Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1942

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DEPARTMENT OF THE ATTORNEY GENERAL.

State House.

Attorney General,
ROBERT T. BUSHNELL.

Assistants.

JAMES E. FARLEY.
FRANK G. VOLPE.
ROGER CLAPP.
JACOB LEWITON.[1]
J. BURKE SULLIVAN.[1]
JOSEPH F. BACIGALUPO.
WILLIAM F. HAYES.
WILLIAM L. MACINTOSH.
FRANK H. WRIGHT.
JAMES F. MEAGHER.[2]
SHERMAN W. SALTMARSH.[1]
HAROLD E. MAGNUSON.[1]
ALBERT Z. LEMOINE.
NEWTON A. LEVINE.[1]
MILTON A. WESTGATE.
H. WELLS KILBOURNE.[3]
JOSEPH F. REZENDES.
HARRIS J. BOORAS.
SARKIS M. ZARTARIAN.[1]
G. BRUCE ROBINSON.
SAMUEL M. KALEMIAN.
PHILIP L. SMITH.
SIDNEY A. AISNER.[1]

Assistants on Special Work assigned to Other State Departments.

JOSEPH K. COLLINS (Boston Elevated Railway), Department of Public Utilities.
EUNICE P. SIMM (Boston Elevated Railway), Department of Public Utilities.
HARRY J. GREENBLATT, Division of Employment Security.
THOMAS E. KEY, Division of Employment Security.[1]
FERNAND R. DUCHARME, Division of Employment Security.
FRANK F. WALTERS, Milk Control Board.
ARTHUR E. WHITTEMORE, New York, New Haven & Hartford reorganization.

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[1] Now serving in the armed forces of the United States.
[2] Died April 19, 1942.
[3] Resigned August 3, 1942.

Director of Division of Collections.
W. Forbes Robertson.

Chief Clerk to the Attorney General.
Harold J. Welch.

List Clerk to the Attorney General.
James J. Kelleher.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES.

For the Fiscal Year.

General appropriation for 1942	$149,625 00
Balance brought forward from 1941 appropriation	12,497 64
Appropriation for small claims	5,000 00
Appropriation under G. L. (Ter. Ed.) c. 12, § 3B	11,750 00
Total	$178,872 64

Expenditures.

For salary of Attorney General	$8,000 00
For salaries of assistants and others	130,082 68
Incidentals	11,000 00
For small claims	1,114 08
For claims under G. L. (Ter. Ed.) c. 12, § 3B	10,505 58
Bank deposits litigations	5,983 86
Office renovation	351 90
Total expenditures	$167,038 10
Balance	$11,834 54

Financial statement verified as to principal items.

WALTER S. MORGAN,
Comptroller.

By JAMES F. ROCHE.

JANUARY 8, 1943.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 20, 1943.

To the Honorable Senate and House of Representatives.

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

The cases requiring the attention of this Department during the fiscal year ending November 30, 1942, totaling 10,866, are tabulated as follows:

Corporate franchise tax cases	737
Extradition and interstate rendition	77
Land Court petitions	80
Land-damage cases arising from the taking of land:	
Department of Public Works	160
Department of Conservation	2
Metropolitan District Commission	28
Metropolitan District Water Supply Commission	84
Miscellaneous cases	738
Petitions for instructions under inheritance tax laws	9
Public charitable trusts	607
Settlement cases for support of persons in state hospitals	15
Pardons:	
Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127, § 152, as amended	148
Workmen's compensation cases, first reports	2,894
Cases in behalf of Milk Control Board	226
Cases in behalf of Division of Unemployment Compensation, now Division of Employment Security	1,785
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	3,276

I omit a heading entitled "Details of Capital Cases," which has been included in the reports of Attorneys General up to the present time. I assume that this section, consuming several pages in the report of the Attorney General, is a relic of the former custom under which the Attorney General participated in the trial of all capital cases. For more than twenty years, at least, this custom has been nonexistent. In modern times the great bulk of criminal cases, including capital crimes, are tried and disposed of by the district attorneys. Inclusion of cases requiring the attention of the Department of the Attorney General, therefore, of "indictments for murder, capital cases," and a separate section of the report entitled "Details of Capital Cases" appears to me to be misleading and to serve no useful purpose.

For all but a week of the period covered by this report the United States has been engaged in total war, upon success in which the existence of democratic government depends. State governments have been called upon to meet conditions without

precedent in their history. Since the declaration of war in December, 1941, a sustained effort has been made to organize the Department of the Attorney General in such a manner that, despite losses of trained personnel, the work of the Department could be carried on with as high a degree of efficiency and continuity as possible. Work believed to be of importance to the war effort in any of the many ways by which the government of the Commonwealth can contribute to the sum total of the united effort of the American people in this direction has taken precedence over all routine matters.

The extent to which the Department of the Attorney General has met the extraordinary demands made upon it as a result of the war, and at the same time efficiently conducted what might be termed the normal legal business of the Commonwealth, has been due to the loyalty and devotion to the interests of the Commonwealth of the members of the staff, including those who have continuously remained with the Department, those serving in the armed forces of the United States, and those who have acted as replacements, often on short notice. Because of the complexities of particular cases which had been in their charge prior to entry into the service, it has not infrequently been necessary to call upon men in the service to enable their successors as quickly as possible to be in a position to protect the interests of the Commonwealth. This assistance has been rendered cheerfully and readily under difficult and arduous circumstances and often at long distances. I wish particularly to record appreciation in this connection to Assistant Attorney General J. Burke Sullivan, now captain in the United States Army Air Corps, and Assistant Attorneys General Jacob Lewiton and Harold E. Magnuson, now lieutenants in the United States Navy. Prior to their entry into active service, these men occupied key positions in the department. Even while engaged in arduous courses of training beyond the borders of the Commonwealth, they have retained their interest in the legal affairs of the Commonwealth, and have, at the sacrifice of hours set aside for rest and recreation from new and strenuous labors, assisted their successors in familiarizing themselves with unfinished work.

Following is a discussion of various aspects of the work of the Department which I believe may be of interest to the General Court at this time.

Wartime Emergency Powers of Executive Department.

In October, 1941, toward the close of its last regular session, the General Court enacted chapter 719 of the Acts of 1941, entitled "An Act to provide for the safety of the Commonwealth in time of military emergency." The treacherous attack at Pearl Harbor occurred on December 7, 1941, a few weeks after the adjournment of that session. On December 29, 1941, His Excellency the Governor, with the advice and consent of the Council, proclaimed the existence of a state of emergency under the provisions of chapter 719 of the Acts of 1941.

Prior to the convening of the special session of the General Court on January 26, 1942, this Department had engaged in a survey of the legal machinery of the Commonwealth with reference to its adaptability to meet a sudden emergency which might confront it in the event of total war. Heads of various departments, divisions, boards and commissions of the Commonwealth were consulted with reference to their particular problems and many proposals for legislation were received and considered. The willing co-operation and the manner in which all officers of the

State government and other citizens of the Commonwealth gave freely of their time and efforts in the preliminary survey made it possible for the Department of the Attorney General to prepare a legislative program for presentation to the General Court when it convened in special session. Messrs. Fernald Hutchins, counsel to the Senate, and his assistant, Thomas R. Bateman, Henry D. Wiggin, counsel to the House of Representatives, and his assistant, Louis K. McNally, Arthur D. Hill, Esq., chairman of the Special Committee on Public Safety of the Boston Bar Association, Frank W. Grinnell, Esq., of the Massachusetts Bar Association, as well as other members of the Bar, Comptroller Walter S. Morgan and Budget Commissioner Charles W. Greenough were particularly generous with their time, energy and ability when called upon for critical discussions and suggestions in considering the legislative program.

Among measures enacted at the special session was chapter 13 of the Acts of 1942, entitled "An Act to provide for the safety of the Commonwealth during the existing state of war." This important enactment, together with chapter 719 of the Acts of 1941, expressly confers upon the Chief Executive vast powers over persons and property within the Commonwealth. In effect, these are powers conferred upon the Chief Executive to govern by order or decree, subject to the limitations imposed by the General Court. In normal times such powers would be utterly inconsistent with a democratic form of government. In the light of experiences of other countries during the present war, however, it was believed that such powers would enable the State government to meet promptly and effectively at least some of the foreseeable emergencies of total war.

After the enactment of chapter 13, this Department suggested certain rules of procedure with reference to consideration of requests for the exercise of these extraordinary powers. This procedure, designed to facilitate the promulgation of Executive Orders when needed and at the same time to submit all requests to the most thorough and searching legal scrutiny that circumstances would permit, has been generally followed. Requests for Executive Orders initiated by governmental departments are transmitted to the Office of the Governor in duplicate, thus permitting the Chief Executive to forward one copy immediately to the Attorney General for his advice and opinion. Department heads have been instructed to include in such requests (*a*) a statement of the results sought to be achieved by the Order; (*b*) a full statement of the facts which brought about the request for the Order; (*c*) as complete references as possible to existing laws, rules and regulations pertinent to the subject matter of the request; (*d*) a statement of reasons why existing machinery is inadequate to effect the result sought by the Order; and (*e*) suggestions by the Department head for specific limitations to prevent promulgation of Executive Orders in forms so broad that they might affect situations not intended to be covered.

Upon receipt of a copy of the request this Department immediately begins a study of the factual situation and the law. The Department endeavors to investigate facts on which requests for each Executive Order are predicated and carefully to study the relation of the proposed Executive Order to provisions of existing law. In each case effort is made to keep disruption of the normal legal machinery of the Commonwealth down to a minimum, to provide safeguards against arbitrary or capricious action when authority is delegated, and to confine the provisions of the Order to the matters intended to be dealt with.

Before an Order reaches the stage of final draft, it is subjected in this Department particularly to the test of whether it will expedite the war effort (*a*) by providing for positive action; (*b*) by removing legal impediments to action necessary to the war effort; (*c*) by co-operation with the Federal Government or the government of another state in a manner not provided for by existing law; and (*d*) by preserving the principles of local authority, home rule and state sovereignty in so far as it is possible so to do consistently with the object believed to be necessary to the success of the war effort. When doubts arise as to the legality of a proposed Order found necessary to the war effort or any part thereof, such doubts are resolved in favor of taking affirmative action necessary or expedient to the prosecution of the war. Technical legal considerations are not permitted to outweigh the paramount object of a successful war effort.

Up to and including November 30, 1942, forty Executive Orders have been prepared by this Department and issued by His Excellency the Governor. Requests for more than twice this number of orders for the extraordinary use of the executive power have been rejected after study and advice by the Attorney General.

In my judgment the machinery above outlined has been successful in enabling the Commonwealth to meet expeditiously some of the rapidly changing conditions presented by total war. I believe that Executive Orders have been confined to subjects with which they were intended to deal and that those promulgated to date constitute a body of wartime laws which have reasonably been kept from becoming a part of the organic law of the Commonwealth and which, therefore, may be readily discarded when the emergency is over. His Excellency Governor Saltonstall, as Chief Executive, has exhibited a scrupulous desire to confine the exercise of his extraordinary powers to the purpose for which they were intended. Nevertheless, the success of the machinery up to the present time should not obscure the fact that it is essentially dangerous, should be guarded against undue extension, and should be terminated at the earliest possible moment after the war.

The thought that I have in mind has been well expressed by Mr. Justice Jackson of the Supreme Court of the United States:

"Impersonal and inevitable forces bring to any war many trends which history teaches us to fear. The extent to which our institutions survive the impact of war depends on the continuity of our tradition in the minds of the people, even while we temporarily depart from it in practice." — (Address at Annual Banquet of the State Bar Association of Texas, July 3, 1942.)

Other Legal Business conducted by the Department of the Attorney General Directly relating to the War Effort.

Since the declaration of war, the Department has been continuously called upon for assistance and advice in connection with the application of the resources of the Commonwealth in aid of the national war effort in many fields other than the field of executive orders. The general policy followed has been to attempt to place the Commonwealth in a position in which it might go "all out" in the national war effort, and at the same time attempt to preserve and protect its legal rights as a sovereign state, so that these rights might be asserted once again after the war is over. The following instances illustrate the nature of this phase of the Department's work which continues without interruption.

Federal Government Leases for Various Purposes connected with the War.

These include use of land for airports, drill grounds, military railroads, military highways, the use of wharves, forest fire observation towers, existing railroad facilities, the use of armories for barracks and storage, and the use of other state buildings for manufacturing and Coast Guard bases.

Negotiations were completed whereby the Federal Government was granted rights of entry for the erection of barracks, the storage of ammunition, and for conducting anti-aircraft practice.

Applications of the Navy for the erection of structures in tidewater were heard and recommendations made in connection with the issuance of necessary permits.

Difficulties arising from the existence of public highways in the area taken for Westover Field were adjusted by negotiations.

Assistance and advice were given in connection with the abandonment of the site for radio beacons at the Army Base and the securing of a new location for such beacons. This involved a taking of land and settlement of the claim arising out of such taking.

At the request of military authorities, assistance was rendered by means of an Executive Order in the taking of land and relocation of a bridge on Weymouth Back River in order to make the naval ammunition dump at Hingham more accessible.

Study was undertaken and recommendation made for the protection of military property at Cape Cod Canal and eventually, by means of an Executive Order, a road was closed in accordance with such recommendations.

Assistance was rendered to the War Production Board in connection with the availability of abandoned metal bridges for scrap, and further investigations of law and recommendations were made regarding scrap in abandoned hulks in Boston Harbor.

Much time and study were given and many conferences were held with Coast Guard, city and state officials relative to the removal of dilapidated piers and abandoned hulks from Boston Harbor.

Co-operation was extended to various officials to prevent the deposit of débris in Boston Harbor which might create a dangerous condition, regarded by the Coast Guard as a possible fire menace.

The development of a large shipbuilding company was facilitated by assistance rendered through the Department of Public Works and clarification of the status of permits for structure in tidewater.

Conference with the Federal officials and the Department of Public Works resulted in securing to the Commonwealth air rights in that area surrounding Bedford Airport which had been taken by the Federal Government.

Numerous conferences have been held with civil aeronautics authorities regarding the law establishing approach zones at the Boston Airport. Those zones are regarded as vital to the operation of the Airport, now under the control of the Army. Litigation involving the interpretation of the statute applicable to this matter was conducted in the Superior Court where its validity was upheld and the case is now pending before the Supreme Judicial Court.

An interesting matter now pending in this Department concerns the develop-

ment of mineral resources in Massachusetts. A substantial deposit of mica was discovered in the Chester State Forest. Mica is heat-resistant and indestructible, and is used in radios and airplane spark plugs. In consequence, it is an important mineral at the present time. The Federal Government is anxious that this available supply of mica be developed as speedily as possible and this Department is co-operating fully to that end.

On several occasions, negotiations have been completed by which leases with the Federal Government have been terminated when no longer of benefit either to the Commonwealth or to the Federal Government.

Assistance has been rendered also in instances where the Federal Government has neglected to exercise its option to renew leases within times stipulated, despite which the renewal of such leases was effectuated.

Compensation to the Commonwealth for the use of the Massachusetts Maritime Academy quarters as barracks for the Coast Guard presented a somewhat difficult question, as the Commonwealth was in possession of the quarters occupied by the academy under a lease and not as owner. Means of compensation were eventually worked out and the money paid to the Commonwealth.

Thirty cases in the District Court of the United States involving seizures of land by the Federal Government for purposes connected with the war were carefully investigated and studied. Property rights of the Commonwealth were found to be involved in eleven of these cases. Settlements have been completed and payment made to the Commonwealth for damages sustained in two cases. In nine cases negotiations for settlement are in progress. One case involves a new claim by Federal authorities not advanced in previous cases, to the effect that tidelands owned by the Commonwealth are subject to the Federal Government's paramount easement for purposes of navigation. Previous to this case the Federal Government had recognized the title of the Commonwealth to land between low water mark and the harbor line, and the right to compensation for land so taken was recognized. In a case of the taking of land in Massachusetts above the low water mark from a private owner, the claim is now advanced by the Federal Government that no compensation is due to the Commonwealth for the tidelands because of the easement for navigation purposes. An answer has been filed and the title of the Commonwealth as a sovereign state to tidelands has been put in issue.

Legislative Order relative to Meal Tax Law.

On January 29, 1942, the House of Representatives passed an order adopted in concurrence by the Senate on January 31, 1942, relative to interpretations of chapter 64B of the General Laws, inserted by chapter 729 of the Acts of 1941, by the Commissioner of Corporations and Taxation.

The preamble to this order recites that unnecessary confusion and differences of opinion have arisen by reason of interpretations of chapter 64B by the Commissioner of Corporations and Taxation and by published statements purporting to be interpretations of said chapter 64B; that such confusion and differences of opinion may result in injustices and needless and costly litigation; that the nature of said tax makes refunds to the taxpayers practically impossible in the event of illegal collection thereof; and that the intent of the General Court in the passage of said legislation was to tax only each and every separate meal, the charge for which is one dollar or more, at the rate of five per cent thereon, and not to confer upon the

Commissioner of Corporations and Taxation any broader rule-making or regulatory power than is specifically granted therein; therefore be it

"*Ordered*, That the said Commissioner of Corporations and Taxation consult the Attorney General forthwith with respect to the interpretation of said chapter sixty-four B, and issue such rules and regulations as may be authorized by said chapter sixty-four B, and make interpretations thereof, only with the prior approval of the Attorney General and bearing in mind the intent of the General Court as above stated."

The Attorney General has no desire to intrude upon the administration of another department nor to engage in a public controversy with other government officials. In accordance, however, with what he believed to be the spirit and intent of the Legislature in passing the order above quoted, the Attorney General has attempted, in so far as possible, to prevent injustices referred to in the order.

Some success has been achieved in cases brought to the attention of the Attorney General — many of them by direct complaints to this Department following passage of the order. I have no means of knowing how many law-abiding citizens of small means, honestly desiring to comply with all provisions of the law, have accepted erroneous interpretations, rulings and demands for illegal payments without protest.

On February 2, 1942, I communicated with the Commissioner of Corporations and Taxation, calling the order to his attention and requesting him to furnish me forthwith with —

"(1) Copies of all rules and regulations which you have issued to date under this act.

"(2) If no formal rules or regulations have been issued by you, copies of any and all instructions relative to the enforcement of this act given to —

"(*a*) Agents and employees of your department.

"(*b*) Taxpayers.

"(3) Copies of any and all interpretations of this act made by you.

"If you have made no official interpretations of the act not included in the scope of requests (1) and (2), kindly so inform me. If you have made public statements which might be construed by taxpayers or prospective taxpayers as interpretations of the act by the Commissioner, kindly furnish me with copies thereof.

"(4) Copies of drafts of any regulations, rules, instructions or interpretations which you propose to promulgate or make in regard to this act.

"Please do not consider the above specific requests as restrictions on information desired by me. This request is intended to be one for complete information from the Commissioner of Corporations and Taxation to enable the Attorney General to effect the intent of the General Court as expressed in this Order.

"In view of the general confusion and uncertainty in the minds of the taxpayers, I consider that this matter is urgent, and would request that you give it your immediate attention. Both Assistant Attorney General Magnuson and I have been constantly available since the passage of this Order on Saturday, but at this writing have received no indication from your department that you are aware of its terms."

I received the following communication in reply:

"February 2, 1942.

"Hon. Robert T. Bushnell, Attorney General, State House, Boston.

"Dear Mr. Bushnell:

"This is to acknowledge your letter of February 2, 1942, relative to Chapter 64B of the General Laws.

"In view of the fact that such an order as you call to my attention in your letter has so far as I know never been passed by the General Court heretofore, it is respectfully requested that you advise me as to the full force and effect of this order and as to what extent if at all it is constitutionally binding upon me as Commissioner of Corporations and Taxation.

Respectfully yours,

(signed) HENRY F. LONG,
Commissioner of Corporations and Taxation."

The following reply was sent to the Commissioner:

"FEBRUARY 3, 1942.

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

"DEAR SIR: —

"Re: *Five Per Cent Meal Tax.*

"I am surprised at the nature of your reply to my request of yesterday for information in regard to the above matter. Referring to the Legislative Order specifically directing you to take certain steps to eliminate existing confusion in regard to this tax, you, in effect, request an opinion 'as to what extent if at all it is constitutionally binding' upon you. I dislike to believe that you are deliberately attempting by such a reply to avoid compliance with the Order.

"Whatever its technical, legal effect may be, this Order voted by both branches of the General Court, is a clear expression of intent by them to remedy, if possible, 'confusion and differences of opinion' which if allowed to continue may result in injustice. It contains specific directions to you relative to the issuance of rules, regulations and interpretations of General Laws (Ter. Ed.), chapter 64B.

"I am not now going to consider the question as to whether this 'Order' is technically any less legally binding upon you than a resolve or an act would be. It is perfectly clear to me that by its action the Legislature desired to make an attempt to remedy an intolerable situation with regard to the meal tax.

"I expect you to comply with the Legislative Order without further delay. As indicated in my letter of February 2, my department is, and has been since the passage of the Order, ready to do its part in such compliance. I hope that you will forward the information requested at once. It seems to me that in these times it is more important than ever for governmental departments to conduct the public business harmoniously and with complete co-operation.

Very truly yours,

ROBERT T. BUSHNELL,
Attorney General."

On February 6, 1942, I approved three interpretations submitted to me by the Commissioner and disapproved three others. The three approved interpretations were as follows:

"#1 — A 5% excise tax is to be paid on each and every separate meal for which there is charged a total of $1.00 or more. Said 5% tax is to be computed upon the total charges for each meal and not upon the aggregate charges for two or more meals.

"#2 — In determining the total charges for a meal there shall be included cover, minimum, admission and all similar charges and charges for liquor served in the course of the meal.

"#3 — The charges for a meal shall not include such items as cigarettes, cigars and tobacco, for which the purchaser of the individual meal is charged separately."

No other rulings or interpretations have been submitted to me since that date.

Following promulgation of these interpretations, complaints indicating that illegal exactions under this act were continuing were received by this Department.

Complaints of the nature referred to in a communication under date of March 21, 1942, from the Attorney General to the Commissioner have been received by this Department up to the present time. They have been less numerous in the latter part of the year than at that date, and the Commissioner has expressed complete willingness to adjust them when brought to his attention.

Obviously, a condition which tends to undermine confidence in the good faith of this government should not pass unnoticed. Large taxpayers and hotel owners, represented by counsel, are able to prevent illegal exactions. Proprietors of small businesses, many of them today without help, with their young people in the armed forces, are the victims of overzealous attempts to collect revenue for the government beyond the intent of the Legislature in writing a tax law.

The following is a summary of cases called to my attention and referred to in my letter of March 21, 1942, to the Commissioner and which, in my opinion, should be called to the attention of the members of the Legislature considering the administration of the tax laws of the Commonwealth.

"I.

"*Injustices caused by the extension of the scope of the act in the face of the clear terms of ruling #1 that the tax applies only to single meals 'for which there is charged a total of $1.00 or more . . . and not upon the aggregate charges for two or more meals.'*

"A. *Meal tickets.* Proprietors of small lunchrooms sell meal tickets for — by way of illustration — $4.75, which entitles the purchaser of the tickets to $5.00 worth of meals. Purchasers of these tickets seldom, if ever, buy single meals for which a charge of $1.00 or more is made. Without regard to this fact, your department has consistently advised these small proprietors that the five per cent meal tax must be paid on the face value of these tickets. This advice has been given and payment insisted upon by your department, both before and after the promulgation of ruling #1 on February 6 that the tax applies only to 'each and every separate meal for which there is charged a total of $1.00 or more . . . and not upon the aggregate charges for two or more meals.' Since the adoption of ruling #1 your department has attempted to justify this illegality by stating that the tickets are still taxable because the Attorney General has not yet insisted upon a specific ruling in regard to them. If the situation presented by these meal tickets were approached with an attitude of fairness to persons sought to be taxed and with a desire to carry out the intent of the Legislature, it seems clear that no ruling in addition to ruling #1 should be necessary. If you wish, however, you may submit to me a ruling on this subject. In any event, the practice of taxing the tickets when used as payment for numbers of meals, for none of which a charge of $1.00 or more is made, is illegal and improper and must be stopped.

"B. *Meals served to groups — schools, churches, lodges, et cetera — for which each individual is charged less than $1.00, but for which payment is made in a lump sum.* Your department, apparently, has consistently informed both the caterers and the groups affected, even after the promulgation of ruling #1, that a five per cent tax is to be collected on the aggregate charge for these meals.

"Here, again, it seems to me that no other ruling than #1, specifically providing that the tax applies only to —

'*each and every separate meal for which there is charged a total of $1.00 or more . . . and not upon the aggregate charges for two or more meals,*'

would be required for the guidance of any tax official approaching the situation in a spirit of fairness and with a desire to carry out the plain intent of the Legislature. However, if you believe a ruling on the specific point is necessary to enforce compliance with the provisions of the act, I shall be glad to consider for approval

any ruling you may care to submit. Here, again, the important thing is to stop the practice complained of — and to stop it at once.

"C. *Meals served by boarding or lodging houses, charged for at weekly or other periodic rates, representing charges of much less than $1.00 for each meal.* The administration of the meal tax law in this respect has been viciously unjust, unless the reports referred to the Attorney General's office are entirely without foundation. Instances have been brought to my attention in which your department has insisted that a tax is due when the total amount charged for room and board for an entire week has been $6, $7, $9.50 or $10.

"Repeating the language of ruling #1 that the tax applies to —

'each and every separate meal for which there is charged a total of $1.00 or more . . . and not upon the aggregate charges for two or more meals' —

it seems too clear for argument that in such cases the imposition of the tax cannot be justified.

"Ruling #1 was promulgated on February 6, 1942. The following statement is made in a letter to me under date of March 2, 1942:

'The Springfield office of the State Tax Department advises me that if the money charged for food is collected weekly, as has been the custom prior to this year, it is taxable. This does not seem fair or reasonable to me inasmuch as no meal costs a dollar.

'In my case breakfast is thirty-five cents, dinner seventy-five cents but when taken by the week is figured seven dollars, or one dollar per day. This is certainly not in the luxury class. Yet because, to simplify bookkeeping, we collect by the week, these people must pay this tax. . . .

'Do you believe that the people who made and passed this law intended to impose this tax on boarding houses simply because meals are paid for by the week?'

"With this letter, the writer forwarded to me a copy of an answer from your department to a letter from her in which she asked you the same questions. Here is a substantial portion of that reply:

'The Income Tax Office in Springfield has advised you correctly as to what our interpretation has been under the law as it was passed. I note you say that you can collect for each meal and this is probably true.'

It seems to me that frankness and honesty require that this person should have been informed of ruling #1 and that under it the tax did not apply to her. The reply of your department was evasive and deceptive. It allowed her to continue in the mistaken belief that the tax applied, but avoided making this misrepresentation outright.

"Again, I quote from a typical letter received after ruling #1 went into effect:

'I telephoned Mr. Long's office this morning to find out if our boarders had to pay a meal tax. I explained to a Mr. . . . that we charged nine dollars & fifty cents for board and room. Seven dollars being for their meals for a week. Mr. . . . informed me that as the law now stands, they must pay. . . .

'It seems to me there is something wrong about this tax. We do not serve separate meals and never charge one dollar for a single meal, which is what I thought that tax would apply to.'

"The above quotations are but typical examples of many received by me from small boarding-house keepers. Many of the writers are widows, without other means of support. Many of them, I judge from the tenor of the letters, have paid the tax under threats by your department. In many instances, the tax is passed along to lodgers of equally small means.

"I am aware, of course, that the Legislature bestowed upon you broad powers —

'to prescribe the method of determining the portion of the entire charge which is applicable to meals in the event that such entire charge is in part for meals and in part for lodging or any other item of service.'

Under fundamental principles of law, however, no powers are given you under this statute to make findings which are unreasonable, capricious or outrageous. Any finding that $1 or more is charged for single meals when the total charges for board and room for a week amount to no more than $6, $7, $9 or $10 is untenable on its face.

"Proper administration requires apportionment of the gross weekly charge as between the charge for room and that for meals. Once this apportionment is made, it must be determined whether the amount apportioned for food is large enough to justify a conclusion that a charge of $1 or more is being made for any one meal. Even then, it should be obvious that the tax would not be payable on the entire food charge, but only on that portion covering single meals for which a charge of $1 or more is made.

"Here, again, formal rulings, in addition to ruling #1, should not be necessary if the administration of the act is approached with these obviously correct principles in mind and with a desire to carry out the intent of the Legislature.

"In any event, the illegal practices of your department with respect to lodging-houses and boarding houses, pointed out herein, should be terminated forthwith.

"II.

"*Unauthorized extensions of the statutory requirement of registration so as to include persons never intended by the Legislature to be registered.*

"Section 3 of chapter 64B, which we are now considering, requires that —

'*Every taxpayer shall register with the commissioner and pay to him the sum of one dollar, upon receipt of which the commissioner shall issue a numbered identification certificate . . .*'

"Section 1 of the act defines 'taxpayer' as '*any person making a taxable charge,*' i.e., a charge of $1 or more for a meal.

"Apparently, it has been your practice to compel all persons selling food to register, irrespective of whether they have ever made a charge of $1 for a single meal or not, whether they were likely to make such a charge in the future, or even whether the business conducted by them was of such a nature as to make it impossible for them to charge a total of $1 or more for a single meal. This practice is clearly shown by correspondence between you, members of your department and persons making inquiry.

"For example, a widow acting as a housemother at a dormitory for students of a business school in one of our cities stated her case to be that she was —

'feeding eleven boys, who pay $6.00 a week for breakfast, a lunch which they carry to school and dinner at night. If they are away over a week end they take out for meals away. Does this come under the law to pay 5% tax on what they pay me? I have a state license as I was told I had to have one, although I do not deal with the public, only as I feed these eleven boys who live here at the dormitory.'

"It is perfectly clear on the facts stated that this lady was neither subject to the tax nor obliged to register or to file a return, yet she received a form letter from you which, in substance, threatened her with a penalty of $5 per day for each day of delay in filing her return. Your letter closed with the sentence:

'A return and payment as required by General Laws, chapter 64B, is hereby demanded of you.'

"As far as I can ascertain, you apparently claim that all persons serving meals, or, indeed, dealing in any substance that can be eaten, must register under this act and pay the registration fee. You or your agents have insisted upon and

brought about the registration of hundreds of small fish and chip shops, drug stores, ice cream parlors, variety stores, hot dog stands, and even pool rooms — and other small businesses that never have served and never contemplated the serving of meals for which a charge of $1 or more is made. You are reported to have stated, in substance, that you intend to require the registration of as many people as possible, whether they are covered by the act or not, as you feel that such a policy may be advantageous for some future purposes not yet disclosed by you. If this actually is your policy, it is improper.

"An examination of the correspondence of your department with bewildered persons seeking advice and information discloses an apparent disregard of the fact that your department is administering an act of the Legislature and that you have no right to extend the statutory requirements to conform to ideas of your own as to what the Legislature should have required. A few examples will make my meaning clear:

"An inquiry was made as to whether a school cafeteria should be registered under the terms of the act. It was stated that the only meals served therein, which are lunches, average about 15¢ and never go over 25¢. 'We try to keep the cost of the students' lunches down to a minimum, and if we were required to provide these numerous checks for nickels and dimes, the cost would not be inconsiderable.' Obviously, this cafeteria is not subject to registration under any reasonable interpretation of the act. However, your department advised the writer of that letter that registration is required, told him that he need give no further concern to the use of the checks, and made the astounding statement:

'*The license is really so that we may have a record of all these places against the day when there may be a change in circumstances which might bring in other groups.*' (Italics mine.)

"Again, a small druggist wrote:

'The only food that we sell is an occasional hot chocolate and small five-cent packages of crackers. Do I have to file an application and keep sales records? If so, can I escape this by discontinuing either the hot chocolate or crackers or both?'

Your reply to this citizen was, in substance:

'You nevertheless are required to be licensed.'

"Again, you wrote to a citizen who operates a bakery, implying that he must register under the act on the ground that —

'All persons who serve meals, regardless of cost and regardless of whether they are merely sandwiches or full-course dinners, must be licensed.'

"Another operator of a small concession wrote that she sells such things as 'cigarettes, tonic, candy, milk and ready-made sandwiches to sell for ten and fifteen cents. That is the extent of the amount of food that I sell. I do not serve meals of any type.' She, therefore, would 'like to know whether I am subject to the above-mentioned law.'

"In response to this inquiry and despite the clear terms of the act of the Legislature, the Commissioner of Corporations replied to this inquiry:

'It will be necessary for you to file the enclosed application blank and forward it to us with the $1 filing fee,' *et cetera*.

"A similar reply was given by you to another person, who wrote:

'I do not sell regular meals. All I sell does not go over the price of 10¢. I sell tonic 5¢, sandwiches 10¢, hot dogs 6¢, candy 1¢ and 5¢. So this puts me in doubt as to whether I should fill out the application that was sent me. Will you please let me know whether I should fill it out or not.'

"The same advice and insistence upon registration was given to a dealer who stated:

'We do not serve meals. The only thing that we sell are pickled eggs or pickled pig's feet to a customer now and then.'

"Another wrote:

'I have a drug store, but sell no meals and never have and never intend to. I sell only milk shakes and ice cream. Do I have to register under the act? I sell no sandwiches, not even crackers with the milk shakes.'

"Your department replied promptly:

'Milk shakes and ice cream are food. Therefore it is necessary that you apply.'

"As you frequently point out in your correspondence, the registration fee is small and the payment of $1 is not 'very distressing' even for small business men and women. Their troubles, however, have just begun with the illegal requirement of registration. Once such persons have registered, they are apparently compelled by you to file returns, reporting the aggregate number of meals served by them and the total of such meals, regardless of the taxability of the meals. You display complete indifference to the hardships thereby created and to the fact that the energies of our citizens should be diverted as little as possible in these times to unnecessary, unproductive, red-tape demands by governmental bureaus.

"Again, I quote from typical letters from the people themselves as the best illustration of what I seek to prevent. These people never should have been compelled to register in the first place.

'My establishment is a sandwich and light lunch shop where the meals very rarely are over 50¢ and average between 25¢ and 35¢.'

'Since the first of this year I have been making out slips for each sale and find that this is only an added expense in order to send in a form at the end of each month.'

'As my business is very small this added expense is felt and as far as I can see accomplishes nothing.'

"In a similar vein is the following:

'Ours is a soda, candy and luncheonette business. We never serve any meal charging anywhere near a dollar, yet our checks last month ran over several thousand . . .'

'It doesn't seem as though it should be necessary for an operator to have to go through several thousand checks each month and report how many meals he served when it has no bearing on the tax itself. My average meals are 30¢ to 40¢.'

'*These days when it is so hard to get help and the small operator has to do so much of the work himself, it is really difficult to keep up the book work and small details.* . . . It should be fairly easy to catch up with those trying to avoid paying the tax without requiring every owner to spend hours and hours checking something which doesn't help the tax situation.'

"The foregoing quotations illustrate the absurdity and injustice of the manner in which the provisions for registration have been interpreted by you and your department.

"I suggest that all persons who have been illegally compelled by your department to register should at least be relieved immediately of the burden placed upon them of additional and unnecessary bookkeeping. This can be accomplished by your sending notices to them at once that they are not required further to fill out the returns sent by you, except in so far as they may serve individual meals for which a charge of $1 or more is made. I request that this action be taken at once and that you notify me when you have done so.

"I note in the correspondence references apparently intending to carry a thinly veiled charge that any person who complains of what he believes to be illegal action or interpretation of the act by your department must be opposed to the policy of old-age assistance. So far as I can ascertain, there is absolutely no basis for such a charge. On the contrary, a person who is sincerely in favor of such a humanitarian program would be most anxious to oppose illegal practices with respect to its administration, lest public indignation against the illegal administrative practices should in time produce a wave of opposition to the program itself.

"The great mass of citizens in this Commonwealth is in favor of old-age assistance, and the Commonwealth is definitely committed to such a program. It is solely within the province of the Legislature to prescribe how the necessary fund shall be raised. If the present statutes, as enacted by the General Court, do not provide adequate funds, that situation will have to be dealt with by the Legislature. It is not within the province of the Tax Collector to supplement the authorized revenues with illegal exactions imposed by him.

"I hope that upon reflection you will realize the unreasonableness and the injustice of the course which has been pursued by your department in the administration of this statute, and that you will take effective action at once to correct the excesses and unwarranted interpretations to which I have directed your attention.

"I request that you inform me without delay as to what steps you have taken in accordance herewith."

The above summary was made in the communication to the Commissioner of Corporations and Taxation by the Attorney General on March 21, 1942. The Commissioner replied on March 23, 1942, that ". . . Most of the matters to which you call attention have long since been brought into conformity with your thought. There are some other suggestions you make which it seems to me can be put into effect and to the extent possible, please be advised they will be."

Complaints received by this Department subsequent to the above letter from the Commissioner and as late as December 26, 1942, indicate that the situation has not been wholly corrected, and that the intent of the Legislature, as expressed in the legislative order of January, 1942, has not been fully complied with. In my opinion, further study of this subject by the Legislature is desirable.

Payments of Bank Deposits into Commonwealth Treasury and to Rightful Owners.

At its last regular session in 1941, the General Court appropriated fifteen thousand dollars to cover expenses for proceedings which I considered it advisable to undertake relative to bank deposits which had remained unclaimed and unused for periods of twenty and thirty years.

These proceedings were brought under provisions of the General Laws, chapter 168, sections 41 and 42. So far as I am able to ascertain, this was the first occasion on which the Commonwealth had availed itself of the provisions of law under both sections on a state-wide scale.

To date, a total of $276,594.32 has been paid into the treasury of the Commonwealth as a result of this activity and $38,858.48 to persons giving satisfactory proof of rightful ownership. A total of $315,452.80 has thus been removed from unused accounts and turned over to the Commonwealth and rightful owners.

The total expenditures from the foregoing appropriation up to and including November 30, 1942, were $8,967.33. Of this expenditure, $5,654.74 was spent for required advertising of the accounts.

Petitions in seven counties on the thirty-year accounts are still pending and are expected to be disposed of shortly.

In addition to the amount of money thus made available, the activity disclosed the existence of a well-organized scheme to defraud the Commonwealth and rightful owners of these funds, resulting in prosecutions by this Department.

Missing Heir Frauds.

One hundred and eight indictments have been returned in the various counties involving eleven persons, seven of whom are attorneys at law in the Commonwealth.

In the investigation of bank accounts standing in the names of probate judges for the benefit of persons whose whereabouts were unknown, in connection with proceedings described in the preceding section of this report, it was disclosed that approximately $100,000 had been obtained through the probate courts over a period of years by individuals pretending to represent legal heirs. In many cases the heirs were reported to be residing in foreign countries. In cases where legal heirs did exist, participants in the fraudulent scheme obtained the funds by use of names of the heirs and made no accounting after obtaining the money from the courts.

The scheme involved the forgery of petitions and affidavits, the obtaining of the signatures of judges of probate to decrees by misrepresentation, and the mutilation of probate court records. In one case, the seal of a notary in Canada was manufactured, and used in conjunction with the forgery of his name.

One defendant has already been disbarred and is serving a sentence in the House of Correction in Worcester. Other cases are still before the courts and, with the exception of one defendant who is now in the armed forces, will be disposed of shortly after trials and pleas of guilty.

Litigation in Texas Courts.

Commonwealth v. *Davis.*
Davis v. *Commonwealth.*

Immediately upon my assuming office in January, 1941, His Excellency Governor Saltonstall called my attention to the fact that the Commonwealth was a judgment debtor to one Edgar B. Davis in the amount of $825,095.84, as a result of proceedings in a district court of the State of Texas. Investigation disclosed the following circumstances:

In *1926*, Davis, a resident of Brockton, well known and well liked in that community for his philanthropies, received a large sum of money as a result of oil production from certain properties in Texas. The Commissioner of Corporations and Taxation held that the sums thus received were subject as income to a tax at 6% by the Commonwealth of Massachusetts. Davis disputed this claim and, at the end of the year, purported to change his domicile to the State of Texas.

In *1928*, suit was brought by the Commonwealth to recover this tax. A special counsel was engaged by the Commonwealth to try the case in the Superior Court at Boston. The principal issue at the trial was whether or not Davis had actually, in good faith, effected a change of domicile from Massachusetts to Texas in 1926. The jury decided adversely to Davis.

In *1933*, the Supreme Judicial Court overruled exceptions taken by Davis to

rulings of the Superior Court (see *Commonwealth* v. *Davis*, 284 Mass. 41). Judgment with interest amounted to $534,917.48, plus $91.05 costs. Davis did not pay the judgment.

In *1937* (June), the Commonwealth proceeded to bring suit against Davis on the Massachusetts judgment in a district court of Texas, at the same time suing out a writ of garnishment against the United North and South Development Company, about eighty per cent of the stock of which was owned by Davis.

As a creditor resorting to a writ of garnishment, the Commonwealth under Texas law filed a bond running to Davis in the amount of $1,400,000, conditioned that the Commonwealth would pay all damages for "wrongful garnishment." The bond was executed on behalf of the Commonwealth by the then Governor of the Commonwealth, with the approval of the Council, which act was later ratified by the General Court. The cost to the Commonwealth of this garnishment bond was $14,000 annually.

Davis filed a cross action against the Commonwealth, which had thus submitted itself to the jurisdiction of the Texas courts, for "wrongful garnishment."

In *1939* (October), the two cases were tried before a judge and jury in the county in which Davis then resided. Massachusetts was represented at the trial by one Kenneth B. Tiffin of Boston, and one William Russell, then a member of the San Antonio bar, who died shortly after the trial.

The trial judge directed a verdict for the Commonwealth on the Massachusetts tax judgment, ruled that the garnishment was unlawful, and that it was a question for the jury to determine how much Davis had been damaged by the unlawful garnishment. The jury awarded Davis damages in the amount of $1,550,000. Under Texas practice, the amount of the directed verdict for Massachusetts, $724,904.16, was deducted from the $1,550,000 verdict in favor of Davis in the cross action. The net result was that the Massachusetts tax judgment was wiped out, and Davis was established as a judgment creditor of the Commonwealth in the amount of $825,095.84.

An appeal was duly entered on behalf of the Commonwealth. In order to prevent Davis from levying execution against the sureties, pending the appeal, a supersedeas bond in the sum of $1,700,000 was filed in March, 1940. The premiums on the supersedeas bond cost the Commonwealth $11,551.34 annually. Meanwhile the garnishment bond continued in effect, making a total annual cost to the Commonwealth of premiums alone from March, 1940, of $25,551.34.

Upon taking over this litigation on behalf of the Commonwealth in 1941, I found that Mr. Charles W. Trueheart, of the San Antonio bar, had succeeded to the practice of the late William Russell and was acting as Texas counsel for the Commonwealth. I found him to be a reputable and capable lawyer who had done everything possible, under difficult circumstances, to protect the interests of the Commonwealth. I continued him as Texas counsel. I discharged Mr. Tiffin from any further connection with the case.

The case was set down for argument before the Texas Court of Civil Appeals at Austin, Texas, June 4, 1941, and was argued for the Commonwealth personally by me in association with Mr. Trueheart. This court set aside an item of $1,000,000 awarded as damages to Davis in the lower court, but otherwise affirmed the judgment of the trial court. This resulted in a net judgment in favor of the Commonwealth in the sum of $174,904.16.

While in Texas on this occasion, I attempted by conferences with counsel for Davis to effect a settlement of the case and thus bring the litigation to an end. These efforts met with no success — apparently because of Davis' belief that he had been unjustly treated by the Commonwealth over a period of years.

After the decision of the Court of Civil Appeals at Austin, each party applied for a writ of error to the Supreme Court of Texas, and both applications were granted. The case was specially assigned for hearing before the Supreme Court of Texas on October 14, 1942.

I again argued the case personally for the Commonwealth, in association with Mr. Trueheart. On December 16, 1942, the Supreme Court of Texas handed down a decision affirming the judgments of the district court and the Court of Civil Appeals in favor of the Commonwealth against Davis on its tax judgment, reversing all judgments of the trial court and the Court of Civil Appeals in favor of Davis on his cross action, and rendering judgment denying any recovery thereon.

Under the terms of this decision, the Commonwealth is fully restored to its position as a judgment creditor, and claims by Davis for damages on the cross action are wiped out. The expeditious manner with which the Supreme Court of Texas dispatches its business indicates that motions for rehearing filed by Davis will be acted upon within a short space of time.

The cost to the Commonwealth of the $25,000 payments on bond premiums will terminate when the Supreme Court of Texas has disposed of the case.

This case involved more than money; it involved the good faith of the Commonwealth. The judgment against Massachusetts was, in effect, based on the proposition that the Commonwealth had committed a wrongful or tortious act against Davis for which it was responsible in damages to him.

Regardless of whether or not action in suing out the garnishment or in entering the state courts of Texas was wise, I did not believe that any of the officials of the Commonwealth responsible for these actions intended to commit a wrong or that they acted in any manner by which bad faith should be imputed to the Commonwealth of Massachusetts. I felt that it was incumbent upon me as Attorney General to maintain this proposition, in which I sincerely believed, until every possible effort had been made to erase a finding to the contrary.

The decision of the Supreme Court of Texas fully clears the Commonwealth of such imputations, and regardless of what further action the judgment debtor may seek to take, I am not apprehensive that the allegation of bad faith or commission of a wrongful act on the part of the Commonwealth will again be successfully asserted.

It is sometimes asserted that sectional differences are still existent in this country. Representing the people of this Commonwealth, I twice appeared before appellate courts directly elected by the people of Texas. I wish it to be recorded that no litigant could have received fairer hearings before a more capable and intelligent judiciary than have been accorded the Commonwealth of Massachusetts by the courts of the State of Texas. Moreover, no counsel could have been treated with greater courtesy and consideration than was the Attorney General for the Commonwealth of Massachusetts on both appearances before Texas courts.

Bankruptcy Reorganization of New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company.

The petition for reorganization of the New Haven Railroad was filed in the United States District Court for the District of Connecticut, October 23, 1935. The petition for reorganization of the Old Colony Railroad was filed in the same court in June, 1936. In the following years several plans of reorganization were filed and extended hearings were held. In March, 1940, the Interstate Commerce Commission by its Division 4 approved a plan of reorganization, excluding the Old Colony from the New Haven plan. In August, 1940, an Interstate Commerce Commission examiner recommended abandonment of service on the Boston group lines of the Old Colony. These are the lines through Braintree to Middleborough, Plymouth and Greenbush. Representatives of the public opposed these steps and further hearings were held.

On February 18, 1941, the Interstate Commerce Commission denied the petition to abandon the Boston group and reported favorably a plan for reorganization of the New Haven and Old Colony railroads together, with provisions under which, if the New Haven in certain measuring years should sustain out-of-pocket losses in its operation of the Old Colony lines, passenger service on the Boston group might be abandoned.

This plan allowed freight gains to offset passenger losses and made allowance for all aspects of gain as well as loss to the New Haven in its operation of the Old Colony. The plan was objected to by the security holders but was not opposed by the public representatives. It appeared to give an opportunity for assuring a continuance of the Boston group passenger operation in the hands of a private carrier.

On June 3, 1941, hearings were held on this plan in the United States District Court. In the course of the hearing the District Judge, acting informally, appointed what he characterized as an informal committee to consider and, if possible, state, a compromise proposal. This committee consisted of Edwin S. S. Sunderland, J. Burke Sullivan, Charles A. Coolidge and Harry W. Dorigan. Mr. Sunderland was counsel for the Insurance Group, holding New Haven securities. Mr. Coolidge was counsel for the Old Colony. Mr. Dorigan was a member of the Trustees' staff. Mr. Sullivan had been an Assistant Attorney General in charge of the case for the Commonwealth during the administration of my predecessor. He was reappointed by me when I took office on January 15, 1941, and reassigned to continue in general charge of the New Haven Reorganization matter. The court made it clear that the members of the committee thus appointed were to act in their individual capacities only, without power to bind their principals.

On December 8, 1941, the court disapproved the Interstate Commerce Commission plan of February 8, 1941, and appended to its opinion a report of the Compromise Committee, commending it for consideration.

Hearings relative to a new plan were held before the Interstate Commerce Commission from February 17 to February 20, 1942.

On April 4, 1942, the Compromise Committee, joined by the New Haven Plan Committee, the Insurance Group, the Mutual Savings Bank Group and the Old Colony Plan Committee, filed with the Commission the so-called Joint Report, which in effect placed in the record as a formal proposal the Compromise Com-

mittee's Plan of Reorganization, supplemented by a statement of the price to be paid by the New Haven for the Old Colony properties.

On April 18, 1942, attorneys for both debtors, for numerous creditor groups, and for several creditors, filed a Joint Brief in support of this plan.

Meanwhile, upon full, complete analysis of the plan and consideration of its effect in operation, I came to the conclusion that unless modified in substantial respects the plan was contrary to the best interests of the Commonwealth, and should be opposed in its then form.

I appointed Arthur E. Whittemore, Esquire, of Hingham, as a Special Assistant Attorney General to assist me in the case. Mr. Whittemore had been associated with the case as counsel to the Commuters' League of the South Shore.

On April 20, 1942, and May 15, 1942, I filed briefs on behalf of the Commonwealth opposing the plan on the grounds that it gave no substantial assurance of the continuance of passenger service, no matter what further economies and sacrifices might be made, and, by giving the lines to the New Haven at scrap value for profitable freight use, with the possibility that it would be able to escape from all passenger obligations on the Boston group lines, the plan unjustifiably enriched the New Haven at public expense. Objection was also made that the plan, by using passenger losses for purposes of the escape clause only, permitted abandonment of passenger service notwithstanding profitable operation of the Old Colony lines as a whole. The briefs also developed the view that a feasible alternative existed and recorded particular objection to the provision of the plan which would have attempted to foreclose legal questions by requiring a stipulation from the Attorney General. An opportunity for oral argument was requested.

On October 6, 1942, the Interstate Commerce Commission, having considered the matter on briefs and without an oral hearing, issued its third Supplemental Report and Order, recommending this Compromise Committee or Joint Report Plan.

The apparent assumption of the Compromise Committee Report had been that the Plan provided a means whereby passenger service might be saved. The District Judge, in his comment on the Plan in his opinion of December 8, 1942, indicated his appreciation of the position of the Massachusetts authorities and recognition of their desire to continue co-operation "in order to find a solution which should meet the reasonable requirements of the Massachusetts public and yet comport with the rights of property under the American system." The Interstate Commerce Commission, in its report of October 6, 1942, appears to assume that the Plan will give the Commonwealth an opportunity to preserve the passenger service. The report, at page 22, reads: "Paragraph (*c*) of section 4 is intended to give the Commonwealth of Massachusetts an opportunity to insure the continuation of passenger service upon fully protecting the reorganized principal debtor against unlimited passenger losses."

I have been and am in favor of a Plan which gives the Commonwealth this opportunity on a reasonable basis. There has been every disposition on my part to proceed in a spirit of give and take to develop such a Plan. I stated on February 19, 1942, at the Interstate Commerce Commission hearing, "that the parties that seem to represent divergent interests here should adopt an attitude of compromise, a realization that somebody has got to give way here in some manner, otherwise this thing will be kept in litigation for twenty years and there will be nothing left

at all at the end, and the Commonwealth of Massachusetts stands very willing in all of its departments to proceed on that basis." That statement still holds true. But I am convinced that the Plan does not do what it has been assumed to do and must do if it is to be fair to the people of this Commonwealth. It does not give an opportunity to insure the continuation of passenger service. On the contrary, it tends to insure that the passenger service will not continue. The Plan itself does not disclose this. It becomes apparent, however, on an examination of the entire Old Colony–New Haven reorganization picture and in particular of the projects and proposals for reduction of passenger losses.

Close scrutiny of the Compromise Plan as a part of the whole picture of the Old Colony–New Haven Railroad Reorganization convinced me that the condition of avoiding the loss of passenger service under the Compromise Plan is in great probability an impossible one to meet and consequently that the Plan fundamentally is not what it purports to be. Therefore, in accordance with my conviction that compromise can and should be had, I have made very effort to obtain modification of the Plan.

The Compromise Plan proposes to wipe out charter obligations to render passenger service on the Boston group and to substitute a contract obligation to carry passengers on condition *inter alia* that if after two years the losses (measured on a so-called segregation formula) in any two-year period in passenger operation alone, regardless of freight earnings, are at the rate of more than $250,000 per year, passenger service may be abandoned on the Boston group. The reasons why this critical figure in all probability can never be attained are stated in detail in the Attorney General's briefs hereinbefore referred to. The Plan gives control of all the Old Colony Lines to the New Haven and at its option the ownership also. Upon abandonment, the Commonwealth will have to consider taking over the operation of the lines, but the Plan does not provide the figure at which the Commonwealth might acquire them. In this aspect the unattainability of the critical figure not only tends against the continuance of service, but also tends to place the Commonwealth in an unfair position with respect to providing substitute service.

After the receipt of the order of the Interstate Commerce Commission of October 6, 1942, as already noted, rendered without oral hearing, Special Assistant Attorney General Whittemore went to Washington to ascertain whether or not opportunity would be given to file a petition to modify the reported plan as in the case of an original plan reported by the Commission. Having ascertained that such opportunity would be given, the Attorney General, on December 3, 1942, with the special Railroad Commission, filed a petition to modify the Plan, together with a supporting brief. At the same time an opportunity for oral argument on behalf of the Commonwealth was again requested.

At the time of writing this report there has been no indication whether there will be an oral hearing before the Commission.

The next step, after final consideration by the Commission, will be before the United States District Court for the District of Connecticut. If the Plan is not modified, as I believe justice to the Commonwealth requires, I shall continue to oppose it through the courts.

I cannot but believe that at some stage the objections of the Commonwealth to this Plan will be found to require that substantial modifications be made therein.

If this does not occur, however, I believe it will be necessary for the Commonwealth to consider whether it should not acquire the lines, at least as far as Braintree, before, by virtue of the reorganization Plan, the New Haven shall have finally acquired the ownership or control thereof. Apparently under that plan the New Haven is to pay only scrap value for this ownership or control. If the Commonwealth is to be forced to take these lines it should not let pass the opportunity to get them when they are for sale at this price.

A paragraph in the Commissioner's Order of October 6, 1942, reads as follows:

"*It is further ordered*, That should the judge determine, after due notice and hearing, that the provisions of this plan in respect of the reorganization of the Old Colony are, because of opposition of other than New Haven parties or interests, such as to delay unreasonably and unnecessarily the reorganization of the principal debtor, he may, in his discretion set such provisions aside and consider and act upon the plan for reorganization of the principal debtor and the secondary debtors other than the Old Colony."

In 1939 and 1940 it appeared to be greatly against public interest that separate reorganization should occur. The expectation that joint reorganization meant a chance to save the passenger service as a private operation was borne out by the action of the Commission in February, 1941, in proposing a joint plan which gave that chance. But the Plan, in its present form, while it provides for joint reorganization, appears to carry with it substantial elimination of the chance to save the passenger service. Therefore, if this Plan persists without modification the Commonwealth must consider whether it would not be better off if the Old Colony were excluded from the New Haven reorganization. I believe that this dilemma ought not to be forced upon the Commonwealth. Modification of the Plan would appear to make it reasonably avoidable. If, however, it is finally presented, it should be met and dealt with.

Boston Elevated Railway Litigation.

By chapter 89 of the Resolves of 1941, approved on October 27, 1941, provision was made for the bringing of proceedings seeking judicial determination of the powers and duties of the Trustees of the Boston Elevated Railway Company with respect to certain charges included in the "cost of the service" as defined in the Public Control Act, Spec. St. 1918, c. 159, as amended and extended by St. 1931, c. 333.

Questions were raised by a report of the special counsel employed in an investigation of the Boston Elevated Railway under the auspices of the Mayor of Boston and the Boston Finance Commission, dated March 12, 1941. This report was made to His Excellency the Governor on April 9, 1941, and was referred by him to the Attorney General for advice.

The report, proceeding on the assumption that the contentions of counsel made therein were established principles of law, recommended that a suit for an accounting be brought by the Attorney General covering the entire period during which the Boston Elevated Railway has been operated under the Public Control Act.

The views of the Attorney General on this subject appear in House Document 2627. In substance they are that the Boston Finance Commission Report raises substantial questions of law which should be judicially decided, but that every effort should be made to secure such judicial determination, if possible, by shorter means

than an accounting suit of enormous cost and unpredictable length. Attention was called to the fact that the *ex parte* investigation by the Boston Finance Commission, upon which the report was based, had consumed 19 months at a cost to the City of $56,185 for legal counsel, accountants, engineers, etc., and that obviously this would be but a fraction of the time and expense necessarily involved in the suit for an accounting as recommended by the report.

On November 12, 1941, Assistant Attorney General Joseph K. Collins of Boston was assigned by me to devote his full time to the preparation, conduct and direction of the litigation brought pursuant to the resolve. From time to time other assistants and law clerks have been assigned to aid him in this work.

On January 26, 1942, an information in equity was filed in the Supreme Judicial Court, which court declined jurisdiction and referred the case to the Superior Court. This information sought to obtain a declaratory decree interpreting the Public Control Act by defining the powers and duties of the Trustees with respect to depreciation and obsolescence allowances, the expansion of the Company's plants by use of moneys retained by said allowances and with respect to charges included in the cost of the service as maintenance expense.

An answer was filed by the Public Trustees on March 21, 1942, setting up a defense, in substance that the charges included in the cost of the service by the Trustees were properly included therein, that the amounts charged for depreciation, obsolescence and losses were amounts which the Trustees, in the exercise of discretionary powers granted to them by the statute, had been determined to be necessary or advisable with respect to charges against the Reserve for Depreciation. It is asserted that such charges in no way increase the cost of the service and it is denied that the Company's plant has been expanded by overcharges included in the cost of the service.

The Boston Elevated Railway Company filed a demurrer to the information.

Inasmuch as the City of Boston bears the greatest burden on the reassessment of deficiency payments made by the Commonwealth, I invited the Corporation Counsel for the City of Boston to collaborate in the litigation. Assistant Corporation Counsel James W. Kelleher, who had participated in the investigation and signed the report to the Boston Finance Commission and the Mayor of Boston, was assigned to the case by the Corporation Counsel.

The demurrer filed by the Boston Elevated Railway raised certain questions that made it advisable to file an amended information. To the amended information the Trustees filed an answer and the Company again demurred, the pleadings being completed on June 23, 1942. The case was heard on oral argument by a Justice of the Superior Court November 18 to 23, 1942, and supporting briefs were filed.

On February 2, 1942, suit was brought by *George E. Richards et als.* v. *Hurley, Treasurer and Receiver General, et als.*, Suffolk Superior Equity No. 54373. This is a suit under the so-called taxpayers' statute, G. L. (Ter. Ed.), c. 29, § 63, and St. 1937, c. 157, against the Treasurer and Receiver General, the Commonwealth, the Trustees and the Elevated Railway Company. This suit sought to restrain the payment of alleged deficiencies certified by the Elevated Trustees for the twelve months ending March 31, 1941, and for the nine months ending December 31, 1941. In many respects the suit attempted to cover the same ground as the information in equity and has delayed and complicated these proceedings to some

extent. Demurrers and pleas in this suit were argued at the same time as those to the information in equity brought by the Attorney General. In view of the fact that the case is still in litigation and the issues raised by the pleadings are still under consideration by the Justice before whom arguments were made, further comment on the case at this stage would be inappropriate.

As indicated in the communication reproduced in House Document 2627, page 17, in order to avoid duplication of expense, I proposed to use as much of the evidence and information acquired by the investigators for the Finance Commission as possible. This policy has been followed. For accounting services Messrs. F. E. Welch and J. Frank Waring and for engineering services Henry S. Day have thus far principally been relied upon in the preparation of the case. All of these gentlemen were employed by the F. E. Welch Company in the Boston Finance Commission investigation upon which the report was made.

By chapter 89 of the Resolves of 1941, $75,000 was appropriated to the Department of Public Utilities to meet the costs of this litigation under the direction of the Attorney General. For the period covered by this report, expenditures of $16,802.34, approved by the Attorney General, have been made.

Miscellaneous Legal Services of the Department in the Field of Civil Law.

By G. L. (Ter. Ed.) c. 12, § 3, the Attorney General is required "to appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question. . . . All legal services required by such departments, officers, commissions . . . in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction."

During the past year the Attorney General has rendered 81 formal written opinions upon questions of law to departmental heads and other officers of the Commonwealth in response to their requests and in connection with duties required of them.

The Attorney General has been called upon to defend various officers of the judicial, executive and administrative services of the Commonwealth against petitions for extraordinary writs in 29 cases in the Supreme Judicial or Superior Court and against three bills in equity brought with like purpose. These included two petitions for writs of prohibition; 15 petitions for writs of mandamus; and 12 petitions for writs of certiorari.

The Department has appeared in 17 cases which have been brought by the petitioners upon appeals or exceptions before the Full Bench of the Supreme Judicial Court. These include five cases concerning tax matters coming direct to the court from the Tax Appeal Board by report or from the Probate Court. Four cases have not yet been decided; three were adversely determined; and opinions favorable to the Commonwealth were rendered in ten.

The Department has examined and approved 407 contracts divided among the following administrative departments or institutions:

Department of Public Works	74
Metropolitan District Commission	30
Commission on Administration and Finance	288

Massachusetts State College	2
Department of Correction	4
Department of Mental Health	8
Department of Public Health	1
Total	407

The Department has examined and approved 275 deeds and releases for the following departments:

Department of Public Works	270
Department of Correction	2
Department of Mental Health	1
Metropolitan District Commission	1
Adjutant General	1
Total	275

The Department has examined and approved 104 leases for the following departments:

Superintendent of Buildings	27
Department of Public Works	[1] 11
Department of Adjutant General	4
Department of Conservation	62
Total	104

Claims Involving State-Owned Vehicles.

Sixty-three cases were disposed of by settlement or after trial during the period covering December 1, 1941 to November 30, 1942, on which a total of $10,472.17 was paid. At present there are forty-four cases pending and one hundred and sixty claims on which no suit has been brought.

Town By-laws.

The Attorney General is required to pass upon the legality of all town by-laws, including zoning by-laws.

By-laws of 82 towns, some original and some amendatory in character, have been examined in detail and perfecting changes indicated for some, so that over 80 of the sets of by-laws submitted were approved.

Board of Appeals on Motor Vehicle Liability Policies and Bonds.

An Assistant Attorney General is required by statute to sit as a member of this three-man Board which performs a valuable service in determining whether cancellation of motor vehicle liability policies by insurance companies is reasonable and in sustaining appeals from unwarranted action by insurers against their policyholders. Timely recommendations and decisions of this Board often serve to curb

[1] To the United States for war purposes.

the dangerous driver and the irresponsible registrant of an automobile or truck. The time of an assistant for an average of three days a week is required for this work.

Collections.

The various departments in the State government make diligent efforts to effect collections of accounts due the Commonwealth. When they have exhausted their efforts to collect these accounts, they are turned over to this Department.

During the year covered by this report this Department has collected from the accounts so turned over to it, and exclusive of unclaimed bank deposits, referred to under a separate heading in this report, the sum of $143,967.62.

Refunds — Mattress Tax.

The Legislature authorized the refund under the direction of the Attorney General of the license fee imposed by chapter 351 of the Acts of 1939 and by Item 2820–07 of chapter 683 of the Acts of 1941 appropriated $10,000 for this purpose. The license fee, the so-called mattress tax, had been held unconstitutional in *Mueller* v. *Commissioner of Public Health*, 307 Mass. 270. From the stubs of the licenses which were turned over to the Attorney General it appeared that 206 licenses were issued, amounting to $10,500. The number refunded to date has been 47 — $2,350 being repaid. Refunds are made upon application of the licensee, and upon receipt and approval of the necessary releases.

Extradition and Rendition.

There were 16 applications from other states. After examination, hearing and report, all were found to be in proper form. One was withdrawn by the demanding state.

The Commonwealth made 60 applications upon other states and the return of 59 fugitives from justice for trial here was effected. One application has been withdrawn pending proceedings. Of these, 27 persons were brought back on charges of desertion, nonsupport and neglect of wife and children. The Commonwealth instituted one case of extradition — this on the Dominion of Canada.

Recommendations for Legislation.

This report contains no specific recommendations for legislation. However, drafts of several proposed acts have been considered and prepared in co-operation with other departments of the Commonwealth. Those drafts have been filed with the General Court by various members of the House of Representatives.

Criminal Law.

The general policy of the present administration is to leave the great bulk of the criminal business in the hands of the district attorneys elected by the people of the eight districts into which the Commonwealth is divided. Numerous conferences have been held at the office of the Attorney General attended by the district attorneys and their assistants, for the purposes of uniform and effective administration of the criminal law throughout the Commonwealth. Excellent progress

has been made in this regard, and the Department has received the whole-hearted co-operation of all district attorneys. Direct charge of criminal prosecution is undertaken by the Attorney General in such cases as involve the public interest of the entire Commonwealth.

A division of criminal law is maintained within the Department for the purpose of conducting such prosecutions as may be considered advisable to be undertaken by the Department, and generally to promote a more effective and uniform administration of the criminal law.

In addition to the missing heir cases already referred to in another part of this report, the Department has found it advisable to undertake criminal prosecutions in enforcement of the Milk Control Law for the protection of small dairy farmers throughout the Commonwealth.

It was found advisable also to undertake prosecutions of public officials and other persons in one community in which it was felt that wholesale corruption was undermining the whole fabric of local government. These prosecutions resulted in convictions and jail sentences for two commissioners of public safety in charge of the Police and Fire Departments, one lawyer, acting as the intermediary for the commissioner in a conspiracy to solicit and accept bribes, and others noted below.

After the conviction of conspiracy to solicit bribes of the first commissioner and his sentence to the House of Correction, the second commissioner was elected to take his place. At the time of his election this person was under indictment for conspiracy to solicit bribes while serving as a school committeeman. Following his election he was tried, convicted and sentenced to the House of Correction, from which place he has apparently continued to run the Police and Fire Departments committed to his charge.

After conviction or pleas of guilty, the officials in this group of cases were sentenced by different judges of the Superior Court before whom they had pleaded guilty or been tried. The manner with which the courts dealt with various defendants differed in accordance with the varying facts of each individual case and the view of the presiding judges thereon. One school committeeman found guilty of conspiracy to solicit a bribe was sentenced to 15 months in the House of Correction; another found guilty of a violation of the Corrupt Practices Act, requesting and accepting gratuities, received a sentence of 18 months; a former school committeeman charged with accepting a bribe was found guilty and sentence of one year was suspended; a commissioner of the Soldiers' Relief Department found guilty of conspiracy to defraud the city and of accepting a bribe was sentenced to State Prison for a term of 3 to 4 years. His confederate, who pleaded guilty, received a suspended sentence of 2 years, conditioned upon restitution; an ex-alderman, head of an engineering department, pleading guilty to two indictments involving solicitations of bonuses from employees, received a fine of $500 in each case; a superintendent of schools pleading guilty to an indictment charging him with conspiracy to offer a bribe to a school committeeman was fined $500, and continues to act as superintendent of schools; an alderman, director of public property and parks, pleaded guilty with his son to the charge of conspiracy to defraud the city, and fines of $500 were imposed on each.

The foregoing constitutes a brief résumé of conditions existing in that community and the activities undertaken by this Department with a view to their correction.

Under conditions of total war, it is clear that certain types of criminal activity may become even more serious in their effect upon any American community than in peacetime. Obviously, widespread organized criminality, diverting financial and other resources away from government into the private possession of a comparatively few unscrupulous individuals, constitutes aid and assistance to the enemy, whether so intended or not.

Widespread belief that powerful interests are above the law, and therefore immune from prosecution, has a doubly serious effect upon the morale of a people at war, called upon — and willing — to make every sacrifice to win that war. Government should not only receive but merit the confidence of its people to a higher degree now than ever before.

Criminal activities of the type referred to, with effects so far-reaching that they are not always readily discernible, can seriously undermine the war effort in any community and can weaken the foundations of the democratic system of government at home, while members of the armed forces are sacrificing their lives to preserve it from enemies abroad.

Obviously, it is the duty of law-enforcement branches of civilian government to be doubly vigilant and to use all means within their power to stamp out criminal activities.

This Department will continue to attempt to meet its responsibilities in this regard.

Respectfully submitted,

ROBERT T. BUSHNELL,
Attorney General.

OPINIONS.

Public Health — Pre-Marital Medical Examination.

Dec. 1, 1941.

Dr. Paul J. Jakmauh, *Commissioner of Public Health.*

Dear Sir: — You have written to ask my opinion as to the interpretation of those provisions of G. L., c. 207, § 20B — enacted as St. 1941, c. 601, § 1, and amended by St. 1941, c. 697 — which deal with an examination of the parties to an intended marriage to be made by a physician. The pertinent provisions of the statute are as follows:

"Except as hereinafter provided, such notice of intention of marriage shall not be accepted by the clerk or registrar until he has received from each party to the intended marriage a certificate signed by a qualified physician registered and practising in the commonwealth or a commissioned medical officer on active service in the armed forces of the United States who has examined such party as hereinafter provided. If such physician, in making such examination, discovers evidence of any infectious disease declared by the state department of public health to be dangerous to the public health, he shall inform both parties of the nature of such infectious disease and of the possibilities of transmitting the same to his or her marital partner or to their children. Such examination shall include a standard serological test for syphilis and said test shall be made by a laboratory of said department or by a laboratory approved by it for such test.

. . . . . .

The examination by such physician and the laboratory test shall be made not more than thirty days before the filing of the notice of intention of marriage. . . ."

You state that there is considerable confusion among physicians concerning the nature of the examination required by this statute, and that this arises from their uncertainty as to whether or not the parties must be examined for all infectious diseases declared by the State Department of Public Health to be dangerous to the public health.

At the time St. 1941, c. 601, was enacted, some forty infectious diseases, including syphilis, had, pursuant to G. L., c. 111, § 6, been declared by your department to be dangerous to the public health. You have furnished me with a list of these diseases, which is still in force, and you inform me that for the detection of many an elaborate laboratory examination is necessary.

In my opinion, syphilis is the only one of these infectious diseases the presence or absence of which must be determined, in the manner prescribed, as a part of the examination required by G. L. c. 207, § 20B, as amended. I am led to this conclusion primarily by the terms of the statute, providing that the physician shall inform the parties regarding any of these diseases of which he "discovers evidence" in making his examination, but requiring, in the case of syphilis, that the examination shall include a specific test to be made in a specified laboratory.

Moreover, that only one laboratory test must be made seems manifest from the provision that the "examination by such physician and *the laboratory test*" shall be made not more than thirty days before the filing of the notice of intention. Yet, as you inform me, many of the diseases referred to cannot be detected without various laboratory tests. This fact furnishes added support to the conclusion

that the physician is not required to determine the presence of any of the infectious diseases other than syphilis, as distinguished from merely discovering evidence of such diseases.

If the Legislature had intended the examination to determine the presence or absence of every disease in the category named, it undoubtedly would have so provided, and the expression of the requirement of a laboratory test as to one disease indicates that its omission as to the other diseases was intentional. *Cf. Boston & Albany R.R. Co.* v. *Commonwealth*, 296 Mass. 426, 434.

On the other hand, I believe that the physician's examination should be of such nature as to disclose any evidence of the infectious diseases referred to which a physician could reasonably be expected to discover without a laboratory test. My opinion in this regard is based upon the manifest purpose of the statute, which is to protect the public health by measures reasonably calculated to deter the transmission, incident upon marriage, of the designated infectious diseases. The method adopted is a compulsory examination by a physician, including one laboratory test. The only object of the examination is to enable the physician to enlighten the parties to the intended marriage regarding the nature and transmissibility of any infectious disease in the specified group, of which he discovers evidence. Plainly, in order to carry out the purpose of the statute, the physician's examination should be directed toward the discovery of such evidence.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration of Hairdressers — Rules — Application for Examination.

DEC. 2, 1941.

Mrs. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — The Board of Registration of Hairdressers through you has asked my opinion upon two questions.

1. The first question reads:

"The Governor recently signed a bill amending our law, which becomes effective November, 1941. Under section 87W a person filing an application for examination must file this application together with two photographs of herself. At the time this law was amended, it was the intention of the Board to have one photograph pasted on the application and the other on the registration. Now the question arises as to whether or not the Board can pass a ruling, and request the persons already holding a registration to file these two pictures when renewing their registration for 1942."

Section 87W of G. L. (Ter. Ed.) c. 112, as inserted by St. 1941, c. 626, § 5, in place of former section 87W, reads as follows:

"Any operator who has had not less than six months' practical experience as such, and who, after application accompanied by an examination fee of ten dollars for a first examination together with two photographs of the applicant or five dollars for a second or subsequent examination, passes a practical examination satisfactory to the board, may be registered by the board as a hairdresser, and thereafter may practice hairdressing in a registered shop for compensation, and may supervise operators, without additional payment for the period during which such person was originally registered as an operator, and thereafter upon payment annually of a hairdresser's renewal fee of two dollars."

Former section 87W contained no provision with relation to the furnishing of photographs.

The force of the new section 87W is not retrospective. Its requirement as to the furnishing of photographs does not apply to former applicants who have already been registered.

Although the new section 87W deals not only with the application, examination and original registration of operators as hairdressers, but also with their subsequent annual registration, as to the latter form of registration it contains no requirement concerning the furnishing of photographs.

The Legislature appears to have fully regulated the whole subject of requirements for annual registration as well as original registration of operators as hairdressers. It has specifically established the requirement for such annual registration and has provided only that it shall consist of the payment of a fee. A rule made by your Board establishing an additional requirement for annual registration, such as the furnishing of photographs, would be repugnant to the statute and so would not be within the rule-making authority vested in your Board by section 87CC of said chapter 112.

It was said by the Supreme Judicial Court in *Commonwealth* v. *Johnson Wholesale Perfume Co.* 304 Mass. 452, 457:

"When a subject has been fully regulated by statute an administrative board cannot further regulate it by the adoption of a regulation which is repugnant to the statute. *Commonwealth* v. *McFarlane*, 257 Mass. 530, 531."

Consequently, in my opinion, your Board may not, under its rule-making authority, establish an additional requirement for the furnishing of photographs by operators seeking an *annual renewal* of their hairdresser's registration originally granted under section 87W in either its old or amended form.

2. Your second question asks whether persons who have not renewed their registrations as hairdressers granted them for the years 1936 to 1941 may now renew them before November, 1944, in view of the amendment of G. L. (Ter. Ed.) c. 112, § 87GG.

St. 1941, c. 626, § 9, amends G. L. (Ter. Ed.), c. 112, by striking out section 87GG and inserting a new section 87GG, which reads:

"Each registration granted under sections eighty-seven T to eighty-seven JJ, inclusive, shall expire on December thirty-first next succeeding its date, and shall be renewed upon the filing of an application therefor, and the payment of the prescribed renewal fee, on or before its expiration. In default of such renewal, a person registered under said sections as a hairdresser, manicurist, instructor or operator shall forfeit the right to engage in the occupation covered by such registration until the prescribed renewal fee shall have been paid; provided, that any hairdresser, manicurist, instructor or operator whose registration has not been so renewed within three years following the date of expiration thereof shall not be entitled to renewal of such registration but shall register anew under sections eighty-seven T to eighty-seven JJ, inclusive."

The effect of this new section 87GG is to bar from registration, upon payment of a renewal fee only, all registrations which expired more than three years prior to the effective date of said chapter 626.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Treasurer and Receiver General — Unemployment Compensation Funds and Accounts — Bonds — Statutory Construction.

Dec. 2, 1941.

Hon. William E. Hurley, *Treasurer and Receiver General.*

Dear Sir: — You have informed me that you are the principal on a general bond, dated January 15, 1941, in the amount of $100,000 with a surety, for the faithful discharge of your duties as Treasurer and Receiver General, as required by G. L. (Ter. Ed.) c. 10, § 2.

You advise me that on January 15, 1941, you also gave bond with a surety in the amount of $25,000 for the faithful performance of your duties as Treasurer and Custodian of the *Unemployment Compensation Fund*, as required by G. L. (Ter. Ed.) c. 151A, § 39, as then amended and in force on that date. Said section 39 provided that the Treasurer "shall give a separate and additional bond conditioned on the faithful performance of his duties as treasurer and custodian of the fund."

On January 15, 1941, you gave another bond with surety, in the amount of $25,000, for the faithful performance of your duties as Treasurer and Custodian of the *Unemployment Compensation Administration Account*, as required by G. L. (Ter. Ed.) c. 151A, § 42, as then amended and in force on that date. Said section 42 provided that the Treasurer "shall give a separate and additional bond conditioned on the faithful performance of his duties as custodian of the moneys in the account."

By the enactment on October 24, 1941, of St. 1941, c. 685, said G. L. (Ter. Ed.) c. 151A, was repealed and a new chapter 151A, entitled "Employment Security," was inserted in its place. This new chapter made certain changes with relation to the two funds, set up by the repealed chapter, of which you were treasurer.

Sections 48 to 55 established an *unemployment compensation fund*, as formerly, of which the State Treasurer is treasurer *ex officio*. He is required to maintain within said fund (1) a clearing account, and (2) an unemployment compensation fund account.

1. Money in the clearing account, except that used for refunds, is to be paid over by the Treasurer to the Secretary of the Treasury of the United States.

2. All money received by requisition upon the treasury of the United States from the money paid into the said treasury for the account of the Commonwealth's unemployment trust fund is to be transferred by you to the Director of the Division of Employment Security, who is to deposit it in a "*benefit account*" to be used by him exclusively for the payments of benefits provided for by said chapter. The Director is required to give a bond not exceeding $25,000, with surety, for "the faithful performance of his duties with respect to the benefit account."

The new chapter 151A, in section 59 contains the following new provisions with relation to the bonds of the Treasurer:

"The state treasurer, in addition to the provisions contained in section two of chapter ten, shall be liable on the treasurer's bond for the faithful performance of his duties in connection with the unemployment compensation fund, the clearing account in connection therewith and the employment security administration account provided for under this chapter. Such liability of the treasurer on his official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision."

You have asked me in the three following specific requests to advise you with relation to the course you should now follow concerning the said three outstanding surety bonds on which you are the principal:

"1. Does section 55 of chapter 685 provide for the liability for the Benefit Account formerly placed upon me being transferred to the director? Should this bond be canceled?

2. Section 59 of chapter 685 has been changed in accordance with the request of the federal authorities and it would now seem that my general bond covers all the different accounts. There will be for at least the next year outstanding checks which have been signed by me.

3. Is it your interpretation that the two $25,000 bonds which have been written to run concurrent with the term of office as Treasurer and Receiver General shall be continued until the end of my term in January, 1943, and after that date no separate bonds will be required for the protection of either the Administration Account or the Unemployment Compensation Benefit Account?"

Section 55 of said chapter 151A, as now inserted in the General Laws, makes the Director of the Division of Employment Security responsible for the custody and disbursement of the "*benefit* fund" and to that extent you are now no longer liable for the improper management of the moneys which are to be paid as benefits to employees from the unemployment compensation fund. Nevertheless, you still have duties and responsibilities with regard to the unemployment compensation fund in connection with making requisitions upon the federal treasury for money therefrom, transferring such money to the Director, and maintaining "a clearing account" described in section 50 (1). Furthermore, the term of the bond which you gave on January 15, 1941, is coincident with your term of office, which does not expire until January, 1943, and, with relation to your duties in connection with said compensation fund, provides a safeguard from any possible dereliction not yet ascertained in the discharge of such duties which may conceivably have occurred.

You state that it has been suggested in effect that the Legislature intended by enacting said section 59 to provide as security for the compensation fund and the administration account, in each case the existing special bond previously given in the sum of $25,000, and in addition the general bond which you gave as Treasurer under G. L. (Ter. Ed.) c. 10, § 2, in the sum of $100,000. This is not a correct construction of the statute.

The Legislature, by providing specifically in said section 59 of the new chapter 151A that the State Treasurer, "in addition to the provisions contained in section two of chapter ten, shall be liable on the treasurer's bond for the faithful performance of his duties in connection with the unemployment compensation fund, . . . and the employment security administration account," has apparently construed the provisions of sections 39 and 42 of the earlier chapter 151A as providing that the liability of the Treasurer upon his general bond given under said chapter 10, section 2, did not cover his liability with relation to the last-mentioned fund and account.

It appears from the language of the earlier chapter 151A, §§ 39 and 42, especially in the light of the foregoing legislative construction, that the requirement in said earlier sections for "a separate and additional bond" to cover malfeasance by the Treasurer in connection with the two specifically named funds, precluded liability for such malfeasance arising under the larger and general Treasurer's bond.

That being so, the Legislature may not now by the terms of the new section 59 add to the liability undertaken by the surety on the general bond written before the enactment of the present chapter 151A.

It is a well-recognized principle of law that, under the provisions of the United States Constitution, which forbid legislative impairment of the obligation of a contract (U. S. Const. Art. 1, § 10), it is unconstitutional to add by statute to the liabilities assumed by a surety upon a pre-existing bond. *Conant* v. *Newton*, 126 Mass. 105, 109; *Wasser* v. *Congregation Agudath Sholom*, 262 Mass. 235, 237. To interpret said new section 59 as imposing liability for breaches of duty not so imposed by law on January 15, 1941, when the Treasurer's general bond was executed, would be to give to the section an unconstitutional effect.

By construing the section to mean that the two existing bonds relating to the specifically designated fund and account should remain in force and that, after the term of the present Treasurer, subsequent Treasurers should give one general bond to cover all the forms of liability now covered by the three existing bonds, a valid and constitutional enactment is seen to exist and the legislative purpose may be carried out effectively. *Lorando* v. *Gethro*, 228 Mass. 181, 190.

It has been said by our Supreme Judicial Court in the case of *Wilfred B. Keenan, Petitioner*, 310 Mass. 166, that a statute "if fairly possible, is to be interpreted 'so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' *United States* v. *Jin Fuey Hoy*, 241 U. S. 394, 401; *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271, 282."

In accordance with this principle I advise you that the bonds covering the Unemployment Compensation Fund and the Unemployment Compensation Administration Account should not be canceled but should be continued until the end of your term of office.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Health — Approval of Sources of Water Supply for Municipalities.

DEC. 2, 1941.

Dr. PAUL J. JAKMAUH, *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion upon the following question of law, the answer to which will affect the performance of the duties of your department with relation to its approval of new sources of water supply for municipalities within ten miles of the State House.

"Has the Department of Public Health authority to approve a new source of water supply for a city or town any part of which is within ten miles of the State House if such *city* or *town* has been authorized by any act of the Legislature to establish additional sources of water supply within the limits of said city or town?"

I answer your question in the affirmative.

You have informed me that you have now before you for approval the use of a recently completed well in the town of Weston as a permanent water supply; that the quality of the water and the capacity of the well are such that your department is prepared to give its approval, if it is proper for it to do so.

It would not be proper for your department to give such approval to the town

of Weston if the new well from which it is now proposed to take water upon a permanent as distinguished from an emergency basis is not one of the sources of water supply which the Legislature has authorized the said town to use.

In Massachusetts the service of supplying water by municipalities to their inhabitants for domestic purposes has been regarded by our courts as so partaking of the nature of a business carried on for profit that it may be undertaken by a city or town only under legislative authority. *Loring* v. *Commissioner of Public Works*, 264 Mass. 460, 464; *Pearl* v. *Revere*, 219 Mass. 604.

Accordingly, the Legislature has from time to time by statutes empowered various municipalities within ten miles of the State House, including the town of Weston, to take water for a water supply system for domestic purposes from certain designated or authorized sources. In many of these statutes it was specified, as a condition precedent to the actual use of water from the authorized sources, that the "approval" of your department should first be obtained. The "approval" of your department, when referred to in this manner in such statutes, relates to an approval of the quality of the water from the standpoint of public health and is never used therein as synonymous with or as a substitute for a legislative authorization to employ a designated source or sources of water supply as part of a municipal system. So it is provided in G. L. (Ter. Ed.) c. 111, § 17, as amended:

". . . Towns and persons shall submit to said department for its advice and approval their proposed system of water supply or of the disposal of drainage or sewage, and no such system shall be established without such approval. . . ."

The approval of your department is not an authorization to resort to a designated source of water supply, but is a necessary condition for the actual use of the water for domestic purposes.

In the town of Weston the Weston Water Company was incorporated and authorized by St. 1896, c. 217, to take water from any source, including ground waters, *within the town*, and section 11 of said chapter authorized the town to acquire all the property, rights, privileges and franchises of the said Water Company and to operate with the same a water supply system of its own for the benefit of its inhabitants. You inform me that the town did acquire such property, rights, privileges and franchises of said Water Company on July 1, 1921, and has since operated a water supply system. You advise me that the recently completed well which the town now desires to use as a water supply is *within the town* limits.

Other municipalities within ten miles of the State House have been empowered to take water from various authorized sources by statutes either enacted before or since 1895.

By chapter 488 of the Acts of 1895 the Legislature made provision for a metropolitan water supply and for the furnishing from it of water to various municipalities, including those within ten miles of the State House. By section 23 of said chapter 488 (see G. L. (Ter. Ed.) c. 92, § 16) it was provided:

"No town, except Hingham and Hull, any part of which is within ten miles of the state house, or water company owning a water pipe system in any such town shall, except in case of emergency, use for domestic purposes water from any source not now used by it except as provided in this chapter, or as shall hereafter be authorized by the legislature."

(As said section 23 now appears in G. L. (Ter. Ed.) c. 92, § 16, the words "or as shall hereafter be authorized by the legislature" appear to have been omitted by

the compilers as being in the nature of surplusage; the effect of the provisions of the section is not changed by such omission.)

As a result of the above provisions of said chapter 488, after 1895 municipalities within ten miles of the State House could take water for permanent domestic purposes only from sources then actually used by them, unless the Legislature by specific enactment authorized them to avail themselves of newly designated ones, and from the metropolitan water supply. This condition was continued in effect by the passage in 1941 of chapter 465, section 1, which further amended G. L. (Ter. Ed.) c. 40, § 38, as previously amended by St. 1938, c. 172, § 2.

St. 1941, c. 727, an emergency act relative to furnishing water to towns, provided further for the furnishing of water to municipalities from the metropolitan water supply, and in section 3 set forth:

"Any town having an established water system and the inadequacy of the water supply of which has been so reported by said department may, with the approval of said department, increase its supply of water from its own sources by taking water from authorized sources which are not already appropriated for the purposes of a public water supply; provided, that application for such approval is made on or before June thirtieth, nineteen hundred and forty-three."

The effect of said section 3 is to enlarge the sources now available to municipalities within ten miles of the State House and to permit them to take water from sources upon which they have been authorized to draw by legislation passed either before or since 1895, when an existing supply is inadequate and is so reported by the Department of Public Health.

Your department should not aid in the development of any source, the use of which has not been authorized by the Legislature. However, when, as in the case of the town of Weston, there appears to be a source authorized by the Legislature other than the metropolitan water supply, your approval may be given if the quality of the water satisfies your department and a former established water system is determined by you to be inadequate.

Very truly yours,

Robert T. Bushnell, *Attorney General.*

Governor — Authority to Fill Vacancies in the Offices of Justice and Special Justice of District and Municipal Courts.

Dec. 5, 1941.

His Excellency Leverett Saltonstall, *Governor of the Commonwealth.*

Sir: — You have asked my opinion as to your authority, in view of the provisions of St. 1941, c. 664, to fill vacancies existing in the office of justice of the District Court of Chelsea and one of the two special justices of the Municipal Court of the Charlestown District.

These two district courts, prior to the enactment of said chapter 664, each consisted of a justice and two special justices (G. L. (Ter. Ed.) c. 218, § 6, as amended).

Said chapter 664 reads:

Section 1. Section six of chapter two hundred and eighteen of the General Laws is hereby amended by striking out the first paragraph, as appearing in the Tercentenary Edition, and inserting in place thereof the following paragraph: — Each district court, except the municipal court of the city of Boston, shall consist of one justice and one special justice.

Section 2. This act shall not affect the tenure of office of any special justice in office upon its passage. No vacancy in said office in any district court subject to this act, whether existing before its passage or occurring thereafter, shall be filled at any time when there is one special justice of such court in office.

Section 3. This act shall take effect upon its passage.

In my opinion, this statute does not limit your power to appoint as *justice* of a district court such person as you may select. I see no sound basis for construing this legislation as a requirement that the Governor shall appoint as justice of a district court to fill a vacancy one of the two special justices of such court.

The title of the act has some bearing on the legislative intent in enacting it. That title expressly states that it is "An Act limiting the number of special justices of certain district courts."

In section 2 the word "office" is used four times, but only in reference to the "office" of a special justice. This is obvious in the first sentence of the section, in which the word "office" appears twice. In the second sentence this meaning is made clear by the accompanying word "said" — "*said office.*" In no place where it appears has the word "office" any reference to the office of justice of the court. Said section 2 plainly provides that if a district court consists of a justice and two special justices, the Governor may not fill a vacancy in the office of special justice if the other special justice is still holding his position. The intent of the Legislature in enacting this chapter was gradually to reduce the number of special justices in the specified district courts from two to one, but to accomplish this result without affecting the tenure of office of those special justices who were occupying their positions at the time of the passage of the act. It simply forbids the filling of a *vacancy* in one of the offices of special justice if the other is still occupied. It has no reference to the office of justice of the court.

With reference to the Municipal Court of the Charlestown District, you state that by reason of the death of one of the associate justices a vacancy was created prior to the effective date of chapter 664. In my opinion, it makes no difference whether the vacancy was created before or after chapter 664 became effective. The Governor, by the provisions of this chapter, is precluded from making an appointment to fill such a vacancy if the remaining special justiceship is not vacant.

Very truly yours,

Robert T. Bushnell, *Attorney General.*

Secretary of the Commonwealth — Notary Public — Conviction — Notice of Forfeiture of Commission.

Dec. 6, 1941.

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

Dear Sir: — In a recent letter you inform me that on November 19, 1941, a selectman of a certain town was found guilty of larceny in connection with the performance of his duties, and that, pursuant to G. L. (Ter. Ed.) c. 268, § 8, the court, following the conviction, ordered that the defendant forfeit his office and be forever disqualified to hold any public office, trust or appointment under the Constitution or laws of the Commonwealth.

You also inform me that at the time of said conviction said person held a commission as notary public, and you ask my opinion on the following question:

"Is it incumbent on the Secretary of State to inform an individual that his commission as notary public has been forfeited by order of the court under the provisions of section 8 of chapter 268 of the General Laws?"

In my opinion, there is no duty imposed on you by law to inform a notary public of the forfeiture of his commission under the circumstances related.

G. L. (Ter. Ed.) c. 268, § 8, provides, in part, that a "municipal officer who is finally convicted of committing, in connection with the performance of the duties of such office, the crime of larceny, embezzlement or obtaining money under false pretences shall, in addition to the penalty imposed by law for the punishment of such crime, forfeit his office and be forever disqualified to hold any public office, trust or appointment" under the Constitution or laws of the Commonwealth.

The office of notary public is a public office under the Constitution and laws of this Commonwealth and within the sweep of the foregoing provisions with respect to forfeiture and disqualification. See Mass. Const. Amend. IV; G. L. (Ter. Ed.) c. 222, § 1. *Mumford* v. *Coghlin*, 249 Mass. 184, 188; *Opinion of the Justices*, 150 Mass. 586, 589.

Nothing contained in said G. L. (Ter. Ed.) c. 268, § 8, places any duty on the Secretary of State to inform one holding a commission as notary public of the forfeiture of his office as such or of his disqualification to hold such public office, trust or appointment in the future.

Certain notices to individuals holding commissions as notary public and otherwise are required by law in certain circumstances. Thus, G. L. (Ter. Ed.) c. 30, § 12, provides that the Secretary shall forthwith notify a person who has failed to take and subscribe the oath of office to which he has been appointed that his appointment is void. G. L. (Ter. Ed.) c. 9, § 15, as amended by St. 1934, c. 19, provides as follows:

"The secretary shall send by registered or insured mail to every justice of the peace or notary public a notice of the time of expiration of his commission, not more than thirty nor less than fourteen days before such expiration."

Obviously the quoted statute does not apply to the facts set forth by you because of the impossibility of complying with the time limits specified therein for the giving of notice and because said statute refers in express terms to the "*expiration*" of the commission. "Expiration" as used in G. L. (Ter. Ed.) c. 9, § 15, means, in my opinion, termination of the office by lapse of time rather than by the commission of acts which would work a forfeiture. See *Oakley* v. *Schoonmaker*, 15 Wendell (N. Y.) 226, 230; *City of Williamsburg* v. *Weesner*, 164 Ky. 769.

There is no requirement of law that makes it incumbent on you to notify a notary public of the forfeiture of his office in the circumstances set forth in your letter. On the other hand, there is nothing in the law to prevent your sending such a notice. That procedure may well be deemed advisable in order to avoid resulting complications if the individual presumed to act as a notary public unaware that he had forfeited that office. However, this is a matter of policy which should be determined by you.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Department of Public Health — Employees.

Dec. 12, 1941.

Hon. Ulysses J. Lupien, *Director of Civil Service.*

Dear Sir: — You have asked me whether the effect of the amendment of G. L. (Ter. Ed.) c. 17, by St. 1941, c. 725, is to include within the sweep of the Civil Service Law all positions in the Department of Public Health, with the exception of Commissioner.

Section 1 of said chapter 725 repealed section 4 as it formerly appeared in said chapter 17 and inserted in place thereof a new section 4 reading:

"There shall be in the department a division of sanatoria and such other divisions as the commissioner, with the approval of the public health council, may from time to time determine. The commissioner may appoint a director of the division of sanatoria, and, subject to the approval of the public health council, shall appoint a director to take charge of every other division, and shall prescribe the duties of such other divisions. Every such director shall be subject to chapter thirty-one."

The old section 4, which is superseded, read:

"There shall be in the department a division of sanatoria and such other divisions as the commissioner may, with the approval of the public health council, from time to time determine. The commissioner may, subject to the approval of the governor and council, appoint and remove a director of the division of sanatoria, and, subject to the approval of the public health council, shall appoint and may remove a director to take charge of every other division, and shall prescribe the duties of such other divisions. The compensation of directors of all divisions shall be fixed by the commissioner, subject to the approval of the governor and council."

The effect of the amendment was to enable the Commissioner to appoint a Director of the Division of Sanatoria without the approval of the Governor and Council and to make said Director and such other directors of divisions as are appointed subject to the provisions of the Civil Service Law.

Section 2 of said chapter 725 of the Acts of 1941 struck out section 6 as formerly appearing in said chapter 17 and substituted therefor a new section 6, which reads as follows:

"The commissioner may, with the approval of the public health council, appoint assistant directors of divisions and epidemiologists, inspectors and other necessary employees. Persons appointed hereunder shall be subject to chapter thirty-one."

The superseded section 6 read:

"The commissioner may, with the approval of the public health council, appoint and remove assistant directors of divisions and epidemiologists, who shall be exempt from chapter thirty-one, inspectors and other necessary employees."

The effect of the new section is to bring within the provisions of the Civil Service Law assistant directors of divisions and epidemiologists, formerly exempted from such provisions, as well as inspectors and other necessary employees of the department who were formerly subject to the Civil Service Laws by force of the old section 6.

Said chapter 725 did not amend sections 8 and 9 of said G. L. (Ter. Ed.) c. 17, which determined the institutions to be included in the Division of Sanatoria and

made special provision for the appointment of officers and employees in those institutions which have been placed in such division, as distinguished from the employees of the Department of Public Health not attached to such institutions.

Said sections 8 and 9 read:

"SECTION 8. The division of sanatoria shall include the state sanatoria at Rutland, North Reading, Lakeville and Westfield.

SECTION 9. In addition to the persons employed under section six, the commissioner, with the approval of the public health council, may appoint a treasurer for each sanatorium, who shall give bond for the faithful performance of his duties, and physicians, assistants and employees necessary for the proper administration of the affairs of the institutions under the charge of the division and may incur all expenses necessary for the maintenance of the institutions."

The enactment of said chapter 725 makes no change in the status of the employees of the Division of Sanatoria dealt with in section 9. Their relation to the Civil Service is the same now as before the enactment of said chapter 725. The provisions of the old section 6 and those of the new section 6 have no application to them, as they are dealt with by force of said section 9 as a separate and distinct class from the "other necessary employees" referred to in both the old and new section 6.

These employees in the institutions within the Division of Sanatoria are not explicitly or impliedly exempted from the sweep of the Civil Service Law. Those who occupy positions falling within the classification of positions and employments created by Rule 4 of the Civil Service Rules are subject to the provisions of the Civil Service Law, and those whose positions have not been classified by the said rules are not so subject.

Accordingly, I answer your question by saying that the effect of the amendments made by St. 1941, c. 725, to G. L. (Ter. Ed.) c. 17, is to bring within the sweep of the Civil Service Law assistant directors of divisions, epidemiologists, inspectors and other necessary employees of the Department of Public Health as such, and that no change with regard to Civil Service is worked in the status of the employees of the institutions in the Division of Sanatoria mentioned in said sections 8 and 9.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

State Board of Retirement — Officer of State Police — Rating Board.

DEC. 13, 1941.

Hon. WILLIAM E. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — As chairman, *ex officio*, of the State Board of Retirement (G. L. (Ter. Ed.) c. 10, § 18) you have asked my opinion as to whether such Board has authority to disapprove an application for retirement by an officer of the Division of State Police when the "rating board" established by G. L. (Ter. Ed.) c. 32, § 68B, inserted by St. 1939, c. 503, § 3, has reported in writing to the said Board that such officer "is physically . . . incapacitated for the performance of duty by reason of . . . illness incurred through no fault of his own in the actual performance of duty, . . . "

I am of the opinion that your Board has no authority to disapprove such an application accompanied by such a report in writing.

G. L. (Ter. Ed.) c. 32, in the last two paragraphs of section 68A, and in section 68B, as inserted by St. 1939, c. 503, § 3, provides:

"SECTION 68A. . . . 'Officer', an officer of the division of state police in the department of public safety appointed thereto under section six of chapter twenty-two on or after September first, nineteen hundred and twenty-one, or appointed thereto under section nine A of said chapter.

'Rating board', a board having the powers and duties provided for in sections sixty-eight B and sixty-eight C, and consisting of the surgeon-general of the commonwealth, the commissioner of public health and the commissioner of public safety, or a subordinate designated by any of them from time to time by a writing filed in the office of the state board of retirement.

SECTION 68B. (1) An officer of the division of state police in the department of public safety shall be retired by the state board of retirement in case the rating board, after an examination of such officer by a registered physician appointed by it, shall report in writing to the state board of retirement that such officer is physically or mentally incapacitated for the performance of duty by reason of (*a*), illness incurred through no fault of his own in the actual performance of duty, or (*b*), an injury resulting from an accident occurring during the performance and within the scope of his duty, and without contributory negligence on his part, and that such incapacity is likely to be permanent."

This statute vests no authority in your Board to review a determination made by the rating board after examination of an officer by a registered physician appointed by it and a written report thereon to your Board.

If, after such an examination by a physician, the rating board reports in writing to your Board that the officer is physically or mentally incapacitated for duty by reason of illness or accident of the character described in clauses (*a*) or (*b*) respectively of said section 68B occasioned in the manner designated, in such clauses, the State Retirement Board by the terms of said section 68B is required to retire him.

The fact that your Board considers the finding of the rating board incorrect, or that it would itself have made a different determination as a result of an inspection of the report of the examining physician, does not authorize your Board to refuse to make the requested retirement. The duty of making the determination as to the existence of the facts deemed by the Legislature to warrant retirement rests upon the rating board. Your Board is required to accept the rating board's determination and to act thereon if it sets forth such facts as are designated as necessary to enable an officer to retire.

You have called my attention to a written report made to you by the rating board in connection with an application for retirement by Officer Fitzgerald. You have asked me whether the fact that this report is signed not by any member of the rating board but by one Timothy C. Murphy, as "Recorder, State Police Retirement Rating Board," warrants your Board in not acting upon the report and refusing to retire Officer Fitzgerald.

I am of the opinion that the written report should be signed by at least a majority of the members of the rating board and that the report filed with you in the present matter, which is not so signed, is not of such a character that you are required to act upon it.

No provision is made in the applicable statute for the position of a "recorder" to the rating board and you are not required to assume that a report so signed is such "a report in writing" by the rating board as is designated by said section 68B.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Call Firemen — Promotion — Reserve Fire Forces.

Dec. 18, 1941.

Hon. Ulysses J. Lupien, *Director of Civil Service.*

Dear Sir: — You have asked me if St. 1941, c. 38, entitled "An Act regulating the certification of names for promotion from the reserve to the regular fire force in certain cities," repeals the provisions of G. L. (Ter. Ed.) c. 48, § 36, which relate to the promotion of call firemen.

In my opinion, G. L. (Ter. Ed.) c. 48, § 36, is inapplicable to cities which have reserve fire forces established pursuant to G. L. (Ter. Ed.) c. 48, §§ 59B–59D, inclusive.

G. L. (Ter. Ed.) c. 48, § 36, provides, in substance, that any town which has accepted St. 1913, c. 487, and has a call or part call fire department, may in specified circumstances promote to membership in the permanent force, without civil service examination, persons then in the call or part call fire department who have served for a specified period of time and who are certified to be competent physically for the duty. While section 36 refers in terms to towns, it is applicable to cities as well. (See G. L. (Ter. Ed.) c. 4, § 7.) Its applicability to cities is specifically set forth in the basic statute from which section 36 derives and in all subsequent amendments thereto. (See St. 1913, c. 487; St. 1914, c. 138; Gen. St. 1916, c. 119; St. 1923, c. 109.)

In 1932, chapter 31 of the General Laws dealing with civil service was amended by the insertion of section 19A (St. 1932, c. 146). The new section provided, in substance, that in each city having a reserve force of firemen established under G. L. (Ter. Ed.) c. 48, §§ 59B–59D, inclusive, appointments to the regular force should be made upon certification from the list of members of the reserve force of firemen. This provision, so far as it was applicable to a particular city, rendered inoperative, with respect to such city, the provisions of G. L. (Ter. Ed.) c. 48, § 36.

Subsequent amendments to, or substitutions of, G. L. (Ter. Ed.) c. 31, § 19A (including St. 1941, c. 38, to which you referred), merely modified the specific procedure to be followed in connection with appointments to the regular fire forces of cities from the reserve forces thereof. These amendments to section 19A did not alter the prior situation as to the inapplicability of G. L. (Ter. Ed.) c. 48, § 36, to cities having reserve forces established under sections 59B–59D, inclusive, of chapter 48.

The net effect of this series of enactments is that in cities *which have a reserve fire force* established under the aforementioned statutes, appointments to the permanent fire force must be made from the list of members of the reserve force and not from call firemen, as provided in G. L. (Ter. Ed.) c. 48, § 36.

Nothing in St. 1941, c. 38, or in corresponding provisions of earlier statutes, impairs the applicability of said chapter 48, section 36, to towns or to cities *having no such reserve fire forces.*

Very truly yours,

Robert T. Bushnell, *Attorney General.*

Civil Service — Removal of Names from Eligible Lists — Certification of Names of Persons Seventy Years of Age.

Dec. 23, 1941.

Hon. Ulysses J. Lupien, *Director of Civil Service.*

Dear Sir: — You inform me that you have adopted as your "office policy" two practices, and you ask my opinion upon three questions of law relative to the first of such practices.

1. The first practice you state to be as follows:

"Names of persons are to be removed from eligible lists upon reaching seventy years of age. Persons so removed should be notified forthwith."

Your questions with relation to this practice are:

"1. Whether or not this division has the right to remove names from eligible lists when applicants reach the age of seventy."

No provisions of the Civil Service Law (G. L. (Ter. Ed.) c. 31) or the rules and regulations made thereunder, authorize you to remove from eligible lists the names of applicants who reach the age of seventy.

The provisions of G. L. (Ter. Ed.) c. 32, as amended, by requiring employees reaching the age of seventy to withdraw from the public service of the Commonwealth and of such of its political subdivisions as have retirement systems maintained by virtue of such provisions, by implication prohibit the appointment to positions in such service of those who have attained the age of seventy. There are, however, some municipalities which have retirement systems maintained and governed by special acts under which employees may be continued in service for limited periods after attaining the age of seventy. As to such municipalities it cannot be said that the appointment of a person who has just attained the age of seventy is impliedly prohibited. See, as to Boston, St. 1922, c. 521; as to Newton, St. 1925, c. 355; as to Somerville, St. 1930, c. 184; as to Chelsea, St. 1931, c. 448; as to Everett, St. 1933, c. 223; as to Brookline, St. 1933, c. 299; as to Medford, St. 1934, c. 88; as to Quincy, St. 1934, c. 152; and as to Fitchburg, St. 1935, c. 450.

It cannot properly be said that, by mere implication from the provisions of the various statutes relating to the retirement of persons in the different public services at designated ages, the Legislature has vested in you the right of anticipating the duty of appointing officials to decline to appoint persons over the age of seventy where such duty exists, and the power to remove from eligible lists the names of those applicants who reach the age of seventy.

Your second and third questions read:

"2. Whether or not we can refuse to certify for permanent positions persons on eligible lists in positions to be certified once they reach the age of seventy."

"3. Whether or not we can refuse to certify for temporary positions persons on eligible lists in positions to be certified when they reach the age of seventy."

The same considerations which I have outlined in relation to your first question impel me to say that you have no right to refuse to certify for positions persons who have attained the age of seventy, and in this connection it is immaterial whether the positions sought to be gained are permanent or temporary.

2. The second practice which you have adopted, and upon which you ask my opinion, you state to be as follows:

"Names of persons who are receiving old age assistance are to be removed from eligible lists. Check to be made with Welfare Department before certification is made of any person reaching age where eligible for such assistance."

This practice is plainly improper and unlawful. No authority is vested in you by specific provision of any statute, rule or regulation, or by implication therefrom, to remove the "names of persons who are receiving old age assistance . . . from eligible lists."

A person may be entitled to receive old age assistance at the age of sixty-five. (G. L. (Ter. Ed.) c. 118A, § 1, as amended.) No provision of law prohibits a person who has been receiving such assistance from holding a public position. No implication arises from the fact that a person is receiving old age assistance that he is incapacitated or unqualified for public employment.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Placing Municipal Position Within Terms of Civil Service Law — Public Office.

DEC. 31, 1941.

HON. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You have laid before me a vote of the Millville Municipal Finance Commission adopted on November 15, 1941, and signed by two of the three members. The Attorney General is a member of this Commission but was not at the meeting when the vote was adopted and did not participate in this action.

The vote purports to establish the position of clerk in the Town of Millville as a civil service position and to request the Civil Service Commission to approve such vote and permit the position occupied by the designated incumbent to be under the protection of civil service.

You have asked me whether you may consider this vote as fulfilling the requirements of the Civil Service Law so that said position is now to be treated as within the provisions of said law. (G. L. (Ter. Ed.) c. 31, as amended.)

In my opinion, this vote does not place said position within the classified civil service.

The full text of the vote is as follows:

"NOVEMBER 15, 1941.

The Millville Municipal Finance Commission in session on Friday, November 14, 1941, by this vote establishes the position of Clerk in the Town of Millville, acting now for the Millville Municipal Finance Commission and filled by Sadie E. McManus as a Civil Service position incumbent since 1933, at a salary of $900, being the minimum grade of Junior Clerk & Typist.

It was further voted to request the Civil Service Commission to approve this and permit through this vote the establishment of the position occupied by Sadie E. McManus to be under the protection of the Civil Service.

(Sgd.) HENRY F. LONG,
THEODORE N. WADDELL,
Millville Municipal Finance Commission."

The Millville Municipal Finance Commission was established by St. 1939, c. 514, and consists of the Commissioner of Corporations and Taxation, the Attor-

ney General and the Director of the Division of Accounts in the Department of Corporations and Taxation.

By said chapter 514 the Commission is given broad and exclusive powers to act for and to bind the town. In section 2 of said chapter 514 it is provided:

"Until April twentieth, nineteen hundred and forty-four, the town of Millville shall have the capacity to act through and to be bound by the commission and not otherwise, except as hereinafter provided, and the commission shall have and exercise exclusively, so far as will conform to the provisions of this act, all rights, powers and duties now or hereafter conferred or imposed upon the inhabitants of said town and its officers, and the commission shall determine the amount that may be expended for any purpose whatsoever and no liability shall be incurred in excess of the amount so determined, notwithstanding the common law or any provision of statutory law to the contrary. The commission may exercise and perform such rights, powers and duties through such agent or agents as it may designate. The commission, on behalf of the town, may issue bonds or notes of the town, but only with the approval of the governor and council. . . . The commission shall have the power of appointment of all agents hereunder and shall fix their compensation and assign to them such of the powers and duties of the commission as it shall specify; may purchase supplies, and may employ persons to do work for the town."

The population of the town of Millville is not more than twelve thousand, and so is not authorized by G. L. (Ter. Ed.) c. 31, § 47, to accept the provisions of the Civil Service Law generally and to place all the positions in its service under civil service.

Section 49A of said chapter 31, as amended by St. 1941, c. 414, provides a mode and manner by which a specific office or offices in a city or town may by petition of voters and a referendum be placed within the classified civil service. These provisions, however, relate only to an office or offices and are not applicable to a position or positions.

The place established by the said vote is a position as distinguished from an *office*, and the action of the Commission, assuming that it had authority to take effective action under said section 49A, is without power to bring such position within the classified civil service.

In section 49A, with relation to the place or places which may be brought under the classified civil service by action of the voters of a municipality, the words "office" or "offices" are employed throughout and the word "*position*" does not appear therein.

A distinction recognized by our courts exists between a public office and a public position or employment, as it is sometimes called. *Brown* v. *Russell*, 166 Mass. 14; *Attorney General* v. *Tillinghast*, 203 Mass. 539, 543; *O'Connell* v. *Retirement Board of Boston*, 254 Mass. 404.

The position of clerk in a town "at a salary of $900," being the minimum grade of junior clerk and typist, as described in the said vote, is plainly a position and not an office. I Op. Atty. Gen. 340, 343.

Accordingly, since no provision of said G. L. (Ter. Ed.) c. 31, § 49A, as amended, authorizes the placing in the classified civil service of a *position* as distinguished from an *office*, it follows that the action which the said Commission attempted to take by its vote of November 15, 1941, was without effect.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration in Embalming — Registrants Who Served in the Army — Renewal Fees.

Dec. 31, 1941.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — The Board of Registration in Embalming and Funeral Directing through you has asked my opinion as to its authority to allow registered embalmers and funeral directors now serving in the United States Army to renew their annual registrations at the expiration of their service in the army instead of on November 30, 1941, which was determined by the said Board, under the authority vested in it by G. L. (Ter. Ed.) c. 112, § 83, as amended, as the date upon which the fee of five dollars for the annual renewal of the registration of an embalmer or funeral director was required to be paid.

The said Board not only has authority, but is required to allow those registrants who were serving in the United States Army on November 30, 1941, four months after the expiration of their service in which to pay such renewal fee.

This is provided by St. 1941, c. 708, § 23, which reads:

"Any license, permit or certificate of registration issued by any department, division, board, commission or officer of the commonwealth that expires while the holder thereof is serving in the military or naval service of the United States may be renewed within four months after the termination by such holder of such service, to the same extent as though the application for such renewal were made upon the expiration of such license, permit or certificate of registration; provided, that nothing in this section shall be construed to authorize such holder of a license, permit or certificate of registration to exercise any rights thereunder after its expiration and prior to its renewal as aforesaid."

Very truly yours,
Robert T. Bushnell, *Attorney General.*

Civil Service — Call Firemen — Promotional Examination.

Dec. 31, 1941.

Hon. Ulysses G. Lupien, *Director of Civil Service.*

Dear Sir: — You have asked my opinion as to whether that part of Civil Service Rule 28, section 3, which provides with relation to call firemen that —

"No examination shall be required for promotion of call men within the call force." —

is abrogated by the enactment by the Legislature in 1939 of the provisions of the Civil Service Law which now appear as G. L. (Ter. Ed.) c. 31, § 20.

Said section 20 provides in its pertinent portions:

"Appointments and promotions in such police forces and fire forces of cities and towns as are within the classified civil service shall be made *only by competitive civil service examination*, except as otherwise provided in this chapter, or in the rules of the commission relative to temporary or emergency appointments. . . ."

Call firemen are a part of the "fire forces" of cities and towns which employ them. G. L. (Ter. Ed.) c. 31, § 48, refers to them as such, and other statutes, while distinguishing them from "regular" members of a fire force or from the more

limited organizations of a fire department, treat them as members of "fire forces." (See G. L. (Ter. Ed.) c. 32, §§ 80–82, 85A, as amended.)

G. L. (Ter. Ed.) c. 31, § 48, authorizes cities and towns to accept said chapter 31 as to fire forces, including call men, or to accept it as to fire forces exclusive of call men. As to those municipalities which have not accepted the provisions of said chapter 31 for its call men as well as for its other fire forces, neither section 20 of chapter 31 nor said Rule 28, section 3, has any application to call men.

As to those municipalities which have accepted said chapter 31 as to all their fire forces, including call men, I am of the opinion that the effect of said section 20 is to render invalid the quoted part of said Rule 28, section 3.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Plumbers — Municipalities — Codes — Statute — Master Plumbers.

JAN. 9, 1942.

Mrs. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — I acknowledge your request on behalf of the Board of State Examiners of Plumbers for my opinion on the three following questions relating to St. 1941, c. 518:

"1. Does the act, chapter 518, have the effect of law in municipalities that have accepted chapter 142 of the General Laws (meaning that they have recognized plumbing codes) immediately on October 24th, or must the act be specifically accepted by the municipal governing body before it becomes effective?

2. Is the master plumber, or any person designated as a plumber in towns with no recognized code, relieved of personal liability if he complies fully with the new act in the installation of a hot water tank which subsequently explodes? If the answer is 'no' to the foregoing question, whose personal liability is it?

3. Is the new act applicable to all cities and towns in the Commonwealth irrespective of whether they have a plumbing code or not?"

Your first and third questions may be answered together. In my opinion, St. 1941, c. 518, is applicable to all cities and towns in the Commonwealth and became effective on October 24, 1941, in all such municipalities without any act of acceptance by them.

St. 1941, c. 518, is entitled "An Act relative to the marking, construction and installation of hot water tanks," and amends G. L. (Ter. Ed.) c. 142. In conjunction with section 20 of chapter 142, the new act forms a comprehensive unit of legislation, dealing solely with "hot water tanks," a hot water tank being defined in the statute as any "range boiler, tank, vessel or container, ferrous or non-ferrous, in which water is to be heated or stored under pressure for domestic, culinary or sanitary purposes."

Thus, section 1 of the new act substitutes a new section 17 in G. L. (Ter. Ed.) c. 142, forbidding the sale of hot water tanks unless they are marked in a prescribed manner with certain data specified in the section. Section 2 substitutes a new section 18 in said chapter, forbidding the repair, relocation, or installation and connection of hot water tanks unless they are constructed in the manner, and of the materials, specified therein. Section 3 of the new act substitutes a new section 19 in said chapter, prohibiting the installation and connection of hot water tanks unless they are protected with safety devices specifically described in the

section. The fourth and last section adds a new section (§ 22) to G. L. (Ter. Ed.) c. 142, fixing penalties for violations of sections 17, 18 and 19, as amended, and requiring "inspectors of plumbing or other proper authorities" to cause those sections to be enforced.

Accordingly, St. 1941, c. 518, defines the subject with which it deals, lays down detailed requirements regarding the same, provides for their enforcement, and specifies penalties for violations of its provisions. It is not expressly limited in its applicability to any particular municipality, nor does it in terms require acceptance by a city or town as a condition precedent to its applicability to such city or town. The content of this statute is such as might reasonably be intended to be operative in all cities and towns throughout the Commonwealth.

You refer in your first question to "municipalities that have accepted chapter 142 of the General Laws (meaning that they have recognized plumbing codes)." I assume that you have in mind G. L. (Ter. Ed.) c. 142, § 2, which provides that certain sections of said chapter shall be operative only in those municipalities in which they are accepted. However, this provision for acceptance applies only to the first sixteen sections of chapter 142, dealing with the adoption of plumbing regulations by cities and towns. Said section 2, therefore, does not affect the applicability of sections 17 to 22 of chapter 142, and hence does not require acceptance of sections 17, 18, 19 and 22 as a prerequisite to such sections becoming operative in a given municipality.

My opinion as to the state-wide scope and operation of St. 1941, c. 518, is supported by the opinion of one of my predecessors with respect to the scope and operation of G. L. (Ter. Ed.) c. 142, §§ 17 to 19, inclusive, as they were in force prior to the current amendment. See Attorney General's Report, 1930, p. 71.

Your remaining question, which is the second of the three submitted, requests my opinion as to the personal liability, if any, of a plumber or master plumber who complies fully with St. 1941, c. 518, in installing a hot water tank which subsequently explodes. This question does not seek an opinion as to a matter which concerns the Board of State Examiners of Plumbers in the performance of its official duties, and for that reason I must respectfully decline to answer it. I Op. Atty. Gen. 562; II Op. Atty. Gen. 100.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Police Sergeants — Transfers.

JAN. 12, 1942.

The Civil Service Commission.

DEAR SIRS: — You have informed me that in 1929 a certain city by ordinance established the position of sergeant-mechanic in its police force; that thereafter the Chief of Police sent a requisition to the Civil Service Commission asking it to certify upon an eligible list of applicants for a sergeant's position the name of some person, who had special qualifications as a mechanic.

You further advise me that of those seeking a sergeant's position the only one possessing the required special mechanical qualifications was No. 7 on the eligible list; that such person was certified for the position and thereafter was appointed and has held the position as a permanent appointee since 1929.

It appears that the city attempted to abolish the position of sergeant-mechanic in 1939, but that as a result of a decision of the Supreme Judicial Court it was unsuccessful, and the original appointee, as you state, "has now been returned to duty as sergeant-mechanic, and the Director of Civil Service has received a request from the Mayor to approve the transfer of the man in question from the position of sergeant-mechanic to that of sergeant. The Director has refused to approve this change."

In relation to this situation you have asked my opinion upon three questions of law:

1. The first question reads:

"Was the appointment of this man as sergeant-mechanic primarily an appointment as sergeant and, if the position of sergeant-mechanic were abolished, would he remain on the roster simply as a sergeant? (See G. L. c. 31, § 46G.)"

In my opinion, the appointment in question was primarily an appointment as sergeant. Whether the particular individual to whom you refer would remain on the roster as sergeant if the position of sergeant-mechanic were abolished would depend on the matter of seniority.

The position of sergeant-mechanic, established by the city at, as you state, the same rate of pay as attached to other positions of sergeants, was a sergeant's position, equally with that of the other sergeants' positions in the city. It was so treated by the Civil Service Commission in certifying an applicant from its eligible list for sergeants. The fact that the applicant certified and appointed was No. 7 on the eligible list indicates no different effect from his appointment than would have attached to the appointment of one of the three persons at the head of such list. By the terms of Civil Service Rule 13, section 3, the general provisions of the Rules with regard to the certification and appointment of those at the head of an eligible list are changed when it becomes necessary to select from a list an applicant who possesses, as in the instant case, certain special qualifications. Rule 13, section 3, which has been in force since 1922, is as follows:

"If a requisition is made calling for persons having several qualifications ordinarily covered by distinct classes, the Commissioner may, in his discretion, certify from any class persons possessing the qualifications called for."

A person so selected under said Rule, even if he be No. 7 on an eligible list, is certified and appointed as properly and lawfully as one of the three at the head of a list under ordinary circumstances.

The question of his remaining on the roster as a sergeant would depend, as I have said, upon the matter of seniority.

Assuming that there are four other sergeants in the city in question with the person who is sergeant-mechanic, there are in all five sergeants' positions.

If the position of sergeant-mechanic be abolished, there will be only four sergeants' positions in the municipality, and as there are five sergeants, one of such sergeants will of necessity be separated from the service through no fault of his own. Under the circumstances, the sergeant to be separated from the service must be the last appointee among the group, and those four of the present five sergeants who have been longest in the service as sergeants will be retained. This conclusion is required by G. L. (Ter. Ed.) c. 31, § 46G, as amended, which reads:

"If the separation from service of persons in the classified service becomes necessary through no fault or delinquency of their own, they shall be separated from the service, and reinstated therein in the same position or in a position in the same class and grade as that formerly held by them, according to their seniority in the service so that the oldest employees in point of service shall be retained the longest, and reinstated first and before any reinstatement under section forty-six C or the certification of new names. Nothing in this section shall prevent reinstatements under section forty-six D or impair the preference provided for disabled veterans by section twenty-three."

2. The second question reads:

"Is the transfer of this man from the position of sergeant-mechanic to that of plain sergeant one that would require a request from the appointing power and the approval of the Civil Service Director under G. L. c. 31, § 16A, or is it a transfer that could be made by the Mayor or Chief of Police without reference to the Civil Service Commission?"

A change from sergeant-mechanic to sergeant is a change in duties, rather than a transfer from one position to another within the meaning of "transfer" as used by the Legislature in G. L. (Ter. Ed.) c. 31, § 16A, which reads:

"The director shall, with the approval of the commission, provide by rule for the transfer of persons within the classified service from offices or positions in one department to offices or positions in the same or different departments, and for the temporary transfer of such persons for a period not to exceed six months, without regard to classification if, in his opinion, such transfers will be in the public interest. No such transfer shall be made without the approval and consent of the appointing authority in the department or departments involved. Except as otherwise provided by law, any person duly certified for permanent employment and actually employed for at least one year in any position in the classified civil service may, after application in writing to the director by the appointing authority and with the consent of the director, be transferred to another similar position. No employee shall be permanently transferred from a position in one class to a position of higher rank or for which there are substantially dissimilar requirements for appointment unless he is appointed to the latter position after certification, in accordance with the provisions of this chapter and the rules made thereunder."

It follows that if the person who is sergeant-mechanic is not the most recently appointed of the sergeants in the employ of the city in question, and if it is desired, either before the position of sergeant-mechanic is abolished or afterwards, to give him the duties and title of an ordinary sergeant, this may be done by the appropriate municipal authorities without reference to the Civil Service Commission or to the Director.

3. Your third question reads:

"Would this change from sergeant-mechanic to sergeant be regarded as a promotion? (G. L. c. 31, § 20.)"

You have stated that the pay of a sergeant-mechanic and of a sergeant is the same. From the facts as you have stated them there does not appear to be anything which would lead to the conclusion that a change from sergeant-mechanic to sergeant is a promotion.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration of Architects — Statute — Intent of Legislature.

Jan. 12, 1942.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — In a recent communication you transmitted a request made by the Board of Registration of Architects for my opinion as to the proper construction of section 3 of St. 1941, c. 696, entitled "An Act for the establishment of a board of registration of architects and for the regulation of the practice of architecture."

You stated with respect to that statute:

"On page 4, section 3, line 1, reference is made to section 60D. In our opinion, this should refer to section 60B on page 2, which defines the general qualifications necessary for registration and establishes the registration fee.

Section 60D refers only to renewals and is not applicable to the intent under section 3."

In my opinion, the Board of Registration of Architects may properly proceed with its administration of the aforementioned statute as though the reference in St. 1941, c. 696, § 3, were to section 60B instead of section 60D.

The pertinent rule of law is that "legislative enactments are not, any more than any other documents, to be defeated on account of errors, mistakes, or omissions. Where one word or figure has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word or figure will be deemed substituted or supplied." *McLendon* v. *Columbia*, 101 So. Car. 48, 5 A. L. R. 990, and note, 997; *Coney* v. *Topeka*, 96 Kan. 46; *People* v. *Clute*, 50 N. Y. 451; *Claire* v. *State*, 68 Ind. 25; *Lowell* v. *Washington County R. Co.*, 90 Me. 80; *People* v. *Lord*, 9 N. Y. App. Div. 458; *Richards* v. *State*, 65 Neb. 808; *State* v. *Cross*, 44 W. Va. 315.

An examination of the statute now under consideration discloses beyond question the real intent of the Legislature with respect to the section intended to be referred to in St. 1941, c. 696, § 3. Thus, section 2 of chapter 696 inserts, in chapter 112 of the General Laws, sections 60A to 60J, inclusive. Section 60B specifies the requirements with respect to the citizenship, age and character of persons who may apply for registration as architects. Section 60C defines technical qualifications to be required of applicants for registration and the methods whereby the presence of such qualifications may be ascertained by the board of registration. Section 60D provides for the mechanics of re-registration of architects who have once been registered by the newly created board.

Section 3 of chapter 696 of the Acts of 1941 contains provisions for the registration of architects who apply for registration prior to January 1, 1943. This section relaxes, for the benefit of persons "complying with section sixty D" and applying for registration prior to that date, some of the requirements of section 60C. However, since section 60D refers to the mechanics of *re*-registration, it is obvious that the Legislature did not intend to require compliance with the provisions of that section as a prerequisite to *original* registration prior to January 1, 1943, under section 3. A careful examination of the entire statute makes it clear that significance can be given to the provisions of section 3 only by construing the clause "person complying with section sixty D" as though it read "person

complying with section sixty B." In my opinion, the statute must be so construed.

My conclusion as to the legislative intent, drawn from an examination of the entire statute, is confirmed by reference to the legislative history of the act. St. 1941, c. 696, derives from House Bill No. 2448. Section 3 of the current enactment was originally section 87RR of House Bill No. 2448, and in that section reference was made to persons complying with section 87QQ. As renumbered in the enacted law, the provisions of section 87QQ are found in section 60B. It is obvious, therefore, that the reference in section 3 of chapter 696 should have been to section 60B and not to section 60D.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Lease — Authority of Commission to Acquire Land by Leasing — Acceptance of Bond for Conveyance of Land.

JAN. 14, 1942.

Wachusett Mountain State Reservation Commission.

DEAR SIRS: — You have requested my opinion on the following question:

"Has the Wachusett Mountain State Reservation Commission the legal right to enter a lease for the use of approximately sixty acres of privately owned land which adjoins the State Reservation?"

The Wachusett Mountain State Reservation Commission was established by St. 1899, c. 378. Section 2 of said act is as follows:

"The commission is hereby authorized and directed to take, by purchase, gift or otherwise, land not exceeding three thousand acres in extent, situate on and about Wachusett mountain in the towns of Princeton and Westminster, and the land acquired under the provisions of this act shall be known as the Wachusett Mountain State Reservation. *The title to the same shall be and remain in the Commonwealth of Massachusetts.*" (Italics mine.)

Section 4 of said act is as follows:

"The commission shall have the same powers to acquire lands for the Wachusett Mountain State Reservation which are given to the metropolitan park commission, established by chapter four hundred and seven of the acts of the year eighteen hundred and ninety-three, and acts in amendment thereof or supplementary thereto, and shall be vested with full power and authority to care for, protect and maintain the same in behalf of the Commonwealth."

Your particular attention is called to the last sentence in section 2. This sentence appears to limit your power and authority to the acquisition of land in such manner that the title in the first instance shall be and shall thereafter remain in the Commonwealth of Massachusetts. G. L. (Ter. Ed.) c. 92, §§ 77 to 80 inclusive, and § 86, all as amended, set forth the powers of the Metropolitan Park Commission, now called the Metropolitan District Commission, to acquire lands. I call your attention to the fact that these powers granted to the Metropolitan District Commission do not include the limitation found in section 2 of the act establishing your Commission, namely, that the title to the lands acquired shall be and remain in the Com-

monwealth of Massachusetts. It therefore appears that the provision that the title be and remain in the Commonwealth of Massachusetts is peculiar to the act establishing your Commission. The General Court apparently intended you to have the same powers to acquire lands for the Wachusett Mountain State Reservation as are given to the Metropolitan District Commission, but expressly subject to the limitation that the title to the same shall be and remain in the Commonwealth of Massachusetts.

This same provision as to title appears in each of the following acts and resolves providing for the acquisition of additional land for the purposes of the reservation. St. 1901, c. 496; St. 1906, c. 512. Res. 1918, c. 39, is the only legislation providing for the purchase of additional land which does not expressly include the provision that title thereto shall be and remain in the Commonwealth. It may well be that the General Court felt this principle had been repeated so often there was no need of further repetition. The acts, special acts and resolves of the General Court from 1899 through 1941 have been examined. The methods provided by St. 1899, c. 378, for the acquisition of land by your Commission do not appear to have been changed or amended.

Since a lease of sixty acres of privately owned land adjoining the State reservation would not vest title to the land in the Commonwealth of Massachusetts in the first instance and would not cause title to remain in the Commonwealth thereafter, it appears that you have no authority to enter into such a lease. Your Commission is empowered to spend money for care and maintenance of the reservation. The authority for such expenditures appears to have been granted to you on the assumption that the money appropriated would be spent on property, the title to which was and would remain in the Commonwealth of Massachusetts, and, therefore, did not contemplate such expenditures on leased land, the benefits of which would revert to the lessor at the end of the term of the lease.

While you lack authority to lease the property in question, there appears to be another method whereby you may be able to acquire it without paying the purchase price at the present time. G. L. (Ter. Ed.) c. 92, § 79, gives the Metropolitan District Commission power to acquire land and rights in land by purchase, gift, devise, or eminent domain, or to take bonds for conveyance thereof. If you were to acquire said sixty acres of land by first obtaining a bond for conveyance thereof, such procedure would appear to satisfy the requirement set forth in the last sentence of St. 1899, c. 378, § 2. The taking of a bond for conveyance of the parcel looks to the acquisition of the title. The bond for the conveyance would be a preliminary step in acquiring the title. After such a title had been acquired it would remain in the Commonwealth. Therefore, acquisition by first taking a bond for the conveyance would appear to fall within the powers granted to you by the General Court.

Of course the acquisition of the adjoining sixty acres in question should not in any event cause the reservation to exceed the limit of three thousand acres established by St. 1899, c. 378, plus the later increases authorized by St. 1901, c. 496 ($25,000 for additional land and conditioning mountain roadway), by St. 1906, c. 512 ($5000 for additional land), and by Res. 1918, c. 39 and Spec. St. 1918, c. 149 ($800 for additional land).

Yours very truly,

ROBERT T. BUSHNELL, *Attorney General.*

Motor Vehicle — Title — Time of Passing — Contract of Sale.

JAN. 15, 1942.

HON. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — You have requested my opinion as to the time when title to an automobile passes from the seller to a buyer.

It appears from your letter making the request that it is not sought in connection with the performance of any of your duties but for the purpose of aiding Massachusetts automobile dealers to clarify an existing situation occasioned by an order of the federal authorities prohibiting the delivery of automobiles to vendees after January 1, 1942.

It has been the practice of my predecessors in office for many years, to decline to render opinions which do not deal with duties to be performed by the official requesting an opinion. (II Op. Atty. Gen. 100.) This is a salutary practice and one to which I have adhered.

In the present instance I realize the extent of the burden which the federal order places upon the legitimate business of automobile dealers and I deem it my duty to give them through you such assistance as I may, in so far as there may be no interference with the effective administration of all measures tending toward the vigorous prosecution of the war. It is difficult to perceive how my opinion with respect to a relatively simple question concerning the civil law of sales can be helpful to Massachusetts automobile dealers. However, upon the urgent representations of a representative of such dealers that my opinion may be of help to them in the existing emergency, I am complying with your request.

The uniform sales act, in force in many states of the Union, as embodied in G. L. (Ter. Ed.) c. 106, §§ 3–64, provides in section 20:

"(1) If the contract is to sell specific or ascertained goods, the property therein passes to the buyer at such time as the parties to the contract intend.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."

Section 21, in its applicable parts, provides:

"Unless a different intention appears, the following rules for ascertaining the intention of the parties as to the time when the property in the goods is to pass to the buyer shall govern:

Rule 1. If there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. If there is a contract to sell specified goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

. . . . . ."

From the foregoing statutory provisions it is plain that the time when title to an ascertained article of merchandise, such as a particular automobile selected by or allotted to a buyer, passes is determined by the intention of the parties to the transaction. *Brush* v. *New Bedford*, 250 Mass. 543, 545; *Scofield* v. *Barowsky*, 249 Mass. 1.

When there is an unconditional contract to sell such an automobile which is in a condition for delivery, title passes to the buyer when the contract of sale is made, regardless of when payment is to be made or delivery taken. If something still remains to be done to such an automobile before it is ready for delivery, title will pass only when it has been made ready. Both these rules prevail only when the parties to the contracts have not actually agreed that title shall pass at some other time. *Levinson* v. *Connors*, 269 Mass. 209; *Bondy* v. *Hardina*, 216 Mass. 44, 47; *Hecht* v. *Boston Wharf Co.* 220 Mass. 397; *Chickering & Sons* v. *M. Steinert & Sons*, 278 Mass. 156.

In each of the five illustrative, hypothetical cases of sales of automobiles to which you have called my attention in a memorandum annexed to the request submitted to me it appears that a particular car has been selected or assigned to a buyer by an automobile dealer and a contract of sale made, the buyer actually making payment, or a deposit, or delivery of another car in trade. No facts appear tending to show any intent on the part of the parties to the transaction that title shall not pass at the time of making the contract of sale.

It is plain that in each of these specific cases stated by you, title passed to the buyer at the time the contract of sale was entered into, either orally or in writing, irrespective of the fact that in certain of the cases stated the buyer was not by agreement to take delivery until January second.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Plumbers — Licenses — Examinations — Credit to Applicants Who Served in Army or Navy.

JAN. 20, 1942.

MRS. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — On behalf of the State Board of Examiners of Plumbers, you have asked my opinion upon the following question:

"Does chapter 317 of the Acts of 1919 (An Act relative to the granting of plumbers' licenses to certain soldiers and sailors) still apply to applicants for licenses who are now serving in the army or navy of the United States during the present war?"

I answer your question in the affirmative.

Gen. St. 1919, c. 317, § 1, reads:

"The state examiners of plumbers are hereby directed to grant a credit of five per cent to the examination standing of each applicant who has served in the army or navy of the United States in time of war and has been honorably discharged or released from active duty. This act shall apply to all applicants for examination by them who have taken the examination subsequently to the first day of January in the year nineteen hundred and nineteen and before the date on which this act takes effect, and to all applicants whose applications are hereafter filed within one year of their discharge or release as aforesaid."

The foregoing statute is not limited by its terms to applicants for licenses who served in the army or navy in time of war before the enactment of the statute. It is of general prospective effect. The phrase in the statute "who has served" does not refer to a service prior to 1919, but describes service rendered by an applicant at any time prior to an examination.

If and when any person now serving in the army or navy in the present war takes an examination for a plumber's license, he will be entitled to the credit of five per cent provided for by the statute.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Board of Parole — Office — Approval of Accounts.

JAN. 20, 1942.

Mr. WALTER S. MORGAN, *Comptroller.*

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

"(1) Does the Board of Parole as created by General Laws (Ter. Ed.) chapter 27, section 5, as amended, constitute an office within the meaning of chapter 29, section 20, so that I can accept, upon its accounts or demands submitted to me for payment, the approval of the majority of its members?

(2) If the answer to the previous question is in the negative, how should such accounts or demands be approved that I may put them in line for payment?"

I answer your first question in the affirmative. Since your first question is so answered, your second question does not require an answer.

G. L. (Ter. Ed.) c. 29, § 20, is as follows:

"No account or demand requiring the certificate of the comptroller or warrant of the governor shall be paid from an appropriation unless it has been authorized and approved by the head of the department or office for which it was contracted; nor shall any appropriation be used for expenses, except gratuities and special allowances by the general court, unless full and properly approved vouchers therefor have been filed with the comptroller."

Pub. Sts. c. 16, § 29, contained provisions similar to those above quoted, but the word "bureau" was employed therein in place of the word "office" now appearing in line 4 of said section 20 in the phrase "the department or office."

Rev. Laws, c. 6, § 30, also contained provisions similar to those of said section 20, but employed the word "board," instead of the word "bureau," in place of the word "office" as now appearing in line 4 of said section 20.

The words "office" and "offices" are employed in contradistinction to "departments" in section 5A and section 29, as amended, of said chapter 29.

I am of the opinion that as used in said section 20, line 4, the word "office" in the phrase "the department or office" means a board either outside one of the departments of the Commonwealth or, if placed within one of such departments, expressly or by implication removed from the control of the head of a department.

G. L. (Ter. Ed.) c. 27, § 5, as amended by St. 1937, c. 399, with relation to the Department of Correction and the Parole Board, provided:

"There shall be in the department a parole board, consisting of five members, two of whom shall be women. . . .

With the approval of the commissioner, said board may expend annually from the appropriation for contingent and other expenses of the department a sum not exceeding two hundred dollars for examination by physicians of prisoners whose cases come before said board for action."

Section 4 of said chapter 27 provided that the Commissioner of Correction should appoint the agents of the Parole Board and should approve their bills for expenses.

In 1941, by chapter 690, the Legislature made new provisions with respect to the Parole Board by repealing said section 4 and inserting a new section 5A in said chapter 27. This new section authorized the Parole Board itself to appoint employees and agents. Said new section further provided that the expenses of such agents shall be paid after their bills "have been approved by said *board*," and also provided that the Commissioner of Correction shall require one of the Deputy Commissioners to supervise the work of such of the agents, employees and parolees *as the board may designate "subject to the direction of the board."*

By section 8 of said chapter 690 the Legislature further provided that agents and other employees of the Department of Correction, assigned by it to matters relating to parole, should be transferred to serve under the Parole Board.

It is plain from the action of the Legislature in repealing said section 4 of chapter 27, and enacting the provisions of the new section 5A of chapter 27, that the Parole Board is removed from the control of the Department of Correction or its Commissioner.

It follows that since the Parole Board may properly be termed an "office," as the quoted word is used in G. L. (Ter. Ed.) c. 29, § 20, approval of its accounts or demands by the Board should be accepted by you as in compliance with the provisions of said section 20.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Pardon — Records of Convictions in Office of Commissioner of Probation.

JAN. 21, 1942.

Hon. ALBERT B. CARTER, *Commissioner of Probation.*

DEAR SIR: — You have informed me that a certain person was, on March 11, 1920, convicted of larceny and sentenced to eighteen months in a House of Correction; that on December 17, 1941, the Governor, with the advice and consent of the Council, granted to him a full and complete pardon for the offense.

You advise me that this person has requested "that the foregoing offense be expunged from the record information in this office forwarded by the probation offices under General Laws, chapter 276, sections 99–100."

You have asked my opinion upon the following questions:

"1. Does such a full and complete pardon wipe out the record which the recipient has incurred?"

I answer this question in the negative.

Although a full and complete pardon is regarded as blotting out the determination of guilt involved in the conviction, it does not obliterate existing facts. The record of the recipient of the pardon is not changed or altered concerning matters and proceedings which have actually occurred, except in so far as the effect of the determination of guilt which is a part of such record is concerned.

Your second question is:

"2. Should this office expunge such record information from its record?"

I answer this question in the negative.

G. L. (Ter. Ed.) c. 276, §§ 99 and 100, provide for the collection of data by the Board of Probation and the keeping of records of judicial proceedings connected

with the work of probation officers and of said Board under rules and regulations made by it. No provision of the statutes relating to your Board requires the expunging of such record information from your files under any particular circumstances, and no such requirement arises by implication from enactments concerning pardons or from the fact of the granting of a pardon.

Your third question is:

"3. Should this office only note the fact of the pardon on the record in its files?"

It is the duty of your Board, for the purpose of keeping its records in proper form and in justice to the recipient of a pardon, to note the fact of the granting of the pardon on the record in its files relating to the recipient.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Classification Plans for Municipalities — Authority of Director — Promotional Examination.

JAN. 21, 1942.

Commissioners of Civil Service.

GENTLEMEN: — You have asked me four questions involving the interpretation and application of G. L. (Ter. Ed.) c. 31, § 2A (b), which reads:

"In addition to other duties imposed by this chapter and chapter thirteen, the director shall — . . .

(*b*) Establish, with the approval of the commission, classification plans for all cities and towns subject to the provisions of this chapter;"

From a supplementary memorandum by the Director of Civil Service attached to your request, it appears that questions have arisen at this time in connection with a classification plan made by him of the positions of municipal employees in the City of Springfield. While the problems raised by your request were under consideration by this department, a Springfield attorney, representing some of the employees who are or may be affected by the classification plan and subsequent action taken in connection therewith, conferred with members of my staff. Since then the attorney has instituted litigation seeking to invalidate the classification plan which has been made for Springfield, and to prevent any action being taken under it.

Because of this situation I deem it in the public interest to answer your questions briefly, without setting forth a detailed analysis of the pertinent legal considerations leading to my conclusion.

Your first question reads:

"Has the Director of Civil Service, with the approval of the Commission, the right to establish classification plans for any city or town where Civil Service applies in the Commonwealth, under G. L. c. 31, § 2A (*b*), without the approval of the Governor and Council?"

I answer this question in the affirmative. The provisions of G. L. (Ter. Ed.) c. 31, § 2A (*b*), authorize the Director, with the approval of the Commission, to establish "classification plans for all cities and towns." The quoted phrase does not limit the Director to establish a single plan which shall be applicable to each

and every city or town, but authorizes him to establish such a plan for any municipality according to its peculiar requirements. It is not required that the establishment of such a plan or plans shall have the approval of the Governor and Council.

Your second question reads:

"In establishing these classification plans under G. L. c. 31, § 2A (*b*), is it necessary that they conform with the classification set up by Civil Service Rule 4?"

The phraseology of the statute is not wholly clear in this respect but I am of the opinion that the "classification plans" established by the Director are not required to conform with the classes and grades established by the classification made in the rules of the Commission.

Your third question reads:

"What limitation, if any, does G. L. c. 31, § 3, place upon the right of the Director of Civil Service, with the approval of the Commission, to establish classification plans as provided in section 2A (*b*) thereof?"

This question as put by you is very broad. It does not refer to any particular limitation which may be involved nor to any which is required to be considered in the performance of any duty at the present time. This being so, the Attorney General must properly refrain from attempting at this time to answer the question in its present form.

Your fourth question reads:

"Upon the establishment of classification plans with the approval of the Commission under G. L. c. 31, § 2A (*b*), has the Director of Civil Service the right to determine whether an employee whose position has been reclassified to a higher grade in accordance with the duties performed shall be required to take an examination for promotion under G. L. c. 31, § 15?"

G. L. (Ter. Ed.) c. 31, § 15, provides, in part:

"No person shall be appointed or promoted to any position in the classified civil service except upon requisition by the appointing officer and upon certification by the director from an eligible list prepared in accordance with this chapter and the rules and regulations made thereunder."

Rule 28 of the Rules and Regulations of your Commission entitled "Promotion," provides, in part:

"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 non-competitive examination, as the Commissioner may decide, except as otherwise required by statute.

2. So far as practicable, such promotions shall be made by successive grades; and no person shall be designated for promotion or examined until he shall have served at least six months in the lower position except by special order of the Commissioner."

While the matter is not entirely without doubt and although the provisions of G. L. (Ter. Ed.) c. 31, §§ 2A and 3, and the terms of the Civil Service Rules are in some respects ambiguous, nevertheless I am of the opinion that the Director,

upon the establishment of an approved classification plan or plans, has the right to determine whether an employee, whose position has been classified in a higher grade than formerly, in accordance with the duties performed, shall be required to take an examination for promotion under said Rule 28.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Department of Mental Health — Commissioner — Travel of Patients Who Are Enemy Aliens.

JAN. 22, 1942.

Dr. CLIFTON T. PERKINS, *Commissioner of Mental Health.*

DEAR SIR: — You have asked me to advise you as to your duties under the laws of the United States, with relation to the travel of such of the patients in the institutions under your department as are deported to other states or permitted to go from an institution to some other place within the Commonwealth.

It is your duty to notify the office of the United States Attorney for the District of Massachusetts, at Boston, whenever it is desired to have a patient, who is an enemy alien, travel from an institution to another place either inside or outside Massachusetts, and to obtain a permit authorizing such travel before such patient is permitted to leave an institution.

The President of the United States, by Proclamations 2525–2527, inclusive, made on December 8 and 11, 1941, under authority of 50 U. S. C. §§ 21–24, provided that "with respect to the continental United States, . . . an alien enemy shall not change his place of abode . . . or otherwise travel or move from place to place without full compliance with any such regulations as the Attorney General of the United States may, from time to time, make and declare." In these proclamations citizens of Japan, Germany and Italy were specifically designated as enemy aliens.

The United States Attorney for this district advises us that the regulations made by the Attorney General under these proclamations, the text of which is not yet available to us, include as enemy aliens citizens of what were Austria and Hungary, as well as citizens of Japan, Germany and Italy, but not citizens of other countries. The regulations further provide that any foreign citizen must obtain a permit from a United States Attorney in one of the Federal districts before he may travel from one place to another within the United States.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

State Retirement Board — Contributions from Members — Military or Naval Leave.

JAN. 23, 1942.

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

DEAR SIR: — You have informed me that:

"Many of our employees who are now in military service have been contributing from their own funds the monthly assessment in the State Retirement System and some of these employees desire to continue their contributions as 3% interest is guaranteed on these funds."

You have asked my opinion upon two questions.

Your first question is:

"May the State Retirement Board continue to accept contributions from members who are on military or naval leave?"

I am of the opinion that the State Retirement Board may not accept contributions from members of the State Retirement System who have left the service of the Commonwealth since January 1, 1940, or who may hereafter leave it, for the purpose of serving in the military or naval forces of the United States and who do so serve or are rejected for such service, until their re-employment in the service of the Commonwealth.

St. 1941, c. 708, § 1, provides that any person who, on or after January 1, 1940, terminates his service with the Commonwealth for the purpose of serving in the United States Army or Navy, and so serves or is rejected for such service, shall be deemed to be or to have been on leave of absence and not to have resigned from his office until one year from the termination of his military or naval service.

Section 8 of said chapter 708 provides that no person referred to in section 1, who has been or is separated from his office while a member of the State Retirement System, shall be considered to have terminated his membership in such system until one year from the termination of his military service.

Section 9 of said chapter 708 provides that any person referred to in section 1, when reinstated or re-employed in the service of the Commonwealth, shall have the period of his military or naval service credited to him as creditable service under the retirement system, and that the Commonwealth shall pay into the retirement system the amount which such person would have contributed if his employment had not been interrupted by his military or naval service.

It is plain from these statutory provisions, particularly from those which provide for the payment by the Commonwealth of those contributions to the system which an employee would have made himself if he had not left to enter the army or navy, that it is the intent of the statute that an employee himself shall not continue to make contributions while in the army or navy.

Your second question is:

"Shall contributions made by members of the State Retirement system who are on military or naval leave and who made contributions prior to October 29, 1941, be refunded by the State Retirement Board?"

I am of the opinion that the contributions made by members of the system who are on leave of absence under the provisions of said St. 1941, c. 708, § 1, should be refunded.

Since, as I have indicated, it is the intent of the statute that the Commonwealth itself shall ultimately pay the contributions otherwise due from members of the system in the military or naval service, it follows that payments of such contributions are not due from members themselves while in the military or naval service. The effect of the statute is retroactive in this respect to January 1, 1940. Any contributions made by members since entering the military or naval service at any time since January 1, 1940, were not required by law to be made or received and they should be refunded.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

State Employee — Receipt of Two Salaries — Salary Not Received from the Treasury of the Commonwealth.

JAN. 27, 1942.

Dr. PAUL J. JAKMAUH, *Commissioner of Public Health.*

DEAR SIR: — You have informed me that a certain physician is chief of a clinic of the Boston Dispensary and as such receives a salary paid to him by the Dispensary, which is not a State institution. You also state that the Dispensary is reimbursed through one of the divisions of your department for all its expenses, including salaries, from funds contributed by the Commonwealth or derived from Federal grants.

You inquire as to whether the fact that this physician receives, and will continue to receive, a salary from the Boston Dispensary, for which the Dispensary is reimbursed by funds so contributed by the Commonwealth or the Federal Government, prevents his appointment as a part-time salaried assistant director of one of the divisions of your department.

I am of the opinion that the fact that this physician receives, and will continue to receive, a salary from the Boston Dispensary, under the stated circumstances, will not of itself make unlawful his appointment as a part-time employee of the Commonwealth in your department, drawing a salary from the Commonwealth.

G. L. (Ter. Ed.) c. 30, § 21, provides:

"A person shall not at the same time receive more than one salary from the treasury of the commonwealth."

The salary which this physician will receive from the Boston Dispensary, under the stated circumstances, will be paid by that institution, although the institution will be reimbursed by the Commonwealth for a part or the whole of the amount which it expends for such salary. Under the stated circumstances, such salary is not received from the "treasury of the commonwealth" as the quoted words are used in said section 21, but from the institution. It follows that the receipt by this physician of salary from the Commonwealth, as a part-time employee, in addition to such salary from said institution, will not fall within the prohibition of said section 21 against the receipt of more than one salary from the Treasury of the Commonwealth.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Milk Control Board — Power to Revise Orders — Statutory Construction — Effective Date of Order.

JAN. 27, 1942.

Milk Control Board.

GENTLEMEN: — You have requested my opinion on three questions, quoted below, relating to the administrative powers of the Milk Control Board. Prior to November 30, 1941, the authority of the Board was derived from St. 1934, c. 376, as amended, known as the "Massachusetts Milk Control Law." That law was superseded on November 30, 1941, by St. 1941, c. 691, which contains three principal subdivisions pertinent to the questions which you ask.

Section 1 of said St. 1941, c. 691, inserts in chapter 20 of the General Laws three new sections establishing your Board, defining the qualifications of its members and stating its general powers. Section 2 of the 1941 act provides for the insertion of an entire new chapter (c. 94A) in the General Laws, to be known and cited as the "Milk Control Law." This new chapter, which comprises twenty-seven sections, contains detailed provisions concerning regulation of the milk industry. Section 3 of the 1941 act repeals the provisions of the existing Milk Control Law but provides that "to the fullest extent possible conformably to its terms, this act shall be construed as a continuation of said provisions and not as a new enactment." It also contains a provision with respect to the continuance, revision or modification of orders issued under the earlier act, with which I shall deal specifically below.

With the foregoing general description of the new law, I now turn to your specific questions in a slightly different order from that in which they were set out in your letter.

1. You have stated one of your questions as follows:

"May the Milk Control Board on or after November 30, 1941 and before May 31, 1942 alter, amend or revise an order establishing wholesale or retail prices issued prior to November 30, 1941 without a petition in writing as described in section 12 of chapter 94A, as amended effective November 30, 1941?"

In my opinion, the Milk Control Board does not have unlimited authority to alter or revise such an order from time to time, without a petition of the type described in chapter 94A, section 12, but it may do so where such alteration or revision is an integral part of a review (1) made upon the Board's own motion once in each year, or (2) made on the order of the Governor, or (3) made on the request of the Milk Regulation Board.

St. 1941, c. 691, § 3, provides that all orders, rules and regulations adopted by the Board under the prior law "shall continue in force after the effective date of this act unless and until suspended, revised, rescinded, cancelled or revoked by the milk control board pursuant to section nine of chapter twenty and any pertinent provisions of chapter ninety-four A of the General Laws," except that such resale price orders shall not continue in force for more than six months after said effective date. While chapter 20, section 9, referred to in the foregoing quotation, speaks of orders, rules and regulations in general, the entire tenor of the new act, as of the previous one under which the orders in question were issued, demonstrates a legislative intent that price-fixing orders be governed by sections specifically dealing with them. That being so, section 12 of the new Milk Control Law must be regarded as one of the "pertinent provisions of chapter ninety-four A" governing the suspension, revision or revocation of resale price orders issued under authority of the old law. The answer to your question, quoted above, thus lies in the correct interpretation of said section 12, which reads as follows:

"Upon petition in writing, with an affidavit that it is signed by not less than fifty-one per cent of the Massachusetts producers who, during the month of April in the license year next preceding that in which such petition is filed, delivered milk for sale or distribution as fluid milk in any market, requesting the board to establish minimum prices, wholesale or retail, or both, for milk for such market, and if, upon making such examination and investigation as is authorized by this chapter, and after public hearing held after due notice, the board finds at the close of such hearing that such petition is signed by not less than fifty-one per cent of such pro-

ducers who, during said month or such subsequent month as the board may find is a more representative period, delivered milk for sale or distribution as fluid milk in said market, that the price to the producer established under authority of this chapter or by any agreement, license, regulation or order made or issued pursuant to any federal law, cannot otherwise be maintained, and that the maintenance of such price is necessary in order to ensure a regular, continuous and adequate supply of fresh, pure milk sufficient to meet the requirements of said market and to protect the public health therein, the board may declare, subject to approval of the milk regulation board, that a state of emergency exists. The board may thereon issue such orders, rules and regulations as may be necessary, including the fixing by official order of minimum wholesale or retail prices, or both, for milk sold within the market affected, irrespective of where such milk is produced. *The board may in like manner at any time alter, revise, amend or rescind the prices so fixed. Any such action shall be reviewed by the board at least once in each year, or at any time on the order of the governor or on the request of the milk regulation board.* Due notice shall be given of any such review. Every price fixed pursuant to this section, and any alteration, revision or amendment thereof, shall be fair, just and reasonable and shall be published as provided in section twenty-two."[1]

One problem of statutory construction involved herein is whether or not the words "*in like manner,*" used in the sentence of section 12 which confers authority upon the Milk Board "at any time" to "alter, revise, amend or rescind" orders fixing wholesale and retail prices of milk, refer back to the requirement of a petition of the type described in the first sentence of said section 12. In my opinion, the relative position of the words "in like manner" in section 12, and the entire context of that section, require that the words be construed as a limitation upon the Board's *general* authority to alter, revise or amend orders fixing minimum resale prices. Consequently, such alteration, revision or amendment is permitted only upon compliance with the procedure prescribed by earlier provisions in the section as conditions precedent to the original issuance of such orders. A contrary construction would give the Board authority to fix new minimum wholesale and retail prices of milk from time to time for an indefinite period in the future simply because such prices had been fixed on one occasion at a time when the conditions precedent were found to exist.

This construction follows the fundamental principle of statutory interpretation that a particular phrase or part of a statute is to be construed in harmony with the intent of the Legislature disclosed by the whole statute, to the end that the legislation be made workable and effectual. *Holbrook* v. *Holbrook*, 1 Pick. 248; *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271; *Morrison* v. *Selectmen of Town of Weymouth*, 279 Mass. 486.

My conclusion as to the correct interpretation of G. L. (Ter. Ed.) c. 94A, § 12, as inserted by St. 1941, c. 691, § 2, is supported by the legislative history of the statute, which may properly be considered in determining the construction to be placed upon its words. *Hood Rubber Co.* v. *Commissioner of Corporations and Taxation*, 268 Mass. 355, 358; *Carlos Ruggles Lumber Co.* v. *Commonwealth*, 261 Mass. 445, 447, 448; *Loring* v. *Young*, 239 Mass. 349, 367, 368.

The earlier counterpart of the new chapter 94A, section 12, was St. 1934, c. 376, § 15 (C), as amended, which specifically provided that the Board "may in like manner, *but without petition as aforesaid,* alter, revise, amend or rescind the prices" fixed thereunder. House Bill No. 2325 (1941) provided, in the section correspond-

[1] The provisions for publication appear in section 19 of chapter 94A rather than in section 22 thereof. The statute is to be construed as if the correct section number were referred to in section 12, above.

ing to said section 12, that "the board may in like manner at any time alter, revise, amend or rescind the prices so fixed." House Bill No. 2325 was amended by House Bill 2728, which inserted in the corresponding section, after the phrase "in like manner," the words "but without petition as aforesaid." The words "but without petition as aforesaid" were stricken from said section 12 prior to its enactment, thereby disclosing a specific intention on the part of the Legislature that such a petition be required as a condition precedent to the Board's authority "at any time" to "alter, revise, amend or rescind" wholesale and retail prices of milk.

The meaning which I ascribe to the words "in like manner" harmonizes with the other provisions of the statute and is not an impracticable one. If a situation should arise in which the public welfare would be imperiled if the Board were required to delay revision of such price-fixing orders pending the preparation, circulation and filing of such a petition, appropriate action by the Board would be possible under another provision of said section 12. I refer to the following sentence contained therein:

"Any such action shall be *reviewed* by the board at least once in each year, or at any time on the order of the governor or on the request of the milk regulation board."

In my opinion, the Board's power and duty of review, as limited by the quoted sentence, include the power to revise an existing fixed minimum wholesale or retail price. Both in its ordinary and its legal meaning the word "review" may include "revise." Webster's International Dictionary; Bouvier's Law Dictionary (3rd rev.) 2954. The words of a statute are to be construed according to their common and approved usage. *Sayles* v. *Commissioner of Corporations and Taxation*, 286 Mass. 102; *Sampson* v. *Treasurer and Receiver General*, 282 Mass. 119. G. L. (Ter. Ed.) c. 4, § 6. The word "review" should be so construed as to accomplish the apparent intent of the Legislature disclosed by the whole statute. *City of Somerville* v. *Commonwealth*, 225 Mass. 589; *National Fire Ins. Co.* v. *Goggin*, 267 Mass. 430; *Lowell Co-operative Bank* v. *Dafis*, 276 Mass. 3. G. L. (Ter. Ed.) c. 4, § 6. An interpretation of the word "review" as merely requiring the Board to go over a previous price-fixing order and not including authority to revise such an order would give that word an empty meaning and the Board an ineffectual authority, in disregard of the principles of statutory construction set forth above.

Consequently, if the emergency requiring a prompt revision of such orders were to arise before the Milk Control Board had exercised its statutory authority to make one "review" in each year without a petition, it could proceed to act under that authority. If the Board had already made a "review" without petition during the year, the facts with respect to the emergency could be laid before the Governor or the Milk Regulation Board, who could then order or request that a review be made by the Milk Control Board without the necessity of a petition.

2. Another question on which you have asked my opinion reads as follows:

"May the Milk Control Board acting under the provisions of section 12 of chapter 94A, as amended effective November 30, 1941, or prior to that date acting under the similar provisions of chapter 94A as now existing, for those Massachusetts markets in which the price to be paid to the producer is dependent upon a price fixed by marketing agreement or order issued pursuant to relevant Federal law, fix by official order two or more alternative schedules of wholesale and retail prices to be charged by milk dealers, with provisions for determining which particular

schedule shall be applicable during any particular period, depending upon the automatic increase or decrease in the price required to be paid by the milk dealer to the producer under the provisions of such Federal order or agreement?"

This question has been amplified in some respects by a proposed form of order which has been submitted to me by the secretary of your Board. Thus, the proposed form sets forth several specific producer prices which may become applicable under an existing federal agreement or order, and specifies which of the several schedules of wholesale and retail prices, prepared by your Board and contained in said form of order, shall apply while each of the specified federal producer prices prevails. The proposed form of order submitted to me also provides that a shift from one schedule of wholesale and retail prices to another shall be preceded by at least three days' notice and publication in the manner prescribed by section 19 (*a*) of said chapter 94A.

In so far as the form of order submitted to me indicates the type of alternative orders which you propose, I am of the opinion that you may lawfully issue such orders.

Having been informed by the secretary of your Board that no such order was in fact issued before November 30, 1941, I must conclude that that part of your question relating to the period prior to that date is hypothetical and need not be considered.

The provisions of said chapter 94A clearly indicate that the Legislature contemplated that there should be a correlation between federal producer prices of milk and Massachusetts wholesale and retail prices fixed by your Board. Sections 23 and 24 thereof provide for various forms of co-operation with other States and with the United States for the purpose of attaining uniform milk control. Moreover, retail and wholesale prices of milk can be fixed by the Board only when producer prices established by state or federal regulation cannot otherwise be maintained (§ 12). The Board is required by section 10 of said chapter 94A to take into consideration, in the exercise of its price-fixing powers, "all the conditions affecting the milk industry, including the amount necessary to yield a reasonable return to the producer and the milk dealer." Said section 10 further provides that "in establishing minimum prices for milk under this chapter the board shall cause said prices to be fair, just and reasonable."

In order to satisfy the requirements of the statute and to accomplish the result sought by it, resale prices fixed by the Board must necessarily fluctuate together with changes in producer prices fixed by either state or federal regulation. Obviously, in the event of a change in the producer price, a wholesale or retail price of milk previously fixed by the Board would either cease to yield a reasonable return to the dealer or enable him to make an excessive profit. In either case, a wholesale or retail price which remained static in spite of a change in the Federal producer price fixed for the same market would not be "fair, just and reasonable."

Federal orders issued, or marketing agreements made, pursuant to Public Act No. 10, 73rd Congress, as amended and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, occasionally provide for an automatic increase or decrease in producer prices, depending upon a change in the price of some other dairy product. For instance, a "tentatively approved marketing agreement," dated September 27, 1941, now in operation and regulating the handling of milk in Greater Boston, provides for an increase from $3.63 per hundred weight

to $3.86 per hundred weight in the event that "92-score butter, wholesale at New York, average of daily quotations of the United States Department of Agriculture for thirty days immediately preceding the twenty-fifth day of each month" should exceed forty cents per pound.

In view of the comparatively slow and cumbersome procedure prescribed by said chapter 94A for issuing new resale price orders either upon petition or on review it would not be possible for your Board to effect, by new orders, prompt adjustments in wholesale and retail prices of milk fixed by your Board, when such adjustments are necessitated by automatic changes in a federal producer price which might occur under an existing federal agreement or order of the character referred to above. Section 16 (*b*) requires that a general hearing must be held by you and an opportunity to offer evidence must be afforded to all interested persons "before adopting, altering or rescinding any general order." Seven days at least before any general hearing, the Board must publish in a manner prescribed by said section 19 (*a*) a notice containing a brief but sufficient statement of the subject matter of such hearing (§ 17 (*a*)). Section 17 (*b*) requires that three days at least before any general order shall become effective, it must be published as prescribed in section 19 (*a*).

If said chapter 94A were construed as not empowering the Milk Control Board to issue, under the specified circumstances and conditions, the type of order which you propose, the legislative purpose disclosed by the provisions set forth above and by the statute as a whole would be thwarted, contrary to the cardinal principle that a statute is to be interpreted so as to accomplish the apparent intent of the Legislature and to make it a workable and effectual piece of legislation. *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271, 276; *Dascalakis* v. *Commonwealth*, 244 Mass. 568, 570.

3. A third question reads:

"Under the provisions of chapter 94A as now existing or as amended effective November 30, 1941, may the Milk Control Board publish a general order, rule or regulation adopted by the board by posting a copy thereof for public inspection in the main office of the Board on a business day and have it effective upon the fourth business day next succeeding, provided the provisions with respect to mailing and filing with the State Secretary are complied with?"

Such orders, rules and regulations may, in my opinion, not only become effective on the fourth business day following the completion of the prescribed publication thereof, but may also be made effective on the third following business day.

The statutory provision applicable to orders issued prior to November 30, 1941, is found in section 9 of St. 1934, c. 376, as amended, which reads in part as follows:

". . . Every such general rule, regulation or order shall be posted for public inspection in the main office of the board at least three days before it shall become effective, and a copy thereof shall be mailed to each licensee deemed to be affected thereby, and shall be further published by advertisement in a newspaper or otherwise, as the board deems advisable. . . ."

The pertinent provisions operative on and after November 30, 1941, are contained in G. L. (Ter. Ed.) c. 94A, §§ 17 (*b*), 17 (*e*) and 19 (*a*). As already noted above, subsection (*b*) of said section 17 requires that at least three days before "any general order, rule or regulation adopted by the board shall become effective," it shall be

published in the manner prescribed by subsection (*a*) of section 19. Subsection (*e*) of said section 17 provides that: "In computing a period of notice required or authorized under this chapter, Sundays and legal holidays shall be excluded."

In determining the day upon which any general order, rule or regulation shall become effective, the day upon which publication is made should be counted as one of the three days required by the statute. In *Lane* v. *Holman*, 145 Mass. 221, the court said at page 222:

"In construing statutes which provide for the service of process, or of notice, when the process is required to be served, or the notice to be given, a certain number of days before the return day, the days have been reckoned by excluding the return day, and including the day on which the process is served or the notice given, and fractions of a day have not been regarded."

The same rule was recognized in *Corey* v. *National Ben Franklin Fire Ins. Co.*, 284 Mass. 283, 286, and in *Stewart* v. *Griswold*, 134 Mass. 391, and *Bemis* v. *Leonard*, 118 Mass. 502, 507.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Municipal Commissioner of Public Welfare — Examination Pursuant to Merit System Rules — Right to Classification.

FEB. 4, 1942.

Hon. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You recently requested that I advise you concerning the status of a certain person, who formerly occupied the position of commissioner of public welfare in a city named by you. More particularly you inquired whether he is now entitled, under St. 1941, c. 402, to be classified on the records of your office as holding that position under civil service, and whether, in view of the facts related by you, the said individual should be restored to his position, which he does not now occupy.

The material facts upon which my opinion is requested are these: The person to whom you referred was appointed, on February 6, 1939, to the position of commissioner of public welfare for a term of two years, in accordance with the provisions of the city charter. At the expiration of his term in February, 1941, another person was appointed to his position, and has occupied it since that time. However, on September 21, 1940, the person in question had taken the examination given pursuant to the Merit System rules which had theretofore been promulgated by the Department of Public Welfare of Massachusetts. The results of that examination were not announced until September 5, 1941. The position which he occupied on April 15, 1940, and at the time he took the examination, is one of the positions which was brought within the scope of the Civil Service Laws by chapter 402 of the Acts of 1941, as amended.

In my opinion, the individual concerning whom you inquired is not entitled to be restored to his former position or to be classified on your records as occupying said position.

The rights of persons who took the Merit System examination, so called, on September 21, 1940, are defined by St. 1941, c. 402, § 5, which took effect June 24, 1941. Said section 5 reads as follows:

"Every person on *said effective date holding a position* referred to in section one and made subject to said chapter thirty-one by said section one who was an incumbent thereof on April fifteenth, nineteen hundred and forty, and has taken a qualifying examination pursuant to the provisions of 'Rules for a Merit System in Massachusetts covering Old Age Assistance and Aid to Dependent Children' promulgated by the department of public welfare, a copy of which is on file in the office of the state secretary, *shall, from said effective date, have unlimited tenure thereof* as provided in said section one, subject to the condition that if he fails to pass said examination his position, if not previously vacated, shall thereupon become vacant." (Italics mine.)

From the facts which you have stated, it appears that the individual in question ceased to hold said position in February, 1941, and that, consequently, he does not come within the purview of said section 5.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Metropolitan Water District — Stand-By Charges on Municipalities — Construction of Statute.

FEB. 5, 1942.

Hon. EUGENE C. HULTMAN, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have called my attention to the fact that St. 1941, c. 727, "requires certain municipalities, not members of the Metropolitan Water District, which have for many years enjoyed the protection of connections to the Metropolitan Water System and which have been furnished a free stand-by protection, to annually pay a stand-by charge."

You have asked my opinion as to whether another class of municipalities which is outside the Metropolitan Water District but which has connections with the systems of municipalities that are members of the Metropolitan Water District, should be assessed the stand-by charge.

I am of the opinion that no authority exists for assessing a "stand-by" charge upon the latter class of municipalities.

The Legislature, in said St. 1941, c. 727, entitled "An Act relative to the furnishing of water to towns in the Metropolitan Water District and certain other towns," has dealt comprehensively with the matter of municipal payments of annual charges for connections to the Metropolitan Water System. It has specified the class of municipalities, not members of the Metropolitan Water System, which shall be assessed a charge for connection with the water system, namely: towns already having a connection with the Metropolitan Water System (with certain exceptions not here material) and any towns which make application for such connection, provided that any such towns are eligible to membership in the Metropolitan Water District by reason of their location or, if not so eligible, are located so that they can reasonably be supplied with water from any distributing reservoir of said district, and have at any time requested or been furnished a supply of water from said district.

The statute does not include within the towns which may be so assessed those municipalities which do not have or have not applied for connections with the system of the Metropolitan Water District itself, although they have connections with the systems of municipalities that are members of the Metropolitan Water District.

Such a specific designation by the Legislature of a particular class of municipalities to be subject to an assessment, under familiar principles of statutory construction, impliedly excludes from liability for such an assessment any other class or classes of municipalities, whatever benefit they may derive indirectly from the Metropolitan Water System.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Division of Parks — State Parks and Forests — Licenses from Local Authorities.

FEB. 5, 1942.

Mr. EDGAR L. GILLETT, *Director, Division of Parks and Recreation.*

DEAR SIR: — You have asked me if it is necessary for the Division of Parks and Recreation in the Department of Conservation to obtain licenses from local authorities to maintain picnicking, camping and log cabins, which it operates in State parks and forests.

My answer is in the negative.

G. L. (Ter. Ed.) c. 132A, § 3, authorizes the Commissioner of Conservation to "acquire for the commonwealth . . . any lands suitable for purposes of conservation or recreation . . . and [to] lay out and maintain such lands for such purposes and erect and maintain such structures and other facilities thereon as may be necessary to render such lands reasonably available and accessible therefor."

It is further provided in section 7 of said chapter (as amended by St. 1941, c. 722, § 11) that "the commissioner, with the approval of the governor and council, may make rules and regulations for the government and use of all property under the control of the division. . . ."

G. L. (Ter. Ed.) c. 140, § 188, provides that "the aldermen . . . or the selectmen may grant a license to any person to establish, let, keep open and maintain a grove to be used for picnics. . . ."

St. 1939, c. 416, amending G. L. (Ter. Ed.) c. 140, and as further amended by St. 1941, c. 396, states "No person shall conduct, control, manage or operate, directly or indirectly, any recreational camp, overnight camp or cabin or trailer camp unless he is the holder of a license granted" by the board of health of any city or town.

In maintaining on State parks and forests grounds any structures for picnicking and camping the Commissioner "is acting as the agent of the State in exercising the authority of the sovereign over its own property. . . . Such an act must be regarded as needful in the proper execution of the powers which the State may exercise over its own property; and the general law made for the regulation of citizens must be held subordinate to this special statute regulating the use of the property of the State unless there is express provision to the contrary." *Teasdale* v. *Newell, &c. Construction Co.*, 192 Mass. 440, 443. See also III Op. Atty. Gen. 265; V Op. Atty. Gen. 128; Attorney General's Report, 1932, p. 86; *ibid.* 1933, p. 65; *ibid.* 1939, p. 42.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Commissioner of Correction — Parole — Period of Time Between Conditional Release and Return to Prison.

Feb. 6, 1942.

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

Dear Sir: — You ask my opinion regarding the interpretation of the recently enacted statute conferring upon the Commissioner of Correction jurisdiction over the parole of prisoners sentenced to penal institutions of the Commonwealth for drunkenness. That statute (G. L. (Ter. Ed.) c. 127, § 136A, as inserted by St. 1941, c. 690, § 2) reads as follows:

"The commissioner may grant, upon such terms and conditions as he may prescribe, a conditional release to any prisoner in a penal institution of the commonwealth who is there held solely by reason of a sentence for drunkenness. Such terms and conditions may be revised, altered or amended, or such conditional release may be revoked, by the commissioner at any time. A violation by the holder of such conditional release of any of its terms or conditions or the violation of any law of the commonwealth shall render such conditional release void. The commissioner, if a conditional release issued by him has become void or has been revoked, may order the arrest of the holder of such conditional release by any special state police officer in the department of correction or any officer qualified to serve civil or criminal process in any county, and the return of such holder to the prison to which he was originally sentenced."

You request my opinion "whether the period of time between the conditional release of a prisoner and his return to prison (under section 136A) should be considered as part of a prisoner's original sentence in computing the length of sentence left to be served," and you state two hypothetical situations to illustrate the problem.

In my opinion, the period of time between the conditional release of a prisoner and his return to prison (under section 136A) should be considered as part of a prisoner's original sentence in computing the length of sentence left to be served, provided the prisoner is properly at liberty throughout that period. If during any part of that period the prisoner is not properly at liberty, such part of the period should not be considered as part of the original sentence in computing the length of sentence left to be served.

Prior to the effective date of St. 1941, c. 690, "drunks" sentenced to State institutions were paroled in the same manner as other prisoners, under G. L. (Ter. Ed.) c. 127, §§ 128, 147, 148, and 149, as amended. Section 149 provides specifically that when a prisoner has been returned to prison because his permit to be at liberty has become void or has been revoked, "in computing the period of his confinement, the time between his release upon a permit or on parole and his return to prison shall not be considered as any part of the term of his original sentence." This provision was retained in section 149 as that section was revised by St. 1941, c. 690, § 3. The Legislature inserted no comparable provision in the new section 136A, although that section was enacted as part of the same statute as section 149.

When one statute contains two parallel sections dealing with the same general subject matter, and an express qualification or proviso is made in one, and not in the other, the absence of the qualification or proviso in the second is a strong indication that the Legislature intended to differentiate between the two. *McArthur*

Brothers Co. v. *Commonwealth*, 197 Mass. 137, 139; *Boston & Albany Railroad* v. *Commonwealth*, 296 Mass. 426, 434; *Spence, Bryson, Inc.* v. *China Products Co.* 308 Mass. 81, 88. Application of this principle to the statute now under consideration leads to the conclusion that the Legislature did not intend the computation of time provision of section 149 to apply to section 136A, but intended that such time as the prisoner is properly at liberty should be counted as part of the term of his original sentence. See *In re Prout*, 12 Idaho 494, 501–502; *Woodward* v. *Murdoch*, 124 Ind. 439, 444–445; *Scott* v. *Chichester*, 107 Va. 933, 935–936.

However, when a prisoner has violated the conditions of his release and has been ordered arrested and returned to prison, he is no longer properly at liberty. His status is analogous to that of an escaped convict. *Harding* v. *State Board of Parole*, 307 Mass. 217, 220; *Anderson* v. *Corall*, 263 U. S. 193, 196; *Zerbst* v. *Kidwell*, 304 U. S. 359, 361; *White* v. *Pearlman*, 42 F. (2d) 788, 789. Time, therefore, does not run on his sentence from that time until his return to prison. *Dolan's case*, 101 Mass. 219, 222.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Non-competitive Examinations Prior to St. 1939, Chapter 506.

FEB. 6, 1942.

Hon. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to whether two certain persons may be appointed as permanent pharmacy investigators by the Board of Registration in Pharmacy.

I am of the opinion that they may not be so appointed.

St. 1941, c. 596, § 6, amending G. L. (Ter. Ed.) c. 13, § 25, provided that the said Board might appoint four agents whose duties are those of inspectors. Before the enactment of said chapter 596, said chapter 13, section 25, as it then stood, authorized only the appointment of a *single agent* to perform such duties, and there was an incumbent of such position.

You have advised me of the following facts relative to the two persons in question.

On February 1, 1937, they were appointed provisionally as "pharmacy investigators," pending the result of a competitive examination.

On December 28, 1938, the then Commissioner of Civil Service purported to authorize their permanent employment, subject to a non-competitive examination.

On January 3, 1939, both took and passed a non-competitive examination, but inasmuch as the Board of Registration in Pharmacy had no authority under said section 25 to employ more than one permanent agent or investigator, they were appointed only on a temporary provisional basis, which thereafter was continued from time to time to the present.

On October 3, 1939, as the result of a competitive examination, there was established an eligible list for the position of "pharmacy investigator." One of the persons in question, who took this examination, stood seventh on this list. The other did not take it and his name does not appear on the eligible list.

It appears from the facts stated in your letter and from an examination of the files, that no permanent appointment of these two persons was ever actually made as a result of the non-competitive examination of January 3, 1939.

By the enactment of St. 1939, c. 506, amending G. L. (Ter. Ed.) c. 31, § 15, it is now provided in said section 15 that:

"No person shall be appointed or promoted to any position in the classified civil service except upon requisition by the appointing officer and upon certification by the director from an eligible list. . . .
. . . no person shall receive an original appointment to the classified official service . . . otherwise than by virtue of a competitive examination. . . ."

Certain exceptions to the above provisions appear in said section 15 but they are not applicable in the present situation.

The effect of said section 15 is to render persons, such as the two to whom you refer, who passed non-competitive examinations but were not actually appointed to permanent positions prior to the enactment of said St. 1939, c. 506, not eligible for appointment to permanent positions merely by reason of their having passed such non-competitive examinations.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Deputy Purchasing Agent of Springfield — Facilities within Classified Civil Service.

FEB. 19, 1942.

Hon. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — In requesting my opinion concerning the applicability of the Civil Service Law and Rules to the position of Deputy Purchasing Agent in the City of Springfield you gave me of the following facts:

On November 30, 1939, the City of Springfield accepted the provisions of G. L. (Ter. Ed.) c. 41, § 103, which authorize the establishment of a purchasing department in the city. Thereafter the City Council of Springfield passed an ordinance, which was approved by the Mayor, providing for the organization of a purchasing bureau or department and also for the appointment of a Purchasing Agent and a Deputy Purchasing Agent. With respect to the position of Deputy Purchasing Agent the ordinance provides that appointments shall be made by the Mayor "subject to confirmation by the city council."

You have requested my opinion specifically as to whether the said position of Deputy Purchasing Agent is, by reason of the requirement of confirmation, placed beyond the scope of the Civil Service Law and Rules, in accordance with G. L. (Ter. Ed.) c. 31, § 5, the pertinent portions of which are:

"No rule made by the commission shall apply to the selection or appointment of any of the following:
. . . officers whose appointment is subject to confirmation . . . by the city council of any city."

In my opinion, the position of Deputy Purchasing Agent in Springfield is not affected by said section 5 of chapter 31 of the General Laws.

The basic authority for the creation of a purchasing department in Springfield is contained in G. L. (Ter. Ed.) c. 41, § 103, which reads:

"A city which accepts this section in the manner provided in the following section or has accepted corresponding provisions of earlier laws, or a town which accepts this section or has accepted corresponding provisions of earlier laws, may establish

a purchasing department, to consist of a purchasing agent and such assistants as the city council or selectmen may determine. In cities the salaries of the purchasing agent and assistants shall be determined by the city council. In cities the agent and assistants shall be appointed by the mayor for such terms of office as may be prescribed by ordinance, and in towns they shall be appointed and may be removed by the selectmen. The purchasing agent shall purchase all supplies for the city or town and for every department thereof except in case of emergency. All purchases or contracts for purchases exceeding one hundred dollars in amount shall be based upon competition. A record shall be kept by the department of the prices paid for the supplies, and shall be open to the inspection of any citizen."

The Legislature, in enacting said section 103, has specified in considerable detail the respective functions of mayors and city councils in connection with the establishment and operation of purchasing departments in cities. The statute states that assistants in the purchasing department of a city shall be appointed by the mayor. It does not provide for their confirmation by a city council. A city council is given authority by said section to determine the number and, inferentially, the type, of assistants who are to be appointed. It has no authority, however, to provide a different mode of appointment for such officials than that determined by the Legislature, nor any authority to limit or curtail the power of appointing assistants, which the act of the Legislature vested in the mayor alone.

No legal effect can be ascribed to provisions in an ordinance which purport to run counter to the legislative mandate.

An assistant to whom is delegated the power to act temporarily in the place of his superior officer during the absence of the latter or during a vacancy in the latter's office, in addition to the ordinary authority of an assistant official, is, nevertheless, an assistant, though an assistant of a particular type. *Attorney General* v. *Tillinghast*, 203 Mass. 539.

It follows that an ordinance of the City of Springfield passed, after its acceptance of said section 103, on December 29, 1941, which provides for a "deputy purchasing agent" in the purchasing department, to be appointed "by the mayor . . . subject to confirmation by the city council," does not constitute the assistant called "deputy purchasing agent" an officer whose appointment is "subject to confirmation by the city council."

Consequently, the position in question is not excluded from Civil Service classification by the terms of G. L. (Ter. Ed.) c. 31, § 5, which I have quoted above.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Veteran — Settlement — Hospitalization — Military Aid — Soldiers' Relief.

FEB. 25, 1942.

Hon. W. REA LONG, *Commissioner of State Aid and Pensions.*

DEAR SIR: — You have asked my opinion as to whether

"hospitalization of a veteran or dependent, while receiving no other type of aid, affects a legal settlement."

I am of the opinion that the receipt of treatment in a hospital or other institution, which comprehends "hospitalization" of a veteran or his dependent eligible to receive military aid or soldiers' relief under G. L. (Ter. Ed.) c. 115, does not affect the acquisition or defeat of a settlement of either.

G. L. (Ter. Ed.) c. 116, § 4, provides:

"If a soldier or a dependent of a soldier eligible to receive military aid or soldiers' relief under chapter one hundred and fifteen receives aid or treatment in any hospital or other institution, such aid or treatment shall not have the effect of preventing or defeating the acquisition of a legal settlement."

In enacting section 4 it was the intent of the Legislature to provide that aid or treatment furnished in a hospital or institution to one entitled to military aid or soldiers' relief should always be treated as received under the terms of G. L. (Ter. Ed.) c. 115, entitled "State and Military Aid, Soldiers' Relief, etc." and never as "public relief" furnished under G. L. (Ter. Ed.) c. 117, to poor and indigent persons. This is so, regardless of the type of relief to which the expense of such hospital or institutional aid or treatment should be allocated by a municipality.

In like manner aid or relief received under said chapter 115 is excluded from the relief which may prevent the acquisition of a settlement by section 2 of said chapter 116 as amended, which reads:

"No person shall acquire a settlement, or be in the process of acquiring a settlement, while receiving public relief other than aid or relief received under chapter one hundred and fifteen, unless, within two years after receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth or to the town furnishing it. No former patient of a state or county tuberculosis sanatorium or hospital, who is employed in such an institution, shall lose or gain a settlement or be in the process of losing or gaining a settlement while so employed."

The effect of these provisions is such that a veteran, eligible to receive military aid or soldiers' relief, who is an inmate of a soldiers' or sailors' home or other institution, and is receiving aid or treatment therein, will not be prevented or defeated in the acquisition of a settlement by force of said section 4.

You have directed my attention to certain provisions of section 5 of said chapter 116, which read:

"The time during which a person shall be an inmate of any infirmary, jail, prison or other public or state institution, within the commonwealth or in any manner under its care and direction, or that of an officer thereof, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or defeating a settlement, except as provided in section two."

In my opinion, these provisions do not militate against the answer which I have given to your specific question.

It is a cardinal principle of statutory construction to construe statutes dealing with the same general subject so as to give effect to each and so as to form a logical and consistent whole. *Decatur* v. *Auditor of Peabody*, 251 Mass. 82, 87; *Goodale* v. *County Commissioners*, 277 Mass. 144, 151. Applying this principle to the present enactments, it is clear that section 5 should be construed in such a manner that it will not conflict with the specific terms of section 4. Section 5 is readily susceptible of such a construction.

Thus, if section 5 is construed so as to apply to an inmate of a soldiers' or sailors' home, who is *not eligible* for aid under chapter 115, effect will thereby be given to section 5 without any conflict with section 4. In the absence of specific problems requiring solution whether there are other possible non-conflicting constructions of section 5 need not be determined at this time.

You have called a particular case to my attention. You state that a veteran receiving military aid under said chapter 115 from the City of Worcester, where he previously had a settlement, was in the process of acquiring a new settlement in Springfield under G. L. (Ter. Ed.) c. 116, § 5, by residence there for a period of five years; and that during such five-year period a dependent of the veteran received treatment by way of an operation in a hospital of the City of Springfield at its expense. I am of the opinion that by reason of the provisions of said section 4 of G. L. (Ter. Ed.) c. 116, such aid and treatment of the veteran's dependent in a hospital did not prevent his acquisition of a settlement by five years' residence in Springfield.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration — Issuance of Duplicate Annual Renewals of Certificates of Registration — Charge Therefor.

FEB. 26, 1942.

Mrs. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — You have asked my opinion as to whether "duplicate annual renewals issued by the Boards in the Division of Registration come under the provisions of G. L. (Ter. Ed.) c. 112, § 88, cl. (3)."

You have informed me that by "duplicate annual renewals" you refer to duplicate certificates of annual renewals of registration issued by a State board of registration or examination.

I am of the opinion that the boards of registration and examination in the Division of Registration derive no authority from said section 88 to issue or charge a fee of five dollars for such duplicate certificates of annual renewals.

G. L. (Ter. Ed.) c. 112, § 88, in its applicable parts, reads:

". . . Every board of registration or examination established by the commonwealth shall —

. . . . . .

(3) Issue a duplicate certificate of registration upon satisfactory evidence that the original certificate has been lost or destroyed, and the fee therefor shall be five dollars."

The issuance of certificates of annual renewals of registration has been provided for by statute only with relation to nurses and barbers. (See G. L. (Ter. Ed.) c. 112, §§ 74, 87Q.)

At the time the provisions of said section 88 were first enacted by Gen. St. 1918, c. 217, § 3, in the form in which they are now embodied in the General Laws, the then existing statutes did not provide for the issuance of any certificates of annual renewals of registration. It follows that the words "a duplicate certificate of registration" as employed in said section 88, refer only to a duplicate of the certificate issued to an applicant at the time of his original registration. Furthermore, by the terms of said section 88, the authority to issue a duplicate certificate of original registration and to charge a fee of five dollars therefor is limited to those cases in which the original certificate of registration has been lost or destroyed.

If, in the opinion of any of said boards, it is useful for the protection of the public that registrants or licensees have certificates which will show that regis-

trations or licenses are in effect by annual renewal and the registrants or licensees request that they be furnished with them, such board has implied authority to issue such a certificate and to charge therefor a nominal fee sufficient to cover the actual expenses involved in making and issuing it.

The same principle would apply to the issuance of a duplicate of the original certificate of registration by the Board of Registration in Dentistry to a dentist having two offices and required by G. L. (Ter. Ed.) c. 112, § 45, to display an original certificate of registration or a duplicate in his office, even though the original has not been lost or destroyed. You have called my attention to such an issuance, and I am of the opinion that the Board of Registration in Dentistry has implied authority in the indicated circumstances to issue the duplicate certificate and to charge therefor a nominal fee sufficient to cover the actual expense involved.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Metropolitan Water District — Municipal Stand-By Charge — Liability of the Town of Saugus.

FEB. 27, 1942.

Hon. EUGENE C. HULTMAN, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have asked my opinion as to the liability of the Town of Saugus to pay a so-called stand-by charge under St. 1941, c. 727, for a connection of its water pipes with those of the Metropolitan Water District from which water is to be furnished to the town under St. 1941, c. 566.

I am of the opinion that the Town of Saugus is not liable to pay such stand-by charge.

St. 1941, c. 727, § 4, which took effect on October 31, 1941, specifies those towns which are required to pay such a stand-by charge. The applicable part of said section 4 reads:

"*Any town which already has a connection* with the metropolitan water system, except any such town which shall, not earlier than January sixth, nineteen hundred and forty-two nor later than the March first next following, have notified the metropolitan district commission that it desires to discontinue such connection, *and any town which makes application for such connection under any provision of this act,* shall annually, until it becomes a member of said district, be assessed and pay, as hereinafter provided, a premium equal to three hundredths of one per cent of its valuation for the preceding year."

St. 1941, c. 566, which took effect on July 30, 1941, authorized your Commission to sell and deliver water to the Town of Saugus upon its application "for its use for the purpose of extinguishing fires and for domestic and other purposes" at a charge for such water and upon such terms and conditions as are agreed upon annually with the selectmen of such town. It was provided that such sale and delivery should not constitute the town a member of the Metropolitan Water District.

You have informed me that, on August 6, 1941, the Town of Saugus made application to your Commission for the purchase of water under the provisions of said chapter 566. Acting upon this application, your Commission entered into an agreement with the town to furnish water from its system to the town upon terms

and conditions which purported to cover the town's entire liability for water so furnished, including a charge covering the cost of connection with the pipes of the Metropolitan Water District. This agreement is still in force, but you have informed me that a connection of the pipes of the town with those of the Metropolitan Water District has not yet been made.

It is plain from the above-quoted portion of section 4 of said chapter 727 that only two classes of towns are required to pay the stand-by charge or premium described therein. These are (1) towns which at the time of the enactment of said chapter 727 had a connection with the pipes of the metropolitan water system; and (2) towns which make application for such a connection "*under any provision of this act,*" namely, said chapter 727.

You have informed me that the connection of the pipes of the Town of Saugus with those of the metropolitan water system is "not yet made." This being so, the town does not come within the first class of towns described in said chapter 727, section 4.

Nor does the Town of Saugus come within the second class of towns required by said chapter 727, section 4, to pay stand-by charges, since the town's application for a connection with the pipes of the Metropolitan Water District was made pursuant to St. 1941, c. 566, and not "under any provision" of said chapter 727.

Consequently, the Town of Saugus is under no liability to pay a stand-by charge for a connection of its water pipes with those of the Metropolitan Water District.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

State Racing Commission — Public Hearing on Application for License for a Dog Racing Meeting — Form of Notice.

MARCH 5, 1942.

Hon. CHARLES F. CONNORS, *Chairman, State Racing Commission.*

DEAR SIR: — You have asked my opinion as to whether a notice of a public hearing on an application for a license to conduct a dog racing meeting in Revere as given by you, of which you have sent me a copy, is correct "with particular reference to the citation of the law" contained in it.

I am of the opinion that the form of the notice complies with the requirements of the law. It reads:

"*Notice of Public Hearing.*

Notice is hereby given that an application has been filed by the Revere Racing Association, Inc. with the State Racing Commission for a license to conduct a dog racing meeting in Revere, Suffolk County, on a track known as Wonderland Park, located on Veteran of Foreign Wars Parkway, Revere. In accordance with section 3, chapter 128A of the General Laws, a public hearing will be held at Revere City Hall, Revere, on Tuesday, February 17, 1942, at 7:00 P.M. on said application.

STATE RACING COMMISSION."

You have informed me that at the public hearing held in accordance with this notice it was contended that it was not a proper or legal notice because it stated that the hearing would be held "in accordance with section 3, chapter 128A of

the General Laws," whereas, it was contended, it should have stated that the hearing was to be held "under section 3 of chapter 374 of the Acts and Resolves of 1934."

I am of the opinion that such contentions are not correct as a matter of law. St. 1934, c. 374, § 3, provides:

"The General Laws are hereby amended by inserting after chapter one hundred and twenty-eight, as appearing in the Tercentenary Edition, the following new chapter: —

CHAPTER 128A.

Horse and Dog Racing Meetings."

and then sets forth the entire text of the new chapter so inserted in the General Laws.

Section 3 of this new chapter 128A provides, in part, in its first paragraph:

"If any application for a license, filed as provided by section two, shall be in accordance with the provisions of this chapter, the commission may issue a license to the applicant to conduct a racing meeting, in accordance with the provisions of this chapter, at the race track specified in such application. . . ."

Later the foregoing part was amended by St. 1935, c. 454, § 2, so as to make provision for notice and hearing before the issuance of a license to conduct a racing meeting. Said St. 1935, c. 454, § 2, amended the foregoing quoted part of c. 128A, § 3, so that it now reads:

"If any application for a license, filed as provided by section two, shall be in accordance with the provisions of this chapter, the commission, after *reasonable notice* and a public hearing in the city or town wherein the license is to be exercised, may issue a license to the applicant to conduct a racing meeting, in accordance with this chapter, . . ."

No particular form for the required "reasonable notice" was prescribed and there is no requirement that the notice shall refer to the statutory provisions pursuant to which the hearing is to be held. It is apparent, therefore, that the notice, as published, is "reasonable" as to content unless the reference to "section 3, chapter 128A of the General Laws" without reference to the act by which that chapter was inserted in the General Laws is misleading or deceptive.

In my opinion, the notice cannot be held to be misleading or deceptive in this regard.

I have quoted that portion of St. 1934, c. 374, § 3, which specifically provides for the insertion of a new chapter 128A in the General Laws. This provision is in accordance with the general legislative policy, as set forth in G. L. (Ter. Ed.) c. 3, §§ 51–54, to incorporate in the General Laws statutes embodying legislation of a general character rather than to treat such statutes as special measures or as acts of a particular legislative year.

By G. L. (Ter. Ed.) c. 3, § 53, a copy of all amendments of and additions to the General Laws is required to be filed in the office of the State Secretary, open to the inspection of the public. Consequently, a person whose attention was directed by the notice in question to "section 3, chapter 128A of the General Laws" would be able, even without a reference to St. 1934, c. 374, to see said chapter 128A, together with amendments and additions thereto, including the

amendment made by said St. 1935, c. 454, § 2, by applying at the office of the State Secretary.

It follows that reference to "section 3, chapter 128A of the General Laws", in the notice in question, was sufficient to enable anyone interested in the general subject matter of the hearing referred to therein to acquaint himself fully with the particular statutory enactment by virtue of which the hearing was to be held.

There was no failure in the wording of the notice to comply with any statutory requirement, and it omitted no essential matter and contained no misleading statement. It was valid as a "reasonable notice" of the hearing which it advertised.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Warden of State Prison — Purchase of Defense Stamps for Inmates — Rules and Regulations.

MARCH 6, 1942.

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

DEAR SIR: — You have asked my opinion as to whether the Warden of the State Prison has authority to purchase defense stamps or bonds for an inmate at the latter's request from the inmate's accumulated share of the profits of his labor in prison industry carried on in State Prison under the provisions of G. L. (Ter. Ed.) c. 127, § 48.

I am of the opinion that, although the statute itself does not by specific terms provide for the exercise of such authority, provision may be made therefor by the addition of a new rule to the "Rules and Regulations governing the payment of wages to inmates at the State Prison" heretofore made by the Warden, with the approval of the Governor and Council.

The rule-making power in this request is contained in the following provisions of section 48A:

"At the state prison, . . . there may be established a system of compensation for its inmates, to be paid out of the excess profits from the industries in that institution as hereinafter provided. As a basis for determining such excess profits, the minimum rate of profit on prison industries shall be twenty-five per cent of the cost as hereinafter defined at the state prison, . . . Whenever the rate of profit shall be in excess of such minimum rate . . . the excess profit may be disposed of in the following manner: one half shall be placed to the credit of the prison industries fund of such institution and one half to the credit of such of the inmates of such institution as are entitled thereto in accordance with *rules and regulations, which are hereby authorized to be established* by the warden or superintendent of said institution *to carry out the purposes of this section.* Said rules and regulations shall take effect when approved by the commissioner of correction and by the governor and council. . . ."

You have advised me that:

"On many occasions men originally committed to the State Prison, who have earned an amount of money credited to their name under section 48, are transferred to the State Farm, Massachusetts Reformatory or State Prison Colony. All moneys and personal property in the hands of the warden are transferred with the prisoner and turned over to the superintendent of the institution to which the prisoner is transferred."

You have inquired as to whether the superintendent of one of such institutions to which an inmate of the State Prison and his money were transferred may pur-

chase said bonds and stamps from the accumulated credits of such inmate transferred with him, and whether such securities should be purchased in the name of the inmate or in the name of the superintendent as trustee.

I am of the opinion that by the adoption of a rule such as I have referred to, a superintendent may be authorized to make such a purchase, and I perceive no reason why the securities should not be purchased in the name of the inmate himself and then held for him until his release.

I suggest as appropriate for the accomplishment of the desired salutary and patriotic result the following new rule:

"The Rules and Regulations governing the payment of wages to inmates at the State Prison approved by the Governor and Council on March 20, 1929, are hereby amended by adding thereto the following rule:

7A. Any part or portions of the share of profits credited to an inmate under Rules 6, 7 and 8 may at his written request be expended by the Warden for the purchase of United States Savings Bonds and Stamps.

Such bonds and stamps so purchased, or the proceeds thereof, shall be held for an inmate in the same manner as other moneys and personal property belonging to an inmate, and shall be delivered to the inmate upon his discharge in the manner provided for with regard to an inmate's total accumulations under Rule 8.

.....
Warden.

Approved: .....
Commissioner of Correction.

Approved: .....
Governor and Council."

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Milk Control Board — Interpretation of Statute — Officers of Co-operative Associations — Authority with Relation to Petition by Members under G. L. (Ter. Ed.) C. 94A, § 12.

MARCH 6, 1942.

Milk Control Board.

GENTLEMEN: — In requesting my opinion as to the proper interpretation of G. L. (Ter. Ed.) c. 94A, § 12, inserted by St. 1941, c. 691, you have referred to certain "bona fide co-operative associations of milk producers" which, you state, are parties to agreements with their respective members whereby certain powers of representation are conferred upon said associations by their members. You have further advised me that the grants of authority contained in such agreements generally fall into one of two classes:

1. In one of these classes, the association is "constituted such member's exclusive agent for the marketing of such member's entire production of milk for sale."

2. In the second class of agreement, the co-operative association is not only made the member's exclusive marketing agent but is also appointed the member's "exclusive agent to represent him in all matters pertaining to milk marketing codes, licenses, agreements and regulations under laws now or hereafter enacted by the United States Government or by the Commonwealth of Massachusetts, concerning which the association deems it advisable to have unit action by or for its members."

Your specific question is whether the officers of co-operative associations, acting under either of the foregoing types of authorization in signing the names of their respective milk producer members to a petition requesting the fixing of resale prices of milk, will thereby satisfy the requirements of said G. L. (Ter. Ed.) c. 94A, § 12, with respect to the signing of such petition.

In my opinion, your question must be answered in the negative.

The pertinent provisions of said section 12 read as follows:

"Upon *petition* in writing, with an affidavit that it is *signed by not less than fifty-one per cent of the Massachusetts producers* who, during the month of April in the license year next preceding that in which such petition is filed, delivered milk for sale or distribution as fluid milk in any market, requesting the board to establish minimum prices, wholesale or retail, or both, for milk for such market, and if, upon making such examination and investigation as is authorized by this chapter, and after public hearing . . ., the *board finds* . . . that such *petition is signed by not less than fifty-one per cent of such producers* . . . The board may . . . issue such orders, rules and regulations as may be necessary, including the fixing by official order of minimum wholesale or retail prices, or both, for milk sold within the market affected . . . The board may in like manner at any time alter, revise, amend or rescind the prices so fixed. . . ."

For present purposes, it may be conceded at the outset that agreements of the types referred to by you, and especially agreements of the type described in class 2 above, confer very broad authority upon co-operative associations. It may further be conceded that, as between member and co-operative association, such a grant of authority would encompass the signing of the member's name by officers of the association to a petition for resale price fixing. These concessions, however, are not decisive as to whether the signing of the members' names by the association officers constitutes compliance with the prerequisites prescribed by section 12. The answer to that question depends upon the manifest intent of the Legislature as to the manner of ascertaining the wishes of a majority of the producers in a given marketing area with respect to the fixing or modification of resale prices.

In my opinion, the requirements that the petition be "signed by not less than fifty-one per cent of the Massachusetts producers" in a given area and that the Board shall find, after hearing, that the petition is "signed by not less than fifty-one per cent of such producers" were inserted by the Legislature for the purpose of providing a simple and direct method of determining the actual wishes of that proportion of the total number of individual producers. While the statute may not require that each petitioning producer shall sign the petition in his own handwriting (cf. *Finnegan* v. *Lucy*, 157 Mass. 439, 441), it does, in my opinion, require that an agent signing in behalf of a producer shall do so only pursuant to authority expressly conferred with respect to the specific petition. It does not appear to have been the intent of the Legislature that co-operative associations should be enabled to initiate the issuance or revision of such resale price-fixing orders by signing the names of their members to a petition, irrespective of the wishes of such individual members with respect thereto at the time the petition is so signed.

The foregoing conclusion as to the proper interpretation of section 12 of chapter 94A is supported by an examination of its legislative history, which may properly be considered in construing the statute (*Carlos Ruggles Lumber Co.* v. *Commonwealth*, 261 Mass. 445, 447; *Loring* v. *Young*, 239 Mass. 349, 367, 368). Thus, the original counterpart of section 12 was contained in St. 1934, c. 376, § 15 (C).

It required a petition by only twenty-five per cent of the producers, as compared with the present fifty-one per cent, for the original issuance of a resale price-fixing order. It did not in terms require that the petition be "signed" by the producers or that the Milk Control Board make any finding with respect to the percentage of producers who "signed" the petition, as does the present law. It conferred broad powers upon the Milk Control Board to alter or rescind such orders without petition and without regard to the number of individual producers who might favor or oppose such alteration or rescission, whereas the present act authorizes alteration or revision of such orders, in most instances, only upon petition signed by at least fifty-one per cent of the producers (see Opinion of Attorney General to Milk Control Board, January 27, 1942). All of these modifications of St. 1934, c. 376, § 15 (C), contained in the new G. L. (Ter. Ed.) c. 94A, § 12, manifest a legislative intent to vest a large share of the initiative with respect to such resale price-fixing orders in the individual producers who deliver milk for sale in the marketing areas affected thereby.

Even more significant than the foregoing factors, however, is the manner in which the Legislature dealt with a specific proposal to permit co-operative associations to act in such matters in the names of their members. Thus, House Bill No. 1707, from which St. 1941, c. 691, is derived, contained a section 25 which in turn was subdivided into subsections (*a*), (*b*) and (*c*). Subsection (*c*) of said section 25 read as follows:

"If a producer's co-operative association in good faith engaged in marketing within the commonwealth milk produced by its members is by written contract or agreement signed by a member of such association, duly authorized so to represent such member, a petition or vote signed or cast by such association and expressly stating that it is filed with such intent, shall, for the purposes of petition or referendum under this chapter be received by the board as and deemed to be the petition or vote of such member."

When St. 1941, c. 691, was enacted, the substance of subsections (*a*) and (*b*) of section 25 of House Bill No. 1707 was included in section 15 of the new act, but subsection (*c*) quoted above, was entirely eliminated. This action by the Legislature is impressive evidence of a legislative intent not to permit the requirements of producer petitions or signatures to be satisfied by the submission of petitions or signatures of co-operative associations purporting to act in the names of their producer members.

My conclusion as to the correct interpretation of said section 12 is not affected by the prevailing practice before the federal regulatory agency, since the pertinent federal statute specifically provides that the action of co-operative associations in these matters shall be regarded as the action of their members. (See Act of June 3, 1937, § 8c (12), 7 U. S. C., c. 26, § 608C (12); *United States* v. *Rock Royal Co-operative Inc.*, 307 U. S. 533, 548, 559).

In stating my opinion that the prerequisite signatures of producers may not be affixed to petitions under section 12 by co-operative associations acting under a general grant of authority contained in membership agreements, I do not intend to imply that each producer must sign such petition in his own handwriting or that producer associations may not in another manner be authorized to sign the names of their members to such petitions. I am of the opinion that this statute does not require the personal signature of the producers (see *Finnegan* v. *Lucy*,

157 Mass. 439, 441), and that the name of a producer may properly and effectively be signed to such petition by an agent (including an officer of a co-operative association), provided that authority is expressly conferred upon the agent by the producer with particular reference to the specific petition which is so to be signed by the agent.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Veteran — Soldiers' Relief — Selection of Veteran's Own Physician — School Physician.

MARCH 16, 1942.

Hon. W. REA LONG, *Commissioner of State Aid and Pensions.*

DEAR SIR: — You have advised me that in the City of Lawrence a veteran receiving medical treatment or aid as soldiers' relief under the provisions of G. L. (Ter. Ed.) c. 115, § 17, as amended, is not permitted by the local authorities "to select his own physician in case that physician has an appointment as a city or school physician."

You have asked me if this procedure on the part of the city officials is prohibited by those provisions of said G. L. (Ter. Ed.) c. 115, § 17, which prohibit interference with the recipient of such aid in the matter of the person to whom he shall give his custom.

I am of the opinion that in the case of officials of the City of Lawrence such procedure is not prohibited by the said provisions of G. L. (Ter. Ed.) c. 115, § 17, as amended, by reason of the terms of section 37 of the revised charter of the City of Lawrence (St. 1911, c. 621, Part II, § 37, adopted Nov. 7, 1911).

Said section 37 of the revised charter reads:

"It shall be unlawful for any member of the City Council or School Committee, *or for any officer or employee of the City, directly or indirectly to make a contract expressed or implied with the City,* or to receive any commission, wages, discount, bonus, gift, contribution or reward from, or any share in the profits of, any person or corporation making or performing such a contract. No funds of the City of Lawrence shall be deposited in any bank or trust company of which the City Treasurer or the treasurer of the sinking fund or any sinking fund commissioner is an officer, agent or stockholder. A violation of any provision of this section shall render the contract in respect to which such violation occurs voidable at the option of the city. Any person violating any provision of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment."

Under G. L. (Ter. Ed.) c. 115, § 17, as amended, a city is required to supply aid and treatment as soldiers' relief to veterans, and to pay for the same.

The provisions of said G. L. (Ter. Ed.) c. 115, § 17, as amended, directly applicable to the subject matter of your inquiry, read:

"Whenever money is expended for any person within the provisions hereof, no officer of any town shall, directly or indirectly, solicit, direct, or in any way interfere with the recipient of such aid in the matter of the person, partnership or corporation to whom or to which, or the place at which, the recipient shall give his custom; and whoever violates this provision shall be punished by a fine of not less than twenty-five nor more than five hundred dollars."

The above provisions of G. L. (Ter. Ed.) c. 115, § 17, as amended, were first enacted and inserted in said section 17 by St. 1932, c. 63.

Said St. 1932, c. 63, is a general act covering the subject matter in a broad fashion and was enacted twenty-one years after St. 1911, c. 621, which latter statute is a special act dealing with the government and administration of a particular city. Under familiar principles of statutory construction it is to be held that it was not the intent of the Legislature that the general act should supersede the earlier special act, but rather that the provisions of the earlier act or revised charter of the city should stand as exceptions to the general terms of the later statute. *Brown* v. *Lowell*, 8 Met. 172; *Copeland* v. *Springfield*, 166 Mass. 498, 504, and cases there cited.

So construed, the applicable provisions of said G. L. (Ter. Ed.) c. 115, § 17, as amended, do not embrace within their terms as forbidden actions refusal to permit employees of the City of Lawrence, such as city or school physicians, to render aid or treatment to veterans as soldiers' relief for which they would be recompensed by the city under an implied contract growing out of the duty placed upon cities to pay for such aid or treatment furnished as soldiers' relief.

The prohibitions of said section 37 of the charter of the City of Lawrence, upon the participation in express or implied contracts of the city by its officers or employees, are in line with the general public policy of the Commonwealth forbidding officers and employees of the State and political subdivisions thereof from entering into contracts with the authority which they serve, as shown in the general provisions of G. L. (Ter. Ed.) c. 268, §§ 9–11.

Very truly yours,

Robert T. Bushnell, *Attorney General.*

County Commissioners — Eminent Domain — Land Acquired by the Commonwealth for State Forests.

March 18, 1942.

Hon. Raymond J. Kenney, *Commissioner of Conservation.*

Dear Sir: — You have asked my advice as to whether county commissioners, under their authority to take land for highway purposes, have the right to take by eminent domain land which has been acquired by the Commonwealth for a state forest. I assume that the authority of county commissioners to take land by eminent domain, to which you refer, is the authority conferred upon them in general terms by G. L. (Ter. Ed.) c. 82, § 7, as amended, to take land and easements and rights therein for highway purposes.

In my opinion, county commissioners have no authority under said G. L. (Ter. Ed.) c. 82, § 7, as amended, to take land acquired by the Commonwealth for a state forest.

It is a general principle of law that statutes are not to be interpreted as imposing burdens on the sovereign, the Commonwealth, unless a clear legislative intent that they should do so is apparent. *Teasdale* v. *Newell, &c. Construction Co.*, 192 Mass. 440, 443; *Commonwealth* v. *Boston Terminal Co.*, 185 Mass. 281. I Op. Atty. Gen. 288, 296–297; VIII *ibid.* 473.

It is obvious that if a general grant of authority by statute, such as the one under consideration, were construed so as to permit a political subdivision of the Commonwealth to take any property of the Commonwealth by eminent domain

for highway purposes, it would be possible for such subdivision to obstruct or impede the normal functions of the Commonwealth in its sovereign capacity. Such an implication cannot be drawn from a general grant of authority.

A different situation might be presented by a statute which in specific terms authorized a political subdivision to make takings of land in a particular area for a designated purpose, which could be accomplished only by taking land owned by the Commonwealth. In such a case a grant of authority to take land of the Commonwealth might be found to exist by necessary implication. *Old Colony Railroad* v. *Framingham Water Co.*, 153 Mass. 561, 565.

Title to land acquired for state forests is vested in the Commonwealth by the provisions of G. L. (Ter. Ed.) c. 132, § 30, and § 33, as amended. VIII Op. Atty. Gen. 473, 474. Accordingly a political subdivision may not take such land from the Commonwealth under a general authority to exercise the power of eminent domain for highway purposes.

Such an invalid taking imposes no duty upon you to give a deed of any land of the Commonwealth which it was sought to take. However, county commissioners are not wholly prevented from acquiring land in state forests for highway purposes where no detriment will result to the Commonwealth. Under G. L. (Ter. Ed.) c. 132, § 34A, you have authority, with the approval of the Governor and Council, and after a public hearing, to sell any land acquired under said sections 30 and 33, and to grant rights of way for public highways over any such land, though by the express terms of said section 34A you are not required so to do unless in your "judgment such sale . . . or grant is advantageous to the commonwealth." Moreover, G. L. (Ter. Ed.) c. 30, § 44A, provides that the head of a state department having control of any land of the Commonwealth may, "subject to the approval of the governor and council, sell and convey to any county, city or town . . . so much of such land as may be necessary for the laying out or relocation of any highway." These provisions are not mandatory but if, in your best judgment, such conveyance would be for the best interests of the Commonwealth, you may, with the approval of the Governor and Council, make a conveyance of land in a state forest to a county for the purpose of laying out and relocating a highway.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Acceptance of Section 47 of General Laws (Ter. Ed.), Chapter 31, by Municipalities — Labor Service.

MARCH 18, 1942.

Hon. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to "whether a town which has never accepted the provisions of G. L. (Ter. Ed.) c. 31, or corresponding provisions of earlier laws, may classify *its labor service only* by the acceptance of section 47 of chapter 31."

By the word "classify" I assume that you mean bring within the provisions of the Civil Service Law and Rules.

I am of the opinion that a town cannot classify "*its labor service only*" by the acceptance of said section 47 without also bringing under the terms of Civil Service Law all of its eligible officers and employees.

Said section 47 reads:

"This chapter shall continue in force in all the cities of the commonwealth and in all towns of more than twelve thousand inhabitants which have accepted corresponding provisions of earlier laws, and shall be in force in all such towns which hereafter accept it by vote at a town meeting. The provisions of this chapter and the rules established under it relative to employment of laborers designated as the 'labor service' shall not be in force in any city of less than one hundred thousand inhabitants, which has not heretofore accepted the corresponding provisions of earlier laws, until said provisions are accepted by the city council."

Although said section 47 makes provision in its second sentence whereby a city of less than one hundred thousand inhabitants may classify its laborers under the provisions of the Civil Service Law, the section provides no means by which a town may bring its labor service within the sweep of the classified civil service without also including therein its official service. Nor is there any procedure provided by the statutes whereby a town which has not accepted the provisions of said chapter 31 or corresponding provisions of earlier laws may bring into the classified civil service the members of its labor service alone as distinguished from its other employees.

If a town desires to bring its labor service within the provisions of the Civil Service Law and Rules it may do so by a vote accepting said section 47. Such a vote accomplishes the desired result but it also has the effect of placing all eligible town officers and employees under the Civil Service Law.

In its original form the Civil Service Law was made applicable to both the official and the labor services of all cities by St. 1884, c. 320. By St. 1894, c. 267, said law was made applicable to any town having a population of over twelve thousand upon its acceptance by the voters. No provision was made in said chapter 267 for the acceptance by a town of the Civil Service Law to apply to its labor service alone.

By St. 1896, c. 449, specific provision was made whereby so much of the Civil Service Law and Rules as related to the labor service should not take effect in cities of less than one hundred thousand population except upon specific acceptance of that portion of the Civil Service Law which was applicable to the labor service of such cities. No provision was made in said chapter 449 for a like procedure by towns.

The provisions of said St. 1894, c. 267, and St. 1896, c. 449, were codified in the Revised Laws in section 36 of chapter 19, the then Civil Service Law, as follows:

"This chapter shall be in force in any town of more than twelve thousand inhabitants when accepted by it. So much of this chapter and the rules established under it as relate to the employment of laborers, designated as the 'Labor Service,' shall not be in force in any city of less than one hundred thousand inhabitants until the city council, with the approval of the mayor, accepts the same."

These provisions in substantially the same form now appear as said section 47 of G. L. (Ter. Ed.) c. 31.

If a town of over twelve thousand inhabitants desires to place its labor service under civil service it can do so by a vote at a town meeting accepting G. L. (Ter. Ed.) c. 31, but by so doing it will place not only those in its labor service but all of its eligible officers and employees under civil service.

Very truly yours,

Robert T. Bushnell, *Attorney General.*

Massachusetts Hospital School — Non-resident Children.

April 6, 1942.

Dr. John E. Fish, *Superintendent, Massachusetts Hospital School.*

Dear Sir: — You have asked my opinion as to the authority of the Trustees of the Massachusetts Hospital School to admit to the school children who are not residents of Massachusetts.

I am of the opinion that the trustees have no such authority.

G. L. (Ter. Ed.) c. 121, § 28, reads:

"The Massachusetts hospital school shall be maintained for the education and care of crippled and deformed children of the commonwealth. The board of trustees of said school shall have the same powers and shall be required to perform the same duties in the management and control of the school as are vested in and required of the trustees of the various state hospitals under chapter one hundred and twenty-three, so far as applicable."

St. 1904, c. 446, § 1, from which said section 28 derives, which originally provided for the creation of said board of trustees and the erection and establishment of the school, defined the purpose of the board of trustees in the following language:

"the purpose of which shall be the education and care of the crippled and deformed *children of the commonwealth.*" (Italics mine.)

The intent of the Legislature, as expressed in said section 28, appears to have been to provide that the school should be maintained for the exclusive benefit of children who are residents of the Commonwealth. No provision of the statute gives the trustees any rule-making authority over admissions which indicates any legislative grant of power to admit children having no residence or settlement in the Commonwealth. Section 31 of said chapter 121 contains detailed provisions with relation to the admission to and support of children in the hospital, but they are all made to apply to children "entitled to receive the benefit of the school," and the section contains no phrase indicating the vesting of power or discretion in the trustees to enlarge the class of children mentioned in the quoted phrase so as to embrace others than those designated in said section 28 as "children of the commonwealth."

Very truly yours,
Robert T. Bushnell, *Attorney General.*

Civil Service — Labor Service — Transfers.

April 7, 1942.

Hon. Ulysses J. Lupien, *Director of Civil Service.*

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

"Has the Division of Civil Service any right to approve the permanent transfer of a person in the official service to a position in the labor service provided the consent of the employee and the respective appointing authorities has been obtained, and the employee has been duly certified for permanent employment and actually employed for at least one year?"

I answer your question in the affirmative.

Rule 3 of the Civil Service Rules made under the provisions of G. L. (Ter. Ed.) c. 31, provides:

"The offices and positions to be filled under these rules are divided into three divisions; the first to be known as the Official Service of the Commonwealth and the several cities thereof; the second as the Labor Service; and the third as the Division of State and Municipal Appointees."

Rule 32 provides in section 1:

"The Labor Service shall be subject to the provisions of the foregoing rules (Civil Service Rules 1–31, inclusive) in so far as they are not inconsistent with the following rules especially applicable to the Labor Service."

One of "the foregoing rules" (Rule 27) relates to transfers. It is not inconsistent with the "rules especially applicable to the Labor Service" referred to in section 1 of said Rule 32, as "the following rules." Rule 27 provides:

"1. 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."

It is to be noted that Rule 27 does not provide that one employed "in any classified position in the Official Service" may be transferred to another position *in the official service.* It states that such a person may be transferred "to *another position.*" The words "another position" as so used include within their scope not only positions in the "Official Service" but any of the positions described in said Rule 3, which include positions in the Labor Service.

Since the adoption of said Rule 27, with relation to transfers, the Legislature, in 1939, made specific provisions for the formulation of rules relating to transfers by the Commission and by the Director. (G. L. (Ter. Ed.) c. 31, § 3, cl. (*h*), and § 16A, as inserted by St. 1939, c. 238 and c. 506, respectively.) However, no new rule or rules relative to transfers have been made since such action of the Legislature. There is nothing contained in the provisions so enacted by the Legislature in 1939 which vitiates said Rule 27 or requires a different interpretation of its effect than that which I have set forth.

You have also asked my opinion upon a question relative to seniority in employment with relation to a person who has been transferred from the official service to a position in the labor service and whom it is now proposed to transfer from the labor service to his original position in the official service.

Said Rule 27 contains no provision authorizing the transfer of an employee in the labor service to a position in the official service, nor is there any provision of the Rules or of the Civil Service Law (G. L. (Ter. Ed.) c. 31, as amended) which authorizes such a transfer. Since this is so, there will be no occasion for your consideration of the problem of seniority with respect to an employee whose transfer from the labor service to the official service has been proposed.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Director — Municipal Labor Service — Roster — Seniority.

April 7, 1942.

Hon. Ulysses J. Lupien, *Director of Civil Service.*

Dear Sir: — You have informed me that the labor service of the City of Quincy was placed under Civil Service on January 12, 1935, and you have asked my opinion as to whether you have authority under St. 1941, cc. 165 and 290, "to establish a seniority roster" for such labor service, "based on" an "exhaustive pay-roll study made by this Division."

I am of the opinion that you have no such authority.

St. 1941, c. 165, amended G. L. (Ter. Ed.) c. 31, by inserting therein a new section, 31B. Under the provisions of this new section the Director of Civil Service is authorized to prepare "rosters of all positions in the classified civil service . . . of each city and town," subject to said chapter 31, "and of the persons whose employment in such positions, respectively, whether permanent or temporary, is legal." The Director is also authorized to make on the proper roster a record of the change in status of any employee whose name is on a roster of persons newly employed in, or appointed to, such service. It is provided that city or town treasurers shall not pay compensation to any person as an employee whose name does not appear on such a roster. The statute does not, however, authorize you to establish or determine the seniority of employees in connection with the preparation and keeping of such rosters.

St. 1941, c. 290, amended said G. L. (Ter. Ed.) c. 31, by inserting therein another new section, 47B, which provides that "Whenever any class of employees in any city or town *not already* in the classified official or labor service is placed therein by statute or otherwise," certain powers may be exercised with relation to the establishment of the seniority of such employees. The statute is not retroactive in effect and was plainly intended to operate only in regard to classes of employees gathered under the protection of the Civil Service Law after the date of its enactment.

You do not derive authority from these statutes to establish seniority by means of a roster with respect to employees in the labor service of Quincy who were placed under Civil Service in 1935.

Furthermore, said section 47B provides that whenever any class of employees in any city or town not already in the classified official or labor service is placed therein,

". . . the appointing authority of said city or town shall forthwith submit to the director a list of all the employees of said class who are actually in the employ of said city or town at that time. Said list shall state the type and kind of work, the length of service, and the compensation of each person so included and any other information which the director may request. . . ."

The section further provides that upon receipt of said list from the appointing authority of said city or town the Director shall cause a copy thereof to be posted in a public place in said city or town for a period of thirty days. At the expiration of said thirty-day period the Director shall forthwith *classify and fix* the seniority of said employees *in accordance with said list* and shall record said classification and seniority dates in the permanent records of the Division.

It is plain from the foregoing provision that in the first instance the Director is required to fix the seniority of employees *not* in accordance with his own investigations or judgment, but only in accordance with seniority as disclosed by the list furnished by the appointing authority, which must state the length of each employee's service and any other information requested by the Director which might include the specific date of appointment of each employee.

The section further provides that:

". . . If, within ten days after the posting of said list, any person whose rights are alleged to have been affected shall petition the director in writing to establish the correctness thereof, the director shall forthwith hold a public hearing and shall hear all parties concerned and may make such changes in said list as he may deem necessary, but no change shall be made more than thirty days after the posting of said list."

It is only after a petition to establish the correctness of a list submitted by an appointing authority and after a public hearing thereon that the Director has authority, independent of that of the appointing authority, to exercise his own judgment in establishing seniority.

Due notice of such public hearing must be given to all parties concerned, and corrections or changes made in the list by the Director must be based upon evidence introduced at the hearing. Such information as he may have acquired by independent investigation must be introduced in evidence at the hearing if it is to be considered by the Director in arriving at his decision on the petition to establish the correctness of the list. *American Employers' Ins. Co.* v. *Commissioner of Insurance*, 298 Mass. 161, 168, 169.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration of Hairdressers — Rules — Beauty Schools and Shops — Charges — Premiums — Conduct.

APRIL 7, 1942.

Mrs. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — You have requested my opinion with respect to certain questions of law propounded by the Board of Registration of Hairdressers.

1. In the first of these questions you ask whether "beauty schools" may make a charge for materials used by students in practice work upon members of the public, the charge to be paid by the public.

A negative answer is required to this question. The pertinent statute specifically provides that "no student shall practice hairdressing or manicuring upon any paying customer." G. L. (Ter. Ed.) c. 112, § 87U, as amended by St. 1941, c. 626, § 3.

2. You next inquire whether beauty shops may "offer defense stamps with certain branches of work." In my opinion, beauty shops may conduct their business in the manner stated in your question. There is no provision of law which forbids beauty shops to offer premiums, prizes or discounts, nor is there any provision of law which would authorize the Board of Registration of Hairdressers to prohibit the offering or giving of such premiums, prizes or discounts. The rule-making powers of the Board of Registration of Hairdressers are specifically limited by the provision that the Board shall not have power "to regulate or fix

compensation or prices." G. L. (Ter. Ed.) c. 112, § 87CC, as amended by St. 1941, c. 626, § 8. See also *Sperry & Hutchinson Co.* v. *Director, Division on the Necessaries of Life*, 307 Mass. 408.

With respect to your third question, which reads:

"Can hairdressers and manicurists and students wear slacks while attending any person in any shop or school?"

I call your attention to the specific limitation upon the power of the Board of Registration of Hairdressers contained in G. L. (Ter. Ed.) c. 112, § 87CC, as amended. This provision prevents the Board from interfering "in any way with the conduct of the business of hairdressing or manicuring, except so far as is necessary for the protection of the public health, safety or morals." I am aware of no factual basis upon which it could be held that the practice referred to in your question can be regulated by the Board on the ground that it "is necessary for the protection of the public health, safety or morals."

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Retirement — Separation from Service — Veteran.

APRIL 7, 1942.

Metropolitan District Commission.

GENTLEMEN: — You have recently requested an opinion as to whether a certain person, who has applied to your Commission for retirement under the provisions of G. L. (Ter. Ed.) c. 32, § 57, may be retired thereunder. I have been advised by your letter and by statements of the secretary of your Commission of the following facts pertinent to your question:

The applicant for retirement was first employed by the Commission on March 23, 1931. He continued to work until October 29, 1939, when he was injured, and since that time he has been receiving compensation under G. L. (Ter. Ed.) c. 152, §§ 69–75. On January 30, 1942, he applied for retirement under G. L. (Ter. Ed.) c. 32, § 57, claiming to be incapacitated for active service. He has been receiving compensation for total disability since his injury on October 29, 1939, and he has not worked since that time. I assume from the facts which you have stated that the individual to whom you referred is a war veteran.

In your letter you quoted a medical report of the present physical condition of the applicant. I make no comment with respect to the contents of that report, since the question of disability sufficient to permit retirement under c. 32, § 57, is a question of fact to be determined by the retiring authority.

In my opinion, this man is not eligible for retirement under G. L. (Ter. Ed.) c. 32, § 57, the pertinent provisions of which are:

"A veteran who has been in the service of the commonwealth, or of any county, city, town or district thereof, for a total period of ten years, may, upon petition to the retiring authority, be retired, in the discretion of said authority, from active service, at one half the regular rate of compensation paid to him at the time of retirement, and payable from the same source, if he is found by said authority to have become incapacitated for active service; . . ."

At the time this man was injured he had been in the service of the Commonwealth for a period of less than nine years. His retirement under the ten-year

statute (§ 57) would now be possible only if it could be said that he remained "in the service of the commonwealth" between October 29, 1939, the date of his injury, and March 23, 1941, the tenth anniversary of his employment. In my opinion, it must be ruled, in accordance with existing law, that he became separated from the service at some time prior to the expiration of that seventeen-month period following his injury and that he does not, therefore, have the prerequisite ten years of service.

In the case of *Dunn* v. *Commissioner of Civil Service*, 279 Mass. 504, 509, the Supreme Judicial Court said:

"It has been held that absence from duty due to sickness may constitute the separation from the public service of one protected by the civil service law. *Fernandez* v. *Mayor of New Bedford*, 269 Mass. 445. *Goldberg* v. *Commissioner of Civil Service*, 274 Mass. 300. Those decisions are authority to the effect that bodily disability may constitute separation from the public service. The fact that in those cases the absent public servant happened to receive benefits under the workmen's compensation act is irrelevant to the question whether the absence due to bodily disability constituted separation from the service."

The court proceeded to hold that a police officer who had been on leave of absence for three months because of an illness, which made it impossible for him to perform his duties, had thereby become separated from the service.

The effect of the *Dunn* decision was modified as to leaves of less than six months by the enactment of St. 1934, c. 207, which provided for the insertion of the following new section in chapter 31 of the General Laws:

"Section 46E. 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."

In 1936 the Legislature amended section 46E and further relaxed the rule of the *Dunn* case with respect to employees injured in line of duty. By St. 1936, c. 297, the following paragraph was added to said section 46E:

"If a person in the classified civil service, whether official or labor, who is unable to work *for a period not exceeding three years* because of injuries received in the performance of duty and on account of which compensation under chapter one hundred and fifty-two is paid, not later than six months after the final payment of compensation aforesaid gives to the commissioner written notice that he is ready, willing and able to do his former work, and presents to him a certificate of a registered physician, approved by the board, that he is physically fit to efficiently perform the duties of his position, he shall not be deemed, by reason of such inability to work, to have become separated from such service, and any seniority rights to which he was entitled at the time of receiving such injuries shall be preserved."

By St. 1941, c. 136, the words "for a period not exceeding three years" were stricken from section 46E. In other material respects it remains in the form quoted above.

In my opinion, this series of enactments manifests a policy of caution on the part of the Legislature in relaxing the rule of separation from service stated and applied in the case of *Dunn* v. *Commissioner of Civil Service*, *supra*. Thus the first statute, enacted in 1934, was designed merely to preserve the status of employees who are on leave for less than six months. That statute was followed by the 1936 amendment, which extended certain protection to employees injured in the per-

formance of their duties. However, the benefits of the 1936 statute were not available to all persons so injured but only to an injured employee who (1) was disabled for a period of three years or less, (2) gave written notice, within a specified period, of his being ready, willing and able to do his former work, and (3) presented a physician's certificate as to his physical fitness to perform the duties of his position. The 1941 statute merely eliminated the first of the enumerated qualifications prescribed by the 1936 statute, but the other qualifications remain in full force and effect. They must be complied with by any employee who seeks to be regarded as not having been separated from the service by a long absence caused by physical disability.

The Legislature could, of course, have provided without qualification that the absence of an employee by reason of injuries incurred in the performance of his duties should not effect a separation from the service. As I have shown, however, the Legislature did not do so and we are obliged to apply the law as it stands and not as it might have been enacted.

It is obvious that if the man to whom you referred in your letter is, as he claims, totally disabled, he cannot now comply with the conditions prescribed by G. L. (Ter. Ed.) c. 31, § 46E. Unless and until he does comply therewith, his status is governed by the rule applied in the *Dunn* case, as modified by the six-month provision enacted by St. 1934, c. 207. Applying that rule to the facts stated, it follows that this man was separated from the service of the Commonwealth prior to the expiration of seventeen months after he was injured. It is not necessary for present purposes to determine just when the separation occurred during the seventeen-month period, since credit for service during the entire seventeen-month period would be necessary to qualify this individual as a person who had been "in the service of the commonwealth" for a period of ten years.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Eminent Domain — Taking by Municipality — Appropriation.

APRIL 9, 1942.

Metropolitan District Commission.

GENTLEMEN: — You have requested my opinion concerning the validity of a certain taking of land by the City of Quincy. You have also inquired whether the Commonwealth would be liable for any damages if your Commission, relying on the taking as valid, should enter upon the land taken and construct a traffic circle thereon, and subsequently the courts should declare the taking invalid. The following are the pertinent facts which have been brought to my attention:

The City Council, by vote dated June 16, 1941, adopted an order purporting to take certain specifically described lands in Quincy by eminent domain "for street purposes." The City Council did not, prior to adopting said order of taking, vote to appropriate any sum of money for that specific purpose. Early in 1941 the Council appropriated from the tax levy the sum of $32,000 for street construction, and later made further appropriations by two loan orders for $150,000 each, also for street construction. In none of these appropriations was there a specific reference to the taking of land. I am informed that the original appropriation and the loan orders were passed by votes in excess of two thirds of all the members of the

City Council. It also appears that the City of Quincy operates under a Plan A charter (G. L. [Ter. Ed.] c. 43, §§ 1–55, inclusive) adopted in 1916.

I am further advised that your Commission does not have funds with which to pay damages for a taking from the original owners, or with which to pay damages to the owners if the Commission should proceed in reliance upon the city's taking and the latter should be held invalid. For these reasons you desire positive assurance that the city's taking is valid before proceeding with the proposed construction.

For the reasons discussed below, I am unable to give you the positive assurance which you desire that the taking by the City of Quincy is valid. While its validity might be sustained if tested in the courts, the question cannot be answered with certainty in the absence of a judicial decision. In answer to your second question, I am obliged to advise you that if your Commission undertakes the construction on the land in question, relying upon the city's taking for title, and if the taking should subsequently be held invalid by the courts, the Commonwealth would be liable for damages to the true owners of the land.

The validity of the city's taking depends upon whether the procedure prescribed for the exercise of the power of eminent domain has been followed, and whether all the requirements preliminary to the adoption of an order of taking have been met.

G. L. (Ter. Ed.) c. 79, § 1, which sets forth the manner in which a taking of real estate shall be effected, provides that before a board of officers, upon which authority is conferred to take land, makes an order of taking, it must first comply "with all the preliminary requirements prescribed by law." Such requirements are contained in G. L. (Ter. Ed.) c. 40, § 14, which you cited in your letter, and in G. L. (Ter. Ed.) c. 43, § 30.

G. L. (Ter. Ed.) c. 40, § 14, so far as pertinent, reads as follows:

"The aldermen of any city, . . . may purchase, or take by eminent domain under chapter seventy-nine, any land, easement or right therein within the city or town not already appropriated to public use, for any municipal purpose *for which the purchase or taking of land, easement or right therein is not otherwise authorized or directed by statute;* but no land, easement or right therein shall be taken or purchased under this section unless the taking or purchase thereof has previously been authorized by the city council . . ., nor until an appropriation of money, to be raised by loan or otherwise, has been made for the purpose by a two thirds vote of the city council. . . ."

The words in italics were inserted in section 14 by St. 1933, c. 283, § 1.

G. L. (Ter. Ed.) c. 43, § 30, so far as pertinent, reads as follows:

"At the request of any department, and with the approval of the mayor and the city council under Plan A, . . . the city council may, in the name of the city, purchase, or take by eminent domain under chapter seventy-nine, any land within its limits for any municipal purpose. . . . No land shall be taken or purchased until an appropriation by loan or otherwise for the general purpose for which land is needed has been made by the city council, by a two thirds vote of all its members; nor shall a price be paid in excess of the appropriation, unless a larger sum is awarded by a court of competent jurisdiction. . . ."

Section 30 authorizes a city subject thereto to take land "for any municipal purpose." A taking of land for street purposes by the City of Quincy is such a taking, and is "otherwise authorized or directed by statute," as that phrase is used

in section 14. It would appear, therefore, that section 14 is not applicable to the taking now under consideration.

It remains to be considered whether the preliminary requirements of section 30 have been met, in the absence of a prior appropriation for the specific purpose of land takings. The pertinent provisions of said section 30 read:

"No land shall be taken or purchased until *an appropriation* by loan or otherwise *for the general purpose for which land is needed* has been made by the city council, by a two thirds vote of all its members; nor shall a price be paid *in excess of the appropriation*, unless a larger sum is awarded by a court of competent jurisdiction."

I understand the position of the City of Quincy to be that, as the land taken was needed for street construction and as the prior general appropriations were made for street construction, they were "for the general purpose for which land is needed" and therefore satisfy the appropriation requirements of section 30.

This position, which finds support in the language used in the first part of the sentence quoted above from section 30, may be the correct one. However, I am unable to advise you with certainty that the city's interpretation of the statute would be adopted by the courts. A litigant might well advance intelligent arguments in support of a contrary interpretation.

Thus, the remainder of the quoted sentence reads:

". . . nor shall a price be paid *in excess of the appropriation*, unless a larger sum is awarded by a court of competent jurisdiction."

This provision is obviously intended to be a limitation upon the acquisition of lands by cities subject thereto. The statute must be so construed as to give effect to all of its provisions. See *Commissioners of Public Works* v. *Cities Service Oil Co.*, 308 Mass. 349, 360; *Paquette* v. *Fall River*, 278 Mass. 172, 176. If the appropriation required by section 30 means a general appropriation covering the entire expense of street construction for the year, the clause just quoted with respect to the price to be paid would be a rather meaningless limitation. This proposition is demonstrated by the facts now under consideration. The land which was taken is assessed for less than ten thousand dollars. The appropriations relied upon exceed three hundred thousand dollars. Obviously, a limitation forbidding payment of over three hundred thousand dollars, without a court order, for land assessed at less than ten thousand dollars, is no limitation at all.

This aspect of section 30 tends to indicate that the Legislature intended to require an appropriation specifically directed to the matter of land taking, which appropriation could be expected to provide a reasonable limitation upon the amounts to be paid without a court award. If this view is correct, the taking to which you referred would be held invalid, since there was no appropriation for the specific purpose of land taking.

Another factor which may be considered in construing section 30 is the general policy of the law with respect to the acquisition of land by municipalities, as shown by other statutes and judicial decisions. The closest analogy to section 30 is found in G. L. (Ter. Ed.) c. 40, § 14, which is quoted above. Both statutes deal with the same subject, namely, the preliminary requirement of appropriations in connection with the purchase or taking of lands by municipalities. Both statutes are contained in chapters of the General Laws dealing with municipal government. The following language from the case of *Sheldon* v. *Boston & Albany R.R.*, 172 Mass. 180, 182, would appear to be pertinent:

"Where statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish."

Section 14 has been construed as requiring that a purchase or taking of land pursuant to that section must be preceded by an appropriation specifically directed towards such purchase or taking. See *Breckwood Real Estate Co.* v. *Springfield*, 258 Mass. 111, 113; *Reed* v. *Springfield*, 258 Mass. 115; *Walker* v. *Medford*, 272 Mass. 161. In the *Breckwood* case the Supreme Judicial Court said:

"The dominant purpose and intention of the Legislature in the enactment of this statute [c. 40, § 14] was *to protect the people of municipalities from the appropriation and expenditure of the public funds* unless and until such appropriation had been previously authorized by the safeguard of a two-thirds vote of the city council or a two-thirds vote of the town at a regular meeting. . . . If, as in the case at bar, an appropriation has not been previously made by a two-thirds vote of the city council, the city obtains no title to the land and none can be deemed to be vested in the city by estoppel or otherwise. To reach a different result would in effect nullify the express requirements of the statute." (258 Mass. 111, 114.)

It may be strongly urged that "the people of municipalities" operating under a Plan A charter and subject to section 30 of chapter 43 need such protection just as much as do "the people of municipalities" operating under special charters and subject to section 14 of chapter 40.

I am aware of no case in which this specific question as to the proper interpretation of section 30 has been decided by the courts of Massachusetts. In view of the considerations discussed above, it would appear that the courts may hold that section 30 requires a prior appropriation dealing specifically with the purchase or taking of land as a prerequisite to the validity of such a taking or purchase under that section. Upon such an interpretation, the taking here in question would be held invalid. On the other hand, the courts may adopt the view contended for by the city, in which case the validity of the taking would be sustained.

For these reasons, and in the absence of a court decision, I am unable to give you any positive assurance that the City of Quincy now has a clear title to the land to which you refer. It is, of course, within the power of the city to proceed anew with the taking and to comply with the strictest possible interpretation of section 30. Thus, the city can make a new taking, preceded by an appropriation by loan or otherwise, referring specifically to such taking. If that were done, your Commission could proceed with its construction work without incurring the risk of liability to the original owners of the land.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

State Employees — Military Substitute — Vacancies.

APRIL 16, 1942.

His Excellency LEVERETT SALTONSTALL, *Governor of the Commonwealth.*

SIR: — You have recently requested my opinion on three questions which concern the interpretation of St. 1941, c. 708, § 7. That section provides, in substance, that when an officer holding a position of the type described therein is unable to perform the duties of his office by reason of his serving in the military

or naval forces of the United States, the head of the department, division, board or commission may, with the approval of the Governor, designate another person to perform the duties of such officer during the latter's military or naval service.

Your specific questions and my answers thereto are as follows:

"1. Must the person appointed under section 7 necessarily be in the employ of the Department?"

In my opinion, the specific language of section 7 requires an affirmative answer to this question.

"2. Does such appointee receive the pay of the position to which he is appointed or does he continue at the rate of pay he receives as such 'employee'?"

In my opinion, the designee or appointee is entitled to receive the compensation which attaches to the office the duties of which he is to perform during the military or naval service of the regular incumbent. While receiving this salary the designee does not, of course, continue to receive the salary to which he was entitled while holding his original position. See G. L. (Ter. Ed.) c. 30, § 21.

"3. Does such employee upon taking over and performing the duties of an officer create a vacancy in the position he held as an 'employee'?"

In my opinion, the answer to this question will depend on the circumstances existing with respect to each particular case. It may well be possible and practicable for a person in the employ of a particular department to continue to perform his normal duties while at the same time performing the duties of some other officer pursuant to a designation under St. 1941, c. 708, § 7. In such a case, no vacancy would be created in the position of the person so designated. On the other hand, cases may arise in which the normal duties of the designee are so onerous or so incompatible with the duties which he will be required to perform under the designation that a sound policy of administration would require that he relinquish his normal duties. In that event it could properly be held that a vacancy was thereby created.

The following sentence, which appears in section 7, manifests a legislative recognition of the fact that such vacancies may arise:

". . . Any appointment, promotion or transfer of any person to perform the duties of a person so designated shall be temporary and shall not extend beyond the date when such designation ceases to be in force and effect."

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Reformatory for Women — Escape — Prosecution.

APRIL 17, 1942.

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

DEAR SIR: — You have asked my opinion as to whether prosecution for escape of a female prisoner, who has been sentenced to the Reformatory for Women, and indentured under G. L. (Ter. Ed.) c. 127, § 85, and who leaves her place of service, should be instituted under the provisions of G. L. (Ter. Ed.) c. 127, § 86, or of G. L. (Ter. Ed.) c. 268, § 16, as amended.

I advise you that prosecution for such an escape should be had under said chapter 127, section 86.

Said section 86 provides that if a woman serving a sentence in the Reformatory for Women, who has been indentured,

"leaves her place of service, . . . she *shall be held to have escaped from prison*, and may be arrested and returned to the prison from which she was taken as if she had escaped therefrom, and *shall, upon conviction of such escape, be punished by imprisonment in jail or in a house of correction for not less than three months nor more than one year or in the reformatory for women. . . .*"

G. L. (Ter. Ed.) c. 268, § 16, as amended, provides that

"a prisoner who escapes or attempts to escape from any penal institution, or from land appurtenant thereto, or from the custody of any officer thereof or while being conveyed to or from any such institution, may be pursued and recaptured and shall be punished by imprisonment in the state prison for not more than ten years or by imprisonment in a jail or house of correction for not more than two and one half years."

Said chapter 268, section 16, as amended, is the final form of enactment of a long line of statutes relative to escapes from penal institutions, the original version having been enacted much earlier than the original statute embodying the provisions of said sections 85 and 86 of chapter 127.

It appears that in enacting said section 86 the Legislature intended to deal with a different offense from that described in said section 16. This is manifested by the fact that the Legislature specifically provided a milder penalty to be applied upon conviction of the form of escape dealt with in section 86 than that applicable to one convicted under section 16 of an escape from a penal institution.

In my opinion, a woman who is released from the Reformatory for Women and indentured to service elsewhere does not, upon leaving her place of service, come within the terms of said section 16 of chapter 268, although such act constitutes "an escape."

You have also asked my opinion as to the length of time which may be required to be served by a woman (1) sentenced to the Reformatory for Women under G. L. (Ter. Ed.) c. 268, § 16, as amended, *for an escape from a penal institution*, and (2) sentenced to the Reformatory for Women under G. L. (Ter. Ed.) c. 127, § 86, *for leaving her place of service.*

1. Said section 16 provides that a person who escapes from a penal institution shall be punished by not more than ten years' imprisonment in State Prison or not more than two and one-half years in a jail or house of correction. If a woman is convicted of that offense and is sentenced under section 16 to an indefinite term in the Reformatory for Women, she may be held at the Reformatory for not more than five years (G. L. (Ter. Ed.) c. 279, § 18).

2. If a woman is convicted of leaving the service to which she has been indentured, which is a misdemeanor, she may be sentenced under G. L. (Ter. Ed.) c. 127, § 86, to an indefinite term in the Reformatory for Women, where she may be held for not more than two years (G. L. (Ter. Ed.) c. 279, § 18). See *Platt* v. *Commonwealth*, 256 Mass. 539.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration in Medicine — Alien Application for Registration — Citizenship Requirements.

April 28, 1942.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — On behalf of the Board of Registration in Medicine you have inquired whether that Board has the right to grant registration as a physician to an alien applicant who, under federal law, is not eligible to United States citizenship.

In my opinion, your question must be answered in the negative.

G. L. (Ter. Ed.) c. 112, § 2, sets forth at some length the prerequisites to the issuance of certificates of registration to physicians. The following language, which appears in the last paragraph of said section 2, deals specifically with the matter of citizenship:

"The board shall examine an applicant who is an alien only if he presents to it a certificate from the court in which he shall have filed his declaration of intention to become a citizen of the United States, or from the Immigration and Naturalization Service of the United States, showing that he has declared his intention to become such a citizen, or a copy of such declaration of intention, certified by the clerk of such court. . . . The foregoing provisions of this paragraph shall not apply to limited registration under section nine or section nine A or to any alien physician of distinguished merit and ability, duly licensed to practice his profession in any foreign country wherein the requirements for the issuance of such a license are not substantially lower than those of this commonwealth, while he is temporarily teaching in this commonwealth in a medical school approved by the approving authority."

Thus it appears that, in general, an alien may not be given the preregistration examination unless he complies with specific requirements indicating that he has undertaken to acquire United States citizenship. It is obviously impossible for the person to whom you refer to comply with these requirements, since he is ineligible for citizenship. I have been advised of no facts upon which it could be ruled that he comes within the excepted classes referred to in the last sentence of the above-quoted paragraph, as an intern (§ 9), a student (§ 9A), or an alien physician of distinguished merit and ability temporarily teaching in an approved medical school in this Commonwealth.

My opinion as to the Board's lack of authority to issue a certificate of registration to the said alien applicant is not affected by the fact that the Board proposed to grant registration to him without examination, but on the basis of his having a certificate of qualification from the National Board of Medical Examiners of the United States under G. L. (Ter. Ed.) c. 112, § 2A. That section reads as follows:

"In determining the qualifications necessary for registration as a qualified physician, the board may at its discretion accept the certificate of the National Board of Medical Examiners of the United States, chartered under the laws of the District of Columbia, in place of and as equivalent to its own professional examination; but before registration in pursuance of this section the applicant therefor shall pay a fee of twenty-five dollars."

Thus, section 2A authorizes acceptance of National Board certificates by the Massachusetts Board "in place of and as equivalent to its own professional examination . . ." The Massachusetts Board is not authorized, however, to accept such a certificate in place of compliance with the other qualifications prescribed

by section 2, or to waive those other requirements, including those relating to citizenship.

In my opinion, the citizenship requirements imposed by the quoted portion of G. L. (Ter. Ed.) c. 112, § 2, are valid. See *Clarke* v. *Deckebach*, 274 U. S. 392; Attorney General's Report, 1939, p. 76.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

State Employee — Temporary Increase in Salary — Step Rate Increase.

APRIL 28, 1942.

Commission on Administration and Finance.

GENTLEMEN: — You have requested my opinion as to whether a temporary increase in salary granted to a State employee as of February 1, 1942, pursuant to St. 1942, c. 12, should be diminished if, at a later date, the employee receives a step rate increase under G. L. (Ter. Ed.) c. 30, §§ 45–50, which brings his permanent salary to a figure which would have excluded him from the benefits of St. 1942, c. 12, had he been compensated at the new permanent rate on February 1, 1942.

In my opinion, an employee's receipt of a step rate increase in his permanent salary does not warrant a reduction in, or any other adjustment of, the temporary increase to which he became entitled on February 1, 1942, by operation of St. 1942, c. 12.

Section 1 of said chapter 12 reads as follows:

"The salary of each officer and employee in the service of the commonwealth receiving a salary at the rate of less than fifteen hundred dollars per annum for full time service is hereby increased by an amount of one hundred and fifty dollars per annum; *provided, that no increase shall be made hereunder which will increase the total salary of any such officer or employee to an amount in excess of fifteen hundred and eighty dollars per annum.* The salary of each officer and employee in said service receiving a salary at the rate of fifteen hundred dollars, but less than twenty-four hundred and eighty dollars, per annum for full time service is hereby increased by an amount of one hundred dollars per annum; *provided that no increase shall be made hereunder which will increase the total salary of any such officer or employee to an amount in excess of twenty-four hundred and eighty dollars.*" (Italics mine.)

The provisos which are italicized in the foregoing quotation manifest a legislative intent that they shall operate as limitations only with respect to total salaries as augmented by *temporary increases granted pursuant to section 1*, and not with respect to aggregate salaries resulting from subsequent step rate increases. This interpretation is supported by the provisions of St. 1942, c. 12, § 5, which read:

"The increase in salaries provided for by this act shall be effective only for the period beginning February first in the current year and ending June thirtieth, nineteen hundred and forty-three, and *such increase shall not prevent an officer or employee from receiving during said period step rate increases to which he may be entitled.*" (Italics mine.)

The foregoing provision protecting the rights of employees with respect to step rate increases would be deprived of its vitality and substance if it were held that an employee by receiving a step rate increase was thereby rendered ineligible thereafter to receive the benefits of the temporary increase granted under section 1. Had the Legislature intended to produce such a result, it could easily have made

provision therefor in chapter 12. Such a provision was specifically included in an earlier statute (Gen. St. 1917, c. 323), which provided for the granting of temporary increases to State employees whose salary rates were below a specified figure. That statute provided, in section 4:

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

The omission of any such provision from St. 1942, c. 12, is indicative of a legislative intent to permit State employees to receive the benefits of the temporary increases granted pursuant to said chapter 12 and also the benefits of step rate increases which they may receive after February 1, 1942, pursuant to other provisions of law.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Works — Commissioner — Laborers — Establishment of Hours of a "Work Week."

APRIL 30, 1942.

HON. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — You have recently asked my opinion as to whether you have "the legal authority to establish a 40-hour week" for "maintenance men" employed by the Department of Public Works. In a subsequent letter you described "maintenance men" as "men on the labor pay roll who are laborers, workmen and mechanics." I am informed that no rules or regulations have been promulgated by the Division of Personnel and Standardization under G. L. (Ter. Ed.) c. 30, §§ 45–50, prescribing the hours of labor of a "work week" of State employees.

I am of the opinion that, in the absence of such regulations by the Division of Personnel and Standardization, you have authority to make reasonable, non-discriminatory determinations as to the number of hours of labor not exceeding forty-eight hours, which will constitute a "work week" with respect to laborers or other classes of employees of the Department of Public Works. There is no occasion at this time to consider whether your determinations with respect to "maintenance men" would be superseded if the said Division were later to prescribe hours of labor for that class of employees.

The Legislature has not provided specifically the number of hours of work per week required to be performed by laborers or other employees of the Commonwealth. The Legislature has provided that certain classes of laborers and other employees shall not be required to work more than forty-eight hours in any week (G. L. (Ter. Ed.) c. 149, §§ 30, 39). These sections do not specifically define nor establish what number of hours shall comprise a work week for laborers and other employees referred to therein. They do not do so by implication. (See *Weerdt* v.

Springfield, 295 Mass. 523). They only set up a maximum of hours beyond which work may not be required during a week.

No implication as to the number of hours in a work week for laborers arises from G. L. (Ter. Ed.) c. 30, § 24, which provides that the offices of all State departments shall be open to the public for the transaction of business during certain designated hours. II Op. Atty. Gen. 475.

The Legislature has not in express terms vested any particular officer or officers with authority to establish the number of hours which shall constitute a week's work for laborers or other employees of the Commonwealth.

The Commissioner of Public Works is the executive and administrative head of the Department of Public Works. G. L. (Ter. Ed.) c. 16, §§ 2, 4. As such head he is given broad authority with respect to the appointment of employees, the assignment of their duties, and their removal (§ 4). Included among his powers is that of determining the hours of labor of employees of the Department, subject to such superior authority as may be vested in the Division of Personnel and Standardization by G. L. (Ter. Ed.) c. 30, §§ 45–50. III Op. Atty. Gen. 413. The Commissioner must, of course, act reasonably in making such determinations with respect to hours of labor, and he may not for such purpose fix any number of hours in excess of the maximum number permitted by G. L. (Ter. Ed.) c. 149, §§ 30, 39, or such other limitations as may be imposed by law.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

State Employee — Re-employment — Salary.

MAY 4, 1942.

Hon. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — You have inquired whether a certain employee of the Department of Public Welfare is entitled to a temporary increase in salary under St. 1942, c. 12, in the light of the following facts:

The employee in question had been employed in your department for many years until her retirement on February 24, 1942. Her salary rate was then $2,640 per year and upon retirement she became entitled to payments of $1,420.56 per year from the State Retirement Fund. On February 26, 1942, pursuant to St. 1942, c. 16, she was re-employed in her former position. Since her reinstatement she has been paid at the rate of $2,640 per year, $1,219.44 from funds of the Welfare Department and $1,420.56 from the Retirement Fund.

In my opinion, the employee to whom you refer in your letter is not entitled to a temporary increase under St. 1942, c. 12.

Temporary increases were granted by said chapter 12 to officers or employees whose annual salary rates were less than $2,480. The word "salary" as used in chapter 12 is defined therein as including "all compensation from the commonwealth, however payable, . . ." Hence, it follows that, if the State employee is receiving compensation from the Commonwealth at the rate of $2,640 per year, she is beyond the purview of chapter 12. In my opinion, she must be so regarded.

St. 1942, c. 16, which authorizes the re-employment of retired officers or employees, provides in section 1 that:

". . . Any person so employed shall receive full compensation for such services, less any retirement allowance or pension received by him . . ."

It is apparent from this provision, as well as from the tenor of chapter 16 as a whole, that a retired employee who is re-employed pursuant thereto is not to receive a diminished compensation for her services, but is to receive the full rate which attaches to her position. In this case the pertinent salary rate is $2,640 per year and the employee in question is receiving compensation at that rate. To hold that while she is thus receiving $2,640 per year she is entitled to a temporary increase under St. 1942, c. 12, would, in my opinion, do violence to the clearly expressed legislative intent that such increases should be available only to officers or employees compensated at an annual rate of less than $2,480.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Labor Service of Department of Public Works — Temporary Positions.

MAY 7, 1942.

HON. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to whether "a group of female cleaners who were employed on July 1, 1941, at Commonwealth Pier 5 by the Department of Public Works are entitled to be recorded as permanent cleaners classified under Civil Service under the provisions of chapter 627 of 1941."

The members of the group to which you refer were in the labor service of the Department of Public Works on July 1, 1941. It appears, however, that each of the members of this group was occupying a temporary and not a permanent position in such service. The records of the Division of Personnel and Standardization show that each of the members of this group had originally received a temporary appointment for the three months' period only, that these temporary appointments had each been renewed for further periods of three months at a time, and that on July 1, 1941, each member of this group held her position upon such a temporary appointment.

I am of opinion that the members of the group of female cleaners to whom you refer are not entitled to be recorded as permanent cleaners classified under Civil Service.

St. 1941, c. 627, was entitled "An Act placing certain positions in the Department of Public Works under the Civil Service Laws." Its applicable parts read:

"SECTION 1. Section four of chapter thirty-one of the General Laws, as amended, is hereby further amended by adding at the end the following new paragraph: —

The labor service of the state department of public works.

. . . . . .

SECTION 6. The persons holding, on July first of the current year, positions in the department of public works referred to in section one of this act may continue to serve in such positions without examination or re-appointment."

The effect of this statute, which was approved August 4, 1941, was, as its title indicates, to bring the labor service of the State Department of Public Works within the sweep of the Civil Service Law and Rules. Prior to the enactment of this statute the labor service was not within the classified Civil Service.

In my opinion, the intent of the Legislature in enacting St. 1941, c. 627, § 6, was to give Civil Service status, with its unlimited tenure, to persons holding labor service positions under permanent appointments or appointments of indefinite duration. There is nothing in the statute to indicate that the Legislature intended thereby to transform an expressly limited temporary employment into one of unlimited tenure under the Civil Service Law and Rules. An examination of the General Appropriation Act of 1941, together with the departmental budget estimates and the report of the Budget Commissioner to the Committee on Ways and Means, shows a legislative awareness of the fact that certain of the employees at Commonwealth Pier 5 hold temporary employments. (See St. 1941, c. 419, item 3132–02; also report of Budget Commissioner.) This fact lends support to my opinion that the persons to whom you refer, who were holding temporary positions, were not intended by the 1941 amendment to acquire the status of permanent cleaners classified under Civil Service.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Soldiers' Relief Agent — Northampton — Classification.

MAY 8, 1942.

Hon. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to whether the incumbent of the position of Soldiers' Relief Agent in the City of Northampton is an "*officer* within the meaning of G. L. c. 31, § 5, and, therefore, exempt from Civil Service Law and Rules."

Irrespective of whether the incumbent of the said position is an officer or an employee of the City of Northampton, he is not exempt from the provisions of the Civil Service Law and Rules under G. L. (Ter. Ed.) c. 31, § 5, because his appointment is not, by the terms of the city ordinance creating the position, one which is subject to confirmation by the City Council.

G. L. (Ter. Ed.) c. 31, § 5, in its applicable parts, reads:

"No rule made by the commission shall apply to the selection or appointment of any of the following:

Judicial officers; . . . officers whose appointment is subject to confirmation by the executive council, *or by the city council* of any city. . . ."

The City of Northampton has a city council consisting of a board of aldermen and a common council.

By chapter 48 of the city ordinances of the current year, adopted by both branches of the Council on April 2, 1942, it is provided:

"SECTION 1. The Mayor shall appoint upon the passage of this ordinance, *subject to confirmation by the Board of Aldermen,* a person . . . to be known as the Soldiers' Relief Agent."

Confirmation by a board of aldermen is not equivalent to confirmation by a city council so as to exclude the holder of a municipal office from the classified Civil Service. *Attorney General* v. *Douglass,* 195 Mass. 35, 38.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Qualifying Examinations under St. 1941, c. 709 — Separation from Service.

May 13, 1942.

Hon. Ulysses J. Lupien, *Director of Civil Service.*

Dear Sir: — You have asked my opinion as to whether you should give qualifying examinations pursuant to St. 1941, c. 709, for the position of Assistant Director in the Division of Employment Security to three persons, each of whom held such a position on October 29, 1941, but none of whom holds it now. The pertinent provisions of said chapter 709, which took effect on October 29, 1941, are:

"Section 1. The director of the division of employment security in the department of labor and industries shall transmit to the director of civil service a list of the deputies or assistants who were appointed under section nine I of chapter twenty-three of the General Laws and who upon the effective date of this act are incumbents of said offices.

Section 2. The director of civil service on receipt of said list shall forthwith proceed to give a qualifying examination to each deputy or assistant on said list to determine his qualifications to perform the duties of said position of deputy or assistant, as the case may be.

Section 3. . . . The director of civil service shall certify to the position of assistant directors such deputies and assistants as pass such qualifying examination, and they shall be deemed to be permanently appointed thereto without serving any probationary period, and their tenure of office or employment shall be unlimited, subject, however, to the civil service laws."

The factual situation out of which your question arises may be summarized as follows:

On October 29, 1941, each of said persons held the position of Assistant Director of the Division of Employment Security, by appointment under G. L. (Ter. Ed.) c. 23, § 9I. No qualifying examination pursuant to section 2 of chapter 709 above has ever been given to them. The reason for this omission is not stated by you, but there is no evidence or intimation of which I am aware that the omission was due to any fault or inaction on the part of the Assistant Directors. One of them continued to serve in that capacity until November 30, 1941, when he resigned to accept an appointment by the Governor to another State office. The other two Assistant Directors referred to in your letter continued to hold their positions until December 31, 1941, when they were separated from the service of the Division of Employment Security by order of the Director of that Division.

Their separations from the service involved no fault on their part but were based entirely upon the fact that there were no funds available from which to pay them. Such funds had formerly been furnished by the Federal Government, but federal grants were discontinued as of January 1, 1942, when, pursuant to a request by President Roosevelt, the employment service functions of the Division of Employment Security were temporarily transferred to the United States Employment Service (see Governor's Executive Order No. 2, issued December 31, 1941). Since January 1, 1942, said Assistant Directors have been employed in the Boston office of the United States Employment Service. Other employees of the Employment Security Division with Civil Service status, who were similarly separated from the service on December 31, 1941, have been placed upon a "Special List," so called, giving them a preferred status with respect to possible future vacancies in the State service (G. L. (Ter. Ed.) c. 31, § 46G; Civil Service Rule 23 (2)).

In view of the unusual factual situation set forth above, I am of the opinion that you may now give a qualifying examination pursuant to St. 1941, c. 709, to each of the two Assistant Directors who were separated from the service of the

Employment Security Division because of lack of funds, but that you may not give such an examination to the Assistant Director who resigned on November 30, 1941.

It is clear from the provisions of St. 1941, c. 709, that the Legislature intended to confer all of the benefits of the Civil Service Law and Rules upon the persons described in chapter 709, provided such persons passed a qualifying examination. These benefits included not only protection against removal without proper cause, but also the right, in the event of removal for cause but without fault, to be placed upon a Special List (Civil Service Rule 23 (2)) and the right to preference in the event of reinstatement (G. L. (Ter. Ed.) c. 31, § 46G). The latter privileges are particularly important in this instance in view of the temporary nature of the transfer of the employment service functions from the State to the federal agency (see Governor's Executive Order No. 2, December 31, 1941).

However, despite a clear legislative intent that the persons holding office as Assistant Directors on October 29, 1941, should be permitted to acquire Civil Service status and rights, they cannot acquire such status or rights unless they are permitted to take a qualifying examination as required by St. 1941, c. 709, § 2. It is doubtless true that in the ordinary situation a qualifying Civil Service examination may be given only to a person then holding the position for which he is to be examined. However, because of the unusual circumstances involved in this situation, I am of the opinion that the legislative purpose would be frustrated if it were ruled that these men should be denied the benefits of chapter 709 simply because they were separated from the State service unexpectedly and without fault on their part before they had been given qualifying examinations. I am of the opinion that if these persons are permitted to take such an examination now and thereby secure the benefits of positions on a Special List, which would otherwise be lost to them through no fault of theirs, the legislative intent would be fulfilled as far as possible at this time.

The foregoing considerations do not apply to the Assistant Director who resigned on November 30, 1941, in order to accept another appointment in the State service. He made his choice and his resignation carried with it a surrender of all rights and privileges which he may have had with respect to the position of Assistant Director of the Division of Employment Security. Among the rights so waived by him was the right to a qualifying examination under St. 1941, c. 709, § 2.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Health — Authority of Employees to Enter Private Premises — Compensation for Injuries Sustained on Private Premises.

MAY 14, 1942.

Dr. PAUL J. JAKMAUH, *Commissioner of Public Health.*

DEAR SIR: — In your letter of May 5th you ask to be advised as to the following:

1. Have employees of this Department authority, under sections 9 and 165 of chapter 111 of the General Laws, to enter private premises in the performance of their official duties without signing waivers saving the owner of the premises harmless in case of injury?

2. Are representatives of this Department entitled to compensation as State employees under any statute of this State for injuries resulting from the performance of their official duties if such injuries take place on private premises?

In answer to your first inquiry, it is my opinion that employees of the Department of Public Health under sections 9 and 165 of chapter 111 of the General Laws, as amended, have authority to enter private premises in the performance of their official duties without signing any waivers for the benefit of the owners of the premises. In fact, those statutes specifically provide for free access to any place within the scope of authority of such employee, with penalties for anyone who "hinders, obstructs or in any way interferes with any such inspector."

In answer to your second inquiry, it is my opinion that employees of your Department, acting within the scope of their authority under the law, are protected in accordance with G. L. c. 152, as amended, if they sustain injuries arising out of and in the course of their employment, even when such injuries are sustained on private premises.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Insurance — Renewal Certificates — Extension of Policy.

MAY 20, 1942.

Hon. CHARLES F. J. HARRINGTON, *Commissioner of Insurance.*

DEAR SIR: — You have advised me that groups of insurance companies which issue fire and automobile liability policies in Massachusetts have suggested that the national defense would be assisted "if such policies as are now outstanding in this Commonwealth could be continued in force upon their expiration dates by the use of properly executed Renewal Certificates." With respect to this situation you have requested my opinion on the following questions of law.

"1. May a Standard Fire Policy issued under the authority of section 99 be continued after its expiration date by the issuance to the assured of a properly executed Renewal Certificate.
2. Is the Commissioner of Insurance authorized by existing law to approve a Renewal Certificate Form to be used for the continuance of a Compulsory Motor Vehicle Liability Policy beyond its termination date if such form does not contain the minimum requirements of chapter 175, section 113A?"

In considering your questions I assume that the outstanding policies which it is suggested might be continued in force are in such form that if they were originally issued at this time they would comply with all of the present legal requirements. Upon that assumption it is my opinion that these policies can be continued in force beyond their expiration dates, although there may be some question as to whether that can be done through the use of "Renewal Certificates."

G. L. (Ter. Ed.) c. 175, § 99, which is referred to in your first question, prescribes the standard form of fire insurance policy. Clause ninth of said section provides that modifications of, or additions to, the provisions of standard form policies shall be written on the policies, or on written or printed riders to be attached to the policies, in either event signed by officers or agents of the company using them. The statute does not require that the form of standard fire insurance policies, or modifications thereof, shall be approved by the Commissioner of Insurance.

G. L. (Ter. Ed.) c. 175, § 113A, referred to in your second question, sets forth certain provisions which are required to be contained in motor vehicle liability policies, and further provides that no such policy shall be issued until the form thereof has been approved by the Commissioner of Insurance. The requirement of approval by the Commissioner as to form is extended by force of G. L. (Ter. Ed.) c. 175, § 192, to riders, endorsements and applications designed to be attached to motor vehicle liability policies.

In my opinion, there is nothing in the aforementioned statutes which would forbid an insurance company from continuing in force beyond the original expiration date a contract of fire insurance or automobile liability insurance which is now contained in a formal policy complying fully with all the requirements of the law. Such a continuance in effect of an existing insurance policy may be provided for by a continuation or extension agreement properly endorsed upon the policy or upon an appropriate rider attached to the policy. It would be necessary that such an endorsement or rider on a fire insurance or automobile liability policy comply with the requirements concerning riders or modifications set forth in G. L. (Ter. Ed.) c. 175, §§ 99, 113A and 192, but it would not be necessary that the endorsement or rider set forth all of the data prescribed for insurance policies.

The foregoing comments with respect to continuing in force an existing policy may not be applicable to a "renewal" of such a policy. In other connections the word "renewal" has been held to imply the creation of a new contract and not merely the continuing in force or extending of an existing contract. Cf. *Mutual Paper Co.* v. *Hoague-Sprague Corporation*, 297 Mass. 294, 299; *Leavitt* v. *Maykel*, 203 Mass. 506, 509. If the word "renew" as used in connection with an insurance policy were similarly interpreted, the renewal in legal effect would be the substitution of a new insurance policy, in which event the statutory requirements with respect to the contents of insurance policies would apply to the renewal documents. In order to avoid this result, while at the same time preserving those features designed for the protection of Massachusetts policyholders, it would seem desirable to avoid the use of the word "renew" on endorsements or riders continuing existing policies in force for additional periods.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Statute — Effective Date — Subjects of Referendum Petition.

MAY 21, 1942.

Hon. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to the effective date of chapter 625 of the Acts of 1941 which reads:

"*An Act placing under Civil Service Certain Employees of the State Farm.*

SECTION 1. Section four of chapter thirty-one of the General Laws, as amended, is hereby further amended by adding at the end the following new paragraph:

All permanent employees of the state farm, except those specifically exempted by law and qualified physicians and registered nurses.

SECTION 2. The incumbents, on the effective date of this act, of the positions at the state farm placed under civil service by section one of this act may continue to serve in such positions without taking a civil service examination, and their tenure of office shall be unlimited, subject, however, to the civil service laws."

This chapter became effective on September 4, 1941, the thirtieth day after the date of its enactment.

The State Farm is situated at Bridgewater in the County of Plymouth.

The operation of chapter 625 by its terms is limited to that part of the territory of the Commonwealth in which the State Farm is located. Since the operation of this chapter is thus restricted, it falls within that class of measures which is excluded from the scope of referendum petitions by the provisions of Mass. Const. Amend. XLVIII, The Referendum, III, § 2, which provides that:

"No law . . . the operation of which is restricted . . . to particular districts or localities of the commonwealth . . . shall be the subject of a referendum petition."

It is provided in G. L. (Ter. Ed.) c. 4, § 1, that a statute which may not be made the subject of a referendum petition and which is not declared therein to be an emergency law and for which a different time of taking effect is not expressly provided in the measure, shall take effect on the thirtieth day after its enactment.

Chapter 625 is not declared therein to be an emergency law, no time for its taking effect is expressly provided in its terms, and it may not be the subject of a referendum petition. It follows that it took effect the thirtieth day after the date of its enactment, which was August 4, 1941.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Marriage — Solemnization — Non-resident Army or Navy Chaplain.

MAY 22, 1942.

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

DEAR SIR: — You have asked my opinion as to whether, under G. L., c. 207, § 38, as amended, "a non-resident Army or Navy chaplain is authorized to solemnize marriage within this Commonwealth."

I regret that I am unable to give you a categorically affirmative answer to this question. If an opinion of the Attorney General were an expression of personal views, my answer would most certainly be in the affirmative. If the question involved an interpretation of a point of law, the effect of which would be confined to the present emergency, and if such an interpretation was governed neither by precedent nor by statute, I should resolve any doubts that might arise in my mind in favor of the convenience of members of the armed forces. Many personal and property rights and privileges depend upon the validity of the marriage ceremony (see *Rhodes* v. *Rhodes*, 96 F. (2d) 715; also Restatement of the Conflict of Laws, § 122).

The General Court of Massachusetts has consistently limited the authority to solemnize a marriage (see *Commonwealth* v. *Munson*, 127 Mass. 459, for a summary of earlier statutes), yet has tried to protect innocent parties (see G. L. (Ter. Ed.) c. 207, § 42). Prior to 1932 a non-resident had no authority to solemnize a marriage except as provided in section 39 of said chapter 207.

St. 1932, c. 162, amended section 38 of G. L. (Ter. Ed.) c. 207 by inserting the words which are in italics, so as to read as follows:

"A marriage may be solemnized in any place within the commonwealth by a minister of the gospel who resides in the commonwealth *or who if a non-resident is*

the pastor of a church or denomination duly established in the commonwealth and who is recognized by his church or denomination as duly ordained and in good and regular standing as a minister of such church or denomination; by a rabbi of the Israelitish faith, duly licensed by a congregation of said faith established in the commonwealth, who has filed with the clerk or registrar of the city or town *where such congregation is established*, a certificate of the establishment of the synagogue *therein*, the date of his appointment thereto and of the term of his engagement; . . ."

The above statute, therefore, granted authority to certain non-residents to solemnize marriage. Strong legal arguments could be made against any categorical ruling that non-resident army or navy chaplains are authorized to solemnize marriage within the Commonwealth. For example: The statute refers to a non-resident "pastor". "Pastor" is defined as "the minister of the Christian religion, who has charge of a congregation," Wharton's Law Lexicon; as "the minister or priest in charge of a church or parish," Webster's New International Dictionary; and as "a permanent or established official of the parish, who holds a position of spiritual power without reference to locality," *Dupont* v. *Pelletier*, 120 Me. 114. It could be argued with force in a court that the word "pastor" as used by the Legislature means a priest or minister in charge of a specific church, parish, congregation or denomination. The word "church" has been defined by the Supreme Judicial Court to mean "a body of persons associated together for the purpose of maintaining Christian worship and ordinances," *Silsby* v. *Barlow*, 16 Gray 329, 330, as the "body of communicants gathered into church order, according to established usage, in any town, parish, precinct or religious society, established according to law, and actually connected and associated therewith, for religious purposes," *Stebbins* v. *Jennings*, 10 Pick. 172, 173; and as the "body of communicants gathered in the church membership for the observance of sacraments and for mutual support and edification in piety, morality and religious observances," *McNeilly* v. *First Presbyterian Church in Brookline*, 243 Mass. 331. One of my predecessors in office, for the purpose of section 38 of said chapter 207, has defined the word "denomination" as follows: "a religious sect united upon a common creed or system of faith which, if it holds that creed in common with other sects, is further distinguished from these by its belief in matters of polity or discipline." VII Op. Atty. Gen. 152. The duties of an army or navy chaplain are closely analogous to those performed by a clergyman in civilian life, modified only by the peculiar conditions attaching to military life and especially by the necessity that each chaplain will, so far as practicable, serve the moral and religious needs of the entire personnel of the command to which he is assigned. He has the duty to hold appropriate religious services for the benefit of the command to which he is assigned at such times and places as may be designated by the commanding officer, and in the performance of his duty is accountable to the commanding officer. See Army Regulations 60–5, dated November 1, 1941.

If there is any doubt whether or not a chaplain falls within the words "pastor of a church or denomination," I fear that it might be held that such church or denomination or synagogue referred to in section 38 of chapter 207 must be one that is established within the Commonwealth of Massachusetts. All army posts and navy yards within the area of Massachusetts are federal reservations and subject to the laws of the United States, except limited rights which were reserved when ceded to the Federal Government. See U. S. Const., art. I, § 8. However

much I might be inclined to disagree, a contention that a church, denomination or synagogue established on a federal reservation and subject to the laws of the United States is not established within the Commonwealth of Massachusetts, as required by said section 38, would have some force.

I believe that a suggestion might well be made to the Legislature that section 38 be amended specifically to authorize army and navy chaplains to solemnize marriage within the Commonwealth. Such legislation would answer your question with finality and certainty. In the meanwhile the Governor may in his discretion designate an army or navy chaplain to solemnize specific marriages under the terms of G. L. c. 207, § 39. The pertinent part of this statute reads as follows:

"The governor may also in his discretion designate a minister of the gospel or rabbi who resides out of the commonwealth to solemnize a specified marriage, and the state secretary shall issue to him a certificate of said designation. A minister or other so designated, if qualifying under said certificate, may solemnize said marriage at any place within the commonwealth."

Under this section any non-resident army or navy chaplain so designated by the Governor may qualify to solemnize marriage in the Commonwealth.

My answer to your question, therefore, may be summarized in this manner: Certain non-resident army or navy chaplains coming within the terms of statutes enacted by the Legislature are authorized to solemnize marriages within this Commonwealth. The doubts which arise in the cases of others not clearly within the designations made by the Legislature can only be removed by the Legislature itself.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Statute — Acquisition of Land by United States.

JUNE 2, 1942.

Hon. RAYMOND J. KENNEY, *Commissioner of Conservation.*

DEAR SIR: — In a recent letter you quoted St. 1931, c. 183, which authorized "the acquisition by the United States, by purchase, gift, devise or lease, of such areas of land or water, or of land and water, in Massachusetts, as the United States may deem necessary for the establishment of migratory bird reservations . . ." You also referred to the amendment of that law by St. 1941, c. 599, § 2 approved August 2, 1941, and effective January 1, 1942, which added the following paragraph to section 97:

"Nothing in this section shall be deemed to permit the acquisition by the United States of any land or water, or any land and water, without the prior approval of such acquisition by the commissioner."

You requested my opinion "as to whether or not the provisions of chapter 599, above referred to, in any way affect the steps which may have been taken prior to January 1, 1942, by an agency of the Federal Government in connection with the establishment of a wild life refuge in this state."

The phrase, "steps which may have been taken," being somewhat ambiguous, I am unable to answer your question categorically. You will note that the amended statute requires your approval only with respect to the *acquisition* of land or

water, or land and water, by the United States. Acquisition, as used in the 1941 amendment requiring your approval, obviously refers to the transfer of title, possession or control of property by the methods prescribed in that statute. Whether such a transfer has been effected in a particular case is often a complex problem, depending upon the facts of that case.

It is my opinion that if the title, possession or control of a given tract of land or water was actually transferred to the United States prior to January 1, 1942, in accordance with the terms of the statute then in force, your approval of the acquisition is not required in order to make it valid. This conclusion follows from the general principle of statutory interpretation which is summarized in the following quotation from *Hanscom* v. *Malden & Melrose Gas Light Company*, 220 Mass. 1, 3:

"The general rule of interpretation is that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations. Doubtless all legislation commonly looks to the future, not to the past, and has no retroactive effect unless such effect manifestly is required by unequivocal terms. It is only statutes regulating practice, procedure and evidence, in short, those relating to remedies and not affecting substantive rights, that commonly are treated as operating retroactively, and as applying to pending actions or causes of action."

It is to be noted that the 1941 amendment expressly prescribes the date when it shall become effective. The general rule in such cases is that every provision and clause of the act is suspended until the time specified for its going into operation and that the powers conferred on any person by the statute do not become vested until that time arrives. *Opinion of the Justices*, 3 Gray, 601, 607.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Motor Vehicles — Registration — Absentee Owners — Applications — Regulations.

JUNE 4, 1942.

Hon. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — You have informed me, with relation to applications by absentee owners for the registration of motor vehicles under G. L. (Ter. Ed.) c. 90, § 2, as amended, that it has been the practice of the Registrar of Motor Vehicles in certain cases to accept an application signed on behalf of an owner by a person acting under a written power of attorney authorizing him to execute such an application for the owner. That practice is described in the "Motor Vehicle Registration Manual" published by the Department of Public Works as follows:

"*Absentee Ownership.* Application should be signed by the absentee owner. In special cases, an exception may be made to the general rule which requires the signature of the owner. An application by an attorney, acting under a written power of attorney, filed with the application, will be accepted, although the validity of such a registration has never been determined by the courts of the Commonwealth."

You now inquire whether an application for registration signed in accordance with the foregoing practice is a valid one upon which registration of a motor ve-

hicle may legally be granted. As stated in your letter, the question of the validity of such an application by an agent acting under a written power of attorney has become increasingly important by reason of the large number of automobile owners who are absent from the Commonwealth or from the United States on military service.

I am of the opinion that the Registrar of Motor Vehicles has ample authority under G. L. (Ter. Ed.) c. 90, § 31, to prepare a rule permitting the registration of a motor vehicle in the name of its owner upon an application signed in his behalf by a person acting under a written power of attorney for that purpose. Such a ruling may be made applicable to registrations generally or may be restricted to a limited class of cases in which the circumstances would cause exceptional hardship if the personal signature of the owner were required.

The statutory requirements concerning registration are contained in the following portion of G. L. (Ter. Ed.) c. 90, § 2:

"Application for the registration of motor vehicles and trailers may be made by the owner thereof. The application shall contain, in addition to such other particulars as may be required by the registrar, a statement of the name, place of residence and address of the applicant, with a brief description of the motor vehicle or trailer, including the name of the maker, the number, if any, affixed by the maker, and, in case of a motor vehicle, the engine number and the character of the motor power. The registration fee as required in section thirty-three shall accompany such application. . . ."

Section 2 does not specifically require that an application for registration of a motor vehicle shall be signed by the owner himself. It does not contain any reference to the signature of the owner nor to any other matters from which an inference would arise that the owner himself must sign the application.

It has been held in many opinions of the Supreme Judicial Court that only a person coming within the scope of the word "owner" as used in this section may lawfully have a motor vehicle registered in his name. It has never been held by the Supreme Judicial Court that an owner may not properly make application for registration through an agent duly authorized by him for that purpose. There is nothing in the nature of the statute itself nor in its requirements which indicates a legislative intent that such an application must necessarily be made and signed personally by the owner of a motor vehicle, and that the performance of such acts may not be delegated by him. See *Finnegan* v. *Lucy*, 157 Mass. 439.

As appears from the quoted portion of section 2 above, the Registrar of Motor Vehicles is specifically authorized to require "such other particulars" as he may deem desirable to be contained in the application. In the exercise of that authority the Registrar may require the actual signature of the owner to be placed upon every application, since the owner's signature may serve to identify him. Such a requirement would be in furtherance of one of the legislative purposes behind the enactment of said section 2, namely, to afford means for identification of the owner and of the motor vehicle. *Topf* v. *Holland*, 288 Mass. 552, 554; *DiCecca* v. *Bucci*, 278 Mass. 15, 16. Whether the right to procure registration upon an application signed by an agent acting under power of attorney should be made available to all persons is, in my opinion, a question of policy which, under the statute, the Registrar is authorized to decide.

It has been suggested that the provisions now contained in G. L. (Ter. Ed.) c. 90, § 24, imposing penalties upon a person who "in an application for registra-

tion of a motor vehicle or trailer gives as his name or address or place where such vehicle is principally garaged a false name, address or place," indicate a legislative intent that such an application be actually signed by the owner of a motor vehicle sought to be registered. I am unable to adopt that theory. The statutory requirements with respect to registration are contained in the above-quoted portions of section 2 and they have been in their present form with no material amendment since the enactment of the General Laws in 1920. In my opinion, the meaning of the language contained in that section is not to be controlled by the aforementioned provisions of section 24 enacted in 1936. See St. 1936, c. 182, § 1.

In my opinion such regulations as may be issued by the Registrar concerning this matter should comply in all respects with the requirements set forth in G. L. (Ter. Ed.) c. 90, § 31, which prescribe the procedure to be followed in the preparation and promulgation of rules and regulations governing the use and operation of motor vehicles.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Retirement Law — County Commissioner of Worcester — Attainment of Age of Seventy.

JUNE 15, 1942.

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

DEAR SIR: — In requesting my opinion as to whether one Elbert M. Crockett is required to cease acting as County Commissioner of Worcester County by reason of his having attained the age of seventy years, you have advised me of the following pertinent facts:

Mr. Crockett was appointed County Commissioner on November 16, 1931, to fill an unexpired term. He was then over fifty-five years of age and was, therefore, not eligible to become a member of the Worcester County Retirement System established pursuant to G. L. c. 32, §§ 20–25, inclusive. Following his completion of the unexpired term, Mr. Crockett was elected County Commissioner and has continued to hold that office up to the present time by successive elections. He is understood to have reached the age of seventy on or about August 18, 1941. Worcester County accepted the provisions of St. 1936, c. 400, in 1936 and by reason thereof a new retirement system became operative therein on January 1, 1937. Mr. Crockett has not exercised his option to become a member of the new retirement system.

In my opinion, County Commissioner Crockett is not required, by reason of his having reached the age of seventy, to relinquish his office.

The retirement law which was in effect in Worcester County when Mr. Crockett was first appointed County Commissioner, in 1931, contained the following provisions:

"(2) All employees who enter the service of the county after the date when the system is declared established, except persons who have already passed the age of fifty-five, shall, upon completing ninety days of service, thereby become members. Persons over fifty-five who enter the service of the county after the establishment of the system shall not be allowed to become members, and no such employee shall remain in the service of the county after reaching the age of seventy." G. L. c. 32, § 22, par. (2).

Had the foregoing provisions remained effective until Mr. Crockett reached the age of seventy in August, 1941, they would have compelled his retirement at that time, despite the fact that he is an elected officer rather than an "employee" in the ordinary sense. The inclusion of elected officers in the retirement system as "employees" was peculiar to Worcester County (see definition of "employees," G. L. c. 32, § 20). However, it is my opinion that the above-quoted provisions of section 22 (2) ceased to be effective upon Worcester County's acceptance of St. 1936, c. 400, which occurred prior to January 1, 1937, and that those provisions do not, therefore, require the termination of Mr. Crockett's services as County Commissioner.

St. 1936, c. 400, struck out sections 20 to 25 of chapter 32 of the General Laws as then in force, and substituted for those sections in said chapter 32 the new sections 20 to 25I, inclusive. The new sections provide, as did the old, the framework for county retirement systems. Section 5 of the 1936 statute reads as follows:

"Sections twenty to twenty-five H, inclusive, of chapter thirty-two of the General Laws, as appearing in section one of this act, shall take effect in any county only upon their acceptance as provided in section twenty five I of said chapter, as appearing in said section one. Sections twenty to twenty-five, inclusive, of said chapter thirty-two, as amended otherwise than by this act and amendments hereof, shall continue in force as to any county which has accepted said sections twenty to twenty-five, inclusive, in the manner therein provided, until such county accepts sections twenty to twenty-five H, inclusive, of said chapter, as appearing in section one of this act. *After such acceptance said sections twenty to twenty-five, inclusive, as amended otherwise than by this act and amendments hereof, shall remain in force only to the limited extent provided by section twenty-five I of said chapter, as appearing in section one of this act.*"

The new sections 20 to 25H of chapter 32 having been accepted by Worcester County before January 1, 1937, reference must be had to the new section 25I in order to determine whether, by St. 1936, c. 400, § 5, quoted above, the provisions of the old section 22 (2) with respect to compulsory retirement at seventy remained in force after the acceptance of the new sections. The pertinent provisions of said section 25I read as follows:

"Section 25I. Sections twenty to twenty-five H, inclusive, may be accepted in any county except Suffolk by vote of the county commissioners of such county. . . .

In case said sections are accepted in a county having a contributory retirement system the retirement board thereof shall continue in office, with the same powers and duties as formerly, until the board established under said sections commences to function thereunder; and thereafter said last mentioned board, if any members of the previously existing retirement system shall not elect to become members of the system under said sections or if there are any beneficiaries of such previously existing retirement system, shall continue to operate as to such members and beneficiaries such previously existing retirement system in accordance with the provisions of law relative thereto, in addition to operating the system under said sections, and the board of such previously existing system shall cease to exist; provided, that the board established under said sections may in its discretion merge similar funds under both systems. . . ."

From the foregoing provisions it is apparent that upon the acceptance of the new sections by Worcester County, and upon the establishment and functioning of a new retirement board pursuant thereto, the preexisting County Retirement

System ceased to be operative except as to (1) members of the previously existing retirement system who did not elect to become members of the new system, or (2) beneficiaries of the previously existing retirement system. Mr. Crockett never having been a member or beneficiary of the preexisting retirement system, its provisions were not kept alive as to him by said new section 25I or by any other provision of law. Consequently, the preexisting requirement that he terminate his services with the County upon reaching the age of seventy was nullified by St. 1936, c. 400, § 5, upon the County's acceptance of the new system before he attained that age.

The statutes governing the new retirement system in Worcester County, as accepted in 1936, and as subsequently amended, do not require Mr. Crockett's retirement merely because he is seventy years of age. The only provision in the new law which might be deemed to have that effect is contained in the new section 21 (3), as inserted in chapter 32 of the General Laws (Ter. Ed.) by St. 1936, c. 400, § 1. The pertinent provision of the new section 21 (3) reads as follows:

"(3) Persons fifty-five years of age or over who originally enter the service of the county or hospital district after the date when the system becomes operative shall not become members thereof, and no such employee shall remain in the service of the county or hospital district after reaching age seventy. . . ."

The "system" referred to in the foregoing quotation from section 21 (3) is defined in section 20 as "a contributory retirement system established in any county which accepts sections twenty to twenty-five H, inclusive, as provided in section twenty-five I."

It follows, therefore, as applied to Worcester County, where the new system became operative on January 1, 1937, that section 21 (3) requires the retirement at the age of seventy of employees who originally entered the service after January 1, 1937, at the age of fifty-five or over. Since Mr. Crockett entered the service of Worcester County many years prior to that date, he does not come within the purview of section 21 (3).

In conclusion, therefore, it is my opinion that there is no provision of law requiring Mr. Crockett to terminate his services as County Commissioner merely because he has attained the age of seventy.

Your request for my opinion also contained the following question:

"Since Elbert M. Crockett is a 'veteran' of the World War, can he as an elected officer have the benefits of General Laws, chapter 32, sections 56 to 60, or any of them?"

From the information which has been submitted to me, it appears that this question is purely hypothetical, particularly in view of the opinion which I have just expressed concerning the necessity of Mr. Crockett's retirement. It has long been the established practice of this department to refrain from rendering opinions on hypothetical questions. Following that practice, I must respectfully decline to answer your question as to Mr. Crockett's eligibility to retirement under chapter 32, sections 56 to 60.

Very truly yours,

Robert T. Bushnell, *Attorney General.*

Settlement — Veteran — Acquisition of Military Settlement.

JUNE 18, 1942.

Hon. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — In requesting my opinion upon certain questions concerning the settlement of a person who served in the United States Navy during the first World War, you have advised me of the following facts to which the questions relate:

The veteran was born in Quincy on October 18, 1895. He lived in Quincy and Newton until he enlisted in the United States Navy on July 22, 1915. He received an honorable discharge from the navy on July 21, 1920, and since then has resided in various cities and towns in the Commonwealth, with no five-year residence in any one place. The veteran's parents lived in Newton from 1904 to October 3, 1911, when they moved to Brookline. They remained in Brookline until 1914 and then moved to Wollaston, where they continued to reside, at least until October 18, 1916. The veteran's father lost his settlement in Newton on October 3, 1916, a few days before the son had attained his majority.

You referred to a derivative settlement which the veteran might have had through his mother under G. L. c. 116, § 5, and to the amendment of that section by chapter 292 of the Acts of 1926.

1. Your specific question was, "As this case comes up after 1926 should we interpret the law as now in force, and hold that the mother lost [her settlement] with the father on October 3, 1916?"

I regret to say that the derivative settlement rights of the veteran appear to be determined by the law as it stood when the rights were acquired, which in this case was prior to the amendment of 1926. The Supreme Judicial Court of Massachusetts has held in several cases that the amendment contained in St. 1926, c. 292, has no retroactive effect. See *Lexington* v. *Commonwealth*, 279 Mass. 571, 573–574; *Brockton* v. *Conway*, 278 Mass. 219, 223–224.

2. You also ask the question, "Why should he not acquire a military settlement even though he enlisted before the time of war, if he actually was in the service when the war was declared?"

I know of no reason why the Legislature should have treated such a veteran differently, but it has done so nevertheless. We have to take the law as the Legislature makes it, and the provisions of the applicable statute, G. L. (Ter. Ed.) c. 116, § 1, cl. Fifth, do not permit of the acquisition of a military settlement except in accordance with its terms. These terms grant a military settlement under certain circumstances to —

"A person who enlisted and was mustered into the military or naval service of the United States, as a part of the quota of a town in the commonwealth under any call of the president of the United States *during* the war of the rebellion *or any war between the United States and any foreign power*, or who was assigned as a part of the quota thereof . . ."

and to

"Any person who was inducted into the military or naval forces of the United States under the federal selective service act, or who enlisted *in said forces in time of war* between the United States and any foreign power. . . ."

On the facts you have given me, therefore, I am obliged to rule that a veteran who enlisted in the United States Navy in 1915 does not come within the classes

of persons to which the statute grants the privilege of acquiring a military settlement. I wish very much that the law were otherwise.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Commissioner of Soldiers' Relief in Lawrence — Officer — Election by City Council.

JUNE 23, 1942.

Hon. ULYSSES J. LUPIEN, *Director of Civil Service.*

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

"Is the position of Commissioner of Soldiers' Relief in the City of Lawrence excluded from the classified Civil Service by reason of the fact that the ordinance creating this position provides that the occupant should be elected by the City Council, and therefore, exempt under the provisions of General Laws, chapter 31, section 5?"

I answer your question in the affirmative.

The position of Commissioner of Soldiers' Relief in the City of Lawrence was established by an ordinance enacted on March 12, 1928, by the City Council, whose members are the Aldermen of the city.

G. L. (Ter. Ed.) c. 31, § 3, provides that the Civil Service Commission shall, subject to the approval of the Governor and Council, make rules and regulations which shall regulate the selection of persons to fill appointive positions in the government of the Commonwealth, its cities and certain of its towns. Section 5 of said chapter 31 provides in part that:

"No rule made by the commission shall apply to the selection or appointment of any of the following:
Judicial officers; officers elected by the people or, except as otherwise expressly provided in this chapter, by a city council; . . ."

Upon considering the powers, duties and functions of the Commissioner of Soldiers' Relief in Lawrence, as shown by the provisions of the ordinance creating the position and by other facts which have officially come to my attention, I am of the opinion that the incumbent of that position is an "officer" rather than an "employee." The city ordinance which established the position provides that the Commissioner of Soldiers' Relief shall be elected by the City Council. The position being that of an officer elected by the City Council, it comes within the scope of the language quoted above from G. L. (Ter. Ed.) c. 31, § 5, and is not within the classified Civil Service.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Probation Service — Appointment of Officers — Re-employment for Duration of War.

JUNE 30, 1942.

Mr. ALBERT B. CARTER, *Commissioner of Probation.*

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

"May appointments to the probation service be made under chapter 16, Acts of 1942, without the approval required by chapter 276, section 83, General Laws, as amended by chapter 360, Acts of 1936?"

I answer your question in the negative.

G. L. (Ter. Ed.) c. 276, § 83, as amended by chapter 360 of the Acts of 1936, was further amended in 1937 by chapter 186 of that year. As so amended it provides for approval by the Associate Justices of the Municipal Court of Boston of appointments of probation officers by the Chief Justice and of the amount of their compensation fixed by him, and for the approval by the Administrative Committee of the District Courts of the appointments of probation officers made by a justice of a district court, and for similar approval of the amount of their compensation fixed by him.

St. 1942, c. 16, authorizes the re-employment for the duration of the war of any former officer or employee of the Commonwealth, or one of its political subdivisions, who has been retired or separated from the service by reason of superannuation or disability.

In my opinion, the provisions of chapter 16 were not intended to eliminate the basic requirements contained in the statute prescribing the method of appointment to the office in question.

It follows that appointments of probation officers made under St. 1942, c. 16, must be approved in the manner set forth in said G. L. (Ter. Ed.) c. 276, § 83.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Health — State Hospitals and Sanatoria — Licenses.

JULY 1, 1942.

Dr. PAUL J. JAKMAUH, *Commissioner of Public Health.*

DEAR SIR: — You have asked me whether State institutions in the nature of hospitals or sanatoria, conducted by the various departments of the Commonwealth, are required to be licensed by the Department of Public Health under the provisions of G. L. (Ter. Ed.) c. 111, §§ 71 to 73, as inserted by St. 1941, c. 661.

I answer your question in the negative.

Section 71 provides that the Department of Public Health shall issue a license for a term of two years "*to any person* whom it deems suitable and responsible to establish or maintain a hospital or sanatorium which meets the requirements of the department," provided the appropriate local board of health has issued a certificate that such proposed hospital or sanatorium is suitable for its purpose. The fee for such a license is set at ten dollars. A "hospital" or "sanatorium" is defined as

"any institution, whether conducted for charity or for profit, which is advertised, announced or maintained for the express or implied purpose of caring for persons admitted thereto for purposes of diagnosis, or medical or surgical treatment which is rendered within said institution, except an institution caring exclusively for cases of mental diseases and licensed by, or under the general supervision of, the department of mental health."

Section 72 provides that the Department of Public Health shall classify and make rules for the conduct of hospitals and sanatoria.

Section 72A provides for the appointment of an advisory committee on hospitals and sanatoria serving with the Department.

Section 73 makes it an offense punishable by fine or, upon repetition, by fine or imprisonment to establish or maintain a hospital or sanatorium without a license and for a licensee to violate a rule made under section 72.

It is plain from a statement of the foregoing provisions of the statute that it was not the intent of the Legislature to require the licensing of the Commonwealth's own institutions conducted by its various departments. Authority to establish and conduct hospitals and sanatoria, which are institutions of the Commonwealth, flows directly from the Legislature itself and is given in the statutes making provision for them.

The provisions of said sections 71 to 73 inserted in G. L. (Ter. Ed.) c. 111 by St. 1941, c. 661, are in the nature of police regulations, and it is well settled that such regulations are not to be construed as applying to the Commonwealth, its officers or institutions, unless it clearly appears that it was the intention of the Legislature that they should so apply. *Teasdale* v. *Newell &c. Construction Co.*, 192 Mass. 440. V Op. Atty. Gen. 128.

It does not appear that it was the intent of the Legislature in inserting said sections 71 to 73 in chapter 111 of the General Laws by St. 1941, c. 661, to subject such of the Commonwealth's own institutions as are hospitals or sanatoria to the necessity of obtaining certificates as to suitability from local boards of health or to the licensing power of the Department of Public Health.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Great Ponds — Tashmoo Lake — Changes in Characteristics.

JULY 28, 1942.

Hon. RAYMOND J. KENNEY, *Commissioner of Conservation.*

DEAR SIR: — The town of Tisbury was authorized by St. 1935, c. 161, to borrow money "for the purpose of improving harbor facilities by connecting Tashmoo lake with Vineyard Sound." You have informed me that, in pursuance of this authority, the natural channel between the lake and the sea has been widened and deepened, riprap has been installed, protective measures have been taken which will keep the channel open, the lake has become saline, the rise and fall of the tide are apparent in it, and small boats may pass through the channel. You now request my opinion as to whether Tashmoo Lake, which you advise me has hitherto been regarded as a great pond, has now become an arm of the sea under the jurisdiction of the Division of Marine Fisheries, or retains its status as a great pond and so is under the jurisdiction of the Division of Fisheries and Game.

In my opinion, Tashmoo Lake is still a great pond.

A great pond is "a pond of a certain area created by the natural formation of the land at a particular place." *Commonwealth* v. *Tiffany*, 119 Mass. 300, 303. It does not necessarily lose its identity as the result of artificial changes and the only test of whether a body of water is a great pond, which has been applied in the decisions of our Supreme Judicial Court, is the extent of the area covered by the pond in its earlier natural condition. VII Op. Atty. Gen. 262. *Commonwealth* v. *Tiffany*, 119 Mass. 300; *Tyler* v. *Hudson*, 147 Mass. 609, 613. The salinity of the water and the influence of the tide are not controlling factors in determining the character of such ponds, as many of them are connected with the sea. *Commonwealth* v. *Vincent*, 108 Mass. 441, 449. Accordingly, Tashmoo Lake is still a great pond unless the Legislature, which controls all great ponds in the public interest, intended that it should become an arm of the sea. *Sprague* v. *Minot*, 195

Mass. 581, 583; *Commonwealth* v. *Alger*, 7 Cush. 53, 85; *Fay* v. *Salem & Danvers Aqueduct Co.*, 111 Mass. 27, 28.

Great ponds not appropriated before the Colony Ordinance of 1647 to private persons are public property, and the right of reasonably using and enjoying them for lawful purposes is common to all. They are available to the public for fishing, fowling, boating, skating, cutting and removing ice, taking water for domestic or agricultural purposes, and such other reasonable uses as can be made of them under certain conditions subject to legislative restriction. *Hittinger* v. *Eames*, 121 Mass. 539; *Slater* v. *Gunn*, 170 Mass. 509. VII Op. Atty. Gen. 262, 266–272. The rights of the public in coastal waters are more limited and are subject to local regulation, as far as some forms of fishing are concerned. G. L. (Ter. Ed.) c. 130, §§ 52, 57.

In view of the rights of the public in great ponds, it should not be inferred that the Legislature intended to change the status of such a pond unless that intention has been clearly and unmistakably expressed. There is no provision in St. 1935, c. 161, which indicates a legislative intention that Tashmoo Lake should lose its identity as a great pond. It is significant of such lack of intention that the Legislature subsequently referred to the lake as "Tashmoo Pond" in St. 1939, c. 100, which authorized the construction of a bridge across the channel between that body of water and Vineyard Sound. Accordingly, Tashmoo Lake must be regarded as a great pond, although some of its former characteristics have been changed by artificial means.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Metropolitan District Water Supply Commission — Authority to Divert Waters of Ware River.

AUG. 19, 1942.

Metropolitan District Water Supply Commission.

GENTLEMEN: — You have requested my opinion as to "whether, under the provisions of chapter 375 of the Acts of 1926, the Commission has any right to divert the waters of the Ware River when the flow of such waters is in excess of 85 million gallons a day during the period between June 15 and October 15."

My opinion is that the Commission has no such right, unless such proposed diversion is approved each year by the State Department of Public Health, and unless such proposed diversion, if it will have any effect whatsoever on the navigable capacity of any water of the United States, is also approved by the Secretary of War.

Section 1 of chapter 375 of the Acts of 1926 directed the Commission to divert into the Wachusett reservoir the flood waters of the Ware River at a certain point of diversion to be established as provided therein. Section 4 of chapter 375 defined the flood waters of the Ware River as "the waters thereof at and above the point of diversion established under section one in excess of a flow of eighty-five million gallons a day, meaning thereby that on any day when the natural flow of said river is less than eighty-five million gallons no water shall be diverted."

Section 1, as clarified by St. 1939, c. 513, § 7, also provided that said flood waters "may be so diverted at any time in any year, including the period between May thirty-first and December first, but no such diversion shall be made between said dates in any year unless approved by the state department of public health."

It is clear, therefore, that the Commission must secure the approval of the State Department of Public Health before making the proposed diversion.

In 1899, Congress, in assertion of "its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction" (*Sanitary District* v. *United States*, 266 U. S. 405, 425), included certain sections in the Rivers and Harbors Appropriation Act of that year that are pertinent to the present inquiry. Section 10 of that act provides, in part: "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." 33 U. S. C. A., § 403 (Mar. 3, 1899, c. 425, § 10, 30 Stat. 1151).

A diversion of water that impairs the navigable capacity of a river, lake, or other body of water of the United States is such an obstruction to navigable capacity as is prohibited by section 10 of the Act of 1899, unless authorized by the Secretary of War on the recommendation of the Chief of Engineers. *Sanitary District* v. *United States*, 266 U. S. 405, 426; *Wisconsin* v. *Illinois*, 278 U. S. 367, 413–414; 30 *Op. of U. S. Atty. Gen.*, 217–218; 34 *ibid.* 410, 416–417. See *Connecticut* v. *Massachusetts*, 282 U. S. 660. In section 9 of that act Congress prohibited the erection of certain enumerated structures over and in navigable waterways without its consent; and then in section 10 Congress prohibited all obstructions to the navigable capacity of waterways that were not affirmatively authorized by it, unless such obstructions should be authorized by the Secretary of War as provided therein. "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction." *Wisconsin* v. *Illinois*, 278 U. S. 367, 413. See *Sanitary District* v. *United States*, 266 U. S. 405, 426.

Shortly after the Legislature directed the Commission to divert the waters of the Ware and Swift Rivers, Massachusetts applied to the Secretary of War for permission to make certain diversions, under section 10 of the Act of 1899. The Ware and Swift Rivers are tributaries of the Chicopee River, and the Chicopee is a tributary of the Connecticut River. The Ware, Swift and Chicopee Rivers were not considered navigable; the Connecticut, however, was. The Secretary of War made a finding that the proposed diversion of the Ware River "will have no adverse effect on the navigable capacity of the Connecticut River." He permitted diversion of the flood waters of the Ware River, as proposed, in excess of 85,000,000 gallons per day at the point of diversion between October 15 and June 15, and prohibited the taking of any water except during that period. He also permitted a certain diversion of the Swift, but more limited than that proposed.

The opinion of the Supreme Court of the United States in *Connecticut* v. *Massachusetts*, 282 U. S. 660, wherein Connecticut was denied an injunction against the diversions by Massachusetts, as authorized by the Secretary of War, concluded with the following paragraphs:

"Connecticut maintains that the presently proposed diversion will not be adequate for the future needs of the Boston district and that the size and character of the works as well as legislative reports and other circumstances disclose an intention on the part of Massachusetts, when the need shall arise, to draw from other rivers . . . tributary to the Connecticut and insists that the decree should restrain Massachusetts forever from increasing its diversion to an amount in excess of what the Secretary of War has already indicated would cause no damage to the navigation of the Connecticut.

"The scope of the project is that shown by the Acts as limited by the determination of the War Department. It involves no diversion from streams other than the Ware and Swift. Massachusetts declares that she intends to and must obey these findings of the War Department. Her statements before the master and here clearly negative any threat, intention or purpose to make any diversion of water in excess of that specified or otherwise than as set forth in the determinations of the War Department. Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future. (Cases cited.)

"Connecticut's bill of complaint will be dismissed without prejudice to her right to maintain a suit against Massachusetts whenever it shall appear that substantial interests of Connecticut are being injured through a material increase of the amount of the waters of the Ware and Swift diverted by or under the authority of Massachusetts over and above the quantities authorized by the Acts of 1926 and 1927 as heretofore limited by the War Department."

If the Secretary of War had not expressly prohibited the proposed diversion, then the Commission might now make a finding that the diversion would result in no interference with navigation and then proceed to make the diversion. Even then, of course, if the Secretary should disagree with such a finding, the Attorney General of the United States might bring suit against Massachusetts to enjoin an unauthorized diversion. *Sanitary District* v. *United States*, 266 U. S. 405, 426; 33 U. S. C. A. § 406 (Mar. 3, 1899, c. 425, § 12, 30 Stat. 1151, as amended). A finding of the Secretary of War that a diversion affected navigability would be given great weight by the courts. *Miami Beach Jockey Club* v. *Dern*, 83 F. (2d) 715, 719, supplemented by 86 F. (2d) 135, cert. den. 299 U. S. 556. But the Secretary of War has expressly prohibited the diversion, and a violation by the Commission of an outstanding prohibition of the Secretary would of itself be ground for a suit by the Attorney General of the United States for an injunction.

Even if the Secretary of War should authorize the proposed diversion because he believes it does not interfere with navigation or does not interfere with it unreasonably, still Massachusetts might be liable to be enjoined at the suit of Connecticut if Connecticut can prove that "any real or substantial injury or damage will presently result" to her. (See *Connecticut* v. *Massachusetts*, 282 U. S. 660, 672; *New York* v. *Illinois*, 274 U. S. 488, 489), or that the diversion does interfere unreasonably with the navigable capacity of a river. *Wisconsin* v. *Illinois*, 278 U. S. 367, 420.

The releases delivered to the Commission by mill owners below the point of diversion, in consideration for money paid to them by the Commonwealth for the release of claims for damages, "past, present and future", which they might have as a result of the taking of the waters of the Ware River, were expressly limited to the terms and conditions of the taking. The order of taking included the provision, "Any diversion made under this taking shall comply with such regulations and decisions as may from time to time be made with respect thereto by the Secretary of War acting under authority of the Act of Congress of March 3, 1899,

Chapter 425, Section 10, 30 Statutes-At-Large 1151." Any diversion now made against the prohibition of the Secretary of War might render the Commonwealth liable to further suits by these mill owners for damages caused them by such diversions.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Works — Sidewalk — Town — Authority of Selectmen.

AUG. 27, 1942.

Hon. HERMAN A. MACDONALD, *Commissioner of Public Works.*

DEAR SIR: — In a recent letter you requested my opinion as to whether the Town of West Newbury can be compelled to maintain a sidewalk on a State highway in that town.

I answer your question in the negative.

You state that the sidewalk was constructed by the Department of Public Works in 1935, pursuant to the authority of G. L. (Ter. Ed.) c. 81, § 20, after the Department had received a written statement signed by the selectmen of the town as follows:

"This is to certify that, if the Department of Public Works will construct one or more sidewalks on the State highway in this town, the town will assume the responsibility for maintenance and removal of snow on said sidewalks."

There was no vote of the town authorizing the selectmen to sign this agreement. You also state that the sidewalk is located on a road which was laid out as a State highway in 1905, at which time no land was taken in fee.

I infer from the facts set forth by you that the sidewalk was originally constructed by the Department in 1935 within the limits of the 1905 State highway layout and that it was not the rebuilding or replacing of a sidewalk existing prior to 1905.

In an opinion to a former Commissioner of Public Works, dated September 10, 1938, the then Attorney General held that where the construction work done by the Department was within the area where sidewalks previously existed and where no taking was made by the Department the town in which the sidewalks were constructed was obliged, even in the absence of agreement, to maintain the sidewalks. Attorney General's Report, 1938, p. 108.

Such a result cannot be reached on the facts set forth in your letter because the construction of the sidewalk in question was not the reconstruction or replacement of a town sidewalk, which was in existence prior to the 1905 layout, but was an original undertaking by the Department pursuant to statutory authority and within the limits of an existing State highway layout.

Nor can it be said that the written statement signed by the selectmen agreeing on behalf of the town to maintain the sidewalk binds the town to do so.

Persons dealing with the selectmen of a town are charged with notice of the scope of their authority and are bound at their peril to ascertain the limits thereof. *Meader* v. *West Newbury*, 256 Mass. 37, 39.

The authority of the selectmen of a town is of a special and limited nature.

"They are not general agents. They are not clothed with the general powers of the corporate body for which they act. They can only exercise such powers and

perform such duties as are necessarily and properly incident to the special and limited authority conferred on them by their office. They are special agents, empowered to do only such acts as are required to meet the exigencies of ordinary town business." *Smith* v. *Cheshire*, 13 Gray, 318.

The agreement made by the selectmen was one that would impose upon the town the obligation to appropriate and expend money for the maintenance of the sidewalk and removal of snow therefrom.

The agreement, having been entered into without either the authority of a vote of the town or special statutory provision, was beyond the power of the selectmen and not binding upon the town. *Wood* v. *Concord*, 268 Mass. 185, 188.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration in Embalming — Funeral Directing — Advertisements.

SEPT. 24, 1942.

Mrs. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — You have written me on behalf of the Board of Registration in Embalming and Funeral Directing, requesting my opinion as to whether or not, under the law, the names of persons not registered as funeral directors can be used on signs and advertising of funeral directing firms or corporations.

In my opinion, the names of such persons may be used on signs and advertising of funeral directing firms or corporations, provided such signs and advertising are not so worded as to hold out as a funeral director any person who is in fact not registered as such.

Under the provisions of G. L. (Ter. Ed.) c. 112, § 83, corporations or partnerships may not be registered as funeral directors. Such registration is available only to individuals.

The only provision of law pertinent to the use of names of unregistered persons on signs and advertising of funeral directing firms or corporations is G. L. (Ter. Ed.) c. 112, § 87, as most recently amended by St. 1939, c. 160, § 2, the applicable provisions of which are as follows:

". . . whoever, not being registered as a funeral director under . . . section eighty-three and licensed as a funeral director under section forty-nine of chapter one hundred and fourteen, shall engage in the business of funeral directing, or shall hold himself out as such, shall . . . be punished . . .; but sections eighty-two to eighty-seven, inclusive, shall not . . . prohibit a corporation or partnership, if not engaged in any other business, from engaging in the business of funeral directing, if a duly registered and licensed funeral director is in charge of the business of said corporation or partnership."

While this section prohibits persons not registered as funeral directors from engaging in the business of funeral directing or holding themselves out as funeral directors, it does permit corporations or partnerships not engaged in any other business to engage in said business if a duly registered and licensed funeral director is in charge thereof.

Such a corporation or partnership, as necessarily incident to its authority to engage in said business, may use its corporate or partnership name on signs and advertising, subject to the limitation stated above, that no unregistered person may

hold himself out by such signs and advertising as a funeral director. Whether an unregistered person does so hold himself out by the use of any particular sign or advertising is a question of fact to be determined in each case.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Water Supply — City of Lowell — Water Department.

SEPT. 25, 1942.

Dr. ALTON S. POPE, *Deputy Commissioner of Public Health.*

DEAR SIR: — You have informed me that a water supply emergency exists in the City of Lowell owing to an increased demand for water consumption due, as I am advised, to an influx of persons employed in industries essential to the successful conduct of the war, and that the most appropriate source of additional supply for immediate development is in the Town of Chelmsford.

You have asked my opinion as to the authority of the Water Department of Lowell to develop a water supply from the ground in Chelmsford and to acquire land in such town, by eminent domain or purchase, for the purposes of such development and the construction of the necessary works for collecting and pumping water from such supply to the distributing plant of Lowell in order to meet the present emergency.

I am also informed that the City of Lowell does not use the metropolitan water supply.

I am of the opinion that the provisions of G. L. (Ter. Ed.) c. 40, § 40, as amended, authorize the City Council of Lowell, during an emergency, to take by eminent domain or acquire by purchase the right to draw water from ground sources in the Town of Chelmsford, not already appropriated to another public water supply, for a period of not more than six months in any year in quantities necessary to relieve the emergency, after the State Department of Public Health has approved such water as a proper source of supply. The City Council is also authorized by said section 40 to take by eminent domain the right to use any land for the time necessary to use such water.

The applicable portions of said G. L. (Ter. Ed.) c. 40, § 40, read:

"The metropolitan district commission in cities or towns using the metropolitan water supply, the city council in other cities, . . . in cases of emergency, may, on behalf of their respective bodies politic or corporate, take by eminent domain under chapter seventy-nine the right to draw water from any stream, pond or reservoir or from ground sources of supply by means of driven, artesian or other wells not already appropriated to uses of a municipal or other public water supply, . . . for a period of not more than six months in any year in quantities necessary to relieve the emergency; but no such taking or purchase shall be made until after the department of public health has approved the water as a proper source of water supply . . . The proper authority as aforesaid may also take by eminent domain under said chapter seventy-nine the right to use any land for the time necessary to use such water; . . . The vote of a city council . . . to make or authorize such taking or purchase as aforesaid shall be conclusive evidence of the existence of the emergency. . . ."

The authority to make takings or to purchase rights to draw water for the period and in the quantities mentioned in the foregoing statute from sources outside a city not using the metropolitan water supply is vested *not* in its water de-

partment but in its city council, and the right to take the use of land necessary to the utilization of such water is likewise vested in the city council.

If such authority is exercised by the City Council of Lowell, erection, maintenance and operation of the works necessary for obtaining and transmitting the water to Lowell may properly be carried on by that body to which by the terms of its present charter, is entrusted the supervision of the city's water supply.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Health — County and Municipal Tuberculosis Hospitals — Licenses.

OCT. 2, 1942.

DR. ALTON S. POPE, *Deputy Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion as to whether county and municipal tuberculosis hospitals are required to be licensed by the Department of Public Health under the provisions of St. 1941, c. 661.

I am of the opinion that such institutions as are required by specific provisions of law to be maintained by designated public officials are not required to be so licensed.

St. 1941, c. 661, amended G. L. (Ter. Ed.) c. 111, by striking out sections 71 to 73, inclusive, and adding new sections in their places.

The new section 71 provides that the said department shall issue a license, subject to revocation by it, for cause, "to any *person* whom it deems suitable and responsible to establish or maintain a hospital or sanatorium which meets the requirements of the (said) department" and that "the fee for the issue or renewal of each license shall be ten dollars" per year.

The new sections 72, 72A and 73 vest authority in said department to make rules and regulations for the conduct of such hospitals and sanatoria and for the appointment of an advisory committee to visit these institutions and advise the department with regard to them.

The new section 73 provides a penalty for the establishment or maintenance of a hospital or sanatorium without a license.

Counties, through their county commissioners, the mayors of Chelsea and Revere, and the selectmen of Winthrop, are specifically authorized by said G. L. (Ter. Ed.) c. 111, §§ 81 to 90, as amended, to establish and maintain tuberculosis hospitals and preventoria or sanatoria, with the approval of the Department of Public Health, for the purpose of serving designated districts.

In so establishing and maintaining these institutions the counties and the authorized officials act as agencies of the Commonwealth, and, in establishing the institutions, do so with the approval of the Department of Public Health.

The amendments made in said chapter 111 by St. 1941, c. 661, are to be so construed as to be in harmony with the other provisions of chapter 111. It is a general principle of statutory construction that provisions for licensing of businesses or activities are not to be construed as binding upon the Commonwealth or its agencies unless specific terms of an act require that such a meaning be given. *Teasdale* v. *Newell, &c. Const. Co.*, 192 Mass. 440. II Op. Atty. Gen. 399. The instant statute is to be so construed and, thus read, does not show a legislative intent to embrace within its scope those county tuberculosis hospitals and sana-

toria, the establishment and maintenance of which are specifically authorized by the provisions of said G. L. (Ter. Ed.) c. 111, §§ 81 to 90, as amended.

As originally introduced in the Legislature, House Bill No. 1232, upon which said chapter 661 was based, defined "hospital" or "sanatorium," as used therein, as

"any institution, whether conducted for charity or for profit, which is advertised, announced or maintained for the express or implied purpose of caring for persons admitted thereto for purposes of diagnosis, or medical or surgical treatment which is rendered within said institution, except an institution caring exclusively for cases of mental diseases and licensed by the department of mental health."

The measure was reported out of the Committee on Public Health as House Bill No. 2528 and at that stage contained the following sentence after the definition above set forth:

"With respect to municipal and county hospitals and sanatoria, the provisions of this section and sections seventy-two to seventy-three, inclusive, shall apply only to the maternity wards or sections thereof used for the reception, care and treatment of women during pregnancy, delivery, or while recovering from delivery."

The House of Representatives itself, pending the question of ordering House Bill No. 2528 to a third reading, struck out the above sentence inserted by the Committee on Public Health, and the bill was enacted in its present form without such sentence.

These actions of the Committee and of the House do not indicate an intention that the measure should require the licensing of those tuberculosis hospitals and sanatoria whose establishment and maintenance were specifically authorized by said sections 81 to 90 of chapter 111, as amended.

Although municipalities have a general power to establish and maintain tuberculosis hospitals, they are not specifically authorized so to do by legislative enactment, and in establishing them approval by the Department of Public Health would not be a prerequisite.

I am of the opinion that the municipalities which establish and maintain tuberculosis hospitals and sanatoria cannot be said in so doing to be acting as agencies of the Commonwealth, and that, consequently, the provisions of said new section 73 of chapter 111, with respect to the requirement of a license and a fee therefor, are to be construed as applicable to them.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Constitutional Law — Anti-Aid Amendment.

OCT. 5, 1942.

HON. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — You have asked my opinion as to whether the provisions of Amendment XLVI to the Constitution of Massachusetts, commonly known as the Anti-Aid Amendment, prohibit the Division of Child Guardianship in your department from paying denominational institutions for actual services rendered to children in the care or custody of the department, who are ill or in such other circumstances as prevent their care in private families.

I am of the opinion that the provisions of Amendment XLVI do not prohibit the making of payments to denominational institutions for necessary services such as you have described, which are actually furnished by said institutions and could not be rendered by private families.

Amendment XLVI forbids the grant, appropriation or use of public money by the Commonwealth or any of its political subdivisions for the purpose of "founding, maintaining or aiding . . . any . . . infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, . . ."

Payments for services actually rendered for the benefit of the Commonwealth for necessary care of children in the custody or supervision of the Department of Public Welfare, even if made to a hospital, institution or other undertaking described in the amendment are not, in my opinion, within the prohibition of the amendment.

In other words, the terms of the amendment forbidding the use of public money for the purpose of "founding, maintaining or aiding" institutions referred to therein do not prevent payments by the Commonwealth which are based on fair and adequate consideration.

Following the long continued practice of my predecessors in the office of Attorney General, I must respectfully decline to answer your further question because it is hypothetical in nature and involves a consideration of the possible exercise of authority by the Governor.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Department of Public Welfare — Assistance to Aged Persons — Rules — "Family Group."

OCT. 5, 1942.

Hon. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — You have informed me that the Department of Public Welfare, acting pursuant to the provisions of G. L. (Ter. Ed.) c. 118A, § 1, as amended by St. 1941, c. 729, has ruled that "a family group is defined as three or more persons related by blood or marriage living in one household under one head or manager. A person also will be considered living in a family group who resides with two or more other persons not related by blood or marriage forming one household when the relationship between the members of the household is of long standing and is based on ties of affection and is not a mere relationship based on convenience and economy." You have requested my opinion whether this determination as to what constitutes a family group is within the scope of said statute.

In my opinion, this determination is within the scope of the statute.

G. L. (Ter. Ed.) c. 118A, § 1, as amended by St. 1941, c. 729, § 1, provides for the granting of assistance to aged persons. It specifies the minimum rates at which such assistance shall be given: In case the individual or individuals live within a "family group," a certain minimum sum per month; and in case such individual or individuals live outside a "family group," a somewhat larger minimum sum per month. The section then provides: "The determination as to what constitutes a family group under the provisions of this section shall be made in accordance with

rules and regulations established by the department, authority to establish the same being hereby granted."

The Department, acting under an express rule-making power, has made a reasonable rule, entirely consistent with the provisions of the enabling act. The rule is, therefore, within the scope of the statute. This rule of the Department, determining that a family group consists of at least three persons, does not react to the detriment of two aged persons, such as husband and wife, who live alone and are eligible for assistance, but rather inures to their benefit, for under this rule such aged persons are entitled to greater assistance than that to which they would be entitled if the Department had determined that a family group consisted of two or more persons.

You have also requested my opinion as to whether G. L. (Ter. Ed.) c. 118A, § 1, as amended, precludes or prevents the Department from ruling that "three or more brothers, sisters, or brothers and sisters, all of whom are eligible and are living under one roof with one as the head or manager of the family constitute a family group."

In my opinion, this proposed ruling is no more than an application of the above general rule to a particular group of persons, and, therefore, for the reason above stated, is permitted by the statute.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Settlement — Executive Order No. 32.

OCT. 7, 1942.

Hon. ARTHUR G. ROTCH, *Commissioner of Public Welfare.*

DEAR SIR: — You have informed me that a certain man was inducted into the Federal service on January 16, 1941, and was honorably discharged therefrom on February 28, 1941. You have stated that this man was in receipt of public assistance from March to June, 1942, and was unsettled during that period.

You have asked me as to whether Executive Order No. 32, issued by the Governor on August 20, 1942, with relation to the settlement of persons who serve in the military or naval forces of the United States in the present war, was "retroactive in its scope so as to affect the settlement of this person."

Executive Order No. 32, in its applicable parts, reads:

"Any person who serves as a member of the military or naval forces of the United States at any time during the present war, which for the purpose of this order shall be deemed to have begun September 16, 1940, whether said person enters said forces by enlistment, induction pursuant to the provisions of Selective Training and Service Act of 1940, or otherwise, and his wife, or widow and minor children shall be deemed to have a settlement in the place where he actually resides or resided at the time of his induction, enlistment or entry into such service."

By its terms the foregoing order was effective to give to a person who had entered the service of the United States military or naval forces at any time after September 16, 1940, and up to August 20, 1942, the date of the said Executive Order, a settlement as of said date at the place where he actually resided on the date of his enlistment or induction. Enactments concerning settlements are not ordinarily construed as retroactive in the sense of establishing or changing acquired settlements as of a time prior to the date of the enactment. *Commonwealth* v. *Inhabitants of Sudbury*, 106 Mass. 268.

In other words, on and after August 20, 1942, by force of the Executive Order, the person in question could no longer be deemed to be "unsettled" but would, as of that date, have a settlement in the place in which he resided at the time of his induction, enlistment or entrance into the military forces of the United States.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Elections — Absentee Voting — Federal Statute.

OCT. 23, 1942.

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

DEAR SIR: — I am in receipt of your letter relative to an Act of the 77th Congress, 2d Session, Public Law 712, chapter 561, approved September 16, 1942, entitled: "An Act to provide a method of voting, in time of war, by members of the land and naval forces absent from the place of their residence."

You state that "in several respects" the provisions of this act "are in conflict with our election laws" which impose penalties upon election officials for failure to comply with their terms, and you inform me that these officials are apprehensive as to the consequences which might result from their compliance with those mandates of the Act of Congress which are inconsistent with the statutes of the Commonwealth concerning the conduct of elections in Massachusetts.

I assume that such apprehension as may exist results from suggestions which may have been made that possible arguments to the effect that the Act of Congress is unconstitutional may at some time be made the basis of litigation, which might result in some portion or all of the act being declared unconstitutional by a court of last resort.

The purpose of the Act of Congress is a patriotic one, intended to make available to the members of the land and naval forces of the United States, who are called away from their home states to serve their country in war, the right to vote for United States Senators and Representatives and presidential electors by absentee ballots in such states. It also makes provision for voting for state and local officers when a state has itself authorized it.

At the present time only those provisions of the act which deal with voting for United States Senators and Representatives are compelling upon the election officials, and I confine myself at the moment to a consideration of such provisions, excluding from the scope of this letter all reference to presidential elections.

I see no cause for concern by election officials if they comply with the terms of the Act of Congress even when such terms are in some particulars in opposition to the provisions of the statutes of the Commonwealth governing elections.

The Act of Congress was duly enacted. It is the law of the land. There is to be a presumption as to its constitutionality by all public officials, — executive, administrative and judicial. It is not to be treated by such officials as unconstitutional in the absence of a decision to that effect by a court of last resort.

In so far as the act conflicts with the provisions of our state statutes it supersedes them, and election officials are bound to follow the mandates of the act in regard to the election of United States Senators and Representatives.

It is a generally recognized principle of law that every presumption is to be indulged in favor of the validity of an enactment of a legislative body which is not manifestly in excess of legislative power. *Howes Bros. Co. v. Unemployment*

Comp. Comm., 296 Mass. 275, 284; *Perkins* v. *Westwood*, 226 Mass. 268, 271; *Lowell Co-op. Bank* v. *Co-operative Central Bank*, 287 Mass. 338, 343.

In view of the purpose of this act and the circumstances of its passage in time of war, it cannot reasonably be asserted that it is manifestly in excess of the legislative power of Congress. Such questions as may be raised with relation to its constitutionality cannot be answered with certainty until the Supreme Court of the United States has pronounced upon them, but in view of the presumption of validity which prevails in favor of an enactment of the Congress, officials of the Commonwealth should at the present time be governed in their actions concerning elections by this Congressional act. No official of the Commonwealth before a pronouncement by the Supreme Court of the United States should refuse to obey this Act of Congress in reliance upon his own views of its unconstitutionality, setting his judgment of the authority of the supreme legislative body of the nation against that of the considered judgment of the Congress itself.

The duty of the election officials of Massachusetts to comply with the terms of the Act of Congress at the present time is so plain that such officials need feel no apprehension as to criminal prosecution against them for a violation of our state law made necessary by such compliance, even if the act should ultimately be determined to be unconstitutional by the Supreme Court.

Although the decisions of various courts throughout the United States are not altogether in agreement, it would seem that correct principles of law will not hold officials criminally liable for acts done contrary to state law but in compliance with an existing Act of Congress, even should the latter be subsequently determined to be unconstitutional.

As was said in an opinion of the Supreme Court of North Carolina (*State* v. *Godwin*, 123 N. C. 697 (1898)) in relation to such suggested criminal liability:

"The criminal law cannot be invoked to punish one who acts as a public officer — as an agent of the people — and who in the discharge of a public duty had obeyed an Act of the law-making power even though the law be unconstitutional, unless the Act itself had required the committal of a crime — a thought which could not be entertained for a moment. . . . Until the subsequent statute was declared to be unconstitutional by competent authority, the defendants, under every idea of justice and under our theory of government had a right to presume that the law-making power had acted within the bounds of the Constitution, and their highest duty was to obey."

And as was said by the court in *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250, 254:

"Plaintiff invokes the generality, 'An unconstitutional law is no law.' It is sufficient to say that the general language invoked cannot be applied to work a hardship upon a public officer who, in the performance of his duty, has acted in good faith, in reliance upon the validity of a statute and before any court has found that the statute is invalid."

Furthermore, if any court or any official under a mistaken view of its or his duty should entertain or begin a criminal proceeding against an election official who has acted in compliance with the provisions of the Act of Congress, the Attorney General of the Commonwealth will immediately exercise his authority to terminate such a proceeding.

Let me reiterate and amplify the foregoing statement. If any election official

in this Commonwealth is prosecuted for failure to perform an act required of him by our state laws which he is prevented from performing by his compliance with the Act of Congress or for performing some action required by the act but prohibited by our state law, such prosecution will be at once stopped by the Attorney General in the exercise of the power which is vested in him.

This being so, no election official has cause for apprehension of criminal prosecution in the event that he complies with the provisions of the Act of Congress. Your letter relates to apprehension of officials concerning criminal prosecutions or penalties. Other considerations relative to a conceivable civil liability need not be considered by me at this time. To do so would merely serve to complicate the issue raised by your letter, which should be kept as simple as possible.

The Act which Congress has passed for the benefit of the members of the land and naval forces of the United States, being a measure deemed by that body to by conducive to the preserving of their rights, is, like all acts of that body, a part of the supreme law of the land, is to be presumed to be within the constitutional law-making power of Congress, and is to be complied with by all officials whose duties it prescribes.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Lowell Textile Institute — Instructors — Reinstatement After Military Service — Statutes.

OCT. 23, 1942.

Hon. WALTER F. DOWNEY, *Commissioner of Education.*

DEAR SIR: — You have requested my opinion as to the status of two men who served as instructors at the Lowell Textile Institute from September 1, 1938, until June 26, 1942. The circumstances under which their services terminated, as given to me, are set forth below. Claims have been made by these men that some or all of the following State and Federal enactments grant them rights to reinstatement.

A. Massachusetts Acts of 1941, c. 708.
B. Federal Soldiers' and Sailors' Civil Relief Act of 1940.
C. Federal Selective Training and Service Act of 1940.
D. Public Resolution No. 96, 76th Congress, approved August 27, 1940.

You desire the opinion of the Attorney General as to the effect of these state and federal statutes upon the status of these two men in order that the trustees of the school may be enabled to offer employment to new instructors on a definite basis.

In my opinion, under the circumstances set forth, the trustees of the school may proceed upon the assumption that the statutes cited confer no rights to re-employment or reinstatement upon these men.

The statement of facts submitted to me discloses the following:

The Trustees of the Lowell Textile Institute at a meeting held April 30, 1942, unanimously voted to terminate the services of these two instructors as of June 30, 1942. Action of the trustees was based upon evidence of incompetence and other evidence submitted to them by the president of the school. The men were notified of the above-mentioned vote of the trustees on May 29, 1942. Nearly a

month later, or four days prior to the date they knew their employment was to terminate, to wit, on June 26, 1942, the men tendered their resignations to the trustees to take effect immediately, "for the purpose of serving in the military forces of the United States," and at the same time informed the trustees of their intention to invoke the State and Federal statutes cited above, "to protect their rights as employees of the Lowell Textile Institute." One of the men joined the military forces subsequent to June 30, 1942. The other is believed to be still in civilian life.

Before considering the relation or nonrelation of the specific statutes cited to the status of these men, it should be noted that the Trustees of the Lowell Textile Institute, who, on April 30, 1942, unanimously passed the vote terminating the services of these men as of June 30, 1942, are a board of seventeen public officers serving in the Department of Education and entrusted with the duty of directing and maintaining this school for the Commonwealth. G. L. (Ter. Ed.) c. 15, §§ 19, 24; c. 74, § 47; Gen. St. 1918, c. 274, § 2; St. 1895, c. 475, § 1; Pub. Sts., c. 115, § 5. There are no statutes limiting their power to appoint or discharge instructors in the school. Their vote effectively terminated the employment of the two men as of June 30, 1942.

The men discharged were employees of the Commonwealth. G. L. (Ter. Ed.) c. 74, § 47; St. 1941, c. 419, § 2, item 1332-00; III Op. Atty. Gen., 222. Their positions, however, were not classified under chapter 31 of the General Laws, nor were they appointed, upon the facts submitted to me, for any fixed terms.

Taking the statutes claimed to effect their status in the order in which I have cited them above in the first paragraph of this opinion, I have the following comments to make:

Sections 1 to 5 of chapter 708 of the Acts of 1941 provide for the re-employment in their former positions of employees of the Commonwealth or any political subdivision thereof whose positions are subject to chapter 31 of the General Laws. Sections 1 and 6 provide for the re-employment of those employees of the Commonwealth or any political subdivision thereof whose positions are not subject to chapter 31. Section 15 was enacted as an aid to those who were given protection under the Federal acts enumerated therein. It does not apply to State employees.

Sections 1 and 6 provide:

"Section 1. Any person who, on or after January first, nineteen hundred and forty, shall have tendered his resignation from an office or position in the service of the commonwealth, or any political subdivision thereof, or otherwise terminated such service, for the purpose of serving in the military or naval forces of the United States and who does or did so serve or was or shall be rejected for such service, shall, except as hereinafter provided, be deemed to be or to have been on leave of absence; and no such person shall be deemed to have resigned from his office in the service of the commonwealth, or any political subdivision thereof, or to have terminated such service, until the expiration of one year from the termination of said military or naval service by him."

"Section 6. Any person referred to in section one who was or shall be separated from the service of the commonwealth or any political subdivision thereof while holding an office or position not subject to chapter thirty-one of the General Laws, shall, if he so requests in writing to the appointing authority within one year after the termination of his said military or naval service, be reinstated or re-employed in said office or position; provided, that, in case he was appointed for a fixed term, the term has not expired; . . ."

If the men resigned from their positions "for the purpose of serving in the military or naval forces of the United States" and do serve, or are rejected for such service, within the meaning of section 1 of chapter 708, then, since their resignations became effective before the date of the termination of their service, as voted by the trustees, they were "separated from the service of the commonwealth . . . while holding an office or position not subject to chapter thirty-one of the General Laws," within the meaning of section 6 of chapter 708. But at the time of their resignations they were in the positions of persons appointed for a fixed term and, under section 6, they had rights to reinstatement only so long as that term had not expired. That term expired on June 30th.

The Soldiers' and Sailors' Civil Relief Act, cited by the removed employees in support of their claim of a right to reinstatement, does not deal with the re-employment of service men. It suspends the enforcement of certain civil liabilities of persons in the military or naval service while they are absent in such service.

The Selective Training and Service Act, § 8 (*b*), gives job protection to certain classes of employees inducted in the military forces under that Act, and Public Resolution No. 96, § 3 (*b*), in identical words, gives the same protection to the same classes of employees which as members of "any reserve component of the land or naval forces" are called to active duty. The classes of employees which these acts direct shall be restored to their former positions "or to a position of like seniority, status, and pay" are employees of the United States and employees of private employers, but not State employees. As to State employees, the acts say, "It is hereby declared to be the sense of the Congress that such person should be restored." There is no mandate. The Federal acts do not, therefore, give the men any rights to re-employment.

Also, if it can be proved that they tendered their resignations not for the purpose of serving in the military or naval forces, but for the purpose of circumventing the effect of their discharge, then clearly they have no rights to reinstatement. Neither the Massachusetts statute nor the Federal statutes were intended as a refuge for employees properly discharged from their positions prior to their resignations.

Very truly yours,
ROBERT T. BUSHNELL, *Attorney General.*

Department of Mental Health — Transfer of Feeble-minded Persons in State Schools.

Nov. 5, 1942.

Dr. CLIFTON T. PERKINS, *Commissioner of Mental Health.*

DEAR SIR: — You have asked my opinion as to the authority of the Department of Mental Health to transfer feeble-minded persons from one of the State's schools for the feeble-minded to another.

Such schools are institutions under the general supervision of the department (G. L. (Ter. Ed.) c. 123, §§ 3, 25, 45) and the department has general authority to transfer inmates of its institutions from one to another when to do so promotes efficiency in the care and management of such inmates (G. L. (Ter. Ed.) c. 123, § 20). This general authority is, however, limited in respect to persons who have been admitted to such schools by application from their parent or guardian under the terms of G. L. (Ter. Ed.) c. 123, § 47. Persons of this class are referred to in your letter as "voluntary" inmates. Section 21 of said chapter 123 contains in

its last clause a prohibition against the transfer from one institution to another of "*any voluntary inmate of any institution*, except with his written consent."

The major portion of section 21 deals with a limited mode of transferring patients to or from private institutions but its last clause, to which I have referred, was added to similar provisions concerning patients in private institutions, embodied in earlier statutes from which this section stems, by St. 1909, c. 504, § 70, which prescribes that the department shall not transfer patients of private institutions except under certain stated conditions, "nor transfer any voluntary inmate of any institution, public or private, except with his written consent."

Accordingly, it follows that the department may not transfer a "voluntary" inmate from one State school to another except with his written consent. A feeble-minded person's "written consent" to a transfer should be given by the duly appointed guardian of his person or by his natural guardian, if no guardian has been appointed by the court.

With regard to a feeble-minded person who has been *committed* to a State school by a judge of probate under G. L. (Ter. Ed.) c. 123, § 66, no such limitation upon the authority of the department to transfer inmates from one institution or State school to another is set up by the Legislature, and they may be so transferred in proper instances.

The proper mode of effecting such a transfer is set forth in section 66, however, and should be observed in transferring a feeble-minded person from one State school to another. This mode is carried out by the department withdrawing the feeble-minded person from the custody of the particular State school to which he was committed to its own custody or supervision, and thereafter transferring him from its own custody or supervision to another school for the feeble-minded, in accordance with the provisions of chapter 123, section 66A, governing the care of feeble-minded persons who have been committed by a judge of probate directly to custody or supervision of the department itself and not to a State school.

Very truly yours,

Robert T. Bushnell, *Attorney General.*

State Examiners of Electricians — Oral and Written Examinations of Applicants for Licenses.

Nov. 5, 1942.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — You have requested my opinion upon two questions of law in relation to examinations of the State Examiners of Electricians which were embodied in a letter by such examiners to you and which are as follows:

(1) "Does G. L. (Ter. Ed.) c. 141 authorize the State Examiners of Electricians to give oral examinations to applicants for master and journeyman electricians' licenses?"

I answer the first question in the negative. The applicable portion of G. L. (Ter. Ed.) c. 141, § 2, with regard to the duties of the Examiners of Electricians, provides:

". . . examinations shall be sufficiently frequent to give ample opportunity for all applicants to be thoroughly and carefully examined, may be written or in practical work, and may be supervised by one or more of the examiners, . . ."

I am of the opinion that the legislative intent as expressed in the whole context of the section and in the quoted provisions was to establish examinations which were not to be oral but were to be written examinations or examinations in the actual performance of types of work connected in some degree with the occupation of an electrician.

The word "may" as used in the phrase "examinations . . . *may* be written or in practical work," appears to have been employed with the meaning of "*shall*." Such use is not uncommon in statutes. *Attleboro Trust Co.* v. *Commissioner of Corporations*, 257 Mass. 43, 51; *Commonwealth* v. *Mekelburg*, 235 Mass. 383, 384. It is to be noted as significant that in a similar manner the Legislature appears to have adopted this usage of the word "may" in the next following phrase of section 2 "and may be supervised by one or more of the examiners." Equally in both of these phrases it clearly appears that the Legislature was pronouncing a mandate, not leaving action to the vagaries or discretion of the officials concerned, but requiring them to supervise the examinations and requiring them to give only written examinations or examinations in ability to perform electrical work.

I am confirmed in this view by the fact that with relation to examinations to be given by other state boards to test the fitness of applicants for registration or licenses to practice other trades or professions, the Legislature has, when it thought best to leave the form of examination, whether oral or written, to the discretion of an examining board, employed simple phrases to vest such discretionary power in the particular officials and has not qualified those phrases by provisions concerning the character of the examination, as in the wording of the section now under consideration. Examples of this legislative mode of vesting unlimited discretionary authority, with relation to the type of examination which might be given, are to be found in the wording of G. L. (Ter. Ed.) c. 112, § 55, with regard to those desiring to become veterinarians, "an applicant . . . shall be examined"; G. L. (Ter. Ed.) c. 112, § 68, optometrists, "an examination conducted by the board in theoretic, practical and physiological optics;" G. L. (Ter. Ed.) c. 112, § 82, embalmers, "an applicant . . . shall be entitled to be examined;" G. L. (Ter. Ed.) c. 112, § 87A, public accountants, "the board . . . shall examine applicants;" G. L. (Ter. Ed.) c. 112, §§ 87V–87X, "an examination satisfactory to the board;" G. L. (Ter. Ed.) c. 112, § 51, "an applicant . . . shall be examined by the board in the subjects considered essential by it;" G. L. (Ter. Ed.) c. 112, § 45, dentists, "an applicant shall be entitled to be examined by the board;" G. L. (Ter. Ed.) c. 112, § 24, pharmacists, "an applicant . . . shall . . . be entitled to examination."

On the other hand, when the Legislature has not vested such discretion in an examining board it has, as in the section concerning electricians under consideration, required that the authority to examine be exercised in a prescribed manner and has so expressed its grant of authority as to indicate that such authority was required to be exercised only in the manner prescribed. For example: G. L. (Ter. Ed.) c. 142, § 4, plumbers, "the board . . . shall examine each applicant . . . as to his practical knowledge of plumbing . . . and subject him to a practical test satisfactory to the board;" G. L. (Ter. Ed.) c. 112, § 60C, architects, "the board . . . shall examine the applicant in writing" — a written examination may be supplemented by such oral examination as the board may direct; G. L. (Ter. Ed.) c. 112, § 75, nurses, "the examination shall be wholly or in part in writing, in the English language;" G. L. (Ter. Ed.) c. 112, § 3, physicians, "examinations shall be wholly or in part in writing."

Accordingly, I am of the opinion that the Examiners of Electricians have no authority to give oral examinations to applicants for licenses.

Your second question reads:

(2) "If an applicant for a license fails the established written examination, may the State Examiners of Electricians give the applicant an oral examination and issue him a license if he appears to be qualified?"

I answer this in the negative. The Board has no authority, as I have stated, to give an oral examination for an electrician's license. The fact that an applicant has failed to pass a written examination does not empower the Board to disregard the legislative mandate that examinations are to be either written examinations or examinations in practical work. An examination in practical work consists of an actual demonstration to the examiners by an applicant of his ability to perform physical tasks incident to the calling of an electrician. It is neither an "oral" nor a "written examination" as the quoted words are used in said section 2.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Trust Company — Total Liability of Borrowers — Loans Guaranteed by Reconstruction Finance Corporation — Not Guaranteed by the United States as Required by G. L. (Ter. Ed.), c. 172, § 40, as Amended.

NOV. 6, 1942.

Hon. JOSEPH E. PERRY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion as to whether, in computing the liabilities of a person to a Massachusetts trust company, the amount of loans which are guaranteed by the Reconstruction Finance Corporation may be excluded from the total of such liabilities.

The answer to your inquiry must rest upon a determination of whether loans guaranteed by the Reconstruction Finance Corporation may properly be said, as a matter of law, to be "obligations which are unconditionally guaranteed as to the payment of principal and interest by the United States" as the quoted words are used in G. L. (Ter. Ed.) c. 172, § 40, as most recently amended by St. 1941, c. 484. Said section 40, as amended, prohibits a trust company from making loans to persons whose total liabilities to such a company exceed an amount stated therein, but excepts from inclusion in such total liabilities

"investments in obligations which are unconditionally guaranteed as to the payment of principal and interest by the United States."

I am of the opinion that loans guaranteed by the Reconstruction Finance Corporation are not as a matter of law "obligations which are unconditionally guaranteed . . . by the United States" as those quoted words are used in said section 40, and that consequently they may not be excluded in computing the liabilities of a person to a trust company for the purposes of said section 40. Although the Reconstruction Finance Corporation, which was created by Act of Congress in 1932, c. 8, § 1, 47 Stat. 5, which act, as amended, now appears in U. S. C. A., Title 15, §§ 601–617, is a corporate agency of the Government of the United States, it is not the United States itself.

By the terms of the creating act the Reconstruction Finance Corporation may:

"be employed as a financial agent of the Government; and it shall perform all such reasonable duties, as depositary of public money and financial agent of the Government, as may be required of it." (U. S. C. A., Title 15, § 612.)

This provision would seem to be a determination by Congress that the corporation is something other and apart from the United States. One may not act as his own agent, financial or otherwise.

Moreover, it is provided that while the corporation may obligate itself upon "notes, debentures, bonds, or other such obligations" within large but definite limits (U. S. C. A., Title 15, § 609) it is further provided that these obligations "shall be fully and unconditionally guaranteed both as to interest and principal by the United States and such guaranty shall be expressed on the face thereof." (U. S. C. A., Title 15, § 609.)

The Secretary of the Treasury, in his discretion, is authorized to purchase any obligation of the corporation and to market its obligations "using therefor all the facilities of the Treasury Department now authorized by law for the marketing of obligations of the United States." (U. S. C. A., Title 15, § 609.) These provisions indicate that Congress intended that the corporation, while performing certain functions pertaining to the National Government, was yet something apart therefrom.

Of similar import are those terms of the creating act which empower the directors of the corporation to determine the manner in which its obligations shall be incurred and its expenses paid, and those which expressly give the corporation immunity from taxes that the United States as such does not pay. (U. S. C. A., Title 15, § 610.)

Doubtless many forms of the governmental authority of the United States are discharged through the myriad activities of the Reconstruction Finance Corporation in rehabilitating finance and industry and commerce, yet there is a distinction between the corporation and the integral portions of the Federal Government which are properly comprehended in the words "United States" in G. L. (Ter. Ed.) c. 172, § 40, in the phrase "unconditionally guaranteed . . . by the United States."

There is nothing in *Keifer et al.* v. *Reconstruction Finance Corporation*, 306 U. S. 381, or in *Graves* v. *O'Keefe*, 306 U. S. 466, 477, or in other opinions of the United States Supreme Court contrary to the foregoing view as to a real distinction between this corporation as an agency of the Federal Government and such government of the United States.

The phrase "unconditionally guaranteed . . . by the United States" as employed in G. L. (Ter. Ed.) c. 172, § 40, shows an intent upon the part of the Legislature to indicate a class of obligations not guaranteed merely by a corporate agency discharging certain Federal governmental functions, but guaranteed by the United States itself in its sovereign capacity, placing the full faith and credit of the National Government behind the obligations.

The same phrase "unconditionally guaranteed . . . by the United States," as applied to various obligations, has been employed by the Legislature in G. L. (Ter. Ed.) c. 168, § 54, cl. second, as amended, in setting forth permissible investments for a savings bank, and the phrase "direct obligations of the United States" has likewise been used in the same section, and with regard to investments of credit

unions in G. L. (Ter. Ed.) c. 171, § 21. In contradistinction, when the Legislature has intended to make available for investment obligations of governmental agencies not unlike the Reconstruction Finance Corporation, it has referred to such securities as those of a designated agency and not as those of the United States. As for example: farm loan bonds of "federal land banks" (G. L. (Ter. Ed.) c. 168, § 54, cl. tenth); obligations of the "Federal Home Loan Bank" (G. L. (Ter. Ed.) c. 170, § 25); bonds of the "Home Owners Loan Corporation" (St. 1933, c. 343); obligations insured by the "Federal Housing Administrator" (St. 1935, c. 162, as amended by St. 1941, c. 260).

As I have pointed out, the obligations of the Reconstruction Finance Corporation are required by the terms of the Federal statute (U. S. C. A., Title 15, § 609) to be "unconditionally guaranteed . . . by the United States" but no similar provision has been made by Congress that obligations of persons, firms or private corporations guaranteed as to payment by the corporation shall or may be guaranteed by the United States. "Unconditionally guaranteed by the United States" appears to have a definite meaning in the statutes of this Commonwealth, and its requirement as to any obligation is not satisfied by the guarantee of a corporate governmental agency of the type of the Reconstruction Finance Corporation.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Civil Service — Employment of Disabled Fireman.

NOV. 6, 1942.

HON. ULYSSES J. LUPIEN, *Director of Civil Service.*

DEAR SIR: — You have informed me that a permanent fireman of the City of Boston, who had been appointed from an eligible list under the provisions of the Civil Service Law, and employed as such from 1914 to 1941, became unable to perform the regular work of a fireman by reason of an injury received while in the performance of his duties.

You ask me whether under the provisions of G. L. (Ter. Ed.) c. 152, § 73A (inserted by St. 1941, c. 649), you have "the right to allow him to be employed in any other capacity and receive the salary of a fireman while so employed."

I am of the opinion that you have no authority to give approval under the provisions of said section 73A to the employment of a disabled city fireman in another capacity.

The provisions of section 73A do not authorize the employment by a city of a disabled fireman. They extend the benefits of limited employment suited to the capacity of disabled city employees, subject to the approval of the Director of Civil Service, only to such employees as are:

"by reason of partial disability . . . *entitled to receive compensation as provided by section sixty-nine*" (of chapter 152).

Section 69 provides for the payment of compensation by certain cities to disabled "laborers, workmen and mechanics" but specifically *excludes* from the terms "laborers, workmen and mechanics" employees who are "*members of a police or fire force.*"

Since a partially disabled member of a fire force is by reason of such exclusion *not* entitled to receive compensation as provided by said section 69, it follows that

he is not included among those city employees who may receive the benefits of said section 73A by way of employment in a capacity suited to a disabled condition, and that consequently you have no authority nor "right" to give your approval to his employment in such a capacity.

Firemen of the City of Boston are entitled to receive pensions for disability under a comprehensive pension system established by St. 1880, c. 107, and acts in amendment thereof and in addition thereto, but they are not entitled to receive compensation under G. L. (Ter. Ed.) c. 152, § 69. The specific exclusion in section 69 of members of a fire force from the terms "laborers, workmen and mechanics" is a legislative affirmation of the opinion of the Supreme Judicial Court in *Devney's Case*, 223 Mass. 270, 272, that the use of the words "laborers, workmen and mechanics" in a statute providing for compensation does not indicate an intention on the part of the Legislature to include members of a fire department.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Metropolitan Water Supply — Municipal Connection with Supply — Expense — Reimbursement.

Nov. 7, 1942.

Hon. EUGENE C. HULTMAN, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have informed me that the City of Cambridge has asked for connections in addition to one which it already has with the metropolitan water supply system. I assume from your statement that additional connections are requested as the city is not now "already adequately connected."

You further inform me that Cambridge has not joined the water district "but under the provisions of the Acts of 1941, chapter 727, pays an annual premium, based upon the valuation of the city, for the protection of having a connection to our original system."

You request my opinion as to whether your Commission is authorized to spend approximately $25,000 out of the fund appropriated for its water division for the expenses of installing the requested additional mechanical connections between its pipes and those of the City of Cambridge without an agreement for reimbursement for such expenses from the city.

I am of the opinion that in the first instance the cost of making the requested additional necessary mechanical connections, the City of Cambridge not being already adequately connected with the metropolitan water supply system, is to be paid by the Metropolitan District Commission out of funds provided for the construction of water supply connections, that thereafter said cost is to be assessed upon the city in the manner provided for such assessment, and it will be required to pay its fair share thereof in the manner provided for the collection of assessments by section 5 of chapter 727.

In other words, the obligation of the city to pay the cost of the additional requested mechanical connections is fixed by the statute under section 4, and the mode of collecting assessments for such cost is fixed by section 5. This being so, no contract for reimbursement of such cost is required from the city nor is one necessary to obtain the reimbursement, as a mode of effecting the same is provided by the statute itself.

St. 1941, c. 727, entitled "An Act relative to the furnishing of water to towns in the metropolitan water district and certain other towns," provides, in section 4, that a town (the word "town" as used in this act includes a city) "which is so located that it can reasonably be supplied with water from any distributing reservoir," shall, upon application, be provided with a connection to supply its immediate needs "unless already adequately connected." Section 4 further provides that such a town, and I assume from the tenor of your letter that Cambridge is such a town, "shall be assessed and pay . . . its fair share of the cost of said connection, which may . . . be distributed over a period not exceeding ten years" and that a town so provided with a connection shall be eligible to membership in the metropolitan water district.

It is further provided in said section 4 that "Any town which already has a connection with the metropolitan water system, . . . and any town which makes application for such connection under any provision of this act, *shall annually*, until it becomes a member of" the metropolitan water district, "*be assessed and pay*, as hereinafter provided, *a premium* equal to three hundredths of one per cent of its valuation for the preceding year."

This annual payment of a premium which is required to be made by any town which has a connection with the metropolitan water system or makes application therefor, before such town becomes a member of the metropolitan water district, is a charge separate from, additional to and unconnected with the charge for the cost of the original mechanical connection or of an additional mechanical connection or connections, and is assessed only for the privilege of being enabled to draw water from the system. It is sometimes called a "stand-by charge."

Section 5 provides a mode for the collection from the city of the amount assessed under section 4 as its fair share of the cost of the necessary additional mechanical connection or connections. It reads:

"The state treasurer shall annually notify each town, not a member of the metropolitan water district, assessed under the provisions of section four of this act, of the amount so assessed, and the same shall be paid by the town to the commonwealth at the time required for the payment of and as a part of its state tax. The proceeds from all such payments shall be used to defray the cost, in the case of each such town, of the water supply connection provided, and any balance shall be applied by the state treasurer to meet the expenses of maintenance and operation of the metropolitan water works."

These provisions of section 5 relate to the amount assessed upon a city. This amount includes the assessment for the cost of connections and the assessment of the annual premium for what I have referred to as the "stand-by charge."

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

Board of Registration of Professional Engineers — Requirements for Registration — Civil Service Classifications.

Nov. 20, 1942.

MRS. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM: — You have asked my opinion as to whether the Board of Registration of Professional Engineers and of Land Surveyors, created by St. 1941,

c. 643, may require that only engineers in State or municipal service, within the Civil Service Law, classified under Civil Service Rule 4, as in Class 27, grades 4, 5 or 6, may be registered.

I am of the opinion that the said Board may not make such a requirement and that engineers in grades 1, 2 and 3 of said Class 27 are equally entitled to registration.

By Civil Service Rule 4 the positions of various employees are "made subject" to the Civil Service Law and Rules and placed in appropriate classes.

Class 27 is composed by its terms of "civil, designing, electrical, mechanical, and sanitary engineers."

This class so composed of "engineers" is subdivided into six grades. The positions in each are given different titles and their respective duties are roughly outlined. The duties assigned to grades 1 to 3, inclusive, appear to require less knowledge and skill than those assigned to grades 4 to 6, inclusive. Nevertheless, the positions in all the grades are those of "engineers" as prescribed by the rule for Class 27.

St. 1941, c. 643, § 4, provides for the issuing of certificates of registration by the Board to certain professional engineers without examination and specifically provides:

"Engineers in state or municipal service qualified as civil, mechanical, designing, electrical, or sanitary engineers under the civil service laws of the commonwealth upon the effective date of this act shall be eligible to register as a professional engineer under this section."

In view of the fact that Class 27 as established by the Civil Service Rules is a class composed of "civil, designing, electrical, mechanical, and sanitary engineers," whose members must have qualified as such under the provisions of said rules, these members, irrespective of the grade to which they may have been allocated within the class, fall within the group of employees intended by the Legislature to have the benefit of registration without examination. They are "engineers" as described in the quoted sentence, in the designated public employment, and by virtue of their classification and mode of attaining the same under the Civil Service Law are "qualified," as that word is used in such sentence. It is plain from the context of the sentence as a whole that the Legislature did not intend that the Board should substitute its own judgment of the qualifications of these public engineers for that of the Division of Civil Service, under whose rules, by virtue of G. L. (Ter. Ed.) c. 31, as amended, they had been "qualified."

You have also asked me if the said Board is required "to accept for registration as a professional engineer, any of the engineers employed in State or municipal service." I assume this question applies to engineers who are not in positions classified by Civil Service under said Rule 27, but in positions which are required by law to be filled by engineers, which positions are placed in some other class under the Civil Service Rule.

I am of the opinion that if any particular position is required to be filled by a civil, designing, electrical, mechanical or sanitary engineer and the incumbent thereof has been held to be qualified for it by the Division of Civil Service, the Board is without authority to refuse to register him as a professional engineer.

You have asked me further if the said Board is empowered to state the requirements of the qualifications of a professional engineer.

I answer this question in the negative. The Legislature has set forth such qualifications in G. L. (Ter. Ed.) c. 112, § 81D, as inserted by St. 1941, c. 643, § 2, as amended by St. 1941, c. 722, § 9A, and in St. 1941, c. 643, § 4, and the Board is without authority to enlarge or diminish these qualifications.

Very truly yours,

ROBERT T. BUSHNELL, *Attorney General.*

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