuals under Old Age Assistance, a member of the bureau may be appointed the supervisor and serve as the executive officer."

I answer your question to the effect that your department appears to have acted without authority in making said section 7 of the said rules.

G. L. (Ter. Ed.) c. 118A, as amended by St. 1936, c. 436, § 2, reads as follows: —

"Each board of public welfare shall, for the purpose of granting adequate assistance and service to such aged persons, establish a division thereof to be designated as the bureau of old age assistance. In determining the need for financial assistance, said bureaus shall give consideration to the resources of the aged person. Separate records of all such aged persons who are assisted shall be kept and reports returned in the manner prescribed by section thirty-four of chapter forty-one and by sections thirty-two and thirty-three of chapter one hundred and seventeen. The department shall make an annual report to the general court, and also such reports to the social security board established under the federal social security act, approved August fourteenth, nineteen hundred and thirty-five, as may be necessary to secure to the commonwealth the benefits of said act."

The Legislature by the foregoing enactment appears to have dealt with the creation of local bureaus of old age assistance. It does not appear to have been the intent of the Legislature that the mode of constituting such bureaus or divisions should not be left to the local boards of public welfare but should be governed by rules made by the State Department of Public Welfare.

The grant of rule-making power to the State Department of Public Welfare is contained in section 10 of said chapter 118A, as amended, and is limited to making rules (1) relative to giving of "notice" and to "reimbursement" provided for by the said chapter, and (2) "relating to the administration of this chapter." It cannot fairly be said that the provisions of said section 7 fall within either of these two classes. It does not appear to have been the intent of the Legislature that by the words "relating to the administration of this chapter" authority was to be vested in your department to provide for the constitution of the local bureaus, the creation of special offices therein, the designation and number of their members and the necessity of approval of their organization by your department.

You have also asked me concerning G. L. (Ter. Ed.) c. 41, § 34, the following question: —

"Does the section above quoted vest authority in the Department of Public Welfare to request local boards of public welfare to furnish complete information concerning applications for relief?"

Said section 34 reads as follows: —

"The board of public welfare shall keep books so arranged as to readily furnish information required by law relative to all needy persons aided by them, and all further information as to relief applied for, whether given or refused, the preservation of which may be of importance to the town or to the commonwealth, stating the amount and kind of aid given and the reasons for giving or refusing it."

Your department undoubtedly has a right to inspect the books referred to in said section 34 and the records referred to in G. L. (Ter. Ed.) c. 117, § 32. You have a right to require the production of books and papers by summons, relative to old age assistance, under section 10 of said G. L. (Ter. Ed.) c. 118A, and under section 5 of said chapter 118A, as amended, with relation to dependent children.

I am not informed as to the status of the "cases" referred to by you in your letter of March 16, 1937, to the executive director of the board of public welfare in Boston, which you call to my attention, so that I am unable to advise you as to what powers you may have in requiring production of books and records before you concerning them, but an application by you of the principles which I have stated above to these particular "cases" should apprise you of the authority of your department in the matter.

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

Inspector of Animals — Nomination — Approval — Appointment.

APRIL 16, 1937.

Mr. CHARLES F. RIORDAN, *Director, Division of Livestock Disease Control, Department of Agriculture.*

DEAR SIR: — Replying to your letters relative to the appointment of an inspector of animals in Marlborough, in which you ask my advice as to what you might do in regard to the appointment of an inspector under the circumstances which you have outlined in your letter, let me say that I think you yourself might make the appointment by virtue of the provisions of G. L. (Ter. Ed.) c. 129, § 16.

As I understand the facts which you have set forth, the mayor of the city made a nomination of an individual to be an inspector of animals, under section 15, which nomination you did not approve. The term of the inspectors of animals is, obviously, from the language of the statute, intended to be for one year only, and the term of this inspector ceased, presumably, at some time in March or April. In so far as he is now acting as an inspector of animals he does so either as a holdover or as a *de facto* officer, but, inasmuch as his nomination was not approved by you, he has not been appointed for the coming year's term, and as no other nomination has been submitted to you there is no one placed before you, by action of the mayor, whom you could approve so that the mayor may perform his duty of appointment. Under such circumstances the mayor would seem not to be proceeding with his duty, or at all events he has not made an appointment of the necessary inspector. In view of this, the provisions of section 16 would appear to be applicable, and it is apparent from these provisions that, where the mayor has not complied with the requirements of section 16 and has not made a required appointment of an inspector, you, as Director of the Division, have authority to appoint an inspector for such term. It is not a question of making a removal, and even if such an inspector be under the provisions of the civil service, that would not interfere with your appointing some one to the office which he formerly occupied, because the term of his office was for only one year and has already expired.

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

Registration of Certified Public Accountants — Information to the Public — Applicants for License.

APRIL 23, 1937.

Mr. JAMES J. SUGHRUE, *Director of Registration, Department of Civil Service and Registration.*

DEAR SIR: — You have asked my opinion, in effect, as to whether the Board of Registration of Certified Public Accountants is required to disclose to members of the public information relative to the examination by the Board of applicants for registration as certified public accountants.

By the terms of G. L. (Ter. Ed.) c. 112, § 87A, the said Board is required to keep "a registry of all persons registered by it which shall be open to public inspection" and a duplicate list of such registry in the office of the Secretary of the Commonwealth, likewise open to inspection by the public. Aside from this registry of those registered as certified public accountants, and its duplicate, the Board is not required to keep any other records relative to such applicants which are to be open for public inspection, nor is it required to furnish information concerning the applicants or their examinations other than that set forth in such registry.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Teachers' Retirement — Credit for Prior Service — Commonwealth — Metropolitan District Commission.

APRIL 27, 1937.

Hon. JAMES G. REARDON, *Chairman, Teachers' Retirement Board.*

DEAR SIR: — You have asked my opinion upon certain facts as follows: —

"A member of the Teachers' Retirement Association who was born November 21, 1866, and is therefore required under the law to retire on July 1, 1937, has served in the public schools of Massachusetts as follows: — Cambridge, from October 10, 1922, to September 1, 1924, and from November 17, 1924, to date. She also worked for the Metropolitan Water Works from April 21, 1896, to June 20, 1900.

Will you kindly inform me as to whether or not credit should be allowed, as provided by G. L. (Ter. Ed.) c. 32, § 10 (7), for the service the above teacher had in the Metropolitan Water Works from April 21, 1896, to June 20, 1900?"

No provision is made by the statutes with relation to the retirement system for teachers by which the time of service which you have indicated as served by the teacher in question with the Metropolitan Water Works may be credited to such teacher in determining her retirement allowance. Although credit for prior service rendered to the "Commonwealth" may be given under G. L. (Ter. Ed.) c. 32, § 10 (7), the word "Commonwealth" as there used does not include the Metropolitan District Commission nor its predecessors. Provision is not made for credit for service with the latter bodies in connection with the teachers' retirement system, in contradistinction to the provision which is made specifically in regard to the State retirement system under sections 1 and 2 of said chapter 32.

Unless such a former employee of the Metropolitan District Commission, or its predecessors, had first entered the State Retirement Association and from there had passed into the Teachers' Retirement Association, by which process such teacher would acquire credit for all such prior service under G. L. (Ter. Ed.) c. 32, § 9 (4), no term of the applicable statute allows the giving of credit for the earlier service with the Metropolitan District Commission or its predecessors.

In the absence of any language in the statute specifically providing for transfer of accumulated funds or credit for service to those in the Teachers' Retirement Association who had formerly been in the service of the Metropolitan District Commission, or its predecessors, and had never subsequently been in the State Retirement Association, a legislative intent to give such credit cannot properly be assumed.

Very truly yours,

Paul A. Dever, *Attorney General.*

Alcoholic Beverages — Summer Licenses — Estimates — Amendments.

May 12, 1937.

Alcoholic Beverages Control Commission.

Gentlemen: — You have asked my opinion upon the two following questions: —

"1. May a local licensing authority which has properly made such an estimate prior to April first amend the estimate if the amendment is made at a proper meeting also held prior to April first?

2. May a local licensing authority which has properly made such an estimate prior to April first amend the estimate if the amendment is made at a proper meeting held subsequent to April first?"

The applicable provision of the statute, G. L. (Ter. Ed.) c. 138, § 17, as amended, is as follows: —

" . . . the local licensing authorities may make an estimate prior to April first in any year of such temporary resident population as of July tenth following, a copy of which estimate shall be transmitted forthwith to the commission, . . ."

It is to the advantage of the general public that the estimates of the local licensing authorities relative to summer population should be made as accurate as possible. It would not seem that the rights of any one would be prejudiced by amendments to original estimates. I see no reason why such amendments should not be made at any time, but if made after April first they cannot be treated as having a retroactive effect to justify the cancellation of licenses already granted under a prior estimate.

Accordingly, with the above proviso, I answer both your questions in the affirmative, and such answers are in harmony with the opinion rendered by the Attorney General to your Commission on July 24, 1935 (Attorney General's Report, 1935, p. 86).

Very truly yours,

Paul A. Dever, *Attorney General.*

Civil Service — Certification of Laborers — Position — Prior Employment.

May 13, 1937.

Hon. Thomas H. Green, *Commissioner of Civil Service.*

Dear Sir: — You advise me, in effect, that you had upon your eligible list for certification of laborers, among others, certain laborers who during a recent period of employment with the Boston Transit Department had worked for some considerable period of time at the special work of grouting with such Boston Transit Department, and that thereafter they, together with other laborers who had been employed by the Boston Transit Department, had their connection therewith severed and were placed again upon the eligible list of laborers.

You also advise me that in the original "certification of these particular men grouting experience was not recognized and was not requested in the initial requisition. Common laborers were certified and these men appointed as such. These men were assigned to this work in the same manner that other laborers were assigned to other types of employment."

While the Attorney General does not pass upon questions of fact, I gather from the quoted portion of your letter, together with other statements therein, that "grouting" is work which may be performed by "laborers" generally, and that a position as a "grouter" is not differentiated from any other position involving laboring activity, in the classifications established by your department, in the manner in which carpenters, bricklayers and certain other special trades were distinguished in your classifications from laborers.

The applicable provision of the civil service rules to which you call my attention (Rule 35, § 2) reads as follows: —

"In case the employing officer shall request in his requisition the certification of persons with experience in the department, the Commissioner shall give preference in certification to all persons who have served one year in the department in the same position to fill which requisition is made, and who have not been removed or discharged for cause, or who have resigned without charges pending."

The requisition which has been made upon you by the Boston Transit Department states that it is made as follows: "Title of position — laborer." To this is added, near the end of the application, under the heading "Special qualifications, if any", — "These men must be experienced in grouting in subways and tunnels."

I am of the opinion that the work "in the same position," to fill which requisition is made, as used in your rule, is here indicated by the requisition, giving the title of the position required as to "laborers," and that prior employment in a special form of work ordinarily done by "laborers" does not entitle persons who have been employed in such work to be preferred upon requisitions for laborers, even though a request is made for persons experienced in the particular form of work done by laborers indicated as "grouters." The words of your rule applying to "persons with experience in the department" refer to "persons who have served one year in the department in the same position to fill which requisition is made." In the instant matter, if requests can be said to have been made in the requisition for persons with experience in the department, it would mean persons who have served one year in the department as laborers, and would not apply to persons such as those referred to in your

letter, who are laborers, in connection with any particular branch of common labor performed by them. They would have the same preference in certification as any other laborer who had served one year in your department. It would seem in the instant matter that a request was made for those in the position of laborer and to do work which is part of labor.

Very truly yours,

Paul A. Dever, *Attorney General.*

Public Utilities — Mortgage Note — Amount Approved.

May 20, 1937.

Hon. A. C. Webber, *Chairman, Department of Public Utilities.*

Dear Sir: — You have asked my opinion upon the following question with relation to a note and mortgage made by an electric company: —

"Is a mortgage note securing a mortgage upon the franchise and property of a corporation subject to the provisions of G. L. (Ter. Ed.) c. 164, within the restriction of section 13 of said chapter that the bonds shall not exceed the capital stock and cash premiums thereon paid to the corporation?"

The applicable portion of the statutes, G. L. (Ter. Ed.) c. 164, § 13, reads: —

"A corporation subject to this chapter may, by vote of a majority in interest of its stockholders at a meeting called therefor, and subject to the limitations and restrictions of the following section, issue bonds at not less than par, to an amount not exceeding its capital stock actually paid in at the time of such issue and applied to the purposes of the corporation, increased by all cash premiums paid to the corporation thereon and likewise so applied, and bearing interest at such rate as the department shall approve, and, if issued under a mortgage existing on June second, nineteen hundred and twenty, by the provisions of which the rate of interest on bonds issued thereunder is fixed, at a price and with provisions for amortization of any discount approved by the department as consistent with the public interest; provided, that the terms of the mortgage so permit; and may secure the payment of the principal and interest of said bonds by a mortgage of its franchise and property."

This portion of the statute limits the amount of "bonds" which may be issued, whether such bonds are secured by mortgage or not. It does not purport to apply to notes, secured by mortgage or otherwise.

The original enactment, St. 1886, c. 346, § 3, now embodied in said section 13, likewise specifically referred only to "bonds" as the subject of a limitation upon amount of issue similar to that in said section 13. Various statutes passed since 1886 amending said chapter 346 have not added words applicable to other instruments, such as notes or other forms of evidences of indebtedness.

This being so, the word "bonds" in said section 13 cannot be interpreted by implication to include notes or notes secured by mortgages.

Had it been the intent of the Legislature to make these last-named forms of obligations subject, like "bonds," to the provisions of said section 13, it would have so stated by appropriate language. The fact that the General Court over a long period of years has seen fit not so to include

them in said section 13 and similar prior enactments makes it evident that the legislative intent was not to extend the scope of the provisions as to amount of issue to any other instruments than "bonds."

It may be that the purpose giving rise to these enactments cannot be completely fulfilled by the narrow scope of the statute, and that without including notes together with bonds therein the result anticipated from this legislation may in part be defeated; yet that condition is one which can be remedied only by the passage of some further measure by the Legislature.

Your Board is not altogether without power to act in the interest of a corporation's stockholders or of the investing public, for the provisions of section 14, as amended, of said chapter 164 give you power to authorize or to withhold authorization of the issue by gas and electric companies of "such amount of stock and bonds and of coupon notes and other evidences of indebtedness" as you may from time to time decide to be presently necessary or unnecessary, as the case may be, "for the purpose for which such issue of stock, bonds, coupon notes or other evidences of indebtedness has been authorized."

Although the terms of said section 13, as I have stated, do not prohibit the making of a note secured by mortgage in an amount greater than would be permitted in an issue of bonds, the actual issue of such note is subject to your approval.

Very truly yours,
Paul A. Dever, *Attorney General.*

Governor and Council — Extraordinary Expenses — Emergency Transfer of Funds.

Where a commission undertook to create a liability upon the Commonwealth, as to which there had been no legislative appropriation, payment of such a sum does not constitute an extraordinary expense; nor does any emergency exist in relation thereto which will warrant a transfer of money, appropriated to the Executive Department under G. L. (Ter. Ed.) c. 6, § 8, to the commission for such purpose.

May 25, 1937.

His Excellency the Governor, and the Honorable Council.

Gentlemen: — You have asked my opinion in the following communication: —

"At a meeting of the Governor and Council held Wednesday, May 19, 1937, consideration was given to communications received from the Commission on Investigation of Salaries of Judges of Probate and Insolvency.

Pending further action, the Executive Secretary was directed to request an opinion of the Attorney General advising the Governor and Council whether they have authority to comply with the request of said Commission."

The request of the Commission therein referred to reads: —

"May 1, 1937.

To His Excellency the Governor, and the Honorable Council.

Sirs: — At the final meeting of the Special Recess Commission created under chapter 64 of the Resolves of 1936, it was voted that an additional $100 be paid the clerk of the Commission, Mr. Arthur W. Woodman.

The appropriation granted for conduct of the investigation made by this Commission is inadequate to provide funds to pay this additional compensation due the clerk for services rendered.

The Commission requests that your favorable action be taken on this request and that the sum voted the clerk be paid from the contingency fund.

A copy of the action taken by the Commission, bearing signatures of the members approving the vote, is attached hereto."

It also appears from a copy of the records of the said Commission, appended to said letter, that, on November 24, 1936, at what is said in the Commission's letter to have been its final meeting, it voted to pay "an additional $100" for the services of its clerk.

The resolve creating the said Commission (Res. 1936, c. 64) reads: —

"*Resolved,* That a special unpaid commission, to consist of two members of the senate to be designated by the president thereof, five members of the house of representatives to be designated by the speaker thereof, and three persons to be appointed by the governor, with the advice and consent of the council, is hereby established for the purpose of making an investigation and study of the laws relative to the salaries of judges of probate and insolvency, with a view to determining the advisability of making changes in such salaries based on a uniform schedule or otherwise. In such investigation and study special consideration shall be given to current senate documents numbered eighty-nine, two hundred and forty-four, three hundred and twenty-five, three hundred and twenty-six, and current house documents numbered two hundred and twenty-five, six hundred and sixty-five, eleven hundred and ten, eleven hundred and eleven, and fourteen hundred and fifty-three. Said commission shall be provided with quarters in the state house or elsewhere, shall hold hearings and may expend, for clerical and other services and expenses, such sums, not exceeding, in the aggregate, five hundred dollars, as may hereafter be appropriated. Said commission shall report to the general court the results of its investigation and its recommendations, together with drafts of legislation necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives on or before the first Wednesday of December in the current year."

From such resolve it is apparent that the said Commission was not authorized to expend for clerical and other expenses any sum in excess of the amount which might be appropriated by the General Court, and no sum exceeding in the aggregate $500. By item 33c of the supplementary appropriation bill (St. 1936, c. 432) the sum of $500 was appropriated for the expenses of the Commission's investigation. No other appropriation appears to have been made for that purpose, and no deficiency appropriation for such purpose was made in the general appropriation bill previously passed in the current year. See St. 1937, c. 234.

An appropriation of $100,000 was made in said general appropriation bill of the current year, in item 104, under the title "Service of the Executive Department", —

"For payment of extraordinary expenses and for transfers made to cover deficiencies with the approval of the Governor and Council."

The governing statute, for the operation of which said item 104 was enacted (G. L. [Ter. Ed.] c. 6, § 8), reads: —

"An amount not exceeding one hundred thousand dollars shall be appropriated each year for carrying out sections twenty-five to thirty-three, inclusive, of chapter thirty-three, for the entertainment of the president of the United States and other distinguished guests while visiting or passing through the commonwealth, for extraordinary expenses not otherwise provided for, which the governor and council may deem necessary, and for transfer, upon the recommendation of the comptroller, with the approval of the governor and council, to such appropriations as have proved insufficient."

It is obvious from the letter of the Commission that, since there were no funds available, from the appropriation which had been made for its expenses, with which to pay the amount of $100 which the Commission undertook by its vote to create as a liability upon the Commonwealth, the Commission was without authority to pass such vote or to create such a liability. The conditions prescribed by the Legislature for the performance of its functions must be observed and complied with by the Commission, and the enabling resolve defined both the powers and limitations of the Commission. The members of the Commission and also those dealing with it were equally obliged to ascertain and to keep within such legislative bounds. *Adams* v. *County of Essex*, 205 Mass. 189; *Dyer* v. *Boston*, 272 Mass. 265, 274.

If the action of the Commission is to be regarded as creating some moral obligation on the part of the Commonwealth, it is the province of the Legislature to so determine, and, by a deficiency appropriation during the current year, to provide the necessary funds to liquidate the same.

No power of appropriation was conferred upon the Commission. Such power, in accordance with our Constitution and form of government, rests exclusively in the General Court. *Opinion of the Justices*, Mass. Adv. Sh. (1936) 1285.

The appropriation made under said item 104 of the appropriation bill of this year is not, by its terms nor as read in connection with said G. L. (Ter. Ed.) c. 6, § 8, intended to authorize the transfer of any part of it to supply deficiencies which have arisen in appropriations of past years.

No payment of a sum voted near the close of a fiscal year to an employee of a Commission in excess of an existing appropriation can be considered as one of the "extraordinary expenses not otherwise provided for," mentioned in said G. L. (Ter. Ed.) c. 6, § 8. It is not apparent from the records of the Commission that any emergency existed in connection with the vote to pay an additional sum beyond its appropriation to its employee; therefore, a payment of such sum cannot, from any viewpoint, be considered an "extraordinary" expense. The vote of the Commission, for reasons already sufficiently referred to, did not create an emergency. No emergency existed. *Safford* v. *Lowell*, 255 Mass. 220. Moreover, the said Commission was without authority, upon the facts stated, to obligate the Commonwealth to pay a sum which was in excess of its appropriation of $500, so that it cannot be said that the appropriation was "insufficient," and a transfer from the money appropriated to the Executive Department under this item is not warranted because of insufficiency.

I therefore answer your request for my opinion to the effect that, upon the facts presented for my consideration, the Governor and Council have no authority to comply with the request of the said Commission.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Insurance — Deferred Annuity Contracts — Foreign Company — Employer — Employee.

May 27, 1937.

Hon. Francis J. DeCelles, *Commissioner of Insurance.*

Dear Sir: — You have submitted to me a memorandum of facts relative to a proposed plan whereby Harvard University intends to purchase in New York from a New York insurance company, not authorized to do business in Massachusetts, deferred annuity contracts for its employees. It is stated to me that the University regards this method of establishing what is, in effect, a mode for pensioning superannuated employees as advantageous to itself in its role as an employer in the same manner as other employees regard "group insurance."

The proposed plan differs from "group insurance," as such insurance is defined in G. L. (Ter. Ed.) c. 175, § 133, in certain details. Under the proposed plan the University is not a direct party to the contracts covering the various employees, as it would be in a policy of group insurance. I am advised that the annuity contracts are, as one would expect, directly between the insuring company and the several employees, and that a separate agreement is to be made between the company and the University, by which the latter will bind itself to pay the company half the amount of premiums due from the respective employees. The University then intends by arrangement with its employees to deduct one-half of the amount due for premiums from their respective salaries and forward the same to the company. As each employee reaches the agreed time for retirement from the University's service, payments upon the annuity which has been thus purchased for him will be payable by the company.

In relation to such facts you have asked my opinion upon the following questions of law: —

"1. Whether Harvard University would be violating any provision of Massachusetts law in putting into effect, in the method outlined in the memorandum, the proposed pension plan.

2. Whether Harvard University would be violating any provision of either section 3 or section 160 of G. L. (Ter. Ed.) c. 175, in putting into effect, in the method outlined in the memorandum, the proposed pension plan."

G. L. (Ter. Ed.) c. 175, § 3, reads as follows: —

"No company shall make a contract of insurance upon or relative to any property or interests or lives in the commonwealth, or with any resident thereof, and no person shall negotiate, solicit, or in any manner aid in the transaction of such insurance or of its continuance or renewal, except as authorized by this chapter or chapter one hundred and seventy-six or one hundred and seventy-eight, or except as otherwise expressly authorized by law."

G. L. (Ter. Ed.) c. 175, § 160, reads as follows: —

"Whoever, for a person other than himself, acts or aids in any manner in the negotiation, continuation, or renewal of a policy of insurance or an annuity or pure endowment contract with a foreign company not lawfully admitted to issue such policies or contracts in this commonwealth shall, except as provided in section one hundred and sixty-eight, be punished by a fine of not less than one hundred nor more than five hundred dollars;

but this section shall not apply to a duly licensed special insurance broker acting under said section one hundred and sixty-eight, nor to any act of a duly licensed insurance broker in negotiating, continuing or renewing policies of insurance on transportation, inland navigation and ocean and coastwise marine risks, nor to any insurance appertaining thereto which cannot, to the advantage of the insured, be placed in authorized companies. A person, other than the commissioner or his deputy, upon whose complaint a conviction is had for violation of this section, shall be entitled to one half of the fine recovered upon sentence therefor."

Although it does not appear that there is any matter before you requiring present action on your part, and although your questions are in a sense hypothetical, perhaps ultimately for judicial determination, nevertheless, for guidance in the possible performance of duties which may hereafter be required of you in connection with the proposed plan, I advise you that I am of the opinion that, upon the facts stated, both your questions are to be answered in the negative.

It is well settled that notwithstanding the provisions of the statutes above set forth a person resident in Massachusetts may enter into a lawful contract of insurance for his own benefit in another state. *Allgeyer* v. *Louisiana*, 165 U. S. 578. *Johnson* v. *Mutual Life Ins. Co.*, 180 Mass. 407. *Stone* v. *Old Colony St. Ry. Co.*, 212 Mass. 459.

Unquestionably this rule of law applies to an employer who, as an actual party to the contract of insurance, purchases a "group policy" covering his employees in another state. *Boseman* v. *Connecticut General Life Ins. Co.*, 301 U. S. 196.

It is obvious that in a technical sense the relation of the employer, in a plan such as outlined above, to the insurer is not precisely the same as it would be under a "group policy," in which his name would appear as an insured. But in principle his relation is not essentially different, for in both situations the protection afforded by the contract with the company is for the direct benefit of the employees and for the indirect benefit of the employer. The employer has an insurable interest in his employees, and their protection under the company's contract in both instances inures also to his benefit in that "it makes for loyalty, lessens turn-over and the like," as was said by the United States Supreme Court of the employer's interest in a group policy in *Boseman* v. *Connecticut General Life Ins. Co.*, *supra*. In both situations the employer, in a very true sense though not in a technical sense, under the proposed plan is buying protection for himself through contracts made directly by him in another state. Under the proposed plan the facts set forth show that he is not acting as an agent for the insurance company, nor under the arrangement contemplated can he be regarded as an agent of his employees. Using the words with a broad significance, the employer has a common interest in the transaction of purchasing and keeping alive the annuity contracts, and in such transaction the employee and the employer may be regarded as joint principals.

To consider the employer under the proposed plan as negotiating an annuity contract in another state with a foreign company "for a person other than himself," as the quoted words are used in said section 160, would involve so literal and narrow an interpretation of the statute as to do violence to the intent of the Legislature in framing it. The evil which was aimed at by said sections 3 and 160 was the solicitation and negotiation of insurance and annuity contracts in this Commonwealth by

unlicensed companies, or by agents and brokers acting on their behalf, either within or without Massachusetts. See *Hooper* v. *California*, 155 U. S. 648; *Nutting* v. *Massachusetts*, 183 U. S. 553.

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

Lease — Dwelling House — Eviction.

JUNE 4, 1937.

Hon. JAMES T. MORIARTY, *Commissioner of Labor and Industries.*

DEAR SIR: — Replying to your letter relative to the eviction of tenants from premises occupied for dwelling purposes, by means of "straw leases," let me say that G. L. (Ter. Ed.) c. 186, § 13, was intended by the Legislature to prevent summary eviction of a tenant from such premises and to require that the tenant shall have time to vacate, after a lease has been made, equal to the time between rent days under the former tenancy at will and the receipt by him of notice in writing of the cessation of the tenancy.

The statute, in its original form as a permanent measure, was St. 1927, c. 339, which embodied similar provisions which had first been introduced into our statutes by Gen. St. 1919, c. 257, as emergency measures during a period of housing shortage, and was intended to relieve tenants from the hardship of our former laws with relation to hasty evictions after lease by a landlord. See Message of the Governor, May 21, 1919; Report of Commission on the Necessaries of Life to the Legislature, 1927, House Document No. 1100; *Newman* v. *Sussman*, 239 Mass. 283.

The tenant will be protected by the courts in the enjoyment of the privileges granted him under sections 13 and 14 of said chapter 186.

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

Alcoholic Beverages — Use of Manufacturer's License by Anyone other than the Licensee.

A license for the manufacture of alcoholic beverages may not be used by anyone other than the person to whom it was issued, except when transferred in accordance with the provisions of the applicable statute.

JUNE 8, 1937.

Alcoholic Beverages Control Commission.

GENTLEMEN: — I am in receipt from you of a communication asking my opinion upon the following matter: —

"The New England Distillers, Incorporated, has a manufacturer's license to manufacture and sell alcoholic beverages in premises located at 14 Green Street, Clinton.

You will note that the attorneys have requested this Commission to authorize Bellows and Company, a separate and distinct corporation, to alternate with the New England Distillers, Incorporated, in the manufacture and sale of alcoholic beverages under the said license without the payment of any additional license fee.

Your opinion is requested as to whether or not, in view of the provisions of the Liquor Control Act, this Commission may legally grant such a request."

In my opinion, your Commission may not lawfully grant such a request.

It was not the intent of the Legislature, in providing for the issuance of licenses to manufacture alcoholic beverages under the provisions of G. L. (Ter. Ed.) c. 138, as amended, that a license for such purpose should be used by anyone other than the person to whom it was issued, except when transferred out of the ownership of the original licensee under certain specified conditions not here applicable. Nor was it the intent of the Legislature, as set forth in said chapter, that more than one manufacturer should be authorized to carry on business at the same premises.

I am advised that it has been suggested to you that the lessee of the premises and business of a licensed manufacturer might carry on business at such premises temporarily under the license of his lessor for the purpose of complying or attempting to comply with certain Federal regulations. It is immaterial whether the details of the manufacture under such a lease are performed by the lessor or the lessee if the lessee is, as a matter of fact, engaging in the business. The business of manufacturing alcoholic beverages may not be carried on in Massachusetts without a license issued to the manufacturer.

Very truly yours,

Paul A. Dever, *Attorney General.*

Statute — Emergency Law — Effective Date.

June 9, 1937.

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

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

"St. 1937, c. 384, approved May 28, 1937, provides that 'this act shall take effect upon December first in the current year.' His Excellency the Governor has declared it to be an emergency law that should take effect forthwith.

As it is necessary for me to certify the law, will you kindly, at your earliest possible convenience, inform me whether this law takes effect upon the date the Governor declared it an emergency law or upon December first as provided in the act."

I am of the opinion that the act to which you refer took effect upon the date when the Governor declared it an emergency law.

The said act was one subject to the referendum, under the provisions of Mass. Const. Amend. XLVIII.

Under said article XLVIII, The Referendum, *II, Emergency Measures*, the Governor has authority to declare a law passed by the Legislature without an emergency preamble to be "an emergency law," and the same then becomes a law upon his signing it.

The applicable portion of said constitutional amendment provides, as to the Governor's power in this respect, as follows: —

". . . but if the governor, at any time before the election at which it is to be submitted to the people on referendum, files with the secretary of the commonwealth a statement declaring that in his opinion the immediate preservation of the public peace, health, safety or convenience requires that such law should take effect forthwith and that it is an emergency law and setting forth the facts constituting the emergency, then such law, if not previously suspended as hereinafter provided, shall take effect

without suspension, or if such law has been so suspended such suspension shall thereupon terminate and such law shall thereupon take effect: but no grant of any franchise or amendment thereof, or renewal or extension thereof for more than one year shall be declared to be an emergency law."

Under other provisions of the same clause of article XLVIII the law in question might have been declared an emergency law by the Legislature, and if that had been done it would have taken effect likewise upon its approval by the Governor.

If the Legislature had passed such law without any emergency preamble, in the absence of a declaration of emergency by the Governor it could not have taken effect until ninety days after it had become a law by the signing of the same by the Governor (Mass. Const. Amend. XLVIII, The Referendum, *I*). The mere fact that the Legislature has provided for its becoming effective at a later designated time ("December first in the current year") cannot nullify the authority specifically granted to the Governor by the said constitutional amendment to declare it to be an emergency law and to cause it to become effective upon his signing it. The legislative pronouncement as to the date of the law's becoming effective, contained in the measure, can have binding force only in case the Governor does not exercise his constitutional power, after the measure has left the General Court, to declare the same an emergency law. The power of the Legislature to set a date upon which such a measure as that under consideration shall become effective is exercised subject to the possibility that the Chief Executive will use the paramount authority vested in him by the said constitutional amendment to make the measure an immediately effective law. To hold otherwise would be to permit a destruction of this constitutional power of the Executive by the legislative branch of the government.

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

National Guard — Death Due to Accident — Lump Sum Settlement.

JUNE 10, 1937.

Lt. Col. RALPH M. SMITH, *President of the Board for Physical Injuries, Department of the Adjutant General.*

DEAR SIR: — I have received from you the following communication: —

"Your opinion is requested as to whether or not the Board constituted under the provisions of G. L. (Ter. Ed.) c. 33, § 69, as amended, may make a lump sum settlement with the dependents of a soldier whose death resulted from injury coming under the provisions of said section, in lieu of the weekly payments provided for in G. L. (Ter. Ed.) c. 152."

I answer you to the effect that your Board has authority to make such a lump sum settlement as you describe, if agreed to by the said dependents.

G. L. (Ter. Ed.) c. 33, § 69, provides, in part, with reference to your Board's authority covering compensation to said dependents: ". . . said board shall exercise all the powers given by said provisions of chapter one hundred and fifty-two to the department of industrial accidents."

By section 48 of said chapter 152 the Department of Industrial Accidents, under circumstances similar to those which you describe, is em-

powered to fix an amount for a lump sum settlement. While your function in regard to compensating dependents of a deceased soldier is not precisely that of the Department of Industrial Accidents, nevertheless, the two functions are so similar that the power to approve of lump sum settlements in cases of the instant sort, vested in said department, is in its nature the same as the power to effect such settlements on the part of your Board under said section 69 of chapter 33. In either instance, agreement thereto by the dependents is a prerequisite to the exercise of the power to effectuate a lump sum settlement.

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

State Prison Colony — Hospital — Medical Treatment — Prisoners — Segregation.

JUNE 16, 1937.

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

DEAR SIR: — You have asked my opinion on certain questions of law relative to various sections of G. L. (Ter. Ed.) c. 127, as amended.

Your first question is: —

"Will you please advise me whether or not the hospital of the State Prison Colony comes within the meaning of the word 'hospital,' as found in G. L. (Ter. Ed.) c. 127, § 117. For your information I might add that the State Prison Colony hospital has been given an AA rating by the American Surgical Association."

I answer this question to the effect that the hospital of the State Prison Colony is a "hospital," within the meaning of said section 117.

Your second question is: —

"Will you also advise me whether or not the intent of the words 'medical treatment,' as contained in said section, also includes surgical treatment."

I answer your second question to the effect that the words "medical treatment," as used in said section 117, include "surgical treatment" within their meaning.

Your third question is: —

"Will you also advise me whether or not the word 'prisoners,' as mentioned in section 109A of chapter 127, includes inmates confined at a county jail awaiting trial."

I answer your third question to the effect that the word "prisoners," as used in said section 109A, does not include inmates of county jails awaiting trial. Notwithstanding this, an examination of the earlier statutes which are now compiled as said section 117 shows that the intent of the Legislature was to give you authority, by virtue of said section 117, to remove temporarily a person held in a jail *awaiting trial,* except for a capital crime, to a hospital, upon the certificate of the physician of such jail, irrespective of the terms of said section 109A. The word "prison," as used in said section 117, includes jails within the scope of its meaning. It is immaterial, so far as the authority given you is considered, that a hospital is located at the State Prison Colony.

Your fourth question is in effect as follows: —

"Will you further advise me whether or not I am obliged, under section 22 of said chapter 127, to keep" the person awaiting trial when removed to the State Prison Hospital "segregated from all convicted prisoners."

I am of the opinion that the provisions of section 22 were not intended by the Legislature to be applicable to persons temporarily placed in a hospital under the provisions of said section 117.

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

Metropolitan District Water Supply Commission — Contract — Bid.

JUNE 21, 1937.

Metropolitan District Water Supply Commission.

GENTLEMEN: — You advise me that bids for the construction of administration buildings at Belchertown were publicly opened on June 10, 1937, at eleven o'clock, which was the time set in the proposals for bids; that fourteen bids were received and opened; that these bids were referred to the Chief Engineer to determine the competency, experience and financial ability of the various bidders and to then report to the Commission; that the lowest bidder conferred with the Chief Engineer and informed him that it had made a mistake of $23,400 in its bid, which should have been $385,845 instead of $362,445, as submitted; that thereafter, at two o'clock in the afternoon of June 16, 1937, this bidder delivered a letter to the Commission in which it set forth its alleged error in the bid submitted, sought permission to withdraw the bid and further stated: "We cannot see our way clear to do the work for the sum first named and would like to have you gentlemen consider us as the second lowest bidder. We leave it entirely to you. If you cannot do that, then we shall appreciate it very much if you will return our certified check." You also advise that no further action has been taken by you, and that the next lowest bid amounted to $371,996.

Bids for the work were invited by the Commission by a printed paper which was captioned "Information for Bidders" and which was duly advertised and supplied to those who submitted bids. This paper set forth the general nature of the work and called attention to certain provisions of the formal contract which the successful bidder would be required to execute. It also contained the following provisions: —

"As a guaranty of the good faith of the bidder, each bid must be accompanied by a certified check acceptable to the Commission and payable to the Commonwealth of Massachusetts, for Fifteen Thousand Dollars ($15,000), such check to be returned to the bidder unless forfeited under the condition herein stipulated. This check should not be enclosed in the sealed envelope containing the bid, but should be delivered to the Secretary of the Commission, who will give a proper voucher for the deposit."

It contained the further statement that upon the failure of the contractor to execute the contract within ten days after it has been notified that the contract has been awarded to it, "the Commission at its option may determine that the bidder has abandoned the proposed contract, and thereupon, if it so determines, the proposal and acceptance shall be

null and void, and the check accompanying the proposal shall be forfeited to the Commonwealth as liquidated damages." The Commission reserved the right to reject any or all bids and to determine the competency, experience and financial sufficiency of any bidder before making the award of the contract.

The blank forms for the proposal were furnished to the bidders by the Commission, and one of these was used by the lowest bidder in making his bid. The proposal provided that: —

"If this proposal shall be accepted by the Metropolitan District Water Supply Commission, and the undersigned shall fail to execute the contract and the bond, . . . then the Commission at its option may determine that the bidder has abandoned the said contract, and thereupon, if it so determines, the proposal and acceptance shall be null and void, and the certified check accompanying this proposal shall become the property of the Commonwealth of Massachusetts, . . ."

You request my opinion as to whether the lowest "bidder has any standing as such and whether the Commission should consider the amended figures as a bid."

You are advised that the contractor has no right to withdraw its original bid or to amend its proposal by increasing the amount thereof by $23,400 by reason of any alleged error in making up its bid. The mistake, if any there were, was not caused by the Commission. Neither was it a mutual mistake. The contractor cannot require the Commission to consider it the second lowest bidder. The company is bound by its bid and the Commission is authorized, if the contractor is found to be competent, experienced and financially able, to award the contract to it; and upon the failure of the company to execute the contract, to forfeit its certified check for the benefit of the Commonwealth. The contractor is the lowest bidder, but whether it is the lowest acceptable bidder is for the Commission to determine, just as it is within its province to fairly decide whether it is in the general public interest to reject any or all bids. You are empowered by St. 1926, c. 375, and St. 1927, c. 321, to exercise reasonable judgment in obtaining for the Commonwealth the most advantageous contract for the proper construction of these buildings. The amount of the bid, the character of the bidder, its experience and ability to faithfully carry out the terms of the contract are important factors to be weighed and considered in the selection of the contractor to whom the award should be given. *Larkin* v. *County Commissioners*, 274 Mass. 437; *Archambault* v. *Mayor of Lowell*, 278 Mass. 327.

We simply say that the contractor is still the lowest bidder, and nothing occurring since the opening of the bids has changed that status. *Wheaton Building & Lumber Co.* v. *Boston*, 204 Mass. 218, *John J. Bowes Co.* v. *Milton*, 255 Mass. 228, *Daddario* v. *Milford*, Mass. Adv. Sh. (1936) 2219.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Municipality — Private Water Company — Appropriations.

JUNE 23, 1937.

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

DEAR SIR: — You advise me that a private water company furnishes a portion of the town of Salisbury with water for domestic purposes and

that, in order to secure a supply of water for a part of the town to which the company has refused to extend its mains, the town, at its annual meeting in 1936, passed the following vote: —

"Voted unanimous to raise and appropriate the sum of $15,000 to purchase materials and appurtenants necessary to extend the water system to Rings Island in conjunction with a WPA project, and that to meet the appropriation the Treasurer with the approval of the Selectmen be and hereby is authorized to borrow a sum not exceeding $15,000 and to issue bonds or serial notes of the town therefor, said bonds or notes to be payable in accordance with the provisions of chapter 44 of the General Laws, said bonds or notes to be amortized at the rate of $1000 annually so that the whole loan shall be paid in not more than fifteen years from date of issue of the first bond or note as recommended by the Finance Committee."

You ask me: "Can the town of Salisbury lay water pipes connecting with those of a private water company in order that such private water company may supply certain portions of the town?"

Towns are only authorized to raise and expend funds for the public purposes for which they were created, and their powers in this respect are wholly derived from our statutes. This principle of law is well settled and has been frequently enunciated in a long line of decisions, commencing with *Stetson* v. *Kempton*, 13 Mass. 272, and ending with *MacRae* v. *Selectmen of Concord*, Mass. Adv. Sh. (1937) 157.

The statute governing appropriations by towns, G. L. (Ter. Ed.) c. 40, § 5, specifically enumerates the purposes for which towns may appropriate money, and then expressly includes "for all other necessary charges arising in such town." No mention is made therein relative to the acquisition or maintenance of a water system. Towns are authorized, however, by G. L. (Ter. Ed.) c. 40, § 38, to purchase existing water systems, "or contract therewith for a supply of water." Your communication indicates that the town is not to purchase the water and sell it to the consumers, but rather that the company is to use the new mains laid by the town and sell water directly to its customers. The portion of the statute last cited does not permit the expenditure of public funds principally in the interest of a private water company. If, however, the predominating motive of the town was to advance the common good which will result from the laying of the main, then the appropriation is legal, even though the company may thereby secure some incidental advantage. *Opinion of the Justices*, 182 Mass. 605; *Wheelock* v. *Lowell*, 196 Mass. 220. It should be left to the good sense and judgment of the citizens, expressed in a town meeting, and if they determine that a common benefit will be effected by the expenditure of money secured by a loan to the town, which they are willing to repay by taxation, then their action should be held valid, excepting only in those instances where the object sought to be accomplished is not a public purpose sanctioned by law. *Opinion of the Justices*, 240 Mass. 616, 618; *Wright* v. *Mayor and City Council of Cambridge*, 238 Mass. 439.

It has been the uniform practice for the General Court to authorize towns to establish and set up new water systems, and it has not been unusual for the Legislature to prescribe the conditions under which towns may purchase existing systems. See *Revere Water Co.* v. *Winthrop*, 192 Mass. 455, 460. Upon the acceptance of such an enabling act, towns are authorized by G. L. (Ter. Ed.) c. 44, § 12, to appropriate the necessary funds to carry out the purposes of such special act.

We assume that the provision in the vote for the payment of the notes or bonds in accordance with chapter 44 refers to the third clause of section 8, which provides for the incurring of a debt, outside the debt limit, "for establishing or purchasing a system for supplying the inhabitants of a city or town with water, for the purchase of land for the protection of a water system, or for acquiring water rights." The extension of the mains, as set forth in the vote, does not come within the purview of this clause.

The amount of the appropriation, however, is not stated to be beyond the debt limit of the town; and the facts necessitating the extension of a water supply to Rings Island, including the number of persons who would be thereby affected, the preservation of the public health, adequate fire protection, and the enhancement of the public good, might well be sufficient to show that the expenditure of public funds in the extension of the water mains might be warranted as a necessary charge within G. L. (Ter. Ed.) c. 40, § 5.

Very truly yours,
Paul A. Dever, *Attorney General.*

Savings Bank Life Insurance — State Actuary — Tables of Mortality.

June 28, 1937.

Judd Dewey, Esq., *Deputy Commissioner of Savings Bank Life Insurance.*

Dear Sir: — You have asked my opinion upon the following question of law: —

"May the State Actuary adopt a table of mortality other than the American Experience Table, to be used for computing the legal reserve to be held under policies of insurance to be issued by savings-insurance banks operating under G. L. (Ter. Ed.) c. 178?"

I answer your question in the affirmative, assuming that the approval of the Commissioner of Insurance has been given to the action of the State Actuary.

Special specific provision is made by the Legislature, in G. L. (Ter. Ed.) c. 178, § 15, for the adoption by the State Actuary, in computing the legal reserve to be held under insurance and annuity contracts written under said chapter 178, to use a different table than "the American Experience Table" if deemed more suitable, to wit: — the State Actuary "shall also prepare or procure tables for computing the legal reserve to be held under insurance and annuity contracts, and for this purpose may, with the approval of the commissioner of insurance, adopt a table of mortality which may be deemed more suitable than the American Experience Table for policies of insurance of the character and amounts to which the risks of the banks are limited; and shall in all other respects, except as otherwise provided, perform the duties of insurance actuary for all the savings and insurance banks . . ."

This authority so specifically given to the State Actuary in connection with the computation of such legal reserves is not limited or controlled by earlier provisions of said section 15 concerning his authority to prepare tables of premium rates. Nor is it limited by the provisions of section 6 of said chapter 178, which provides that any savings and insurance bank, acting through its insurance department, "may make and issue policies upon the lives of persons and grant or sell annuities with all the rights, powers and privileges and subject to all the duties, liabilities and

restrictions in respect to the conduct of the business of life insurance conferred or imposed by general laws relating to domestic legal reserve life insurance companies, so far as the same are applicable and except as is otherwise provided herein," since with respect to such authority it "is otherwise provided," within the meaning of the exception set forth in the above quotation from said section 6; and the restriction imposed by the General Laws with relation to domestic legal reserve life insurance companies, requiring computation of the net value of outstanding policies upon the basis of the "American Experience Table" of mortality (G. L. [Ter. Ed.] c. 175, § 9, Second) is consequently not applicable.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Department of Education — Advisory Board — Incompatible Positions.

The position of dean of a State teachers' college is incompatible with that of a member of the Advisory Board to the Commissioner of Education.

JUNE 28, 1937.

Hon. JAMES G. REARDON, *Commissioner of Education.*

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

"Can a member of the Advisory Board of the Department of Education accept a position as dean of one of the State teachers' colleges, and remain as a member of the Advisory Board to the Commissioner?"

The "Department of Education" is defined by G. L. (Ter. Ed.) c. 15, § 1, as follows: —

"There shall be a department of education, in this chapter called the department, which shall be under the supervision and control of a commissioner of education, in this chapter called the commissioner, and an advisory board of education of six members, in sections one to six, inclusive, called the board, of whom at least two shall be women and one shall be a school teacher of the commonwealth."

In G. L. (Ter. Ed.) c. 73, § 1, as amended, it is provided that teachers' colleges shall be subject to the "general management" of the "Department of Education."

Said section 1 reads: —

"The department of education, in this chapter called the department, shall have general management of the state teachers' colleges at Barnstable, Bridgewater, Fitchburg, Framingham, Lowell, North Adams, Salem, Westfield and Worcester, and the Massachusetts school of art at Boston, wherever said colleges may be hereafter located, and of any other state teachers' colleges hereafter established, and of boarding houses connected therewith, and may direct the expenditure of money appropriated for their maintenance."

You inform me that the practice is for the Commissioner of Education himself to appoint the deans of teachers' colleges and that their salaries are fixed by virtue of the classifications and specifications established by the Division of Personnel and Standardization, under G. L. (Ter. Ed.) c. 30, § 46. Nevertheless, inasmuch as the general management of such

colleges is vested in the Department of Education, of which the Advisory Board is an integral part, it would seem that the position of dean of such a college, which falls under the general power of management vested in the Department of Education, is incompatible with that of the office of a member of the Advisory Board, which is a part of the Department of Education. It would follow that acceptance of the position of such a dean by a member of the said Advisory Board would vacate the office of such member.

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

Registrar of Motor Vehicles — Revocation of Licenses — Amending Statute.

JULY 2, 1937.

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

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

"Your opinion is respectfully requested concerning the following matter:
Under the provisions of St. 1937, c. 117, section 24 of G. L. (Ter. Ed.) c. 90, was amended.

Prior to the passage of chapter 117, under the provisions contained in section 24 (2) (*a*), (*b*) and (*c*), the Registrar of Motor Vehicles was required, upon a conviction for operating so that the lives or safety of the public might be endangered, to revoke immediately the license, and there was no discretionary power to restore it until after sixty days from the date of an original first conviction and one year from the date of a second conviction. St. 1937, c. 117, amended this by giving the Registrar discretionary authority to rescind after a revocation, within the period of sixty days.

St. 1937, c. 117, became effective on June 18, 1937.

The question arises as to whether or not the Registrar of Motor Vehicles has discretionary power in cases where there was a conviction before said date, or whether his discretionary power is limited to convictions that happen after June 18, 1937."

I answer your question to the effect that the discretionary power to rescind a revocation of a license, given to the Registrar by the amendment of G. L. (Ter. Ed.) c. 90, § 24 (2) (*c*), is vested in him as of the effective date of the amending act, and may be exercised by him thereafter to rescind revocations which he has made as the result of past convictions as well as those which may occur in the future.

To so hold is not to give a retrospective force to the legislative enactment; for, although convictions and revocations may have occurred in the past, the present exercise of the discretionary power vested in the Registrar by the amended statute does not operate as of a time prior to the enactment of the law, but in all respects in effect and in time as of a date subsequent to such enactment. *Mulvey* v. *Boston*, 197 Mass. 178.

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

Municipalities — Appropriations — Reimbursement.

A municipality is without authority to borrow money for the purpose of reimbursing its treasury for money already expended.

July 19, 1937.

Emergency Finance Board.

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

"There have been submitted to the Emergency Finance Board the following votes of the city of Somerville which authorize borrowing and the appropriation of at least a portion of the borrowed funds. The approval of the Emergency Finance Board is required before expenditures can be made therefrom.

The Board is desirous of having your opinion as to whether the following appropriations of loan moneys are in accordance with the Municipal Finance Act as set forth in G. L. (Ter. Ed.) c. 44, §§ 7 and 20; and whether the Board, if it should so vote, may approve any or all of the appropriations called for: —

A.

Ordered: The City Treasurer, with the approval of the Mayor, is hereby authorized to issue not exceeding $100,000, in bonds of the city, under General Laws, chapter 44, section 8 (7), for the extension of water mains and for water department equipment, such bonds to be payable within five years from their date. The City Auditor and City Treasurer are hereby authorized to use $20,000 of the above amount borrowed as a reimbursement for the amount already spent for above-mentioned purposes.

B.

Ordered: The City Treasurer, with the approval of the Mayor, is hereby authorized to issue not exceeding $140,000 in bonds of the city, under General Laws, chapter 44, section 7 (1), as amended, for the construction of sewers for sanitary or surface drainage purposes, such bonds to be payable within five years from their date, and the sum of $29,000 is hereby appropriated in this year's tax levy in accordance with section 7 of chapter 44 of the General Laws. The City Auditor and City Treasurer are hereby authorized to use $30,000 of the above amount borrowed as a reimbursement for the amount already spent for the above-mentioned purposes.

C.

Ordered: The City Treasurer, with the approval of the Mayor, is hereby authorized to issue not exceeding Eighty Thousand ($80,000) dollars in bonds of the city, under General Laws, chapter 44, section 7 (6), as amended, for macadam pavement or other road material under specifications approved by the department of public works, such bonds to be payable within five years from their date. The sum of Twenty-nine Thousand ($29,000) dollars is hereby appropriated in this year's tax levy in accordance with section 7 of chapter 44 of the General Laws. The City Auditor and City Treasurer are hereby authorized to use Twenty-seven Thousand ($27,000) dollars of the above amount borrowed as a reimbursement for the amount already spent for the above-mentioned purpose.

It is respectfully requested that an opinion be rendered."

Each of the foregoing orders for an issue of bonds contains a sentence in effect appropriating a part of the proceeds for reimbursement to the city of money previously spent for the same purpose as that for which bonds are to be issued under the terms of the order.

It was said in an opinion of one of my predecessors in office (IV Op. Atty. Gen. 261), with which I agree, that a municipality was without authority to borrow money or to issue bonds for the purpose of reimbursing its treasury for money already expended. Reimbursement was not, at the time when said opinion was written, nor is it now, one of the purposes for which a municipality is authorized to incur indebtedness.

The same general principle was enunciated by the Supreme Judicial Court in *Chapin* v. *Lincoln*, 217 Mass. 336.

The orders which you have shown me are similar to that considered in said opinion of the former Attorney General and similar in purpose to that before the court in *Chapin* v. *Lincoln*, *supra*, except that in the present instance the purpose of the order is to appropriate only a part of the contemplated loan to reimbursement, whereas in the ones previously considered the purpose of borrowing was to apply the entire proceeds of the loan to reimbursement.

I am of the opinion, however, that this difference between the instant orders and those previously considered does not make the present proposed loans valid. The debt now sought to be contracted is a debt for borrowed money. Since the purpose of the order is to obtain money for a use for which borrowing is not permitted, the purpose of the loan as a whole cannot fairly be said to be a lawful one. A bond issue based upon the exercise of such unwarranted authority cannot be said to be good in part and bad in part. In all fairness to investors it must be valid and authorized in its entirety.

Statutes of the character of those now under consideration are to be construed strictly, both for the protection of municipalities from the creation of improvident debts and for the protection of investors in municipal securities. *Agawam National Bank* v. *South Hadley*, 128 Mass. 503; I Op. Atty. Gen. 24.

It follows, from the foregoing considerations, that the appropriations contained in the said orders should not be approved by your Board.

Very truly yours,

Paul A. Dever, *Attorney General.*

State Racing Commission — Dog Racing — Licenses — Agricultural Fair.

A racing meeting may be held in connection with an agricultural fair, although the racing track and the fair grounds are separated, if both are part of the same enterprise, for the same purpose, and under the same management.

July 19, 1937.

Hon. Charles F. Connors, *Chairman, State Racing Commission.*

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

"The State Racing Commission is in receipt of a tentative application from the Plymouth County Agricultural Society, Inc., of Bridgewater,

requesting the privilege, as a State and county fair, to run dog racing as provided by G. L. (Ter. Ed.) c. 128A.

This society is an organization for the promotion and extension of agriculture, operating under the direction of the Department of Agriculture of the Commonwealth of Massachusetts, and is receiving State grants in connection with its fair.

The grounds of the Plymouth County Agricultural Society, Inc. are at Bridgewater, in Plymouth County. The society requests the right to have dog racing at the same time that its fair is being held, with the proviso that the dog racing is to be held on the grounds of the Bristol County Kennel Club, Williams Street, Dighton (Bristol County), for a meeting of six days, from August 16 to August 21, 1937, both dates inclusive.

Has the Commission the right, under the law, to grant a license to the Plymouth County Agricultural Society, Inc., of Bridgewater (Plymouth County), to run dog racing, in connection with its fair, on the grounds of the Bristol County Kennel Club at Dighton (Bristol County)?"

G. L. (Ter. Ed.) c. 128A, as amended, makes provision, by sections 3 and 4, for the issuance of licenses for dog racing meetings to be held "in connection with a state or county fair, or any exhibition for the encouragement or extension of agriculture," at a smaller fee than that charged for a license to conduct other dog racing meetings. Before such a license for a dog racing meeting in connection with an exhibition for the encouragement or extension of agriculture may be issued, the applicant is specifically required, by the provisions of said section 3, to satisfy your Commission "that the main purpose of such fair or exhibition is the encouragement or extension of agriculture and that the same constitutes a bona fide exhibition of that character." Also, by implication from the context of said sections 3 and 4, it is apparent that the applicant must also satisfy your Commission that the proposed dog racing meeting is to be held "in connection with" such a fair or exhibition. Whether it is to be so held is a question of fact for your determination, upon the facts relative to each application to you for a license of this particular character.

It cannot be said as a matter of law that the words "in connection with," as used in said sections 3 and 4, mean that there must be a physical connection between the track where a dog racing meeting is conducted and the buildings or grounds in which the fair or exhibition is held. A racing meeting may be held, within the meaning of the words as used in said sections, "in connection with" a fair or exhibition, even though the track and the fair grounds are widely separated, if you find as a matter of fact that the dog racing meeting is conducted not as a separate enterprise but so directly as a part of the fair or exhibition, considered as an enterprise or undertaking, as to be for the same purpose, under the same general management and reasonably calculated to promote the success of the fair or exhibition. It cannot be said as a matter of law that any particular distance or the intervention of any specific boundary lines of counties or other political subdivisions between the fair grounds and the dog racing track would render it impossible to find as a matter of fact that such a racing meeting was not held "in connection with" a particular fair or exhibition, although such subsidiary facts relative to distance and situation of fair grounds and track are to be considered by you in making your final determination of fact in any particular case as to whether a dog racing meeting is to be held "in connection with" a fair or exhibition.

Assuming that all applicable provisions of the statute have been satisfied by the applicant to whom you refer in your letter, upon the facts which you have set forth therein you have the right to grant the license in question.

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

Old Age Assistance — Inmates of Incorporated Homes.

Persons otherwise eligible to old age assistance, who are inmates of incorporated homes of a charitable character, are entitled to such assistance.

JULY 21, 1937.

Hon. WALTER V. MCCARTHY, *Commissioner of Public Welfare.*

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

"Certain relief officials connected with boards of public welfare in the Commonwealth are averse to granting old age assistance to applicants otherwise eligible who are inmates in certain boarding houses.

It is contended that incorporated homes are exempt from taxation by virtue of their charter (charitable), and that this exemption can be considered in fact the same as a contribution of public funds in favor of the incorporated homes, and on this reasoning they cannot be considered in the group of homes which are 'not supported in whole or in part by public funds.'"

You have, in effect, asked my opinion as to the correctness of the contention referred to in the above-quoted portions of your communication.

G. L. (Ter. Ed.) c. 118A, § 1, as amended by St. 1937, c. 440, to which you have called my attention, governs the situation.

The fact that persons otherwise eligible to old age assistance are inmates of incorporated homes which are exempt from taxation by virtue of their charitable character, under their respective charters, does not warrant the refusal of such assistance to such persons. The mere fact that such persons are living in incorporated homes which are exempt from taxation does not make them inmates of a home or institution "supported in whole or in part by public funds," as the words are used in said chapter 118A. Such persons are entitled to receive old age assistance irrespective of the fact that they live in such homes, other factors of eligibility being present.

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

Retirement System — Compensation — Deductions.

JULY 26, 1937.

Hon. FRANCIS J. DECELLES, *Commissioner of Insurance.*

DEAR SIR: — You have asked my opinion as to the meaning of the words "regular compensation," in St. 1936, c. 318, § 29 (2) (*c*), as describing the basic salary for employees upon which a pension is to be figured.

You advise me that you are asking my opinion for the benefit of "the actuary of this department," who advises the retirement boards mentioned in said chapter 318 in regard to technical matters.

In your letter you have quoted the definition of "annual compensation" given in section 26 of the said chapter, and have correctly stated the import of said section 29, which provides that prior service be credited on the basis of accumulated deductions of ten per cent of the employee's average annual rate of regular compensation for a five-year period.

Your specific query relates to the manner in which deductions from the employees' salaries made during the depression years should be treated. You say: "In some units employees were asked to make voluntary contributions permitting a portion of their salary to be allocated to the city or town treasury for whatever purpose it was needed. In other cities and towns a compulsory deduction was in effect which gave the employee no alternative. In still other cities and towns a combination of both methods was employed for different years."

An opinion of one of my predecessors in office, to which you refer, given March 11, 1932, to the then Commissioner of Education (Attorney General's Report, 1932, p. 53), accurately determined the meaning of the words "the amount of the salary due," as those words were used in G. L. (Ter. Ed.) c. 32, § 12 (5), with relation to the deductions from teachers' salaries. The principles laid down in said opinion, with relation to the first two questions which were answered therein by the then Attorney General, are applicable to the instant interpretation. No sum which was paid from an employee's salary to a city or town by or on behalf of the employee, with his consent, should be taken as reducing the annual compensation of such employee in any year. No deduction made by a town from the amount of compensation due an employee in any given year, whether with the express consent of the employee or by any mode of compulsion, should be treated as lowering the annual compensation of that year; nor, likewise, should any contribution effected both by compulsion and by voluntary action be treated as lowering the annual compensation for any year.

In the said opinion of the former Attorney General he stated that, if a teacher by a voluntary contract agreed to work for a designated portion of the year without compensation, it could not be said that for the period covered by such contract there was any "salary due" such teacher for such period, under the specific wording of said G. L. (Ter. Ed.) c. 32, § 12 (5). So that under such circumstances the annual salary "due" such employee would be reduced by the amount otherwise payable for the designated period. But as the words "annual rate of regular compensation" are used in said section 29 (2) (*c*) of said chapter 318 and defined as "the annual compensation lawfully determined for the individual service of the employee," in section 26 of said chapter 318, these words were intended by the Legislature to denote the annual compensation as originally determined by law for an employee without any decrease through contractual arrangement. There is an obvious difference between the words "annual compensation lawfully determined for the individual service of the employee," as used in said section 26, and the words "salary due," as used in G. L. (Ter. Ed.) c. 32, § 12 (5), construed by the former Attorney General in his opinion.

I therefore advise you, for such assistance as it may render your department in discharging services to the retirement boards, that "regular compensation," as used in chapter 318, should be considered to mean the basic

salary originally determined by lawful authority for any particular employee and not a temporarily reduced salary actually paid or due him for any given year or years.

Very truly yours,
Paul A. Dever, *Attorney General.*

Lord's Day — Licenses — Admission — Public Entertainment.

July 27, 1937.

Col. Paul G. Kirk, *Commissioner of Public Safety.*

Dear Sir: — You request an opinion as to the application of G. L. (Ter. Ed.) c. 136, § 4, "to concerts consisting of music and entertainment provided to patrons of hotels, restaurants, clubs and all other establishments where food or drink is sold on the Lord's Day."

The above-mentioned section provides: —

"Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, in keeping with the character of the day and not inconsistent with its due observance, to which admission is to be obtained upon payment of money or other valuable consideration; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing."

The exception (G. L. [Ter. Ed.] c. 149, § 105) referred to in the quoted section, prohibits, in general, the granting of licenses for theatrical performances or public shows in which children under fifteen years of age are employed.

The power conferred by the instant section upon local authorities relative to the licensing of entertainments therein enumerated is not pertinent to your inquiry, which, by a long established policy of this department, must necessarily be confined to advising State officers in regard to the performance of a present duty concerning which they are required to make a decision. I Op. Atty. Gen. 562; II *ibid.*, 100.

The power granted to you is simply one of approval, if you find that the proposed entertainment is not contrary to the spirit and observance of the Lord's Day. If no license is granted by the local licensing authorities, then, of course, you have no duty to perform. If a license is granted by them, then you are required to exercise your judgment and discretion in ascertaining the nature of the entertainment, the hours during which it is to be held, the place where it is to be given, the number and kind of people who will probably attend, and all other material circumstances, in order to decide whether or not the proposed entertainment is consistent with the character and due observance of the Lord's Day. If you so find, of course you would be justified in granting your approval.

The functions of an officer having the power of approval have been settled frequently in this Commonwealth. *Simpson* v. *Marlborough*, 236 Mass. 210; *Bay State St. Ry. Co.* v. *Woburn*, 232 Mass. 201; *Leroy* v. *Worcester St. Ry. Co.*, 287 Mass. 1, 7, 8.

The public entertainment which is to be licensed is one "to which admission is to be obtained upon the payment of money or other valuable consideration." The payment of an admission fee is, therefore, descriptive of the entertainment included within the sweep of the section. Usually, admission fees are paid at the entrance and are given in consideration of being permitted to enter a place in which entertainment is to be furnished. Generally speaking, one may enter a hotel, restaurant, club or similar establishment where food or drink is sold on the Lord's Day without paying any admission fee.

The old principle of the common law that an innkeeper "does not sell but utters his provision" (*Parker* v. *Flint*, 12 Mod. 254) has been greatly restricted, if not rejected, because it is now the settled law of this Commonwealth that a guest is the purchaser of the food or drink supplied to him. *Friend* v. *Childs Dining Hall Co.*, 231 Mass. 65; *Schuler* v. *The Union News Co.*, Mass. Adv. Sh. (1936) 1273. The price at which one purchases food or drink in such an establishment is the purchase price of the articles furnished, but this price must be fixed in reference to various items of expense incurred by the owner in setting up and maintaining his place of business or for music or entertainment furnished, which must be paid out of the proceeds of the business. They are a kind of service furnished to patrons for which payment is included in the purchase price paid for the commodities furnished.

In a general way, the same situation is true of a consumer purchasing goods in a department store. The price which he pays must necessarily include various items of overhead in order to permit the proprietor to continue in business. No one will claim that when purchasing goods in a department store anything is paid for admission.

The statute in question is limited to entertainments for which an admission is charged. It is true that the admission price need not be paid in money, but must, at least, be paid in a valuable consideration. In other words, unless something is charged for admission the entertainment does not come within the purview of the statute. *Commonwealth* v. *Wall*, Mass. Adv. Sh. (1936) 1473. A cover charge, which I assume is a minimum charge to be made to customers, and which is collected in some of the establishments referred to in your communication, may not be essentially different from a service charge, so called, which is made by certain public utility companies.

From the facts stated in your communication, I am not satisfied that the entertainments referred to fit the statutory description, because I am not convinced that any admission, either directly or indirectly, is paid on account of being permitted to enter the establishment where such entertainments are held.

I am therefore of the opinion that under such circumstances the statute is inapplicable, and, consequently, you are not required to determine whether or not you will give or withhold your approval of any action which the licensing authorities may take relative to purporting to grant a license for the holding of such entertainments.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Alcoholic Beverages — Licenses — Applicants — Right of Appeal.

July 30, 1937.

Alcoholic Beverages Control Commission.

Gentlemen: — You ask my opinion as follows: —

"Will you kindly advise us as to whether or not, in your opinion, under the provisions of section 67 of the act, any applicant for a license under section 14 or 30A who is aggrieved by the action of the local licensing authorities in refusing to grant the same or by their failure to act within the period of thirty days limited by section 16B, or any person who is aggrieved by the action of such authorities in suspending, cancelling, revoking or declaring forfeited such a license, may appeal therefrom to this Commission."

The Liquor Control Act of this Commonwealth, G. L. (Ter. Ed.) c. 138, as originally appearing in St. 1933, c. 376, § 2, and as subsequently amended, was, as is obvious from its scope and context, intended by the General Court to create a comprehensive scheme for the State-wide administration of the liquor traffic, with provisions for licensing by local boards, but with the final control of the general subject vested in the Alcoholic Beverages Control Commission of the Commonwealth, to which those aggrieved by the actions of local authorities might seek relief by direct appeal. It is apparent from the language employed in framing the said chapter that the Legislature intended to make such procedure by appeal readily accessible to all feeling themselves aggrieved by the issuance of, or refusal to issue, licenses by local authorities, and to clothe the Commission with broad powers to carry into effect those findings which it made in the exercise of its appellate jurisdiction.

Section 67 of said chapter 138, as amended, is as follows: —

"Any applicant for a license who is aggrieved by the action of the local licensing authorities in refusing to grant the same or by their failure to act within the period of thirty days limited by section sixteen B, or any person who is aggrieved by the action of such authorities in suspending, cancelling, revoking or declaring forfeited the same, may appeal therefrom to the commission within five days following notice of such action or following the expiration of said period, and the decision of the commission shall be final; but, pending a decision on the appeal, the action of the local licensing authorities shall have the same force and effect as if the appeal had not been taken. Upon the petition of twenty-five persons who are taxpayers of the city or town in which a license has been granted by such authorities or who are registered voters in the voting precinct or district wherein the licensed premises are situated, or upon its own initiative, the commission may investigate the granting of such a license or the conduct of the business being done thereunder and may, after a hearing, modify, suspend, revoke or cancel such license if, in its opinion, circumstances warrant.

If the local licensing authorities fail to issue a license or to perform any other act when lawfully ordered so to do by the commission upon appeal or otherwise, within such time as it may prescribe, the commission may itself issue such license or perform such act, with the same force and effect as if issued or performed by the local licensing authorities."

The words "any applicant for a license," as used in said section 67, were intended by the Legislature to embrace every one who is in fact an applicant for any license which may be granted under the provisions of this statute. The import of such words cannot properly be limited by implication from any particular part of the chapter so as to include only some particular class or classes of applicants for licenses governed by the chapter. There are no words in the chapter which specifically make such limitation. The fact that as to licenses granted under sections 12 and 15 of the statute their prior approval by the Commission is a prerequisite to their issuance is entirely immaterial in considering the inclusiveness of the right of appeal accorded to "any applicant for a license" by said chapter 67. The scope of the appellate jurisdiction of the Commission possesses a sweep as wide as the provisions of the statute itself and comprehends all applicants for licenses to sell alcoholic beverages, whether mentioned in sections 12 and 15 or in 14 and 30A. Allusion to the terms of section 16B in said section 67 does not withdraw the protection of the Commission's appellate jurisdiction from applicants for licenses as to which section 16B is not applicable, but merely by particular mention includes a failure of compliance with said section 16B as a particular cause for appeal, additional to the refusal to grant a license, first set forth as a general cause of appeal open to any applicant for a license under the provisions of the said chapter.

In my opinion, it is clear that any of the applicants or other persons described in your question have the right of appeal to your Commission from a refusal to grant an application for a license under section 14 or 30A, and that any person aggrieved by the action of local authorities in suspending, cancelling, revoking or declaring forfeited such a license has likewise an appeal to the Commission.

Very truly yours,

Paul A. Dever, *Attorney General.*

Alcoholic Beverages — Druggist's License — Local Regulations.

July 30, 1937.

Alcoholic Beverages Control Commission.

Gentlemen: — You have laid before me a copy of a form of license which you advise me is used by the Boston licensing board for licenses to registered pharmacists, under G. L. (Ter. Ed.) c. 138, § 30A, entitled "A Druggist License to sell Alcoholic Beverages for Medicinal, Mechanical or Chemical Purposes without a Physician's Prescription." You have called my attention to certain conditions and regulations contained therein which relate to the sale of "alcohol," and have asked my opinion as follows: —

"We respectfully request your opinion as to whether or not the Boston licensing board may impose these conditions, or either of them; and whether or not the license may be legally suspended or revoked for a violation of any or all of these conditions."

I answer your inquiry to the effect that the Boston licensing board may not, as a matter of law, impose the conditions and regulations relative to "alcohol" which appear upon the said druggist's license to sell alcoholic beverages, etc., and may not lawfully suspend or revoke said license for a violation of said conditions and regulations relative to "alcohol."

Under the provisions of the Liquor Control Act, G. L. (Ter. Ed.) c. 138, as appearing in St. 1933, c. 376, § 2, as amended, a registered pharmacist is not required to have a license to sell "alcohol."

Section 29 of said chapter 138 reads as follows: —

"A registered pharmacist in a city or town who holds a certificate of fitness under the following section, having complied with all provisions of law relative to the practice of pharmacy irrespective of the vote of the city or town under section eleven, may use alcohol for the manufacture of United States pharmacopoeia or national formulary preparations and all medicinal preparations unfit for beverage purposes, and may sell alcohol, and, upon the prescription of a registered physician, (1) wines, (2) malt beverages, and (3) other alcoholic beverages. Each of the three foregoing classes shall be sold only on separate prescriptions and in quantity not exceeding one gallon of wines, one gallon of malt beverages and one quart of other alcoholic beverages. Every such prescription shall be dated and signed by the physician and shall contain the name of the person prescribed for.

All such prescriptions shall be retained and kept on file in a separate book by the pharmacist selling the same and shall not be refilled. Such prescription book shall be open at all times to inspection of the board of registration in pharmacy, licensing authorities and their agents and police officers. Nothing in this chapter shall disqualify a registered pharmacist from being licensed under section fifteen, provided that he sells no cooked food to be consumed on the premises; but a license issued to a registered pharmacist under said section shall not be included in computing the number of licenses that may be granted in any city or town as provided in section seventeen.

Sales of alcoholic beverages hereunder shall be made only in the original sealed packages, and such beverages shall not be permitted to be drunk on the premises."

A registered pharmacist, who, I assume, is indicated by the word "druggist" in the license form under consideration, is required to have a license to sell "alcoholic beverages" without a physician's prescription in a municipality wherein licenses to sell all alcoholic beverages are authorized.

Section 30A of said chapter 138 reads as follows: —

"A registered pharmacist in a city or town wherein the granting of licenses to sell all alcoholic beverages is authorized may be licensed by the local licensing authorities to sell alcoholic beverages for medicinal, mechanical or chemical purposes without a physician's prescription subject to the limitations contained in section thirty-three, the said sales to be recorded in the manner prescribed in section thirty E. Sales of alcoholic beverages hereunder shall be made only in the original sealed packages and such beverages shall not be permitted to be drunk on the premises. Sales of such beverages by a licensee hereunder shall be permitted only during such hours as sales thereof may be made by a licensee under section fifteen. The fee for a license under this section shall be not less than fifty nor more than three hundred dollars."

The Boston licensing board may make the license to sell "alcoholic beverages," described in said section 30A, subject to reasonable conditions and regulations concerning its exercise, which will have the force of penal statutes, violation of which is punishable by fine and imprisonment under section 62 of said chapter 138.

The said board may not, however, make conditions and regulations which are not reasonable, and may not, in the guise of regulating the sale of alcoholic beverages as to which a license relates, impose upon the licensee conditions and regulations unrelated to the sale of alcoholic beverages but pertaining to the sale of "alcohol" for which no license is required by statute. Nor may the said board, in the form of regulations and conditions purporting to control a license to sell alcoholic beverages, impose rules and prohibitions upon the use and sale of an entirely different commodity, such as "alcohol," the use and sale of which have been regulated by legislative enactments. The entire subject of sales of "alcohol" by registered pharmacists has been dealt with by the General Court in said chapter 138, more particularly in section 29, and it may not be further regulated or controlled, under whatever pretext, by a local licensing authority. Privileges granted by virtue of a statute cannot be restricted by a local regulation unless the power to do so is specifically delegated to local authorities. *Burke* v. *Holyoke*, 219 Mass. 219; *Greene* v. *Fitchburg*, 219 Mass. 121; *Cawley* v. *Northern Waste Co.*, 239 Mass. 540.

Rules and regulations of a subordinate board beyond the sweep of an enabling act have no force or validity. Attorney General's Report, 1935, p. 66.

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

Department of Education — Employees — Receipt of Two Salaries.

AUG. 11, 1937.

Hon. JAMES G. REARDON, *Commissioner of Education.*

DEAR SIR: — You advise me that your department has retained during the six weeks' term of summer school held at two of the State teachers' colleges the services of two directors, two matrons and one nurse, and that these five persons are regularly employed in their respective capacities during the usual school year at one or the other of these two institutions. You inform me that the Comptroller and the Division of Administration and Finance have questioned the validity of the payment of compensation to these five persons for services rendered during the summer courses, and you request my opinion on the matter.

Each of these individuals receives a yearly salary from the Commonwealth for the performance during the calendar year of all the duties pertaining to their positions or employment, although they are actually so engaged only during the school year. The contracts of each are entire, even though full consideration is to be furnished in less than the calendar year. *Donlan* v. *Boston*, 223 Mass. 285.

Their employment, however, during the summer schedule requires the performance of services similar in all respects to those rendered in the same institutions during the regular sessions. Each of these persons was engaged in his usual occupation both during the regular and the summer sessions of the institutions in question. Although they performed extra services which, if the summer schools were not in session, they would not have rendered, yet the rendition of services during the summer course was a continuance of the performance of their usual occupation.

It was previously decided by one of my predecessors that the State Board of Education could employ normal school teachers for service in

teachers' institutes, and that called for special services for which an allowance, as distinguished from their regular salary, could be made. II Op. Atty. Gen. 21. That opinion is sound. It is, however, inapplicable to the present situation because the work done in connection with the teachers' institute was outside of that which they contracted to perform during the school year as members of the teaching staff of the normal school. It was special work. See V Op. Atty. Gen. 697.

The statute, G. L. (Ter. Ed.) c. 30, § 21, inhibits one from receiving at the same time more than one salary from the treasury of the Commonwealth. The salaries of these five individuals in question are fixed in accordance with G. L. (Ter. Ed.) c. 30, § 45 *et seq.*, and cannot be increased by allotting to them extra work in their usual occupation, at their customary place of employment, during the period in which they were under contract with the Commonwealth.

The situation is identical with that pertaining to a case in which probation officers attempted to secure additional compensation for services rendered by one while another was on a vacation. The original assignment of each plaintiff to do a special part of the probation work does not make two distinct offices. "The Legislature has delegated to the judge or judges of the court, subject to the approval of the county commissioners, power to fix the salary of a probation officer. When so fixed, it measures his full compensation for performing the duties of his office." *O'Brien* v. *Boston*, 266 Mass. 156, 159.

I am therefore of the opinion that payment to the five persons in question for the rendition of extra services in the summer schools would not be valid.

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

Department of Mental Diseases — Municipal Permit — Fee.

AUG. 11, 1937.

MR. WILLIAM I. ROSE, *Business Agent, Department of Mental Diseases.*

DEAR SIR: — You ask if I will inform you "whether an institution under this department should pay the cost of a permit to the town for transporting offal through the streets, in accordance with G. L. (Ter. Ed.) c. 111, § 31A."

I wish to advise you that if the offal is being transported by a representative or agent of the Commonwealth the latter is not required to pay any license fee to the local licensing authorities, because, in the first place, the person described within the statute referred to does not include the Commonwealth, and, in the next place, the statute does not contain any express provision that it was the intent of the Legislature to require the Commonwealth to pay a tax in the performance of one of its governmental functions.

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

Department of Public Works — Shade Trees — Care and Custody — State Highway.

AUG. 11, 1937.

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

DEAR SIR: — You advise me that one William Edson has applied for a permit to remove six maple trees on the State highway in West Brookfield. You also call my attention to other trees located upon the property of Mr. Edson, which you advise me he intends to remove. You inquire as to what authority your department has in reference to both the trees upon the highway and those on the premises of a private individual.

The Department of Public Works is entrusted with the care and custody of all trees and shrubs located upon the State highways, and no person may trim, cut or remove any such trees, even though he may be the owner of the trees, without a permit from your department.

In reference to the trees located entirely upon private property, even though some portion thereof may project over the side line of a State highway, your department has no authority to prohibit the owner from removing such trees.

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

Civil Service — Chief of Police — Town — Acceptance of Act.

AUG. 13, 1937.

Hon. THOMAS H. GREEN, *Commissioner of Civil Service.*

DEAR SIR: — You advise me that on March 24, 1937, G. L. (Ter. Ed.) c. 31, § 49, placing the chief of police of the town of Webster under civil service, was accepted by the town, and that thereafter, at a meeting on July 6, 1937, section 48 of the same chapter was likewise accepted. You inquire whether the town was authorized to place the position of chief of police under the civil service when it had not at that time accepted section 48, which provides for putting the members of the police department under civil service.

While a marshal or chief of a police department may ordinarily be regarded as a member of the force, yet he is the incumbent of an office which is superior to and distinct from that of the rank and file of the department. The chief may not be promoted from the membership and his position is not a mere designation. *Kaplan* v. *Sullivan*, 290 Mass. 67. The distinction between the office of chief and that of patrolman has been recognized by the statutes pertaining to the civil service, although, since 1911, the inclusion of the members of a city department extends to the position of the head of that department. *Lattime* v. *Hunt*, 196 Mass. 261. *Ellis* v. *Civil Service Commission*, 229 Mass. 147. See St. 1884, c. 320; St. 1911, c. 468.

The decision of the voters expressed at a town meeting ought, however, to be given force and effect unless forbidden by some requirement of law.

The status of the chief from March 24, 1937, until July 6, 1937, is not in question, and when, on the latter date, the town voted to accept the provisions of G. L. (Ter. Ed.) c. 31, § 48, the voters must have known that they had previously voted to accept section 49 of this same chapter relative to the position of chief. The town, then, was one which had

accepted the provisions of both sections in accordance with the desires of its citizens, although the order in which it was accomplished was not in strict compliance with the statutes. There are, however, instances in the operation of the civil service statutes where steps prescribed to be taken after a certain event have been held valid if performed before that event. *Carey* v. *Casey*, 245 Mass. 12. *Reagan* v. *Mayor of Fall River*, 260 Mass. 529.

If the town, as it evidently does, desires to have the position of chief of its police classified under the civil service rules, then the technical objection that the statutory sequence was not pursued is not, in my opinion, sufficient to stay the expressed opinion of the voters, who in fact voted to put the chief of the police and also the members of the police force under the civil service rules.

I am accordingly of the opinion that the certification of the office of chief of police of the town of Webster ought to be issued by your Commission.

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

Schools — Transportation of School Children — Reimbursement.

A town is entitled to reimbursement for money actually spent for the transportation of school children, but not for money appropriated to meet the expense of litigation arising out of such transportation.

AUG. 16, 1937.

Hon. JAMES G. REARDON, *Commissioner of Education.*

DEAR SIR: — You advise me that one of the small towns of the Commonwealth has submitted its "certificate of expenditures for high school transportation," amounting to $5,932.08, and has requested reimbursement, in accordance with the provisions of G. L. (Ter. Ed.) c. 71, § 7, on the basis of this expenditure, although you have also been advised that only $2,048 has been actually expended by the town for the purpose of providing transportation to school pupils, and that the balance is now held by the town pending the outcome of certain litigation concerning transportation contracts.

You request my opinion as to whether reimbursement should be made by your department on the basis of the amount appearing in the certificate or the amount actually expended.

It is clear, under the statute to which you refer, that the expenditure must be for transportation and should not include any amounts by way of damages based upon breach of contract or in satisfaction of any judgment which may hereafter be awarded against the town. Future expenditures for transportation should not be included in the certificate which the town presented to your department, upon which reimbursement is sought. By the section in question the amount for which the State may reimburse the town is specifically based upon the amount actually paid by the town for transportation during the school year.

You are therefore advised that reimbursement should be made upon the basis of the amount actually expended for transportation and not upon the amount reported in the aforesaid certificate.

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

Civil Service — Transfer of Employees — Leave of Absence — Provisional Temporary Employment.

Aug. 23, 1937.

Hon. Thomas H. Green, *Commissioner of Civil Service.*

Dear Sir: — You inform me that a person appointed permanent junior accountant in the Department of the Auditor on July 1, 1936, served until January 1, 1937, when he was granted a leave of absence to June 20, 1937, to accept a provisional temporary appointment in the Department of Public Welfare; he was reinstated in the Department of the Auditor on June 18, 1937, and was granted on June 19, 1937, another leave of absence, without pay, to December 10, 1937.

You request my opinion as to whether this person is now eligible for a transfer from the Department of the Auditor to the Department of Public Welfare.

The authority governing transfers from one department to another of those already in the classified civil service is governed by Rule 27, which provides: —

"Any person duly certified for permanent employment and actually employed for at least one year (including the time of probationary service) in any classified position in the Official Service may, after written application to the Commissioner by the respective appointing officers and upon consent of the Commissioner, be transferred to another position with or without examination, as the Commissioner may order; provided, that in the discretion of the Commissioner, the person to be transferred must at the time of transfer possess the qualifications required for an original appointment to the new position."

The employee in question has only performed approximately six months' service in the Department of the Auditor, with the exception of a single day's work on June 18, 1937, in an apparent effort to comply with the provisions of G. L. (Ter. Ed.) c. 31, § 46E, which provide: —

"A leave of absence for a period of less than six months shall not be deemed a separation from the classified civil service, except with the assent of the person granted such leave."

The question, however, is not whether or not he has separated himself from the classified civil service, but whether or not under the rule cited above he is entitled to a transfer. It is clear, however, that he must have been actually employed by virtue of a permanent appointment for at least one year before he is eligible for a transfer to another office classified under the civil service. He is not entitled under the rule to add the time actually spent in one office under a permanent appointment to the time spent in another office under a provisional temporary appointment. The basis for the rule is the actual experience acquired by a permanent appointee in performing the duties of a position under the civil service so as to determine whether or not the applicant has the necessary qualifications for a transfer to a new office.

It is quite clear from your communication that the person in question was not actually employed for at least a year after being duly certified for permanent employment. Consequently, I am of the opinion that he is ineligible for a transfer under the provisions of Rule 27.

Very truly yours,

Paul A. Dever, *Attorney General.*

Civil Service — Engineers and Firemen at State Hospitals — Construction of Statutes.

Engineers and firemen in State hospitals are exempt from the civil service rules by virtue of G. L. (Ter. Ed.) c. 123, § 42.

AUG. 24, 1937.

Hon. THOMAS H. GREEN, *Commissioner of Civil Service.*

DEAR SIR: — In a recent communication you point out that G. L. (Ter. Ed.) c. 123, § 43, which was derived from Gen. St. 1919, c. 350, § 80, and which became effective on December 1, 1919, provided for the exemption from the civil service rules of engineers and firemen employed at State hospitals; that G. L. (Ter. Ed.) c. 31, § 4, the present form of Gen. St. 1918, c. 257, § 91, which, by St. 1920, c. 2, became effective February 1, 1921, required your department to prepare rules for including within the classified civil service all persons in charge of steam boilers, heating, lighting and power plants maintained by the State, and that in compliance with this statute your department has duly promulgated a rule including such engineers and firemen therein.

You inquire if by reason of the fact that the 1918 enactment became effective subsequent to the 1919 statute, the former statute supersedes the latter, so that engineers and firemen at all State plants are within the classified civil service.

G. L. (Ter. Ed.) c. 31, § 4, designating positions to be included within the classified civil service, reads, in so far as now pertinent, as follows: —

"All persons having charge of steam boilers, heating, lighting or power plants maintained by the commonwealth."

G. L. (Ter. Ed.) c. 123, § 42, provides: —

"Engineers, firemen and head farmers employed in state hospitals shall be exempt from chapter thirty-one."

Both statutes are included in the same statutory system of the Commonwealth, and both must be construed, if possible, consistently with each other and as parts of a single harmonious arrangement for the regulation of engineers and firemen employed in plants maintained by the Commonwealth. *Brooks* v. *Fitchburg & Leominster St. Ry.*, 200 Mass. 8. *Decatur* v. *Auditor of Peabody*, 251 Mass. 82.

Effect should be given to both enactments by excluding from the sweep of G. L. (Ter. Ed.) c. 31, § 4, engineers and firemen employed at State hospitals. You are therefore advised that such engineers and firemen are exempt from the civil service rules.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Governor and Council — Transfer of Funds — Extraordinary Expenses — Executive Functions.

The payment of a gratuity to the family of an officer killed in the course of duty is not one of the extraordinary expenses within the scope of G. L. (Ter. Ed.) c. 6, § 8, nor may it be paid from the fund created by said chapter 6, section 8.

Sept. 22, 1937.

His Excellency Charles F. Hurley, *Governor of the Commonwealth.*

Sir: — You have asked my opinion as to whether the Governor and Council have authority to transfer and pay from the "extraordinary fund" money to the widows and, in one instance, to the family of two police officers of a municipality who were killed in the performance of their duty.

The "extraordinary fund" to which Your Excellency refers is appropriated annually by the Legislature under the provisions of G. L. (Ter. Ed.) c. 6, § 8, which reads: —

"An amount not exceeding one hundred thousand dollars shall be appropriated each year for carrying out sections twenty-five to thirty-three, inclusive, of chapter thirty-three, for the entertainment of the president of the United States and other distinguished guests while visiting or passing through the commonwealth, for extraordinary expenses not otherwise provided for, which the governor and council may deem necessary, and for transfer, upon the recommendation of the comptroller, with the approval of the governor and council, to such appropriations as have proved insufficient."

The purpose for which the instant proposed payment would be made can hardly be said to fall within the designation in said section of "extraordinary expenses not otherwise provided for, which the governor and council may deem necessary." V Op. Atty. Gen. 476. While the word "expenses" is one of broad import, it cannot be stressed to include the matters in question. *Sears* v. *Nahant*, 215 Mass. 234, and cases cited.

The payment of a gratuity to the family of an officer killed or injured in the course of his duty does not properly fall within the meaning of "extraordinary expenses," as those words are employed in said section. Such a payment is not unusual in character, being not uncommonly the subject of legislative grants, nor immediately necessary for the preservation of the general welfare of the Commonwealth. Cities and towns are authorized to make payments to the dependents of a police officer killed in the performance of duties. G. L. (Ter. Ed.) c. 32, § 89.

Moreover, the determination that the payment of money in the form of a pension or gratuity, based upon particular faithful performance of public duties, is, in each instance, to be predicated upon a prior determination that such appropriation or payment is for the public interest, which determination may be made only by the Legislature, and is a function of the legislative branch of the government alone. It is not a function of the executive branch, and the power to exercise it by such branch cannot be delegated by the Legislature to the executive department; nor is an attempt to delegate such power to be implied from the phrase "which the governor and council may deem necessary," as used in said section 8.

The Supreme Judicial Court has rigidly applied the rule that public

money can be expended only for a public purpose. *Whittaker* v. *Salem*, 216 Mass. 483; *Lowell* v. *Boston*, 111 Mass. 454; *Mead* v. *Acton*, 139 Mass. 341; *Kingman* v. *Brockton*, 153 Mass. 255.

It is within the scope of the power of the General Court to determine that an appropriation and payment of money to an individual are for a public purpose, but this is a legislative power and incapable of being delegated to the executive department. To attempt to confer this power upon the Governor and Council would be a clear invasion of the provision of the Bill of Rights which provides that "the executive shall never exercise the legislative and judicial powers, or either of them." Bill of Rights, art. XXX. The authority to appropriate public funds is entirely in the Legislature. *Opinion of the Justices*, Mass. Adv. Sh. (1936) 1285. The power of the Legislature itself to recognize moral obligations of the Commonwealth and to make payments to individuals which it determines to be for the public interest and purposes has been recognized by our Supreme Judicial Court. In *Opinion of the Justices*, 175 Mass. 599, 602, it has been said of the exercise of this power: —

"The General Court has the right to appropriate money for the purposes supposed in a case where it fairly can be thought that the public good will be served by the grant of . . . an unstipulated reward, but that it has not that right where the only public advantage is such as may be incident and collateral to the relief of a private citizen. To a great extent the distinction must be left to the conscience of the Legislature."

Although public money can be expended only for strictly public purposes, a purpose does not become unlawful merely because money may be paid to private persons without previous claim to it. The power to give rewards for conspicuous civil public service as well as for conspicuous military service, where a public purpose will be served thereby, rests with the Legislature. *Opinion of the Justices*, 240 Mass. 616, 618. In that opinion the court said: —

"Where the public purpose of the appropriation of public money is not clear, a recital of facts and legislative reasons may be necessary in order to show that the purpose is in a true sense public, and not private."

It follows, from the foregoing opinions of the Supreme Judicial Court and the decisions cited therein, that the determination of the existence of a public purpose to be served by a payment of public money to an individual is a function of the Legislature and may be exercised by that body in an appropriate instance. The authority to make such a determination and payment from funds appropriated to it does not lie in the executive branch of the government. Moreover, the occasions for the payment of such sums as are referred to in the instant inquiry are not "extraordinary" matters, as I have heretofore stated, within the meaning of said section 8.

For these reasons I am constrained to answer Your Excellency's inquiry in the negative.

Very truly yours,
Paul A. Dever, *Attorney General.*

Insurance — Formation of Company — Subscriptions for Insurance — License.

SEPT. 22, 1937.

Hon. FRANCIS J. DECELLES, *Commissioner of Insurance.*

DEAR SIR: — You inform me that you have granted a preliminary certificate to a certain domestic liability company in order to enable it to secure an application for insurance; that subscriptions for insurance have been received, mostly in December, 1936, and in March, 1937; and that $100,000 has been deposited in a bank in this Commonwealth as the advance payments of premiums on such subscriptions. You request my opinion on the following questions: —

"1. If a finance company or a private individual advances money to an auto owner and said auto owner does use said money to pay in advance in cash his premium on a subscription to a policy of insurance subsequently to be issued by the proposed insurance company, does such a payment represent premiums that 'have been actually paid to it in full in cash,' as required in G. L. (Ter. Ed.) c. 175, § 93?

2. If an auto owner signs an agreement to accept an insurance policy on his vehicle when the proposed company is licensed, and pays for the same in advance, as required by said section 93, and in the meanwhile insures said vehicle in another company, with knowledge of the fact that his insurance in the other company cannot be cancelled without ten days' notice and then only at 'short term' rates, and that a new policy in the proposed company cannot be written except at 'short term' rates, said policy costing him twenty-five per cent more than if he refused to honor the subscription in the new company, is there anything in the statute which would bar the Commissioner from accepting such subscriptions and payments as bona fide and binding upon the auto owner?

3. Can the Commissioner, under the law, with the knowledge that the projected company cannot have in force $100,000 in insurance premiums on the date of licensing, license said company if he believes that the company will, within a reasonable time, have such an amount in force?

4. In the event that the company is licensed upon the evidence that certain persons have paid sufficient premiums in advance upon their subscriptions to equal the statutory requirement of $100,000 and after being licensed the proposed company chooses to refund certain of these premiums for underwriting reasons or at the request of the assured or upon the refusal of the assured to cancel his policy in another company because of the twenty-five per cent. additional cost, or for any other reason, can the company so refund said advance premium payments in whole or in part upon said company, substituting for the same, after being licensed, new business in equal amount?"

I assume that these inquiries are made in reference to the applicability of G. L. (Ter. Ed.) c. 175, § 93, which, in so far as pertinent, provides that no mutual liability company shall issue a policy "until it has secured applications for insurance on risks in the commonwealth the premiums on which shall amount to not less than one hundred thousand dollars," and, further, that it has satisfied you that such premiums have been actually paid to it in full in cash.

Payments for the premiums so advanced to automobile owners by a finance company would be immaterial so long as you are satisfied that

such advancements are genuine, made in good faith, and not as a method of circumventing the requirement of the statute. If the gist of the transaction was a loan from the finance company to the insurance company, in order that the latter would have the stated amount requisite to permit it to commence business, then the company is not authorized to begin actual operations or to issue any policies. There must be actual subscriptions from bona fide subscribers.

The disadvantage resulting to the automobile owners from substituting owners in one company for those in another would arise from their subscriptions, which, when accepted by the company, become contracts and bind the subscribers to accept the policy for which they had already paid and for which the company was required to issue its policy unless there was contained in the said subscriptions any material provision which was breached by the company and which would then permit a remittance to the subscribers of the premiums. On the other hand, if no breach of the subscriptions has been effected by the company, then the failure of a subscriber to accept the policy would not entitle him to be reimbursed by the company.

If, on the date of licensing, the company has applications for insurance the premiums on which amount to at least $100,000, and premiums in this amount have been actually paid by the applicants in cash to the company and such applications are now outstanding and in full force and effect, then the company is entitled to be licensed. The insurance, however, to the amount of $100,000 must be actually in force immediately after licensing, although a few days might elapse before all policies subscribed for can be issued and delivered to all subscribers.

No company can commence its actual business or the issuance of its policies until premiums in the above amount have been actually subscribed for and paid in cash to it. This condition must be met before a license can issue. While there might be some incidental changes in the situation of the subscribers, who may either own a less number of automobiles or none at all at the date of the issuance of the policies, yet, if the company has accepted the subscriptions and has complied with their terms, no refund should be made to the applicants.

I therefore answer your first inquiry in the affirmative, and all the others in the negative.

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

Civil Service — Employee — Removal — Classification.

A legislative provision authorizing a public board to employ and remove employees does not of itself alone indicate an intent on the part of the General Court that such employees should be outside the sweep of the civil service laws.

SEPT. 22, 1937.

Hon. THOMAS H. GREEN, *Commissioner of Civil Service.*

DEAR SIR: — You have asked my opinion as to "whether or not the employees of the Quincy City Hospital are classified under civil service."

Spec. St. 1919, c. 134, authorized the construction and maintenance by the city of Quincy of the hospital in question.

I am informed that prior to the date of the enactment of said chapter

134 the city of Quincy had adopted the provisions of the civil service laws applicable to municipal employees.

The said chapter 134 places the general management of said hospital in a board of managers, and vests the board with "authority to employ and remove superintendents, nurses, attendants, and all other agents and employees."

A legislative provision authorizing a public board "to employ and remove" certain municipal employees, without other words with relation to the mode of removal or nature of the tenure, does not necessarily, in my opinion, indicate an intention on the part of the General Court to place such employees outside the protection of the civil service laws.

It has been held in various instances in opinions by my predecessors in office that where other words were used by the Legislature, such as "removed for cause," or some specific mode of removal inconsistent with procedure under the civil service laws and regulations was prescribed by the Legislature, then such words, so used by the Legislature in the various enactments considered, indicated an intent on the part of the General Court that the employees there in question should not come within the protection of the civil service laws. See VI Op. Atty. Gen. 152 and 334; VII *ibid.*, 719; VIII *ibid.*, 643.

Yet it has never been said by former Attorneys General nor by the Supreme Judicial Court that, from the mere use, without any other words, of the phrases "appoint and remove" or "employ and remove," concerning the relation between a superior municipal officer and employees whose appointments were not of an emergency or temporary character, it could be inferred that the Legislature intended to place such employees outside the protection of the civil service laws; and I am of the opinion that the words "employ and remove," as used in said chapter 134, were not intended by the Legislature to place, and do not place, the employees of the Quincy City Hospital in the class of those employees who are excluded from the benefits of the civil service laws and regulations because they "are by law exempt from the operation of this chapter," namely, the Civil Service Law. G. L. (Ter. Ed.) c. 31, § 5.

Accordingly, I answer your inquiry to the effect that the employees of the Quincy City Hospital are properly classified under civil service.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Interstate Commerce — Apples — Inspection — Storage.

SEPT. 24, 1937.

Hon. WILLIAM CASEY, *Commissioner of Agriculture.*

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

"Will you kindly give me in writing your opinion as to whether or not Massachusetts apple inspectors shall inspect for export shipment apples stored in Massachusetts warehouses even though said apples were grown out of the State. Inasmuch as the Massachusetts Apple Grading Law pertains to 'apples packed or repacked within the commonwealth and intended for sale within or without the commonwealth,' it is my interpretation that export apples should be inspected by our inspectors, no matter what State shipped the apples here for storage."

Apples from outside the Commonwealth and consigned to persons outside Massachusetts are still in interstate commerce, even if placed in storage within the Commonwealth temporarily, and may not, under such circumstances, be inspected.

If, however, the apples are not shipped from a State outside Massachusetts directly to another foreign State, but are sent directly to a place of storage within the Commonwealth and then, after being packed or repacked in storage, are for the first time consigned to a person in another State outside Massachusetts, they will not, while in such storage, be in interstate commerce and may be inspected at such place.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Civil Service — Employees of the Labor Relations Commission — Classifications.

SEPT. 27, 1937.

Labor Relations Commission.

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

"The Labor Relations Commission respectfully requests a ruling by your department relative to the following matter:

Under St. 1937, c. 436, § 4, known as the Labor Relations Act, are appointments to the positions of 'executive secretary, and such attorneys, examiners and regional directors' exempt from the provisions of G. L. (Ter. Ed.) c. 31, and the rules and regulations of the Civil Service Commission?"

The applicable portion of said section 4 reads: —

"The commission shall appoint an executive secretary, and such attorneys, examiners and regional directors and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the commonwealth, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by the general court."

I am of the opinion that in relation to the four positions first named in said section, as to which you specifically inquire, namely, an executive secretary, and such attorneys, examiners and regional directors as the Commission may "from time to time find necessary for the proper performance of its duties," it was not the intention of the Legislature to make them subject to the provisions of the Civil Service Law, G. L. (Ter. Ed.) c. 31.

In the same sentence, power to appoint to the said four positions is given to the Commission without qualification; and, in contradistinction, power is also given to the Commission to appoint "other employees," whose appointment is specifically stated to be qualified by existing laws applicable to the employment of officers and employees of the Commonwealth generally. The wording of this sentence, which places the said four positions in one class and the other positions to which the Commission may appoint in another class, plainly indicates that the Legislature realized that there was a distinction in the nature of the employment of those occupying the said four positions and the "other employees" of the

Commission, and that it was the intention of the Legislature that those in the first class should not be under civil service and that those in the second class should be placed thereunder.

I therefore answer your question to the effect that appointments to the positions of executive secretary, attorneys, examiners and regional directors, made by your Commission, are exempt from the provisions of G. L. (Ter. Ed.) c. 31, and the rules and regulations of the Civil Service Commission, but that other employees whom you may appoint are subject to such provisions.

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

Schools — Transportation of Pupils to Private Schools — Reimbursement of Town by Commonwealth.

OCT. 2, 1937.

Hon. JAMES G. REARDON, *Commissioner of Education.*

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

"Since the passage of St. 1936, c. 390, several towns have provided transportation to pupils attending private schools in other towns, under conditions set forth in the opinion of the Attorney General under date of December 23, 1936 (*ante*, p. 37). Claims for reimbursement for transportation have been made by the towns furnishing it to private school pupils as indicated above. Our question is: 'May the Department of Education approve such claims for reimbursement?' In other words, 'Is transportation legally paid for private school pupils reimburseable by the State, as in the case of public school pupils under G. L. (Ter. Ed.) c. 71, § 7?'"

I answer your question in the affirmative.

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

Shellfish — Permits — Municipal Regulation.

OCT. 2, 1937.

Mr. BERNARD J. SHERIDAN, *Supervisor of Marine Fisheries.*

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

"First: May the aldermen of a city or the selectmen of a town, acting under authority of G. L. (Ter. Ed.) c. 130, § 48, as amended, or any other provisions of law which give the selectmen the right to 'control, regulate or prohibit the taking of eels, and any or all kinds of shellfish and seaworms within such city or town,' make regulations that deny to persons not resident in the city or town the right to take shellfish for their own family use?

Second: May the aldermen of a city or the selectmen of a town, acting under the same authority, make a regulation allowing a nonresident to take shellfish for his own family use but subject to a permit for which a fee is charged?"

The provisions of G. L. (Ter. Ed.) c. 130, §§ 48–50, inclusive, as amended, lay down a legislative rule which may not be changed by city or town action.

Said section 50 provides, in substance, that any inhabitant of the Commonwealth who holds a permit, issued under section 48 by any city or town, to take the fish therein referred to from the waters of such municipality may take such fish "for his own family use" from the waters of any other city or town to an extent therein designated. It was not the intent of the Legislature, indicated by the wording of said section 50, that such extended use of a permit for the special purpose referred to should be subject to any further permit or charge other than the initial one paid when the original permit was issued.

A city or town regulation which denies the right to take fish from local waters to all nonresidents for their "family use" would be repugnant to the explicit provisions of said section 50 with regard to persons having a permit with relation to the waters of another locality, and so would be void. A city or town regulation which denied to nonresident citizens of the Commonwealth, merely as such, the right to obtain permits of any sort to take fish from local waters, while giving the right to residents, would seem to be so arbitrary and unreasonable as to be invalid.

I have used the word "fish" herein as denoting shellfish, eels and seaworms, which are referred to specifically in the noted sections, and answer both your questions in the negative.

Very truly yours,

Paul A. Dever, *Attorney General.*

District Court — Fines — Ordinance — Motor Vehicle.

Oct. 7, 1937.

Hon. Henry F. Long, *Commissioner of Corporations and Taxation.*

Dear Sir: — You ask my opinion with relation to the disposition of certain fines levied in the District Court of North Adams. Whether or not the provisions of section 12 of the ordinance of North Adams, to which you refer, are valid, the question of such validity is one primarily for judicial interpretation. Its invalidity could be raised as a defense by one charged in a complaint with its violation. Nevertheless, where the court has proceeded to convict a person of a violation of such section of the ordinance, the fine is imposed for violation of the city ordinance and not for a violation of the provisions of G. L. (Ter. Ed.) c. 90; and the clerk has no other course than to pay it to the municipality and may not go behind the record and treat the conviction as if it were for a violation of G. L. (Ter. Ed.) c. 90, § 14, and pay the money into the county treasury.

You have set forth said section 12 and the provisions of G. L. (Ter. Ed.) c. 90, § 14, in your letter, and it is obvious from an inspection of them that they are not precisely the same, the former providing that vehicles shall slow down at street crossings and intersections, and the latter providing that there shall be such slowing down "where his (the operator's) view is obstructed."

Said section 12 of the ordinance would seem to be a regulation as to speed and to fall within the provisions of G. L. (Ter. Ed.) c. 90, § 18, and, not having been adopted in accordance with the provisions of said

section 18, might be invalid. The invalidity of said section, however, is a question for judicial determination in a case before the courts.

The foregoing considerations answer your first question, and I answer your second question in the negative.

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

Governor and Council — Transfer of Funds — Extraordinary Expenses.

Where no appropriation has been made by the Legislature for the work of a special commission, the Governor and Council cannot transfer money from another source for the use of such commission; nor, under G. L. (Ter. Ed.) c. 6, § 8, can the expense of hiring an engineer by such commission be deemed an "extraordinary expense," and no amount for such expense may be expended from the appropriation provided for by said chapter 6, section 8.

OCT. 21, 1937.

His Excellency CHARLES F. HURLEY, *Governor of the Commonwealth.*

SIR: — I am in receipt from Your Excellency of the following letter requesting my opinion in connection with a proposal to place at the disposal of a special commission appointed under the Resolves of 1937, chapter 22, funds from the appropriation provided for by G. L. (Ter. Ed.) c. 6, § 8, in accordance with a letter from the chairman of said commission, which also follows: —

"OCTOBER 20, 1937.

Hon. PAUL A. DEVER, *Attorney General, State House, Boston, Massachusetts.*

MY DEAR ATTORNEY GENERAL: — Referring to the enclosed letter from Honorable Edward L. Logan, I have been directed by His Excellency the Governor to request an opinion of you relative to the subject matter. . . .

Very truly yours,
WILLIAM V. GORMLEY,
Assistant Secretary."

"LAW OFFICES OF EDWARD L. LOGAN,
85 DEVONSHIRE STREET, BOSTON, MASS., October 18, 1937.

Governor CHARLES F. HURLEY, *State House, Boston, Massachusetts.*

MY DEAR GOVERNOR HURLEY: — Under Chapter 22 of the Resolves of 1937, a Special Commission was appointed, consisting of the Chairman of the Board of Trustees of the Boston Metropolitan District, the Chairman of the Transit Department of the City of Boston, the Corporation Counsel of the City of Boston, the Chairman of the State Street Committee, and a member of the Metropolitan Transit Council, for the purpose of investigating the matter of the removal of the elevated railway structure located on Atlantic Avenue and other streets.

No appropriation was made for carrying out the purposes of the resolve. To make its report effective, the Commission is of the opinion that some money will be necessary, and I am writing, at the suggestion of the members of the Commission, to request, if it is possible, that we may be allowed from such sums as the Governor of Massachusetts may have at his dis-

posal, the sum of *twenty-five hundred dollars* to be used, among other purposes, for the hiring of a competent engineer, whose opinion would be regarded as authoritative in the making of our report to the legislature.

With the hope that you may be able to give us from such funds, which you have under your control, the money which in the opinion of the Commission is really needed, . . . I remain,

Sincerely yours,

Edward L. Logan."

G. L. (Ter. Ed.) c. 6, § 8, reads as follows: —

"An amount not exceeding one hundred thousand dollars shall be appropriated each year for carrying out sections twenty-five to thirty-three, inclusive, of chapter thirty-three, for the entertainment of the president of the United States and other distinguished guests while visiting or passing through the commonwealth, for extraordinary expenses not otherwise provided for, which the governor and council may deem necessary, and for transfer, upon the recommendation of the comptroller, with the approval of the governor and council, to such appropriations as have proved insufficient."

Under this section the Governor and Council have authority, on the recommendation of the Comptroller, to transfer money from the amount appropriated under the provisions of said section, for a given purpose, to "such appropriations as have proved insufficient."

In the present instance, inasmuch as no appropriation was made by the Legislature for the work of the said special commission, this particular power of transfer cannot be exercised by the Governor and Council under the terms of said section. Where no definite appropriation has actually been previously made by the General Court as to which a deficiency has occurred, it is obvious that no transfer can be made, as there has never been any appropriation to which a transfer could be "allocated." V Op. Atty. Gen. 476; see Opinion of Attorney General to the Comptroller, December 4, 1930 (not published).

Under the provisions of section 8 the Governor and Council may also make payments of money, from the appropriation made by said section, "for extraordinary expenses not otherwise provided for, which the governor and council may deem necessary."

Although the purpose for which the special commission desires this money expended by the Governor and Council is undoubtedly a public purpose, since the work of the special commission has been stamped as such by the Legislature by virtue of the general terms of said chapter 22, yet, in my opinion, it can hardly be said, as a matter of law, that the expense of hiring an engineer for the benefit of a legislative committee is properly to be deemed an "extraordinary expense," within the meaning of said section 8.

The employment of an engineer to assist a legislative committee engaged in considering a subject which is to some degree connected with engineering problems is not unusual. Such a payment would be an ordinary or usual form of payment. An appropriation for such a payment would be a usual and customary form of appropriation. Neither could be said to be extraordinary.

It can hardly be doubted but that the Legislature might have had in mind, in creating the special commission, that the commission might desire the help of an engineer or other persons in his work. The Legisla-

ture, however, did not see fit to allow the commission by appropriation any money for such a purpose. The mere fact that said commission now desires to do something to help it in making its report, for which the Legislature did not see fit to authorize the expenditure of money, does not make such expenditure an "extraordinary" one.

I am unaware of any use of the word "extraordinary," as it is employed in said section 8, which could make a payment of money for the purpose outlined in the letter of the commission a payment for an "extraordinary" expense. No circumstances have arisen and no act has been performed by servants of the Commonwealth from which any moral duty to make this payment could arise, nor has the demand for such payment arisen from unexpected or unpredictable reasons, as was the case with regard to a transfer from the appropriation for extraordinary expenses for the benefit of certain prisoners who had lost their money through the closing of one of the trust companies in 1931. See Opinion of the Attorney General to the Lieutenant-Governor and Council, October 30, 1935 (not published).

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Teachers' Retirement — Retiring Allowance — Average Salary — Deductions.

Nov. 1, 1937.

Hon. JAMES G. REARDON, *Commissioner of Education.*

DEAR SIR: — In a recent communication you have written me as follows: —

"Under the Teachers' Retirement Law the amount of the assessments a member is permitted to pay depends upon the salary of the member. In determining the retiring allowance, the average salary for the five years preceding retirement is a very important factor.

In addition to being a factor in computing retiring allowances, the law further provides that no pension for a teacher under section 10 (5) of the retirement law shall exceed one-half the average salary for the five years preceding retirement.

As the salary is such an important factor under the Teachers' Retirement Law, the Retirement Board would like your opinion as to the salary which should be used as a basis for assessments and to determine the average salary for the five years preceding retirement, in the following cases:

1. If the teacher is making a voluntary contribution to a city or town, as for example ten per cent.

2. If a teacher agrees to serve for a certain period during the school year without pay.

3. If the salary is cut by the city or town, as, for example, in the case of Fall River, where teachers' salaries were originally reduced twenty per cent and where the cut is now fifteen per cent.

I believe that in all cases where there were voluntary contributions, a waiver of salary or a reduction by a city or town the reductions have been restored either in whole or in part, indicating that in each of the three cases it was the intention for the reductions to be of a temporary nature during the depression."

The principles which were enumerated in an opinion given by one of my predecessors in office to a former Commissioner of Education, on March

11, 1932 (Attorney General's Report, 1932, p. 53), with which opinion I concur, — to the effect that the Teachers' Retirement Board should base its assessments for the annuity fund on the full salary established for a teacher, irrespective of any sum paid by such teacher or any deduction made from such a salary to or by a municipality, but that when a teacher had made a specific contract with a municipality to serve for a designated period without salary, then the smaller salary so received was to be the basis for assessments, — are applicable to a determination of the salary which should be used to arrive at the average salary for the five years preceding retirement.

The salary which should be used as a basis for assessments was described in said opinion, and the salaries which should be used in computing the average salary for the five years preceding retirement are to be determined in the same way.

The phrase with relation to salary computation in connection with the retiring allowance of teachers, under G. L. (Ter. Ed.) c. 32, § 10 (5), is "based on his average yearly rate of salary for the five years immediately preceding his retirement," and with relation to the deductions which were to be made from the amount of salary from year to year, under G. L. (Ter. Ed.) c. 32, § 12 (5), referred to in section 9 (2), is "from the amount of the salary *due* each teacher."

The word "salary" in said section 12 (5) and section 9 (2) was defined in said opinion of March 11, 1932, as follows: "The word 'salary,' as used in said section 9 (2), means the compensation which each of the teachers affected by the statute is entitled to receive as a matter of law."

So it was held in said opinion (1) that the Retirement Board should base its assessment on the full salary to which the teacher is entitled by law, regardless of any sum paid therefrom to the town by or on behalf of the teacher with his consent; (2) that the Retirement Board should base its assessment on the full salary to which the teacher is entitled by law, regardless of any deduction made by a town from the amount so due; and (3) that the Retirement Board should not base its assessment on the full salary to which the teacher was originally entitled by law if the teacher had entered into an agreement by which he contracted to serve for a designated period during the year without salary.

Applying the same principles to the matter which you now lay before me, I answer, with relation to the cases which you have set forth in your letter as above quoted, to the effect (1) that if the teacher is making or has made a voluntary contribution to a city or town, the rate of salary for the year or years when such voluntary contribution is made is not to be used in computing the "average yearly rate of salary for the five years immediately preceding his retirement," but that the salary established for him by the municipality without such contribution is to be employed for such purpose; (2) that where the teacher agrees to serve for a certain period during the school year without pay, the salary for such year is to be taken as being the sum actually paid such teacher under such an agreement; and (3) that if the salary is cut by the city or town the same principle as that applied in case (1) is to be followed.

You refer in your letter to an opinion, a portion of which has been called to your attention, rendered by the Attorney General to the Commissioner of Insurance on July 26, 1937 (*ante*, p. 113). This opinion related to deductions from the salaries of employees *other than teachers*, which were governed by St. 1936, c. 318, and concerned the meaning of

the words "regular compensation," as used in said chapter 318, in describing the basic salary for employees for which a pension is to be paid them. In that opinion the distinction between the wording of said chapter 318 and the wording of said G. L. (Ter. Ed.) c. 32, §§ 12 (5) and 9 (2), is pointed out.

I enclose a copy of this opinion to the Commissioner of Insurance, so that you may have it before you in its entirety and may see that it is not applicable to the situation regarding teachers. If it were applicable, the wording of the statute as to the retirement of teachers and that as to the retirement of employees under said chapter 318 would have been the same, and the reduced yearly salary spoken of in case (2), cited in your letter, would then have to be treated in the same manner as the other cases which you stated. That, however, is not the situation with regard to the provisions of G. L. (Ter. Ed.) c. 32, affecting the basic salary of teachers to be used in computing a portion of their retirement allowance.

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

Teachers' Retirement — Service outside the Commonwealth — "State."

Nov. 4, 1937.

Hon. JAMES G. REARDON, *Commissioner of Education.*

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

"At a meeting of the Teachers' Retirement Board held on October 26, 1937, it was voted to request your opinion as to whether or not St. 1937, c. 302, which allows credit for service in the public day schools of other States, under certain conditions, applies to public day school service rendered in the possessions of the United States, such as the Philippine Islands and Porto Rico, and also in the government schools in the Panama Canal Zone."

St. 1937, c. 302, to which you refer, and which is entitled "An Act to allow credit under the Teachers' Retirement Law for service rendered in public day schools outside the Commonwealth," refers to the public day schools in whose service teachers have acted and for which they are to be allowed credit under the retirement system as "the public day schools of *any other State.*"

G. L. (Ter. Ed.) c. 4, § 7 (31), provides that the meaning of the word "state," in construing statutes where a contrary intention does not clearly appear, shall, when the word "state" is "applied to the different parts of the United States, extend to and include the District of Columbia and the several territories; . . ."

None of the three possessions of the United States to which you refer in your letter is a territory, and consequently the schools in such possessions do not fall within the definition of public day schools of any other State, as employed in said chapter 302, there being nothing in the chapter itself or in the legislative history of its enactment which indicates that any contrary meaning is to be given to the word "state" as therein employed.

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

Alcoholic Beverages Control Commission — Authority — Regulation of Prices.

Nov. 4, 1937.

Alcoholic Beverages Control Commission.

GENTLEMEN: — You have sent me the following communication: —

"The Commission has been requested by the Massachusetts Wholesale Liquor Dealers' Association, Inc. to make a regulation which in substance shall provide as follows: —

'The price to be charged to the retailer for any brand of merchandise (alcoholic beverages) shall be such that the gross profit to every wholesaler of such merchandise shall be not less than fifteen per cent of the selling price of such merchandise. Gross profit shall mean the difference between the selling price and the invoice cost of the merchandise, plus freight and the required taxes imposed by the Commonwealth of Massachusetts.'

Inasmuch as the Commission now has the matter under consideration, will you kindly advise us as to whether or not, in your opinion, the Commission may legally make such a regulation under authority contained in G. L. (Ter. Ed.) c. 138, § 24, as amended."

The only authority given to your Commission by the Legislature to regulate prices of alcoholic beverages is that to which you refer, contained in section 24 of G. L. (Ter. Ed.) c. 138, as amended, and reads: —

"The commission shall . . . make regulations . . . for establishing maximum prices chargeable by licensees under this chapter . . ."

Under such a grant of authority specifically applicable to maximum prices alone, and probably intended by the Legislature as a safeguard against exploitation of the purchasing public, you are not empowered to make such a regulation as that set forth in your letter, which purports to regulate minimum prices as between retailer and wholesaler.

Very truly yours,

PAUL A. DEVER, *Attorney General.*

Mental Diseases — Institutions — Schools — Licenses.

Nov. 16, 1937.

Dr. CLIFTON T. PERKINS, *Acting Commissioner of Mental Diseases.*

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

"The first sentence of G. L. (Ter. Ed.) c. 123, § 33, reads as follows: —

'The department may annually license any suitable person to establish or have charge of an institution or private house for the care and treatment of the insane, epileptic, feebleminded, and persons addicted to the intemperate use of narcotics or stimulants, and may at any time revoke the license.'

Recently, several problems have been raised in this department relative to the licensing of private schools for the care of feebleminded individuals. We have felt that the meaning of the above sentence in regard to this matter did not apply to so-called 'day schools' for the feebleminded, but applied only to those schools which gave continued care, day and night, to feebleminded pupils.

I would request an opinion from you as to whether or not the term

'institution or private house,' as used in G. L. (Ter. Ed.) c. 123, § 33, applies to day schools as outlined above, or only to those schools which give continued day and night care to their residents."

I am of the opinion that it was not the intent of the General Court that the words "institution or private house," as used in said section 33, should include within the scope of their meaning "day schools" which furnish only tuition during a few hours of daytime to the feebleminded.

It is, of course, a question of fact in any given instance, to be passed upon by your department, as to whether a particular school limits its functions solely to such tuition during such hours.

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

State Hospital Employees — Nonresidence — Compensation.

Nov. 16, 1937.

Dr. CLIFTON T. PERKINS, *Acting Commissioner of Mental Diseases.*

DEAR SIR: — You have asked my opinion, in effect, as to whether employees of the Metropolitan State Hospital who are not residents thereof, and who receive only one meal per day from the hospital in connection with their work there, are to be treated as "in residence thereat throughout" a year in computing the average yearly population of the hospital under the provisions of St. 1928, c. 372, § 10.

Said section 10 provides: —

"There shall be paid by the commonwealth to the city of Waltham as full compensation for the right to dispose of the sewage of said metropolitan hospital through the sewerage system of said city . . . beginning with the year nineteen hundred and thirty-four, the sum of eighteen hundred dollars per year, *unless in any year during said last mentioned five year period the average population of said hospital, including inmates, attendants and other employees in residence thereat throughout said year shall exceed two thousand, in which case there shall be an added payment to said city* . . ."

I am of the opinion that attendants and other employees who do not in fact make their abode at such hospital but who, as you say, are domiciled away from the hospital grounds, and I assume live and reside in some dwelling outside the hospital grounds, are not to be taken as being in residence at the hospital, even if they receive one meal a day there, and that they are not to be counted in figuring the average "*population*" of the hospital in any given year.

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

Public Officials — Annual Bonds — Statute.

Nov. 17, 1937.

Hon. WILLIAM E. HURLEY, *Treasurer and Receiver General.*

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

"This department recently sent out notices to various officials affected by St. 1937, c. 219, §§ 2, 4 and 6, in accordance with an informal opinion

of your department advising that all bonds now deposited with the State Treasurer by said officials should be substituted by new bonds dated July 16, 1937, and annually thereafter.

As inquiries have been made as to our authority in making this demand, I would respectfully ask your formal opinion as to the effect of said chapter 219 on the bonds of the officials affected by said act now on file with this department."

In my opinion, the notice which you describe as having been sent out by your department is a correct interpretation of the effect of St. 1937, c. 219. In its requirement that officials should give a bond and renew it annually, the chapter is not retrospective in its terms. It is not to be interpreted as applying to acts which have been done prior to its effective date, but makes requirements as to what shall be done when it becomes effective.

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

Schools — Visiting Teachers — Lip Reading — Free Lunches.

Nov. 29, 1937.

HON. ALBERT COLE, *Chairman, Special Commission Relative to University Extension.*

DEAR SIR: — 1. Your Commission has submitted to me 1937 House Bill No. 815, which provides for the employment by cities and towns of visiting teachers, which bill was not enacted into law at the last session of the Legislature, and in connection with its subject matter has asked me the following question: —

"Do cities and towns under the present law have the right to employ visiting teachers, so called, without further legislation?"

There is not now any specific provision of law authorizing the appointment of "visiting teachers" by school committees. It may well be that the duties of a visiting teacher are so unlike those of the ordinary teacher in our public school system that the authority now given to school committees to employ "teachers" does not empower the employment of teachers of the particular type named. I assume that in the present state of the statutory law that would ultimately be a question for judicial interpretation if some city or town did in fact employ one as a "visiting teacher."

Such a result might be averted and any existing doubt as to the power of school committees in this respect could be set at rest by the enactment of a measure such as said House Bill No. 815.

2. You also submit another 1937 House Bill No. 816, authorizing instruction in lip reading in the schools. An inspection of the applicable existing statutes indicates that no specific authority has been given to any authorities relative to the employment of teachers for the highly specialized form of instruction indicated. Such authority should properly be established by the Legislature specifically, for its proper implication from existing law is doubtful. House Bill No. 816 should not be taken as a model for drafting a proposed measure. The mandatory provisions therein relative to private school pupils are of doubtful meaning and propriety.

3. The third matter to which you have directed my attention, 1937 House Bill No. 952, relates to the authorizing of school committees to furnish food for undernourished school children.

It is obvious from an inspection of the existing laws that school committees have no authority to furnish free lunches. See G. L. (Ter. Ed.) c. 71, § 72.

In the absence of action by the Federal authorities under the Social Security Act (see St. 1935, c. 494; St. 1936, c. 347), it is not clear that the local departments of public welfare would have authority to furnish food to school children in the way indicated, and probably intended, by said House Bill No. 952 in connection with the schools as such. Of course, such departments have authority to supply necessary food to needy children, but their obligation to furnish food in a manner related to the administration of the school system, which I take to be an integral part of the desired legislation, is nowhere made plain in our statutes.

Very truly yours,

Paul A. Dever, *Attorney General.*

Alcoholic Beverages — Regulations — Interstate Commerce.

Nov. 29, 1937.

Alcoholic Beverages Control Commission.

Gentlemen: — You submit to me for an opinion as to their legality two regulations the adoption of which is contemplated by your Board. These regulations read as follows: —

"Regulation 37A. One label on every bottle, jug or other container of American type whiskey, other than corn or blended whiskey, offered by any Manufacturer or Wholesaler and Importer for intra-state sale solely within this Commonwealth, shall state the period of time during which after distillation and before bottling such whiskey was aged in charred oak barrels, and shall also state whether such barrels were new or re-used.

Regulation 37B. One label on every bottle, jug or other container of American type corn whiskey, other than a blend, offered by any Manufacturer or Wholesaler and Importer for intra-state sale solely within this Commonwealth, shall state the period of time during which after distillation and before bottling such whiskey was aged in oak barrels."

Under the provisions of G. L. (Ter. Ed.) c. 138, § 24, the Commission is authorized, subject to the approval of the Governor and Council, to make regulations "for insuring the purity, and penalizing the adulteration, or in any way changing the quality or content, of any alcoholic beverage."

Such regulations, however, must not be inconsistent with our own statutes or "with federal laws and regulations, governing the labelling of packages of alcoholic beverages as to their ingredients and the respective quantities thereof."

The labelling prescribed by the proposed regulations is confined to the duration and method of ageing process employed.

Their operation is to be confined exclusively, as stated therein, to "intra-state sale solely within this Commonwealth."

Under the Twenty-first Amendment, the transportation and importation of intoxicating liquors for delivery and use in a State must be effected in such a way as not to be violative of the statutes of that particular

State. States are thus permitted to legislate in a field which, but for such a provision, would probably be held as violative of the interstate commerce clause of the Federal Constitution, as the effect of such statutes would be to impose a direct burden upon such commerce. See *State Board* v. *Young's Market Co.*, 299 U. S. 59.

The regulations are not inconsistent with our statutes or with Federal laws or regulations, and, in my opinion, will be valid if adopted by your Board and approved by the Governor and Council.

Very truly yours,

Paul A. Dever, *Attorney General.*

Alcoholic Beverages — State Election — City Election — Sales.

Nov. 29, 1937.

Alcoholic Beverages Control Commission.

Gentlemen: — You have called my attention to G. L. (Ter. Ed.) c. 138, § 33, which provides: —

"No licensee under section twelve shall sell and no licensee under section fifteen shall sell or deliver any alcoholic beverages, and no registered pharmacist acting under section twenty-nine and no licensee under section thirty A shall sell any alcoholic beverages or alcohol without a physician's prescription, during polling hours on any day on *which a state or municipal election, caucus or primary is held* in the city or town in which such licensed place is conducted; provided, that the foregoing restrictions shall not apply in the case of such an election, primary or caucus if the local licensing authorities issue an order to that effect applicable alike to all licensees of every class subject to such restrictions."

In connection therewith you have asked my opinion as to whether or not —

"1. The provisions of the said section apply to a special primary at which party nominees are to be chosen to run at a special election to fill a vacancy in the United States House of Representatives?

To a special election to elect a nominee to fill a vacancy in the United States House of Representatives?

2. The provisions of the said section apply to a special primary at which party nominees are to be chosen to run at a special election to fill a vacancy in the Massachusetts Legislature?

To a special election to elect a nominee to fill a vacancy in the Massachusetts Legislature?

3. The provisions of the said section apply to a special election at which a city councillor is to be elected to represent one of the wards of a city?"

1. A "state election" has been defined by the Legislature, in G. L. (Ter. Ed.) c. 50, § 1, as the words are used in G. L. (Ter. Ed.) cc. 50–57, as follows: —

"'State election' shall apply to any election at which a national, state or county officer is to be chosen by the voters, whether for a full term or for the filling of a vacancy."

I know of nothing which indicates that the Legislature did not employ the words "state election" in said G. L. (Ter. Ed.) c. 138, § 33, as amended, in the same sense.

A "special election," as you use the quoted words in your letter, indicates an election to fill a vacancy. It follows, logically, that a primary such as you describe in your first question falls within the meaning of "state primary," as those words are employed in said section 33.

I therefore answer both queries contained in your first question in the affirmative.

2. By reason of the same considerations I answer both the queries contained in your second question in the affirmative.

3. The words "city election" are likewise defined by the Legislature in said G. L. (Ter. Ed.) c. 50, § 1, as follows: —

"'City election' shall apply to any election held in a city at which a city officer is to be chosen by the voters, whether for a full term or for the filling of a vacancy."

I am of the opinion that the words "municipal election" as used in said section 33 are there employed by the Legislature with the same significance as is the above-quoted portion of said chapter 50, section 1. A city councillor is a city officer. I therefore answer your third question in the affirmative.

There is nothing contained in the provisions of said section 33 or in any other portion of said chapter 138 which indicates that the Legislature did not intend the provision for the closing of places selling alcoholic beverages to apply to the whole of a city when any election was held therein, irrespective of whether only the voters in one ward thereof were taking part in the same. The Legislature evidently perceived that hardships might result if this statute were enforced in every instance and, accordingly, empowered the local licensing authorities, in the exercise of their sound judgment and discretion, to grant exceptions from the operation of the statute. G. L. (Ter. Ed.) c. 138, § 33, as most recently amended by St. 1937, c. 268. This was accomplished by the General Court by inserting in the statute the following provision: "provided, that the foregoing restrictions shall not apply in the case of such an election, primary or caucus if the local licensing authorities issue an order to that effect applicable alike to all licensees of every class subject to such restrictions."

Very truly yours,

Paul A. Dever, *Attorney General.*

Lord's Day — Holiday — Publication — Computation of Time.

Nov. 30, 1937.

Alcoholic Beverages Control Commission.

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

"G. L. (Ter. Ed.) c. 138, § 15A, as amended, provides that 'Local licensing authorities shall cause to be published at the expense of the applicant a notice of every application for a license under section twelve, fifteen or thirty A within ten days after the receipt of such application.'

Will you kindly advise us as to whether or not, in your opinion, if the tenth day following receipt of the application is a Sunday or legal holiday the notice of the application may legally be published on the next succeeding business day, or whether it can legally be published on the Sunday or legal holiday?"

The provisions of G. L. (Ter. Ed.) c. 4, § 9, read: —

"Except as otherwise provided, when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on Sunday or a legal holiday, the act may, unless it is specifically authorized or required to be performed on Sunday or on a legal holiday, be performed on the next succeeding business day."

The expression "within ten days after the receipt of such application" allows the same to be published at any time before the expiration of ten days. *Young* v. *The Orpheus*, 119 Mass. 179, 185; *O'Neil* v. *Boston*, 257 Mass. 414.

Accordingly, in regard to the facts which you have set forth, Sunday or a legal holiday, as the tenth day after the receipt of an application, is the last day on which performance by publishing may be accomplished. Being such last day, said G. L. (Ter. Ed.) c. 4, § 9, by its explicit terms permits the performance by publication to be made upon the next day, which would be Monday, the eleventh day since such receipt of the application.

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

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RULES OF PRACTICE

In Interstate Rendition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the

requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application. The affidavit or affidavits should contain sufficient facts to make out a prima facie case of guilt, and should not be a reiteration of the form of the complaint nor contain conclusions of law.

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

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

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

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

850-11-'38. No. 5524.

JU[illegible] W.P.L.