Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1950

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ATTORNEY GENERAL

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PUBLICATION OF THIS DOCUMENT APPROVED BY GEORGE G. CRONIN, STATE PURCHASING AGENT

900-8-'51-905270.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 2, 1951.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending June 30, 1950.

Respectfully submitted,

FRANCIS E. KELLY,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

State House

Attorney General

FRANCIS E. KELLY

Assistants

TIMOTHY J. MURPHY
FRANCIS J. ROCHE[1]
HENRY P. FIELDING
GARRETT J. BARRY
CHARLES ALPERT[2]
BERNARD J. KILLION[3]
WILLIAM S. KINNEY
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EDWARD P. HEALY
DAVID MILLER
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DAVID H. STUART[2]
JOHN J. BRESNAHAN
JAMES J. BACIGALUPO
CHARLES R. DESMARAIS[5]
JAMES G. WOLFF
LENAHAN O'CONNELL
JOSEPH S. VAHEY
MICHAEL H. SELZO[6]
CHARLES H. WALTERS[6]
WILLIAM J. O'NEILL[6]
EVA G. SILVA
JEANNETTE C. SULLIVAN
LAWRENCE E. RYAN[7]

Assistant Attorneys General assigned to State Housing Board

THOMAS C. DOLAN
MAURICE M. GOLDMAN

Assistant Attorneys General assigned to Division of Employment Security

ALBERT M. CICCHETTI
EDWARD J. NANTOSKI

Assistant Attorneys General assigned to Veterans' Division

DAVID N. ROACH
ERNEST BRENNER

Secretary to the Attorney General

JAMES T. BURKE

Chief Clerk to the Attorney General

HAROLD J. WELCH

List Clerk to the Attorney General

JAMES J. KELLEHER

Director of Division of Collections

W. FORBES ROBERTSON

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[1] Specially assigned to N. Y., N. H. & H. R.R. case.
[2] Specially assigned to New England Tel. & Tel. Co. case.
[3] On leave of absence.
[4] Resigned May 15, 1950.
[5] Resigned June 15, 1950.
[6] Appointed Apr. 21, 1950.
[7] Appointed Feb. 16, 1950.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1949, to June 30, 1950

Appropriations.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	237,250 00
Claims, Damages by State Owned Cars	15,000 00
Small Claims	10,500 00
National Association of Attorneys General	1,000 00
Recovery of Unclaimed Bank Deposits	14,562 14
New York, New Haven and Hartford Railroad Investigation	15,000 00
Veterans' Legal Assistance	20,000 00
Total	$325,312 14

Expenditures.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	229,884 61
Claims, Damages by State Owned Cars	14,996 34
Small Claims	10,500 00
National Association of Attorneys General	1,000 00
Recovery of Unclaimed Bank Deposits	6,151 22
New York, New Haven and Hartford Railroad Investigation	10,869 44
Veterans' Legal Assistance	14,973 73
Total	$300,375 34

Financial statement verified (under requirements of c. 7, § 19, of the General Laws), November 8, 1950.

By JOSEPH A. PRENNEY,
For the Comptroller.

Approved for publishing.

FRED A. MONCEWICZ,
Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 2, 1951.

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 June 30, 1950, totaling 10,813, are tabulated as follows:

Extradition and interstate rendition	120
Land Court petitions	132
Land damage cases arising from the taking of land:	
Department of Public Works	224
Metropolitan District Commission	33
Department of Conservation	1
Miscellaneous cases, including suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5,267
Estates involving application of funds given to public charities	926
Settlement cases for support of persons in state hospitals	40
Pardons:	
Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127, § 152, as amended	79
Workmen's compensation cases, first reports	1,839
Cases in behalf of Division of Employment Security	1,321
Cases in behalf of Veterans' Division	831

Criminal Prosecutions.

For the administration of the criminal laws of the Commonwealth, including prosecutions in court, the State has been divided into several districts. In each district there is a district attorney elected by the people of his respective district. To be eligible for office a district attorney must be a resident of the district in which he is elected. Each district attorney possesses the appointing power of the assistant district attorneys who serve under him, with their tenure of office at his pleasure.

As Attorney General I have adopted a carefully thought-out policy of noninterference with the work of the several district attorneys. This I firmly believe to be a policy grounded in wisdom. It is my purpose as chief law enforcement officer of the Commonwealth to follow that policy unless extraordinary occasions present themselves. The good feeling and the co-operation that have been established by the office of the Attorney General and the offices of the several district attorneys, since I became Attorney General, have worked satisfactorily and promise much good for the future. I have found the district attorneys cordially co-operative

in all my contacts with them, and firmly believe that the policies which I have established with respect to criminal prosecutions will enure to the benefit of the Commonwealth. However, occasions may arise where the ramifications of criminal litigation might extend into more than one district. That situation might require a closer active participation and co-operation between the Attorney General as the chief law enforcement officer of the Commonwealth and the several district attorneys whose districts might be concerned. Under such circumstances it would be necessarily the plain duty of the Attorney General to act with the district attorneys with all the forces at his command. But in the ordinary and usual conduct of the criminal business of the State, it is my purpose to leave that responsibility in the hands of the several district attorneys. Since taking over the office of Attorney General I have met with the district attorneys at my office in the State House and mutual cordial understanding and confidence have been established between our respective offices.

It is to be observed, however, that whenever occasion necessarily requires the co-ordination of law enforcement agencies of the State, as chief law enforcement officer of the Commonwealth on such solemn occasions I shall not hesitate to act in the public interest by advice, exchange of views, or by such other action in court or otherwise as may be deemed necessary.

Obscene Literature.

Early in my service as Attorney General I caused to be formed an advisory committee on juvenile reading composed of twenty-nine civic-minded men and women connected with various religious, educational, veterans' and youth service organizations of the Commonwealth. This committee undertakes the task of screening new publications being offered for sale and distribution to juveniles throughout the Commonwealth. Publications which are considered offensive to the morals and tending to corrupt the minds of youth are reported by this volunteer committee to the Attorney General who requests that such publications be withdrawn from circulation. It is not my purpose as Attorney General to embark upon a book-burning crusade or to set myself up as a censor, but to seek the co-operation of publishers and booksellers by calling upon them to clean their own houses. In one case which I brought into the courts the Supreme Judicial Court of the Commonwealth sustained my view that a book placed before it for adjudication exceeded the bounds of decency and came within the restrictions of the law. The tragedy is that such books, especially in low priced editions, fall into the hands of children in the schools and are passed from hand to hand among school children and discussed by them unknown to their parents. Following the decision of the Supreme Judicial Court in the instance to which I have referred, a religious journal of high standing in this Commonwealth, referring to the efforts of the Attorney General, said editorially in part: "The ideal situation in regard to the printed word would be the arrangement whereby each publisher took the responsibility for printing only decent publica-

tions. In point of fact most publishers are faithful to this public trust and there is no problem. Occasionally someone for the sake of gain, or even less worthy motives, overrides common decency and traffics in obscenity. The ones most affected by it are the idle, the curious, the perverse and the young; the mature mind is usually strong enough to remain unmoved by it. At this point to protect society itself some force must step in to declare in a specific case where literature ends, even 'earthy' literature, and pornography begins. Such activity seems to be a necessary function of government. . . . If the matter were allowed to pass without correction we would find that it would require government attention, especially police attention, on a different level quite promptly. Most problems in social disorder come out of the groups among whom indecent literature finds its greatest influence. Common sense indicates that restricting the traffic in obscene literature is striking delinquency at its roots."

Communism.

On September 29, 1949, I rendered a formal opinion to the Secretary of the Commonwealth relative to chapter 619 of the Acts of 1949, which statute in its effect bars from the public service members of the Communist party or those who are members of or support any organization which advocates the overthrow by force, violence or other illegal or unconstitutional methods of the Government of the United States or of the Commonwealth. In that formal opinion I stated in part:

"It is my opinion that no person who by reason of his or her own voluntary acts and conduct, explicitly or implicitly, by clear and reasonable inference, comes within the prohibitions of the foregoing statute 'shall be employed in any capacity by the commonwealth or any political subdivision thereof.' The prohibitions of the statute have reference to, and embrace within their sphere, employment in the service of the Commonwealth and in the service of every political subdivision thereof, including counties, cities, towns and districts." I further stated in my opinion that "any person employed as above stated in this paragraph after the effective date of the statute who has then by reason of his or her own acts and conduct, or who thereafter by reason of his or her own acts or conduct, brings himself or herself within the prohibitions of the statute, would be subject to removal from the public service."

Town By-Laws.

One of the many functions of the Attorney General is the approval of town by-laws. Under the provisions of G. L. (Ter. Ed.) c. 40, §§ 27 and 32, no town by-law may become effective until it has received the approval of the Attorney General of the Commonwealth. Shortly after I assumed office in 1949 there came to my attention a by-law which had been adopted by the town of Dover. This by-law, in its express terms and clearly intended implications, would have the effect of excluding from the town of Dover all religious educational institutions. This by-law had been approved by one of my predecessors in office. Upon studying the by-law I

fully realized that I had an imperative public duty to perform with reference to it. Without delay I called the attention of the town authorities to the by-law, stressing to them its discriminatory and unconstitutional character. My official efforts were met by the town authorities with flat refusal. I thereupon directed to be made by members of my office staff a further careful study of the legal aspects of this unpleasant situation and finally came to the conclusion that it was necessary to have a more prompt and sound remedy of procedure provided for by legislative sanction. Recognizing as I did the evil of the situation and the unjust and undemocratic implications which were involved, not only for the present but for the future, I caused to be prepared a draft of legislation to implement possible court procedures in the matter. The draft of this implementing legislation was presented to the Legislature. The gratifying result was that both houses of the General Court adopted the legislation and enacted it by chapter 325 of the Acts of 1950. This chapter was approved by His Excellency Governor Dever on April 11, 1950, and thereupon became the law of the Commonwealth. Upon this statute becoming effective, in my own name as Attorney General I brought proceedings in the Superior Court under the new statute by petition in equity for a declaratory decree. This proceeding is now pending in the Supreme Judicial Court.

Veterans.

The Veterans' Division in the Department of the Attorney General has during the past year continued to function daily concerning the many problems and interests of veterans. Two Assistant Attorneys General have been assigned to this important and humane work with excellent and satisfying results. One of these assistants also represents the Attorney General by sitting frequently on the Veterans' Bonus Appeal Board, which board reviews appeals taken from decisions denying bonus payments. Federal and State laws are carefully followed and interpreted by the Veterans' Division. The present case load in this division is at a new high, due to changes in laws pertaining to veterans. Questions are constantly presented concerning family problems, business ventures, civil service matters, pension claims, participation in the Korean conflict and other factors growing out of present world conditions. The continuance of this division is most earnestly recommended.

In October, 1949, my opinion was requested by the Commissioner of Veterans' Services of the Commonwealth as to whether or not a veteran who is participating in a strike growing out of a labor dispute, and consequently being unemployed, is entitled to veterans' benefits under chapter 115 of the General Laws of the Commonwealth. A former Attorney General had rendered an opinion that a veteran so on strike and engaged in picket duty was not entitled to such benefits. In my opinion I ruled otherwise and stated in part: "Employees have a legal right to participate in a lawful strike growing out of a labor dispute and have a right, within lawful bounds, to participate, if necessary, on the picket lines in the exercise of the right of peaceful persuasion. . . . When an employee who is a veteran,

within the meaning of the statutory provisions, is called out on strike by his union, he is not required to turn his back on his fellow striking employees and abandon his legal right to strike or abandon the legal duties delegated to him by his union of peaceful persuasion on the picket line in order to preserve his rights to veterans' benefits if he and his dependents by virtue of their circumstances are otherwise lawfully entitled to veterans' benefits under the laws of the Commonwealth. It is my considered opinion that veterans and their families should not be penalized for exercising their legal rights when engaged in a lawful strike to better their working conditions."

Early in 1949 my opinion was requested as to the legality of transporting in funerals the bodies of deceased soldiers and veterans in other than closed vehicles under a rule adopted by the Board of Registration in Embalming. In my opinion to that board I stated in part as follows: "The rule in question does not in express terms prohibit the use of the caisson or the use of the jeep for the bearing of soldiers' bodies in military funerals. It would be difficult, if not unsound, to impute to the Legislature the intent, in granting a limited measure of rule-making power to the board, to authorize the board by rule to abolish the time-honored custom of the use of the caisson in military funerals as a means of bearing the bodies of the soldier dead in flag-draped caskets to their final burial places. This use of the caisson has become deeply embedded in our traditions. Similar reasoning applies to the use of the jeep in military funerals for the same time-honored purpose. . . . In the interpretation of the rule consideration must be given to the intention of the lawmakers, including the Legislature and the rule-making body authorized to make rules within limited spheres by the Legislature. . . . My opinion is that the rule here under consideration does not give your board 'the right to prohibit the custom in military funerals of transporting the remains on a caisson or jeep.'"

In October, 1949, I rendered an opinion to the Director of Civil Service as to procedures by his office relative to the legal soundness of a rule, approved by the Governor and Council, providing that veterans were entitled to a two-point preference in competitive examinations for promotion in positions in the classified civil service. Under the provisions of this rule two additional points are added to the general average mark of veterans in such examinations. My opinion was sustained by the Supreme Judicial Court in the case of *McCue* v. *Director of Civil Service*, 325 Mass. 605.

During the year I have also ruled by formal opinion that a "paraplegic veteran" temporarily residing outside the Commonwealth retains his Massachusetts domicile and is still entitled to receive the special annuities granted to this class of veterans; that a woman veteran is entitled to veterans' benefits, although her veteran husband had become ineligible to receive such benefits; that a veteran is entitled to receive veterans' benefits, such funds being applied in part toward the care of a child in a State institution; and that salary ratings and seniority rights of veterans be protected in cases where promotions had been delayed because of service in the military or naval forces.

Charitable Trusts.

As representative of the rights of the public in public charitable trusts, the Attorney General successfuly resisted efforts to have a trust created under the will of the late Frank Wood of Dorchester terminated and its assets distributed. The Supreme Judicial Court on January 3, 1950, sustained the position taken by the Attorney General and, as a result, a trust fund totaling in excess of three million dollars will be devoted to the construction and maintenance of a convalescents' home and a home for incurables.

This litigation, because of the huge sum involved, highlights the activities of the Attorney General's Department with respect to charitable trusts. Much additional work was done by this division of the department, however, which, though it must be classified as routine, is nevertheless highly important in the safeguarding of funds left by public-spirited citizens to be devoted to charitable purposes.

Recommendations.

The care and education of blind and deaf persons at certain schools is provided for under G. L. (Ter. Ed.) c. 69, § 26. It is further provided under that statute that the Department of Education, with the approval of the Governor, may, at the expense of the Commonwealth, make such provision for the care and education of children who are both deaf and blind as it may deem expedient. The provisions of law, however, should be amended and broadened in scope so as to include children who are blind only but who are also suffering from some crippling disability other than deafness.

Perfecting legislation is recommended relative to the commitment of defective delinquents. G. L. (Ter. Ed.) c. 123, §§ 113, 114 and 123, should be amended to expressly require actual notice to the defendant and, in the case of minors, actual notice to the parent or guardian. Notice and hearing are fundamentals of due process.

Conclusion.

In my last annual report I set out in more or less detail the principal duties of the Attorney General. The changing conditions of the times have substantially increased the activities which must necessarily occupy the attention of the Department of the Attorney General and every effort has been made by the Attorney General and his staff to meet constantly arising new problems.

In closing this present report I desire to express my sincere appreciation of the faithful services and commendable co-operation of my staff of Assistant Attorneys General, my confidential secretary, and others of my legal assistants who have performed their public duties ably and well and always with a high sense of justice. The civil service staff in the Department of the Attorney General have without exception performed their duties faithfully, intelligently and efficiently, which has been of great assistance to me in the performance of my duties as Attorney General.

I cannot close this annual report without expressing my deep appreciation for the helpful co-operation and understanding of the Legislature, as well as of His Excellency the Governor, concerning the many needs and intricate problems of the office of the Attorney General.

To serve the people of this Commonwealth as Attorney General is not only a great privilege but a great honor. That privilege and that honor I respect with a deep sense of gratitude and devotion.

Respectfully submitted,

FRANCIS E. KELLY,
Attorney General.

OPINIONS.

Division of Marine Fisheries — Use of Boat.

Aug. 8, 1949.

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

Dear Sir: — In a recent communication you submitted to me the three following questions for my determination:

"1. Under G. L. (Ter. Ed.) c. 21 do the fish inspectors remain in the Division of Marine Fisheries or should they be in the Division of Law Enforcement?

"2. Are the boat captain and his crew members of the Division of Law Enforcement or should they remain in the Division of Marine Fisheries, and finally,

"3. The boat itself, does it belong in the Division of Law Enforcement or in the Division of Marine Fisheries?"

I answer your first question as follows: The fish inspectors are enforcement officers who formerly under G. L. (Ter. Ed.) c. 21, § 8C, as it existed prior to the enactment of St. 1948, c. 651, were in the bureau of law enforcement, within the division of marine fisheries. This bureau was the law enforcement agency of the division of marine fisheries. Under the new chapter 21 of the General Laws, inserted by St. 1948, c. 651, the director of the division of law enforcement, a new officer in the Department of Conservation, is given charge of the division of law enforcement under the control of the commissioner. The fish inspectors, although not specifically mentioned in the new chapter 21, are, nevertheless, under the provisions of section 5 thereof, to continue to serve in the department and perform the same duties as were formerly assigned to them.

I answer your second question as follows: You describe the captain and crew of a boat used in your department as persons who perform police duties and have been made deputy coastal wardens. They are, therefore, persons who under G. L. (Ter. Ed.) c. 21, § 8C, were members of the bureau of law enforcement. They now come under the jurisdiction of the director of law enforcement, subject to the control of the commissioner.

I answer your third question as follows: There is no specific mention of the boat in the new chapter 21. It is, therefore, in the control of the commissioner. When the commissioner assigns the boat for use by law enforcement officers, it shall at such times be in charge of the director of law enforcement. The commissioner may, however, assign the boat to the use of other personnel in the division of marine fisheries at such times as he may deem necessary or expedient.

Very truly yours,

Francis E. Kelly, *Attorney General.*

Public Works — Expenditures — Highway Program — Appropriations.

AUG. 9, 1949.

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

DEAR SIR: — You have requested my opinion as to whether the provisions of G. L. (Ter. Ed.) c. 29, § 9B, are applicable to funds to be expended by the Department of Public Works (hereinafter called the department) in accordance with St. 1949, c. 306.

General Laws (Ter. Ed.) c. 29, § 9B, as inserted by St. 1941, c. 564, is as follows:

"Sums made available on and after December first, nineteen hundred and forty-one, by appropriation or otherwise, to executive and administrative offices, departments and undertakings, including offices under the governor and council, but not including the office of the governor or the office of the lieutenant governor, shall be expended only in such amounts as may be allotted as provided in this section. The governor shall from time to time divide each fiscal year into allotment periods of not less than one month nor more than four months. He shall, after requesting a written recommendation from the commission on administration and finance, allot to each such office, department and undertaking the amount which it may expend for each such period out of the sums made available to it by appropriation or otherwise. The officer in charge of each such office, department or undertaking shall submit in advance to the budget commissioner, in such form and at such times as he shall prescribe, a detailed estimate of anticipated expenditures for each such allotment period."

The apparent object of the foregoing provisions, as pointed out in the annual message of Governor Saltonstall to the General Court, Senate Document No. 1 (1941) p. 29 *et seq.*, upon which the legislation was based, is the control of the ordinary appropriations of the various State departments throughout the fiscal year.

Chapter 306 of the Acts of 1949, however, does not relate to the ordinary, annual expenditures of the public agencies referred to therein. As appears from the emergency preamble, the funds provided are to be expended to implement an *accelerated* highway program, and section 13 of the act establishes a time limit within which all contracts for the projects authorized by the act must be entered into. This time limit expires on June 30, 1951, more than two years from the date of enactment of the statute. In view of this latter provision, it would be necessary to read into G. L. (Ter. Ed.) c. 29, § 9B, authority for the allocation of funds by years, as well as by periods within a fiscal year, in order to make it applicable to expenditures under chapter 306. Such authority is obviously beyond the scope of section 9B, and since the effect of finding such authority would be to slow down the rate of expenditure in the face of the legislative mandate to inaugurate an accelerated rate of expenditure of the funds made available by chapter 306, it could not have been the intention of the Legislature that such funds were to be subject to allotment by periods under section 9B.

Moreover, it is questionable whether the provisions of section 9B, for

setting up allotment periods and the allotment of funds were ever intended by the Legislature to apply to appropriations made by it for particular construction projects, which by statute as well as by practical necessity must be contracted for on the basis of a total bid price and not on the basis of how much work can be constructed in an allotment period. Here, again, the purpose of section 9B, of slowing down the rate of expenditure is not in accord with the object of public works construction, the interest of the public being better served by the speedy completion of the projects.

In addition to the foregoing considerations, it is clear from the pattern of the act itself that the intention of the Legislature in enacting chapter 306 was to establish a special, self-contained procedure for safeguarding and regulating the extraordinary expenditure of funds therein provided. Thus, section 1 specifies in elaborate detail the types of projects to be undertaken. Section 2 provides, with an exception not here material, that the department shall have "*full authority* to select the projects to be undertaken" (emphasis supplied). Section 3 authorizes and directs the department to make a survey and to report its conclusions to the clerk of the House of Representatives not later than June 1, 1949, on the feasibility and practicability of a proposed expressway and connections. Section 4 authorizes and directs the Metropolitan District Commission (hereinafter called the commission) to expend a sum, not to exceed $8,000,000, for projects to be constructed in the area set forth in the "Master Highway Plan for the Boston Metropolitan Area," established and defined in Exhibit B of House Document No. 1767 (1948). Section 5 authorizes and directs the department to expend a sum, not to exceed $37,000,000, for projects to be constructed in the area set forth in the "Master Highway Plan for the Boston Metropolitan Area." Section 6 authorizes and directs the department to expend a sum, not to exceed $53,000,000, for projects to be constructed in the area set forth in "The Report on Massachusetts State Highway Needs, exclusive of Metropolitan Boston," established and defined in Exhibit A of House Document No. 1767 (1948) and for traffic studies in urban areas and for studies to determine the desirability and feasibility of revenue producing facilities. Not less than $5,000,000 of this sum is to be expended in each of the following four districts: in the area west of the Connecticut River; in the area lying between the Connecticut River and the easterly boundary line of Worcester County; in Essex, Middlesex and Norfolk Counties, including Route 128 therein; and in Bristol, Plymouth, Barnstable, Dukes and Nantucket Counties. Section 7 authorizes and directs the department to expend $2,000,000 for traffic safety devices on specified highways. Section 10 provides that to meet the expenditures necessary in carrying out the foregoing provisions the State Treasurer shall, upon request of the Governor and Council, issue bonds of the Commonwealth to an amount to be specified by the Governor and Council from time to time but not exceeding in the aggregate $100,000,000. Section 11 enumerates the elements to be included in the cost of the work authorized and provides that the department and the commission may engage additional engineering and other personnel, but may not increase the number of permanent positions in their engineering forces. Section 12 requires the department and the commission to file detailed progress reports with the Governor and the clerk of the House of Representatives on December 31, 1949, June 30, 1950, and December 31, 1950, and a final report on or before July 31, 1951, relative to all projects under-

taken. Section 13 specifies that all contracts for projects authorized by the act shall be entered into not later than June 30, 1951.

Thus, it appears that the Legislature has itself, by clear and unambiguous language, made allotment of the funds provided by St. 1949, c. 306. Such allotments have been spelled out in elaborate detail as to the territory in which funds are to be expended (see sections 4, 5 and 6); as to type of project to be undertaken (see sections 1, 3, 5 and 7); and as to time in which funds are to be expended (see section 13). In addition, the Legislature has, in section 12, laid down explicit requirements for detailed progress reports to be made at specified intervals and a final report. These reports are to be submitted to the Governor and the clerk of the House of Representatives. Such provisions are inconsistent with the provisions of G. L. (Ter. Ed.) c. 29, § 9B.

It is a well established principle of statutory construction, however, that where a special statute is inconsistent with the provisions of a general law, the former is controlling. *Clancy* v. *Wallace*, 288 Mass. 557, 564. *McKenna* v. *White*, 287 Mass. 495, 499. See *Copeland* v. *Springfield*, 166 Mass. 498, 504 and cases cited.

As has been manifested herein, the application of G. L. (Ter. Ed.) c. 29, § 9B, to the expenditure of funds under St. 1949, c. 306, would be inconsistent not only with the legislative intention expressed in the preamble and section 13 of the act, but with the operation of the legislative plan contained therein. I am, therefore, of opinion that the provisions of section 9B, are not applicable to the expenditure of funds authorized by chapter 306.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Employment Security Counsel, paid out of Federal Grants of Funds, reinstated after Retirement.

AUG. 17, 1949.

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

DEAR SIR: — In your capacity as chairman ex officio of the State Board of Retirement and in your capacity as Treasurer and Receiver General of the Commonwealth you request my opinion relative to the matter of the designation and appointment of a certain employee in the service of the Division of Employment Security.

On June 24, 1949, under the provisions of G. L. (Ter. Ed.) c. 151A, § 42A, as Attorney General I designated the employee in question as employment security counsel.

This employee is a war veteran. He was retired for superannuation on July 1, 1948, upon his own motion and request. The situation at that time was this: He had two choices of selection as to the method of retirement from the public service, (1) superannuation; and (2) disability. He elected to retire for superannuation. Having in mind the length of his service in the division, if he had postponed his retirement for approximately six months more he could have retired for disability. At the time of his retirement from the Division of Employment Security he had been employed therein for a period of over nine years.

This employee is a member of the Massachusetts bar and has been so for a number of years. During his period of service in the Division of Employment Security he held a position as employment security counsel, which required professional skill and a knowledge of the many legal aspects of the work of the division. It was my opinion at the time I designated him as employment security counsel that the division would be benefited by his return to his former work, to which he would naturally bring the advantages of his accumulated experience and knowledge acquired during his long years of previous service.

He successfully passed the necessary civil service examination for employment security counsel and was certified for appointment by the director of civil service on July 8, 1949. He had a lawful right to take this civil service examination and the director of civil service had a lawful right to certify him for appointment in the capacity above stated to the Division of Employment Security. As heretofore stated, on June 24, 1949, I designated him, as I had a lawful right to do, to the position concerned in the division. The director of the division appointed him, as he had a lawful right to do under all the circumstances.

The employee in question is about fifty-eight years of age. The compulsory retirement age in Massachusetts is seventy years in the class of employment to which he has been appointed and designated.

There are found no express provisions in G. L. (Ter. Ed.) c. 32, or elsewhere, prohibiting the re-employment of one of the age of this employee under the circumstances disclosed in this opinion, who has been retired for superannuation. And this is especially true where the head of the department seeks to re-employ him, and the Attorney General seeks to designate him, because of his experience, specialized learning and special skills in the line of work of the division in which it has been the purpose to employ him.

It is to be noted that while the division is a State agency created by the Legislature as an administrative division in the Department of Labor and Industries, the division is exclusively under the official direction and control of its director. G. L. (Ter. Ed.) c. 23, § 91 (*a*). The division is placed in the Department of Labor and Industries solely to meet the requirements of the Constitution and for no other purpose. Mass. Const. Amend. LXVI.

The division is operated exclusively on Federal grants of funds. The salary of the director of the division and the salaries of all the employees of the division are paid out of Federal grants of money.

As Treasurer and Receiver General of the Commonwealth you have a measure of implied powers as well as powers expressly conferred upon you by statute. Likewise, as chairman of the State Retirement Board, *virtute officii*, you have a measure of implied powers as well as powers expressly conferred upon you by statute, which also applies, in so far as it is applicable, to the other members of your board. If this were not so, in administrative work by public officers it would often be difficult indeed to function as public officers in carrying out public purposes in accordance with the legislative intention. In statutory interpretation it is always important to consider the principal objective sought to be accomplished by the Legislature, and this is especially true where the Legislature has passed into law a long and complex statute. It is a cardinal rule of statutory construction that rights of citizens are not to be taken away by merely reading implications into any of the provisions of a statute. To take away such rights clear and explicit language in the statute is neces-

sary. It is further to be noted that statutes are to be construed always in the light of sound reason and common sense.

On all of the foregoing it is my opinion that the State Retirement Board has full authority to reinstate the designated appointee herein concerned in the public service upon such terms and conditions as the State Retirement Board may lawfully impose. It is furthermore my opinion that you have, as State Treasurer and Receiver General, full authority to carry out all necessary purposes within your province to perfect that reinstatement, following the action of the said board.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Education — Eligibility of Teacher for Sabbatical Leave.

SEPT. 8, 1949.

HON. JOHN J. DESMOND, Jr., *Commissioner of Education.*

DEAR SIR: — You have requested my opinion as to whether or not a certain teacher, an assistant professor in the State Teachers College at Bridgewater, is eligible for leave of absence for study and research under G. L. (Ter. Ed.) c. 73, § 4A, for a period of one year at half pay or for a period of a half year at full pay. You inform me that the teacher in question entered the State Teachers College at Bridgewater as a training school teacher in September, 1934, with compensation divided between the Commonwealth and the town of Bridgewater; that in 1943 the teacher in question became a principal of the training school at Bridgewater and her title became that of senior instructor, that this teacher has been continuously in service since her first employment in 1934; and that in September, 1946, the Commonwealth took over the complete operation, maintenance and expense of the training school at Bridgewater, including the payment of the full amount of salaries.

In my opinion, the teacher in question, who seeks a sabbatical leave of absence for study and research, may be granted such leave under the terms and conditions set forth in G. L. (Ter. Ed.) c. 73, § 4A, including that of entering into the written agreement provided for in that statute of making a refund to the Commonwealth if she does not return to the service.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Authority of Board of Registration in Optometry to make Rules and Regulations — Legality thereof.

SEPT. 8, 1949.

Mr. WILLIAM H. J. ROWAN, *Director of Registration.*

DEAR SIR: — I have your letter of August 25, 1949, in which you inquire as to the legality of a proposed rule which the Board of Registration in Optometry wishes to adopt. The proposed rule reads as follows:

"The Board shall issue a certified statement of registration for use and display in an approved branch office of an optometrist, said statement to

be in such form as may be prescribed by the Board. Said statement shall contain information additional to the regular certified statement of registration and the fee therefor shall be two dollars."

Each optometrist at the present time is required to display his certificate of registration in a conspicuous place in the principal office wherein he practices optometry. G. L. (Ter. Ed.) c. 112, § 70, as amended.

The Board of Registration in Optometry is empowered to make rules and regulations governing the practice of optometry. G. L. (Ter. Ed.) c. 112, § 67.

The present rules adopted by the board permit the establishment of an office other than a principal office upon approval by the board. See rules and regulations governing the practice of optometry, rule 2.

It is provided by G. L. (Ter. Ed.) c. 112, § 88, as amended, as follows:

"Except as otherwise provided in section thirty-three of chapter ninety, every board of registration or examination established by the commonwealth shall —

"(1) Establish rules and regulations stipulating what information is to be furnished in a certified statement of registration for the fee of one dollar, and stipulating that, in case any additional information is furnished, the fee shall be two dollars.

"(2) Furnish to any applicant the certified statement of registration applied for, provided that the application therefor is accompanied by the fee prescribed by its rules and regulations established as provided above.

"(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, except that the fee for duplicates of certificates of registration issued under sections eighty-seven T to eighty-seven JJ, inclusive, shall be one dollar."

Under G. L. (Ter. Ed.) c. 112, § 88, as amended, there may be issued a certified statement of registration, the fee for which is one dollar. For additional information furnished the fee shall be two dollars. The present established form of certified statement of registration, fee for which is one dollar, does not meet requirements for use in a branch office. It would appear, therefore, to be clear that, —

(1) An optometrist must display his certificate of registration in his principal office.

(2) The board may authorize the establishment of a branch office.

(3) The law already provides for the issuance of a certified statement of registration.

(4) The board has authority to make rules and regulations governing the practice of optometry consistent with law.

As I interpret your request, the certified statement of registration referred to in the rule which it is proposed to adopt will be used only in a branch office approved by the board and will contain additional information at least to this extent: "This certified statement of registration is for use and display in the branch office of the optometrist."

In my opinion, the proposed charge of two dollars for a certified statement with this additional information is proper and is in compliance with the law.

It is also my opinion that the proposed rule is a reasonable exercise of the rule-making power of the board.

It would be necessary, of course, that there be compliance by the board with G. L. (Ter. Ed.) c. 30, § 37, as amended, requiring the filing of attested copies of rules and regulations, together with a citation of law under which they are issued, with the Secretary of the Commonwealth.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Agriculture — Furnishing of Surety Bonds by Licensed Poultry Dealers.

SEPT. 13, 1949.

HON. JOHN CHANDLER, *Commissioner of Agriculture.*

DEAR SIR: — You have asked my opinion as to whether or not certain licensed dealers regularly engaged throughout the Commonwealth in the business of buying and selling poultry for food purposes are required to furnish a bond, under the provisions of St. 1949, c. 446, for the balance of the year ending December 31, 1949. On the information you furnish me it appears that there are in excess of five hundred such poultry dealers who are now licensed; and that it will occasion great hardship and more or less confusion, with some disruption in the trade, if these dealers are required to furnish a bond for the short period between the effective date of the statute and the end of the year, and that it will also create administrative difficulties in your department.

The new statute, St. 1949, c. 446, requires that poultry dealers of the class referred to in your request for my opinion shall file a surety bond with the Commissioner of Agriculture and such information as may be required by the commissioner, as provided by the statute, on forms to be furnished by the commissioner. The surety bond is to be conditioned as provided by the express terms of the statute.

All licenses issued to these poultry dealers expire coterminously with the calendar year.

Having in mind all of the foregoing it is my opinion that St. 1949, c. 446, was intended by the Legislature to operate prospectively and not retrospectively. The statute was approved by the Governor on June 16, 1949, and becomes effective ninety days thereafter. It is my opinion that any new licenses issued on and after the effective date of the statute would require the filing of a bond as contemplated by the statute, and that all dealers whose existing licenses do not expire until the end of the calendar year would not be required to file a bond until the renewal of their licenses at the commencement of the forthcoming calendar year. In the case of the revocation or surrender of a license, however, and the issuance of a new license before the end of the present calendar year, a bond would have to be filed under the terms of the statute.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Oath Requirement upon entering Service of Commonwealth and Barring Certain Persons Therefrom.

SEPT. 29, 1949.

Hon. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion relative to certain features of the oath or affirmation required by St. 1949, c. 619, a legislative act entitled "An Act barring certain people from the public service."

This statute is in amendment of G. L. (Ter. Ed.) c. 264, which chapter is entitled "Crimes against Governments," and adds three new sections thereto. It was approved by the Governor on July 30, 1949, and becomes effective as the law of the Commonwealth ninety days thereafter. It is a penal statute and must therefore receive a strict construction. Mass. Const., pt. 1st, art. XXIV. *Commonwealth* v. *Worcester and Nashua Railroad Co.* 124 Mass. 561, 563. *Cleaveland* v. *Norton*, 6 Cush. 380, 383. *Monson* v. *Chester*, 22 Pick. 385, 387. "In putting a construction upon any statute, every part shall be regarded, and it shall be expounded, if practicable, as to give effect to every part of it." *Commonwealth* v. *Alger*, 7 Cush. 53, 89. Furthermore, being a penal statute it must not be construed as operating retrospectively; nor must the statute for any other reason be so construed as to defeat the clear legislative intent.

It is my opinion that no person who by reason of his or her own voluntary acts and conduct, explicitly or implicitly, by clear and reasonable inference, comes within the prohibitions of the foregoing statute "shall be employed in any capacity by the commonwealth or any political subdivision thereof." The prohibitions of the statute have reference to, and embrace within their sphere, employment in the service of the Commonwealth and in the service of every political subdivision thereof, including counties, cities, towns and districts.

It is my opinion that every person upon entering the employment of the Commonwealth or of any political sub-division thereof, including counties, cities, towns and districts, is required under the express terms of the statute, before entering upon the discharge of his or her duties, to take the prescribed oath or affirmation in the form set out in the statute and subscribe his or her name to it on a blank form prepared for the purpose, under the penalties of perjury. Under the terms of St. 1949, c. 619, it will not be necessary for anyone to take the oath or affirmation before a justice of the peace or other officer qualified to administer oaths. See G. L. (Ter. Ed.) c. 268, § 1A, as amended, and G. L. (Ter. Ed.) c. 4, § 6, cl. 6. The oath provided for in the statute is as follows:

"I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

Having in mind the express terms of the statute, it is clear that those now in the employ of the Commonwealth, or of any political subdivision thereof, in any capacity, are not required to take the prescribed oath or affirmation when the statute becomes effective, as a condition precedent to remaining

in the public service. But it is to be observed that any person employed as above stated in this paragraph, after the effective date of the statute, who has then by reason of his or her own acts and conduct, or who thereafter by reason of his or her own acts or conduct, brings himself or herself within the prohibitions of the statute, would be subject to removal from the public service.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Boston Police Department — Increase in Annuities to Dependents of Deceased Policemen.

OCT. 5, 1949.

Hon. THOMAS F. SULLIVAN, *Police Commissioner of the City of Boston.*

DEAR SIR: — I have your recent request for my opinion interpreting section 1 of St. 1949, c. 681.

The act in question is as follows:

"The Boston retirement board or other appropriate retiring authority, as the case may be, may increase by twenty per centum, effective March first, nineteen hundred and forty-nine, the present annual pension or retirement allowance of all former employees and of all beneficiaries of deceased employees of the city of Boston and of the county of Suffolk, who were retired prior to October first, nineteen hundred and forty-six; provided, that such increases shall apply only to those who are now receiving less than fifteen hundred dollars per year; and provided, further, that no pension or retirement allowance shall be increased hereunder by an amount which will make the same exceed fifteen hundred dollars per year."

You state that the pension rolls of the Boston police department contain the names of forty-one annuitants who are receiving annuities which were granted under the provisions of G. L. (Ter. Ed.) c. 32, § 89, as amended, where the deceased police officers were not retired but died in the service of the police department from injuries received in the actual performance of police duty.

Your question is: Are these beneficiaries entitled to the increase provided by St. 1949, c. 681 § 1? I answer your question in the affirmative.

There is a long-established rule that statutes shall be construed according to the manifest intent of the Legislature, though apt words to express that intent may not be used, or though such construction may not accord with the letter of the statute. See *Commonwealth* v. *Dracut*, 8 Gray 455, 457.

"We must look beyond the letter of a statute where a literal construction would be inconsistent with the legislative intent." *Price* v. *Railway Express Agency*, 322 Mass. 476, 484.

"A statute as a whole ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason." *Morrison* v. *Selectmen of Weymouth*, 279 Mass. 486, 492. See also *Knapp* v. *Amero*, 298 Mass. 517, 522.

A statute should be interpreted in the light of the "pre-existing state of the . . . law . . . and the main object to be accomplished." *Kneeland* v. *Emerton*, 280 Mass. 371, 376.

In the case of *Acford* v. *Cambridge*, 300 Mass. 391, 394, the court said that the history of G. L. (Ter. Ed.) c. 32, § 80 (relating to retirement of firemen disabled from service), showed an increasing recognition of the duty of society to those who serve it in hazardous public occupations. It would seem to follow that section 85 of chapter 32, relating to the retirement of policemen for the same causes, must be construed as evincing the same recognition. The same case went on to say, at page 394, that the evolution of G. L. (Ter. Ed.) c. 32, § 89, as amended (relating to annuities to dependents of policemen or firemen dying from injuries due to their employment) evidences "an increasing recognition of the obligation of the public toward those who enter its service in occupations involving risk of injury and death."

If in section 1 of St. 1949, c. 681, there had been added after the word "retired" the words "or died," so as to read "all beneficiaries of deceased employees of the city of Boston and of the county of Suffolk, who were retired or died prior to October first, nineteen hundred and forty-six," the beneficiaries on your pension rolls would clearly be included. To interpret this statute as benefiting only the beneficiaries of deceased employees who were retired before death, and not those who died instantly from their injuries, would be defeating the clear purpose of the statute.

The Legislature intended to increase the allowances given to the living employees who were retired, and to the beneficiaries of those employees who died in line of duty, whether they died immediately after the injuries or were retired before the injuries resulted in death. See *Acford* v. *Cambridge*, 300 Mass. 391, 395.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Assistants in Medicine — Limited Registration — Practicing Medicine in Homes under G. L. (Ter. Ed.) c. 112, § 9A.

OCT. 5, 1949.

MR. WILLIAM H. J. ROWAN, *Director of Registration.*

DEAR SIR: — Through you the Board of Registration in Medicine has requested my opinion on the following question:

"Does the assignment of assistants in medicine, holding limited registration in the Commonwealth of Massachusetts, to the care and observation of persons requiring medical service by an instructor in a legally chartered medical school as specified in G. L. (Ter. Ed.) c. 112, § 9A, apply to medical service in the home separate and apart from medical service at a hospital?"

My answer is in the affirmative. G. L. (Ter. Ed.) c. 112, § 9A, provides:

"An applicant for limited registration under this section as an assistant in medicine, who . . . is enrolled in and has creditably completed not less than two years of study in a legally chartered medical school . . .

and . . . has been assigned to the care and observation of persons requiring medical service by an instructor in said medical school, which instructor shall be a registered physician, may . . . be registered by the board as an assistant in medicine. . . . Such registered assistant in medicine may practice medicine as authorized by this section, but only under the supervision of such instructor; he may, however, be assigned by such instructor to a hospital . . . and may practice medicine as aforesaid in said hospital, but only under the supervision of a registered . . . staff physician in said hospital. . . ."

This statute must be interpreted according to the legislative intent appearing from the language thereof in connection with the subject matter and the object to be accomplished. *National Fire Insurance Co.* v. *Goggin*, 267 Mass. 430, 436. *Meunier's Case*, 319 Mass. 421.

For some time prior to 1922 some medical schools in this Commonwealth as part of their teaching program had sent students out to attend the sick, but under medical supervision. Then in 1922 the above statute was passed to give legal sanction to this growing and desirable practice. The statute expressly provides that assistants in medicine may practice medicine under the supervision of an instructor who is a registered physician and who has assigned these assistants to the care and observation of persons requiring medical service. This language is clearly broad enough to include sick persons in their own homes. The instructor may also assign the assistants to certain hospitals, where they may practice medicine under the supervision of a staff physician at the hospital. When the medical assistant practices medicine in homes he is under the supervision of the medical school instructor, and when he practices in the hospital he is under the supervision of the staff physician.

The statute thus provides for two independent types of activity by such assistants in medicine.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Veterans' Benefits — Eligibility to when Veteran engaged in Lawful Strike.

OCT. 8, 1949.

HON. HENRY V. O'DAY, *Commissioner of Veterans' Services.*

DEAR SIR: — You have asked my opinion as to whether or not a veteran who is participating in a strike growing out of a labor dispute, and consequently is unemployed, is entitled to veterans' benefits under G. L. (Ter. Ed.) c. 115.

You have also stated in your request that my predecessor in office rendered you a written opinion stating "that to strike and to remain on strike without seeking employment with a new employer 'is to engage in voluntary idleness'" within the meaning of the third paragraph of section 5 of G. L. (Ter. Ed.) c. 115, to which you expressly call my attention and which reads as follows:

"No veterans' benefits shall be paid to or for any applicant if the necessity therefor is caused by his voluntary idleness or continuous vicious or intemperate habits. . . ."

I do not concur in the opinion of the former Attorney General that to strike and to remain on strike without seeking employment with a new employer is to engage in "voluntary idleness" within the meaning of the provisions of chapter 115 of the General Laws; and that consequently under the terms of the statute veterans' benefits may not be paid to veterans so on strike.

What constitutes a veteran and what constitutes the dependents of a veteran with reference to veterans' benefits and what constitutes veterans' benefits are defined in G. L. (Ter. Ed.) c. 115, § 1.

Payments of veterans' benefits to veterans and their dependents, under appropriate circumstances, are provided for in explicit language in G. L. (Ter. Ed.) c. 115, § 5. The particular language in that chapter to which you call my attention is to be read not only in conjunction with the entire context of the section from which the language quoted above has been extracted but also in conjunction with the context of the entire chapter in so far as the chapter relates to veterans' benefits. All this is necessary in order to arrive at a fair, reasonable and rational conclusion in determining the legislative intention.

Employees have a legal right to participate in a lawful strike growing out of a labor dispute and have a right, within lawful bounds, to participate, if necessary, on the picket lines in the exercise of the right of peaceful persuasion. G. L. (Ter. Ed.) c. 149, § 24. When an employee who is a veteran, within the meaning of the statutory provisions, is called out on strike by his union, he is not required to turn his back on his fellow striking employees and abandon his legal right to strike or abandon the legal duties delegated to him by his union of "peaceful persuasion" on the picket line in order to preserve his rights to veterans' benefits if he and his dependents by virtue of their circumstances are otherwise lawfully entitled to veterans' benefits under the laws of the Commonwealth.

It is my considered opinion that veterans and their families should not be penalized for exercising their legal rights when engaged in a lawful strike to better their working conditions.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Public Works — Deduction of Value of Unconsumed Small Tools and Certain Materials under "Cost Plus" Contracts.

OCT. 11, 1949.

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

DEAR SIR: — In a recent communication you have requested my opinion as to whether the procedure adopted by the department for the treatment by it of small tools and materials not consumed in the performance of the work under "cost plus" contracts entered into by the department under authority of St. 1949, c. 3, is correct.

The procedure followed is to take an adjusted credit for such small tools and materials which remain of value at the termination of the work, retained by the contractor, in an amount based on a valuation by the district engineer.

Your request further refers to schedule 673, voucher #3164, and the item of credit for small tools attached thereto and you request my opinion as to whether the voucher with the credit attached should be paid.

I answer both your questions in the affirmative.

The contracts you refer to were entered into under authority of section 4 of St. 1949, c. 3, which states that the department may "make cost plus contracts without complying with the provisions of section eight A of chapter twenty-nine of the General Laws, and *any provision of general or special law to the contrary notwithstanding . . .*" (emphasis supplied).

The only restriction upon the making of such "cost plus" contracts was a limitation upon the total amount of the appropriation to be so expended. The obvious purpose of granting the department such authority was to enable it to repair the damage done by, and to protect against, floods in western Massachusetts in accordance with the legislative purpose expressed in the emergency preamble of the act that it is "necessary that the work authorized by this act be carried out without delay."

The statute in authorizing the making of "cost plus" contracts without further description of that term must be taken to authorize the making of such contracts as are customary in the ordinary course of the business of the construction, reconstruction and repair of projects of the class referred to in the statute.

You state that it is the well-established custom in "cost plus" contracts to consider the salvage value of small tools and materials on completion of the contract as a deduction from the cost, and you further state that at all times it was understood with the contractor that such would be the procedure to be followed in the contract entered into under St. 1949, c. 3, § 4.

It is indicated by the brevity of the provisions contained in the "cost plus" contract, executed under authority of the statute, governing the method of, and items to be considered in, determining the contractor's compensation, that it was intended that items were to be determined according to methods in common use in business and within the understanding of the parties. It is evident that this situation was occasioned by the desire for compliance with the legislative mandate of necessary haste in the performance of the work.

The statement in your request that it is the custom in "cost plus" contracts to deduct from the cost the value of small tools and materials not consumed in the work, is confirmed by an examination of the "Standard Form of Cost Plus Agreement between Contractor and Owner," Fourth Edition 1920–1925, issued by the American Institute of Architects, Washington, D. C., and of other material of the Institute. See 2 Nichols, "Encyclopedia of Legal Forms Annotated," (1936) 287, *et seq.* Because it was the understanding of the parties to the contract that such trade customs and uses should be applicable, it follows that it is one of the terms of the contract that the value, as determined by the division engineer, of small tools and materials not consumed in the performance of the work which are retained by the contractor, shall be credited against the cost of the work.

Since the making of "cost plus" contracts authorized by St. 1949, c. 3, § 4, includes authority to make them according to trade custom and since the statute expressly provides that the department is authorized to make such "cost plus" contracts, "*any provision of general or special law to the contrary notwithstanding,*" it follows that the provisions of G. L.

(Ter. Ed.) c. 7, § 22, even if they could be considered to be applicable to the disposition of small tools, etc. — which is open to question — are entirely inapplicable in the circumstances here stated.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Boxing — Age of Contestants.

OCT. 19, 1949.

Hon. JOHN F. STOKES, *Chairman, Ex-Officio, State Boxing Commission.*

DEAR SIR: — You have requested an opinion concerning the authority of the State Boxing Commission to issue a license under G. L. (Ter. Ed.) c. 147, § 35, as amended, to Joseph Louis Barrow, otherwise known and hereinafter referred to as Joe Louis, for the purpose of engaging in a boxing or sparring match or exhibition.

It appears from information submitted that Joe Louis was born May 13, 1914, and hence that he is beyond his thirty-fifth birthday.

As originally enacted (see St. 1920, c. 619, § 10), G. L. (Ter. Ed.) c. 147, § 39, provided:

"No contestant under eighteen years of age shall be permitted to engage in any boxing or sparring match or exhibition . . ."

By St. 1948, c. 371, the words "or over thirty-five" were inserted so as to read:

"No contestant under eighteen or over thirty-five shall be permitted to engage in any boxing or sparring match or exhibition, except that an amateur boxer shall be allowed to compete as such at the age of seventeen. No person under sixteen shall be admitted to or be present at any boxing or sparring match or exhibition."

The interpretation to be placed upon the phrase "or over thirty-five" is one of first impression in this Commonwealth. The principle to be followed in determining the intent of the Legislature when it employed those words, however, is not new. It is a well established rule of statutory construction that words in a statute must be given their plain and ordinary meaning. *Madden's Case*, 222 Mass. 487; *Dascalakis* v. *Commonwealth*, 244 Mass. 568, 570; *Sayles* v. *Commissioner of Corporations and Taxation*, 286 Mass. 102; *Gallagher* v. *Wheeler*, 292 Mass. 547; *Commissioner of Corporations and Taxation* v. *Chilton Club*, 318 Mass. 285; *Johnson's Case*, 318 Mass. 741; *Commonwealth* v. *Slome*, 321 Mass. 713.

But in *Watson* v. *Loyal Union Life Association*, 143 Okla. 4, at page 5, the court stated:

"A person is ordinarily not considered over 55 years of age until he arrives at the age of 56. It may safely be said that it is universally so understood, and it occurs to us that this must have been the sense in which the language was used by the Legislature."

In view of the foregoing, it is my opinion that a contestant is not to be deemed "over thirty-five" within the meaning of G. L. (Ter. Ed.) c. 147,

§ 39, as amended, until he arrives at the age of thirty-six. This conclusion is in accord with the interpretation placed upon similar phrases in other jurisdictions. *New York Life Ins. Co.* v. *Federal National Bank of Shawnee*, 143 F. (2) 69, (CCA, 10); *Allen* v. *Baird*, 208 Ark. 975; *James* v. *Colonial Mutual Life Association*, 7 Cal. App. (2) 748; *Wilson* v. *Mid-Continental Life Insurance Company of Oklahoma City*, 159 Okla. 191.

The interpretation here placed upon G. L. (Ter. Ed.) c. 147, § 39, as amended, is not intended to be applicable to other statutes which may be affected by different rules of statutory construction.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Referendum Petition — Constitution — Excluded Matters — Old Age Assistance — "Leisure Time Activities."

OCT. 26, 1949.

Hon. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR: — You have presented to me a referendum petition, filed at your office by its original signers, seeking the repeal of section 2 of St. 1949, c. 796, and you request my opinion as to whether or not the subject matter of said petition is a proper matter for inclusion on the ballot at the State election in 1950.

Chapter 796 of the Acts of 1949 amends section 1 of G. L. (Ter. Ed.) c. 118A. Chapter 118A is entitled "Adequate assistance to certain aged citizens." Chapter 796 provides in section 1 that "each local board of public welfare shall include in the budget of each recipient an item, to be known as 'Leisure Time Activities,' under which there shall be paid to each recipient" the sum of four dollars monthly in addition to other payments authorized by chapter 118A, section 1. The 1949 act in its section 1 further provides that cities and towns making payments of four dollars per month to recipients under its terms "shall be reimbursed by the commonwealth to the full amount thereof, notwithstanding any other provision of law."

Chapter 796 in section 2, the section which is sought to be repealed by the proposed referendum, provides as follows:

"The provisions of chapter sixty-four C of the General Laws, imposing an excise on cigarettes shall, so far as apt, apply to cigars, and to tobacco sold otherwise than in the form of cigarettes or cigars, except that the excise on cigars and such tobacco shall equal ten per cent of the retail price thereof. All revenue received under this section shall be credited to the old age assistance fund."

It is my opinion that the proposed petition does not ask for a referendum to the people upon a law enacted by the General Court which is not expressly excluded under Mass. Const. Amend. XLVIII, The Referendum, Pt. III, § 2. The subject matter of the said referendum petition, therefore, is not proper for inclusion on the ballot at the State election in 1950.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Special Justices — Number allowed Central District Court of Worcester.

Oct. 26, 1949.

His Excellency Paul A. Dever, *Governor of the Commonwealth.*

Sir: — You have requested my opinion on the question of the determination of "the number of special justices to which the central district court of Worcester may be entitled, if any."

In my opinion, by virtue of St. 1947, c. 588, § 2, provision is made for abolishing both the special justiceships in the central district court of Worcester, the then existence of which is recognized by section 1 thereof, upon the occurrence of vacancies therein after the effective date of St. 1947, c. 588. It is also my opinion that the enactment of St. 1949, c. 731, does not affect the operation of section 2 of St. 1947, c. 588.

St. 1941, c. 611, amending G. L. (Ter. Ed.) c. 218, § 6, provided that each district court, except the municipal court of the city of Boston, should consist of one justice and one special justice. Section 2 of the act provided, however, that the enactment thereof should not affect the tenure of office of any special justice in office upon its passage, and provided that no vacancy in said office in any district subject to the act should be filled at any time when there was one special justice of such court in office.

St. 1947, c. 588, amended G. L. (Ter. Ed.) c. 218, § 6, to provide that the central district court of Worcester should be excepted from the provision as to district courts generally and that it should consist of two justices and two special justices. Section 2 of said statute provided, however, that notwithstanding the provisions of section 1, no vacancy in the office of special justice in the central district court of Worcester occurring after the effective date of the act should be filled.

The effect the Legislature intended these statutes to have is clear from an examination and consideration of them in their entirety. St. 1941, c. 611, was intended to have and had the effect of abolishing all special justiceships in district courts in excess of one for each court, the excess offices to be abolished in the order of vacancies occurring therein. St. 1947, c. 588, was intended to have and had the effect of providing for an additional permanent justice in the central district court of Worcester and of abolishing both the then existing special justiceships therein as vacancies should occur.

The first statute contains a section purporting to abolish certain special justiceships, which is followed by a section providing for a limited continuance of existence of all the special justiceships then filled and a plan for their future abolishment when vacancies occur. In the second statute the reverse of that procedure is followed: section 1 recognizes the then existence of two special justiceships in the central district court of Worcester, and section 2, by forbidding future appointments to such offices as vacancies occur, provides for their eventual abolishment.

St. 1949, c. 731, to which your letter refers, is "An Act establishing the number of justices and special justices of the district court of Springfield." It contains no indication of any legislative intention to effect a change in the situation regarding special justices in the central district court of Worcester by impliedly repealing section 2 of St. 1947, c. 588. Repeals by implication are not favored in the law and a statute is not construed to repeal a prior statute unless the intent to do so is clear. *Inspector of Build-*

ings of Falmouth v. *General Outdoor Advertising Co.*, 264 Mass. 85. It is a well-established rule of statutory construction that "a statute is not to be deemed to repeal or supersede a prior statute in whole or in part in the absence of express words to that effect or of clear implication." *Hinckley* v. *Retirement Board of Gloucester*, 316 Mass. 496, at page 500. It was stated in *Walsh* v. *Commissioners of Civil Service*, 300 Mass. 244, at page 246:

"A statute is to be interpreted with reference to the pre-existing law. *Brown* v. *Robinson*, 275 Mass. 55, 57. *Lowell Co-operative Bank* v. *Dafis*, 276 Mass. 3, 7. If reasonably practicable, it is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law. *Morse* v. *Boston*, 253 Mass. 247, 252. *Kelley* v. *Jordan Marsh Co.*, 278 Mass. 101, 111. Statutes 'alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both, unless there be some positive repugnancy between them.' *Brooks* v. *Fitchburg & Leominster Street Railway*, 200 Mass. 8, 17."

It is apparent that the provisions of section 2 of St. 1947, c. 588, which are not expressly repealed by St. 1949, c. 731, and which so far as would appear from that latter statute the Legislature had no intention to repeal thereby, are no more inconsistent with the re-enactment of G. L. (Ter. Ed.) c. 218, § 6, by said St. 1949, c. 731, than they were inconsistent with the provisions of said section 6, as it was re-enacted by section 1 of St. 1947, c. 588; and the provisions of section 2 of St. 1947, c. 588, can stand with section 6 as re-enacted as well now after the enactment of St. 1949, c. 731, as they could after the enactment of St. 1947, c. 588.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Civil Service Rules — Veterans' Preference in Competitive Promotional Examinations.

OCT. 27, 1949.

MR. THOMAS J. GREEHAN, *Director of Civil Service.*

DEAR SIR: — You have requested my opinion relative to a civil service rule recently adopted by the Civil Service Commission granting a two-point preference to veterans in competitive promotional examinations in the classified official service. The rule in question, after publication and hearings, was approved by the Governor and Council as required by law on August 30, 1949. The rule is an addition to existing Rule 21 of the Civil Service Commission. Rule 21, to which the new provisions are added, reads as follows:

"1. Promotions in the Classified Official Service shall be on the basis of merit ascertained by examination and seniority of service."

The addition to Rule 21 reads as follows:

"2. In competitive examinations for promotion to any position in the Classified Official Service the Director shall add two points to the general average mark obtained by any veteran, as defined in General Laws, Chapter 31, Section 21, providing such veteran has first obtained a passing mark in said examination."

General Laws (Ter. Ed.) c. 31, § 3, as amended, authorizes the Civil Service Commission to make rules of general or limited application, consistent with law. Paragraph (*g*) of section 3 authorizes the commission to make rules governing "preference to veterans in appointment and promotions."

The rule in question, granting a two-point preference, relates only to veterans who come within G. L. (Ter. Ed.) c. 31, § 21, as most recently amended, and who have taken and passed a competitive promotional examination as distinguished from veterans who have taken and passed an open competitive examination for appointment covered by G. L. (Ter. Ed.) c. 31, § 23.

The addition to the rule, having been approved by the Governor and Council on August 30, 1949, does not become effective until November 10, 1949, under the provisions of G. L. (Ter. Ed.) c. 31, § 7.

You submit for my consideration three questions as follows:

1. Shall the two-point preference given in the rule be granted only to veterans who take examinations on and after the effective date of the rule?

2. Shall the two-point preference given in the rule be granted only to veterans whose names are placed on eligible lists on or after the effective date of the rule?

3. Shall the two-point preference given in the rule be granted to all veterans on eligible lists in existence on the effective date of the rule as well as to veterans placed on eligible lists after the effective date of the rule?

My answer to your first question is in the negative.

My answer to your second question is in the affirmative.

My answer to you third question is in the negative.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Veterans' Benefits — Reimbursement to Cities and Towns.

NOV. 16, 1949.

Hon. HENRY V. O'DAY, *Commissioner of Veterans' Services.*

DEAR SIR: — I have your recent letter in which you state that you have received for approval an application for veterans' benefits from the city of Cambridge by a veteran of World War II for the care of his mongoloid child at a State institution.

You also state that a similar case arose during the administration of my immediate predecessor and that you were advised informally by four of his assistants that you should reject the application on the ground that where the Commonwealth was maintaining a State institution on a definite yearly budget, State funds could not be paid for the charge of an inmate of the institution even though he would otherwise be eligible for veterans' benefits.

You have asked for my opinion as to what action you should take on the application of the veteran from Cambridge. I am of the opinion that you should accept this application for veterans' benefits.

The law with respect to "veterans' benefits" is different from that with

respect to ordinary "public welfare." The former puts the veteran on a higher plane, and justly so, because of his service to the Commonwealth and the Nation. The veteran and/or his dependents are entitled to "sufficient support" which, as a matter of practice, has developed into something more than "welfare aid." We should interpret the law relating to "veterans' benefits" liberally and in accordance with the real intent of the Legislature to reward veterans for their sacrifices.

If a veteran has a feeble-minded child and the town of settlement concludes that thirty dollars per week is needed to support both of them and the veteran has sent his child to a private institution, the town pays thirty dollars out of its treasury to or for the veteran even though the cost of the child's care is sent directly by the town to the private institution. The same result would occur if the veteran sent his child to a State institution. If your department refuses to authorize the town to pay for the care of the child at the State institution, you would be forcing the veteran to accept aid for his child from the town's public welfare department. This would be contrary to the intent of the Legislature, which was to reward the veteran with a dignified "veterans' benefit" and to bolster his morale as well as his finances.

It is significant that prior to the enactment of St. 1946, c. 584, the method of granting aid was on the basis of "relief."

Section 5 of chapter 584 provides that no veteran shall be compelled to receive benefits without his consent. There is greater reason, therefore, for concluding that the Legislature does not want to force a veteran to accept "public welfare" against his will.

Section 6 of chapter 584 specifically provides that the Commonwealth shall reimburse cities and towns for amounts expended for "veterans' benefits." In the case mentioned above, the town is asking your approval to expend a certain amount for a veteran's dependent child. The institution caring for the child will receive compensation for such care for the account of the veteran. The kind of budget on which the State institution is maintained has no relationship whatever to the statutory obligation of the Commonwealth to reimburse cities and towns for furnishing "veterans' benefits."

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Civil Service — Temporary Positions — Procuring of Oath from Employees — Overtime.

NOV. 16, 1949.

HON. THOMAS H. BUCKLEY, *Commissioner of Administration.*

DEAR SIR: — I am in receipt of a communication from you asking for my opinion on five questions relating to the hiring by the Department of Public Works, under St. 1949, c. 397, of laborers and chauffeurs for the purposes and subject to the restrictions stated therein.

Your first question is:

"Does chapter 397 of the Acts of 1949 permit the hiring of temporary laborers, chauffeurs and workmen without consideration being given to

the provisions of G. L. c. 30, § 46, as amended by St. 1948, c. 311, and St. 1949, c. 406, whereby the salary of persons in the labor service as well as the classified service shall be based upon the provisions of said section 46 giving credit to such person for years of service, step rate increases etc.?"

In my opinion, the provisions of St. 1949, c. 406, § 1, amending G. L. (Ter. Ed.) c. 30, § 46, as previously amended by St. 1948, c. 311, do not apply to persons employed under the provisions of St. 1949, c. 397.

Statute 1949, c. 406, provides that in fixing the salary rate within a salary grade, which persons reinstated or re-employed by the Commonwealth shall be entitled to receive, such persons shall, or may, dependent upon the time of such return, be credited with the period of their previous service in the same salary grade.

Statute 1949, c. 397, exempts from the provisions of G. L. (Ter. Ed.) c. 31, which regulate appointments to positions and offices in the State service, the employment of laborers and chauffeurs by the State Department of Public Works on a temporary basis, such employment not to exceed a total of ninety days, "between November fifteenth and April fifteenth to be used in connection with the removal of snow and the sanding of slippery surfaces with the incidental work thereto on the highways of the commonwealth . . ." and "during and following a disaster or period of extreme danger when and as authorized by the governor."

The employment of laborers and chauffeurs in the circumstances stated can properly be described as employment in emergency; in the situation first described because of the frequent suddenness and unexpectedness of severe winter storms and the unpredictability of the extent of interference with the use of highways from the combined operation of even light precipitation and low temperatures, and the consequent requirement for taking immediate action to protect the public safety; and in the latter case from the nature of the events described, i.e. "disaster or period of extreme danger."

The obvious legislative intention was to free the State Department of Public Works from any hindrances or delays in the employment of laborers and chauffeurs, in the event of such emergencies, which would prevent the department from taking swift action to keep State highways open and passable in the one case, or any action indicated in the case of a disaster or period of extreme danger.

The Legislature in so exempting such positions has, in effect, declared that the application of complicated procedures relative to public employment should not be permitted to interfere with and delay State officials in such emergencies.

Positions which, because of the need for swift action to meet emergency conditions are exempted from compliance with the requirements of the civil service law, should not, if it is possible to do so, be held to be subject to the provisions of statutes providing for salary graduated to period of service, compliance with which similarly hinders prompt and effective action.

This is particularly so when, as is the case here, with regard to such emergency and temporary employment the purpose of the statutes regulating salary by length of service can in no way, because of the nature of the employment and the restrictions placed upon it by the Legislature, be advanced or served by the application of the provision of such statutes to such employment.

Statute 1949, c. 406, in so far as it has reference to the credit to be given to persons reinstated or re-employed for previous service in the same salary grade, while not expressly limited to persons reinstated or re-employed on permanent appointments to permanent positions, for the reasons stated, must be construed to be restricted by implication, to be of application only to such appointments or to appointments whether on a temporary or provisional basis to positions which either have permanent status or at least are not, as are the positions for which provision is made in St. 1949, c. 397, positions employment in which is authorized only under emergency conditions and is limited to a stated number of days.

Your second question is:

"Does the employing unit employing such persons under authority of St. 1949, c. 397, have to comply with the provisions of St. 1949, c. 619, on which later law you have already given an opinion to the Secretary of the Commonwealth on September 29, 1949 and, if so, when must such oath be procured from prospective employee?"

In answer to your second question, my opinion is that the Department of Public Works, in employing persons under the provisions of St. 1949, c. 397, must comply with the provisions of St. 1949, c. 619, and the oath required thereby must be taken by the person so employed before he enters upon the discharge of his duties.

To a great extent the considerations adverted to with relation to your first question, as indicating the non-applicability of the salary statute there considered with reference to employment under St. 1949, c. 397, would also indicate the non-applicability to such employment of St. 1949, c. 619. However, it is to be noted that one section of the act would forbid the employment of the persons described "in any capacity by the commonwealth," and the inclusion of this specific provision, in my opinion, requires the conclusion that the provisions of St. 1949, c. 619, are applicable to employment under St. 1949, c. 397, and it is expressly required that the oath referred to therein shall be taken by a person entering the employ of the Commonwealth, "before entering upon the discharge of his duties."

Your third question is:

"Does chapter 397 of the Acts of 1949 mean 90 days of 8 or 24 hours' duration?"

The answer to your third question is that the days referred to are calendar days of twenty-four hours' duration.

Your fourth question is:

"What effect sections 30 and 30A of G. L. (Ter. Ed.) c. 149 have on the employment of any persons employed under St. 1949, c. 397?"

In my opinion, the effect of section 30A is not to prohibit the employment of persons included therein for periods exceeding the limits stated even in non-emergency situations, if such employment is otherwise necessary, provided they are not, if no emergency exists, employed in violation of section 30, and such employees are entitled to be compensated for their overtime work. The effect of section 30 is to prohibit the employment of persons in the service of the Commonwealth for periods beyond those stated therein "except in case of emergency."

As stated above, the nature of the work under St. 1949, c. 397, can properly be described as emergency work. It is conceivable that as to some persons employed under the provisions of chapter 397, at some time during their employment, it could be said that their service while still within the statute was not under conditions of emergency, or perhaps even such as not to make overtime work necessary. If and when such situations occur will be dependent almost wholly upon the determination of the Commissioner of Public Works and will involve questions of fact and not of law. The Attorney General does not pass upon questions of fact.

Your fifth question is:

"Does employing unit have to clear through the Civil Service Department and the Division of Personnel and Standardization to satisfy the provisions of G. L. c. 30, § 46, as amended, and G. L. c. 149, §§ 30 and 30A, as amended?"

So far as this question is not already answered, I am of the opinion that, the provisions of the civil service law being inapplicable to the employment, there is no occasion for reference of any appointments thereunder to the Civil Service Department. As regards the Division of Personnel and Standardization, to the extent that the provisions of G. L. (Ter. Ed.) c. 30, § 46, as amended, are applicable, and they are clearly applicable so far as concerns the allocation of positions under St. 1949, c. 397, to proper classifications and salary grades, action to that end must be sought by the department from the division. Under G. L. (Ter. Ed.) c. 149, § 30A, as amended, the rules thereby authorized to be promulgated by the Commission on Administration and Finance will govern in so far as compensation for overtime work is concerned.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Veterans' Services — Paraplegic Veteran — Domicile.

DEC. 7, 1949.

Hon. HENRY V. O'DAY, *Commissioner of Veterans' Services.*

DEAR SIR: — You have recently requested my opinion regarding the application of St. 1949, c. 660, to a veteran who enlisted in the United States Army from Massachusetts and during World War II received injuries to his spine resulting in total disability, and is so rated by the Veterans' Administration. You also state that the veteran concerned intends to take a temporary residence in Florida from November first until the April first following because of the warm and healthful climate there.

Statute 1949, c. 660, relates to annuities to certain paraplegic veterans, and defines a veteran as "any person who served in the military or naval forces of the United States during any war in which the United States was engaged, who was a resident of this commonwealth at the time he was inducted into such forces and whose discharge or release therefrom was other than dishonorable, and who has continued to be a resident of this commonwealth."

You wish to know whether the above described veteran will still be a

resident so as to entitle him to continue receiving the benefits provided by law. My answer is in the affirmative.

"Residence" is a word of varied meanings, ranging from domicile down to personal presence with some slight degree of permanence. *Rummel* v. *Peters*, 314 Mass. 504, 511. Its meaning will depend upon the connection in which it occurs and the result to be accomplished by its use. In common speech "reside" expresses the same idea as to live, dwell, abide, inhabit, have one's home, or possess a domicile. *Marlborough* v. *Lynn*, 275 Mass. 394.

In *Commonwealth* v. *Swan*, 1 Pick. (18 Mass.) 194, a statute provided that the commanding officer of a company shall enroll for militia duty citizens "who shall come to reside within his bounds." The court held that the Legislature intended to enroll only those who were domiciled at a place. To the same effect are *Sleeper* v. *Paige*, 15 Gray (81 Mass.) 349; *Claflin* v. *Beach*, 4 Mete. (45 Mass.) 392; *Plymouth* v. *Kingston*, 289 Mass. 57.

Leaving the Commonwealth and taking a temporary residence in another State for several months for one's health is not acquiring a new domicile. Absence from an established domicile for a particular purpose does not change the domicile if the residence in the new location is not accompanied with a fixed purpose to remain indefinitely and with an intention not to return to the former home. *Plymouth* v. *Kingston*, 289 Mass. 57.

It is therefore clear that the veteran above described retains his domicile in this Commonwealth and is entitled to the benefits under the statute.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

State Secretary — Contracts with National Office of Vital Statistics.

DEC. 8, 1949.

HON. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion whether it is proper for the Secretary of the Commonwealth, as an individual, or for some person designated by the Secretary, as he is head of the department, as an individual, to enter into a contract with the National Office of Vital Statistics to furnish transcripts of the records of deaths, births and stillbirths which occur within the Commonwealth. You further ask whether it is proper for persons doing the clerical work under such a contract to perform their duties at the State House in quarters assigned to the Secretary of the Commonwealth.

You inform me that the Federal Government, through the National Office of Vital Statistics, United States Public Health Service, Federal Security Agency, for many years has been compiling vital statistics from transcripts of the records made in the several States. This is accomplished by a contract between the United States and a department, a department head, or a person designated by such department head in each State. The Federal agency requires complete information on all births, deaths and stillbirths; sample death reports monthly on ten per cent of the death certificates; and special reports on deaths in which motor vehicle accidents

are involved. The source of this information in Massachusetts is the Division of Vital Statistics, and access to the records of that division is an essential feature of the undertaking. The contract price paid by the United States is fixed by law at four cents per death transcript and three cents for each birth or stillbirth certificate. All forms are supplied by the Federal Government, and all office supplies and postage are paid for by the contracting party.

That the Secretary of the Commonwealth "as an individual" does not possess any greater rights than those of the ordinary private citizen is fundamental in our system of government. Mass. Const., pt. 1st, art. VI. *Attorney General* v. *Tufts*, 239 Mass. 458, 500. The same may be affirmed of a person designated by the Secretary, as he is head of the department, "as an individual." It is evident that a person so designated is afforded no official standing by reason of the designation. The question presented, therefore, is resolved into whether a person without official standing can enter into and perform such a contract with the Federal agency.

The answer to this question depends upon the nature of the records to be copied for the National Office of Vital Statistics. General Laws (Ter. Ed.) c. 46, §§ 1 and 17, require that a record of births, deaths and marriages in Massachusetts be kept by the State Secretary. Whether or not such record is public is not expressly provided. General Laws (Ter. Ed.) c. 4, § 7, cl. 26, provides that:

"'Public records' shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, city or town which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, city or town has received or is required to receive for filing, and any book, paper, record or copy mentioned in sections five to eight, inclusive, and sixteen of chapter sixty-six, including public records made by photographic process as provided in section three of said chapter."

Furthermore, G. L. (Ter. Ed.) c. 66, § 10, provides that:

"Every person having custody of any public records shall, at reasonable times, permit them to be inspected and examined by any person, under his supervision . . . ."

As a general rule, this right to inspect records cannot be confined to certain selected entries but extends to the inspection in proper time and manner of all the records, if that is desired. The right to inspect commonly carries with it a co-extensive right to make copies. *Direct-Mail Service* v. *Registrar of Motor Vehicles*, 296 Mass. 353, 356, 357.

But it is clear that no such general right to inspect or correlative right to make copies exists as to the records of births, marriages and deaths kept by the State Secretary. Inspection of such records is expressly limited by the following provision of G. L. (Ter. Ed.) c. 46, § 2A:

"Examination of records and returns of illegitimate births, or abnormal sex births, or of the notices of intention of marriage and marriage records in cases where a physician's certificate has been filed under the provisions of section twenty A of chapter two hundred and seven, or of copies of such records in the office of the state secretary, shall not be permitted except

upon proper judicial order, or upon request of a person seeking his own birth record, or his attorney, parent, guardian, or conservator, or a person whose official duties, in the opinion of the town clerk or state secretary, as the case may be, entitle him to the information contained therein, nor shall certified copies thereof be furnished except upon such order, or the request of such person."

Similar intent to confine the examination of such records to parties immediately concerned and to persons performing official duties is to be found in sections 12, 13 and 24 of the same chapter.

It follows, therefore, that to permit a private contractor to examine the records of all births in the Commonwealth, which are under the supervision of the State Secretary, would involve a violation of G. L. (Ter. Ed.) c. 46, § 2A. Hence, the answer to the first question proposed is in the negative as to your entering into the contract in your individual capacity, and in the affirmative as to entering into the contract in your official capacity. This would seem to eliminate the necessity of answering the second question.

As to your third question, it is my opinion that all moneys received from the Federal Government, through the National Office of Vital Statistics, for the work performed in your department under the contract made by you in your official capacity as State Secretary should be deposited as a whole with the Treasurer and Receiver General of the Commonwealth, and payments made therefrom only in the ordinary and usual course of transacting public business.

The effect of this opinion, however, is not to deprive the National Office of Vital Statistics of valuable statistical and public health reports. It would appear that ample authority is conferred by G. L. (Ter. Ed.) c. 262, §§ 36 and 37, upon the State Secretary acting in his official capacity to furnish the required information at the rate paid by the Federal Government.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Registration in Medicine — Qualifications — Certificates of — Standards for Examination.

DEC. 9, 1949.

Mr. WILLIAM H. J. ROWAN, *Director of Registration.*

DEAR SIR: — You have recently asked my opinion as to whether the Board of Registration in Medicine could legally enter into a reciprocal written agreement with the board of medical examiners of another State under St. 1946, c. 365.

General Laws (Ter. Ed.) c. 112, § 2, provides for the examination and registration of physicians. To be entitled to be examined the applicant must (1) be over twenty-one years of age, (2) be of good moral character, (3) possess the educational qualifications for graduation from a public high school, (4) have completed two years premedical collegiate work at an approved college or university, and (5) have attended for four years, and received a medical degree from, an approved medical school.

Statute 1946, c. 365, amends section 2 by adding a paragraph which provides that the Board of Registration in Medicine may without examination grant certificates of registration as qualified physicians to those who offer satisfactory proof that they have the qualifications required by this Commonwealth to entitle them to be examined, and also proof that they have been licensed or registered on a written examination in another State whose standards are equivalent to those of Massachusetts.

Our Legislature has determined who may be registered to practice medicine by establishing certain standards and requiring certain qualifications. The Legislature has delegated to a certain board discretion to determine whether applicants have met these standards and possess the required qualifications. The board is by law required to exercise its discretion and no contract would be needed for this purpose. The board cannot go beyond or exceed its discretion, and therefore it cannot by contract bind itself to do so.

My answer to your question is, therefore, in the negative.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Public Welfare — Domicile — Illegitimate Child.

DEC. 13, 1949.

Hon. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — You have recently requested my opinion as to the interpretation of G. L. (Ter. Ed.) c. 210, § 1, as amended, under the circumstances hereinafter described. Said statute provides:

"A person of full age may petition the probate court in the county where he resides for leave to adopt as his child . . . If a person not an inhabitant of this commonwealth desires to adopt a child residing here, the petition may be made to the probate court in the county where the child resides."

Your question relates more particularly to the final sentence of the statute. You wish to know whether adoption could be granted in the following situations:

(1) An unwed mother domiciled in Massachusetts takes her child to another State to live and there delivers the child to a couple, who keep the child at their home in that State for over six months, but because of difficulties in securing adoption at their domicile the couple bring the child to this Commonwealth and seek adoption here in the county where the child was born.

(2) An unwed mother domiciled in Massachusetts remains here but delivers her child to a non-resident couple, who take the child to their domicile where the child lives at their home for over six months. Because of difficulties in securing adoption at their domicile the couple bring the child to this Commonwealth and seek adoption here in the county where the child was born.

(3) A legitimate child is taken by its locally domiciled parents to another State to live and there delivered to a couple, who proceed as in (1) above.

(4) A legitimate child is delivered by its locally domiciled parents, who remain in the Commonwealth, to a non-resident couple, who take the child to their home and proceed as in (2) above.

Our first problem is to ascertain what the Legislature meant by "residence" in this particular statute. "Residence" is a word of varied meanings, ranging from domicile to personal presence with some slight degree of permanence. *Rummel* v. *Peters*, 314 Mass. 504, 511. Its meaning will depend upon the connection in which it occurs and the result to be accomplished by its use. In common speech "reside" expresses the same idea as to live, dwell, abide, inhabit, have one's home, or possess a domicile. But one may have a residence in a place for business, pleasure, or health; and yet have a domicile or home elsewhere. Yet it means something more than a mere visit or fleeting stay. It imports something of expected permanence in the way of personal presence. *Marlborough* v. *Lynn*, 275 Mass. 394.

The following cases illustrate the different shades of meaning.

In *Commonwealth* v. *Swan*, 1 Pick. (18 Mass.) 194, a statute provided that the commanding officer of a company shall enroll for militia duty citizens "who shall come to reside within his bounds." The court held that the Legislature intended to enroll only those who were domiciled at a place and not those who have only a temporary residence.

In *Claflin* v. *Beach*, 4 Metc. (45 Mass.) 392, a statute provided that insolvent debtors may apply for relief "to the judge of probate for the county within which he resides." The court held that "resides" means "domiciled."

In *Sleeper* v. *Paige*, 15 Gray (81 Mass.) 349, a statute provided that if, after a cause of action accrued, the debtor shall be absent from and reside out of the State, the time of his absence shall not be included in the running of the statute of limitations. The court held that "reside" was the equivalent of "domicile."

In *Plymouth* v. *Kingston*, 289 Mass. 57, a statute relating to settlements used the words "failure . . . to reside." The court held that in laws relating to taxation, voting and settlements, the word "residence," in the absence of a contrary legislative intent, has always been interpreted as the equivalent of the word "domicile."

In *Jenkins* v. *North Shore Dye House, Inc.*, 277 Mass. 440, a statute provided that a non-resident was any resident of another State. The court held that "residence" in general meant personal presence in some place of abode with no present intention of definite and early removal, not infrequently but not necessarily combined with a desire to stay permanently. The court here construed "residence" as something less than "domicile."

In *Doyle* v. *Goldberg*, 294 Mass. 105, a statute provided that an application for the registration of a motor vehicle shall contain "a statement of the name, place of residence and address of the applicant." The court held that one of the purposes of this statute was to provide an easy means of identification of the automobile and its owner. "Residence," therefore, did not mean "domicile." Although a person could have only one domicile, yet he might have more than one residence for the purposes of this statute. To the same effect is *Russell* v. *Holland*, 309 Mass. 187.

In *Martin* v. *Gardiner*, 240 Mass. 350, a statute provided that the probate court may appoint guardians of minors who are inhabitants of or residents in the county. In this case the petitioners sought guardianship

of a child born in New Hampshire of parents domiciled there. The parents left the child at an orphanage, from which it was taken when ill to a hospital in New Hampshire. By mistake the child was recorded at the hospital as of unknown parentage. The petitioners took the child from the hospital to this Commonwealth, where the child lived with them for nine months prior to the petition for guardianship. The court held that the present statute had for years been construed to authorize the appointment of guardians of minors residing within the Commonwealth though not domiciled here, and that although the child's domicile was New Hampshire, that of its father, the child could be found to have been a resident of Massachusetts.

In *Wachusett National Bank* v. *Fairbrother*, 148 Mass. 181, a statute provided that the holder of a note must give notice of dishonor to the endorser at his place of business or residence. The court held that in the law of negotiable instruments the word "residence" is not used as implying a permanent, exclusive or actual abode in a place, but may be satisfied by a temporary, partial or even constructive residence.

A statute, however, which gives our courts the right to change the status of residents contemplates domiciliary jurisdiction. It is a general principle that the status or condition of a person, the relation in which he stands to another person, is fixed by the law of the domicile. *Ross* v. *Ross*, 129 Mass. 243, 246.

Although the case of *Martin* v. *Gardiner*, 240 Mass. 350, above referred to, involved a change of status, yet that case was decided on historical and other grounds mentioned in the decision. Furthermore, the law of the domicile of the parties is generally the rule which governs the creation of the status of a child by adoption. *Foster* v. *Waterman*, 124 Mass. 592. The Legislature is therefore presumed to have intended the word "residence" in the adoption statute to be synonymous with "domicile"; because a statute is to be interpreted with reference to the pre-existing law. *Lowell Co-operative Bank* v. *Dafis*, 276 Mass. 3, 7.

The court may change the status of resident petitioners toward a child that is brought within the physical jurisdiction of the court; as well as the status of a resident child to non-resident petitioners who bring themselves within the jurisdiction of the court by filing their petition. *Stearns* v. *Allen*, 183 Mass. 404, 407.

In the *Stearns* case the petitioners were domiciled in this Commonwealth and the child had lived here with her mother, though her father was domiciled in Scotland. The court said that if the child is actually dwelling here the State may as well provide for her adoption as to give her protection in other ways. This case, however, should not be considered as an authority for the proposition that non-resident petitioners may adopt a child who is not domiciled here.

In the light of the above cases let us examine situation (1). An illegitimate child is *nullius filius*, yet it must have a domicile. Its domicile of origin would remain until changed. A domicile once established cannot be lost until a new one is in fact acquired. *Plymouth* v. *Kingston*, 289 Mass. 57.

To provide for the support and education of an illegitimate child, its mother has the right to custody and control as its natural guardian. *Wright* v. *Wright*, 2 Mass. 109.

The mother has doubtless all the rights of other parents, *Purinton* v. *Jamrock*, 195 Mass. 187, 199.

An illegitimate child cannot gain a settlement independent of its mother, who has custody and control. *Somerset* v. *Dighton*, 12 Mass. 383, 386.

The conclusion is therefore inescapable that if the mother left the Commonwealth with the child and acquired a new domicile elsewhere, the child was not a resident of this Commonwealth within the intent of G. L. (Ter. Ed.) c. 210, § 1. The child could not become such a resident merely by being brought here for the purpose of adoption.

If, however, the mother did not forsake the Commonwealth but merely went to another State to seek a good home for her child and delivered the child to a couple "on approval," the child's domicile could be found to be here and adoption granted. Whether a new domicile has been acquired becomes a question of fact. Absence from an established domicile for a particular purpose does not change the domicile if the residence in a new location is not accompanied with a fixed purpose to remain there indefinitely and with an intention not to return to the former home. *Plymouth* v. *Kingston*, 289 Mass. 57.

General Laws (Ter. Ed.) c. 210, § 5A, would not be an obstacle because that section only requires that the child shall have resided in the home of the petitioners for six months. This section does not require that the home shall have been in any particular State. The word "resided" here merely means "live with."

In situations (2), (3) and (4) we would have the same result. If a minor leaves his domicile of origin with the consent of his guardian and takes a new home permanently with one who assumes the minor's care, the minor has acquired a new domicile. *Kirkland* v. *Whately*, 4 Allen (86 Mass.) 462; *Cummings* v. *Hodgdon*, 147 Mass. 21, 22.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Private Trade Schools — License — Electric Current in Hair Removal.

DEC. 19, 1949.

Hon. JOHN J. DESMOND, JR., *Commissioner of Education.*

DEAR SIR: — You have recently asked my opinion interpreting the effect of St. 1941, c. 583, under the circumstances hereinafter described.

You state that a school proposing to teach the practice of electrolysis (defined by you as hair removal by means of an electric current) has applied to the State Department of Education for a license to operate as a private trade school under chapter 583. You also state that a committee appointed by the Massachusetts Medical Society recommended that schools of electrolysis should not be licensed. You wish to know whether such a school may be licensed as a trade school.

General Laws (Ter. Ed.) c. 93, as amended by St. 1941, c. 583, provides that no person shall operate a private trade school unless licensed to do so by the Commissioner of Education, who shall not issue a license until he shall approve the proposed standards adopted, the methods of instruction to be followed, the equipment and housing, the training and experience of teachers, and the form of enrollment agreement with students. The reasonableness of the refusal to grant a license is reviewable by the Superior Court. The statute defines a private trade school (with certain

exceptions not here material) as one maintained or conducted for the purpose of teaching any trade or industrial occupation for profit or for a tuition charge.

"Trade" means an occupation or pursuit requiring some manual or mechanical dexterity. "Electrolysis" means chemical decomposition by the action of an electric current. This activity is referred to in G. L. (Ter. Ed.) c. 112, as most recently amended by St. 1943, c. 565, which defines hairdressing as treating the hair of a female in a certain manner but not including the removal of superfluous hair or skin blemishes by direct application of an electric current.

The removal of such hair and blemishes is a needful service and activity and should be permitted to function under strict supervision. If we consider the practice of electrolysis as closely allied to the medical field, there is greater reason to permit the functioning of schools which teach the art and thus develop persons competent to practice it. We can see from the provisions of St. 1941, c. 583, that a school licensed thereunder would be subject to the most rigid rules before it could operate.

At present there are people engaged in the practice of electrolysis without any supervision being required by law, and if no license were granted to a school to teach this art the health and safety of the public would be less protected.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Wife of Veteran, also Veteran in Own Right, entitled to Veterans' Benefits apart from Husband's Right.

FEB. 28, 1950.

His Excellency the Governor and the Honorable Council.

SIRS: — You have recently asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 115, as amended, under the circumstances hereinafter described.

Section 4 of chapter 115 provides: "Every application for veterans' benefits shall be in writing, signed by the applicant . . . and shall contain a statement of . . . his relationship to the veteran upon whose wartime service his application is based . . ."

Section 5 of chapter 115 provides: "Veterans' benefits shall be paid to a veteran or dependent by the city or town in which he has a settlement, or, if he has no settlement in any city or town within the commonwealth, by the city or town wherein he resides . . ."

"Veteran" is defined in section 1 of chapter 115 as any person, male or female, who served in the military forces of the United States during certain wars in which the United States has been engaged.

"Dependent" is defined in section 1 as the wife, widow, child, mother or father of a veteran.

Under certain circumstances described in section 5 benefits are denied as appears in the following clause: "No veterans' benefits shall be paid . . . to or for any veteran who wilfully refuses and neglects to support his dependents nor to or for any dependents of such veteran."

In substance the facts as gathered from the documents attached to your

request are as follows: A woman served as a Wave in World War II. Her husband, also a veteran, deserted her and their two children, leaving them destitute. She thereafter filed an application for veterans' benefits in her own right. Her application was rejected by the local veterans' agent, but on appeal to the Commissioner of Veterans' Services her application was granted. In accordance with the provisions of section 2 of chapter 115 the veterans' agent has appealed the commissioner's decision to the Governor and Council.

You therefore ask me two questions:

(1) Whether or not the wife of a veteran, who is also a veteran in her own right, is entitled to veterans' benefits, where the husband is not so entitled.

(2) Whether or not the wife of a veteran, who is also a veteran in her own right, is to be classified as a dependent and thereby be made ineligible to be paid such benefits.

A statute must be interpreted according to the legislative intent appearing from the language thereof in connection with the subject matter and the object to be accomplished. *National Fire Insurance Co.* v. *Goggin*, 267 Mass. 430, 436; *Kneeland* v. *Emerton*, 280 Mass. 371, 376.

A strictly literal construction of a statute should not be adopted if the result will be to thwart or hamper the accomplishment of the obvious purpose of the statute, and if another interpretation is possible which will not have that effect. *Frye* v. *School Committee*, 300 Mass. 537; *Cullen* v. *Mayor of Newton*, 308 Mass. 578.

In enacting the statute in question the Legislature undeniably intended to reward in suitable measure those men and women who answered their country's call for military service in time of war. Clearly, the Legislature contemplated that female veterans might either be married to veterans during their service or become married to veterans after the conflict was over. It is also obvious the Legislature did not intend to deny benefits to a female veteran otherwise qualified merely because of the accident of being married to an unworthy person who is also a veteran. To do so would lead to the absurd result that a female veteran married to a slacker could receive benefits, but if married to a war hero who later deserted her she could not receive benefits. An intention to accomplish an absurd result is not to be attributed to the Legislature unless clearly required by the language of the statute. *Petition of Curran*, 314 Mass. 91.

The statutory provision denying benefits to a veteran or his dependents in case the veteran wilfully refuses or neglects to support his dependents does not alter the situation. It is true that a husband has the primary duty to support his wife and children. They are his dependents and if he fulfills this obligation he may select the home and domicile of his family. *Somerville* v. *Commonwealth*, 313 Mass. 482, 485. Whenever, however, he deserts his family, his wife has the right to establish her own domicile and that of the children left in her care. *Rolfe* v. *Walsh*, 318 Mass. 733, 735. She is on her own. A woman who keeps her family together and supports them has much the same responsibility for their education and maintenance as is imposed upon a father. See *Horgan* v. *Pacific Mills*, 158 Mass. 402, 404. The Legislature also recognizes the duty of a mother to support her children. See G. L. (Ter. Ed.) c. 273, § 1, as to children under sixteen.

In a sense they are still the deserter's dependents and he can be forced to support them if they can locate him and prove he has the means to do so.

Smith's Case, 322 Mass. 186, 188. This dependency, however, has now become more remote than the immediate dependency of the deserted wife and children upon their own efforts. Our General Court never intended to desert a female veteran under such circumstances.

Furthermore, under the definition of "dependent" in section 1, children of the woman veteran would clearly be her dependents. An application for benefits based upon her wartime service would be lawfully appropriate. It would then be absurd to conclude that the Legislature intended to give benefits to the children derivatively through their mother, but none to her.

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

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Public Health Regulations — Local Boards may set Standards Higher than Required Minimum.

FEB. 28, 1950.

VLADO A. GETTING, M.D., *Commissioner of Public Health.*

DEAR SIR: — You have recently asked my opinion regarding the effect of St. 1947, c. 631, § 2, amending G. L. (Ter. Ed.) c. 111, § 128, as previously amended, in its relation to section 31 of chapter 111.

The 1947 amendment directs the Department of Public Health to make regulations to establish minimum standards of fitness for human habitation. These regulations become effective upon acceptance by a city or town.

Section 31 of chapter 111 provides that "boards of health may make reasonable health regulations."

You seek to know whether the 1947 amendment (if accepted) prevents local boards of health from making regulations which set higher standards.

If reasonably practicable, a statute is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law. *Morse* v. *Boston*, 253 Mass. 247, 252; *Kelley* v. *Jordan Marsh Co.*, 278 Mass. 101, 111. Statutes alleged to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both unless there be some positive repugnancy between them. *Brooks* v. *Fitchburg, etc., Ry.*, 200 Mass. 8, 17.

The different sections of chapter 111 should be construed as portions of an harmonious and practical system of legislation designed to protect the public health. *Malden* v. *Flynn*, 318 Mass. 276, 278.

The power to make reasonable health regulations is a broad power. *Brielman* v. *Commissioner of Public Health*, 301 Mass. 407, 409. The establishment of minimum standards by the 1947 amendment does not infringe upon this broad power. Different localities and different circumstances might very well require the setting of higher standards under section 31.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Alcoholic Beverages Control Commission — License — Revocation — Hearing Mandatory.

MAR. 2, 1950.

MR. EDWARD L. BAKER, *Chairman, Alcoholic Beverages Control Commission.*

DEAR SIR: — You have asked my opinion upon the following question: Was the vote of the Alcoholic Beverages Control Commission taken under date of December 19, 1949, whereby it rescinded its action of December 13, 1949, approving an application for a license of a package goods store for the sale of wines and malt beverages, a legal and lawful action under the provisions of G. L. (Ter. Ed.) c. 138, as amended, so as to invalidate such a license granted by the City of Somerville?

I answer your question in the negative.

General Laws (Ter. Ed.) c. 138, § 67, provides in part as follows: —

". . . upon its own initiative, the commission may investigate the granting of such a license or the conduct of the business being done thereunder and may, after a hearing, modify, suspend, revoke or cancel such license if, in its opinion, circumstances warrant."

Your attention is called to the fact that no such hearing was held before the commission took this action. I find nothing in chapter 138 authorizing this action by the commission but, on the contrary, the pertinent provisions of section 67 are unambiguous and quite clear and specific on this point.

Accordingly, I advise you, as I have already indicated, that your action of December 19, 1949, is a nullity.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Emergency Commission — Powers and Authority — Solid Fuels — Seizure — Ration and Allocation — Regulation of Sales — Penalties.

MAR. 3, 1950.

Hon. WILLIAM H. HARRISON, *Adjutant General of the Commonwealth,*
Hon. JOHN F. STOKES, *Commissioner of Public Safety,* and
Hon. JOHN J. DELMONTE, *Commissioner of Labor and Industries,*
Emergency Commission under G. L. (Ter. Ed.) c. 23, § 9H.

GENTLEMAN: — I am in receipt of a communication from you requesting my opinion on certain questions stated by you for the purpose of obtaining a clarification of your powers as the emergency commission designated by the Governor with the approval of the Council under G. L. (Ter. Ed.) c. 23, § 9H, as amended by St. 1939, c. 261, § 4, upon his determination, as provided therein, that an emergency exists in respect to solid fuels, because of the shortness of supply resulting from the failure of the coal mine operators to reach an agreement with the coal miners' union representatives.

The statute under which you were designated was not, and indeed no

statute of Massachusetts could be, drawn to deal effectively with an emergency resulting, as the existing emergency in solid fuels does, from a failure of production in the bituminous coal fields in other States consequent upon a labor dispute, in which due to the mine operators' refusal to meet the demands of the miners for what they believe to be a fair wage, the miners have refused to work.

It can be said generally that the Massachusetts statute contemplates only those situations wherein, due to some temporary cause, there are scarcities in some areas but relative surpluses in others. The only methods provided by the statute for meeting such emergencies are by ascertaining and publishing the facts with regard to the available supplies and authorizing the Governor or his designee with the approval of the Council, if fair distribution does not result, to take possession of all available stocks with compensation to the owners, and to distribute the stocks taken at reasonable rates.

Under the provisions of section 9H of chapter 23, as contained in St. 1939, c. 261, § 4, upon its designation the emergency commission "shall have, with respect to necessary or necessaries of life as to which the emergency exists, all the powers and authority granted by the Commonwealth Defense Act of nineteen hundred and seventeen, being chapter three hundred and forty-two of the General Acts of nineteen hundred and seventeen, to persons designated or appointed by the governor under section twelve of said chapter"; and in the last sentence of the section it is provided that "the provisions of said chapter three hundred and forty-two are hereby made operative to such an extent as the provisions of this section may from time to time require."

The powers and authority which a person designated by the Governor were granted under Gen. St. 1917, c. 342, § 12, were "to do in his [the governor's] name whatever may be necessary to carry the said powers [any or all powers conferred on the governor by the act] into effect."

In an opinion of the Attorney General to the Governor, dated August 21, 1922, and published in VI Op. Atty. Gen. 582, it was stated, at page 587, that the designee of the Governor, under Gen. St. 1917, c. 342, § 12, would have the powers conferred upon the Governor under the act. Thus it would appear that your commission has the powers conferred upon the Governor by the said chapter. The powers conferred upon the Governor by the act include "with the approval of the council [taking] . . . possession: . . . (*c*) Of . . . any fuel . . . which may be necessary or convenient for the use of the military or naval forces of the commonwealth or of the United States, or for the better protection or welfare of the commonwealth or its inhabitants." With respect to the property so taken possession of, it is provided that "he [the governor] may use and employ all property so taken possession of for the service of the commonwealth or of the United States, for such times and in such manner as he shall deem for the interests of the commonwealth or its inhabitants, and may in particular, when in his opinion the public exigency so requires, sell or distribute gratuitously to or among any or all of the inhabitants of the commonwealth anything taken under clause (*c*) of this section and may fix minimum and maximum prices therefor. . . ."

The statute also makes provision for an award of compensation by the Governor for property so taken and for a petition for the assessment of damages sustained by an owner dissatisfied with the award made or to whom no award is made; but, as will be discussed hereinafter, a question

arises in this connection as to the availability of funds to pay compensation awarded or found to be due.

A further power conferred upon the Governor by the act is that contained in section twenty-three which provides that:

"Whenever the governor, with the advice and consent of the council, shall determine that an emergency has arisen in regard to the cost, supply, production, or distribution of food or other necessaries of life in this commonwealth, he may ascertain the amount of food, or other necessaries of life within the commonwealth; the amount of land and labor available for the production of food; the means of producing within or of obtaining without the commonwealth food or other necessaries of life as the situation demands; and the facilities for the distribution of the same, and may publish any data obtained relating to the cost or supply of such food or other necessaries, and the means of producing or of obtaining or distributing the same. In making the said investigation he may compel the attendance of witnesses and the production of documents and may examine the books and papers of individuals, firms, associations and corporations producing or dealing in food or other necessaries of life, and he may compel the cooperation of all officers, boards, commissions and departments of the commonwealth having information that may assist him in making the said investigation."

In the light of this preliminary statement of the general problem and the statutory provisions relating to your appointment and powers I now proceed to deal with the specific questions upon which you desire my opinion.

You state that you would like to be advised whether or not you have any of the following powers:

(*a*) To establish a system of preferences in the use of solid fuels.

(*b*) To ration and allocate supplies of solid fuels in the possession or subject to the control of a dealer or any other person and assign priorities with respect thereto.

(*c*) To limit, regulate or prohibit the sale, transportation, delivery or transfer of solid fuels in the possession or subject to the control of a dealer or any other person.

(*d*) To restrict the use of solid fuels by ordering the full time, part time or intermittent closing of any building, facility or plant in connection with which solid fuel is used for any purpose and to restrict the use of electric power, gas, steam and other products requiring solid fuels in their manufacture.

(*e*) With the approval of the Governor and Council to adopt, promulgate and make effective plans, regulations, rules and orders to implement and carry out the purposes of the law and the executive designation.

(*f*) To make such investigations and surveys as may be necessary or appropriate to carry out the purposes of existing legislation and the Governor's order of designation.

(*g*) To take possession of existing and available stocks of solid fuels wherever they may be found and wherever, in the judgment of the emergency commission, it is deemed necessary to reallocate the same with due provision for making just compensation.

(*h*) To provide for penalties and sanctions to make enforceable such rules and regulations as may be promulgated.

Subject to the observations made with regard to the commission's right to take supplies of coal which are stated in my answer to your question (*g*) hereinafter, with respect to your question (*a*) it is my opinion that your commission has the power to establish a system of preferences in the use of solid fuels which have properly been taken in the exercise of the power and authority conferred by section 9H. Section 6 of the Commonwealth Defense Act of 1917 provides for the employment by the Governor of "all property so taken possession of for the service of the commonwealth or of the United States, *for such times and in such manner as he shall deem for the interests of the commonwealth or its inhabitants*" (emphasis supplied). That this power includes the right to establish a system of preferences is confirmed by a further provision of the same section authorizing the sale or gratuitous distribution "to or among any or all of the inhabitants of the commonwealth" of the property, including fuel, so taken.

With respect to question (*b*), I assume from the manner in which the question is phrased that you are inquiring as to your powers in this regard in the absence of a seizure. It is my opinion that in the absence of a taking as provided under section 9H, your commission has no power to ration and allocate supplies of solid fuels in the possession or subject to the control of a dealer or any other person or to assign priorities with respect thereto. This is made abundantly plain by the justices of the Supreme Judicial Court in their opinion to the Governor and Council, 321 Mass. 772, 776, where it is stated unequivocally that the Commonwealth Defense Act of 1917 "did not purport to confer any powers of regulation over property not seized."

Question (*c*) is adequately covered by what was said with respect to the preceding question.

With respect to question (*d*), it is my opinion that no such power is conferred upon the Governor or your commission by section 9H or by the Commonwealth Defense Act of 1917.

With respect to questions (*e*) and (*h*), it is my opinion that no authority is conferred upon your commission to make rules, regulations and orders to implement and carry out the purposes of the law and the executive designation. Nor does your commission have authority to provide for penalties and sanctions to make enforceable such rules and regulations. It is expressly provided in section 9H that "during such an emergency, the governor, with the approval of the council, may make and promulgate rules and regulations, effective forthwith, for the carrying out of the purposes of this section and for the performance by the commonwealth and the cities and towns thereof of any function affecting food or fuel or any other common necessary of life, including the providing of shelter, authorized under Article XLVII of the amendments to the constitution." And it is further provided by the same section that "violation of any such rule or regulation shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or by both." In view of these express enactments, which apparently adequately cover the subject matter of the two questions, I am clearly of opinion that no further power in this same regard can or should be implied from the language of the statute.

With respect to question (*f*), it is my opinion that your commission does have authority to make such investigations and surveys as may be necessary or appropriate to carry out the purposes of existing legislation and the Governor's order of designation.

I am of opinion that the powers conferred upon the Governor by section 23 of the Commonwealth Defense Act of 1917, set out above, may be exercised by the commission under the provision of section 9H. Thus the commission may ascertain the amount of solid fuel within the Commonwealth; the means of obtaining fuel without the Commonwealth as the situation demands; the facilities for the distribution of the same; and may publish any data obtained relating to the cost or supply of such fuel, and the means of producing or of obtaining or distributing the same. In making such investigations and surveys the commission has the power to compel the attendance of witnesses and the production of documents and to examine the books and papers of individuals, firms, associations and corporations producing or dealing in solid fuels and to compel the cooperation of all officers, boards, commissions and departments of the Commonwealth having information that may assist them in making the investigation.

With respect to your question (*g*), while the provisions of Gen. St. 1917, c. 342 incorporated by reference into G. L. (Ter. Ed.) c. 23, § 9H, as contained in St. 1939, c. 261, clearly and definitely authorize the taking of fuel supplies from private owners and establish definite and certain methods for the award of compensation and the judicial determination of the amount of damages to which an owner is entitled, in the event of a dispute, there is an underlying question as to your right to make takings because of the constitutional principle that a statute which authorizes takings of property must also provide means for the payment of the compensation found to be due. *Connecticut River R.R.* v. *County Commissioners*, 127 Mass. 50.

The Commonwealth Defense Act of 1917 contains a provision authorizing the expenditure of certain appropriations which were then in effect to carry out the purposes of the act. Obviously that provision is of no assistance here because the appropriations referred to have long since expired. Section 9H itself contains no provisions relative to the source of funds for the payment of compensation which would become due to an owner of coal from whom it was taken. As to any coal taken for State use, there would be available appropriations made by the Legislature for the purchase of coal as needed in the ordinary course and such appropriations could be drawn upon for the payment of compensation to the owner from whom coal was taken for such State use.

It may also be true that there are available funds in special appropriations for emergencies or which can be made available by transfer in accordance with law from existing appropriations and, to the extent of such appropriations, taking of coal could be made. Aside from such cases, however, it would appear that the statute under which the commission is empowered to act is not implemented by the making available of funds to pay compensation for property which is authorized to be taken.

In the case of *Talbot* v. *Hudson*, 16 Gray, 417, 431, Chief Justice Bigelow held that it is sufficient that the statute which authorizes the taking of property should provide for the assessment of damages in the ordinary manner, and directs that the damages so assessed be paid out of the treasury of the Commonwealth, and authorizes the Governor to draw his warrant therefor because: "This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the act. . . . It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the

damages as soon as they are ascertained and liquidated by due process of law."

Section 9H, as has been pointed out, while it provides for the assessment of damages in the ordinary way, does not direct that the damages assessed be paid out of the treasury of the Commonwealth or authorize the Governor to draw his warrant therefor. Statutes similarly deficient have been uniformly held to be unconstitutional. *Bent* v. *Emery*, 173 Mass. 495. VI Op. Atty Gen. 539.

The fact that Gen. St. 1917, c. 342, provides that petitions for the assessment of damages thereunder shall be governed by the provisions of R. L. c. 201, now G. L. (Ter. Ed.) c. 258, merely adds to the doubt as to whether adequate means have been made for the payment of compensation, for section 3 of chapter 258, while it authorizes the Governor to draw his warrant on the State Treasurer for the amount of the damages found due, expressly provides that the latter "shall pay the same from *any appropriations made for the purpose by the general court*" (emphasis supplied).

Although the decisions referred to concern statutes which did not refer to takings occasioned by emergency conditions and it has been indicated that the requirement that adequate provision be made for the payment of compensation for property taken is not applicable in case of a taking in a time of public emergency for a public use, *People* v. *Hayden*, 6 Hill (N. Y.) 359, 361, it would appear that such an exception could not be said to cover the present situation in which the property taken will not, in most cases, be put to use by the State but will be distributed to private persons for private uses which will not commonly be of compelling necessity for the general public safety or welfare.

In accordance with the foregoing, I inform you that, except as it may appear that there are appropriations presently available which can be drawn upon for the payment of compensation to the owners of coal which might be taken, and then only to the extent of such appropriations, your right to take possession of coal is dependent upon provision being made by the Legislature for funds for the payment of compensation to the owners of coal which you might desire to take.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Employees of Commonwealth — Work Week — Holidays — Payment for Work on Holiday.

MAR. 10, 1950.

Hon. THOMAS H. BUCKLEY, *Commissioner of Administration.*

DEAR SIR: — You have recently asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 149, § 30A, inserted by St. 1947, c. 677, and G. L. (Ter. Ed.) c. 30, § 24A, as amended, under the circumstances hereinafter described.

Section 30A provides that the service of all persons employed by the Commonwealth, with certain exceptions, is restricted to five days in any one week and to such hours in any one week not less than thirty-seven and one-half, except in case of part-time employment, nor more than forty hours; and that all service in excess of forty hours in any one week rendered by an employee subject to this section shall be compensated for as

overtime. In this connection it will be well to refer to section 30 of chapter 149, which restricts the service of laborers, workmen, mechanics, foremen and inspectors employed by the Commonwealth to eight hours a day, forty-eight hours in any one week and six days in any one week, except in cases of emergency.

Chapter 30, section 24A, provides that if any person employed by the Commonwealth is required to work on state-wide legal holidays, he shall be given an additional day off, or if such day off cannot be given by reason of a personnel shortage or other cause, an additional day's pay; and if an employee works five or more days a week and his regular day off falls on any of said holidays (except when such holiday occurs on Saturday), he shall be allowed an additional day off or a day's pay in lieu thereof.

You state that in accordance with an opinion rendered by a previous Attorney General, department heads have been fixing the working hours of employees in their respective departments subject to the maximum for such hours established by the Legislature. You present six different situations which may arise and pose a question as to each as follows:

1. An employing unit has on its payroll an employee who works only when required, so that such individual will report for duty only when notified. He is paid on a monthly basis. If such employee is required to work on a holiday described above is he entitled to a day off or a day's pay in lieu thereof?

2. An employing unit employs a person for four days of ten hours each in a week in place of the usual eight hours for each of five days, for the accommodation of the employing unit. This means that there are three days of the week when such employee is not at work. If a holiday occurs during the scheduled four days is such employee entitled to a day off or a day's pay in lieu thereof?

3. The facts are the same as in (2) except that the holiday falls on one of the three days the employee is not scheduled to work. Is said employee entitled to a day off or a day's pay in lieu thereof?

4. An employee works a few hours a day in each of five days in a week, said hours totaling less than forty. If a holiday falls on one of the five days is the employee entitled to time off (and how much) or pay (and how much) in lieu thereof?

5. The facts are the same as in (4) except that the holiday falls on one of the two remaining days the employee is not scheduled to work. Is the employee entitled to time off (and how much) or pay (and how much) in lieu thereof?

6. An employee is scheduled to work more than eight hours some days but no more than forty hours in a total of five days. Is such employee entitled to overtime pay for any hours over the eight worked on any one day, even though the total hours worked do not exceed forty?

In ascertaining the legislative intent we must read the statutes in question together, give the words used their ordinary meaning, consider the pre-existing state of the common and statutory law, determine the evil or mischief toward which the statute was apparently directed, and the main object to be accomplished. See *Meunier's Case*, 319 Mass. 421. Applying the above principles it would appear that the Legislature, motivated by changing social and economic conditions, wished to establish a general labor policy, namely: that certain State employees shall labor only five days and no more than forty hours in a week (c. 149, § 30A), and certain other employees no more than eight hours in a day (c. 149, § 30).

As to those employees subject to section 30A there is no limit to the number of hours per day. To be entitled to overtime the employee would have to work over forty hours during the week. This contemplates such employee would be working more than eight hours on some one day.

The Legislature also determined that those who worked on legal holidays should be rewarded either by a day off or pay in lieu thereof. Nothing is specified in the statute as to the number of hours one has to work on this holiday or during the remaining week in order to qualify. A practical interpretation of the statute would be to define "day off" or "day's pay" according to the status of the employee in question; that is, if the employee is engaged to work on a four, eight, twelve (or any other time unit) hour day, that will be the yardstick by which to measure the "day's pay." It would not be practical or fair to give standard eight hours' pay to an employee whose workday on a particular holiday is four, six, ten or twelve hours. If the holiday falls on a day an employee is scheduled to work four hours and he did not work because of the holiday, he would have a four-hour respite from labor and his pay for those four hours would go on just as if he had worked. Now if he had to work that holiday, he would be entitled to be relieved from working some day he was scheduled to work that number of hours. If because of personnel shortage he could not get this day off, then he would be entitled to the pay for that day of four hours, which in effect would be double pay for the holiday he works. The same would hold true in case of a six-hour day, eight-hour day, ten-hour day, or twelve-hour day, etc.

I therefore answer your questions as follows:

1. Yes.
2. Yes.
3. No.
4. The employee is entitled to such time off as is equivalent to the scheduled workday on which the holiday falls. If because of personnel shortage he cannot get this time off, he should receive the pay which that particular scheduled workday would bring him. He will thus receive double pay for the holiday he works.
5. Yes, as measured by his average scheduled workday.
6. No.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Department of Mental Health — Student Nurses — Oath.

MAR. 31, 1950.

Hon. THOMAS H. BUCKLEY, *Commissioner of Administration.*

DEAR SIR: — You have recently asked me for an opinion interpreting the effect of St. 1949, c. 619, under the circumstances hereinafter described.

Chapter 619 adds the three following sections to G. L. c. 264:

"SECTION 13. No person who is a member of the communist party, or is a member of or supports any organization which advocates the overthrow by force, violence or other illegal or unconstitutional methods, the government of the United States or of this commonwealth shall be em-

ployed in any capacity by the commonwealth or any political subdivision thereof.

"SECTION 14. Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation: —

'I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.'

. . . . . .

"SECTION 15. Violation of section thirteen or fourteen shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both."

You state that in the Department of Mental Health there are student nurses who are affiliated with various private hospitals and who, while gaining psychiatric experience, render service as nurses at some institution in the department and in return for said service receive maintenance, but the grant of this maintenance is on the express condition that said affiliate student nurses shall not be considered State employees.

You wish to know whether said student nurses are employees of the Commonwealth during their period of training so as to require them to take the oath of loyalty described in the above statute.

On September 29, 1949, I rendered to the Honorable Edward J. Cronin, Secretary of the Commonwealth, an opinion relating to certain aspects of this statute. That opinion in part stated:

"No person who by reason of his or her own voluntary acts and conduct, explicitly or implicitly, by clear and reasonable inference, comes within the prohibitions of the foregoing statute 'shall be employed in any capacity by the commonwealth or any political subdivision thereof.' The prohibitions of the statute have reference to, and embrace within their sphere, employment in the service of the Commonwealth and in the service of every political subdivision thereof, including counties, cities, towns and districts.

"Every person upon entering the employment of the Commonwealth or of any political subdivision thereof, including counties, cities, towns and districts, is required under the express terms of the statute, before entering upon the discharge of his or her duties, to take the prescribed oath. . . .

"Those now in the employ of the Commonwealth, or of any political subdivision thereof, in any capacity, are not required to take the prescribed oath or affirmation when the statute becomes effective, as a condition precedent to remaining in the public service. But it is to be observed that any person employed as above stated in this paragraph after the effective date of the statute who has then by reason of his or her own acts and conduct, or who thereafter by reason of his or her own acts or conduct, brings himself or herself within the prohibitions of the statute, would be subject to removal from the public service."

The only issue presented by your question is whether such a student nurse is "employed in any capacity by the commonwealth." Inasmuch

as the statute does not define the word "employee" or "employ" we must give these words their usual and ordinary meaning. *Mengel* v. *Justices, Superior Court*, 313 Mass. 238, 242. Although these words may have a flexible meaning, their definition will depend upon the context and the object to be accomplished by the statute in question. *Muise* v. *Century Indemnity Company*, 319 Mass. 172, 174.

In the case of *Griswold* v. *Director, Division of Unemployment Security*, 315 Mass. 371, 372, the court said that if one is performing service for another and is under the control and supervision of the latter, and is bound to obey his instructions, then he is the latter's employee.

In using the words "employed in any capacity by the commonwealth" the Legislature appears to use the word "employ" in a rather broad sense. The purpose of the Legislature was to screen and exclude from its service any persons who advocate the overthrow of the government by violence. The Legislature wished to guard against "fifth columnists" securing any kind of foothold in the government's service. In view of the above I think the student nurses described by you must be classed as being employed by the Commonwealth. They render a service and are under the control and supervision of the hospital authorities and receive some compensation for said service by way of maintenance.

If a person is actually in the service of the Commonwealth or a political subdivision thereof, an agreement that the former shall not be considered an employee cannot exclude said person from the operation of the abovementioned statute even though said agreement may be effective to exclude the operation of other statutory provisions. To decide otherwise would defeat the whole purpose of the statute in question.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Hospital Medical Officer — Limited Registration in Massachusetts, if Otherwise qualified.

APR. 6, 1950.

MR. WILLIAM H. J. ROWAN, *Director of Registration.*

DEAR SIR: — You have recently asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 112, § 9, under the circumstances hereinafter described.

Section 9 provides that an applicant for limited registration who, among other things, furnishes proof that he has been appointed an interne, fellow, or medical officer in some hospital, may be registered as a hospital medical officer; and he may practice medicine in that hospital or outside such hospital for the treatment, under the supervision of one of its medical officers who is a duly registered physician, of persons accepted by it as patients.

You state that at the head of the pathological department of a certain hospital is a man who had practiced medicine in another State for a number of years but has not been registered here. You wish to know whether such a person, having under his jurisdiction doctors and technicians in training, falls within the definition of interne, fellow or medical officer, so as to qualify for limited registration.

Unless these words have acquired a significant meaning in the medical profession, we must give them their ordinary meaning, having in mind the main object sought to be accomplished by the enactment. *Meunier's Case*, 319 Mass. 421. The general purpose of limited registration was to enable persons not yet qualified to register as full-fledged physicians to finish their training in some hospital and practice under the supervision of a duly registered physician attached to said hospital. Nevertheless, if an applicant has medical knowledge and training superior to that of a neophyte, he should not thereby be disqualified from registering under section 9.

Webster's Dictionary defines an "interne" as a resident physician, surgeon or officer in a hospital, especially one serving in preparation for independent practice. It defines "fellow" as one who is pursuing some special line of study, usually residing at the place of study. It defines "medical officer" as one holding a position of trust, ministration, or authority in matters relating to the healing art or the science of medicine.

The department head whom you describe would seem to fall within the definition of "medical officer" and therefore entitled to limited registration, if otherwise qualified.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Certain Legal Holidays in Suffolk County — Compensation for Work Performed on.

APR. 10, 1950.

Hon. THOMAS H. BUCKLEY, *Commissioner of Administration.*

DEAR SIR: — You have recently asked me for an opinion interpreting the effect of G. L. (Ter. Ed.) c. 4, § 7, cl. 18, as amended, and G. L. (Ter. Ed.) c. 30, § 24A, as amended, under the circumstances hereinafter described.

Chapter 4, § 7, cl. 18, designates certain state-wide legal holidays and requires the closing of all public offices on said days; and also provides that with respect to Suffolk County only, March seventeenth and June seventeenth shall be legal holidays, and that the public offices of certain municipalities and the county shall be closed on March seventeenth, and the public offices of the Commonwealth within the county shall close at twelve noon on March seventeenth but on June seventeenth all public offices in the county shall be closed.

Chapter 30, § 24A, provides that if any person employed by the Commonwealth is required to work on a state-wide legal holiday he shall be given an additional day off or an additional day's pay if the day off cannot be given by reason of personnel shortage or other cause.

You state that many of the State departments located in Suffolk County find it necessary to work their employees in Suffolk County on March seventeenth and June seventeenth. I understand further that unusual emergencies may arise on such holidays, such as damage to airport runways, bridges or highways, which require immediate repair for the public safety. I am informed that prior to the original enactment of G. L. (Ter. Ed.) c. 30, § 24A, in the year 1945 the practice was for the department heads to give compensatory time off to those who were required to work on

legal holidays. This was probably done to promote loyalty and efficiency of operation.

You wish to know whether a State department with offices in Suffolk County may give compensatory time off or an extra day's pay to its employees assigned for work in said county on March seventeenth or June seventeenth.

It is apparent that chapter 30, section 24A, provides for said day off or an equivalent day's pay only for work performed on state-wide holidays. I see nothing in the statute, however, which would prevent a department head from invoking the practice prevailing prior to 1945 whenever emergencies require the service of employees on March seventeenth or June seventeenth for the public health or safety. To do so would be quite commendable. Furthermore, if a department head can give compensatory time off, he can also give the alternative of an equivalent day's pay.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Definite Sentence of Woman to Reformatory for Women — Effect of Indefinite Sentence to be served On and After.

APR. 20, 1950.

Hon. ELLIOTT E. MCDOWELL, *Commissioner of Correction.*

DEAR SIR: — You have recently asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 279, § 18, as amended, under the circumstances hereinafter described. You state that on November 27, 1946, a woman was sentenced to five years and one day in the Reformatory for Women for robbery, and on the same date was sentenced for an indeterminate term at the same institution for the crime of adultery, the last named sentence to begin on and after the expiration of the sentence for robbery.

Prior to September, 1947, under G. L. (Ter. Ed.) c. 279, § 18, a woman sentenced to said Reformatory for adultery could be held therein for not more than five years unless sentenced for a longer term; but in September, 1947, section 18 was amended to provide that if a woman was sentenced to the Reformatory for adultery "she may be held therein for not more than two years."

You also state that this woman has been paroled by the Parole Board to start serving her sentence for adultery on January 19, 1950. You wish to know whether she is subject to the law which existed at the time of her sentence for adultery or to the present law.

If section 18, as amended, were an *ex post facto* law in its application to this woman, it would be inoperative. In *Commonwealth* v. *Phelps*, 210 Mass. 78, at 79 and 80, the court said:

" 'It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage; *Cummings* v. *Missouri*, 4 Wall. 277; *Kring* v. *Missouri*,

107 U. S. 221; but the prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition. Cooley, Const. Lim. (5th ed.) 329.' "

But a law mitigating the punishment of an offence is not *ex post facto*; it is an act of clemency. *Commonwealth* v. *Wyman*, 66 Mass. 237. *Murphy* v. *Commonwealth*, 172 Mass. 264, 269. The same is generally true as to statutes which relate to procedure or penal administration or prison discipline, even though the effect may be to enhance the severity of the confinement. *Duncan* v. *Missouri*, 152 U. S. 377.

In the case of *Commonwealth* v. *Gardner*, 11 Gray, 438, 445, the court said: "When the punishment is mitigated by a new act between the commission of the offence and the trial and sentence, the party may have the benefit of the mitigating law."

In the case of *Commonwealth* v. *McKenney*, 14 Gray, 1, 3, the court said: "A diminution of the punishment, after the act done and before conviction, does not prevent a judgment for the milder punishment."

In *Commonwealth* v. *Marshall*, 11 Pick. 350, 351, Shaw, C.J., said: "It is clear, that there can be no legal conviction for an offence, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment. If the law ceases to operate by its own limitation or by a repeal, at any time before judgment, no judgment can be given."

The above language indicates that if sentence is imposed before the enactment providing a milder punishment, the sentence cannot be altered except by executive clemency. The same would be true if the sentence, although imposed, had not yet taken effect because it was to begin on and after another sentence.

Under the present section 18, however, by its explicit phraseology, the woman in question if sentenced for adultery "may be held therein for not more than two years." A statute will be construed as having a prospective operation only, unless it indicates an intent that it shall operate retrospectively. *Greenaway's Case*, 319 Mass. 121. Section 18 seems to indicate this intent. I am therefore of the opinion that the Legislature intended that a woman already sentenced to your institution for adultery should not be held therein for more than two years.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Civil Service — Seniority Rights of Veterans — Appointment — Promotion.

APR. 27, 1950.

Hon. THOMAS H. BUCKLEY, *Commissioner of Administration.*

DEAR SIR: — You have recently asked me for an opinion interpreting the effect of St. 1949, c. 600, under the circumstances hereinafter described.

This statute amends St. 1941, c. 708, by adding a section 24B as follows:

"Any permanent employee of the commonwealth or any political subdivision thereof, who was eligible to be transferred or promoted to a higher

rating, either on a temporary or permanent basis, but his transfer or promotion was delayed because of service in the military or naval forces of the United States and the position actually was filled by an employee with less seniority on a temporary basis during said permanent employee's absence, and who passes a competitive promotional examination and receives a subsequent permanent appointment, shall thereafter have the same salary rating and seniority rights that he would have if his transfer or promotion had occurred at the time said position actually was filled by an employee with less seniority as aforesaid."

Recently an opinion was given to you analyzing St. 1941, c. 708, and its amendments, which I incorporate herein by reference.

You give the following facts: B, a permanent employee, enters the armed forces and is replaced by a military substitute, A, who has no seniority. Another employee, C, with seniority, would have been eligible for promotion to B's position if C were at home and not with the armed forces. B returns from the wars to his old position and A is dismissed. Four months later B is promoted and C is temporarily appointed to B's old position and subsequently qualifies permanently therefor. You ask four questions:

(1) May C, by virtue of St. 1949, c. 600, be placed on that salary schedule which A would be on if A had subsequently qualified for B's old position instead of C?

(2) Does St. 1949, c. 600, benefit a subsequently promoted incumbent where the previously appointed incumbent has no seniority, on the theory that one with no seniority has "less seniority" than one with some seniority?

(3) In using the phrase "less seniority" did the Legislature contemplate only a comparison between two or more employees, each with some seniority, in order to prevent one permanent employee from benefiting by the absence of another permanent employee with the armed forces?

(4) Does St. 1949, c. 600, modify G. L. (Ter. Ed.) c. 30, §§ 45 and 46 (which require salary ratings of employees according to years of service in the particular grades), so as to place employees returned from the wars in a salary schedule which would credit them with a longer period than actually served by them in such grade?

Your first question should be answered in the affirmative. I think C falls within the literal words of the statute. A literal construction of a statute should not be ignored unless it will thwart the purpose of the Legislature. *Cullen* v. *Mayor of Newton*, 308 Mass. 578; *Frye* v. *School Committee*, 300 Mass. 537. We should construe liberally all legislation intended to benefit those brave men and women who toiled, sweated, bled and risked their all in the service of their country.

If B and C returned from the wars together (the military substitute A being dismissed) and B was immediately promoted and C appointed to B's old position provisionally and then permanently after qualifying, the statute would undoubtedly give him the salary rating and seniority rights he would have acquired as of the date of A's appointment. The fact that B did not resign his old position till four months after his return did not take C out of the exact category described in the statute. C was a permanent employee and he was eligible for promotion to B's position on a temporary basis (as a military substitute) and, because C was with the armed forces, A, with less seniority, actually filled the position on a tem-

porary basis (as a military substitute) and C later actually passed a competitive promotional examination and received a permanent appointment to B's old position. He therefore comes within the exact words of the statute and would be entitled to the same salary rating and seniority rights he would have if he had been promoted at the time A was appointed.

Your second and third questions can be treated together. Let us assume X has five years' service, Y two years' service, and Z none. Clearly Y has "less seniority" than X and if Y received an appointment to which X was eligible, but which X had to forego because he was with the armed forces, the statute in question was intended to benefit X on his return, if he qualified for another permanent better position. The Legislature clearly did not intend to deprive him of these benefits if Z, with no seniority, instead of Y had received the appointment.

Your fourth question should not be difficult to answer. Although St. 1941, c. 708, as amended, uses the word "seniority" as referring to preferential treatment in relation to permanency of position, promotions, layoffs, and the like under civil service and not to monetary benefits as such, nevertheless, St. 1949, c. 600, specifically includes "salary rating." Under this statute the veteran's salary grade will not depend on his actual length of service.

To recapitulate, I answer your four questions as follows:

(1) Yes.
(2) Yes.
(3) No.
(4) Yes.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Civil Service — Seniority Rights as to Salary, Vacation and Sick Leave.

APR. 27, 1950.

Hon. THOMAS H. BUCKLEY, *Commissioner of Administration.*

DEAR SIR: — You have asked me for an opinion interpreting the effect of St. 1947, c. 11, and St. 1948, c. 447, under the circumstances hereinafter described.

You wish to know whether the word "seniority," as it appears in the two statutes, affects the rights of employees of the Commonwealth with respect to salary rates, vacation rights or sick leaves (which you state have always been decided on the basis of actual service) or only their rights as to permanency of employment, transfer, promotion, layoff or reinstatement.

The statutes in question are amendments to St. 1941, c. 708, as amended. It would therefore be helpful to abstract the pertinent sections of the latter enactment. The declared purpose of that act was to protect the rights of certain persons in the armed services of the United States.

Section 1 provides that any person who, after January 1, 1940, shall have terminated his service with the Commonwealth, or any political subdivision thereof, in order to serve in the armed forces of the United States, shall be

deemed to be on leave of absence until two years from the termination of his military service.

Section 2 provides that any person described in section 1 who is classified under civil service shall be reinstated without examination or loss of seniority rights if he makes a written request therefor within two years after the termination of his military service and files a medical certificate that he is not disabled; and all appointments, transfers and promotions made on account of such leave of absence shall be temporary, and the person so appointed, transferred or promoted shall be called a military substitute.

Section 3 provides that any person permanently appointed under civil service, after certification from an eligible list, who enters the armed forces before he begins his employment, shall be permanently employed on the termination of his military service, subject to a probationary period of six months, and provided he makes a request therefor in writing and files a medical certificate that he is not disabled.

Section 4 provides that any person whose name is on an eligible list at the time of his entry into the armed forces shall, on request within two years after the termination of his military service, be restored to the list for a period equal to the remainder of his term of eligibility; and, if a person is otherwise entitled to have his name on a list because of an examination before he enters the armed forces, he shall have the same right to be placed on the eligible list for the full period of eligibility provided he files a medical certificate that he is not disabled.

Section 8 provides that no person referred to in section 1 who has been separated from the service of the Commonwealth while a member of a retirement system shall be considered as terminating his membership in said system until one year after the termination of his military service.

Section 9 provides that any person referred to in section 1 who is reinstated to his former position or a similar position, as provided by this act, shall have credited to him as creditable service under any retirement or pension system or law under which he has actual or inchoate rights the period of his military service.

Section 13 provides that if a holder of a municipal office enters the armed forces and returns to office within two years after the termination of his military service, the period of his absence shall be included in computing the period of five years of continuous service required under G. L. (Ter. Ed.) c. 31, § 49A.

Section 24 provides that any person who is restored to the service of the Commonwealth, or any political subdivision thereof, within two years after his return from the wars shall be entitled to all seniority rights to which he would have been entitled if his employment had not been interrupted by his military service; and any such person whose salary is fixed under a classified compensation plan shall be eligible to a salary rate which shall include accrued step-rate increments to which he would have been eligible except for his absence in the military service.

Statute 1947, c. 11, adds a section 2B to St. 1941, c. 708, which provides that if a person whose name was on an eligible list at the time he entered the armed forces receives a permanent appointment and is given a seniority date later than that of another person who received a permanent appointment from such list but stood lower thereon, the director, on application for such change, may establish as the veteran's seniority date the seniority date of such other person.

Statute 1948, c. 447, is entitled "An Act relative to the compensation to be paid to certain veterans of World War II who received delayed promotions, and providing for the computation of seniority dates in connection with certain public officers and employees whose rights were prejudiced by their military or naval service." This act adds a section 24A and a section 2C to St. 1941, c. 708. Section 24A provides that any permanent employee of the Commonwealth, or any of its subdivisions, who was unable to compete in a competitive promotional examination or whose competitive promotional examination was delayed or postponed because of military or naval service and who after his return from the wars takes a qualifying promotional or competitive promotional examination as provided by law and is subsequently permanently promoted, shall upon such promotion receive the rate of compensation which he would have received had his promotion not been delayed by such service.

Section 2C provides that if a person at the time of his entrance in the armed forces has his name on an eligible list and receives a permanent appointment and is given a seniority date later than that of another person who received a permanent appointment from a list established from a subsequent examination which the former was unable to take because of his absence in the armed forces, the director, on application for such change, may establish as the seniority date of the veteran the seniority date of such other person.

Thus the protection given to persons who were in the public service at the time of their entry into the armed forces includes not only their tenure and civil service rights but also certain rights and privileges with regard to retirement contributions and salary. Persons who were not in the public service at the time of their entry into the armed forces but who were on civil service eligible lists for original appointment and who could not because of their military or naval service accept such appointment, or if appointed were prevented from commencing employment, were given certain more restricted rights, including, among others, extensions of eligibility for appointment or for the time of commencement of employment, after the termination of their military or naval service.

The provisions of St. 1947, c. 11, and St. 1948, c. 447, relate to this latter class; that is, to persons on civil service eligible lists for original appointment to positions in the public service and who were granted by other provisions of said St. 1941, c. 708, extended eligibility for such appointments.

The service to be counted in the fixing of the civil service, salary, retirement or other rights of an employee in the public service would ordinarily be actual service. That rule, however, has been changed, as stated, in certain respects with regard to persons who at the time of their entry into the armed forces were permanent public employees. However, as to persons who at the time of such entry were not actually appointed to positions in the civil service but were only eligible for original appointment thereto, the only changes effected by St. 1947, c. 11, and St. 1948, c. 447, were to provide for adjusting the civil service seniority rights of such persons who received original appointments after the termination of their military or naval service with relation to persons who were appointed from the same list but stood lower thereon (St. 1947, c. 11), or were appointed from a list established from a subsequent examination which the person in the military or naval service could not take (St. 1948, c. 447). The manner of adjusting those rights is to provide that an ap-

pointee covered by either statute who was given a seniority date later than that of a person who either stood lower on the same list or was appointed from such a subsequent list shall have the same seniority date as said other appointee.

"Seniority" is defined in G. L. (Ter. Ed.) c. 31, § 15D (inserted by St. 1945, c. 704), as amended, as follows: "For the purposes of this chapter, seniority of officers and employees in the official or labor service shall mean their ranking based on length of service, computed as provided in this section." The statute then provides that length of service of a permanent officer or employee shall be computed from the date of the original permanent appointment; and in the event of a change of service, whether by appointment, promotion or transfer from one department of the Commonwealth or a municipality to another, or from a municipality to the Commonwealth, or vice versa, the length of service shall be computed from the date of said change until the completion of one year's service in the position to which he is changed, at which time the length of service shall be computed from the same date from which computed immediately prior to said change.

To interpret these statutes we must follow the usual rules of statutory construction. We must seek the legislative intent from the words in which the statute is couched, giving them their ordinary meaning unless there is something in the statute indicating a different signification, from the pre-existing state of the common or statutory law, and the main object sought to be accomplished by the enactment. *Meunier's Case*, 319 Mass. 421; *Kneeland* v. *Emerton*, 280 Mass. 371, 376.

Furthermore, if reasonably practicable, a statute is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law. *Morse* v. *Boston*, 253 Mass. 247, 252; *Kelley* v. *Jordan Marsh Co.*, 278 Mass. 101, 111.

It would seem that wherever in the above-mentioned statutes the word "seniority" appears, it relates to "length of service" in its effect upon civil service benefits and privileges. It is generally understood in speaking of an employee's seniority that reference is made to his preference over other employees under the provisions of the civil service law, in eligibility for promotion or for retention in service in the event of a reduction in force. Under G. L. (Ter. Ed.) c. 31, § 15D, as amended, and also under the prior law, the seniority of a person who at the time of his entry into the armed forces was on an eligible list and whose eligibility was extended by St. 1941, c. 708, as amended, would, if it were not for St. 1947, c. 11, and St. 1948, c. 447, be measured from the date of his actual appointment.

It was to adjust the computation of the seniority of veterans under chapter 31, section 15D, that the Legislature adopted St. 1947, c. 11, and St. 1948, c. 447. This conclusion is fortified by an examination of some of the provisions of St. 1941, c. 708. We noted above that section 9 specifically declares that an employee who went to war and was reinstated on his return shall have credited to him as creditable service under any retirement or pension laws the period of his military or naval service. Section 24 provided that any returning veteran who is restored to State or municipal service shall be entitled to all seniority rights interrupted by his military or naval service and also salary increments which would have accrued if he had not been absent. If "seniority" was intended to relate to compensation, vacation allowances and sick leave, there would have

been no need to spell out the monetary benefits in sections 9 and 24. It is also significant that St. 1949, c. 600, amends St. 1941, c. 708, by adding a section 24B, which provides that a permanent employee who was eligible for promotion to a higher rating but said promotion was delayed because of his military or naval service would, on his return, under certain conditions have "the same salary rating and seniority rights" which he would have had under certain conditions prior thereto. It seems obvious the Legislature did not intend the words "seniority rights" to include "salary rating."

In an opinion of the Attorney General to the Police Commissioner of the City of Boston dated June 29, 1948, it was held that St. 1947, c. 11, related "to the workings of the civil service law, and the seniority dates referred to in said section, established by the Director of Civil Service, are established for the purpose of fixing seniority under the civil service laws only and have no application to the estimate of compensation or vacation allowances under St. 1947, cc. 146 and 342."

As stated in that opinion, St. 1947, c. 11 (and it follows also St. 1948, c. 447), deals with the basis for seniority in the application of the civil service law; and it has no application, since there is no reference thereto, to statutes under which salaries or other rights of an employee affected thereby are determined.

I am therefore of the opinion that the only change effected by St. 1947, c. 11, and St. 1948, c. 447, is to adjust for the purpose above described the rights of a returning veteran under the civil service laws to the same level as those of a person who was appointed from the same eligible list but stood lower thereon (St. 1947, c. 11), or who was appointed from an eligible list established from a subsequent examination which the returning veteran was unable to take because of his absence in the military or naval service (St. 1948, c. 447).

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Mystic River Bridge Authority — Construction Expense of Water Main — Question for Legislature.

MAY 16, 1950.

Hon. WILLIAM T. MORRISSEY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have requested my opinion "as to whether or not the Mystic River Bridge Authority should be required to pay all or part of the expense of constructing" a tunnel beneath the Mystic River in which to relay a 30-inch water main owned by the city of Boston and the commission, which by the demolition of the old Chelsea Street Bridge will be exposed to danger from navigation in the river. This main is not attached to the old Chelsea Street Bridge, which is to be demolished, but is carried on piles paralleling the bridge and passes under the main channel of the Mystic River in a tunnel beneath the draw of the old bridge.

Of course, it is not the function of the Attorney General to determine a question of policy such as the phraseology of your request presents, *i.e.* "whether or not the Mystic River Bridge Authority *should* be required to

pay all or a part of the expense of the construction" referred to. The determination of such questions of policy is for the Legislature. I have, however, examined the legislation, St. 1946, c. 562, under which the Mystic River Bridge Authority was authorized to construct a toll bridge to replace the existing Chelsea Street Bridge to determine what, if any, policy the Legislature may have established therein with respect to imposing upon the Bridge Authority the cost of any construction with relation to the 30-inch main.

A careful perusal of this statute convinces me that in enacting St. 1946, c. 562, the Legislature did not establish any policy with regard to an obligation on the part of the Authority to contribute toward the cost of constructing new structures for the carrying of this main. Indeed, it would appear from the wording of the chapter that the condition in which this main and its supporting structure would be left upon the demolition of the old Chelsea Street Bridge was not in the contemplation of the Legislature at the time St. 1946, c. 562, was under consideration. In any event, there is nothing in the provisions of that statute, as enacted, upon which to predicate any liability on the part of the Mystic River Bridge Authority to pay any part of the cost of the construction of the proposed tunnel.

Whether the Legislature should now determine, as a matter of policy, that the whole or any part of the cost of the construction of the tunnel should be borne by the Authority, *i.e.* should be financed from the payment of tolls, is a matter exclusively within the domain of the General Court. In dealing with this problem, however, the Legislature must have in mind the fact that since the Mystic River Bridge Authority has issued bonds to obtain the funds required by it, the resulting contract of the bondholders with the Authority cannot constitutionally be impaired and any provision made with regard to the cost of construction of the tunnel must be subordinate to the liability of the Authority and its tolls on the bonds already issued.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Metropolitan District Commission — Collateral Contract.

MAY 16, 1950.

Mr. FRED A. MONCEWICZ, *Comptroller.*

DEAR SIR: — You seek my opinion in reference to a schedule received by your office from the Metropolitan District Commission requesting a payment to the Heggie Corporation in the amount of $4,810.29.

From the facts submitted to me it appears that under the terms of a contract dated November 16, 1948, the commission was to pay to the corporation the sum of $2,736 for furnishing and installing a walkway support and trolley beam; the corporation was to pay the commission $930 for the privilege of dismantling and removing certain designated old tube boilers and salvaging for its own profit the metal obtained from the boilers, leaving an amount of $1,806 to be paid by the commission to the corporation.

I am further informed by the Metropolitan District Commission that the Heggie Corporation has fully performed and completed the original contract.

The Heggie Corporation instituted legal proceedings in the Superior Court for Suffolk County to recover damages suffered by it as a result of a collateral contract and agreement with the Metropolitan District Commission. Judgment in the amount of $3,004.29 was entered on May 3, 1950.

The matters contained in the collateral contract and agreement had to do with a subject matter entirely apart from the terms of the original contract.

On all of the foregoing I am therefore of the opinion that the amount to be paid to the Heggie Corporation is the combined total of the amount of the judgment, which is $3,004.29, and the full amount of payment called for in the original contract, namely $1,806, or a total amount of $4,810.29.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Public Works — Public Hearing on Highway Layout.

MAY 17, 1950.

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

DEAR SIR: — In a recent communication you requested my opinion as to whether certain changes in the proposed layout of a highway in the city of Boston adopted after a public hearing are such as to make it necessary for the Department of Public Works to hold another public hearing prior to making the layout.

In reply I advise that this matter is governed by G. L. (Ter. Ed.) c. 81, § 5, as most recently amended. Under this section the Department of Public Works is commanded to hold a public hearing of all parties interested in a proposed State highway in order that it may be determined that public necessity and convenience require that such way be laid out or taken charge of by the Commonwealth. In the instant case, a public hearing was held at which certain changes in the proposed layout were suggested and after due consideration were adopted. The department has now determined to construct the highway in accordance with the original layout as thus modified.

The facts set forth herein do not, in my opinion, necessitate another public hearing before the layout is recorded.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Civil Service — Promotional Examinations in Fire Forces — Terms of Statute Imperative.

May 18, 1950.

Mr. Thomas J. Greehan, *Director of Civil Service.*

Dear Sir: — You have asked my opinion as to whether or not a civil service examination for promotion to the grade of lieutenant in the fire forces of a city having a population under fifty thousand inhabitants may be limited by you, in the exercise of your discretion as Director of Civil Service, to those applicants who have served at least three years in the next lower grade.

The applicable statute relative to applicants who seek to take competitive promotional examinations in police and fire forces of cities and towns within the official service and in the detective force of the State Department of Public Safety and in the police force of the Metropolitan District Commission, which governs the answer to your inquiry, is G. L. (Ter. Ed.) c. 31, § 20, as most recently amended. This statute reads in part, with reference to promotional examinations, as follows:

". . . In cities and towns with a population of fifty thousand or under, such applicants shall not be eligible to take any such examination unless they have been employed in the lower grade or grades admitted to the examination for at least one year. . . ."

The statute cited further provides that in cities and towns with a population in excess of fifty thousand inhabitants, applicants shall not be eligible to take such promotional examinations for the first grade above the lowest grade unless they have been employed in the lower grade for at least three years.

In my opinion, the express terms of the statute are to be construed as imperative and may not be varied, as a matter of discretion, by you in the performance of your duties as Director of Civil Service, but must be followed by you as set forth in the express language of the statute.

My answer, therefore, to your inquiry must be in the negative.

Very truly yours,
Francis E. Kelly, *Attorney General.*

Public Health — Licensing of Convalescent or Nursing Homes — Private or Charitable.

May 18, 1950.

Vlado A. Getting, M.D., *Commissioner of Public Health.*

Dear Sir: — You have requested my opinion as to whether or not convalescent or nursing homes and boarding homes for the aged, whether charitable or otherwise, must be licensed under the provisions of the statutory law of the Commonwealth.

Under St. 1948, c. 618, the Legislature repealed G. L. (Ter. Ed.) c. 121, § 22A, relating to the licensing of homes for the aged by the Department of Public Welfare. In the 1948 statute the Legislature amended G. L.

(Ter. Ed.) c. 111, relating to public health, by striking out sections 71 to 73, inclusive, and substituting therefor in that chapter two new sections.

The statute defines a convalescent or nursing home as follows:

"A convalescent or nursing home is defined as any institution, however named, whether conducted for charity or profit, which is advertised, announced or maintained for the express or implied purpose of caring for three or more persons admitted thereto for the purpose of nursing or convalescent care."

The statute defines a boarding home for the aged as follows:

"A boarding home for the aged is defined as any institution, however named, which is advertised, announced or maintained for the express or implied purpose of providing care incident to old age to three or more persons over sixty years of age who are not acutely ill or in need of medical or nursing care."

The penal section of G. L. (Ter. Ed.) c. 111, as amended by St. 1948, c. 618, reads as follows:

"SECTION 73. Whoever establishes or maintains, or is concerned in establishing or maintaining, a hospital, sanatorium, convalescent or nursing home or boarding home for the aged or is engaged in any such business, without a license granted under section seventy-one, or whoever being licensed under said section violates any provision of sections seventy-one to seventy-three, inclusive, or any rule or regulation made under section seventy-two, shall for a first offence be punished by a fine of not more than five hundred dollars, and for a subsequent offence by a fine of not more than one thousand dollars or by imprisonment for not more than two years. Duplicate licenses shall be posted conspicuously for institutions maintained at separate premises, even though they are under the same management."

Wholesome and reasonable laws may be passed by the Legislature under the police power of the State, which power has to do with public health, safety, morals and welfare.

"It is too well settled to require extended discussion that whatever rationally tends to the promotion and preservation of the public health is within the police power of the State. . . . The public thus are protected from being imposed upon by the ignorant or misled by the specious but unqualified." *Commonwealth* v. *Houtenbrink*, 235 Mass. 320, 323.

The statutory provisions, relative to the application of which you have sought my opinion, are wholesome and reasonable legislation in objectives and purpose, and clearly have to do with the public health and safety. They are to be construed in the light of common sense and sound reason. *Duggan* v. *Bay State Street Railway Co.*, 230 Mass. 370. They apply to homes conducted under charitable auspices as well as those conducted for private profit. They apply to homes existing at the time of the passage of the legislation as well as to those which came into being after the passage of the legislation. Their enforcement raises no sound question under constitutional *ex post facto* grounds.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Self-Insurers — Retrospective Operation of Statute — Reinsurance.

MAY 19, 1950.

Department of Industrial Accidents.

GENTLEMEN: — You have recently asked me for an opinion interpreting the effect of St. 1950, c. 351, in so far as it amends G. L. (Ter. Ed.) c. 152, § 25A, par (2) (*c*), inserted by St. 1943, c. 529, as later amended by St. 1949, c. 441.

As amended, the pertinent provisions of paragraph (2) (*c*) follow:

"As a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter to injured employees, every self-insurer shall make arrangements satisfactory to the department, by reinsurance, to protect it from extraordinary losses or losses caused by one disaster.

"Such reinsurance shall be in such amounts and form as the department may approve and shall be effected with a company as provided in section twenty of chapter one hundred and seventy-five, provided, the minimum amount shall be not less than five hundred thousand dollars. . . ."

You wish to know whether:

1. On the effective date of the amendment a licensed self-insurer whose reinsurance is less than $500,000 is required forthwith to furnish reinsurance up to said minimum of $500,000.

2. If the answer to the first question is in the negative, is a self-insurer required to meet the minimum as a condition to the renewal of his license after the effective date of the amendment?

Ordinarily a statute will be considered as having a prospective operation only, but if it appears that the Legislature intended the statute to operate retrospectively, it will have that effect. *Ring* v. *Woburn*, 311 Mass. 679; *Greenaway's Case*, 319 Mass. 121.

Before the amendment in question became effective the Department of Industrial Accidents could in its discretion require any self-insurer to provide security in such amount as it deemed necessary but no less than a specified minimum. The industrial hazards of different self-insurers undoubtedly vary in intensity and severity and would call for varying amounts of security.

Section 25A, paragraph (2) (*a*), provides, among other things, as follows:

". . . The department shall require an additional deposit or further security when the sum of the self-insurer's liability both incurred or to be incurred exceeds the deposit or any required reinsurance, or permit a decrease of said deposit provided the value of said deposit in no case shall be less than twenty thousand dollars. . . ."

A similar provision with respect to bonds is found in section 25A, paragraph (2) (*b*).

It seems clear that the Legislature contemplated that the industrial hazards of any particular employer may increase before his annual license as a self-insurer expires and thus require greater reinsurance protection. The import of said section 25A is to permit the department at any time to require a self-insurer to provide increased reinsurance.

In view of the above I conclude that St. 1950, c. 351, is retrospective in

its operation and obliges the department to require a self-insurer immediately to furnish the minimum amount of security.

I therefore answer your first question in the affirmative; and your second question will thus need no answer.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

University of Massachusetts — Dismissal of Non-Civil Service Employee — Veteran.

MAY 25, 1950.

Mr. JAMES W. BURKE, *Secretary, University of Massachusetts.*

DEAR SIR: — You have recently asked me for an opinion interpreting the effect of G. L. (Ter. Ed.) c. 30, § 9A, as inserted by St. 1946, c. 269, and amended by St. 1947, c. 242, under the circumstances hereinafter described.

Statute 1946, c. 269, took effect August 3, 1946, and provided that a non-civil service employee of the Commonwealth who is a veteran and who has held his position for not less than ten years shall not be dismissed except in accordance with the provisions of G. L. (Ter. Ed.) c. 31 (civil service law) to the same extent as if his position were classified under said chapter. St. 1947, c. 242, took effect July 9, 1947, and changed the ten-year period to three years.

You state that a veteran of World War II employed as a teacher by the University of Massachusetts since October 8, 1946, has been given notice that his services will be discontinued at the end of the college year. You wish to know whether his dismissal must be made in accordance with the provisions of G. L. (Ter. Ed.) c. 31, relating to notice, cause of dismissal and an opportunity to be heard.

The answer depends on whether or not the Legislature intended the three-year period in St. 1947, c. 242, to begin running after July 9, 1947, the effective date of the statute.

Ordinarily a statute will be construed as having a prospective operation only unless it appears from the main object sought to be accomplished by the enactment that the Legislature intended otherwise. *Ring* v. *Woburn*, 311 Mass. 679; *Greenaway's Case*, 319 Mass. 121.

Although we should be wary of attributing paternalistic motives to the Legislature, nevertheless, a most liberal construction should be given to legislation giving benefits or protection to those brave men and women who toiled, wept, bled and risked their lives for their Commonwealth and Nation. I therefore think the obvious purpose of the General Court was to protect from involuntary dismissal, except for cause, veterans who after the effective date of the statute shall have been in the service of the Commonwealth for at least three years, even though part of the three-year period ran before the effective date of the enactment. Your question must therefore be answered in the affirmative.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Constitutional Law — Compulsory School Attendance — Transportation of Children — Referendum Petition — Excluded Matters.

JUNE 8, 1950.

HON. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR: — You have requested my opinion relative to a referendum petition which was filed in your office as State Secretary by its proponents. This referendum petition seeks the repeal of St. 1950, c. 400, a legislative act recently passed by the Legislature.

You ask, in substance, whether or not the statute is one that may be lawfully placed on the ballot by you in your official capacity, under the referendum provisions in the Constitution, for submission to the voters at the biennial State election in November.

Chapter 400 bore an emergency preamble put upon it by the Legislature, and for that reason immediately became the law of the Commonwealth when His Excellency the Governor placed his official signature upon it May 4, 1950.

This statute provides:

"The first paragraph of section 1 of chapter 76 of the General Laws is hereby amended by striking out the last sentence and inserting in place thereof the following: — For the purposes of this section, school committees shall approve a private school only when the instruction in all the studies required by law is in English, and when satisfied that such instruction equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching, and, in order to protect children from the hazards of traffic and promote their safety, cities and towns may appropriate money for conveying pupils to and from any schools approved under this section.

"Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum."

A careful reading of the statute and study of chapter 400 leaves no doubt as to legislative purpose and intent in the final drafting and adoption of the statute as the law of the Commonwealth. The intention of this statute, *inter alia*, is to make attendance at private schools a sufficient compliance with the compulsory school attendance provisions of G. L. (Ter. Ed.) c. 76. It is a matter of common knowledge that chief among the private schools of this Commonwealth which, under the provisions of chapter 400, school committees shall approve if certain conditions therein specified are satisfied are so-called parochial schools, conducted under the religious aegis, providing certain religious services for their pupils and including instruction in religion in their daily curricula.

The words in the first paragraph of the statute under consideration providing that school committees, whose statutory function it is to approve

schools, shall not withhold their approval of any schools "on account of religious teaching" therein are impressive evidence of this legislative intention.

Article XLVIII of the Amendments to the Constitution of Massachusetts, The Referendum, III, section 2, *Excluded Matters*, provides:

"No law that relates to religion, religious practices or religious institutions . . . shall be the subject of a referendum petition."

No definition of "religion," "religious practices," or "religious institutions" is to be found in the Constitution of the Commonwealth. "These words in the Amendment are to be interpreted in the light of their context and of the Constitution and its Amendments as a whole. See *Raymer* v. *Tax Commissioner*, 239 Mass. 410, 412. They 'are to be given their natural and obvious sense according to common and approved usage.' *General Outdoor Advertising Co. Inc.* v. *Department of Public Works*, 289 Mass. 149, 158. *Opinion of the Justices*, 243 Mass. 605, 607; 308 Mass. 619, 626." *Opinion of the Justices*, 309 Mass. 555, 557. See *Debates in the Massachusetts Constitutional Convention of 1917–1918*, Volume II, pages 982, 983.

There can be no doubt that parochial schools, to which chapter 400 has reference, are "religious institutions" within the meaning of that expression in Article XLVIII, The Referendum, III, section 2, of the Amendments to the Massachusetts Constitution. It is also apparent that such schools are concerned with "religion" and with "religious practices" as those terms are commonly understood.

I am therefore impelled to the conclusion that the provision of chapter 400 which makes attendance at parochial schools sufficient compliance with the compulsory school attendance statute does come within the excluded matters specified in Article XLVIII. Hence, I must advise you that a referendum petition may not properly ask for a referendum to the people upon chapter 400 of the Acts of 1950, and I must therefore decline, in keeping with the Constitution, to prepare and furnish a summary of the statute in question to be placed upon the ballot at the biennial State election in November.

Upon the view here taken, it is not necessary for me to consider whether other provisions of chapter 400 come within the excluded matters of Article XLVIII.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Constitutional Law — Motor Vehicle Tax and Excise Revenues — Appropriations.

JUNE 13, 1950.

Committee on Ways and Means, House of Representatives.

GENTLEMEN: — You recently submitted to me a draft of a proposed act entitled: "An Act authorizing the Department of Public Works to do certain work to alleviate the traffic congestion on streets near the State House."

You request my opinion as to whether the cost of the projects outlined in said act may be paid out of the highway fund. Expenditures from the

highway fund are limited by Article LXXVIII of the Amendments to the Massachusetts Constitution, approved by the voters on November 2, 1948, which reads as follows:

"No revenue from fees, duties, excises or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than cost of administration of laws providing for such revenue, making of refunds and adjustments in relation thereto, payment of highway obligations, or cost of construction, reconstruction, maintenance and repair of public highways and bridges and of the enforcement of state traffic laws; and such revenue shall be expended by the commonwealth or its counties, cities and towns for said highway purposes only and in such manner as the general court may direct; provided, that this amendment shall not apply to revenue from any excise tax imposed in lieu of local property taxes for the privilege of registering such vehicles."

This provision of our Constitution was interpreted by the Supreme Judicial Court in an advisory opinion submitted to the Senate on March 30, 1949. So far as pertinent to the present question, the purposes for which the Legislature may expend the highway fund are "cost of construction, reconstruction, maintenance and repair of public highways and bridges."

In accordance with the provisions of the constitutional amendment and of the advisory opinion of the Supreme Judicial Court, I advise that the projects enumerated in the proposed act, with the exception of that contained in paragraph 2 thereof, are such as may be paid for out of the highway fund, but that the project contained in paragraph 2, to wit, to rebuild the entire parking area adjacent to the State House to adapt it for the parking of motor vehicles, is not a purpose so incidental to highways that its cost may be defrayed from the highway fund.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Public Utilities — Prosecution — Commercial Motor Vehicle Violations — Department Examiners and Investigators.

JUNE 14, 1950.

Hon. THOMAS A. FLAHERTY, *Chairman, Department of Public Utilities.*

DEAR SIR: — You have requested my opinion whether, under the provisions of G. L. (Ter. Ed.) c. 25, § 12F, as inserted by St. 1935, c. 405, § 1, and acts in amendment thereof, examiners of the Department of Public Utilities have a duty to enforce and to prosecute all violations of all laws relative to the operation of commercial motor vehicles, or whether the department is justified in directing them to enforce the provisions of, and to prosecute only violations of, G. L. (Ter. Ed.) c. 159B and of the rules and orders of the department passed pursuant thereto.

If examiners are under a duty to enforce and prosecute violations of all these laws, you further would like to be advised whether this applies to all commercial motor vehicles or only to commercial motor vehicles with

reference to which the department has granted a certificate under chapter 159B.

It is provided by section 12F:

"There shall be in the department, and under the general supervision and control of the commission, a commercial motor vehicle division which shall be under the charge of a director, who shall be subject to chapter thirty-one and the rules and regulations made under authority thereof. The commission shall appoint said director. Said division, subject to such supervision and control, shall perform such functions in relation to the administration and enforcement of chapter one hundred and fifty-nine B imposed upon the department by said chapter as the commission may from time to time determine by order duly recorded in the office of the commission and open to public inspection. Such an order may also provide for appeals to the commission from rulings and decisions of said director. The commission may employ such assistants and employees to serve in said division as it may deem necessary, and may assign for service in said division such number, not exceeding twenty-five, of investigators and examiners as it may deem necessary. Said investigators and examiners, with respect to the enforcement of the laws relating to commercial motor vehicles, shall have and exercise throughout the commonwealth all the powers of constables except the service of civil processes, and of police officers, and they may serve all processes issued by the courts, or the department or the director under chapter one hundred and fifty-nine B."

The commercial motor vehicle division established by this statute, like other administrative agencies, is purely a creature of the Legislature without inherent or common law powers. Employees of this division, therefore, can exercise only such authority as is conferred upon them by statute. In determining the scope of that authority it is necessary to observe the well-founded rule of statutory construction that only those powers are granted to administrative agencies which are expressly or by necessary implication conferred. *East St. Louis, C & W Ry.* v. *East St. Louis & C. R. Co.*, 361 Ill. 606. *State* v. *New Hampshire Gas & Electric Co.*, 86 N. H. 16. *Booneville* v. *Maltbie*, 272 N. Y. 40. *Northern Pac. Ry. Co.* v. *Public Service Commission*, 47 F. (2d) 778, (D. C. Ore. 1930).

It is my opinion that the extent of the powers of investigators and examiners of the commercial motor vehicle division is limited by the statute creating such positions to the enforcement and prosecution of violations of G. L. (Ter. Ed.) c. 159B, as inserted by St. 1938, c. 483, and of acts in addition thereto and amendment thereof, and of the rules and regulations established by the Department of Public Utilities pursuant thereto (see c. 159B, § 16). Thus, it is expressly provided in G. L. (Ter. Ed.) c. 25, § 12F, that the commercial motor vehicle division "shall perform such functions in relation to the administration and enforcement of chapter one hundred and fifty-nine B imposed upon the department by said chapter . . ." True it is that investigators and examiners of the division are given, with certain exceptions not material here, the powers of constables (see G. L. [Ter. Ed.] c. 41, § 94) and of police officers (see G. L. [Ter. Ed.] c. 41, § 98). But these powers are expressly limited by the statute to "the enforcement of the laws relating to commercial motor vehicles," which in the context must be taken to mean the provisions of chapter 159B.

I am not unmindful of Rule 13 of the "Rules and Regulations Established by the Massachusetts Department of Public Utilities under Authority of

Chapter 159B of the General Laws, as amended, Relating to Motor Carriers and Brokers as Defined in said Act" (see D. P. U. 6705). This rule, as most recently amended, provides:

"Holders of certificates, permits and licenses shall comply with all laws, ordinances, by-laws, and regulations relating to the operation of motor vehicles upon public ways and to the transportation of property."

Assuming that the adoption of such a rule is within the authority conferred upon the Department of Public Utilities by c. 159B, § 16, I am nevertheless of opinion that this rule does not empower investigators and examiners of the commercial motor vehicle division to enforce and prosecute violations, for example, of the provisions of G. L. (Ter. Ed.) c. 90, as such. Under Rule 13, *supra*, a violation of chapter 90, by a person subject to chapter 159B may be a violation of the latter statute also. The same act may constitute offenses against several statutes and the violation of each may be punished. *Commonwealth* v. *Harrison*, 11 Gray, 308. *Commonwealth* v. *Shea*, 14 Gray, 386. *Commonwealth* v. *Trickey*, 13 Allen, 559. *Commonwealth* v. *McCabe*, 163 Mass. 98. But the powers and responsibilities of investigators and examiners of the commercial motor vehicle division in such a case do not extend beyond the enforcement and prosecution of violations of Rule 13 of the department under c. 159B, § 21, which provides penalties for those who "knowingly or willfully" violate any provision of that chapter or any rule of the department adopted thereunder.

In view of the foregoing, it is not necessary to elaborate upon your further question.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

District Court Judge — Pension — Proration of Expense Appellate Service.

JUNE 20, 1950.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have requested my opinion relative to the proper method to be adopted in the matter of prorating among several counties of the Commonwealth the expense of the additional pension payment to be allowed a district court judge because of his district court appellate division service over a period of years. In your request you inform me that this opinion is necessary to assist the Division of Accounts in your department in the performance of its duties in auditing the accounts of county treasurers. You further inform me that the judge in question, who has resigned, has presided for a period of over ten years in a district court in the county of Bristol and has attained the age of seventy years. You also inform me that he has sat as a justice in the appellate division in his section of the Commonwealth for a period of over ten years. This appellate division of district courts comprises the counties of Norfolk, Plymouth, Barnstable, Bristol, Dukes and Nantucket, and that part of the county of Suffolk included in the jurisdiction of the Municipal Court of the West Roxbury District. G. L. (Ter. Ed.) c. 231, § 108, as most recently amended.

Under the provisions of G. L. (Ter. Ed.) c. 32, § 65A, as most recently amended, a district court judge who has attained the age of seventy years and who has served as a district court judge for at least ten years may retire upon pension for life at an annual rate equal to three-fourths of the annual rate of salary payable to him at the time of such retirement.

It is further provided in the statute under an amendment made by St. 1946, c. 525, that a district court judge who retires or resigns and who has served continuously for ten years prior to such retirement or resignation in the appellate division of a district court shall, in addition to all other amounts received under the statute, be entitled to receive a pension for life equal to three-fourths of the average annual compensation paid him for such appellate division service during the ten years next preceding such retirement or resignation.

The district court judge who has resigned is entitled to be paid the normal pension which is based upon his service in the district court to which he was appointed, and this pension is to be paid by the county where that court is located and which paid him his salary. The part of the pension of the judge, in addition to his normal pension, for judicial services on the appellate division should be prorated on the basis of the actual judicial services rendered to each of the several counties, within the appellate division to which he was assigned, and on the basis of the respective amounts paid him for such services by each of the several counties concerned.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

Racing — License — Essex Agricultural Society.

JUNE 30, 1950.

State Racing Commission.

GENTLEMEN: — Reference is made to your recent letter wherein you request an opinion concerning the following matter:

On April 13, 1950, your commission voted to grant a license to conduct a dog racing meeting, in connection with an exhibition for the extension and encouragement of agriculture, to the Essex Agricultural Society at the Topsfield Fair Grounds, from September 4 to 9, 1950, both dates inclusive.

You have asked the following three questions:

"1. In view of the zoning by-laws of the town of Topsfield is the vote of the commission at the meeting held on April 13, 1950 a legal action — and if so may the commission issue the certificate of license to the Essex Agricultural Society?

"2. Does the action of the commission by vote of April 13, 1950 conflict with the provisions of G. L. c. 128A, § 3 (*o*)?

"3. Is it proper for the commission to issue the certificate of license to the Essex Agricultural Society and allow this society to conduct a dog racing meeting in connection with the Topsfield Fair, September 4 to 9, 1950, both dates inclusive?"

General Laws (Ter. Ed.) c. 128A, § 3 (*o*), reads as follows:

"No licenses shall be issued to permit dog racing meetings to be held or conducted in any location where the surrounding property is substan-

tially of a residential character, as determined by or defined by a zoning ordinance or by-law, if any, controlling such location."

The prohibition set forth in the law is effective when the property surrounding the location where the dog racing meeting is to be held is substantially of a residential character and, as the law indicates, this determination is made by the zoning by-law itself. In referring to the town of Topsfield zoning by-laws, I find that in addition to the classification of a business district there is a classification for central residential district and a separate classification for outlying residential and agricultural district. Bearing in mind these classifications, it appears that the surrounding property where the meeting is to be held is not substantially of a residential character as determined by the zoning by-laws and consequently the prohibition set forth in G. L. (Ter. Ed.) c. 128A, § 3 (*o*), is not applicable.

The zoning by-laws of Topsfield, Section V, relating to non-conforming uses, and Section VI, relating to prohibited uses, are referred to. Section V, paragraph 2, reads:

"In no event shall a non-conforming use of a building structure or use of land or premises be changed, altered, enlarged, extended, or be held to include racing with pari-mutuel betting except to the extent already in use for a period not to exceed six (6) days at the Essex Agricultural Fair, but to no greater extent."

Section VI reads:

"No property shall be used for racing with pari-mutuel betting except to the extent already in use for a period not to exceed six (6) days at the Essex Agricultural Fair, but to no greater extent."

Harness horse racing has been conducted on the premises for several years. Under licenses issued to the Essex Agricultural Society, harness or running horse racing meetings, including night racing, have been held in 1946, 1947, 1948 and 1949 at the location in question.

The language of these by-laws does not distinguish or separate horse racing from dog racing but refers to "racing with pari-mutuel betting." The language does not indicate a prohibition against dog racing and from all the facts and circumstances submitted by you there does not appear to be a legal objection to the vote of your commission on April 13, 1950, and I therefore answer your questions as follows:

1. The vote of the commission on April 13, 1950, is a legal action and the commission may issue a certificate of license to the Essex Agricultural Society.
2. The action of the commission by vote of April 13, 1950, does not conflict with the provisions of G. L. (Ter. Ed.) c. 128A, § 3 (*o*).
3. It is proper for the commission to issue the certificate of license to the Essex Agricultural Society and allow this society to conduct a dog racing meeting in connection with the Topsfield Fair, September 4 to 9, 1950, both dates inclusive.

Very truly yours,
FRANCIS E. KELLY, *Attorney General.*

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