Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1951

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

900-12-'52-908281

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 28, 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, 1951.

Respectfully submitted,

FRANCIS E. KELLY,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

State House

Attorney General
FRANCIS E. KELLY

Assistant Attorneys General

TIMOTHY J. MURPHY
FRANCIS J. ROCHE[1]
HENRY P. FIELDING
CHARLES ALPERT[2]
GARRETT J. BARRY[3]
WILLIAM S. KINNEY
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LAWRENCE E. RYAN
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JEANNETTE CHISHOLM SULLIVAN

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

Administrative Legal Consultant to the Attorney General
JAMES J. KELLEHER

Director of Division of Collections
W. FORBES ROBERTSON[7]

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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] Deceased May 28, 1951.
[4] On leave of absence.
[5] Appointed Dec. 1, 1950.
[6] Appointed Oct. 11, 1950.
[7] Deceased, June 6, 1951.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1950, to June 30, 1951

Appropriations.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	240,590 00
Claims, Damages by State Owned Cars	15,782 00
Small Claims	8,000 00
Unclaimed Bank Deposits Recovery	8,410 92
New York, New Haven and Hartford Railroad Investigation	15,000 00
Veterans' Legal Assistance	20,000 00
Total	$319,782 92

Expenditures.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	235,668 08
Claims, Damages by State Owned Cars	15,780 74
Small Claims	7,997 98
Unclaimed Bank Deposits Recovery	341 12
New York, New Haven and Hartford Railroad Investigation	14,907 61
Veterans' Legal Assistance	15,161 08
Total	$301,856 61

Financial statement verified (under requirements of c. 7, § 19, of the General Laws), November 29, 1951.

By JOSEPH A. PRENNEY,
For the Comptroller.

Approved for publishing.

FRED A. MONCEWICZ,
Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 28, 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, 1951, totaling 16,159, are tabulated as follows:

Extradition and interstate rendition	90
Land Court petitions	110
Land damage cases arising from the taking of land:	
Department of Public Works	525
Metropolitan District Commission	52
Department of Mental Health	2
Armory Commission	1
Miscellaneous cases, including suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5,189
Estates involving application of funds given to public charities	815
Settlement cases for support of persons in state hospitals	65
Pardons:	
Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127, § 152, as amended	123
Workmen's compensation cases, first reports	4,761
Cases in behalf of Division of Employment Security	1,406
Cases in behalf of Veterans' Division	3,020

During the year the Attorney General and his staff of assistant attorneys general, in compliance with the provisions of G. L. (Ter. Ed.) c. 12 as well as other provisions of law, have appeared in the courts of the Commonwealth for State departments, boards, commissions and officers in the prosecution or defense of suits and other civil proceedings in which the Commonwealth is a party or in which it has an interest. In many of these civil proceedings the acts and doings of such departments, boards, commissions and officers are called in question, especially where extraordinary remedies are resorted to by parties petitioner.

An important duty of the Attorney General is the rendering of formal official opinions to the Governor, to the twenty State departments of the Commonwealth and to the various divisions thereof, as well as to commissions, boards and other public officers of the State. In addition to the formal opinions of the Attorney General, a great number of informal written opinions have also been rendered by assistant attorneys general for the purpose of aiding such officials in the sound performance of their

duties. Constant conferences on questions of law and procedure have taken place between the Attorney General or assistant attorneys general and officers of these various State agencies. There have also been many contacts during the year by the office of the Attorney General with legislative committees in the matter of legal opinions and advice relating to existing as well as prospective laws.

The increase in administrative boards during recent years has materially created burdens with which the office of the Attorney General must concern itself. This additional work for reasons of efficiency requires the assignment on full time of a number of assistant attorneys general.

As part of their duties several of the assistant attorneys general are called upon, by virtue of statutory provisions, to sit as members of certain administrative boards. On frequent occasions they are also called upon to appear before, and conduct hearings before, State commissions and boards and to give advice on the law with reference to such hearings.

Public Utilities.

Due to greatly increased costs for material and labor, many of the public utilities have sought increases in rates from the Department of Public Utilities. In cases where that department has seen fit to grant increases which were somewhat less than requested, utility companies have in some instances sought relief from the Supreme Judicial Court under G. L. (Ter. Ed.) c. 25, § 5, relative to the claims set up by them of confiscatory rates. At all times I have emphasized that the public interest should be the determining factor in the court proceedings — that is to say, that the rates must be ultimately determined on the basis of the value of the service to the consumer. As a matter of law, although a utility is entitled to a fair return on its investment in property devoted to the public use, no service is worth more than its value to the user or the people as a whole. The record indicates that my efforts as Attorney General have resulted in substantial savings to the general public and at the same time have assured the public utilities sufficient returns to enable them to perform their duty of rendering efficient and satisfactory service to the citizens of the Commonwealth.

Obscene Literature.

The endeavor to stem the tide and growth of obscene literature, especially that type of cheap books which falls, unfortunately, into the hands of school children, has proceeded by reasonable and sensible means quietly and effectively during the year. The main efforts of the office of the Attorney General have been made with reference particularly to juvenile reading of a corrupt character which is considered to be of a nature likely to lower the morals of youth. This movement, established when I first assumed office, is carried on in such a way as not to advertise the objectionable publications called into question. Under this system, publishers and book sellers have had placed upon them the obligation and duty of volun-

tarily cleaning their own houses. In this effort they have given commendable co-operation to the committee of civic-minded men and women called into existence by me as Attorney General several years ago. While a great advance has been made in the last three years in the practical prevention of undesirable and corrupt cheap-priced books falling into the hands of the young, much work yet remains to be done to eradicate the evil. Watchful care and constant and sustained effort will continue to be necessary to attain and maintain the desired result. That result I shall constantly seek to reach and maintain while I am the Attorney General of this Commonwealth. Constant and vigorous alertness and sound watchfulness must be ever ready to deal with cases where literature ends and pornography begins.

Town By-Laws.

An assistant attorney general has been assigned to devote a considerable portion of his time to examine carefully all proposed town by-laws which, under the laws of the Commonwealth, can not become effective until they have received the approval of the Attorney General. By-laws which infringe upon the freedom of speech, the freedom of the printing press, or the freedom of religion will be, as heretofore under my administration, promptly disapproved by me as Attorney General.

Veterans.

During the past year the veterans' division in the Department of the Attorney General has functioned daily with commendable devotion to the purposes for which it was instituted. In dealing with special problems and various interests of veterans, over three thousand matters pertaining to veterans have been handled during the year. This important work has been of great advantage to many of those who have served their country in the armed forces of the Nation in time of war. Results emphatically warrant that this work be carried on.

Communism.

The world-wide evils of Communism and the dangers thereof to the institutions and concepts of the form of government under which we enjoy manifold blessings, freedom and liberty, perhaps to a greater degree than in any country in the world, must have the undivided attention not only of public officials but of all good citizens throughout the days to come. The office of the Attorney General stands ready to combat the evils of Communism, under whatever name or disguise, when facts warranting active procedures present themselves.

Conclusion.

To His Excellency the Governor of the Commonwealth, to the Legislature, and to all the other constitutional officers of our State government I wish to express my appreciation of their helpful co-operation during the

past year. To the assistant attorneys general who have served ably and faithfully in the performance of their public duties during the year I commend their work with appreciation. I have also noted and express my appreciation of the faithful and efficient work of the civil service employees and others in the Department of the Attorney General, including the chief clerk and the confidential secretary of the Attorney General.

As I have heretofore said in my annual reports, to serve the people of the 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.

Public Works — Charles River Bridge — Right to lay Gas Main — Constitutional Law.

JULY 13, 1950.

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

DEAR SIR: — You have asked me for an opinion interpreting the effect of the law under the circumstances hereinafter described.

You state that the Massachusetts Pipe Line Gas Company was created by St. 1896, c. 537, and that section 4 of said act declared:

"The company may . . . subject to the conditions hereinafter set forth, lay, construct, . . . and operate its pipe lines . . . in, along, through, under, across or over any public ways, water courses . . . canals, bridges or subways; . . . But nothing herein shall be construed as authorizing the location . . . in, over, through, under or upon any subway, navigable water course, cemetery or public park . . . until said company has first obtained the consent of the . . . authorities having control of such subways, cemeteries, navigable water courses, parks . . ."

and that section 5 of said act, as amended by St. 1903, c. 417, § 9, provided that if the company desired to operate its pipe lines through the public ways of a city or town it might petition the aldermen or selectmen for permission to do so and may appeal an adverse decision to the Board of Gas and Electric Light Commissioners, which could in turn grant such locations as it deemed proper.

You further state that the Boston Consolidated Gas Company (which, in its consolidation by St. 1903, c. 417, succeeded to all the rights of the Massachusetts Pipe Line Gas Company) wishes to lay a thirty-six inch gas pipe on the Charles River bridge (and its approaches), which is a part of the proposed Central Artery project in Boston; and that to permit this would require the redesign of a heavier and stronger structure, thereby increasing the cost of the bridge and approaches.

You wish to know whether section 4 of St. 1896, c. 537, would give this right without the permission required by G. L. (Ter. Ed.) c. 81, § 21, which provides that "no state highway shall be dug up . . . or obstruction or structure placed thereon . . . without the written permit of the department" of public works.

All statutes must be construed according to the legislative intent appearing from the language thereof in connection with the subject matter and object to be accomplished. *Commonwealth* v. *Welosky*, 276 Mass. 398, 401, 402. *National Fire Insurance Co.* v. *Goggin*, 267 Mass. 430, 436. Furthermore, statutes should be interpreted in conjunction with other applicable statutes to the end that there may be an harmonious and con-

sistent body of law. *Morse* v. *Boston*, 253 Mass. 247, 252. *Kelley* v. *Jordan Marsh Co.*, 278 Mass. 101, 111.

Statutes apparently inconsistent with each other, in whole or in part, must be construed so as to give reasonable effect to both, unless there be some positive repugnancy between them. *Brooks* v. *Fitchburg & Leominster St. Ry.*, 200 Mass. 8, 17.

Following these principles are opinions of former Attorneys General. In I Op. Atty. Gen. 317, there was a seeming conflict between St. 1893, c. 476, § 14 (the forerunner of the aforesaid G. L. [Ter. Ed.] c. 81, § 21), which required consent of the Massachusetts Highway Commission for digging State highways for the purpose of laying or placing pipes, sewers, posts, wires, rails, or for other purposes, and Pub. Sts. c. 113, § 7, which gave selectmen and aldermen the right to grant franchises for street railways. That opinion declared that aldermen and selectmen could determine the wisdom of granting such franchises for the operation of railways over the public highways within their respective municipalities even if said ways were State highways, but the consent of the Massachusetts Highway Commission would still have to be procured for construction on such State highways.

In III Op. Atty. Gen. 242 the town of Plainville was authorized by St. 1908, c. 404, to construct for its water supply, aqueducts, conduits, pipes, and other works over any land, water courses, and public or other ways; and for said purpose to dig up or raise and embank any such lands, highways, or other ways. R. L. c. 47, § 11, provided that no structure shall be placed on a highway except in accordance with a permit from the Massachusetts Highway Commission. That opinion declared that St. 1908, c. 404, did not give authority to dig open a State highway without the permission required by R. L. c. 47, § 11.

You also state that permits under said G. L. (Ter. Ed.) c. 81, § 21, have heretofore been required by your department before structures could be placed upon bridges which were part of State highways. This is significant where the language of a statute is ambiguous. In such event, the contemporaneous construction placed thereon by an officer charged with the performance of public duties is strong evidence of its meaning. *Burrage* v. *County of Bristol*, 210 Mass. 299, 301. *Bolster* v. *Com'r of Corp'ns & Tax'n*, 319 Mass. 81, 86.

It is contended, however, that in section 4 of St. 1896, c. 537, consent of certain authorities to construct pipe lines is specifically required as to water courses, railways and subways but no such consent is mentioned as to public ways, canals, or bridges; and therefore the absence of such specific reference means consent was not required.

Such a construction would lead to the absurd result, however, that under chapter 81, section 21, the Department of Public Works could withhold consent to lay pipe lines under a State highway leading to a bridge which was part of said highway (action I understand the gas company concedes is proper), but could not interfere with the construction of massive and unsightly pipes on the bridge itself. If it were contended that in accordance with the literal construction of section 4 of St. 1896, c. 537, the consent of the Department of Public Works was not necessary even as to laying pipes under a State highway, then again the result would be incongruous. If the gas company had to use the ways of a city or town for its pipes, it would need permission under section 5, but when local ways joined or intersected a main artery of travel (controlled by the

Department of Public Works) located within said town, no permission would be required to dig into the State highway. 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.

A strictly literal construction of a statute should not be adopted if the result will be to thwart or hamper the obvious purpose of the statute, and if another interpretation is possible which will not have that effect. *Frye* v. *School Committee of Leicester*, 300 Mass. 537. *Cullen* v. *Mayor of Newton*, 308 Mass. 578. Furthermore, it is questionable whether the Legislature could constitutionally give to one private person the untrammeled and unrestricted right to perform acts which may very well inflict a burdensome use upon a public highway.

I therefore answer your question in the negative.

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

Administration and Finance — Emergency Employee — Overtime Compensation.

AUG. 11, 1950.

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

DEAR SIR: — You have asked my opinion interpreting the law under the circumstances hereinafter described.

You state that an emergency employee is one who is appointed for only thirty working days under G. L. (Ter. Ed.) c. 31; that the Civil Service Commission has ruled that said thirty-day period is thirty working days and not thirty calendar days; that if said employee does not work on any of said days he is not paid; and that the appointing authority may thus keep him employed until he has worked thirty such days.

In your request for my opinion you propound two questions:

"1. If such emergency employee works on a holiday, is he entitled to a day's pay?

"2. If such emergency employee works more than eight hours on one day and more than forty hours in one week is he entitled to overtime pay?"

General Laws (Ter. Ed.) c. 30, § 24A, provides that if any person employed by the Commonwealth is required to work on a statewide holiday 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.

General Laws (Ter. Ed.) c. 149, § 30, 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.

Section 30A of said chapter provides that the service of all persons employed by the Commonwealth, with certain exceptions, is restricted to five days in any one week and no 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.

On March 10, 1950, I gave you an opinion with reference to other aspects of the subject matter involved in your present request. The following quotation from that opinion is here pertinent:

"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 said 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 days.

"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."

It would appear from the foregoing intendment of the Legislature that an emergency employee would come within the description of those entitled to an extra day's pay under said chapter 30, section 24A, and to overtime pay under said chapter 149, section 30A. There does not, however, appear to be any provision of law granting overtime pay for work in excess of eight hours on any one day.

I therefore answer your first question in the affirmative and your second question in the affirmative only as to work of more than forty hours in any one week.

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

Administration and Finance — State Employees — Military Reserves — Payments by State.

AUG. 21, 1950.

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

DEAR SIR: — You have asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 33, §§ 11, 54 and 105, and St. 1941, c. 708, under the circumstances hereinafter described.

You state that a number of employees of the Commonwealth are members of the National Guard, organized reserve of the Army of the United States, Naval Reserve forces, or Officers' Reserve Corps; and that many of them may soon, if not already ordered to do so, be required to leave

their employment and render active service with their respective organizations for periods ranging from five to ninety days.

You also state that on January 26, 1940, the then Attorney General rendered an opinion to the then Commissioner of Public Works to the effect that an employee of the Commonwealth who was ordered to Fort Benning, Georgia, as a student for the National Guard and Reserve Officer's course for a three months' period would be entitled to his pay from the Commonwealth during his period of service with the organized militia.

You wish to know:

1. Whether St. 1941, c. 708, has limited the effect of said opinion of January 26, 1940.
2. What are the rights of members of the organized reserve of the Army of the United States and the Naval Reserve forces?
3. What are the rights of members of the Officers' Reserve Corps of the United States Army or Navy?
4. How are the rights of the foregoing personnel affected by the fact that they are serving the Commonwealth on a temporary or emergency basis or as public officials?

General Laws (Ter. Ed.) c. 33, § 54, provides:

"Any person in the service of the commonwealth . . . shall be entitled during the time of his service in the organized militia, under sections eleven, seventeen, eighteen, nineteen, one hundred and five or one hundred and fifty-four, or during his annual tour of duty of not exceeding fifteen days as a member of the organized reserve of the army of the United States or of the United States naval reserve forces, to receive pay therefor, without loss of his ordinary remuneration as an employee or official of the commonwealth . . ."

Section 6 of chapter 33 provides that the organized militia shall be composed of . . . the land forces as defined in section 66 and the naval forces; and section 66 provides that the land forces shall consist, among others, of the active and inactive National Guard.

Section 11 of chapter 33 provides that the Commander-in Chief "may order out any part of the organized militia for escort and other duties."

Sections 17, 18 and 19 provide that the Commander-in-Chief may call out the organized militia to deal with invasions, insurrections, tumults, riots or public catastrophes.

Section 105 provides: "The land forces shall perform during each year not less than fifteen days' training under service conditions at times and places designated by the commander-in-chief."

Section 154 provides that the Commander-in-Chief may prescribe the terms and conditions under which, and the types of duty for which, officers and enlisted men of the naval forces shall be entitled to receive compensation and transportation.

Provisions are made in St. 1941, c. 708, for the protection of those employees of the Commonwealth who, after January 1, 1940, terminated their services with the Commonwealth to serve in the armed forces of the United States.

The opinion of the Attorney General of January 26, 1940, rightly declared that a person in the service of the Commonwealth who was a mem-

ber of the organized militia and was ordered by the Commander-in-Chief of the Commonwealth to perform duties under chapter 33, section 11, or to submit to a tour of training under section 105, was entitled to his State pay for the period of his ordered duty, even though it exceeded fifteen days.

It seems clear from the language of section 54 that the Legislature wished to preserve to the full the State pay of its servitors who were part of its own military forces as distinct from the military or naval branches of the Federal Government. As to the latter, the Legislature wished to preserve only fifteen days of such State pay. Section 54 specifically states: "Any person in the service of the commonwealth . . . shall be entitled, during the time of his service in the organized militia . . . to receive pay therefor, without loss of his ordinary remuneration as an employee or official of the commonwealth. . . ." Section 54 also states: "Any person in the service of the commonwealth . . . shall be entitled . . . during his annual tour of duty of not exceeding fifteen days as a member of the organized reserve of the army of the United States or of the United States naval reserve forces, to receive pay therefor, without loss of his ordinary remuneration as an employee or official of the commonwealth . . ."

When, however, the members of the organized militia or of the Army or Naval Reserves are inducted into the Federal military or naval service section 54 is no longer operative as to them; and St. 1941, c. 708, would not be applicable.

I therefore answer your questions as follows:

1. Statute 1941, c. 708, does not apply and does not limit the effect of the Attorney General's opinion dated January 26, 1940.

2. Members of the organized reserve of the United States Army and Naval Reserve forces are entitled to their State pay during their annual tour of duty but not exceeding fifteen days.

3. The members of the Officers' Reserve Corps of the United States Army or Navy are a part of the organized reserve of the United States Army or Navy and therefore entitled to the same rights as those described in the preceding answer.

4. The State pay should run for that period of time during which the employee or public official would have been serving the Commonwealth but for the interruption of his service by the performance of the duties described above.

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

Metropolitan District Commission — Police Officers — Overtime Service — Appropriations — War.

OCT. 24, 1950.

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

DEAR SIR: — You ask my opinion whether you have the right to pay the police officers of your department for overtime service rendered by them, especially since money has been appropriated for this purpose.

We must ascertain the intention of the Legislature in this regard by giving the words used in statutes their ordinary meaning, having in mind the main object sought to be accomplished by the enactments. *Meunier's Case*, 319 Mass. 421. We must also look beyond the letter of the statute where a strictly literal construction would be inconsistent with the legislative intent. *Price* v. *Railway Express Agency*, 322 Mass. 476, 484. *Cullen* v. *Mayor of Newton*, 308 Mass. 578.

It is generally conceded that department heads have the right to determine the "established hours of service" of the employees in their respective departments. Prior to any statutory provisions limiting the number of hours of the work week of certain employees and providing for overtime, no employee (with certain exceptions) could be ordered to work beyond said established hours without his consent. In order, however, to promote efficiency and to achieve the purposes for which the department was created it could very well be argued with some force that the department head should have implied or ancillary authority in emergencies to secure and compensate overtime labor, provided the department had received an appropriation for that purpose.

Police officers also have "established hours of service," even though they are subject to call when not on actual duty. The only difference between them and other employees with respect to overtime service is that the latter must give their consent to perform said overtime service. The question of compensation, however, should be dealt with in the same manner. All employees receive a base pay for an established number of hours of service. Any service rendered in emergencies beyond these hours should be compensated for.

This principle was recognized in 1943 when the Commission on Administration and Finance, with the approval of the Council, promulgated rules and regulations requiring the payment of overtime to any employee for the duration of the war and one year thereafter; and if the employee's total service exceeded forty-eight hours he was to receive time and a half his regular basic rate for such services in excess of forty-eight hours per week.

From a technically legal point of view World War II has not yet been declared at an end and the aforesaid rule is operative.

It is contended, however, that the Legislature intended otherwise, because G. L. (Ter. Ed.) c. 92, § 62, gives the police in your department one day off in six; and because G. L. (Ter. Ed.) c. 149, § 30A, providing for overtime in excess of forty hours in the week, excludes the Metropolitan District Commission police. That is a *non sequitur*.

Before the enactment of the statutes giving police so many days off without loss of pay and giving other employees forty-eight and forty-hour work weeks, we have seen that the heads of departments had the power to establish reasonable schedules of working hours. The only effect of the above statutory provisions is to impose limitations on said established schedules.

Furthermore, the fact that the Legislature appropriated money for such overtime in your department is declaratory of the Legislature's interpretation of its own acts.

It also appears that at the request of the Metropolitan District Commission the Division of Personnel and Standardization in the Department of Administration and Finance has since 1945 approved payment for overtime service rendered by the police in your department. It has been

held that the construction of a statute by an officer thereby charged with the performance of public duties is strong evidence of its meaning. See *Burrage* v. *County of Bristol*, 210 Mass. 299, 301.

I therefore answer your question in the affirmative.

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

Veterans' Services — Military Settlements — War — Veterans' Benefits.

NOV. 1, 1950.

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

DEAR SIR: — You ask my opinion as to whether G. L. (Ter. Ed.) c. 116, relating to military settlements, is applicable to those serving in the Korean War. The answer will depend upon the intention of the General Court as gleaned from G. L. (Ter. Ed.) c. 116, § 1, cl. 5, and St. 1950, c. 797. It will be helpful to examine the ancestral legislation culminating in the present law.

The first statutory provision in this connection was St. 1865, c. 230, § 1, which was intended to assist those who served in the Civil War. This statute provided that a settlement would be acquired if the soldier or sailor had been duly enlisted and mustered into the military service of the United States as part of the quota of the city or town in which the settlement was claimed, and provided he was an inhabitant of such city or town and had resided therein for six months prior thereto, and had continued in such service for at least one year.

In *Bridgewater* v. *Plymouth*, 97 Mass. 382, at 390, the court, in interpreting the statute, said:

"The legislature intended the act to embrace every man who at any period served and went to make up the quota . . . Every soldier who was eventually credited to any municipality as a part of its quota, rendered to it the public service in return for which the privileges of a legal settlement therein have been conferred by the act under consideration. The same benefit has been received by the town, and the same rights were given by the statute, whatever may have been the date of the enlistment and mustering into the army."

Statute 1866, c. 288, amended the 1865 statute by declaring that it should not be construed to require a continuous service of one year.

Statute 1868, c. 328, eliminated from the 1865 statute the requirement of six months' residence in the city or town prior to enlistment and mustering into the service.

Statute 1870, c. 392, retained the requirement of enlistment as part of the quota of a city or town and service for at least one year during the Civil War.

In 1902 the law was codified in R. L. c. 80, § 1, cl. 10, and provided:

"A person who was enlisted and mustered into the military or naval service of the United States, as a part of the quota of a city or town in this commonwealth, under any call of the President of the United States

during the war of the rebellion or who was assigned as a part of the quota thereof after having been enlisted and mustered into said service, and who served for not less than one year . . .; and any person . . . who was not a part of the quota of any city or town, shall, if he served as a part of the quota of the commonwealth, be deemed to have acquired a settlement in the place where he actually resided at the time of his enlistment. . . ."

Statute 1911, c. 669, repealed chapter 80 of the Revised Laws and rewrote the law relating to the acquirement of legal settlements. It re-enacted, however, the same provisions which appeared in the aforesaid R. L. c. 80, § 1, cl. 10.

General Statute 1918, c. 257, § 299, amended St. 1911, c. 669, § 1, cl. 5, by inserting after the words "war of the rebellion" the words "or any war between the United States and any foreign power."

General Statute 1919, c. 333, § 5, added to the aforesaid provisions the following:

"Any person who was inducted into the military or naval forces of the United States under the federal selective service act, or who enlisted in said forces in time of war between the United States and any foreign power, whether as a part of the quota of this commonwealth or not, shall, subject to the same proviso, be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment."

Note that no reference is here made to "serving" as a part of any quota.

In the consolidation of the General Laws in 1921 the Legislature, by chapter 116, re-enacted the law as it stood after Gen. St. 1919, c. 333, § 5, but in the paragraph relating to selective service it added the words "or served" so that the pertinent clause read: "or who enlisted in said forces . . . whether he served as a part of the quota of the commonwealth or not."

Statute 1922, c. 177, amended said chapter 116 of the General Laws of 1921 by inserting the clause "or who enlisted and served in said forces during the Philippine insurrection" but struck out the requirement of one year's service, so as to read as the statute now appears in chapter 116, section 1, clause 5, of the Tercentenary Edition of the General Laws, namely:

"A person who enlisted and was mustered into the military or naval service of the United States, as a part of the quota of a town in the commonwealth under any call of the president of the Unites States during the war of the rebellion or any war between the United States and any foreign power, or who was assigned as a part of the quota thereof after having enlisted and been mustered into said service, . . . shall be deemed thereby to have acquired a settlement in such town; and any person . . . who was not a part of the quota of any town, shall, if he served as a part of the quota of the commonwealth, be deemed to have acquired a settlement . . . in the place where he actually resided at the time of his enlistment. Any person who was inducted into the military or naval forces of the United States under any federal selective service act, or who enlisted in said forces in time of war between the United States and any foreign

power, whether he served as a part of the quota of the commonwealth or not, or who enlisted and served in said forces during the Philippine insurrection . . . shall be deemed to have acquired a settlement in the place where he actually resided in the commonwealth at the time of his induction or enlistment . . ."

The pertinent provisions of St. 1950, c. 797, are as follows:

"*Whereas*, The deferred operation of this act would tend to defeat its purpose, which is to provide immediate financial assistance to certain persons in the armed forces of the United States and to their dependent relatives, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

"SECTION 1. Any city or town, acting by its veterans' agent, may provide a war allowance for the dependent relatives of any person in the armed forces of the United States while the United States is engaged in hostilities under the flag of the United Nations, or in a state of war arising out of and as the result of such hostilities, which hostilities, for the purpose of this act, shall be deemed to have begun on June twenty-fifth, nineteen hundred and fifty, provided that said person, at the time of his entry into said service, or his recall thereto or his continuance therein at the expiration of a prior enlistment to the credit of the commonwealth, was a resident of this commonwealth and had been a resident thereof for not less than one year. . . .

"SECTION 2. Any person in the armed forces of the United States, whose dependents are entitled to a war allowance under section one, and who is discharged other than dishonorably from said service, shall be eligible to receive veterans' benefits under the provisions of chapter one hundred and fifteen of the General Laws, relating to world war service, so far as applicable. . . ."

As a general proposition, statutes relating to settlements are prospective in operation, but the Legislature has clearly indicated a contrary intention in the foregoing enactments and they are therefore retrospective. *Newburyport* v. *Worthington*, 132 Mass. 510, 511; *Boston* v. *Warwick*, 132 Mass. 519, 520; *Dedham* v. *Newton*, 320 Mass. 391, 395.

In the last cited case the court said on page 395, "The mere fact that Hale's enlistment was in time of peace and preceded the declaration of war on April 6, 1917, did not prevent his gaining a settlement in Quincy"; and on page 396, "The settlement contemplated by the statute . . . was in Quincy, the city where he resided at the time of his enlistment."

In approaching the question whether service in the Korean war comes within the purview of said chapter 116, section 1, clause 5, we must interpret most liberally all such legislation relating to those brave men and women who give their energy, their blood and even their lives to preserve our State and Nation. If reasonably possible, the above statute must be so construed that immediate veterans' benefits will be granted under G. L. (Ter. Ed.) c. 115 to the dependents of those serving in Korea. The crucial words of the statute are the following: "Any person who was inducted into the military or naval forces of the United States under any federal selective service act, or who enlisted in said forces in time of war between the United States and any foreign power . . . shall be deemed to have acquired a settlement in the place where he actually resided in the commonwealth at the time of his induction or enlistment."

Strictly speaking, the United States is not engaged in any "declared" war against North Korea, and our forces are actually serving under the United Nations' flag. But whatever banners fly as our troops go into battle, we are at war with a foreign power; and it would be splitting hairs to say otherwise.

Furthermore, the language of the quoted provisions of St. 1950, c. 797, indicates a desire to remove all doubt as to which municipality shall provide the veteran or his dependents with benefits under said chapter 115. In order that those entitled to benefits shall not be prejudiced by delays due to controversies between municipalities as to which shall furnish the benefits, the Legislature definitely fixes the place of actual residence at the time of enlistment or induction as the municipality obligated to furnish said benefits.

I therefore answer your question in the affirmative.

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

Conservation — Appropriations — Constitutional Law.

NOV. 3, 1950.

HON. MATTHEW T. COYNE, *Department of Conservation.*

GENTLEMEN: — In a recent communication my opinion has been requested as to the legality of Item 2220–21 in the 1950 Supplementary Budget Appropriation Bill. In reply I advise that this attempted appropriation is ineffectual. By St. 1938, c. 392, the Legislature assented to Public Act No. 415, 75th Congress and stipulated that no funds accruing to the Commonwealth from license fees paid by hunters shall be diverted for any other purpose than the administration of the Division of Fisheries and Game of the Department of Conservation. This assenting statute formed a compact between the United States Government and the Commonwealth of Massachusetts, and pursuant to its terms there is an annual renewal of the agreement that said funds shall not be diverted.

The disposition of the Inland Fisheries and Game Fund is further regulated by G. L. (Ter. Ed.) c. 131, § 3A, which specifies the purposes for which the fund may be used.

It is my opinion that this appropriation diverting ten thousand dollars to the use of the Department of Public Works is violative of the impairment to contract clause of the United States Constitution and therefore invalid.

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

Public Works — Expenditures — Appropriations.

NOV. 27, 1950.

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

DEAR SIR: — You have requested my opinion as to whether expenditures by your department under the authority of St. 1950, c. 685, are

subject to the provisions of G. L. (Ter. Ed.) c. 29, § 9B. Your letter refers to my opinion to you under date of August 9, 1949, holding that the provisions of said section 9B were not applicable to expenditures under St. 1949, c. 306, and you point out that the provisions contained in the 1950 act are practically the same as those contained in the 1949 act previously considered.

A comparison of the two statutes shows that their provisions are substantially identical. Each act is entitled "An Act providing for an accelerated highway program," and each contains an emergency preamble reciting the need for avoiding unnecessary delay in putting the program into effect. The amount authorized to be expended is the same in each act, namely, one hundred million dollars, and each act contains provisions fixing the amounts to be expended by each governmental body involved, as well as the amounts to be expended according to territory and type of project.

Contracts under the 1950 act are required to be entered into prior to June 30, 1952, almost two years after the date of the enactment of the statute. In each act it is provided that detailed progress reports and a final report be filed.

As stated in my opinion of August 9, 1949, the application of the statutory provisions for allotments of appropriations to other than ordinary appropriations for the State offices is doubtful, and such application is particularly questionable as to appropriations for specific construction projects. However, as I stated with reference to the 1949 act, it is clear from the pattern of St. 1950, c. 685, that it was the intention of the Legislature in enacting the law to establish a special, self-contained procedure for safeguarding and regulating the extraordinary expenditure of funds therein provided, and the application of G. L. (Ter. Ed.) c. 29, § 9B, to the expenditure of funds thereunder would be inconsistent not only with the legislative intention expressed in the preamble but with the operation of the legislative plan contained therein.

In accord with the well-established principle of statutory construction that the provisions of a later special statute will control over inconsistent provisions of an earlier general statute (*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), I am of the opinion that the provisions of G. L. (Ter. Ed.) c. 29, § 9B, are not applicable to the expenditure of funds under St. 1950, c. 685.

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

Metropolitan District Commission — Conduits and Gas Lines — Permits — Eminent Domain — Damages.

DEC. 7, 1950.

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

DEAR SIR: — You have asked my opinion interpreting the effect of the law under the circumstances hereinafter described.

You state that in pursuance of the plan of the Metropolitan District

Commission to construct the Hyde Park-Milton pipe line (a pipe line from Morton and Washington Streets to Adams and Medway Streets) the commission made a taking and during the process of construction telephone conduits, Edison conduits and gas lines were found in the location.

You wish to know whether the cost of removal and relocation of said conduits and gas lines must be borne by the Commonwealth.

General Laws (Ter. Ed.) c. 166, § 22, and corresponding provisions of prior and contemporary statutes, grant to municipalities the power to issue permits to utilities to lay conduits in the public ways. *United Electric Light Co.* v. *Deliso Construction Co.*, 315 Mass. 313.

The effect of these permits is to authorize the location of structures which would otherwise constitute a nuisance. *Commonwealth* v. *Boston*, 97 Mass. 555. *Lynch* v. *Lowell Electric Light Corporation*, 263 Mass. 81.

These permits do not give a utility any title or proprietary interest in that part of the way occupied by these structures, and if a municipality, acting under the power of eminent domain, changed the grade of the way or even discontinued it, the utility would have no claim for damages even if it sustained a loss of these structures, which could not be removed without destroying them. *United Electric Light Co.* v. *Deliso Construction Co.*, 315 Mass. 313, 316. *Boston, Worcester, etc., Railway* v. *Commonwealth*, 301 Mass. 283. *Boston Electric Light Co.* v. *Boston Terminal Co.*, 184 Mass. 566.

A good analysis of the right of utilities in such a situation is found in *Natick Gas Light Co.* v. *Natick*, 175 Mass. 246. In that case, by reason of the abolition of certain grade crossings in Natick, the petitioner was put to expense in altering some of its mains legally existing in the public streets. On page 248 the court said:

"It becomes necessary to inquire into the nature of the loss sustained by the company. The pipe was personal property and the title to it did not change. . . . The petitioner, as against the land owner, had in itself no easement. . . . It is permitted to share in the general use for which the public have paid. But whether this right . . . be a valuable one . . . it must, nevertheless, be regarded as subordinate to the general purpose for which the land was originally taken, to wit, public travel, and must yield to the necessities of that purpose.

"The permission to lay down pipes in the public ways, whether or not . . . it be revocable, must be held to have been granted originally upon the condition that the pipes, neither at the time of the laying nor thereafter, shall interfere with the public travel upon the way as then existing or as it may thereafter be changed to meet the reasonable exigencies of such travel."

Furthermore, it appears from the Revised Ordinances of 1947 of the City of Boston that permits for laying pipes and conduits may be revoked at any time by the authority issuing them. See chapter 3, section 21, and chapter 27, sections 9, 14 and 20 of these ordinances.

I therefore answer your question in the negative.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Agriculture — Appointment — Inspector of Animals — Tenure.

DEC. 11, 1950.

Hon. JOHN CHANDLER, *Commissioner of Agriculture.*

DEAR SIR: — In a recent communication you requested me to determine whether inspectors of animals whose appointments are provided for in G. L. (Ter. Ed.) c. 129, as most recently amended by St. 1941, c. 162, shall be appointed annually as provided therein. I answer this question in the affirmative.

In reaching this conclusion I have taken into consideration the provisions of G. L. (Ter. Ed.) c. 31, § 43, as most recently amended by St. 1949, c. 429. This statute provides that "every person holding office or employment under *permanent* appointment" shall have unlimited tenure of office or employment. The appointment of an inspector of animals made under G. L. (Ter. Ed.) c. 129 is an annual and not a permanent appointment and therefore the appointee does not acquire the tenure provided in G. L. (Ter. Ed.) c. 31, § 43.

This opinion in no way qualifies the opinion of the Attorney General reported in III Op. Atty. Gen. 575, to the effect that the appointee must be selected from a civil service list.

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

Veterans' Services — Duty of Commissioner in Controversies.

DEC. 11, 1950.

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

DEAR SIR: — You have asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 115, § 2, under the circumstances hereinafter described.

Section 2 provides in part as follows:

"He [the Commissioner of Veterans' Services] shall decide all controversies between towns relative to the settlement of applicants for veterans' benefits, and, subject to the approval of the attorney general, his decisions shall be final. He shall further decide all controversies between such an applicant and a veterans' agent relative to the validity or amount of a claim for such benefits, and upon the complaint . . . that the city or town . . . is granting such benefits contrary to the provisions of this chapter, shall forthwith make an investigation of such complaint, and a determination of the amount of such benefits, if any, to be granted; a final appeal from such decision or determination may be taken . . . to the governor and council."

You wish to know whether your authority to decide controversies between an applicant and a veterans' agent as to the amount of veterans' benefits is limited to applications of veterans whose settlement is in dispute.

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. *Commonwealth* v. *Welosky*, 276 Mass. 398, 401, 402; *Kneeland* v. *Emerton*, 280 Mass. 371, 376.

Furthermore, 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.

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.

A very narrow interpretation of the second sentence of the above-quoted part of section 2 of said chapter 115 would require an affirmative answer to your question; nevertheless, it seems inescapable from an examination of the whole of the aforesaid section 2 that the Commissioner of Veterans' Services is given plenary powers pertaining to veterans' benefits.

Furthermore, if the Commissioner's decision as to the amount of benefits were limited to cases where a settlement was in dispute, then appeals to the Governor and Council would be limited to such situations. This clearly was not the intention of the Legislature. Such appeals were intended to include all controversies between the veterans' agent and applicants for veterans' benefits.

Consequently the commissioner is obligated to resolve all such disputes, and I must answer your question in the negative.

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

Veterans' Services — Veterans' Benefits — Settlement.

DEC. 11, 1950.

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

DEAR SIR: — You ask my opinion interpreting the effect of G. L. (Ter. Ed.) c. 115, as amended, under the circumstances hereinafter described.

You state that on November 12, 1949, a baby girl died at the Boston City Hospital; that the father of the child was a veteran who had been a resident of Boston since some time after May 9, 1947, but had not yet acquired a settlement in the Commonwealth, nor had he resided in the Commonwealth for three years next preceding the application for the benefits in question. You also state that said veteran was in needy circumstances.

You wish to know whether the commissioner may grant burial expenses for a dependent who while alive would not be entitled to veterans' benefits.

The pertinent provisions of said chapter 115 are as follows. Section 5 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; provided, that no benefits shall be paid to a dependent unless he has resided within the commonwealth continuously for three years next preceding the date of his application for such fbenefits, nor unless the veteran of whom he is a dependent has a settlement in the commonwealth or has actually resided in the commonwealth for three years next preceding the date of dependent's application for benefits. . . ."

Section 6 provides, subject to certain conditions:

". . . one half of the amounts of veterans' benefits paid to applicants having settlements in the cities or towns making such payments, and all of the amounts of veterans' benefits paid to other applicants . . . shall be paid by the commonwealth to the several cities and towns on or before November tenth in the year after such expenditures."

Section 7 provides:

"He [a burial agent] shall, under regulations established by the commissioner, cause properly to be interred the body of any veteran or adult dependent who dies without sufficient means to defray funeral expenses, and the body of any dependent child of a veteran if such veteran and his wife, or his widow, be without sufficient means to defray funeral expenses. . . ."

Section 8 provides:

". . . One half the amounts so paid [by the burial agent] and allowed [by the commissioner] for burial expenses of veterans or dependents having settlements in the cities or towns making such payments, and all of the amounts so paid and allowed for burial expenses of others, shall be paid by the commonwealth to the several cities and towns on or before November tenth in the year after the expenditures have been made."

The above statutory provisions should be read as a whole in order to determine the main object sought to be accomplished by their enactment. *Meunier's Case*, 319 Mass. 421; *Johnson's Case*, 318 Mass. 741.

It thus appears from an examination of the aforesaid statutory provisions that a veteran is entitled to benefits (§ 5) so long as he resides in the Commonwealth, whether or not he has acquired a settlement, whereas the award of veterans' benefits to a dependent of a veteran is conditioned upon settlement or length of residence; that the burial agent of a city or town (§ 7) shall provide for the burial of a deceased veteran or deceased dependent child of a veteran if the family is without sufficient means to defray the funeral expenses; that whatever veterans' benefits are furnished by a city or town will be reimbursed by the Commonwealth (§ 6) to the extent of fifty per cent if the applicant has a settlement in said city or town, and to the extent of one hundred per cent in the case of veterans' benefits paid to others; and as to burial expenses (§ 8) the Commonwealth will reimburse cities or towns making such payments, to the extent of fifty per cent if the deceased veteran or dependent had a settlement in said city or town, and to the extend of one hundred per cent in the case of burial expenses of others.

Consequently, since the father of the deceased child was a veteran, the burial agent of Boston was obligated to provide proper interment, and

since the veteran had no settlement in the Commonwealth the latter must reimburse the city of Boston for the full amount allowed by the Commissioner of Veterans' Services and paid by the city of Boston.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Public Utilities — Permit — Contract Carrier — Ashes and Waste.

DEC. 22, 1950.

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

DEAR SIR: — You have asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 159B, § 4, under the circumstances hereinafter described.

You state that an application has been made to the Division of Commercial Motor Vehicles of your department for a permit under chapter 159B "as a contract carrier of property for hire by an individual who intends to haul ashes, rubbish, garbage and snow under contract with the city of Boston"; that the city of Boston is very anxious to let this contract as soon as possible; and that on October 6, 1948, former Attorney General Clarence A. Barnes rendered an opinion to the effect that the transportation of waste material from a cesspool does not require a permit from your department because "transporting property" implies the transport of property belonging to some person other than the carrier, and that in the ordinary case of waste material the owner either abandons title to it or transfers it to the carrier.

You wish to know whether transporting ashes, rubbish, garbage and snow under a contract with the city of Boston is distinguishable from transporting waste material from a cesspool.

General Laws (Ter. Ed.) c. 159B, § 1, declares that it is the policy of the Commonwealth to regulate transportation of property by motor carriers upon its ways to "(1) promote adequate, economical and efficient service by motor carriers . . . (3) develop and preserve a highway transportation system properly adapted to the needs of the commerce of the commonwealth, and (4) promote safety upon its ways in the interests of its citizens."

Section 4 of the same chapter provides in part: "No person shall engage in the business of a contract carrier by motor vehicle upon any way unless there is in effect with respect to said carrier a permit issued by the department, authorizing him to transport property for the concerns specified, and within the limits set forth, in such permit." This section 4 also declares the policy of the Commonwealth to be "that the business of contract carriage is affected with the public interest and that the safety and welfare of the public upon the ways within the commonwealth, the preservation and maintenance of said ways and the proper regulation of common carriers using the same require the regulation of contract carriers to the extent provided in this chapter."

Section 2 of the same chapter defines a contract carrier by motor vehicle as "any person, not included in the term 'common carrier by motor vehicle' . . . who, under special and individual contracts or agreements . . . transports property by motor vehicle for compensation upon ways."

Last year, however, the Legislature by St. 1949, c. 346, § 1, included a definition of the word "property" as being "any physical matter whatsoever, regardless of value, over which the right of ownership or control may be exercised, including currency, documents and papers of all kinds." But for the 1949 statutory definition of "property", the aforesaid opinion of October 6, 1948, relating to cesspool waste matter, would be just as applicable to ashes, rubbish, garbage and snow. The statutory definition of property, however, obviously includes the material above described. Such material is undoubtedly physical matter over which the right of control may be exercised. It is capable of being controlled, either before or after it gets into the possession of the carrier. Logically, it makes no difference whether the carrier acquires title to said material or not. Regardless of the title or ownership, it is material which may be controlled; and if it is being transported for compensation under a contract, section 4 of chapter 159B is applicable.

The 1949 statute is plain and unequivocal in its language. Coupled with the declared policy of the Commonwealth, as stated in sections 1 and 4, the statute clearly makes it necessary for the contract carrier in question to secure a permit. If chapter 159B, as amended, unduly affects the public welfare in certain situations, the remedy must be sought with the Legislature.

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

Civil Service and Registration — License Renewal — Armed Forces.

JAN. 2, 1951.

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

DEAR SIR: — You have asked my opinion interpreting the effect of St. 1943, c. 421, under the circumstances hereinafter described.

You state that until 1948 all persons in the armed forces who were licensed by your department were permitted to renew their current year's license within a period of six months from the date of their discharge from the service and were not charged for the years during which they actually served. You wish to know whether this same courtesy is to be extended to the men and women who are now serving in the armed forces.

Said St. 1943, c. 421, provides:

"Any license, permit or certificate of registration issued by any department, division, board, commission or officer of the commonwealth that expires while the holder thereof is serving in the military or naval service of the United States may be renewed within six months after the termination by such holder of such service, to the same extent as though the application for such renewal were made upon the expiration of such license, permit or certificate of registration; provided, . . . that no fee shall be charged or collected for the period between such expiration and such renewal."

The words "serving in the military or naval service of the United States" do not refer to any particular kind of service or during any par-

ticular conflict. The holder (male or female) of such license, permit or certificate is entitled to the right specified by the statute during the time of such service, whenever and whatever it may be.

I therefore answer your question in the affirmative.

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

Education — Children of Veterans — Veterans' Benefits.

JAN. 25, 1951.

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

DEAR SIR: — You have requested my opinion on certain phases of a recent enactment by the Legislature as it may affect the administration of your department.

Statute 1950, c. 758, approved August 10, 1950, amends G. L. (Ter. Ed.) c. 69 by striking out section 7B as amended and inserting in place thereof a new section reading as follows:

"*Section 7B.* The commonwealth, acting through the department, may contribute toward the expenses of the higher education of any child, resident in the commonwealth, between the ages of sixteen and twenty-two, whose father or mother entered the armed forces of the United States in time of war, or between September sixteenth, nineteen hundred and forty and December eighth, nineteen hundred and forty-one and whose service was credited to Massachusetts, and who was killed in action or died from other cause as a result of such service.

"Any child who is eligible under this section shall, upon becoming a student in any state or county educational institution or other educational institution approved in writing by the commissioner of education, be entitled to reimbursement by the commonwealth, in an amount not to exceed seven hundred and fifty dollars in any year, for expenses for tuition, board and room rent, transportation, and books and supplies necessary or incidental to his pursuit of study at such educational institution. Such reimbursement shall be made to such child, or his guardian, if any, on the presentation of vouchers therefor approved by the said commissioner. Such payments shall continue for the benefit of a child only during such time as he remains a student in good standing in the institution in which he is enrolled, and in no event shall any student receive the benefits provided by this section for more than four years.

"The said commissioner shall determine the eligibility of children for the benefits provided for in this section."

The problems you have indicated in your letter center around the effect of the provisions of the act of 1950 which limit eligibility for contribution toward expenses to those incurred by a child ". . . between the ages of sixteen and twenty-two, whose father or mother entered the armed forces of the United States . . . and whose service was credited to Massachusetts . . ."

Your questions arise principally from the fact that under the prior law, for which the act of 1950 is substituted as of its effective date, November 8,

1950, it was provided that contribution might be made toward expenses incurred by a child "not under sixteen years of age" whose deceased veteran parent had "entered the armed forces of the United States" within a certain period, without reference to whether his service was credited to Massachusetts. Thus both the age factor and the requirement that the war service of the deceased veteran parent be credited to Massachusetts represent new statutory provisions.

You have cited instances which raise certain problems. These problems may be fairly posed by the following questions, paraphrasing your letter:

1. *What is the age requirement for eligibility for contribution under the act of 1950 toward expenses incurred by a child otherwise qualified set up by the phrase therein "between the ages of sixteen and twenty-two"?*

The word "between," as used in the act, obviously means a period of age between two extremes or termini, a minimum and a maximum. It is, however, unfortunately susceptible of three entirely different and opposed constructions. Thus, does the phrase mean to compensate expenses incurred by a child —

(*a*) Who has reached the age of seventeen and has not yet reached twenty-two, or

(*b*) Who has reached the age of sixteen and has not yet reached twenty-two, or

(*c*) Who has reached the age of sixteen and has not yet reached twenty-three?

The question is an important one, for on the answer to it depends whether a child is eligible for the benefits of the act within the limits of a span of

(*a*) Five years,

(*b*) Six years, or

(*c*) Seven years.

Construction of the language used by the Legislature is not as easy as may appear at first sight.

Examination of the cases relevant to the point leads to the conclusion that the authorities are of little or no assistance. All the cases found are either distinguishable or contradicted by others adopting an opposing interpretation. There is no advantage to be achieved by a citation and discussion of the authorities.

General Laws (Ter. Ed.) c. 4, § 6, provides as follows:

"In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute.

. . . . . .

"Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."

The words here in question are not technical, and have not "acquired a peculiar and appropriate meaning in law" in so far as research has disclosed. Therefore they are to be construed according to the "common and approved usage of the language."

The word "between" is commonly used in a number of different senses, some of which, of course, have no bearing on this question. It is commonly

used, however, as here, to indicate the space, distance, or time between two termini. There is a general rule of construction to the effect that when so used it excludes, and does not include, the termini. See *Atkins* v. *Boylston Fire and Marine Insurance Company*, 46 Mass. (5. Metc.) 439; *Kendall* v. *Kingsley*, 120 Mass. 94.

The general rule, however, presupposes definite termini. Where the termini are exactly and clearly stated, so that there is no doubt as to what is intended, no difficulty arises, and the rule amounts to no more than a statement of an obvious result. This is particularly clear when the termini, in so many words, are stated as points or divisions of time, without length.

Thus, for example, a limitation of time to "between noon and midnight" includes a span of twelve hours. Similarly, a limitation of a period out of the life of a person to "between the moment he becomes sixteen and the moment he becomes twenty-three" includes a span of seven years. The exclusion of the termini, which are mere points or divisions of time, gives no difficulty.

The language used by the Legislature in the act of 1950, however, does not indicate the points or divisions of time which are the termini of the period of eligibility clearly and without ambiguity.

The age of sixteen continues for a full year, as does the age of twenty-two. Nevertheless, the termini must be fixed as mere points of time. At any given moment in the life of a child otherwise qualified, it must be possible to state with definiteness that he is either qualified so far as age is concerned, or is too young or too old to qualify.

What, then, are the points of time established as termini by the Legislature? Returning to the alternatives previously given as possible meanings of the language of the act of 1950, we find that we must accept as the minimum and maximum age termini which are the limits of eligibility —

(*a*) The moment the child reaches seventeen as the minimum, and the last moment he is twenty-one as the maximum, or

(*b*) The moment the child reaches sixteen as the minimum, and the last moment he is twenty-one as the maximum, or

(*c*) The moment the child reaches sixteen as the minimum and the last moment he is twenty-two as the maximum.

On these alternative constructions, the following comments appear to be warranted:

On alternative (*a*):

It does not appear to be reasonably consistent with the "common and approved usage of the language" to use the words "between the ages of sixteen and twenty-two" to indicate persons who are neither sixteen nor twenty-two. This construction would mean that the Legislature had, without any apparent reason therefor, used, to describe the termini, words which describe two distinct one-year periods in the life of a person, and then used those two periods, each covering a whole year, by exclusion, to fix the moments of time when eligibility commences and terminates.

In other words, by this construction, all persons while sixteen years of age and twenty-two years of age are excluded from eligibility. Had the Legislature intended this construction, it would have so indicated by employing language to the effect that eligibility was to be restricted to persons who were "at least seventeen years of age and not yet twenty-two." That the language actually used by the Legislature is the equivalent of the above-quoted language I cannot accept.

On alternative (*b*):

For similar reasons it does not appear to be proper to construe the language as excluding all persons who are twenty-two years of age and not those sixteen. A proper construction would give the result that all persons aged sixteen and all persons aged twenty-two were alike either eligible or ineligible under the act. There appears to be no sufficient reason for holding that the language which refers to the minimum and maximum termini without distinction means to include as eligible persons who are of the one age and to exclude persons who are of the other age. Therefore, if the minimum is set at those who have attained the first moment of their sixteenth year, it would appear to be reasonable to construe the maximum as including those who have not yet passed the last moment of their twenty-second year. See *Atkins* v. *Boylston Fire and Marine Insurance Company,* 46 Mass. (5 Metc.) 439, 440, 441.

Therefore, it appears that the alternative construction (*b*) above set forth is also unacceptable.

On alternative (*c*):

This, by a process of elimination, appears to be the proper alternative construction. It avoids all the criticism that may fairly be levelled at the other alternative constructions.

Thus, it includes, and does not exclude from eligibility, all persons in the two one-year periods set as the termini of age eligibility. It treats persons in both age groups alike, as did the legislative language.

Further, on the affirmative side, it appears clear that according to "the common and approved usage of the language" a person is between the ages of sixteen and twenty-two while he is already sixteen (having reached the minimum set thereby) and not yet twenty-three (having not yet passed the maximum set thereby).

This appears clear beyond question on the minimum side. That it is true also on the maximum side appears clear from the fact that the Legislature does not distinguish between persons who have just become twenty-two and those who are near their twenty-third birthday, but still twenty-two. A person is "twenty-two years of age" for a whole year, not for a single instant, according to common use of the English language.

It is, of course, not overlooked that a person might well be said to be "over twenty-two years of age" when he was one day or indeed one instant past that precise point of time in which he became twenty-two years of age. The Legislature, however, stated the measure of eligibility in terms of periods of a whole year. This is also the common usage of language; *i.e.*, unless further breakdown is asked for, a person states his age in terms of the whole years completed. There is no reason for this construction, breaking down the periods to lesser terms, to be gratuitously inserted into its meaning.

Therefore, on final analysis, the first question posed, as to the meaning of the phrase "between the ages of sixteen and twenty-two," as used by the Legislature in defining eligibility under the act of 1950, is answered as follows:

Children of deceased veterans otherwise eligible under the act of 1950 are qualified as to age to receive benefits toward expenses incurred from the moment they become sixteen years of age until the moment they cease to be twenty-two years of age.

2. *At what moment do persons become sixteen years of age and at what moment do they cease to be twenty-two years of age?*

Under the well-known and established common-law method of computation, a person achieves a specified age (*e.g.*, sixteen) at the earliest moment after midnight of the day before, and not the day of, the particular birth anniversary. Under the same rule, a person ceases to be twenty-two, and becomes twenty-three, at the first moment of the day before his twenty-third birthday.

There is nothing to indicate that the Legislature here intended a meaning other than that ascribed to — specification of age by common-law usage, which has "acquired a peculiar meaning in law," and therefore such terms "shall be construed and understood according to such meaning." (G. L. [Ter. Ed.] c. 4, § 6, Third, *supra.*) *In re Shurey*, 1 Ch. 263. See *Bardwell* v. *Purrington*, 107 Mass. 419.

3. *Is a child who is currently eligible under the provisions of the presently effective law cut off from further benefit under the legislation as of the effective date of the act of 1950, namely, November 8, 1950, for expenses incurred on and after that date, though he has not completed a course of study in an approved institution in which he is then enrolled and a student in good standing, and has not at that time received the benefits provided by the legislation for four years, if, on said effective date, November 8, 1950, though he is otherwise eligible —*

(a) He has already become twenty-three years of age, or

(b) His deceased war veteran parent upon whom his eligibility has rested up to that time was not one "whose war service was credited to Massachusetts"?

Until November 8, 1950, eligibility for benefit was governed by the provisions of G. L. (Ter. Ed.) c. 69, § 7B, as last amended by St. 1948, c. 381. Under this legislation, a child otherwise eligible may receive contribution toward certain expenses incurred by him prior to November 8, 1950, while he is "not under sixteen years of age," if his deceased veteran parent "entered the armed forces of the United States" within a certain period, without reference to whether his war service was credited to Massachusetts. That legislation constitutes proper authorization for expenditure of funds of the Commonwealth to eligible persons.

However, as of November 8, 1950, chapter 758 of the Acts of 1950 amended chapter 69 of the General Laws by "striking out" section 7B, as amended, and "inserting in place thereof" the new section 7B, the provisions of which have been heretofore set forth.

From that date on, the new section 7B is the only legislative authority for disbursement of public funds, and such disbursement must be in accord with the provisions thereof.

Therefore, questions 2 (*a*) and 2 (*b*) as above propounded must be answered in the affirmative.

However, it may not be amiss to point out that if a person currently eligible but who becomes ineligible on November 8, 1950, has incurred a current necessary expense prior to November 8, 1950, he may be reimbursed therefor (up to the amount of five hundred dollars in accordance with the present form of the statute) even though the period covered thereby extends beyond said date. For example, if tuition for the first semester is not divisible, and was due and payable from such a person on a date prior to November 8, 1950, and payment thereof was necessary to enable the student otherwise currently qualified to attend the institution up to

November 8, 1950, he may be reimbursed therefor even though in fact the period for which the tuition is paid extends beyond November 8, 1950.

A like ruling would be proper on the similar facts presented by the case of the person who becomes twenty-three years of age after the effective date of the act of 1950. As of the date on which he becomes twenty-three years of age, though his eligibility for contribution toward his expenses incurred thereafter automatically ceases, this will not prevent reimbursement for expenses incurred before that date as illustrated above, even though the benefit procured thereby is an indivisible one which extends beyond that date.

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

Public Health — Disability — Retirement — Medical Panel.

JAN. 25, 1951.

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

DEAR SIR: — You have recently asked me for an opinion as to whether St. 1950, c. 551, affects the obligation imposed upon your department to appoint a member of a medical panel or board under G. L. (Ter. Ed.) c. 32, §§ 6, 7 and 89, as amended.

Said chapter 32, section 6, provides in part that certain public employees may be retired because of total and permanent incapacity upon making application therefor to the retirement board; that satisfactory proof of such disability must be presented to the board together with a certification by a majority of the physicians on the medical panel (hereinafter described) that such applicant is incapacitated and that such incapacity is likely to be permanent; that in cases involving a retirement under section 7 (accidental disability retirement) said panel shall further state whether the disability is the proximate result of the accident or hazard undergone on account of which retirement is claimed under said section; and that the medical panel whose duty it is to examine said applicants shall consist of three physicians one of whom shall be appointed by the Commissioner of Public Health.

Section 7 provides in part that certain public employees who have become totally and permanently disabled by reason of a personal injury sustained as a result of, and while in the performance of, their duties may make application for retirement for accidental disability; and that satisfactory proof thereof shall be furnished the retirement board together with a certification of such incapacity by a majority of the medical panel.

Section 89 provides in part that if certain public employees die from injuries received or die as the proximate result of undergoing a hazard peculiar to their employment, and while in the performance of their duty, and a majority of the members of a medical board of three physicians (one of whom is appointed by the Commissioner of Public Health) certify that the death was the proximate result of said injuries or hazard, then certain annuities shall be paid the dependents of said deceased; and that said medical board shall be appointed within thirty days after the application for annuities is filed.

It is provided by St. 1950, c. 551, that, notwithstanding the provisions of any general or special law to the contrary, any impairment of health caused by hypertension or heart disease resulting in total or partial disability to a uniformed member of a paid fire department shall be presumed to have been suffered in line of duty unless the contrary be shown by competent evidence.

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. *Kelley* v. *Jordan Marsh Co.*, 278 Mass. 101, 111. *Assessors of Boston* v. *Lamson*, 316 Mass. 166, 171. Furthermore, 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 Railway*, 200 Mass. 8, 17.

We have seen that said chapter 32, section 6, requires the medical panel to determine whether the applicant for retirement is incapacitated and whether such incapacity is likely to be permanent; that section 7 requires said medical panel to determine whether any claimed disability resulting from accident or hazard of employment is the proximate result of the applicant's employment; and that section 89 requires a different medical board to determine whether certain public employees died in the performance of duty.

The presumption created by St. 1950, c. 551, does not eliminate the need of the medical panel under sections 6 and 7 or the medical board under section 89. Section 6 relates only to ordinary disability that is not service connected, so St. 1950, c. 551, would have no relation to it at all. Said act, however, could apply to a disability resulting under section 7. Nevertheless, the medical panel must still determine whether the applicant was permanently incapacitated. Statute 1950, c. 551, merely creates a presumption of service-connected incapacity if it resulted from hypertension or heart disease.

Furthermore, the latter act deals only with firemen, and the medical panel deals with many other classes of employees; and the panel would also have to determine first whether the disability resulted from hypertension or heart disease; and the presumption may be rebutted by competent evidence, which said panel would be obliged to hear and consider.

Whatever has been said with respect to the effect on a medical panel operating under section 7 is just as applicable to the medical board established under section 89.

I therefore answer your question in the negative.

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

Public Welfare — Old Age Assistance — Settlement.

JAN. 25, 1951.

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

DEAR SIR: — You have asked my opinion interpreting the effect of G. L. (Ter. Ed.) c. 116, § 2, as amended, and G. L. (Ter. Ed.) c. 118A, § 1, under the circumstances hereinafter described.

You state that "A," a recipient of old age assistance, had a legal settlement in Chelsea on November 1, 1944; that on said date she entered the Holy Ghost Hospital in Cambridge; that she has been a patient there until the present time; and that this hospital was incorporated in 1893 as a hospital for incurables.

You wish to know:

1. Does "A" have a settlement in this Commonwealth?
2. If she does, is her settlement in Chelsea or Cambridge?

Chapter 116, section 2, provides in part: "No person residing in an incorporated charitable institution the personal property of which is exempt from taxation, . . . shall gain or lose a settlement nor be in the process of gaining or losing a settlement while residing therein."

Said chapter 118A, section 1, relates to old age assistance and provides in part:

". . . Such assistance shall, wherever practicable, be given to the aged person in his own home or in lodgings or in a boarding home, which for the purposes hereof shall include any institution providing shelter, care and treatment for aged persons which is not supported in whole or in part by public funds; provided, that no inmate of such a boarding home or institution shall be eligible for assistance under this chapter while being cared for under a contract . . . ; and provided, further, that for the purposes of this chapter any person who, while such an inmate, has lost his settlement or who shall lose his settlement at the time of admission to such home or institution shall be deemed to have no settlement in the commonwealth. . . ."

Other pertinent statutory provisions are sections 1 and 5 of chapter 116 and section 8 of chapter 118A. Section 1 provides in part that one who resides in a town for five consecutive years shall acquire a settlement therein. Section 5 provides in part that the failure for five consecutive years to reside in the town where one has a settlement shall defeat a settlement acquired under section 1. Section 8 provides that a town rendering such assistance shall be reimbursed by the Commonwealth to the extent of the Federal contribution allotted therefor plus two-thirds of the remainder of such disbursement if the recipient had a settlement in the Commonwealth, and for all of such remainder if the recipient had no settlement in the Commonwealth.

Consequently, if "A" had a settlement in either Chelsea or Cambridge, the town of settlement would bear one-third expense. If she had no settlement in the Commonwealth, the latter would be obliged to reimburse the town rendering assistance to the extent of all in excess of the Federal contribution.

In determining settlement we must, if reasonably practicable, explain the aforesaid statutory provisions in conjunction with one another to the end that there may be an harmonious and consistent body of law. *Kelley* v. *Jordan Marsh Co.* 278 Mass. 101, 111. *Assessors of Boston* v. *Lamson*, 316 Mass. 166, 171.

Furthermore, 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 Railway*, 200 Mass. 8, 17.

"A" presumably acquired a settlement in Chelsea under section 1 of

chapter 116, or derivatively through her husband. If, therefore, when she entered the hospital in Cambridge she intended to abandon Chelsea as her home, she would normally be in the process of losing her Chelsea settlement and gaining a settlement in Cambridge under the provisions of section 5 of chapter 116. (The word "reside" in this section means "have his domicil," *Lakeville* v. *Cambridge*, 305 Mass. 256.)

Assuming the Holy Ghost Hospital is an incorporated charitable institution the personal property of which is exempt from taxation, section 2 of chapter 116 would arrest the process of a change in settlement. Chelsea would therefore still be her settlement during her residence in that hospital.

Chapter 118A, section 1, does not change the result. That statute merely declares that if assistance is rendered to one in an institution not supported in whole or in part by public funds, and if said recipient has, while such an inmate, lost his settlement, then the recipient shall be deemed to have no settlement in the Commonwealth. Since we have seen that "A" did not lose her settlement while she was an inmate of the Holy Ghost Hospital, chapter 118A, section 1, has no application.

I therefore answer your first question in the affirmative and your second question as follows: Her settlement is in Chelsea.

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

Public Works — Budget — Credits.

FEB. 9, 1951.

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

DEAR SIR: — In a recent communication you requested my opinion as to whether monies contributed by the town of Scituate and the county of Plymouth can properly be credited to budget item 2202–09 of St. 1950, c. 825. I answer this question in the affirmative.

In determining this proposition the intent of the Legislature is the controlling principle. In G. L. (Ter. Ed.) c. 91, § 11, it is provided that in selecting the places to do work for the improvement, development, maintenance and protection of rivers, harbors, tidewaters and foreshores, the Department of Public Works shall consider, among other things, the local interest therein as manifested by municipal or other contributions therefor. It is a general principle of statutory construction that all the legislation germane to a particular subject shall be considered together and, if possible, given an harmonious construction.

It is therefore my opinion that although under the budget item in question contributions may not be required by the department, nevertheless, if the same are voluntarily made, they may be applied and credited to the budget item mentioned above.

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

Public Works — Contract — Notice.

FEB. 19, 1951.

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

DEAR SIR: — In a recent communication you requested my opinion as to whether the procedure adopted by the Department of Public Works in awarding a contract to Raymond E. Cavanaugh Foundation Company under budget item 2202–09 of St. 1950, c. 825, was in accordance with the provisions of G. L. (Ter. Ed.) c. 29, § 8A, as most recently amended.

I answer your question in the affirmative.

The object of all statutory construction is to ascertain the true intent of the Legislature from the words used.

General Laws (Ter. Ed.) c. 29, § 8A, provides that before a contract for one thousand dollars or over is awarded, a notice shall be posted near the premises of the department for at least one week, and that when the amount involved is five thousand dollars or more, there shall be an additional notice printed in such newspapers as the Commission on Administration and Finance may approve. There is a further provision that in case of public emergency, publication may be dispensed with, upon the written approval of the Commission on Administration and Finance.

The word "publication" in this connection, in my opinion, covers the notice to be posted and the newspaper notices and, therefore, when the Legislature provided that this publication may be dispensed with in case of emergency, the word "publication" used in said connection is comprehensive and includes both forms of publication.

My opinion in this respect is confirmed by the fact that when G. L. (Ter. Ed.) c. 29, § 8A, was originally inserted by St. 1939, c. 427, it provided that in emergency cases the *newspaper publication* might be omitted. This was amended by St. 1941, c. 547, by striking out the word "newspaper" and leaving only the word "publication." In my opinion the word "publication" in the statute as it now reads, in that portion thereof providing that publication may be omitted in emergency situations, means that both the posting of the notice and the newspaper publication may be dispensed with upon the conditions stated.

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

Education — School Lunches — Constitutional Law.

MAR. 26, 1951.

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

DEAR SIR: — You have requested my opinion as to whether the Forty-sixth Article of Amendment of the Constitution of Massachusetts prohibits the Board of Education of the Commonwealth from entering into an agreement with the Secretary of Agriculture of the United States governing the operations of the National School Lunch Program in Massachusetts.

You have asked two specific questions which are phrased as follows:

1. "Does the Board of Education have the authority to agree to section 5 of the proposed Federal-State Agreement for the benefit of children attending non-profit private schools as well as public schools in the Commonwealth?
2. "Would it be permissible for the Commonwealth to expend monies appropriated or authorized to be appropriated by the Commonwealth in providing lunches for children attending non-profit private schools as well as public schools in accordance with the proposed Federal-State Agreement, governing the operation of a school lunch program in Massachusetts under the provisions of the National School Lunch Act?"

In answer to your first question, it may be pointed out that section 5 of the proposed agreement follows the provisions of section 7 of the National School Lunch Act relating to the apportionment and payment of funds to the various States.

The authority of the Board of Education to represent the Commonwealth in carrying out the provisions of the act was delegated by the Legislature by St. 1948, c. 548, § 1, which reads as follows:

"The board of education is hereby designated as the 'State Educational Agency' to represent the commonwealth in dealing with the secretary of agriculture of the United States in carrying out the provisions of the National School Lunch Act as enacted into law on June fourth, nineteen hundred and forty-six."

The National School Lunch Act clearly contemplates that the State educational agencies designated in the several States shall in general enter into such agreements not only for the benefit of children attending public schools, but also for the benefit of children attending non-profit private schools within the States as well.

The question has previously been raised, however, whether the educational agency so designated in the Commonwealth of Massachusetts could in conformity with Amendment XLVI of the Constitution of Massachusetts disburse Federal funds apportioned to the Commonwealth under the National School Lunch Act to non-profit private schools as well as public schools within the Commonwealth.

This question was answered in the affirmative in Attorney General's Report, 1947, p. 17. See also Attorney General's Report, 1943–1944, p. 74.

It would appear that no novel constitutional issue is raised in question number 1. My answer to that question is in the affirmative.

In answer to your second question, I submit the following.

The Forty-sixth Article of Amendment of the Constitution of Massachusetts, section 2, reads as follows:

"All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or au-

thorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking, which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."

An analagous question arose heretofore in 1936 in Massachusetts under two proposed acts entitled, respectively, "An Act providing that pupils in parochial schools shall be entitled to transportation to and from said schools in the same manner as pupils in public schools," and "An Act providing for the transportation of parochial and private school pupils to and from school." In an opinion given by the Attorney General at that time it was said:

"The intended benefit sought by the proposed legislation, upon which you seek my opinion, is a benefit intended for children attending parochial and other private schools, as distinguished from a benefit intended for the schools themselves . . . The end sought by the legislation has no relation whatever to the founding, maintaining or supporting of private schools . . .

"I am therefore of opinion that there is no constitutional objection to either . . ." (Attorney General's Report, 1936, p. 40.)

With this opinion I agree.

Similar reasoning decided the almost identical problem when it was presented in *Everson* v. *Board of Education*, 330 U. S. 1, decided February 10, 1947. That case dealt with a situation where a New Jersey statute authorized its local school districts to make rules and contracts for the transportation of children to and from schools by bus. The town acted pursuant to this statute, reimbursing certain parents for bus transportation of their children to parochial schools. It was contended that this violated both the State and Federal Constitutions. The New Jersey Court of Errors and Appeals held that the statute violated neither the State nor Federal Constitution. On further appeal the United States Supreme Court, affirming, said of the practice of furnishing transportation to children attending religious schools, at page 17:

"Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their

children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religious than it is to favor them."

And further, the court said at page 18:

"The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

A similar matter arose in Louisiana where the issue was whether an act of the State of Louisiana which authorized the State to purchase books for school children, including private school students as well as those attending the public schools, was constitutional. In upholding the act the Louisiana court said:

"The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries."

These words of the Louisiana court were set forth verbatim in the opinion of the United States Supreme Court in *Cochran* v. *Board of Education*, 281 U. S. 370, which affirmed the Louisiana opinion that the purchase of school books for private school children out of State funds was not unconstitutional.

The cases above cited constitute a class of cases generally recognized today as matters incidental to the private school education of children, with reference to which the State may exercise the appropriation power without violation of any constitutional mandate. Appropriations to insure the safety of school children in journeying to and from private as well as public schools are held to fall within the domain of the public safety; appropriations for the furnishing of adequate school books to school children in private schools as well as public schools are recognized as part and parcel of the public program of education. Inescapably it follows that the National School Lunch Program, embracing private as well as public school children, is a vital part of the nation's public health program. Private school children, equally with public school children, are entitled to share in the benefits of such programs designed to advance the public welfare.

The benefit is a benefit obtained by the children as distinguished from a benefit to the schools. The schools do not receive any aid or support. The fact that the money is paid to the school as reimbursement, after the school submits its vouchers and necessary papers for its expenditures, is of no consequence. The vital point is that the school is only a conduit of funds benefiting the pupil. Mere reimbursement of the school for funds expended in furnishing lunches to its pupils is not aid to the school itself as distinguished from the pupils. The school treasury is not benefited or increased in any way, nor is this in any manner support or maintenance of private educational institutions out of public moneys as prohibited by Mass. Const. Amend. LXVI.

I therefore answer your second question in the affirmative.

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

Powers of Governor — Civil Defense — Pooling money of Commonwealth with United States for Defense.

APR. 2, 1951.

His Excellency PAUL A. DEVER, *Governor of the Commonwealth.*

SIR: — You have asked me for an opinion interpreting the effect of the law under the circumstances hereinafter described.

You state that consideration of priorities, scarcity of materials, problems of uniform specifications, knowledge of sources of supply, etc., may require that the purchase of defense equipment and supplies be pooled for the States and effected by the Federal Government.

The Federal Civil Defense Administration wishes to know:

1. Can the Commonwealth pay into the United States treasury, in trust, advance sums to be applied in payment of the Commonwealth's share of defense equipment and supplies?

2. Can the Commonwealth reimburse the Federal Government for the Commonwealth's share in any instance where the initial outlay is wholly paid from the United States treasury?

The statutory provisions pertinent to the question are as follows:

General Laws (Ter. Ed.) c. 29, § 20:

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

General Laws (Ter. Ed.) c. 29, § 22:

"Except as otherwise expressly provided, no greater sum from an appropriation shall be drawn from the treasury at any one time than is necessary to meet expenses then incurred."

Statute 1950, c. 639, creates a civil defense agency and, among other things, specifically grants to the Governor the right to make any expenditures within the appropriation therefor or from other funds made available to him for the purposes of civil defense as may be necessary to carry out the purposes of this act. It also provides that he may co-operate with the Federal Government.

The language of chapter 29, sections 20 and 22, implies that no monies can be paid from an appropriation until the specific material, labor or services have been purchased or contracted for; and therefore forbids payment in advance of a purchase or contract. Statute 1950, c. 639, however, seems broad enough to permit the Governor to co-operate with the Federal Government for the purpose of pooling the purchase of defense equipment and supplies, particularly when the public safety is in danger.

Under those circumstances I answer both your questions in the affirmative.

Nevertheless, some doubt might arise as to the conflicting authority granted by the aforesaid statutory provisions and, since the Legislature is now in session, it would be advisable to amend the aforesaid chapter 29 to permit the action desired.

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

Public Utilities — Common Carrier — Statute.

APR. 3, 1951.

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

DEAR SIR: — You have asked me for an opinion interpreting the effect of G. L. (Ter. Ed.) c. 159B, § 2, under the circumstances hereinafter described.

You state that a wholesale grocery company sells merchandise to retail stores out of its warehouses in Boston and New Bedford; that its business is substantial, amounting in gross to about six or seven million dollars a year out of Boston; that it quotes a price to its customers for these goods f.o.b. at its Boston or New Bedford warehouses; that if the customer wishes the goods delivered at his place of business the company quotes an additional charge which is stated on its invoice; that said charge on the average covers the actual cost of transporting the goods; that title to the goods does not pass until they are delivered to the customer; that the drivers of the trucks are all in the employ of the company; and that said grocery company does not carry goods for anyone else and does not advertise or otherwise hold itself out to carry merchandise generally.

You wish to know whether said grocery company is a common or contract carrier within the meaning of chapter 159B, section 2.

In said section a "common carrier by motor vehicle" is defined as "any person who directly, or by his agent or under a lease or any other arrangement, or by arrangement with any other common carrier or with any contract carrier, transports property, or any class or classes of property, for the general public by motor vehicle, for compensation, upon ways, over regular or irregular routes. . . ." A "contract carrier by motor

vehicle" is defined as "any person, not included in the term 'common carrier by motor vehicle' . . . who, under special and individual contracts or agreements, directly or by his agent or under a lease or any other arrangements, transports property by motor vehicle for compensation upon ways."

The intent of the Legislature in this respect must be gathered from the words in which the statute is couched, giving them their ordinary meaning unless there is something in the statute indicating that there should be a different signification, and from the main object sought to be accomplished by the enactment. *Meunier's Case*, 319 Mass. 421.

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

Section 1 of said chapter 159B declares the policy of the Legislature to be substantially as follows:

To regulate transportation of property by motor vehicle in order to promote efficient service, reasonable charges therefor, and without unjust discrimination or destructive competitive practices, to co-ordinate the transportation by motor carriers or other carriers, to develop a highway transportation system properly adapted to the needs of the commerce of the Commonwealth and to promote safety upon its ways in the interest of its citizens.

In *First National Stores Inc.* v. *H. P. Welch Co.*, 316 Mass. 147, at 149, the Court said:

"A common carrier is one who holds himself out to the public as one willing to furnish his facilities for the transportation of goods or persons indiscriminately to all who apply to him for the rendition of such services, up to the extent of his facilities, upon the payment of reasonable compensation . . . while a private carrier is one who holds himself out as ready to furnish transportation for hire only to those with whom he chooses to deal in accordance with such contracts as he makes with them."

The grocery company cannot be a common carrier within the purview of this language because the company holds itself out only to transport merchandise for those people who purchase from it.

As to contract carriers, the purpose of the Legislature appears to be the regulation of those who generally, or only occasionally, make special contracts to carry for hire. The Legislature did not, however, intend by this statute to regulate the vehicles of those engaged primarily in selling merchandise and making delivery thereof to the purchaser. The fact that included in the sale price of the merchandise is an item for carriage is purely incidental to the business of selling. It is common knowledge that in determining the sale price of an article of commerce the seller first computes his own cost; and one of the items of cost is the cost of delivery (if the seller is to make delivery).

If the grocery company's practice was to charge for its merchandise f.o.b. the buyers' door, no one would think of calling it a contract carrier because included in the price was the expense the grocery company incurred in making the delivery. It does not become a contract carrier by declaring to its customers "if you will pick up your purchase at our warehouse the price will be so much less." This practice is no different from fixing a price for delivery at the warehouse and then adding the cost of

carriage if delivery is made to the buyers' door. The fact that the title to the merchandise does not pass until delivered to the buyer is also significant.

I therefore answer your question in the negative.

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

Mental Health — Employees — Military Leave.

APR. 6, 1951.

Department of Mental Health.

GENTLEMEN: — You have requested my opinion interpreting the effect of the law under the circumstances hereinafter described.

You state that certain employees of the Commonwealth are doctors and have entered on active duty with the United States Public Health Service, of the Federal Security Agency, as physicians and as commissioned officers. You wish to know whether said employees are entitled to military leave.

According to DCO Circular No. 3–50 (attached to your request) published by the Federal Security Agency, Public Health Service, in February, 1950, the President of the United States by Executive Order 9575 declared the entire commissioned corps of the Public Health Service to be a military service and branch of the land and naval forces of the United States during the period of World War II; that this order became effective on July 29, 1945, and that said order is still in effect.

Such medical officers are therefore to be treated like all other employees of the Commonwealth who have served or are now serving in the land and naval forces of the nation. They are entitled to all the rights and privileges granted by St. 1941, c. 708, and the various amendments thereto.

I refer you to two opinions, dated April 27, 1950, which I rendered to the Commissioner of Administration on the nature of said rights and privileges.

I therefore answer your question in the affirmative.

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

Civil Service and Registration — Plumbing — Inspection — Permit.

APR. 6, 1951.

Hon. MICHAEL H. CONDRON, *Director of Registration.*

DEAR SIR: — You have requested my opinion interpreting the effect of G. L. (Ter. Ed.) c. 142, as amended, under the circumstances hereinafter described.

Chapter 142 is entitled "Supervision of Plumbing," and the pertinent sections referred to in your question are 8, 13, 17, 18, 19, 21, and 22.

Section 8 provides that if any town has not prescribed plumbing regu-

lations under section 13, the board of health of the town may apply to the Board of State Examiners of Plumbers for the formulation of such regulations, and the board shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing in said town.

Section 13 provides that each city, except Boston, and each town of five thousand or more inhabitants shall prescribe regulations for the material, construction, alteration and inspection of all pipes and fixtures by or through which waste water or sewage is used and carried; "and shall further provide that no plumbing shall be done . . . without a permit first being issued therefor, upon such terms and conditions as such cities or towns shall prescribe."

Sections 17, 18, and 19 require that certain water supply pipes, tanks, safety valves and heating appliances shall meet certain specifications before they can be installed.

Section 21 provides that the board of examiners shall formulate rules relating to plumbing work in buildings owned and used by the Commonwealth.

Section 22 provides that inspectors of plumbing shall enforce the provisions of sections 17, 18 and 19.

You state that in pursuance of sections 8 and 21 the board of examiners has defined "plumbing" as including the installation of pipes, fixtures or apparatus for bringing in the water supply as well as removing liquid and water-borne wastes.

You pose four questions:

(1) In a city or town which is subject to section 13 of said chapter 142 and has adopted a plumbing code in pursuance thereof, and is therefore not subject to section 8, are the water supply pipes, tanks, valves and heating appliances specified in sections 17, 18 and 19 "plumbing"?

(2) If the answer to (1) is in the affirmative, is said plumbing subject to inspection by plumbing inspectors under the provisions of section 22?

(3) If the answer to (1) is in the affirmative, is a permit necessary to install, repair or relocate said materials?

(4) If the answer to (1) is in the affirmative, can a permit to do plumbing in such a city or town be issued to a non-licensed person?

The title of chapter 142 is "Supervision of Plumbing." It should be interpreted according to the legislative intent appearing from the language thereof in connection with the subject matter and the object to be accomplished. *Kneeland* v. *Emerton*, 280 Mass. 371, 376. Its purpose is the conservation of the public health from the deleterious effects which may arise from unsanitary and insufficient plumbing work due to the lack of technical knowledge and skill of those who perform it. *Barriere* v. *Depatis*, 219 Mass. 33, 36. *Attorney General* v. *Union Plumbing Co.*, 301 Mass. 86.

Although the act gives a list of definitions in section 1, the word "plumbing" is not defined. We must therefore look to the lexicographers. Webster's dictionary defines "plumbing" as a plumber's occupation, a plumber's work; and defines "plumber" as one who fits and repairs water and gas pipes, cisterns, water closets, etc. Consequently, "plumbing" is the fitting and repairing of water and gas pipes, etc., and also the finished product.

It is therefore unnecessary to determine whether the definition adopted by the board of examiners in pursuance of sections 8 and 21 can be here applied.

Let us examine the ancestral legislation of section 13. In 1888 the in-

stallation of the tanks and appliances here in question could be regulated because St. 1888, c. 105, provided that any city, except Boston, may by ordinance prescribe rules for the construction, alteration and inspection of all pipes, tanks and fixtures "by or through which water or sewage is carried." Then St. 1893, c. 477, § 6, substituted the word "shall" for the word "may" and also substituted the words "by and through which waste water or sewage is used and carried." But this statute added "and shall further provide that no plumbing work shall be done except in the case of repair of leaks, without a permit being first issued therefor upon such terms and conditions as such city and town shall prescribe." The Legislature thus specifically required the regulation of all plumbing. Statute 1894, c. 455, § 7, merely added a provision that the board of health could also make rules and regulations in regard to plumbing not inconsistent with those established by the legislative body of the city or town.

The Legislature in its codification of 1902, R. L., c. 103, § 7, incorporated the law as it stood in 1894.

We have seen that section 13 of the present law provides that cities or towns subject to chapter 142 shall provide that no plumbing (with exceptions not here pertinent) shall be done without a permit. The installation of the appliances described in sections 17, 18 and 19 is clearly "plumbing" and therefore requires a permit under section 13. Under section 22 the inspector of plumbing cannot possibly enforce the provisions of said sections 17, 18 and 19 unless he sees or inspects the work. According to a recent opinion I gave to you, plumbing subject to inspection can be performed only by a licensed person.

I therefore answer your first three questions in the affirmative and your fourth question in the negative.

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

State Airport Management Board — Judgments — Bond Issue.

APR. 11, 1951.

State Airport Management Board.

GENTLEMEN: — You have asked my opinion for an interpretation of the law under the circumstances hereinafter described.

You state that judgments amounting to $41,158.11 have been obtained against the Commonwealth for the taking of land by the Department of Public Works in 1947 while it was operating the Logan Airport; that the bond issue which provided the money for the Department of Public Works in that particular year was authorized by St. 1946, c. 595, § 2, which provided:

"To meet the expenditures necessary in carrying out the provisions of this act, the state treasurer shall . . . issue and sell . . . bonds of the commonwealth . . . not exceeding . . . the sum of six million dollars";

that of the proceeds of this bond issue there is on hand only $541.55; that St. 1947, c. 676, § 1, provided:

"The state department of public works . . . is hereby authorized and directed further to enlarge, extend, improve and develop . . . Logan Airport . . .";

that section 4 of said act provided:

"To meet the expenditures necessary in carrying out the provisions of this act the state treasurer shall . . . issue and sell . . . bonds of the commonwealth . . .";

and that St. 1949, c. 745, and St. 1950, c. 760, give the same authority to the Commissioner of Airport Management and the same authority with respect to bond issue as is found in St. 1947, c. 676.

You wish to know whether you have authority to pay the aforesaid judgments out of the proceeds of the bond issues that were authorized after the land takings were made.

The answer to your question will depend upon a reasonable interpretation of the different statutes involved in order to determine the legislative intent. Said intent should be gathered from the words in which the statute is couched, giving them their ordinary meaning unless there is something in the statute indicating that they should have a different signification; from the pre-existing state of the common and statutory law; and from the main object sought to be accomplished by the enactment. *Meunier's Case,* 319 Mass. 421. Furthermore, 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.

It would seem clear that when these statutes were enacted in 1947, 1949 and 1950 the Legislature had actual if not constructive notice of land takings for the further development of the airport; that the courts might award damages in excess of any appropriation which was originally made; and that persons whose property was taken by eminent domain should be compensated therefor without undue delay.

It would therefore seem reasonable to attribute to the Legislature an intention (when authorizing or directing a further development of the airport) that any available funds derived at any time from a bond issue should be used to pay for such judgments.

I therefore answer your question in the affirmative.

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

Education — Private Trade School — Profession — Physiotherapy.

APR. 13, 1951.

Department of Education.

GENTLEMEN: — You have asked me for an opinion interpreting the effect of the law under the circumstances hereinafter described.

According to the documents attached to your request it appears that on June 23, 1933, the Boston Evening Clinic and Hospital was incorporated as a charitable institution; that the corporation established a training school of physiotherapy and massage; that all the activities of the corpora-

tion are conducted on its premises at 452 Beacon Street, Boston; that ailing members of the public are treated on said premises by a staff of competent and voluntary members of the medical profession; that this treatment is furnished gratis or at a greatly reduced rate for those who are able to pay; that the receipts from patients do not cover the expenses of operation, and charitable contributions are needed and received for this purpose; that the corporation does not undertake to operate for profit, but it charges a tuition fee to students; that treatment is also given in the physiotherapy department or school; that students in this department thus acquire clinical experience; that the students attend lectures and courses in various branches of medicine and roentgenology; and that a hospital diploma is issued to the students on graduation.

You seek to know whether the corporation is conducting a private trade school within the meaning of St. 1941, c. 583.

Section 21A of the act defines a private trade school as follows: ". . . a school maintained, or classes conducted, for the purpose of teaching any trade or industrial occupation for profit or for a tuition charge."

What the Legislature intended by this definition must be gathered from the words in which the statute is couched, giving them their ordinary meaning unless there is something in the statute indicating that they should have a different signification, and from the main object sought to be accomplished by the enactment. *Meunier's Case*, 319 Mass. 421.

It appears the Legislature used the words "trade or industrial occupation" almost synonymously. The Legislature manifestly did not intend to include in the definition every vocation, and it certainly did not intend to include those embraced in the professions, but only those that related to trade or industry. Persons trained to administer to the sick do not engage in a trade or industrial occupation; but on the contrary are practising a profession. Compare *McMurdo* v. *Getter*, 298 Mass. 363, where the court said that although the statute speaks of an optometric practice or business, optometrists are in effect placed on a professional plane.

The practice of physiotherapy is no less a profession than optometry. Consequently, I answer your question in the negative.

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

Administration and Finance — Appropriations — Extending Time Limitation.

MAY 14, 1951.

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

DEAR SIR: — You have sought my opinion as to the effect of time limitations on appropriations made by the General Court under the provisions of St. 1949, c. 309, and St. 1949, c. 790. In your request you state that a large amount of authorized financing under the provisions of the two statutes in question has not been encumbered up to this time due to various substantial reasons for reserving the monies appropriated for future expenditures for purposes included within the scope of the legislation.

There was incorporated by the Legislature, by express reference in each

of the statutes under consideration, the following provision making each statute subject to G. L. (Ter. Ed.) c. 29, § 14:

". . . all projects authorized by this act shall be considered as special appropriations, so called, as provided in section fourteen of chapter twenty-nine of the General Laws, as amended."

Each of the statutes bore an emergency preamble. Statute 1949, c. 309, was signed by the Governor on May 20, 1949, and St. 1949, c. 790, was so signed on August 29, 1949, each statute thus becoming law at once. At the time of such approval G. L. (Ter. Ed.) c. 29, § 14, read as follows:

"An appropriation for any purpose other than ordinary maintenance shall not be available for more than two years after the effective date of the appropriation, except that payments to fulfill contracts and other obligations entered into within the said two years may be made thereafter."

In 1950 the Legislature enacted St. 1950, c. 43, by which statute the two-year limitation was raised to a five-year limitation under which the unencumbered balances of special appropriations "shall revert to the commonwealth at the close of such fifth or other designated year." This statute of 1950, most recently amending G. L. (Ter. Ed.) c. 29, § 14, reads as follows:

"Appropriations for other than ordinary maintenance, unless otherwise specifically provided therein, shall be available for expenditure in the two fiscal years following June thirtieth of the calendar year in which the appropriation is made and any portion of such appropriation representing encumbrances outstanding on the records of the comptroller's bureau at the close of such second fiscal year may be applied to the payment thereof any time thereafter. The unencumbered balance of such appropriation shall revert to the commonwealth at the close of such second, or other designated, fiscal year; provided, however, that appropriations for other than ordinary maintenance financed by the sale of bonds and notes, unless otherwise specifically provided therein, shall be available for expenditure in the five fiscal years following June thirtieth of the calendar year in which the appropriation is made and any portion of such appropriation representing encumbrances outstanding on the records of the comptroller's bureau at the close of such fifth fiscal year may be applied to the payment thereof any time thereafter. The unencumbered balance shall revert to the commonwealth at the close of such fifth or other designated fiscal year."

You are informed that to extend the life of the appropriations made under the two 1949 statutes, namely, chapter 309 and chapter 790, legislative action will be necessary to bring both statutes within the provisions of G. L. (Ter. Ed.) c. 29, § 14, as most recently amended in 1950, in order to obtain the five-year instead of the two-year limitation. This legislation which you propose would be a valid exercise of the legislative power and would not affect the validity of bond issues heretofore or hereafter made under the provisions of these statutes.

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

Civil Defense — Loyalty Oath.

May 15, 1951.

Hon. John F. Stokes, *Director, Civil Defense Agency.*

Dear Sir: — You have recently asked me for an opinion interpreting the effect of St. 1950, c. 639, § 18, under the circumstances hereinafter described.

You state that by Executive Order certain departments, divisions or other agencies of the Commonwealth may be assigned (as a sponsoring or supporting State agency) to assist in the performance of civil defense functions; and that section 18 of chapter 639 requires a certain oath to be taken by "each person who is appointed to serve in an organization for civil defense . . ."

You wish to know whether the employees of departments, divisions or other agencies of the Commonwealth must take the oath, even though they are not specifically appointed to serve in an organization for civil defense.

Statute 1950, c. 639, creates the "Civil Defense Agency." In order effectively to interpret section 18 of that chapter we must examine the main features of the whole act.

The act contains an emergency preamble which declares its purpose to be "in part to unify the sovereign powers of the commonwealth for the purpose of meeting the public need."

Section 1 of the act defines "civil defense" to be "the preparation for and the carrying out of all emergency functions, other than functions for which military forces other than the national guard are primarily responsible, for the purpose of minimizing and repairing injury and damage resulting from disasters caused by attack, sabotage or other hostile action or by fire, flood, earthquake or other natural causes; said functions shall include specifically, but without limiting the generality of the foregoing, fire-fighting and police services, medical and health services, rescue, engineering and air-raid warning services, evacuation of persons from stricken areas, emergency welfare services, communications, radiological, chemical and other special weapons of defense, emergency transportation, existing or properly assigned functions of plant protection, temporary restoration of public utility services and other functions."

A "local organization for civil defense" is defined as "an organization created in accordance with the provisions of this act by state or local authority to perform local civil defense functions."

Section 2 provides in part that the Director of Civil Defense "shall co-ordinate the activities of all organizations for civil defense within the commonwealth, and shall co-operate and maintain liaison with civil defense agencies of other states and the federal government . . ."

Sections 10 and 11 relate to the authority of state and local police and fire forces for the protection of life and property; and the appointment of auxiliary fire, police or other public protection units as may be approved by the civil defense agency.

Section 12 relates to the liability of the Commonwealth, its political subdivisions, or other agencies, or "any person engaged in any civil de-

fense activities" while in good faith complying with the provisions of the act or rules or regulations promulgated in pursuance thereof.

Section 13 provides for the establishment of local organizations for civil defense in accordance with the state civil defense plan and program.

Section 16 provides that the Governor or others in carrying out the provisions of the act shall utilize the services, facilities, officers and personnel of existing departments, offices and agencies of the Commonwealth, and of political subdivisions thereof, to the maximum extent practicable.

Section 18 provides that "no person shall be employed . . . in any capacity in any civil defense organization . . . who advocates, or has advocated, . . . the overthrow of any government in the United States by force or violence . . . Each person who is appointed to serve in an organization for civil defense shall, before entering upon his duties, take an oath, in writing, before a person authorized to administer oaths in this commonwealth, which oath shall be substantially as follows: . . . 'And I do further swear (or affirm) that I do not advocate, nor am I a member of any political party or organization that advocates, the overthrow of the government of the United States or of this commonwealth by force or violence . . .'"

In the construction of any act, the legislative intent is to be gathered from the words in which the statute is couched, giving them their ordinary meaning (unless a different signification is indicated in the context); from the pre-existing state of the common and statutory law; from the evil or mischief toward which the statute was apparently directed; and the main object sought to be accomplished by the enactment. *Meunier's Case*, 319 Mass. 421.

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

Thrusting aside the brambles of technical verbiage, we discover the basic intent of the Legislature to be the preservation and protection of the public against disastrous results of attack, sabotage or other hostile action or catastrophes of nature. To meet this emergency a civil defense agency is created, under the direction of the Governor, with broad powers. Specific provision is made for the utilization of the officers and personnel of all governmental agencies, State and local; but no person shall be "associated in any capacity in any civil defense organization" who advocates, or has advocated, the use of force or violence to change or overthrow the Federal or State Government; and an oath in writing not to advocate such force or violence is required of "each person who is appointed to serve in an organization for civil defense."

Whether existing governmental agencies are assigned to assist in the performance of civil defense functions or new public protection units are created, all the personnel thereof must be loyal and patriotic adherents of our present constitutional form of government. A chain of authority is no stronger than the weakest link exercising said authority. One person "associated in any capacity in any civil defense organization" could sabotage the whole program. It is true that some of the personnel of a governmental agency assigned to civil defense may have no palpable association with civil defense activities; and literally they are not at the time the agency is assigned "appointed to serve in an organization for civil defense."

We must, however, look beyond the literal words of the statute. The

Legislature clearly intended to screen and abort all potential saboteurs by requiring the oath of all who are associated, even remotely, with the civil defense program.

I therefore answer your question in the affirmative.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Administration and Finance — Overtime Compensation — Rules.

MAY 18, 1951.

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

DEAR SIR: — You have asked my opinion interpreting the effect of the law under the circumstances hereinafter described.

You state that on April 27, 1948, in a formal opinion, the then Attorney General declared that the Metropolitan District Commission had authority "to continue the employment of Construction Division personnel without the approval of the Division of Personnel and Standardization"; that on April 14, 1943, the Governor's Council approved a ruling of the Commission on Administration and Finance as follows: "No compensation shall be paid under this rule without prior approval of the Division of Personnel and Standardization"; that St. 1949, c. 448, and St. 1950, c. 512, amended G. L. (Ter. Ed.) c. 7, § 7, so as to read in part as follows: "The commissioner [of administration] shall, subject to the approval of the commission on administration and finance and the governor and council, from time to time, make rules and regulations which shall regulate travel, maintenance charges or payments in lieu thereof, vacation leave, sick leave and other leave with pay, including compensation for overtime service, for permanent and temporary employees"; and that in pursuance thereof the Commissioner of Administration promulgated certain rules (approved by the Governor and Council, effective March 1, 1951) among which was the following: "OE 2– Subject to prior approval by the Division of Personnel and Standardization, overtime compensation will be paid . . . to persons employed by the Commonwealth . . . [with exceptions not here pertinent]."

You wish to know whether payment for overtime to certain employees of the Construction Division is subject to the aforesaid rule approved on April 14, 1943, or whether it falls within the sweep of the aforesaid opinion of the Attorney General.

An examination of the opinion discloses that the Metropolitan District Commission by virtue of St. 1947, c. 583, succeeded to all the powers and obligations of the Metropolitan District Water Supply Commission; that by St. 1926, c. 375, § 2, the Metropolitan District Water Supply Commission had authority to engage employees and to fix their compensation according to its own rules; that such employment was not subject to classification under G. L. (Ter. Ed.) c. 30, §§ 45–50; and that under section 2 of St. 1947, c. 583, none of the provisions of the civil service law should apply to such employees.

Prior to St. 1949, c. 448, and St. 1950, c. 512, the Division of Personnel and Standardization (the authority of which is primarily derived from

chapter 30, sections 45–50) had no jurisdiction over the employees of the Construction Division of the Metropolitan District Commission; the Commission on Administration and Finance could not give the division any jurisdiction not authorized by statute; and overtime compensation could not be treated differently from base pay.

The aforesaid amendments to G. L. (Ter. Ed.) c. 7, § 7, however, specifically give the Commissioner of Administration authority to make rules governing overtime pay of all employees of the Commonwealth; and Rule OE 2 requires the approval of the Division of Personnel and Standardization with respect to overtime compensation.

I therefore answer your question in the negative; but add that in accordance with G. L. (Ter. Ed.) c. 7, § 7, as amended in 1949 and 1950, and the rules promulgated in pursuance thereof, the approval of the Division of Personnel and Standardization is required with respect to overtime compensation.

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

Administration and Finance — Civil Service — Temporary Employees — Credit for Military Service — Reinstatement.

JUNE 26, 1951.

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

DEAR SIR: — You have asked my opinion interpreting the effect of St. 1941, c. 708, under the circumstances hereinafter described.

You state that on January 6, 1942, "A" (certified under civil service) was employed as a junior clerk in the Department of the Secretary of State on a temporary basis but in a position in the classified service (classified under G. L. [Ter. Ed.] c. 30, §§ 45 and 46, as well as G. L. [Ter. Ed.] c. 31, the civil service law); that on May 31, 1942, he was drafted into the armed forces and on December 7, 1945, received an honorable discharge; that within a few days thereafter he applied for his old position with the Department of the Secretary of State; that instead of being reinstated to that position, his name was placed (by civil service) on the active list for appointment; and that on July 1, 1946, he was appointed on a permanent basis to the position of junior clerk in the Adjutant's General Department.

You wish to know:

1. Does St. 1941, c. 708, apply to temporary employees in the same manner as permanent employees?

2. Should "A" be given credit not only for the period January 6, 1942, through May 31, 1942, but also from June 1, 1942, to July 1, 1946?

On April 27, 1950, I rendered to you an opinion analyzing the different features of chapter 708. Those provisions pertinent to your present inquiry follow.

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 holds a

position which 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 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.

It thus appears that the Legislature intended to treat those subject thereto who were on military leave of absence as if they were physically working at their jobs. These sections of the statute make no distinction as to the character of one's service, whether it is permanent or temporary.

Since St. 1945, c. 703, § 1, became effective a temporary appointment is made for a specified time after certification from an eligible list, but prior thereto a temporary employee could be dismissed at any time. Consequently, upon his reinstatement under section 2 of chapter 708, "A" was subject to immediate dismissal by the appointing authority; but we are not to assume this would have happened. We must, therefore, treat "A" as having those rights or benefits he would have had if he had been reinstated.

Although a temporary employee acquires no seniority (length of service) under G. L. (Ter. Ed.) c. 31, § 15D, he nevertheless acquires other benefits accruing from the date he first enters the service of the Commonwealth. (See opinion to you dated February 17, 1950.)

I therefore answer both your questions in the affirmative.

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

Labor and Industries — Motion Picture Operators — Commercial Occupation.

JUNE 26, 1951.

HON. JOHN J. DELMONTE, *Commissioner of Labor and Industries.*

DEAR SIR: — You have requested my opinion as to whether motion picture operators, so called, come within the protection of the laws of the Commonwealth which provide that employees in private employment, with certain exceptions, shall have one day's rest in each seven days of the week.

The basic statute concerning the subject matter of your inquiry is G. L. (Ter. Ed.) c. 149, § 47, as most recently amended. This statute reads as follows:

"Whoever, except at the request of the employee, requires an employee engaged in any commercial occupation or in the work of any industrial

process not subject to the following section or in the work of transportation or communication to do on Sunday the usual work of his occupation, unless he is allowed during the six days next ensuing twenty-four consecutive hours without labor, shall be punished by a fine of not more than fifty dollars; but this and the following section shall not be construed as allowing any work on Sunday not otherwise authorized by law."

The question arises immediately under this statutory provision as to whether or not motion-picture operators are included within the scope of the word "commercial" as used in the statute.

The key word in the statute is manifestly the word "commercial." The words of a statute are the main source for the ascertainment of the legislative purpose. The word "commercial" in varying contexts may in the light of sound interpretation have a narrower or a broader meaning, depending upon the particular context in which it is used. In interpreting the meaning of this word as used in the statute in question, the nature of the statute, its self-evident purposes and its objectives, among other pertinent concepts, must be taken into account in order to assist in arriving at the legislative intention.

The words and phrases used in a statute are an important, if not controlling, source from which the legislative purpose is to be determined. Unless words or phrases have acquired technical meaning in the law they are to be construed "according to the common and approved usage of the language." G. L. (Ter. Ed.) c. 4, § 6, cl. 3. *Commonwealth* v. *Griffith*, 204 Mass. 18. In the *Griffith* case, a child labor case, in interpreting the word "work," the Supreme Judicial Court said: "The object of the statute forbids restriction of the word to a narrow meaning." It is to be here observed and noted that this decision related to the contruction of a penal statute.

"The legislative intent in enacting a statute is to be gathered from a consideration of the words in which it is couched, giving to them their ordinary meaning unless there is something in the statute indicating that they should have a different significance . . ." *Meunier's Case*, 319 Mass. 421, 423; *Duggan* v. *Bay State Street Railway*, 230 Mass. 370, 374.

The development of legislation, its progress through the legislative body, the history of the times, the trend of legislative purposes along social and humanitarian lines for the betterment of those who labor, the conservation of human health and the insuring of the public safety are all matters which may be properly taken into consideration in reaching a rational conclusion as to what was within the legislative intent in enacting the statute hereinbefore set forth. *Commonwealth* v. *Welosky*, 276 Mass. 398, 401.

In G. L. (Ter. Ed.) c. 149, §§ 49 and 50, as amended, there are expressly set forth limitations and exceptions under which certain occupations are excluded from the benefit of the provisions of G. L. (Ter. Ed.) c. 149, § 47, the basic statute under consideration in this opinion. But these limitations and exceptions do not relate to nor include motion-picture operators.

In my opinion the word "commercial" as adopted by the Legislature in drafting the statute was not used in a narrow and restricted sense. It was obviously intended to embrace many occupations in business, commerce and industry. The objectives of the statute alone are sufficient to support this view.

I therefore, on all the foregoing, answer your inquiry in the affirmative.

Motion-picture operators come within the provisions of G. L. (Ter. Ed.) c. 149, § 47, and are entitled to one day's rest in each week. In the light of sound reason and common sense, health and efficiency require this; public safety demands it.

Yours very truly,
FRANCIS E. KELLY, *Attorney General.*

Mental Health — Board of Appeal — Power to Discharge Patients — Records.

JUNE 26, 1951.

Department of Mental Health.

GENTLEMEN: You have recently asked me for an opinion interpreting the effect of St. 1950, c. 764.

You pose two questions:

(1) Does the Board of Appeal have the power to discharge patients from our mental institutions?

(2) Is the Board of Appeal entitled to the records of patients at mental institutions?

Statute 1950, c. 764, amends G. L. (Ter. Ed.) c. 19 by adding a section 7 which provides that there shall be in the Department of Mental Health, not subject to the control or supervision of the commissioner, a board of appeal consisting of three members (two to be appointed by the Governor with the advice of the Council and the third an Assistant Attorney General appointed by the Attorney General) who shall hear and determine appeals taken from decisions of the commissioner relative to the discharge of persons under either complete or limited supervision of the department.

Decisions of the commissioner stem from G. L. (Ter. Ed.) c. 123.

Section 1 of chapter 123 defines the word "department" to be the Department of Mental Health acting by and through the Commissioner of Mental Health.

Section 5 of that chapter provides that the department shall have the power to investigate the question of insanity of an inmate of any institution for the insane, public or private, and shall discharge such person if in its opinion he is not insane or can be cared for after discharge without danger to others and with benefit to himself.

Section 90 of the same chapter requires the approval of the department before an unrecovered insane person may be discharged.

The decisions of the commissioner in such cases arising under sections 5 or 90 are the subject of the appeals referred to in said St. 1950, c. 764.

When a general power is given, or a duty imposed, by statute, every particular power necessary for the exercise of the former or the performance of the latter is given by implication. *Fluet* v. *McCabe*, 299 Mass. 173.

The general power to hear and determine appeals implies the right to revise or reverse the decisions appealed from. It therefore follows that if the commissioner renders a decision adverse to a patient seeking a discharge, a reversal by the Board of Appeal is tantamount to a discharge. It also follows that in order effectively to hear such appeals the board

should have before it all pertinent evidence, including the complete hospital record of the mental patient seeking discharge.

I therefore answer both your questions in the affirmative.

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

Treasurer and Receiver General — Commonwealth as Party to an Action — Federal Law.

JUNE 26, 1951.

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

DEAR SIR: — You have requested my opinion interpreting the effect of the law under the circumstances hereinafter described.

You state that the United States Collector of Internal Revenue has placed with the Department of Public Works a tax lien and also a levy in the sum of $13,605.68 against a certain contractor who is under a contract to perform work for the Department of Public Works.

You wish to know whether the Commonwealth can be made a party to an action in the United States courts brought by the United States against the contractor.

Article III, section 2, of the Constitution of the United States provides that "the judicial power [of the United States] shall extend to all cases, in law and equity, arising under . . . the laws of the United States, . . . to controversies to which the United States shall be made a party. . . ."

In the case of *William J. McCarthy Co.* v. *Rendle,* 222 Mass. 405, the court held that the Commonwealth could not be named as trustee in an action because the Commonwealth cannot be made a party in its own courts without its consent. But whether the Commonwealth can be made a party in the Federal courts depends upon the Federal law and not upon the law of the Commonwealth.

I therefore answer your question in the affirmative.

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

INDEX TO OPINIONS

PAGE

Administration and Finance:
Appropriations; extending time limitation . . . 49
Civil service; temporary employees; credit for military service; reinstatement . . . 54
Emergency employee; overtime compensation . . . 13
Overtime compensation; rules . . . 53
State employees; military reserves; payments by State . . . 14
Agriculture; appointment; inspector of animals; tenure . . . 24
Animals, inspector of; appointment; tenure . . . 24
Appeal, Board of; power to discharge patients; records . . . 57
Appropriations:
Department of Conservation; constitutional law . . . 21
Expenditures; public works . . . 21
Extending time limitation; Administration and Finance . . . 49
Armed forces, persons in; license renewal; Civil Service and Registration 28
Bond issue; State Airport Management Board; judgments . . . 47
Budget; credits; public works . . . 37
Charles River bridge; right to lay gas main . . . 11
Civil defense:
Loyalty oath . . . 51
Powers of Governor; pooling money of Commonwealth with United States for defense . . . 42
Civil service; temporary employees; credit for military service; reinstatement . . . 54
Civil Service and Registration:
License renewal; persons in armed forces . . . 28
Plumbing; inspection; permit . . . 45
Common carrier; statute; public utilities . . . 43
Commonwealth:
Money of, pooling with United States for defense; civil defense; powers of Governor . . . 42
Party to an action; Federal law; Treasurer and Receiver General . . . 58
Conduits and gas lines; Metropolitan District Commission; permits; eminent domain; damages . . . 22
Conservation, Department of; appropriations; constitutional law . . . 21
Constitutional law:
Appropriations; Department of Conservation . . . 21
Charles River bridge; right to lay gas main . . . 11
School lunches . . . 38
Contract; notice; public works . . . 38
Contract carrier; ashes and waste permit; Department of Public Utilities 27
Education:
Children of veterans; veterans' benefits . . . 29
Private trade school; profession; physiotherapy . . . 48
School lunches; constitutional law . . . 38
Eminent domain; conduits and gas lines; Metropolitan District Commission; permits; damages . . . 22
Employees:
Emergency; overtime compensation . . . 13
State; military reserves; payments by State . . . 14
Temporary; credit for military service; civil service; reinstatement . . . 54

PAGE
Expenditures; public works; appropriations 21
Federal law; Commonwealth as party to an action; Treasurer and Receiver General 58
Gas lines and conduits; Metropolitan District Commission; permits; eminent domain; damages 22
Gas main, right to lay; Charles River bridge 11
Governor, powers of; civil defense; pooling money of Commonwealth with United States for defense 42
Labor and Industries, Department of; motion-picture operators; commercial occupation 55
License renewal; persons in armed forces; Civil Service and Registration 28
Loyalty oath; civil defense 51
Medical panel; retirement; disability 34
Mental Health, Department of:
Board of Appeal; power to discharge patients; records 57
Employees; military leave 45
Metropolitan District Commission:
Conduits and gas lines; permits; eminent domain; damages 22
Police officers; overtime service; appropriations; war 16
Military leave; Department of Mental Health; employees 45
Military reserves; State employees; payments by State 14
Military service, credit for; temporary employees; civil service; reinstatement 54
Military settlements; veterans' benefits 18
Motion-picture operators; commercial occupation 55
Old Age Assistance; settlement; public welfare 35
Overtime compensation:
Emergency employee 13
Rules; Administration and Finance 53
Overtime service; police officers; Metropolitan District Commission 16
Patients, power to discharge; Board of Appeal; records 57
Physiotherapy; private trade school; profession 48
Plumbing; inspection; permit 45
Police officers; Metropolitan District Commission; overtime service 16
Public health; disability; retirement; medical panel 34
Public utilities:
Common carrier; statute 43
Permit; contract carrier; ashes and waste 27
Public welfare; Old Age Assistance; settlement 35
Public works:
Budget; credits 37
Charles River bridge; right to lay gas main; constitutional law 11
Contract; notice 38
Expenditures; appropriations 21
Retirement; disability; medical panel 34
School lunches; education; constitutional law 38
Settlement:
Public welfare; Old Age Assistance 35
Veterans' benefits 25
State Airport Management Board; judgments; bond issue 47
Treasurer and Receiver General; Commonwealth as party to an action; Federal law 58
United States, pooling money of Commonwealth with, for defense; civil defense; powers of Governor 42
Veterans' benefits:
Children of veterans; education 29
Military settlements 18
Settlement 25

PAGE
Veterans, children of; education; veterans' benefits 29
Veterans' Services:
Duty of Commissioner in controversies 24
Military settlements; war; veterans' benefits 18
Veterans' benefits; settlement 25