STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1951 - 1954

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Erastus Foote, Wiscasset	1820
Jonathan P. Rogers, Bangor	1832
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Daniel Goodenow, Alfred	1838
Stephen Emery, Paris	1839
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Otis L. Bridges, Calais	1842
W. B. S. Moor, Waterville	1844
Samuel H. Blake, Bangor	1848
Henry Tallman, Bath	1849
George Evans, Portland	1853
John S. Abbott, Norridgewock	1855
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Nathan D. Appleton, Alfred	1857
George W. Ingersoll, Bangor (died)	1860
Josiah H. Drummond, Portland	1860
John A. Peters, Bangor	1864
William P. Frye, Lewiston	1867
Thomas B. Reed, Portland	1870
Harris M. Plaisted, Bangor	1873
Lucilius A. Emery, Ellsworth	1876
William H. McLellan, Belfast	1879
Henry B. Cleaves, Portland	1880
Orville D. Baker, Augusta	1885
Charles E. Littlefield, Rockland	1889
Frederick A. Powers, Houlton	1893
William T. Haines, Waterville	1897
George M. Seiders, Portland	1901
Hannibal E. Hamlin, Ellsworth	1905
Warren C. Philbrook, Waterville	1909
Cyrus R. Tupper, Boothbay Harbor (resigned)	1911
William R. Pattangall, Waterville	1911
Scott Wilson, Portland	1913
William R. Pattangall, Augusta	1915
Guy H. Sturgis, Portland	1917
Ransford W. Shaw, Houlton	1921
Raymond Fellows, Bangor	1925
Clement F. Robinson, Portland	1929
Clyde R. Chapman, Belfast	1933
Franz U. Burkett, Portland	1937
Frank I. Cowan, Portland	1941
Ralph W. Farris, Augusta	1945
Alexander A. LaFleur, Portland	1951

DEPUTY ATTORNEYS GENERAL

Fred F. Lawrence, Skowhegan	1919-1921
William H. Fisher, Augusta	1921-1924

Clement F. Robinson, Portland	1924-1925
Sanford L. Fogg, Augusta (retired 1942)	1925-1942
John S. S. Fessenden, Portland (Navy)	1942-1942
Frank A. Farrington, Augusta	1942-1943
John G. Marshall, Auburn	1943
Abraham Breitbard, Portland	1943-1949
John S. S. Fessenden, Winthrop	1949-1952
James Glynn Frost, Gardiner	1952-

ASSISTANT ATTORNEYS GENERAL

Warren C. Philbrook, Waterville	1905-1909
Charles P. Barnes, Norway	1909-1911
Cyrus R. Tupper, Boothbay Harbor	1911-1913
Harold Murchie, Calais	1913-1914
Roscoe T. Holt, Portland	1914-1915
Oscar H. Dunbar, Jonesport	1915-1917
Franklin Fisher, Lewiston	1917-1921
William H. Fisher, Augusta	1921
Philip D. Stubbs, Strong	1921-1946
*Herbert E. Foster, Winthrop	1925
LeRoy R. Folsom, Norridgewock	1929-1946
Richard Small, Portland	1929-1935
*Ralph M. Ingalls, Portland	1938-1940
Frank J. Small, Augusta	1934-1946
Ralph W. Farris, Augusta	1935-1940
William W. Gallagher, Norway	1935-1942
Richard H. Armstrong, Biddeford	1936
*David O. Rodick, Bar Harbor	1938-1939
John S. S. Fessenden, Portland (Commissioned Navy, 1942)	1938-1942
	1945-1949
Carl F. Fellows, Augusta	1939-1949
*Frank A. Tirrell, Rockland	1940
Alexander A. LaFleur, Portland (Commissioned Army, 1942)	1941-1942
Harry M. Putnam, Portland (Commissioned Army, 1942)	1941-1942
Julius Gottlieb, Lewiston	1941-1942
Neal A. Donahue, Auburn	1942-
Nunzi F. Napolitano, Portland	1942-1951
William H. Niehoff, Waterville	1940-1946
*1 Richard S. Chapman, Portland	1942
*1 Albert Knudsen, Portland	1942
*1 Harold D. Carroll, Biddeford	1942
*John O. Rogers, Caribou	1942-1943
John G. Marshall, Auburn	1942-1943
Jean Lois Bangs	1943-1951
Henry Heselton, Gardiner	1946-
Boyd L. Bailey, Bath	1946-
George C. West, Augusta	1947-
Stuart C. Burgess, Rockland	1949-1953
L. Smith Dunnack, Augusta	1949-

James Glynn Frost, Eastport 1951-1952
Roscoe J. Grover, Bangor 1951-1953
David B. Soule, Augusta 1951-1954
Roger A. Putnam, York 1951-
Miles P. Frye, Calais 1951-1954
Frank W. Davis, Old Orchard Beach 1953-
Milton L. Bradford, Readfield 1954-
Neil L. Dow, Norway 1954-

* Temporary Appointment

*1 Limited appointment to handle cases arising under R. S. 1930, Chapter 138, Sections 31-33, without cost to the State.

COUNTY ATTORNEYS

County		
Androscoggin	Gaston M. Dumais	Lewiston
Assistant	William Dodd Hathaway	Lewiston
Aroostook	Walter S. Sage	Fort Fairfield
Cumberland	Frederic S. Sturgis	Portland
Assistant	Arthur Peabody	Portland
Franklin	Joseph Holman	Farmington
Hancock	William Fenton	Bar Harbor
Kennebec	Lewis I. Naiman	Gardiner
Knox	Curtis Payson	Rockland
Lincoln	James Blenn Perkins, Jr.	Boothbay Harbor
Oxford	Henry Hastings	Bethel
Penobscot	Oscar Fellows	Bangor
Assistant	Orman G. Twitchell	Bangor
Piscataquis	Matthew Williams	Dover-Foxcroft
Sagadahoc	George M. Carlton, Jr.	Bath
Somerset	George Perkins	Skowhegan
Waldo	Hillard H. Buzzell	Belfast
Washington	Harold V. Jewett	Calais
York	William P. Donahie	Biddeford

STATE OF MAINE

Department of the Attorney General

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January 5, 1955

To the Honorable
The Governor and Executive Council:

It is my privilege to submit this report of the activities and affairs of the Department of the Attorney General for the years 1951, 1952, 1953 and 1954, as provided by Section 14 of Chapter 20 of the Revised Statutes of Maine, 1954.

ALEXANDER A. LaFLEUR
Attorney General

REPORT

1951-1954

The Revised Statutes of Maine require a biennial report from the Attorney General. As, for reasons of economy, no report was printed for 1951 and 1952, those two years are included in this report, which thus covers the years 1951-1954.

This is primarily a report to the Governor and Council. It is also for the benefit and information of those State departments, commissions and agencies, the Legislature, and others whom by law we serve as legal counsel. Beyond this official audience, it is my hope that this report may be read by as many of the citizens of the State as possible, because governmental functions are directly accountable to the citizens, and government, to be successful, must never be remote from its people.

The Attorney General is the chief law officer of the State, charged with the uniform enforcement of its laws. He is adviser to the Governor, the Executive Council, other State officers, departments, agencies and divisions. He advises Members of the Legislature on matters of law, at their request. He has supervision over the County Attorneys. Almost every type of legal question comes before him. In his office will be found men highly skilled in their particular fields of law and well qualified to provide the State with sound advice. In a daily routine, the department may give advice on such varied matters as extradition, quo warranto proceedings, condemnation cases, validity of school or highway bonds, criminal appeals, tax matters, license revocations, water pollution, personnel, and many others. During a legislative session, the office, if requested, advises the Governor regarding the constitutionality and effect of pending bills. Members of the staff are in daily contact with State agencies, and one of my aims as Attorney General has been to give needed advice as promptly as possible. Several departments require full-time attorneys. In all, the Attorney General's Department renders advice and assistance to more than one hundred agencies of State Government. Many of these have been added during the present generation and as greater demands have been made by the people of the State for governmental services, it has been necessary to employ more attorneys.

CRIME

Maine's law enforcement officers charged with maintaining the public order will always have an unfinished task, for crime can never be suppressed entirely. The mission of law enforcement is to minimize crime to its lowest extent.

During my tenure of office the crime picture has improved, and I can state that organized crime, as such, does not exist in Maine. The bookie-syndicate racket has been smashed, the slot machine racket has vanished, so has the punchboard racket. Credit should not go solely to the Attorney General's

department, the County Attorneys, the State Police, the sheriffs and local police officers; the first credit should go to the public and the press for insisting upon strict and continuing law enforcement. The public generally gets what it insists upon. This revitalized attitude on the part of the public and the press has made the task easier for law enforcement officers throughout the State. Public support and cooperation are absolutely essential for proper enforcement of our laws.

On February 4th and 5th, 1954, the Maine Medico-Legal Society held a crime conference in Portland. This was not designed to give the will to enforce law – that already existed – but to provide tools for better enforcement.

We must always bear in mind certain objectives, which include:

1. A better understanding between the taxpayers and law enforcement officials, so that investigative work can be continually upgraded.

2. Better investigative technique in homicide cases, which means a system of competent Medical Examiners;

3. Power in the hands of the Courts to see that the defense of each person accused of crime is adequately and competently conclusive by the appointment of special counsel (allowed in felony cases) at government expense to indigent accused to assure their competent and vigorous defense, including the appointment of impartial and competent experts to furnish technical information both before and during trial;

4. Procedural changes so that technicalities are subordinated to the end that logical, substantive proof may be presented, yet without weakening constitutional safeguards;

5. Education of the public to a realization that a professional criminal is an enemy of society and should be regarded as such, while the man who violates laws because of weakness of character or the pressure of environment is capable of rehabilitation, though the wrong punishment may almost automatically turn him into a professional criminal. This means greater emphasis on rehabilitation in our penal institutions, just as it means stronger safeguards for society against its organized enemies. This may well cost the taxpayer more money for penal administration, but it will effect great savings in the over-all cost of crime;

6. Increased public recognition of the merits of our judicial system;

7. A better understanding between the ordinary citizen and members of the medical and legal professions;

8. A better understanding by the legal and the medical professions of each other's problems, to familiarize prosecutors and all law enforcement officials with the importance of legal medicine in problems of proof;

9. Better standards of proof, so that fewer innocent persons are arrested and more guilty persons apprehended and punished.

CHARITABLE TRUSTS

The function of the Attorney General is to interpret and enforce the laws. He should recommend only such new legislation as has a direct bearing upon his responsibilities.

By R. S. 1954, Chapter 20, Sec. 4, he is required to see that the conditions of charitable trusts are carried out and is made responsible for prosecution in those

instances where the terms of the trust have been abused. The law which confers this responsibility upon him is too vague, and accompanying legislation has never been passed to provide him with the means of discharging it. To discharge this responsibility properly and to protect the people of the State, the Attorney General, obviously, would require additional funds, at least one accountant, an investigator familiar with accountancy practices, and a legal assistant conversant with finance and taxation.

These charitable trusts should be required to submit annual reports of their condition to the Attorney General, showing funds collected, disbursements for overhead, and funds for specific charitable purposes. Without direct and thorough supervision, wrongdoing on the part of trustees is entirely possible. It is my feeling that this situation is grave and that prompt action should be taken by the legislature in the interests of public welfare. I have therefore requested Assistant Attorney General Boyd Bailey to prepare specific recommendations.

JUVENILE DELINQUENCY

One of the greatest failures of our American society, and one of its gravest dangers, is to be found in the horrifying proportion of all crimes committed by young men and women, actually boys and girls, often mere children. The increase in juvenile delinquency is inexcusable. There is little consolation in the fact that it is considerably less in Maine than in some other States. If only one child were found guilty of robbery, his misfortune would cry out in a challenging voice to our entire society, and no honest or honorable member of it could be deaf to the voice. The tragic cost of the devastating total of juvenile crime is not to be figured in terms of property stolen or damaged, but in the utter demoralization and disintegration of the moral and spiritual values of youth itself.

It does no good to say that the number of boys and girls involved in crime is a small fraction of the total, though that is most fortunately true. The people of Maine will make a great mistake if they there find an excuse for doing nothing about the problem of juvenile crime. More than anything else, this statistically inspired complacency accounts for the fact that we are not really fighting juvenile delinquency at all, merely letting it run its malignant course like an epidemic disease, trusting that it will run itself out after the usual manner of such afflictions.

Many people insist that there is no such thing as a bad boy, or girl; but the staggering number of bad things done by so many boys and girls, while not refuting this belief, indicates that there is something terribly wrong about our attitudes. Surely, somebody is responsible for this festering malignancy of juvenile crime. If it isn't the offending boys and girls themselves, it must be our society itself, the father and mother, the schools and the churches, the community, the whole structure of government and of our civic and patriotic organizations.

We know from practical experience that when a neighborhood makes up its collective mind to do something about its young people it gets results. If the results do not quite measure up to expectations, it is because, and only because, there has not been enough conscientious parental supervision, enough home, church and school discipline, or enough civic understanding. Many fathers

and mothers do not take their responsibility seriously. They are too lax, too lazy, or too selfish; and they are the ones whose children usually get into trouble. It is nothing short of abdication by those whose duty it is to maintain the principle of authority. For their indifference and irresponsibility the entire family must face the consequences.

What is the matter with parents? What have they done to their children? Have they taught them no independence of action or spirit, no principles? Do they look at their offspring and see a brood that is afraid to be different, afraid to do right? In many cases the child's worst enemy is the parent who is only too glad to get him off his hands and make him a responsibility of the Court and the State, "making more money available to the parent for gambling and liquor."

Yet if I had to choose from all the influences in this matter the one where the most good could, and should, be done, I would select the home above all other. Where children are taught the right principles of citizenship, of decency, of respect for law and order, of respect for the father and mother, and love of their fellowmen, then can we expect those children to grow up to be citizens who are an influence for good.

I believe that the basic principles of sound legislation in this matter are:

1. Parents have the primary responsibility, and society an obligation to help them discharge it;

2. State Government has the ultimate responsibility for a program of public child welfare and youth services or for seeing that such services are provided by local governments throughout the State;

3. Public and voluntary agencies can work together to create an adequate program for the welfare needs of children and youth;

4. Public child welfare and youth services should have clear-cut identities, whether administered by one agency or by several;

5. In locally administered programs, the local units should take as much responsibility as possible, the State providing professional and financial assistance;

6. Public child welfare and youth services should be closely associated with services designed to help individuals and families with their economic, personal, family or community problems;

7. Public child welfare and youth services should always have regard for the tie between parents and children and for the legal and civil rights of both;

8. Those legally responsible for children and youth should be required, so far as they are able, to discharge their legal and financial obligations to them;

9. When the legal custody of a child or youth is vested in a public agency, that agency should have authority from the Court to determine and carry out the treatment that will best meet his needs.

I recommend:

1. Establishment of Crime Prevention Bureaus in all cities and towns of 1500 population or more to attack delinquency from the preventive angle;

2. Creation of a Youth Division in the office of the Attorney General to coordinate and lead community action;

3. Harsher penalties for persons contributing to delinquency of minors.

4. Study, with police chiefs, of the need for local curfews;

5. Study of ways and means to obtain recreational facilities and leadership for housing projects;

6. Stiffer penalties for selling liquor to minors, even to the point of making revocation of license mandatory on conviction.

MAURICE SIMON CASE

Among the many criminal matters coming to the attention of the Attorney General was the charge that one Maurice Simon, a lawyer, of Brookline, Massachusetts, had attempted to bribe the Governor of this State by offering him ¼ of a cent a gallon on all Rode-Rite sold to the State of Maine, in return for action by him in connection with the purchase by the State of said Rode-Rite.

This charge, made by the Governor and communicated by him to the Attorney General, was competently and completely investigated by James P. Archibald, Esq., of Houlton, and Harold J. Rubin, Esq., of Bath, then Assistant Attorneys General, with the advice of the Hon. Ernest L. McLean of Augusta as Special Legal Consultant. All supporting data, exhibits and information relative thereto are now in the files of the Attorney General.

The results of this investigation were presented in due course to the Grand Jury of Kennebec County at the June Term 1953, the Governor appearing as a sworn witness. The said Grand Jury at said term returned an indictment against the said Maurice Simon, and at the February Term 1954 Simon, who was represented by competent counsel, entered a plea of guilty and paid the fine imposed by the Court, the maximum of $3000, plus the statutory costs.

I secured from the clerk of the court a certified copy of the record and forwarded it to the Attorney General of Massachusetts, requesting that the matter be presented to the proper authorities of the Massachusetts Bar for such action as said Bar should deem proper, also expressing my willingness to testify in any proceeding in Massachusetts relative to the criminal proceedings had in Maine. I was informed that disbarment proceedings against Maurice Simon would be instituted in Massachusetts.

Mr. Simon filed with the Governor and Council of this State a petition, returnable on December 1, 1954, requesting a pardon for this offense, alleging that he was in fact innocent of the crime to which he had pleaded guilty. At the hearing on this petition, James P. Archibald appeared for the State in vigorous opposition. However, the matter was continued until a Council meeting during the week of December 20, 1954, at which meeting the Council by a vote of 4 to 3 extended Executive clemency to Maurice Simon in the form of a pardon.

As Attorney General, I was of the opinion that my office had substantial and competent evidence not only to obtain a jury conviction of the offense to which Maurice Simon had pleaded guilty, but also to sustain such a conviction before the Law Court. This department expended thousands of dollars, and rightfully so, of the taxpayers' money in this matter and devoted hundreds of hours to investigation, study, preparation, and prosecution of Simon; in fact, investigators from this department and certain Federal agencies were actively engaged in further study and investigation as late as December 1, 1954. There

were, and are, many questions that remain unanswered in connection with Rode-Rite, and I was not only hopeful but confident that this individual could have furnished some of the information the State was seeking. However, his pardon has effectively closed that anticipated source of information.

I am aware that the exercise of clemency is vested, by our Constitution, in the Governor and Council, and in the normal and ordinary case I should have remained silent; but because of the very nature of the crime, an attack on the integrity of the highest officer of our government, I should be remiss indeed in my duty if I failed to indicate to the citizens of this State my reaction to the pardon granted to Maurice Simon.

This crime was not an offense against the Governor of Maine as an individual, but rather an offense, injury and insult to every citizen of this State.

It is my opinion that there was no legal or moral justification for the pardon of Maurice Simon and I view its granting with bewilderment, disillusionment and great disappointment.

NARCOTICS

A greater threat against the health and morale of our State does not exist than illegal narcotic operations. Every citizen should be put on notice of this fact. Every citizen should be alert to detect any dealing in this evil traffic.

Contrary to some exaggerated stories, illicit narcotic traffic in Maine is very small, but any dealing in illicit drugs is intolerable. No vice is so corruptive or has so little hope of rehabilitation as drug addiction.

A fortune in narcotics is easy to conceal because it comes in small packages. Because of the fabulous profits involved, the illicit drug traffic attracts the most rapacious criminals, who use every cunning and subterfuge to escape attention.

Local law enforcement officers are giving top priority to this subject. The Attorney General's department also has under investigation certain suspicious transactions and our citizens may be sure that their law enforcement officers are on the alert.

PARDONS

As a result of a survey of the procedure in the other New England States, I recommend a general tightening up in the granting of unconditional pardons, making releases in such manner as to bind the recipients to good behavior, at least while their sentences would have run.

I recommend that there be created a Pardon Board of five members, to consist of a psychiatrist, a physician, a Justice of the Supreme Judicial Court (or an active retired Justice), and two others, all to be appointed by the Governor with the advice and consent of the Council; such board to be authorized to compel the attendance of witnesses and hear them on oath, at hearings for pardons or commutations of sentences, and to report their findings and recommendations in writing to the Governor and to the Attorney General. It shall then be the duty of the Attorney General to recommend to the Governor and Council whether a pardon or commutation ought to issue, and, if so, on what conditions, the Governor and Council to issue or withhold the requested pardons or commutations of sentence in their discretion.

POWNAL STATE SCHOOL

A survey of the Pownal State School was conducted for this department by James P. Archibald, Esq., a former Assistant Attorney General, Philip W. Wheeler, senior investigator of the department, and the Attorney General, hereinafter referred to as the Survey Staff, assisted by Norman U. Greenlaw, Commissioner of Institutional Service, Superintendent Bowman, Mrs. Josephine Goodwin, social worker, Miss Constance Blake, secretary to the Superintendent, and Dr. Doris Sidwell-Thompson.

The purpose of this survey was to ascertain whether there was, or had been within the statutory period of limitations, any evidence of criminal activity by employees at the School. The survey was limited to an inquiry whether there was evidence of abuse either physical or sexual, of inmates by employees.

Patients at Pownal, both male and female, are in the age group of five to fifty-five. Their intelligence quotients range from almost absolute zero to approximately 70, where the individual is assumed to be a high-grade moron. In theory, no patient has any psychosis, since Pownal is not an institution for the insane.

From a criminal aspect, the problem arises, what might be considered abusive treatment to a normal individual would not necessarily be abusive treatment to a feeble-minded person. For example, many low-grade patients wear so-called camisoles (a less severe form of straitjacket). Others wear coverings called mittens, on their hands. If a normal person were subject to the wearing of such articles, it might well be classified as abuse. At Pownal, it is often necessary for the protection of the wearer as well as the protection of other patients in the same ward.

Because of limitations on personnel, one or two attendants often supervise and care for forty or fifty patients in an open ward or a large play area, and at times patients become excited and attempt to do harmful acts which require physical force to prevent. The records show that on certain occasions patients have assaulted an attendant to the extent that he required medical care. In other cases the attendant, to protect himself, resorted to force. A record of these instances has been kept and is available to any proper agency of the State. While there may have been instances where an attendant used an excessive amount of force, in general we feel that this would constitute failure to use good judgment rather than assault and battery.

Concerning sexual abuse, it should first be definitely understood that at the patient level there is evidence of homosexual conduct, but whether this is true homosexuality is a debatable point. In view of the mental capacity of the patients and their sexual development, we conclude that it is not. Assume that a patient has an I. Q. of 30 or 35, which places him in the imbecile group, but that he is physically well developed and beyond the age of puberty. He has no contact with the opposite sex, but he does have a sex urge. Under the circumstances it can be expressed only by homosexual activity. The better view would seem to be that such activity is not true homosexuality. Our survey from criminal activities at the School, therefore, did not concern itself with the problem between patients, whereas homosexuality between employees and patients was of initial and grave importance in our investigation.

The problem of patient care has a wide range and imposes an equally wide range of problems: – the idiotic probably untidy, unable to eat or walk, the spastic, the epileptic, all requiring specialized care. It is difficult, within the salary range in effect, to employ people to work with these patients. Turn-over in the nursing department, which includes attendants, is very high. Thus a serious personnel problem is presented at the outset, and it inevitably happened, through no fault of the administration, that on occasion undesirable persons were employed because of insufficient screening.

Again, there has been no education program for the training of employees, and lack of funds is largely responsible. Attendants are engaged who have worked perhaps in factories or as housewives and have never been confronted with a feeble-minded person. Such employees become self-trained to varying degrees and their treatment of patients must be expected to be erratic meanwhile. The standard of care necessarily fluctuates with the natural ability of the particular employee to adjust to the situation.

These matters have been given as background to the survey, but I should be remiss in my duty if I did not state, unequivocally, that there has been, and is now, a nucleus of faithful, loyal and devoted employees who have been at Pownal for many years and without whom the school simply could not function.

The personnel record of each employee was scanned and the records of 245 examined in detail. Checks for criminal records were made on these. Some were found to have records for traffic violations, etc. A few had committed more serious offenses, but have had good records as employees. For instance, one employee was fined in 1938 for assault and battery and arrested for intoxication in 1941, but has been employed at Pownal for several years, is well liked by both patients and attendants, shows a real interest in the wellbeing of the patients and in our opinion is one of the better employees.

Another, who had left the School several months before the survey began, was said by two patients to have engaged in homosexual activity with them. We have been reliably informed that he is not now within the State.

Three employees had been involved in intoxication incidents before coming to the School, but not since, and are rated, respectively as "adequate", "good" and "very good" employees.

One, who had been involved in a fraud case some twenty-five years ago, informed the authorities of same when employed. His record is "very good".

An oral complaint was made to the Attorney General, charging X with abuse of a patient, alleging lack of food, incarceration and lack of sufficient clothing. This patient, Y, was born in Augusta in 1936, committed to the State School for Boys in 1951 and later in the same year to Pownal. His I. Q. was then 59. He was on trial visits in 1952 and 1953, but on January 22, 1954, was sent to the Men's Reformatory for larceny and transferred to Pownal.

On March 10, 1954, he participated in an escape plan which involved "jumping" an attendant and stealing a car. For this he received punishment in the form of 24-hour confinement. On May 1, 1954, he again conspired along similar lines, but was prevented by a carpenter, and confined. This is routine punishment for defective delinquents, who cannot be otherwise restrained because of lack of facilities for maximum security. He was seen by the survey

staff on November 10, 1954. He seemed healthy and was well clothed. On being questioned, he made no complaints and said he was being used well. There were no bruises, nor do any hospital records indicate any. His I. Q. had increased to 77, which placed him in the category of "borderline efficiency", or above the moron level. The survey staff recommended that he be transferred back to the Men's Reformatory, which was done.

This case illustrates a chronic problem at Pownal – maximum security. Many patients are defective delinquents, including arsonists. The welfare of many patients is in jeopardy while that type is not properly secured.

The only facility at Pownal is solitary confinement in a room with periodic exercise under the care of an attendant.

A second complaint alleged that two attendants, S. and D., were guilty of physical abuse of a patient, who is an epileptic with psychosis and has since been transferred to the Augusta State Hospital. This patient was destructive and required restraint to give her medicine. Her record at Pownal shows many instances of violence to both attendants and other patients. The complainant in this case was employed at Pownal for only three months, leaving in March, 1952.

Both attendants were interviewed and acknowledged having to use restraint on the patient, but denied abuse. The patient was interviewed also, at the Augusta State Hospital, and recalled breaking windows, striking patients, etc. She also said that during a fight between patients, in endeavoring to separate them one of "the kids grabbed my thumb and broke it." The complainant had charged that it was a wrist that was broken. Both hands were X-rayed and there was no evidence of fracture. This patient, when questioned, told the survey staff that she knew both S. and D., liked D. and loved S. She also informed the survey staff, "I never was abused at all at Pownal. I got my way too much." In short, there was no basis for the complaint.

A survey was made of the hospital records of the previous superintendent, Dr. Kupelian, and to date through Dr. Bowman's administration, and all cases involving injuries to patients were listed. These numbered seventy-two, including cuts, burns, sprains and fractures.

One patient was treated for a fractured pelvis. He was working in the linen room and fell from a ladder. Another patient had an epileptic seizure while on the stairs, fell and injured his head. A third was pushed by another patient and knocked down, sustaining a fracture of his leg. A girl fell out of bed and cut her head. A boy received a fracture of the jaw in a fight with another patient. Instances like these could be multiplied, but the foregoing indicate the type of accident that occurs. In no case has it been discovered that an employee has injured a patient.

As a further check the survey staff went into every building and talked to those patients who had cuts, black eyes, and so on, and where patients had sufficient mental comprehension, explanations were given. No patient charged physical abuse against any employee.

Conversely, it is clear that there were many instances when employees were assaulted by patients. A male attendant had to be hospitalized after being assaulted by three patients. A lady attendant's uniform was literally torn

off by a disturbed patient. An undetermined number of eyeglasses have been broken by patients.

While we do not deny the possibility of physical abuse of patients by employees, the risk was seen to be the other way. We do not hesitate to commend the employees at Pownal for the care given the patients.

It must by now be obvious that more employees in the nursing departments would be desirable, but the budget is not adequate – which is a legislative problem. We can only ask where, except at Pownal, can you find employees working 24 consecutive days, with four consecutive days off, many of them for a great many years?

We come now to the matter of sexual abuse.

An 18-year-old patient with an I.Q. of 61 told of homosexual activity with a former employee, B. After B. left, the patient said he was approached by another attendant, T., and the practice continued at frequent intervals. Another patient, H., made the same accusation against T. This situation was brought to the attention of the Commissioner and the Superintendent and T. was dismissed.

Patient M., a "farm boy" aged 37, involved two employees, E., a farm worker aged 62, who was also named by two other patients, and B., 47, single, another farm worker. In the latter case, the patient was the aggressor. Both employees "resigned".

In the case of a nursing attendant, aged 26, the survey found no evidence of homosexual activity with patients, but at least two described obscene language used by him, and on the recommendation of the survey staff he was dismissed. He appealed to the Personnel Board, which sustained the dismissal.

Donald E. Whittemore, former head of the education department at Pownal, who admitted homosexual activity with patients for at least 25 years, was indicted for such offenses by the Grand Jury of Cumberland County at the January Term, 1955, pleaded guilty to two indictments and was sentenced by Justice Francis M. Sullivan to State Prison for two terms of 5 to 10 years.

The survey staff found no evidence that any other employees at Pownal were involved with patients.

With the exceptions of cases heretofore noted, the employees at Pownal are doing a reasonable job consistent with their several abilities and experience. Some, of course, are more refined and efficient than others, some more interested than others in their work. These conditions prevail in every institution.

Comment should also be made about the possibility of successful criminal prosecution in the first cases discussed.

The I.Q.'s of the patients who might be called as witnesses range from 39 to 72. While it is technically true that they could qualify as witnesses, their ability to withstand cross-examination is doubtful. The specific acts of homosexuality alleged were not witnessed by others, so that corroboration would not be available. Therefore dismissal was indicated rather than criminal prosecution.

The supporting data, records, etc., of the survey staff pertaining to the investigation are in the files of the Attorney General's department.

Let me repeat that the method of employing personnel lacks a proper background check. There has in the past been no criminal record check, even. There is no personnel director, nor does the budget permit any. As a protective measure, some one should check every new employee before he acquires any status under the Personnel Law. It is not enough to rely on recommendations furnished by the applicant.

Again I urge some system of training for new employees.

Pownal has a very definite place in our institutional system. Because of their disability, its patients can be treated only in an institution. Within the limits permitted by the budget, patients are well cared for at Pownal. Dr. Bowman has rendered outstanding service to the State of Maine in his administration at Pownal. He is tremendously eager not only to raise the standards at Pownal, but to meet the obvious needs of all the patients. He needs public support, morally and financially.

The survey staff are especially grateful for the assistance received from Mrs. Goodwin, the only social worker at the School, from Miss Blake, the Superintendent's secretary, and from Dr. Doris Sidwell-Thompson. The State is indeed fortunate in having such upright and conscientious persons on the staff at Pownal.

As Attorney General, I deem it entirely proper to comment also on my association with the Commissioner of Institutional Service, Norman U. Greenlaw. He has cooperated with the survey staff in every way, withholding nothing. He is a man of integrity and forthrightness, and his conscientiousness in service is over and beyond the call of duty.

If this report on Pownal does nothing else, I earnestly hope that it may give the people of Maine renewed confidence in the integrity of its servants.

DEPARTMENT OF JUSTICE

Because of the lack of coordination of law enforcement agencies, proposals have been made that Maine should establish a Department of Justice. The success of the Federal Bureau of Investigation has been largely the basis for the establishment of such departments in other States, but divergent theories are involved. Some advocate complete centralization of criminal proceedings in the Attorney General and appointment by him of all State prosecutors. These feel that prosecutors could be assigned wherever needed, that the responsibility for failures to prosecute could be definitely fixed; that law enforcement is increasingly less of a local matter; that the laws would be more uniformly enforced, and that the influences of local politics would be reduced to a minimum.

Others argue that a State prosecuting officer would be too far removed from the local situation, that any justified humanizing of prosecution would be lost; that local officials are more familiar with local conditions; that too much centralization is undemocratic; that local communities would be largely deprived of home rule; that State politics would be substituted for local politics, and that, if the State prosecutor were corrupt, the law enforcement machinery of the entire State would be wrecked.

Between these extremes of complete centralization and non-interference, there are systems which provide for various degrees of intervention in local prosecution and supervision by a State authority of local prosecutions. Laws illustrative of such intervention and supervision have been passed by California, Louisiana, Nebraska, New Mexico and others.

Local officials are usually opposed to reduction of their power. Therefore it is not to be expected that a Department of Justice can be so formed as to meet all objections.

One of the most important requirements for such a department, in my opinion, is the elimination of politics, as far as possible, from the appointment of a State coordinator and from the performance of his duties. If he is appointed by an elective officer, those in favor of law enforcement and those opposed to it will become involved, through campaign contributions or otherwise, in the election of the appointing officer.

In my opinion the head of the proposed department should be selected by some legally organized body such as a Judicial Council, consisting of a Justice of the Supreme Judicial Court, the Attorney General, and other judges and non-political members, the department to be in the office of the Attorney General and under his supervision.

The success of the Federal Bureau of Investigation, according to Mr. J. Edgar Hoover, its efficient head, is due largely, if not entirely, to the complete removal of his department from political influence. Unless heads of departments of criminal law enforcement are entirely divorced from politics, it is useless to expect impartial, fearless and effective prosecutions of law violations.

FEDERAL TAXATION

(On income from State and Local Bonds)

During my term as Attorney General an attempt was made by the United States Treasury Department to expose to federal taxation the interest from State and municipal bonds. Defeated in Congress repeatedly, ten years ago, the proposal was revived as a "plug-the-tax-loophole" device, and as a means of ending the "anomaly" of a local government's borrowing more cheaply than Uncle Sam.

This effort to enlarge the federal tax base, if it had been approved by Congress, would have become a *cause célèbre* in the arena of constitutional law, for the tax immunity of interest income from local government bonds finds its sanction not alone in the fundamental tradition of sovereignty, but in a specific statutory declaration in the Internal Revenue Code. Because of this specific exemption the Supreme Court of the United States has never seen fit to rule on the matter.

Most State officials are familiar with the heavy impact of this proposal on the cost of providing State and municipal facilities. It is generally agreed that the increase would be at least 1% in interest rate, or 50% on a 2% bond. On the present volume of State and local debt, the added costs to local governments would run upwards of $250,000,000. It is true that this total would be reached gradually, but the impact on local projects would be felt at once. If a city or town needed a new school or a sewer system, if the

State desired to erect a new building or the Turnpike Authority to extend its turnpike, the full weight of this proposed federal tax would have been felt immediately.

The difficulties faced by local governments since the last war in providing essential services are well known. Some 90% of all State and municipal bonds are issued by local governments. There is no fair comparison between the impact of a 50% increase in the cost of local financing and the comparatively meagre returns that could be hoped for by the Federal Government.

In many cases, the consequences of the proposal would be more serious than the increase in cost. Frequently it would involve the ability of a local government to finance a needed improvement at all.

The power to tax always carries with it the power to exempt and to classify the subjects of taxation. Thus, any future administration could, through the power to tax local bonds or to exempt and classify them, control every operation of the States and their subdivisions. The real issue here should be very clear. It transcends the field of taxation and the field of mere fiscal argument. It rises beyond the niceties of legal debate and distinction. If Congress has the power to tax State and municipal bonds, it has, inevitably, the power to control State and municipal financing. Without control of its own financing, no government can continue as a free and independent State. That is why, as Attorney General of Maine, I appeared before the Ways and Means Committee of the Congress to state the position of Maine on the preservation of local government and all that it means.

And we were successful.

THE ATTORNEY GENERAL

In Maine, the Attorney General is a Constitutional officer. The office has existed since the founding of the State in 1820. Many of our statutes defining the duties of the Attorney General are word for word the same as those of Massachusetts, so that it may undoubtedly be said that his powers in this State are substantially the same as those of the Attorney General of Massachusetts, which were carefully discussed and outlined by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Rozlowsky*, 238 Mass. 379 (1921), where the Court speaks of the office as:

> "One of the institutions of the Commonwealth brought by the early settlers to these shores,"

its functions constituting

> "a part of that body of common law generally recognized as a part of our jurisprudence,"

and goes on to say:

> "It has often been recognized that the powers of the Attorney General are not circumscribed by any statute, but that he is clothed with certain common law faculties appurtenant to the office. (The statutes) do not constrict his general authority existing from early times."

but continue the supremacy of the Attorney General as the chief law officer of the Commonwealth. The Court then quoted with approval a Minnesota case which states:

"The office of Attorney General has existed from an early period, both

in England and in this country, and is vested by the common law with a great variety of duties in the administration of the government. The duties are so numerous and varied that it has not been the policy of the Legislatures of the States of this country to attempt specifically to enumerate them. Where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto at the common law . . . From this it follows that, as the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights."

During recent years, interest has increased greatly in the powers and functions of the Attorney General and his place in the over-all structure of State government. This interest has developed partly out of the post-war movement for reorganization of State governments in the interest of greater efficiency, economy and responsibility, partly from widespread concern with the problem of organized crime and the need to secure more effective law enforcement.

By virtue of its origin in England and its transplantation to America, the office of the Attorney General traditionally enjoyed extensive criminal law enforcement powers, as well as civil functions, many of which stemmed from the common law. In the early days it was an appointive office, the appointing power being lodged in the Governor. In the nineteenth century most States transformed the office into an elective post. At present, the Attorney General is popularly elected in 42 States, appointed by the Court in Tennessee, appointed by the Governor in New Hampshire, New Jersey and Pennsylvania, and in Wyoming he is elected by the Legislature.

In Maine, from 1820 to 1855, the Attorney General was appointed by the Governor. Since the latter date he has been elected by the Legislature.

His powers and duties are scattered through the statutes, but are principally comprised in Chapter 20 of the Revised Statutes of 1954.

These duties may be classified as civil and criminal.

The civil duties include acting as counsel for the State and its various officers, boards and commissions; advising them with regarding the law; conducting litigation for the State; collecting inheritance taxes; acting, when occasion requires, as the representative of the people and the State in bringing delinquent officials to book, and many routine duties, such as approving certificates of incorporation and bonds and contracts to which the State is a party, and overseeing the administration of the Workmen's Compensation Law in its application to State employees.

On the criminal side, as the only prosecutor mentioned in the Constitution or known to the common law, the duty of enforcing the criminal laws of the State is his, except in so far as statutes have vested other officers with special responsibilities.

His powers and duties are not limited to those enumerated. Statutes are not necessary to affirm his powers. The only real question is how far statutes

can constitutionally restrict those powers. Legislation has been suggested which would have the effect of constricting his powers. It is my opinion that such legislation is not in the best interests of the people and is basically unsound. Criminal activities have been increasing year by year in the country, as shown by the records of the Federal Bureau of Investigation, and one of the objectives of government should be to increase the powers of law enforcement agencies, not to diminish them. Only on most serious reflection should a power which has withstood the test of time be changed.

Such suggested legislation would limit the power of the Attorney General in the prosecution of crime and leave him no opportunity to present matters to a Grand Jury unless the County Attorney goes before it with him. We must consider seriously the situation that might result if the County Attorney refused. The prosecution would be blocked, though all prosecutions are in the name of the State, not the County.

If a Grand Jury had occasion to make inquiries relative to a County Attorney personally, the Attorney General would be virtually powerless. There is also the question of what would happen if a County Attorney were ill or incapacitated. These situations arise on occasion and are not to be lightly regarded. The proposed legislation would definitely hinder the proper administration of law, even in homicide cases where the statute expressly directs the Attorney General to prosecute, for it would cast a doubt on his right to go before a Grand Jury in the absence of the County Attorney. There should be no legislation which might, ultimately, give rise to technical doubts as to the validity of murder indictments.

The County Attorneys now work under the supervision of the Attorney General and with his assistance; their salaries are handled through his office, and they make annual reports to him. It would appear that existing laws work no hardship on any County Attorney or upon the people of any county, but on the contrary give them additional protection. To enact legislation which would tend to defeat the authority of the Attorney General is to play into the hands of law violators.

The County Attorney is not a common law officer and he cannot exercise common law powers. Hence to reduce the authority of the Attorney General will not extend it to the County Attorneys, but will make barren a large field of the State's power to cope with the ever present menace of the criminal element. To take common law powers from the Attorney General is to take them from the State itself.

In carrying out the duties of my office I have kept fairly accurate records of time so spent in the last four years and find that I have averaged between six and six and a half days per week, from ten to eighteen hours a day, including 120 Sundays and 15 holidays. I have traveled within the State on official business an average of 15,000 miles a year. I have maintained and made available to State officials and attorneys in the lower part of the State my personal office in Portland for conferences, the gambling probe, the liquor probe, the Littlefield homicide reinvestigation, and many other activities of State Government, also providing light, heat, telephone and stenographic services without cost to the State.

One hundred and twenty-five speaking engagements were fulfilled on law enforcement, public relations, etc.; many conferences were held with County

Attorneys and other law enforcement officers; over sixty autopsies were attended; many trials were participated in, and many investigations conducted under my supervision.

I attended four sessions of the National Association of Attorneys General and several regional conferences, which all proved of invaluable assistance in the discharge of my duties. The acquaintance with other Attorneys General thus acquired has also proved invaluable, as have many suggestions regarding the practical working out of problems which are not discussed in law books, and I hope I have been of substantial assistance to other Attorneys General.

I intervened and filed briefs on behalf of Maine in several cases before the Supreme Court of the United States, affecting States' interests.

These activities would indicate that the position of Attorney General of Maine is a full-time job.

A few people, including certain public officials, have suggested that the Attorney General be appointed by the Governor. They argue that a Governor is in a better position than the Legislature or the people to select an Attorney General of superior qualifications and legal attainments. With this view I respectfully disagree.

The record shows that the Legislature has performed remarkable service in the selection of our Attorneys General. We can point with great pride to such men as:

Hon. Scott Wilson, former Chief Justice
Hon. Guy Sturgis, former Chief Justice
Hon. William R. Pattangall, former Chief Justice
Hon. Raymond Fellows, present Chief Justice
Hon. Warren Philbrook, former Associate Justice
Hon. William T. Haines, former Governor
Hon. John A. Peters, former Chief Justice
Hon. Lucilius A. Emery, former Chief Justice
Hon. Thomas B. Reed, former Speaker of the House (Congress)
Hon. Harris M. Plaisted, former Governor of Maine
Hon. Orville D. Baker, an outstanding trial lawyer
Hon. William P. Frye, former Governor of Maine
Hon. Frederick A. Powers, former Judge, Superior Court
Hon. Hannibal E. Hamlin, former Vice President of the United States.

Does this illustrious list indicate any cogent reason for the appointment of the Attorney General by the Governor? I think not.

The allegiance of the Attorney General of Maine is only to the Constitution and the people, not to the Governor. He is, and should be a neutral interpreter of the Constitution and laws of the State. The Attorney General is, and should be, independent of the Governor, and accountable only to the people through their duly elected representatives, the Legislature.

COUNTY ATTORNEYS

"The County Attorney is the sole creature of the statute, and of modern creation, with his duties prescribed by statute, enlarged by statute, and

with such additional duties as are incidental and necessary to carrying out those prescribed."

State v. Fisheries
121 Me. 124.

From November 1, 1953 to November 1, 1954, the several County Attorneys of this State had under consideration 2434 cases. There were 1101 convictions (45%), 64 acquittals (2.6%); 826 cases filed (33.8%); and 443 cases pending. A tabulation follows:

County	Cases	Convicted	%	Acquitted	%	Filed	%	Pending	%
Androscoggin	196	78	39.78	5	2.55	77	39.27	36	18.36
Aroostook	368	203	55.22	18	4.90	119	32.37	28	7.62
CUMBERLAND	372	72	19.37	1	.27	137	36.85	162	43.58
Franklin	60	22	36.74	1	1.67	22	36.74	15	25.05
Hancock	33	10	30.30	2	6.06	4	12.12	17	51.51
Kennebec	145	114	78.66	5*	3.45	22	15.18	4	2.76
Knox	53	29	54.69	1	1.89	21	39.61	2	3.77
Lincoln	48	31	64.48	2	4.16	11	22.88	4	8.32
Oxford	148	45	30.38	4	2.70	46	30.95	53	35.78
Penobscot	341	187	54.79	6	1.76	112	32.82	36	10.55
Piscataquis	42	10	23.80	2	5.76	17	40.46	13	30.94
Sagadahoc	77	43	55.90	2	2.60	13	16.90	19	24.70
Somerset	126	67	53.13	3	2.38	43	34.10	13	10.31
Waldo	97	44	45.32	1	1.03	43	44.29	9	9.27
Washington	126	66	52.34	6	4.76	48	38.06	6	4.76
York	202	80	39.60	5	2.48	91	45.05	26	12.84
Totals	2434	1101	45.14	64	2.62	826	33.87	443	18.16

* 2 by reason of insanity.

The Counties of Kennebec with 114 convictions out of a case load of 145 and Lincoln with 31 out of 48 had the best records in the State, for convictions, Cumberland with 72 out of 372 and Piscataquis 10 out of 42 the poorest.

It is recommended that the State be divided into seven districts, viz:

	No. of cases, 1954
District 1. York and Oxford	350
District 2. Cumberland	372
District 3. Androscoggin, Franklin and Sagadahoc	335
District 4. Kennebec and Somerset	271
District 5. Hancock, Knox, Lincoln and Waldo	231
District 6. Penobscot and Piscataquis	383
District 7. Washington and Aroostook	496

It is further recommended: That seven full-time prosecuting officers, designated as District Attorneys, be appointed by the Attorney General, with the approval of the Judicial Council, for terms of seven years, with salaries commensurate with those of the Superior Court Justices;

That each be assigned to a particular district, but be available for secondary assignment in other districts in the discretion of the Attorney General, when necessary and convenient in the best interests of law enforcement, and

that all District Attorneys be available for civil work in the Attorney General's department;

That District Attorneys be removable for cause only, after a hearing by the Governor, with the advice and consent of the Council;

That the salary of the Attorney General be fixed at $12,000.

PROBATION AND PAROLE

Probation and parole are mentioned here because an enlightened policy on these matters definitely tends to relieve the criminal problem; they are not leniency or clemency, they are a method of rehabilitation. Maine has adopted the constructive policy of releasing on probation and parole those who seem good risks. The first consideration should be the welfare and safeguarding of society itself. Those individuals should be released on probation or parole who can, under strict supervision of probation authorities, take their places in the community, earn their living and meet their responsibilities.

Modern penology accepts the fact that long incarceration, for some types of offenders, does not reduce crime. The cost of keeping a man in our State Prison is in excess of $1200. The cost of supervising him while on probation, earning his living, is less than $50. per year.

The value of a human being reclaimed by probation cannot be measured in dollars and cents.

Probation is a system of investigation and supervision used by the courts for certain persons convicted of law violations; parole is the release under supervision of an offender who has served part of a sentence. The work of probation and parole officers is similar and the same officer may act in both capacities.

Probation also stands the test on a dollar basis. Before the war, it cost approximately more than $700. to keep a child in a State School, whereas the child could have been schooled in his home town for $190. We behave foolishly when we rail about juvenile delinquency and starve the agencies that could do much to solve the problem.

The heart of the process of rehabilitation is supervision, and the most important aspect of it is work with juveniles.

We have county probation officers with little if any supervision from the State level. While this has proved fairly successful in the more populated sections of the State, in those where the services of a full-time probation officer are not required it has fallen short of standard. I feel, therefore, that we should have one system of probation, appointment and control. This would assure better probation work in small communities and also make possible a uniform standard with collection of accurate statistics for future reference with a view to lessening delinquency.

I therefore suggest the creation of a State Probation Commission consisting of five members to be appointed by the Governor with the advice and consent of the Council for 5-year terms, all probation appointments and work to be directly under them. The resultant efficiency would, in my judgment, offset any additional expense, so that it would cost the taxpayer no more than at present.

SENTENCES

Rehabilitation of a convict must start at the time of sentence and a great problem, after conviction, is to decide on a proper sentence. The Law, and properly so, is solicitous of the defendant in safeguarding his rights at every stage of his trial. The courts insist on strict requirements as to form of indictment, exclude hearsay evidence, and require that the defendant be confronted with the witness against him. He cannot be compelled to testify against himself, but may take the stand in his own behalf and if he fails to do so, the State may not comment upon that fact. Convictions have been reversed because the Court erred on a technical point as to admissibility of evidence or did not instruct the jury properly as to the rights of the accused. In contrast to this strict insistence on his rights during trial is the latitude when the final disposition of his case is considered. Within statutory limits the Court has discretion to put him on probation, suspend his sentence, impose a fine, or imprison him for the minimum term, the maximum, or a period between the two. If the Court gives two sentences at the same term, they may run concurrently or consecutively. There are not definite guides for the Courts, within the statutory limits, and the Judge follows his sense of justice.

Misuse of the sentencing power is not always directed against the defendant. Courts have imposed very inadequate sentence, due to errors of judgment or other cause, with the effect of tearing down the mightiest sanction of the law, respect for the Courts. We have good and wise Judges on our Courts, but even the best and wisest, being human, is likely to err. The imposing of sentence is too delicate and too powerful a function to vest in any man's hands, entirely unsupervised.

Whether or not more objective rules for sentencing can be developed, or it is possible to reconcile the elements that demand consideration in the disposition of criminal cases, there is need for more effective protection of the rights both of the defendant and of society. If the Courts are to retain the power of sentence with such vast discretion as our laws give them, some provision should be made for appeal, broad enough to prevent abuses and to lessen disparities. Proper uniformity in sentences could be achieved by occasional review in an Appellate Court of sentences.

Courts should also be required to be more familiar than some are, with developments in the medical and social sciences.

On the civil side, appeals are permitted to test not only the trial Court's conclusiveness of law but its findings of fact.

In serious cases, any Court would welcome action of an Appellate Court, so that any error he may have committed may be tested and, if need be, corrected, or, when his rulings were affirmed, there would be the assurance that his judgment had stood the test. Then, again, the Governor in exercising his pardoning power would act with greater confidence if he knew that on appeal the judgment of the trial Court had been sustained.

In order to discourage frivolous and unfounded appeals, the Appellate Court should be able not only to quash or reduce sentences that are deemed excessive but to increase inadequate sentences, up to the statutory maximum.

This problem deserves serious consideration by the Legislature.

JURY VERDICTS

All decisions of our Law Court, all our elections, and nearly all our votes in the Legislature are decided by a majority; but the requirement in both civil and criminal matters is that the decision of a jury must be unanimous. This is a serious impediment. The best interests of justice would be better served if there were a reduction in the number of votes required for a jury to reach a verdict, except in the case of those crimes punishable by imprisonment for life or any term of years. All other criminal cases and all civil cases should be determined by a majority vote. The suggested majority is a ¾ vote.

DEPUTY SHERIFFS

As already pointed out, we must keep ahead of the criminal by continually improving our investigative methods. There must be enforcement seminars and training schools where enforcement officers can be taught the latest techniques in investigations.

In order to attract and keep officers of fitness and aptitude, without change or interruption by political fluctuations and changes in the High Sheriff, I feel that all appointments below that of Chief Deputy should come under the Personnel Law as the result of competitive examination without regard to political affiliations, initial appointments to be made by the sheriffs from lists furnished them by the Personnel Board. Removal should be for cause only, after hearing by the Personnel Board.

With adequate salaries should come the other benefits now enjoyed, or to be enjoyed, by State employees.

CRIME COMMISSION

As has already been pointed out, the problem of dealing with crime is basically a local responsibility. The Federal Government has the duty of preventing criminal gangs and syndicates from using the facilities of interstate commerce and interstate communications to carry on their activities, but the crimes actually committed are for the most part violations of State laws. In view of the dangers presented by organized crime, it seems highly desirable for this State to continue a thoroughgoing inquiry into the efficiency or lack of efficiency of law enforcement agencies dealing with it. Once the facts are found and published, the inquiry can devise the measures necessary to deal with the situation. In the last analysis, the citizens of any community will get the kind of law enforcement they demand, but they cannot act intelligently without the facts, and these facts cannot always be obtained from interested public officials who may be on the defensive concerning their own efforts or lack of effort.

Accordingly, I recommend the establishment of an independent citizens' group, or Crime Commission, which would concern itself with the problems of crime and of law enforcement. Such groups have the zeal and the independence which officials sometimes lack. The mere existence of such a Commission would serve as a check and a spur to the officials charged with law enforcement.

The Commission should be appointed by the Governor, with the advice and consent of the Council, and empowered to make a thorough and continuing analysis of organized crime and the efficiency of law enforcement agencies in combatting it. It should be adequately staffed and financed and should report to the Governor and the Legislature at the beginning of each regular session, with such recommendations as it may deem proper. Its compensation should be determined by the Governor and Council.

PROBES

Socially, gambling presents a problem difficult of control, it being in major part a personal vice such as alcoholism, drug addiction and certain sexual crimes, and fraught with similar difficulties of regulation.

It must be attacked primarily at the local level, with aid, where appropriate, from State and Federal authorities. The State has the basic responsibility of helping the county officers to eliminate organized crime and of facilitating exchange of information, with appropriate safeguards.

The task of dealing with organized crime is so great that the public must insist upon the fullest measure of cooperation between law enforcement agencies at all levels of government without buck-passing or petty jealousy.

It can readily be seen by an examination of the report that follows that the indictments gathered in our gambling probe of 1951 were in such numbers as will substantiate the general belief held by this office and others before the investigation was started that such activities had reached a point where organized crime existed in Maine:—not the problem of isolated instances, but an organized, closely-knit, cooperative attempt on the part of some people to make a living from such activity. We had, in Maine, professional gamblers. The names of certain individuals contained in the records already submitted to you will be familiar to those who have studied this problem—agents of well-known operators, one of them, situated in New Jersey, being nationally known.

COST

Appropriation for the gambling probe	$25,000.
Expended	19,000.
Lapsed	$ 6,000.
Total number of respondents: 154	
Total number of indictments: 386	
Total, fines paid	$44,950.00
Total, costs paid	1,254.65
Total, fines and costs	$46,204.65

NOTE. All fines and costs accrued to the counties involved, the State receiving no share.

The cost of the LITTLEFIELD HOMICIDE INVESTIGATION was approximately $11,000, all but $195. of which was paid from the appropriation of the Attorney General's department.

LIQUOR PROBE

Alleged $40,000 Bribe to a Public Official, involving Scarborough Downs.

This episode was given impetus by a speech of Stanley L. Bird, formerly counsel for the Legislative Research Committee, before a service club in Waterville.

The incident was fully explored, largely through the efforts of William H. Niehoff, Esq., then an Assistant Attorney General, and was fully presented to a Grand Jury in Kennebec County in 1952. No indictment resulted. While proceedings before a Grand Jury cannot be disclosed, it is proposed to point out that Mr. Bird testified before that Grand Jury. Furthermore, Mr. Bird appeared before two subsequent Grand Juries in Kennebec County and one in Cumberland, a total of four.

I here make the very positive assertion that no evidence has ever been found to indicate any bribe to any person involving Scarborough Downs, be he a public official or a private citizen. A detailed report on this phase of the investigation has previously been submitted to the Governor and Council and is not here repeated.

With regard to the high public official referred to by Mr. Bird in his Waterville speech, let me point out that the individual referred to was then a County Attorney. Whether that position could be classed as "high" is debatable. Certainly the Attorney in question never had any connection whatever with the alleged $40,000 "bribe" at Scarborough Downs.

A few words would seem to be pertinent as to the policy behind this probe.

This office furnished the services of the investigators detailed to Mr. Bird, and Mr. Niehoff and I worked with the Legislative Research Committee and its counsel.

Every bit of evidence we possessed was presented to the Grand Juries concerned.

The legal procedures were discussed with the Deputy Attorney General, James Glynn Frost, with other members of the Attorney General's staff, with prominent members of the Maine Bar, and on at least six occasions with members of the Bench. We proceeded with what we considered to be, and still believe are, the methods prescribed by our courts. No indictment was requested on hearsay, suspicion, rumor or pressure. We presented only competent, legal and admissible evidence. This has been my approach to the liquor probe. If there have been errors or mistakes in procedures, I accept full responsibility. If there be any credit, my associates are entitled to it.

During my term of Attorney General, and as late of January 5, 1955, I was prepared at all times still to go forward, if evidence were forthcoming. I made appeals to the public through the press and radio for any individual who had evidence to come forward. No one did so.

FREDERICK W. PAPALOS

Frederick Papalos was indicted, tried and found guilty of the crime of conspiracy. The State proceeded on the theory that Papalos, Bernard T. Zahn

and Herman D. Sahagian had entered into a conspiracy which involved the sale of wine to the State, with resultant profits to the alleged conspirators.

Sahagian was not indicted along with Papalos and Zahn, because the State was using him as a prosecution witness. It would not have been legally proper to present him to a Grand Jury as a witness and then indict him. Had he been indicted, he could not have been used, without his express waiver, as a State's witness at the trial of Papalos and Zahn.

Bernard T. Zahn was acquitted.

Following Papalos' conviction, his attorneys have brought several motions for a new trial on the theory of newly discovered evidence, hearings have been had thereon, the records prepared and the arguments were made in the Law Court at the June Term, 1954. Inasmuch as there has been no final adjudication at the date of this report, I do not consider it proper to engage in a discussion of the merits, except to indicate my confidence that the Law Court will sustain his conviction.

JUDICIAL COUNCIL

The responsibility for efficient operation of all our courts rests largely with the judges and other officers thereof. It is recommended that Sections 195-197 of Chapter 113, R. S. 1954, be repealed and the following enacted in lieu thereof:

There shall be a Judicial Council, consisting of the Chief Justice, two Associate Justices of the Supreme Judicial Court, three Justices of the Superior Court, two municipal court judges, one judge of probate, three members of the bar, all to be appointed by the Governor with the advice and consent of the Council, for such periods, not exceeding four years, as he shall determine, provided that if any judge so appointed shall cease to be a judge of the court from which he is assigned, his term shall terminate forthwith.

The Chief Justice shall be chairman. No act of the Judicial Council shall be valid unless concurred in by 7 members.

The Judicial Council shall from time to time:

1. Meet at the call of the chairman or as otherwise provided by it;

2. Survey the condition of business in the several courts with a view to simplifying and improving the administration of justice;

3. Submit such suggestions to the several courts as may seem in the interest of uniformity and the expedition of business;

4. Report to the Governor and the Legislature at the beginning of each regular session with such recommendations as it may deem proper;

5. Adopt or amend rules of practice and procedure for the several courts not inconsistent with the statutes, and submit to the Legislature, at each regular session, its recommendations with reference to amendments of or changes in existing laws relating to practice and procedure;

6. Exercise such other functions as may be provided by law;

The chairman shall seek to expedite judicial business and to equalize the work of the judges. He shall provide for the assignment of any judge to another court of like jurisdiction to assist a judge whose calendar is congested

or act for a judge who is disqualified or unable to act, or to hold court when a vacancy in the office of judge has occurred.

The clerk of the Supreme Court shall act as secretary of the council.

The several judges shall cooperate with the council, shall sit and hold court as assigned, and shall report to the chairman at such times and in such manner as he shall request respecting the condition and manner of disposal of judicial business in their respective courts.

No member of the council shall receive any compensation for his services as such, but he shall be allowed his necessary expenses for travel, board and lodging incurred in the performance of his duties as such. Any judge assigned to a court wherein a judge's compensation is greater than his own shall receive while sitting therein the compensation of the judge thereof, to be paid in such manner as may be provided by law. Any judge assigned to a court in a county other than that in which he regularly sits shall be allowed his necessary expenses for travel, board and lodging incurred in the discharge of the assignment.

IMMUNITY

Investigation into criminal activities is considerably hampered by the refusal of witnesses to testify on the ground that their testimony would tend to incriminate them. This is a common experience of law enforcement agencies. Immunity from the necessity of giving testimony is claimed under the Fifth Amendment to the Constitution. Under the construction which the courts place on this provision a witness has a right to remain silent if it appears that a criminal charge of any kind may be made against him as a result of any matters concerning which he is questioned.

It is frequently desirable that minor participants in a criminal enterprise be made to testify in order to reach the principals. If immunity could be granted, their testimony could be compelled. If they still refused to testify, they could be punished for contempt. If they testified falsely, they could be punished for perjury.

A practical method of compelling witnesses to testify when it is in the public interest to make them do so, is to empower the Attorney General to request immunity by stating in writing that the testimony or the production of books, papers or other records or documents is necessary in the public interest, this writing to be addressed to the Grand Jury or to the court concerned and made a part of the record. Before immunity could be granted, the Court concerned must consent thereto in writing.

It may be said that to entrust any official or officials with the power of granting immunity may be dangerous. However, the necessity for exercise of such a power by somebody has been repeatedly demonstrated in the various probes conducted by this department. Witnesses do not testify willingly to criminal activities, unless they have something to gain thereby or unless they have something to fear from failure to testify. The proposed suggestion, so far as Grand Jury and Court proceedings are concerned, gives them both.

GRAND JURY

While proceedings before a Grand Jury are secret, with no written transcript thereof authorized, it is my firm conviction that all proceedings before a Grand Jury, except its deliberations and votes on indictments, should be taken verbatim by a qualified court reporter and that at a trial of any particular respondent, such respondent shall be entitled to have a copy of said transcribed proceedings and testimony as are relevant and pertinent to him, all under the direction of the Court concerned.

MISCELLANEOUS

The staff continues to handle numerous writs of error and petitions of habeas corpus, the last two years seeing such writs and petitions doubling in number. Such cases have been so numerous that presently, and with some success, we are reviving the ancient writ of coram nobis, a remedy available to those persons whose constitutional rights have been denied by some fact not shown on the face of the record.

The Assistants assigned to the various Departments, Health and Welfare, Highway, Liquor Commission, and the Bureau of Taxation are continuing to carry in excess of normal loads. The sales tax and the accelerated highway program have been instrumental in causing extra work over that experienced four years ago.

Notable in the tax field were two cases. In *Morris v. Goss,* a mandamus proceeding was used to attack the constitutionality of the sales tax, which had been enacted by the Ninety-Fifth Legislature and signed by Governor Payne on May 3, 1951. The defense to this suit was capably handled by Assistant Attorney General Boyd L. Bailey and Special Assistant Powers McLean, and the favorable opinion, upholding the tax, is reported in 147 Maine 89.

In the case of *State v. F. H. Vahlsing, Inc.*, certiorari denied by the United States Court, the potato tax law was sustained.

On April 12, 1952, this office was saddened by the death of John S. S. Fessenden, Deputy Attorney General. James G. Frost, Assistant Attorney General, was appointed Deputy Attorney General to take Mr. Fessenden's place.

Appointments to the legal and investigative staffs of the department are made by the Attorney General and these staff assistants serve during his term or pleasure. In order to attract young lawyers of promise and retain those who demonstrate legal ability and fitness and so continually upgrade performance, unchanged by changes in the person of the Attorney General, it is my feeling that staff positions should come under the provisions of the Personnel Law.

CONCLUSION

I am and shall always be grateful to the citizens of Maine for permitting me to perform the duties of Attorney General.

I endeavored to administer the affairs of the office with integrity, forthrightness and fidelity to duty, during the last four years.

This report could not have been prepared without generous assistance and cooperation. Many have made suggestions, shared ideas and given practical assistance. It is impossible to acknowledge each item of help so freely given, but in view of the special weight of their contributions some names should not go unlisted:

Hon. C. William O'Neill, Attorney General of Ohio
Hon. Eugene Cook, Attorney General of Georgia
Hon. Louis C. Wyman, Attorney General of New Hampshire
Hon. George Fingold, Attorney General of Massachusetts
Hon. Edmund G. Brown, Attorney General of California
Hon. Robert T. Stafford, Attorney General of Vermont
National Association of Attorneys General
Hon. Benjamin Butler, State Senator.

I express to Deputy James Glynn Frost, Assistant Attorneys General Neal A. Donahue, Henry Heselton, Boyd L. Bailey, George C. West, L. Smith Dunnack, Roger A. Putnam, Frank W. Davis, Paul L. Woodworth, and Milton L. Bradford, former Assistants David B. Soule, Miles P. Frye, James P. Archibald, Harold J. Rubin and William H. Niehoff, to Philip W. Wheeler, Senior Investigator, Walter C. Ripley, Junior Investigator, and to Mrs. John S. S. Fessenden and Miss Helen Cochrane not only my personal thanks for tasks well done, but also the appreciation of the State.

Respectfully,

Alexander A. LaFleur
Attorney General

January 5, 1951

To Harold J. Dyer, Director, State Park Commission

Re: Licenses, leases, etc.

In your memorandum of January 4, 1951, you state that the State Park Commission wishes to be relieved of the administrative detail involved in the annual task of issuing licenses, leases, and other agreements, and you inquire as to whether or not the Park Commission can delegate to the Director of State Parks the authority to process such licenses and agreements in behalf of the Park Commission under the provisions of Section 23 of Chapter 32, R. S. 1944.

The provisions of Section 23 of Chapter 32, R. S. 1944, as amended, do not contemplate that the Commissioners must personally handle administrative detail, but the statute does contemplate that the Commissioners shall have the administrative responsibility. There is no reason why all the negotiations with respect to the business of the Commission should not be handled by the employees of the Commission, but it is essential to the validity of any final action taken that the same be taken by the Commission and that those things requiring the consent of the Governor and Council have the consent of the Governor and Council before final consummation.

JOHN S. S. FESSENDEN
Deputy Attorney General

January 8, 1951

To Honorable Frederick G. Payne, Governor of Maine

Re: Correspondence with Housing and Home Finance Agency re Addition to State House, Augusta, Maine

Mr. Mudge has handed to me a letter dated January 3, 1951, addressed to you by the office of the Administrator of the Housing and Home Finance Agency relative to the addition to the State House at Augusta, Maine, to which letter is attached a photostatic copy of an "Agreement and Public Voucher for Advance", which form is approved by the Federal Works Agency. There was also attached a copy of the Act under which advances were made for plans and surveys, together with the Regulations dated January 3, 1946, effective January 1, 1946.

I am informed that pursuant to the application made by Governor Hildreth, dated the 23rd day of June, 1947, and appropriate federal legislation, there was advanced to the State of Maine the sum of $21,000 for the purpose of plans preparation.

From my study of the federal law and of the Regulations issued pursuant thereto, it appears that this amount of money is purely in the nature of a loan without interest, which loan is to be repaid in either of two events:— 1) if

construction is started upon the project for which the money was advanced for preparation of plans, the money is repayable when the first contract is let for construction; 2) it is repayable if the applicant fails to take prompt steps to initiate and prosecute to completion the final plans and specifications for the project.

The Federal Government in the letter to you takes the position that since the advance was made in July of 1947 and final plans have not materialized, the advance is now repayable for failure to take "prompt steps".

In any event, Section 8 of the Regulations contemplates that there should be reasonable expectation of initiating the construction of the proposed works within four years after the receipt of the advance. I am informed that the plans as of this date have not been finally approved and I am informed that there is little likelihood that actual construction will start within four years from the date of the advance. From my study of the Law and Regulations, read in the light of my information as to the status of the building project, it appears to me that the advance is now repayable, whatever view may be taken of the matter.

I would therefore recommend that the repayment be made at an early date.

JOHN S. S. FESSENDEN
Deputy Attorney General

January 22, 1951

To Fred M. Berry, State Auditor
Re: Expenditures in Excess of County Estimates

By R. S., Chapter 79, Section 26, county commissioners may borrow, not exceeding $10,000 without first obtaining the consent of the county. By Section 27, temporary loans are provided for, to be paid within one year, not exceeding $175,000 in Cumberland, $75,000 in Washington County, $50,000 in Kennebec County, and the commissioners in each of the other counties may thus raise by temporary loans, to be thus paid out of money raised during the current year by taxes, not exceeding 1/5 of 1% of the assessed valuation of their respective counties.

The consent of the county is to be obtained by vote in the several towns and cities before obtaining any additional loans, as provided in Section 24.

These limitations indicate the amount which may be lawfully expended in excess of county estimates, once the funds are available. We deem it to be incumbent upon the county commissioners to maintain a complete record of all such transactions for the inspection of the State auditors, including the commissioners' vote to obtain such loans.

The moneys of the county are kept and handled by the county treasurer. His general duties, arising from the very nature of his office, are to receive the money of the county lawfully deposited with him, keep it safely, and pay it out on the commissioners' order, according to law. He is bound to exercise good faith and reasonable skill and diligence in the discharge of his trust, or

in other words to bring to his discharge that prudence, caution, and attention which careful men usually exercise in the management of their own affairs.

NEAL A. DONAHUE
Assistant Attorney General

February 7, 1951

To Fred M. Berry, State Auditor
Re: Uncollected Costs of Court

In your memorandum of February 5, 1951, you ask, "What disposition should be given to the cost of court charge which usually is assessed at $2.00 when these costs are not collected from the respondent?" and you further state that since the matter does not seem to be covered by Chapter 290 of the Public Laws of 1947, you would appreciate receiving our opinion as to whether or not the county treasurer should reimburse the cities for the court costs if they have not been collected from the respondent.

It appears to this office that the questions which you ask can be answered only in the light of the provisions of Section 5 of Chapter 137, R. S. 1944. By the provisions of this section it is required that all fees, costs and forfeitures shall be paid into the treasury of the county where the offence is prosecuted and that (third sentence) "the county treasurer on approval of the county commissioners shall pay to the state, town, city, or persons any portion of the fees, costs and forfeitures that may be due."

We construe this sentence to mean that the amounts payable must be those that are found to be due from the fees, costs and forfeitures that were paid in pursuant to the first sentence of the section and pursuant to the bill of costs which accompanied the remittance when the funds were transmitted to the county treasurer.

JOHN S. S. FESSENDEN
Deputy Attorney General

February 8, 1951

To Frank S. Carpenter, Treasurer of State
Re: Income from money arising from the sale of timber and grass on public reserved lots.

You have inquired as to whether it is within the lawful authority of the legislature to amend the interest rates set forth in Section 38 of Chapter 32, R. S. 1944, so that instead of providing for rates of 4% and 6%, respectively, on the two funds therein created, there could be paid by the Treasurer of State the actual interest earned.

Without having searched for the history of this section to its original inception, we have looked back to the Revision of 1916, at which time the section appears to be Section 20 of Chapter 8, R. S. 1916, under which section the money arising from the sale of timber and grass or from trespasses on reserved lands constitutes a fund for school purposes, of which the income only should be expended and applied as was provided by law.

This section was amended by Chapter 261 of the Public Laws of 1917, at which time first appears the provision for the State to allow interest annually upon the funds at a specified rate and in which chapter the rate is set at 4%. This was amended by Chapter 15 of the Public Laws of 1919, at which time appears the provision whereby the first of the two funds shall be allowed interest annually at 4% and the second of the two funds shall be allowed interest annually at 6%. Thereafter the law remains in substantially its present form through the Revisions of 1930 and 1944.

In view of the fact that originally these funds bore interest only as earned, I see no reason why the present session of the legislature, if it so desires, could not amend the law, eliminating a fixed rate of interest and returning to the original provisions of law whereby the income of the funds was used as earned.

JOHN S. S. FESSENDEN
Deputy Attorney General

February 21, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Incompatibility

At the request of your office I have consulted the records of the decisions of this office with respect to incompatibility in the holding of office in more than one branch of the State Government and am of the opinion that in conformity with a long line of precedent, it is incompatible for one person to occupy the office of State Senator and the office of member of the State Real Estate Commission at the same time.

A person apparently so holding is deemed to have vacated the former office at the time that he qualified for the latter.

JOHN S. S. FESSENDEN
Deputy Attorney General

February 22, 1951

To General Spaulding Bisbee, Director, Civil Defense & Public Safety
Re: Appropriations by Towns

. . . In interpreting Section 11 of Chapter 298, Public Laws of 1949, we are of the opinion that the voters of any city, town or village corporation may appropriate money to be used by their local organization for Civil Defense and Public Safety for expenses of maintaining its office with its incidental supplies and for the purchase of such services, equipment, supplies and materials for purposes of Civil Defense and Public Safety as shall be specified by amount and purpose in such appropriation.

If a town puts articles in its town warrant calling for the appropriating of certain amounts to stockpile non-perishable food, buy fuel, cots, blankets, first aid supplies, for instance, and the voters of such town favor such purchases by their votes and the same does not exceed that town's debt limit, such purchases are authorized by the Act referred to.

There is a provision in the same section of law for acceptance of these items by gift, should they be offered by the Federal Government or by any person, firm, or corporation.

NEAL A. DONAHUE
Assistant Attorney General

March 12, 1951

To H. H. Chenevert, Milk Commission
Re: Hearings

. . . As you know, the Milk Commission Law contemplates that the Commission shall act on the basis of evidence obtained at public hearings and after investigations. While the law does not specifically so state, it is believed that, if the Commission is acting upon investigational material, such material, as a matter of public policy, should be made public at a public hearing, so that persons interested will have an opportunity to be heard thereon.

We were informed that in holding hearings it has been the custom, when questions were asked, for the chairman to state that the witness may answer if he chooses. In view of the fact that the Commission has the authority to subpoena witnesses and to examine persons under oath, it appears to this office that an opportunity should be given for cross-examination and that the witness should not be instructed that he may answer if he chooses. A witness, of course, should not be compelled to answer any questions the answer to which might tend to incriminate him; but since the law contemplates that the Commission shall act on evidence it is a basic element of a fair hearing that there be an opportunity to cross-examine. This does not mean that there must be cross-examination, but only that an opportunity be given to interested parties.

JOHN S. S. FESSENDEN
Deputy Attorney General

March 14, 1951

To William O. Bailey, Deputy Commissioner of Education
Re: Approval of Plans for Schoolhouses

. . . Your specific question is whether school district trustees have the authority to select a location and build a schoolhouse without the approval of the superintending school committee of the town.

The statute referred to recites: "A plan for the erection or reconstruction of any schoolhouse voted by a town shall first be approved by the superintending school committee; and in case no special building committee has been chosen by the town, said superintending school committee shall have charge of said erection or reconstruction; provided, however, that they may, if they see fit, delegate said power and duty to the superintendent of schools."

The first part of this sentence is pertinent to the question at hand. A plan for the erection or reconstruction of any schoolhouse voted by a town shall

first be approved by the superintending school committee. A schoolhouse to be erected by a school district in a town comes within the purview of this act. It is a schoolhouse voted by the town and the statute provides that the plan for its erection shall *first* be approved by the superintending school committee.

It is pointed out in the case of *Lunn v. City of Auburn*, 110 Maine 241 at page 245 that not only should the plan be approved by the superintending school committee before such building is erected, but that it should be so approved before having the approval of your department or that of the State Board of Health, and that it is the building approved by the superintending school committee of the town which should have the approval of your department and the Bureau of Health. . .

NEAL A. DONAHUE
Assistant Attorney General

March 16, 1951

To Harold J. Dyer, Director, State Park Commission
Re: Lamoine State Park

In your memorandum of March 13th you say that the question has arisen whether the Commission can dispose of Lamoine State Park and you give some of the history of its acquisition. As you have noted, it was deeded to the State of Maine in 1927 by the United States of America. In that deed the following provision is found:

"This conveyance is made upon the express condition and limitation that the said property hereby conveyed shall be limited to the retention and use for public use and upon cessation of such retention and use shall revert to the United States of America without notice, demand or action brought."

Because of this condition and limitation the premises may not be conveyed or disposed of by the State Park Commission either with or without the help of the legislature, and any conveyance of the premises would entitle the United States to acquire them at once.

You will note that, while retained by the State, the premises must be used for public purposes. This does not necessarily mean that they shall be used for Park purposes, and it may be that some other use can be found for them which will still be a public use and will be acceptable to the Navy Department from which the premises were acquired. In that manner, with the assistance of the legislature, you may find a proper other use for the premises and so have the Park status thereof terminated.

NEAL A. DONAHUE
Assistant Attorney General

March 27, 1951

To Maine Real Estate Commission
Re: Partnership of Husband and Wife

This office is in receipt of your letter of March 26th, inquiring whether or not it is legal for a man and wife to form a partnership and to operate as such.

While by statute law now found in Chapter 153, Section 39 of the Revised Statutes, a married woman has considerably more latitude in regard to her property than she had at common law, that right in this State has never been extended so far as to permit a business partnership between husband and wife.

Apparently the leading case on this subject is found to be *Haggett v. Hurley*, 91 Maine 542. It is there pointed out that a married woman is by statute made liable for her debts contracted before her marriage, her debts contracted after her marriage in her own name, and her torts committed after April 26, 1883, in which her husband took no part. It is there said:

> "The statute thus makes a distinction between her debts contracted before and her debts contracted after marriage. As to the former she is made liable without restriction. As to the latter her liability is confined to those contracted 'in her own name'. This phraseology alone at the outset should make the Court hesitate to declare that she is liable for a debt contracted after marriage not by her in her own name but in the partnership name."

I therefore conclude that a husband and wife may not enter into a *business* partnership.

NEAL A. DONAHUE
Assistant Attorney General

March 28, 1951

To H. H. Harris, State Controller
Re: Maine State Office Building Authority

In your memo of March 16, 1951 you inquire whether or not the State Controller should refuse to make payments of any future charges that may be presented for payment with respect to the Maine State Office Building Authority. Your inquiry is predicated upon the recent Opinion of the Supreme Judicial Court of Maine, dated March 14, 1951, which holds in effect that the legislation creating the Maine State Office Building Authority is unconstitutional.

In answer to the question with respect to future payments you are advised that no future payments should be made.

You have asked a second question as to whether or not the committee which passes upon the writing off of uncollectible accounts receivable has authority to authorize the State Controller to charge off as uncollectible the sums of money heretofore paid on account of the Maine State Office Building Authority and owed to the general fund of the State by the Authority.

The answer to this question will have to be held in abeyance pending further study of the statutes and the application thereto of the Opinion of the Supreme Judicial Court.

JOHN S. S. FESSENDEN
Deputy Attorney General

April 3, 1951

To Marion E. Martin, Chairman, Board of Elevator Rules

Your inquiries of March 30th in regard to elevator rules are received in this office. You recite that under Chapter 374, Section 99-H, the supervising inspector of elevators is empowered to issue special certificates: "If, upon inspection, an elevator is in the opinion of the inspector found to be in reasonably safe condition but not in full compliance with the rules and regulations of the board, the elevator inspector shall certify to the supervising inspector his findings and said supervising inspector may issue a special certificate, the same to be posted as required in this section." You then inquire:

1) Would the Board of Elevator Rules have the power to make rules governing the issuance of special certificates?

Answer. Section 99-H provides that the supervising inspector *may* issue special certificates. This is optional and not mandatory. Under Section 99-C concerning the duties and powers of the board, it appears that the rules and regulations formulated shall conform, as far as practicable, to the Standard Safety Code for elevators approved by the American Standards Association, and that the Board shall formulate the rules. We believe there is authority for the issuance of special certificates and that they should be prescribed by the rules of the Board.

Query 2. Would the Board have authority to place a time limit on the use of special certificates?

Answer. The special certificate being issued in cases where inspection has been made and the elevator shown to be reasonably safe though not complying with the Board's regular rules, a time limit during which such compliance may be effected would be proper.

Query 3. If an elevator owner is operating on a special certificate and an elevator accident occurs, would he be under additional risk of being proved negligent in not having a regular certificate?

Answer. The statute does not provide an answer to this question. It may be said that the owner will at least be operating under a certificate issued by your Board after an inspection had shown the elevator to be reasonably safe, but at the same time showing that the elevator did not comply with all of your regular rules. We think there is an additional risk.

Your last query is what the Board's liability would be if they adopted rules lowering the standards by allowing lower gates and permitting the shipper rope to be accessible from the outside, both of which provisions they feel would increase the chances of accident, so that the owner would be allowed to operate on a regular rather than on a special certificate.

Answer. The standard to be adhered to is the one referred to above, and non-compliance would be not compliance with the statute and so is not contemplated.

NEAL A. DONAHUE
Assistant Attorney General

April 23, 1951

To Fred M. Berry, State Auditor
Re: Chapter 328, P. L. 1947

Under date of April 13, 1951, you addressed the following memorandum to this office:

"Your opinion is solicited as concerns the following statute, An Act Relating to Unorganized Townships Fund. Chapter 328, Public Laws of 1947, reads in part,

" 'Upon the first fund to be known as the unorganized townships fund, the state shall allow interest annually at 4%. The income from said fund shall be allocated as follows:

I. $5,000 allocated annually for the use of forest commissioner in managing and improving the growth on public reserved lots; and

II. the balance then remaining shall be added to the school equalization fund.'

"The questions are:

1. Do the words in part II 'the balance then remaining' refer to the $5,000 in part I or do they refer to the balance remaining in the income account after the $5,000 has been deducted for forestry purposes?
2. If $5,000 is made available to the Forestry Commissioner for the specific purposes stated in the act, and all of it is not spent in the current year, would the balance be carried forward for use in subsequent years or would it be added to the school equalization fund?"

In answer to your first question, it is our opinion that the words, "the balance then remaining," as used in paragraph II refer to the balance remaining in the income account after $5,000 has been allocated for the use of the Forestry Commissioner.

In answer to your second question, it is our opinion that if the $5,000 made available annually to the Forest Commissioner for the purpose of managing and improving the growth on the public reserved lots is not used for that purpose, any balance remaining in the $5,000 account at the end of the fiscal year should be added to the school equalization fund.

JOHN S. S. FESSENDEN
Deputy Attorney General

April 26, 1951

To Ermo H. Scott, Deputy Commissioner of Education
Re: Teachers' Contracts – P. L. 1951, Chapter 203

Your memo of April 25, 1951, makes inquiry as follows:

"1. To what extent does the Act affect teacher contracts signed between the current date and the date on which the Act becomes effective?

"2. To what extent is the probationary period of not more than three years met by a teacher already in the employ of a municipality previous to the passage of the Act?

"3. Assuming that a teacher has completed the probationary period but wishes to be contracted for only one year, can the employing agency issue such a contract for this less-than-two year term?"

The opinion of this office is in this manner:

1. Teachers' contracts entered into before the Act becomes effective are not concerned in any way. The Act will apply only to teachers' contracts made after the Act becomes effective. Previously made contracts may be carried out to their proper conclusion after as well as before the Act becomes effective.

2. When this Act becomes effective, the probationary period for any contracting teachers should be regarded as met to the extent of all teaching experience had both before and after the Act.

3. No. The provisions of this Act apply to all teachers' contracts and are to be read into them in all cases, whether there be a written contract which follows the Act or not, and likewise if the contract be oral. The teacher-contract may not effectively provide any arrangement which is contrary to this statute, which provides that after the probationary period, subsequent contracts shall be for *not less than two years*, etc.

NEAL A. DONAHUE
Assistant Attorney General

April 27, 1951

To William O. Bailey, Deputy Commissioner of Education
Re: Schoolhouse plans (Bingham)

Your memo of April 23, 1951, makes inquiry as follows:

"A School District was established for the Town of Bingham by the 94th Legislature. The trustees of that district immediately built a four-room elementary school building. They are now engaged in adding a second unit which consists of four more classrooms and a gymnasium. The superintending school committee gave verbal approval to the plans as originally submitted to this Department and the Department of Health and Welfare.

"Now the trustees have decided to change the plans and make the gymnasium considerably smaller. The superintending school committee does not approve of this change on the grounds that the resulting building will not adequately house the educational program that they propose to offer.

"1. Is it necessary that changes in the plans be approved by the State Department of Education and State Department of Health and Welfare?

"2. When a town votes to accept a school district offered by act of the Legislature, is it in effect voting to build a school house as referred to in Section 19 of Chapter 37?

"Note. (See sections 19 and 21 of Chapter 37)."

Answer to Question 1. Yes. When changes are proposed to be made in the plans which have been approved by the State Department of Education and

State Department of Health and Welfare, the plans as revised or changed must be again submitted to those departments for approval.

Answer to Question 2. When a town votes to accept a school district offered by act of the Legislature, it is taking one step in the direction of building a school house. Other steps are necessary. Trustees must be appointed, who are by the Act authorized to assume duties theretofore performed by the school board, namely, the financing and building of a school building or buildings and their attendant surroundings, procuring approval of the proper State departments, etc. There is no other or further vote of the town needed, after acceptance of the school district Act.

NEAL A. DONAHUE
Assistant Attorney General

May 11, 1951

To Ernest H. Johnson, State Tax Assessor

Re: Chapter 260, Public Laws of 1951, An Act Relating to Schooling in Unorganized Territory

I reply to your inquiry of May 4 raising the question whether any 1951 tax is assessable under the provisions of this Act.

The bill establishes an Unorganized Territory School Fund for the purpose of schooling children in the unorganized territory of the State. The Fund is to be made up of an annual property tax "assessed upon the property of said unorganized unit by the state tax assessor in accordance with the provisions of section 74-A of chapter 14. . ."

The effective date is stated by Section 3 of the bill which amends Section 148 of Chapter 37: "As soon as practicable after April 1, 1951, and on April 1, annually, thereafter, the total cost of school privileges . . . shall be assessed upon the property of said unorganized unit by the state tax assessor in accordance with the provisions of section 74-A of chapter 14 . . ."

Turning to Section 74-A of Chapter 14 we find a very explicit direction that the State Tax Assessor prepare a list of taxes due from each owner of land and stating the millage rate in determining the proportionate amount of taxes due from such owners. "Such list shall be filed in the office of the state tax assessor on or before the first day of July of each year, and shall be available for public inspection."

The effective date of the Act is, of course, 90 days after the closing of the session of the Legislature. Such date will unquestionably be no earlier than August, 1951. It is therefore impossible to carry out the terms of the bill in 1951 for the reason that it calls for a list to be filed some 45 days before the anticipated effective date. The effective date cannot be anticipated for it is always possible that the Legislature may take amendatory or supplemental action.

The requirement that a list be filed with the State Tax Assessor on or before July 1 is important. Without such list it is impossible for any taxpayer to determine whether he is being equitably billed in comparison with other taxpayers.

It should be noted that the tax statute does not require that any tax be levied for 1951. The requirement is, "As soon as practicable after April 1, 1951, and on April 1, annually, thereafter", which provision can be taken literally to include a 1952 beginning date or any other subsequent date if assessment is not sooner "practicable".

It being impossible to comply with the law by a 1951 assessment, it is my opinion that the first assessment should be in the following year if then "practicable".

BOYD L. BAILEY
Assistant Attorney General

May 18, 1951

To A. D. Nutting, Forest Commissioner
Re: Slash

This office is in receipt of a letter dated May 17, 1951, from Fred E. Holt, Supervisor, asking a question with respect to disposal of slash, presumably under the provisions of Chapter 363, P. L. 1949. The question asked is as follows:

"A cutting operation is taking place on property adjoining a group of overnight camps. The slash law specifies removal of slash for a distance of 100 feet from dwellings when such slash constitutes an unusual hazard. We are interested to know if the overnight camps, which are leased to the public for a week or so at a time, constitute a dwelling within the meaning of this slash law."

This office is unable to give a categorical answer or rule of thumb as to what constitutes a dwelling house for all purposes of the law. It should also be understood that in interpreting provisions of the statute, the office is only giving an advisory opinion and is not necessarily stating that which a court would undoubtedly find as a result of litigation.

We are of the opinion that if the overnight cabins referred to constitute permanent structures they might well be held to be dwelling houses within the meaning of Chapter 363, Public Laws of 1949. Any permanent structure designed for the occupancy of human beings would constitute a dwelling house.

May we suggest that if there is any question as to the permanency of the overnight cabins, the department might be well advised to proceed under the provisions of the first section, relative to the leaving of slash within 50 ft. of a right of way, provided the slash is within 50 ft. of a right of way, or under a later provision with respect to leaving slash within 25 ft. of a property line. Ordinarily, overnight cabins are so located that it is believed that either of the other sections might more clearly apply.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 21, 1951

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Penobscot Fishway Patrol

Under date of May 17, 1951, the Deputy Commissioner of the Department of Inland Fisheries and Game requested the opinion of this office as to whether the Commissioner has the authority to assign the Penobscot fishway patrol to various wardens whose normal districts include the various fishways along the Penobscot River, or must assign an individual whose principal function it will be to perform this patrol duty.

We have examined the history of the legislation calling for a fishway patrol on the Penobscot River and have found that the Act relative thereto was first passed in 1935, being Chapter 174 of the Public Laws of 1935. The Act reads as follows:

> "The commissioner of inland fisheries and game shall establish a fishway patrol from the Bangor dam north, when said fishways shall have been rebuilt and put in usable condition."

Under the provisions of this legislation it is the administrative responsibility of the Commissioner to determine what kind of patrol will comply with the terms of the statute.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 21, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Last sentence of Sec. 2 of Article IV, Part Third, Constitution

You have asked this office for an opinion as to the period of time contemplated by the words "within five days (Sundays excepted) after it shall have been presented to him." (A bill, unless returned by the Governor, will be as if he had signed it.)

The key word which must be construed in ascertaining what constitutes the five-day period is "after".

Section 16 of Article IV, Part Third, of the Constitution provides for the effective date of non-emergency legislation, the same being ninety days after the recess of the legislature passing it. Ever since this became a part of the Constitution of the State, it has been construed that in computing the ninety days, the day of adjournment has been excluded and the count starts on the day after adjournment.

By analogy, under Section 2 of the same Article of the Constitution, with respect to the returning of bills by the Governor to the legislature within 5 days after presentment to him, the count of the 5 days would start on the day following the date of presentment.

There are no Maine cases construing either one of these sections of the Constitution. However, the case of *Flint v. Sawyer*, 30 Maine, page 226, states the rule on page 229 as follows:

"When a statute requires an act to be performed in a certain time from the date of some transaction, the day of such date is excluded in the computation of time."

In support of my opinion as to the rule to be followed in Maine, as cited above from the case of *Flint v. Sawyer*, there is the case of *Corwin v. Controller-General*, 6 S. C. 390, 395, construing Article III, Section 22 of the Constitution of that State, in which it is provided that a bill shall become a law if it is not returned by the Governor within 3 days after the same shall have been presented to him. The Court held that in counting the 3 days within which the bill is to be returned by the Governor, the day on which the bill was presented to him must be excluded. This is in line with the Maine rule.

The Maine Court has adhered to the same rule stated in *Flint v. Sawyer* in the case of *Page v. Weymouth*, 47 Maine 238 at page 244, and in *Inhabitants of Windsor v. Inhabitants of China*, 4 Maine 298, 304; and the same rule is cited and approved in *Moore v. Bond*, 18 Maine 142 at page 144.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 22, 1951

To Col. Francis J. McCabe, Chief, Maine State Police
Re: Employees in Military or Naval Service

In your memorandum of May 18, 1951 you inquire as to the re-employment status of an employee of your department who, at the conclusion of a period of military service, voluntarily extends his period of active service. You refer specifically to the provisions of Section 23 of Chapter 59, R. S. 1955.

Section 23 of Chapter 59 was first enacted in 1939 and was amended in 1943. It was primarily for the purpose of preserving the re-employment rights of State employees entering the service of the United States during the period of World War II. You will notice that it preserves these rights for employees who enlist, enroll, are called or ordered or drafted into the military or naval service of the United States. For any employees falling within these conditions of entering into the military service, the rights are preserved if they do so in time of war, contemplated war, emergency, or limited emergency. In 1949 the section was amended by Chapter 91 of the Public Laws of 1949, making the section applicable to any such employee entering the service under the provisions of the Selective Service Act of 1948, "or while said act or any amendment thereto or extension thereof shall be in effect."

This office understands that the President of the United States has declared an emergency under which condition Section 23, as it appears in the Revised Statutes, would be effective, and this, coupled with the amendatory legislation making the section applicable while the Selective Service Act of 1948 is in effect, activates Section 23 of Chapter 59 in protecting the re-employment rights of State employees. These rights are not protected solely in the case of those involuntarily serving in the Armed Forces. The rights of

those voluntarily serving are equally well protected. Since a person enlisting is protected, there would appear to be no reason why one re-enlisting should not be equally well protected.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 22, 1951

To Jerome Burrows, Esquire, City Solicitor of Rockland

. . . On May 16th, at your suggestion, the City Clerk of Rockland called this office to inquire as to the propriety of committing an insane person to a State hospital on the authority of an osteopath.

Under date of October 7, 1942, the then Attorney General, Frank I. Cowan, in a similar case analyzed the then existing statutes with respect to the commitment of insane persons and came to the conclusion that they could not be committed on the authority of osteopathic physicians. Since the date of Mr. Cowan's opinion, Chapter 313 of the Public Laws of 1945 has been enacted, which chapter amends the laws applicable to osteopathic physicians. The amendment specifically refers to the "signing certificates for committing persons to state institutions" and with respect to the matters covered by the statute places osteopathic physicians upon the same basis as "physicians of other schools of medicine."

It is therefore our opinion that, although Section 114 of Chapter 23 of the Revised Statutes has not itself been amended, nevertheless under the provisions of Chapter 313 of the Public Laws of 1945 persons may be committed to an institution for the insane on the authority of osteopathic physicians.

In view of the provisions of Chapter 313 of the Public Laws of 1945, Mr. Cowan's opinion of October 7, 1942, is no longer an authoritative advisory opinion of this office. . .

JOHN S. S. FESSENDEN
Deputy Attorney General

May 22, 1951

To the Maine Real Estate Commission
Re: Irrevocable Consent

We have studied your memorandum of May 17, 1951, in which you ask what length of time an irrevocable consent filed by an out-of-state applicant remains in force.

In reply you are advised that an irrevocable consent, contemplated by the laws applicable to those engaged in the real estate business, would undoubtedly remain in force during the entire statutory period within which an action could be brought against the individual filing the same for any transaction arising out of his conduct of business in this State from and after the date that such consent was filed. Normally, this statutory period is six years from the time the transaction takes place.

In order to protect the people of this State satisfactorily, it is recommended that when an out-of-state broker has failed to renew his license and is required by the Commission to file a new application, under such circumstances such out-of-state broker should be required to file a new irrevocable consent.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 23, 1951

To R. A. Derbyshire, D. D. S.

. . . Reference is made to your letter of May 19, 1951, relative to a graduate of Dalhousie University, Halifax, Nova Scotia, who has been admitted to the practice of dentistry in New York and has practiced there for a period of five years. You inquire whether or not he may be admitted to practice in this State upon such examination as the Board may determine he should take. In your letter you state that Dalhousie University has not been approved as yet by the Council of Dental Education.

In reply you are advised that the Board may accept him as an applicant for admission to the practice of dentistry in the State of Maine, to take such examination as the Board may determine to be necessary, for the reason that in the absence of evidence to the contrary it would be assumed that the educational standards of the State of New York would be the equal of the educational standards of the State of Maine.

You will recall that within the last two years the question was raised whether or not a graduate of the Dental School of McGill University should be allowed to take the examination for the practice of dentistry in the State of Maine, the question involved being the fact that the Council of Dental Education of America had failed to rate McGill University. At that time it was developed that the Council had also failed to rate Harvard and Columbia. How many other dental schools the Council had failed to rate we do not know. If we are to continue to be confronted with the problem of graduates from known and recognized universities, over eligibility to take the examination for admission to the practice of dentistry in the State of Maine, by reason of the failure of the Council of Dental Education of America to act, it simply means that, for the purposes of Chapter 66 of the Revised Statutes of 1944, the value of the Council of Dental Education of America to the State of Maine is equivalent to its having ceased to exist, whereupon it becomes the duty of the Board of Dental Examiners to proceed to make its own ratings. . .

JOHN S. S. FESSENDEN
Deputy Attorney General

May 31, 1951

To A. D. Nutting, Forest Commissioner
Re: Pipe Line Lease

Reference is made to your letter dated May 28, 1951, requesting an opinion of the Attorney General relative to your authority to grant permits to the

Federal Government to cross public lots in the laying of a pipe line from Searsport to Limestone in this State.

You are advised that it is the policy of the Executive Department of the State Government to cooperate fully with Federal authorities in a matter of this nature, since it is one involving military preparation and national defense.

It is my opinion that, as Forest Commissioner having complete administrative control over the public lots, you have authority as such Commissioner, especially when coupled with the authority of the Governor and Council as provided in Section 8 of Chapter 1, R. S. 1944, to grant such permits upon such terms as may be agreed upon.

In entering upon the final transaction whereby the permit or license is actually granted, you should first have the authority of a council order passed by the Governor and Council, expressing the terms upon which the permit or license is granted.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 31, 1951

To W. E. Bradbury, Acting Deputy Commissioner of Inland Fisheries and Game

Re: Revocation of a Guide's License

As I read the provisions of section 29 of Chapter 33, relative to guides' licenses, I find no provision whatsoever to the effect that guides' licenses are divisible as to fishing on the one hand and hunting on the other. Such licenses, it appears, are licenses to guide for all purposes, under the regulation of the Inland Fish and Game Laws.

It is therefore my opinion that the Commissioner does not have authority to issue a guide's license limited to fishing only or hunting only.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 31, 1951

To General Spaulding Bisbee, Director of Civil Defense

Re: Powers of Arrest

I am returning herewith Frederick P. O'Connell's letter of May 2, 1951, in which he asks for an opinion as to whether or not an auxiliary policeman of Town A, upon being sent into Town B under the mutual-aid clause of the Civil Defense Act, carries with him the necessary police power to operate in Town B by virtue of the fact that he was sworn in in Town A, or whether it would be necessary to deputize him in Town B.

As I understand the plans of the Civil Defense Department, all law enforcement officials operating outside their own jurisdictions for which they were sworn to enforce the laws are to be attached to police sections of mobile

reserve battalions. This was clarified by Chapter 273 of the Public Laws of 1951, which was the Act which revised the State Civil Defense Law, and provided specifically for the power of arrest, by amending Section 7 of the Civil Defense Law. I would answer, therefore, that if the auxiliary policeman was a member of a police section of a mobile reserve battalion, he would have the authority without being deputized in Town B; otherwise he would not have the authority.

JOHN S. S. FESSENDEN
Deputy Attorney General

May 31, 1951

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Right of Access to Great Ponds

Reference is made to your memorandum of May 18, 1951, in which you requested an opinion on the subject of the public's right of access to "great ponds".

It would not be feasible for the Attorney General's office to write an opinion on the subject of the public's right of access to great ponds since such an opinion would necessarily be of an extended length. While the opinion might be entirely adequate as to the law, the important thing in each case would be the facts, and the application of the law to the facts would be controlling in each case.

The law has been adequately and completely expressed in the Opinion of the Justices found at 118 Maine 503, which Opinion of the Justices in part affirms the decision in the case of *Barrows v. McDermott,* 73 Maine 441. The actual rule of law, very briefly stated, is as follows:

"Any person has the right to go to a great pond on foot through unenclosed woodlands belonging to another and to take fish there; but the privilege must be exercised in the light of the authority by which it is conferred, in that he must see to it that he does not trespass on any man's corn or meadow, tillage or woodland."

JOHN S. S. FESSENDEN
Deputy Attorney General

June 4, 1951

To the Maine Real Estate Commission
Re: Irrevocable Consent

With reference to your memo of May 22, 1951, in which you inquire whether or not a new irrevocable consent from out-of-state brokers should be required every six years, it is our opinion that such a practice, while not absolutely necessary, is one which is probably the safest for all concerned.

It is also recommended that when an out-of-state broker has failed to renew his license and is required by the Commission to file a new application, then in such instance that out-of-state broker should be required to file a new

irrevocable consent, even if in the particular instance the original irrevocable consent has been in effect less than six years.

JAMES G. FROST
Assistant Attorney General

June 8, 1951

To Norman U. Greenlaw, Commissioner of Institutional Service
Re: Good Time Credits for Parole Violators

In response to your memo of May 3d, in which you inquire the method of computing the length of service owed by a parole violator to the State when he has broken his parole and been returned to the institution, we call your attention to Section 22 of Chapter 136 of the Revised Statutes of 1944, which provides that a prisoner violating his parole shall be considered as an escaped prisoner.

> ". . . The length of service owed the state in any such case shall be determined by deducting from the maximum sentence the time from date of commitment to the prison to date of violation of parole and such prisoner shall forfeit any deduction made from his sentence by reason of faithful observance of the rules and requirements of the prison prior to parole or while on parole. . ."

For example, assume the prisoner was committed on January 20, 1942, for 2-4 years for the crime of larceny.

Assume also that he was paroled on August 27, 1943, and he would be entitled to discharge, if he had fully observed the conditions of his parole, on April 21, 1945.

Assume, however, that on January 20, 1944, the prisoner violated his parole.

Applying the formula prescribed by the statute, the time from date of commitment to the prison to date of violation of parole (2 years) should be subtracted from the maximum sentence (4 years):

4 years (maximum sentence)
2 years (time from date of commitment to date of violation of parole)

Length of service owed 2 years.

The prisoner may in the future be granted good time allowances, or may later be reparoled, in the discretion of the parole board.

As to good time credits the prisoner had earned up to the date of violation of parole, such deduction made from his sentence shall be forfeited.

With reference to good time credits accrued by prisoners prior to July 9, 1943, and to the inability of the State to take away those credits because of the ex post facto effect of such action, attention is drawn to a letter to your office dated February 29, 1944, from Abraham Breitbard, Deputy Attorney General, Report of the Attorney General 1943-1944, page 120.

JAMES G. FROST
Assistant Attorney General

June 21, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Eligibility.

Inquiry has recently been made of this office as to the eligibility of a member of the Legislature for appointment as a member of the State Highway Commission when that person was a member of the Legislature which increased the salary of the Commissioners of the State Highway Department.

Article IV, Part Third, §10, of the Constitution is as follows:

> "No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by election by the people."

This constitutional provision was considered by the Court in answer to questions propounded by the House of Representatives, March 20, 1901, (95 Me. 564, 588) and the Court in its answer held that the Constitution (Art. IV, Part Third, §10) "prohibits the appointment of a senator or representative, during the term for which he shall have been elected, to any civil office of profit under this State, which shall have been created or the emoluments of which increased during such term. As to such office the appointment itself is prohibited, and the prohibition continues, not only while the member retains his seat in the legislature, but continues until the expiration of the term for which he was elected. He cannot, therefore, be appointed to such office during that term, even though he has resigned his seat in the legislature."

The constitutional provision clearly indicates that no senator or representative is eligible for appointment to any office which has been created, or the salary of which has been increased during the term of his office.

The salary of each member of the State Highway Commission has been increased by the past Legislature in Chapter 330, Public Laws of 1951. It is my opinion, therefore, that a senator or representative of the 95th Legislature cannot be appointed a member of the State Highway Commission, and this disability continues during the entire term for which he was elected.

JAMES G. FROST
Assistant Attorney General

June 21, 1951

To H. H. Harris, Controller
Re: Mileage

In response to your memo of June 18, 1951, in which you inquire as to the effective date of Chapter 430, Public Laws of 1951, which chapter changes the rate of pay for use of private automobiles on official state business, and your further inquiry as to Fire Inspectors under Chapter 339, Public Laws of 1951, the following answers are submitted.

1. Chapter 340, Public Laws of 1951, which changes the rate of pay for use of private automobiles on official state business is an ordinary bill coming

within the constitutional provision which provides that such acts shall not take effect until ninety days after the recess of the legislature passing the act.

The 5000 miles referred to in these acts has reference to the first 5000 miles traveled in the fiscal year. If an employee has traveled 3000 miles under the present law by August 20, the effective date of Chapter 340, P. L. 1951, the remaining 2000 miles of the first 5000 miles to be traveled in this fiscal year shall be computed at the new rate provided for under Chapter 340.

2. Chapter 339, Public Laws of 1951, amends the prior mileage statute by providing that state fire inspectors be paid 7c for every mile traveled in the business of the state, thereby placing fire inspectors in the same category as inspectors of seed potatoes.

Chapter 340, Public Laws of 1951, is a statute primarily designed to change travel rate. One may be justified, therefore, in assuming that it was the intent of the legislature that fire inspectors shall be continued in this new category, along with seed potato inspectors.

As the effective date of both these acts falls upon the same day, August 20, fire inspectors do not fall within the 7c category on July 1, 1951, but within the 8c category, on August 20, 1951.

The answer, therefore, to your first question is, "No," and the answer to the second question is, "No."

JAMES G. FROST
Assistant Attorney General

June 22, 1951

To Col. Francis J. McCabe, Chief, Maine State Police
Re: Salaries.

Your memo of June 19, 1951, relative to Chapter 408 of the Public Laws of 1951 has been received by this office.

As laid out, there is an overlapping in the salary scales from Trooper to Major. Without more, these overlapping scales would mean that in some instances a sergeant, lieutenant, etc., would draw less salary than a person in the preceding classification.

The last paragraph of the Act provides that "on appointment from one grade promotion to another, the member shall receive the salary in the new classification which is the next step above that which he received before he was promoted."

This last quoted paragraph will not do away with, or eliminate, the overlapping in the salary scales. Its purpose is to insure that upon being promoted to another classification the individual so promoted will not suffer a cut in salary, but will receive a raise to the next salary step above that which he received before he was promoted. To explain this paragraph further, assume a sergeant, under the new pay scale, is receiving $78 per week. On being promoted to lieutenant his salary will be not $72, base pay for a lieutenant, but $81, or the next step above that which he received before he was promoted.

As to the effect of this Act on individuals who remain in the same classification, i. e., sergeant, lieutenant, etc., it is our opinion that the following illustra-

tion more truly portrays the intent of the Act:

> Assume a man has been a sergeant for 3 years and his pay is now $62 per week, or the third salary step in the range of $60-$61-$62-$63-$64. On the effective date of the act his salary should be that granted in the third salary step of the new law, or $69.

JAMES G. FROST
Assistant Attorney General

June 22, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: "Civil Office"

Article IV, Part Third, Section 10, Constitution of Maine:

> "No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by election by the people."

There are numerous and varied definitions of the terms "office," "officer", "public office" as used in statutes and Constitutions. The above quoted provision of the Maine Constitution talks of "civil office". The term "civil office" is synonymous with "public office" *42 Am. Jur. 881.*

The term "officer" is one inseparably connected with an office, so one who holds a public office is a public officer. A public officer is such an officer as is required by law to be elected or appointed, who has a designation or title given him by law, and who exercises functions concerning the public, assigned to him by law. The duties of such officer do not arise out of contract or depend for their duration or extent upon the terms of a contract. *42 Am. Jur. 880.*

A public office is a privilege in the gift of the State. It must have some permanency and continuity and possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public.

"The powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; and the duties must be performed independently and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature, and by it placed under the general control of a superior officer or body." *42 Am. Jur. 881.*

The prohibition contained in Article IV, Part Third, Section 10 of the Constitution against a member of the Legislature, during the term for which he shall have been elected, accepting a civil office of profit, when that office shall have been created, or the emoluments of which increased during such term, applies only to those members of the Legislature accepting a "public office" as distinguished from accepting ordinary employment.

The distinction between the two, "public office" and "employment", is frequently difficult to trace, and recourse must be had to distinguishing criteria of public office, i.e. created by law, the duty involving a portion of the

sovereign power and in the performance of which the public is concerned, of a continuing nature, etc.

In particular instances where a member of the Legislature is being considered for a position the emoluments of which have been increased by the legislature of which he is a member, the problem should be submitted to this office for final determination.

JAMES G. FROST
Assistant Attorney General

June 26, 1951

To Mrs. Evelyn D. Marshall, Factory Inspector, Labor and Industry
Re: Authority under secs. 22 and 24, Ch. 25, R. S. 1944

In your memo of June 15, 1951, you request an opinion relative to the regulation of female employees working in ice cream stands similar to the stands known as "Dairy Queen", "Dairy Treat", etc.

The statute under consideration regulates the employment of females in various fields including manufacturing, mechanical or mercantile establishment, hotel, restaurant, etc.

It is our opinion that such businesses come under the heading of manufacturing establishment, and operators of such establishments are subject to the laws relative to manufacturing establishments.

You will note that under Chapter 184, Public Laws of 1951, effective August 20, under "Definition", the following definition is given:

> "'Retail manufacturer' shall mean any manufacturer of frozen dairy products who is not defined as a wholesale manufacturer."

JAMES G. FROST
Assistant Attorney General

June 26, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Liquor Research Commission; School Building Commission

Your memo of June 22d received and the following are answers with respect to your inquiries concerning the Liquor Research Commissoin and the commission created by the Maine School Building Authority.

Question 1. Mr. Obert, Chairman of the Liquor Research Commission created by Chapter 213, P&SL 1949, asks if that Commission is to continue functioning or has ceased to exist.

Answer. It is our opinion that the Commission created in 1949 continues until the effective date of the 1951 Act (Ch. 218, P&SL 1951), at which time a new Commission should have been appointed and qualified, to continue the work started by the 1949 Act, and to perform its other prescribed duties.

If the present Commission has funds available, it may continue its duties until August 20, but funds appropriated for the fiscal year 1951-1952 will, of course, be unavailable to the present Commission.

Question 2. You inquire further with regard to the status of the Commission created by Chapter 437, Public Laws, 1949, "An Act to Provide Financial Assistance to Cities and Towns in the Construction of School Buildings," and that Commission's relation to the Commission set up by Chapter 405, Public Laws, 1951, under "An Act Creating the Maine School Building Authority."

Answer. The 1949 Act, which to all intents and purposes appears to be completely encompassed by the new 1951 Act, was not directly repealed, and its continued presence is due to the Act's ability, by its provisions, to accept Federal funds, in the event such funds are made available to the State.

Because of this and the further fact that the members of the Commission contemplated by the 1951 Act are composed of certain individuals of a different status than the members of the Commission of the 1949 Act, it would seem that the same Commission would not continue as the Commission under the 1951 Act, but that it will be necessary for a new Commission to be appointed.

There would be no objection to an individual's serving on both Commissions, provided he is eligible under both Acts.

JAMES G. FROST
Assistant Attorney General

June 29, 1951

To: The Mayor and Municipal Officers,
City of Lewiston (Water Department)

An opinion having been requested of the Attorney General as to whether or not the City of Lewiston is subject to, and bound to register as a retailer under the provisions of the "Sales and Use Tax Law", so-called, as contained in Chapter 250, Public Laws 1951, in connection with the sale and distribution of water, you are advised as follows:

The City of Lewiston has been, and still is, authorized by the laws of Maine (in a series of Private and Special Laws), to furnish and supply water to its inhabitants, and this office understands that the city itself is, in fact, the supplier of such water, there being no separate water district or water company.

Section 3 of the Sales and Use Tax Law provides in part:

> "*A tax is hereby imposed at the rate of 2% of the value of all tangible personal property, sold at retail in this state on and after July 1, 1951, measured by the sale price. . .*"

That the statute in question contemplates a tax on the sale of water is clearly evidenced by the following language which also appears in section 3 thereof:

> "*The tax imposed upon the sale and distribution of gas, water or electricity by any public utility, the rates for which sale and distribution are established by the public utilities commission, shall be added to the rates so established.*"

From this language, it is clear beyond the need of construction that the Legislature contemplated a tax on the distribution of water by any public utility.

Chapter 40 of the Revised Statutes, section 15, defines "public utility" in subsection XXVI:

> "'*Public utility*' includes every . . water company . . as those terms are defined in this section, and each thereof is declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

In the same section, XXII, appears a definition of "water company";

> "'Water company' includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water-works for compensation within this state."

In the same section appears a definition of "corporation":

> "'Corporation' includes municipal and quasi-municipal corporations."

The above language clearly indicates that the City of Lewiston is a public utility and that its rates are subject to the jurisdiction, control and regulation of the Public Utilities Commission of the State of Maine.

The rates charged by the City of Lewiston for supplying water to the inhabitants thereof are determined by the Public Utilities Commission of the State of Maine, and are intended by said Commission to compensate the City of Lewiston for the supplying of such water. Some of the rates are based on the number of water outlets, and some are meter rates. Just as is the case with a water district or water company the charges increase proportionately by the number of fixtures or by the water flowing through the meter. The charge thus permitted by the Public Utilities Commission is intended to be compensatory rather than a general tax. Sales to the city of such water would be exempt. There is no exemption respecting sales by the city for the reason that the Sales and Use Tax is intended basically to be on the consumer.

In view of the language of the Sales and Use Tax Law, Chapter 250, Public Laws of 1951, and the other statutes herein before referred to, it is the opinion of the Attorney General that the City of Lewiston is subject to and must register as a retail seller under said Sales and Use Tax Law.

If this office can be of further assistance to the City we would be very glad to extend our facilities.

BOYD L. BAILEY
Assistant Attorney General

July 6, 1951

To Division of Animal Husbandry, Department of Agriculture
Re: Change of Name of Licensee – Livestock Dealer Licensee.

Relative to your communication of July 5, 1951, concerning the change of name on the livestock dealer license of Arthur Bickford, it would seem impossible to accede to the wish of Morris Bickford that the 1949 license be

amended so as to indicate a partnership relation between Arthur and Morris Bickford.

Application for the license was made by Arthur Bickford in his name and was thus granted. When a partnership relation is intended, the parties must so state publicly by depositing in the office of the town clerk of the town where the business is to be carried on a certificate to such effect. It is a relationship that must be intended and publicly attested to by the parties involved.

In the matter at hand, Arthur Bickford, as an individual, applied for a license and made no mention of a partnership relation. Morris Bickford evidently did not object to this at the time. Then, no State department has the right, after the decease of Arthur Bickford, to establish any other status.

JAMES G. FROST
Assistant Attorney General

July 9, 1951

To Lieut. John de Winter, Director, Traffic Division, State Police
Re: Section 100-B, Chapter 323, P. L. 1951.

Your memo of July 5, 1951, in which you request an interpretation of the penalty in Sec. 100-B, Ch. 323, P. L. 1951, as it applies to the provisions of Sec. 100, Ch. 348, P. L. 1947, has been received by this office.

Chapter 19, R. S. 1944, as amended by Sec. 100, Chapter 348, P. L. 1947, sets a gross weight limit for trucks, a maximum load in pounds carried on any group of axles according to the distance in feet between the extremes of the group of axles, weight per axle, and weight limit per inch width of tire.

The penalty for violation of this section is provided in Sec. 135, Ch. 348, P. L. 1947, a section to be invoked where no other penalty is specifically provided.

Ch. 323, P. L. 1951, adds two new sections, 100-A and 100-B, to Chapter 19, R. S. 1944, as amended. These two sections speak of excess weight, and Section 100-B provides that

> "Any person who violates any provision of section 100 shall be guilty of a misdemeanor on account of each such violation. . ."

The question, then, is how the new penalty provision, Sec. 100-B, Ch. 323, P. L. 1951, which applies only to gross weight, affects Sec. 100, Ch. 348, P. L. 1947, the penalty for which section is presently Sec. 135, Ch. 348, P. L. 1947, which penalty section relates to any violation of any provision of Section 100, Ch. 348, P. L. 1947.

It is our opinion that the Legislature, in enacting Ch. 323, P. L. 1951, and the penalty provision therein contained, had no intention of applying Sec. 100-B of Ch. 323, P. L. 1951, as the only penalty provision for violations of Sec. 100, Ch. 348, P. L. 1947, thereby permitting other provisions of Sec. 100 to be violated with impunity, but that the intent was that violations not covered by Sec. 100-B would still be blanketed by Ch. 348, Sec. 135, P. L. 1947.

The result is, therefore, that there are two penalty sections for violations of provisions of Sec. 100, Ch. 348, P. L. 1947, one of which, Sec. 100-B, Ch. 323, P. L. 1951, is to apply where the limitations of gross weight are violated, the other, Sec. 135, Ch. 348, P. L. 1947, is to remain as the general penalty section, providing for penalties where there is no such specific provision.

JAMES G. FROST
Assistant Attorney General

July 13, 1951

To H. H. Chenevert, Milk Commission
Re: Fees on Certain Sales

Question 1. Facts: A Maine milk dealer with a plant in Waterville buys milk from H. P. Hood (Boston) plant in Newport, Maine. H. P. Hood buys milk from Maine producers f.o.b. Newport and ships to Boston by trailer tanks. No collection of fee (2c per hundredweight) is made on this transaction. H. P. Hood sells a part of this milk to Maine dealers in Maine for fluid consumption in Maine. The question: Can the Milk Commission collect 2c per hundredweight fee on the latter transaction and if so from whom?

Opinion. The fact that H. P. Hood sells milk to the Waterville dealer at Newport, Maine, makes H. P. Hood a dealer within the provision of Section 1 of the Maine Milk Control Laws. As such dealer H. P. Hood is liable under the provisions of Section 6 of said Act, to pay the fee of 2c per hundredweight based on quantity of milk purchased and sold in Maine. The fact that H. P. Hood buys the milk in Maine and may transport some or all of it to Boston and then back into Maine and sell it in Maine does not affect the operation of the law. H. P. Hood can recover 1c from the producer in Maine for such milk as H. P. Hood sells in Maine.

Question 2. Facts: A Maine dealer sells surplus milk to another Maine dealer to be used for manufactured products (not to be resold for fluid consumption). This milk would normally be Class II to dealer, being that part of his total receipts which he was unable to sell at retail or wholesale for fluid consumption (Class I use). The dealer contends that since the milk is Class II anyway, and so computed in his blend price to the producers, selling it to another dealer for Class II use does not affect his price to his producers and does not place this milk in Class I category. Question: Does this mean that such dealer-to-dealer sales are Class I only in such areas where dealer-to-dealer prices are established?

Opinion. Section 4 of the Milk Control Laws provides:

> "The dealer-to-dealer prices for all sales shall be established only in such market areas as are necessary for the stabilizing of market conditions, but all such sales between dealers shall be considered Class I milk."

This means that the prices in all dealer-to-dealer sales can be established only in those market areas deemed and found to be necessary for stabilizing the market conditions, but in any event all such sales between dealers are considered Class I milk. In other words, such sales between dealers are to be considered Class I milk although the stabilizing price element does not apply;

the milk is still in Class I classification and remains there for the purposes of applying the provisions of the law.

WILLIAM H. NIEHOFF
Assistant Attorney General

July 23, 1951

To Allan L. Robbins, Warden, Maine State Prison

Your attention is directed to Chapter 23, Section 52, of the Revised Statutes of 1944, which provides as follows:

> "The department shall maintain quarters at the reformatory for women for the incarceration of all women sentenced to the state prison.
>
> "All women sentenced to the state prison shall be transmitted directly from the place of sentence to said reformatory and serve their sentences at said reformatory and shall be subject to all rules governing persons sentenced to the state prison."

As we understand the procedure being followed, the original mittimus is kept by you at the State Prison and an attested copy forwarded to the Superintendent of the Women's Reformatory. It appears that the Superintendent of the Women's Reformatory should have some written authority in addition to a copy of the commitment to show her authority for holding the prisoner. We suggest that in cases of a similar nature, including those already presently transferred to the Women's Reformatory at Skowhegan and those who may hereafter become matters of consideration, you write on the commitment papers the following:

"The within prisoner is hereby transmitted to the Reformatory for Women in accordance with the provisions of Chapter 23, Section 52, of the Revised Statutes of 1944."

This memorandum endorsed on the original commitment and the attested copy going to the Reformatory for Women should be signed by you. The original mittimus is retained in your file and the attested copy accompanies the prisoner to the Reformatory. . .

ALEXANDER A. LaFLEUR
Attorney General

July 17, 1951

To A. K. Gardner, Commissioner of Agriculture

Re: Licenses Required by Section 224-C, Chapter 184, P. L. 1951

This office is in receipt of a letter dated July 10, 1951, from C. P. Osgood, Chief, Division of Inspection, in which letter he requests information relative to the supervision and enforcement of Chapter 184, P. L. 1951, with regard to license requirements for the present year. Mr. Osgood requests that our reply be directed to you.

Specifically, Mr. Osgood wishes to know whether your department should require manufacturers to be licensed for the period of August 20, 1951, to June 30, 1952. This question is prompted, undoubtedly, by the fact that, though the effective date of the Act is August 20, 1951, Section 224-C, the provision setting up license requirements, states that application for such license shall be filed during the month of June, such license to be for 12 months, beginning July 1. In other words, an act becoming effective August 20, 1951, contains a provision that application for licenses required by the Act shall be made in June, such license to begin July 1 and to extend for 12 months.

The fact that the license is to cover a twelve-month period and that no provision is made for apportioning the amount to be paid for the remaining portion of the year, even though the statute did not become effective till later in the year, does not mean that the license can be assessed only for the next successive year. This is particularly so when the license tax is a newly imposed one and not one additionally imposed to one already required. Nor does this situation make the legislation retroactive.

It is therefore our opinion that under §224-C, Chapter 184, P. L. 1951, manufacturers should be licensed for the period of August 20, 1951, to June 30, 1952.

JAMES G. FROST
Assistant Attorney General

July 23, 1951

To Brig.-Gen. George M. Carter, The Adjutant General

Re: Armory Appropriation

Your memo of 17 July 1951, with letter attached from the Town Manager of Fort Fairfield, has been received by this office.

You request an opinion relative to the interest earned on $100,000 appropriated by the State Legislature, by Chapter 143, Resolves of 1949, for the construction of an Armory-Community Center in Fort Fairfield, when that sum is not in use for the purposes intended, but remains in banks awaiting a Federal appropriation of funds under the Facilities Construction Act. The money has not been used because, as you state, bids received were above the total sum of money available, and construction is being delayed until Federal money is available to assist in the construction.

Such funds were not delivered, unencumbered, to the Town of Fort Fairfield, but transferred from the State of Maine to the State Military Defense Commission, a State agency, under that Commission's control. The sum of ten thousand dollars of the fund was expended for the lot upon which the Armory-gymnasium was to be built. The unexpended portion of the appropriation remains State property, as, in general terms, an appropriation is merely the act of setting money aside formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law. Having set the money aside and the money being in the control of a State agency, the interest earned by that fund will inure to the benefit of the State, and not to the benefit of the Town of Fort Fairfield.

JAMES G. FROST
Assistant Attorney General

July 23, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Chapter 395, P. L. 1951

Your memo of June 18, 1951, to which was attached a copy of a letter to you from the Regional Office of the Federal Security Agency, has been received by this office.

The letter from the Federal Security Agency, written by Laurence J. Bresnahan, Regional Director, requests the opinion of the Attorney General's Department relative to certain sections of the Maine Act before a Federal-State agreement may be entered into, such agreement being authorized by the Act. A discussion of each problem raised by Mr. Bresnahan follows, each problem being separately considered and numbered.

1. Sec. 2 of Ch. 395, Public Laws of Maine, 1951, defines "employment" as follows:

> "The term 'employment' means any service performed by an employee in the employ of any political subdivision of the state, for such employer, except service which in the absence of an agreement entered into under the provisions of this chapter would constitute 'employment' as defined in the Social Security Act; or service which under the Social Security Act may not be included in an agreement between the state and the federal security administrator entered into under the provisions of this chapter. Employment in positions covered by any retirement system supported wholly or in part by the state or any of its subdivisions may not be included in such agreement."

Mr. Bresnahan's first question is prompted by the last sentence of the above quoted definition, viz.:

> "Employment in positions covered by any retirement system supported wholly or in part by the state or any of its subdivisions may not be included in such agreement,"

it being his belief that a possible interpretation of that sentence could be that services in positions covered by a retirement system which had been established by a political subdivision but was not thereafter supported wholly or in part by such political subdivision would not be excluded from coverage. Relative to this problem, it will be noted that contained within the above quoted definition of "employment" is the statement:

> "The term 'employment' means any service . . . except service which under the Social Security Act may not be included in any agreement between the state and the federal security administrator entered into under the provisions of this chapter." . .

As under the provisions of the Social Security Act, Sections 218 (d) and 218 (b) (4), the Act excludes from coverage under the agreement service in positions covered by retirement systems established by a state or by a political subdivision thereof, and as this exclusion is covered by the definition, it is our opinion that the last sentence of the definition does not alter the general intent of the definition to exclude from coverage those services excluded by the Social Security Act. The sentence is merely a reaffirmation that services in positions covered by retirement systems as defined in the Social Security Act are excluded from coverage.

2. The second problem arising out of Chapter 395, Public Laws of Maine, 1951, enacting Chapter 60-A of the Revised Statutes, concerns the definition of "political subdivision".

The authority for the Federal-State agreement, contained in Section 218 (a) (1) of the Social Security Act, extends only to coverage of employees of the State or any political subdivision thereof. Chapter 395, Section 2, Maine Public Laws, 1951, defines "political subdivision" as follows:

> "The term 'political subdivision' includes an instrumentality of the State of Maine, of one or more of its political subdivisions, the University of Maine, academies, water, sewer, and school districts and associations of municipalities or an instrumentality of the State and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision;"

The question presented is whether "the University of Maine, academies, water, sewer, and school districts and associations of municipalities" are "political subdivisions" within the meaning of Section 218 of the Social Security Act.

With regard to this matter, it is our opinion that the employees of the above enumerated instrumentalities are included within the coverage of Chapter 395 only if such instrumentalities are bodies corporate and politic, or instrumentalities of the State, of one or more of its political subdivisions, and are separate juristic entities. In this connection, taking the University of Maine as an example, by Chapter 532, Private and Special Laws of 1865, the Trustees of the State College of Agriculture and the Mechanic Arts (this name being later changed to the University of Maine) were to constitute a body *politic* and *corporate*, having succession as provided by Chapter 532. The University of Maine, is therefore, a body corporate and politic, a juristic entity, and as a result, a political subdivision of the State of Maine. Similarly, water districts, sewer districts, and school districts are bodies corporate and politic, as particularly designated by the acts incorporating such districts.

Relative, then, to this question, it is our opinion that those examples enumerated by Section 2 of Chapter 395, Public Laws of Maine, 1951, as being within the coverage, are, with the possible exception of some of the several "academies", bodies corporate and politic and included within the term "political subdivision", as defined by the Federal Act, Section 218 (b) (2).

It is suggested, for the purposes of administration, that the burden of showing that one is within the classes eligible for coverage should be upon the one in whose possession are the documents evidencing such eligibility, namely, the applicant. That is, if an academy should desire to apply for coverage, that academy should submit evidence that it is a body corporate or politic, or otherwise such an instrumentality as would be eligible under the Federal Act..

3. The third issue raised by Mr. Bresnahan involves an interpretation of Sections 2 and 3-III of Chapter 395 of the Public Laws of Maine, 1951, as compared to Section 218 (f) of the Social Security Act.

Section 218 (f) of the Social Security Act provides:

"Any agreement or modification of an agreement under this section shall be effective with respect to services performed after an effective date specified in such agreement or modification, but in no case prior to January 1, 1951, and in no case (other than in the case of an agreement or modification agreed to prior to January 1, 1953) prior to the first day of the calendar year in which such agreement or modification, as the case may be, is agreed to by the Administrator and the State."

Section 2 of Chapter 395, Maine Public Laws 1951, reads:

"Effective date. The provisions of this act shall be retroactive to January 1, 1951, with respect to any political subdivision that shall elect to accept its provisions as of that date."

Section 3-III of Chapter 395, Maine Public Laws, 1951, reads:

"(The Federal-State) agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein, but in no event may it be effective with respect to any such services performed prior to the 1st day of January, 1951."

The problem presented is the possible implication present in the foregoing provisions of the Maine law that an agreement or modification entered into in 1954 could be made retroactive until 1951.

The Constitution of the State of Maine, Article IV, Part Third, Section 16 (Murchie Constitution), provides that no act or joint resolution of the legislature, with several exceptions not here pertinent, shall take effect until ninety days after the recess of the legislature passing it. The effective date of the State Act herein discussed would, ordinarily, be August 20, 1951. However, the above quoted Section 2 provides that this Act shall be retroactive to January 1, 1951, thereby permitting political subdivisions desirous of securing the coverage offered by the Act to take, for a starting point, January 1, 1951, instead of August 20, 1951.

Application of Section 3-III, Chapter 395, Maine Public Laws, 1951, above quoted, is restricted by Section 3 of that chapter, which states that Sections 3-I, II, III and IV are in effect "except as may be otherwise required by or under the Social Security Act as to the services to be covered. . ."

It is our opinion, therefore, that Section 2 of Chapter 395, Maine Public Laws, 1951, and Section 3-III of Chapter 395, Maine Public Laws, 1951, are restricted by Section 3, Chapter 395, Maine Public Laws, 1951, and Sections 2 and 3 are effective only in so far as they are not prohibited by the Social Security Act.

JAMES GLYNN FROST
Assistant Attorney General

July 24, 1951

To H. M. Orr, Purchasing Agent
Re: Demurrage

Your memo of July 18, 1951, in which you inquire whether the contract now in existence between the State of Maine and Maine Oxy-Acetylene Sup-

ply Company permits an increase of demurrage charges from 2 cents per day to 3 cents per day, has been received.

Paragraph 5 of the contract permits the demurrage charge of 2 cents, and reads as follows:

> "Buyer shall return each cylinder when empty to Seller not later than ninety days after its delivery by Seller; Provided that if any loaned cylinder is not returned within thirty days from date of shipment Seller reserves the right to make a demurrage charge of two cents per day for all time over thirty days that such cylinder is out of Seller's possession, which demurrage charge Buyer agrees to pay, or cause to be paid, on demand. Buyer shall pay, or cause to be paid, promptly on demand to Seller, at Seller's then established valuations and rates, for loss of or damage to any said cylinders or fittings resulting from any cause after delivery thereof by Seller and until return to Seller."

You state that the Maine Oxy-Acetylene Supply Company claim that their supplier has passed the charge along to them, and authorization to charge the State the additional amount is within paragraph quoted below:

> "The obligation of Seller to delivery and Buyer to accept deliveries hereunder are subject to strikes, riots, war, fires, acts of God, accidents, Governmental orders and regulations, curtailment of, and failure in obtaining, sufficient electrical power, lack of transportation facilities, and other similar or different contingencies beyond the reasonable control of Seller or Buyer, as the case may be."

Paragraph 6 has reference only to the delivery and acceptance of the product with reference to which this contract was executed, and the unforeseeable and uncontrollable circumstances which might alter plans concerning the delivery and acceptance of that product.

It is our opinion that this paragraph (6) does not contain authority to increase demurrage rates. Demurrage is a sum charged only when the Buyer (State) fails to return the empty cylinder within the time stated in the contract. That is, after delivery and after acceptance of the product, demurrage charges may be made when the cylinder is not duly returned. Paragraph 6, as we have stated, has reference only to delivery by Seller and acceptance by Buyer of the product, and in no way makes mention of situations which occur *after* delivery and acceptance.

It is a paragraph common to contracts, excusing performance when impossible because of unforeseen and uncontrollable circumstances which intervene and make performance impossible, attributable to such happenings as are recited:- strikes, riots, war, etc.

We feel, therefore, that the increase in demurrage rates from 2 cents to 3 cents cannot be justified by paragraph 6 of the contract.

JAMES G. FROST
Assistant Attorney General

July 26, 1951

To Lester E. Brown, Chief Warden

Re: Archery Licenses

Your memo of July 12, 1951, in which you inquire whether the Commissioner has authority to pay the sum of 25 cents as agent's fee for issuing licenses under section 96-B, Chapter 350, Public Laws of 1951, has been received.

Chapter 350, Public Laws of 1951, is an act relating to hunting deer with bow and arrow. Section 96-B is the pertinent license section, and states that the fee for such license shall be $4.25 for hunting deer by residents of this State and $10.25 for hunting deer by non-residents. While the ordinary statutory provisions relating to licenses issued for hunting deer provide that the issuing agent retain 25 cents of the fee, the section being discussed contains no such provision.

However, it is stated in Section 96-B that "Archery deer tags shall be issued for use in the same manner as regular deer tags." We interpret this sentence to mean that deer tags and licenses issued to persons hunting with bow and arrow will be issued in the same manner as regular deer tags; that is, issued by the party regularly designated to issue such licenses, and that the 25 cent fee will be retained by the issuing agent.

Therefore, it is our opinion that the Commissioner has authority to pay the sum of 25 cents as agent's fee for issuing licenses under Section 96-B, Chapter 350, Public Laws, 1951.

JAMES G. FROST
Assistant Attorney General

July 27, 1951

To Francis J. McCabe, Chief, Maine State Police

Re: Hand Signal Law

Your memo of July 23, 1951, requests an opinion as to which vehicles, if any, are exempt from the signal requirements of Chapter 301, Public Laws, 1951.

Chapter 301, Public Laws, 1951, amends Chapter 19 of the Revised Statutes by adding three new sections.

Section 107-A, Chapter 301, Public Laws, 1951, states:

> "No person shall so turn any vehicle designed for the purpose of transportation of persons, other than buses, without giving an appropriate signal in the manner provided in this section and sections 107-B and 107-C in the event any other traffic may be affected by such movement."

Under Section 1, "Definitions", Chapter 19, R. S. 1944, as amended,

> "'motor truck' shall mean any motor vehicle designed or used for the conveyance of property."

As distinguished from "motor truck", which is a vehicle designed or used for the conveyance of property, a vehicle designed for the purpose of transportation of persons is generally a passenger vehicle.

We are of the opinion, therefore, that as trucks are peculiarly vehicles designed or used for the purpose of transportation of property, and not for

the transportation of persons, they are excluded from the requirements of the Act.

JAMES G. FROST
Assistant Attorney General

July 27, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Fees of Secretary of State

This memo is in response to a letter to your Excellency from Lewis I. Naiman, attorney at law, Gardiner, Maine, which letter was submitted to this office for consideration.

The Secretary of State has promulgated a rule and regulation, approved by the Governor and Council, that:

> "Information for commercial purposes other than the name and address of an owner or his registration number will not be furnished except to state prosecuting attorneys or enforcement officials unless the request is accompanied by a fee of twenty-five cents for each individual look up."

Mr. Naiman questions the legality of this regulation, citing Chapter 19, Section 5, R. S. 1944, which makes such records public; Chapter 18, Section 6, the section establishing certain fees; and Chapter 19, Section 8, which authorizes the Secretary of State to make such rules and regulations not inconsistent with other laws. Mr. Naiman states that it is his belief that the establishment of Fees and charges is a legislative function, and there not being legislative enactment authorizing such 25 cents for information pertaining to motor vehicle applications and registration, then this regulation is unlawful and unenforceable.

Relative to this question, we direct attention to Section 33, Chapter 14, R. S. 1944, which reads as follows:

> "Sec. 33. Fees not provided for. R. S. c. 126, §24. In cases not expressly provided for, the fees of all public officers, for any official service shall be at the same rate as are prescribed by law for like services."

It is our opinion that the Secretary of State had authority, under Section 33, Chapter 14, R. S. 1944, to establish a fee for the services performed in that office.

In having such regulation approved by the Governor and Council, the Secretary of State was adhering to the requirements of Section 8, Chapter 19, R. S. 1944.

Such fee could properly be authorized under Section 8, Chapter 19, R. S. 1944, as it was not inconsistent with other laws, Section 33, Chapter 14, R. S. 1944, having provided for such fee.

JAMES G. FROST
Assistant Attorney General

July 31, 1951

To Norman U. Greenlaw, Commissioner of Institutional Service
Re: State Hospital Records

In your memo of July 20, 1951, you ask if Dr. Sleeper, Superintendent of Augusta State Hospital, was within his authority in refusing an attorney permission to examine the case history and report made by the hospital on an inmate of the Maine State Prison, a client of the attorney.

Relative to this question, you are advised that certain records required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, made by a public officer authorized to perform that function, are public records. The fact that records are public does not, however, subject such records to the inspection of all persons.

While you are required by statute to keep public records at the State Prison and perhaps at certain other institutions with regard to matter relative to parole, we find no such requirement in connection with State Hospitals.

Therefore, a rule of thumb which this office believes can be safely followed with regard to attorneys who may inspect such hospital records, is: An attorney should be granted permission to inspect any record which is open to the inspection of that attorney's client. If the request of a person to see records may be refused, then that person's attorney has no stronger right to inspect such records.

This answer would place upon the individual in charge of such records the discretion of ascertaining whether or not the records are such as are not open to the inspection of interested persons.

This office is of the opinion, therefore, that the Superintendent was within his authority in refusing an attorney permission to inspect records which in Dr. Sleeper's opinion were confidential.

With respect to this matter, and perhaps other information of interest to you, we refer you to an opinion written to your office by Abraham Breitbard, Deputy Attorney General, February 9, 1944.

JAMES G. FROST
Assistant Attorney General

August 2, 1951

To Raymond C. Mudge, Finance Commissioner
Re: Chapter 2, Public Laws of 1951

Your memo of July 26, 1951, relative to the Self-Imposed Tax on Sardines, has been received by this office.

You specifically ask:

> "Whose signature may the Commissioner of Finance accept as having authority to sign Work Programs and Requests for Allotments collateral to the operations of the Maine Sardine Tax Committee under the provisions of this Act?"

The problem arises because of the failure of the legislature to include in the statute provisions designating the officers necessary to carry out the functions

of the said committee. There being no such officers designated, you ask who has authority to sign Work Programs and other incidental documents.

It is our opinion that, in the absence of specific provisions, there is an implied power, necessarily present, permitting the members of the committee to elect such officers as are required to execute successfully the statutory duties of the committee.

The proper person, then, to sign such papers as you refer to in your question, would be that member of the committee to whom such power would be delegated, as evidenced by the election of that member as an officer of the committee.

JAMES G. FROST
Assistant Attorney General

August 2, 1951

To W. Earle Bradbury, Deputy Commissioner, Inland Fisheries and Game
Re: Interpretation of the word "Keeper", in Ch. 342, P. L. 1951

This office has received your memo of July 25, 1951, in which you ask if a man should "appoint a person not otherwise employed by him and not a member of his immediate family to patrol his orchard from time to time and kill any deer which he might find doing damage thereto," would a person thus appointed be a keeper in our interpretation of the law?

Chapter 342 of the Public Laws of 1951 amends section 84 of Chapter 33, R. S. 1944, by allowing, in subparagraph I, any person to kill deer where the deer is doing substantial damage to crops, and expressly permits a person to authorize a member of his family or a person employed by him to take such deer.

Paragraph II of the law allows a cultivator, owner, mortgagee, or keeper of said crops to kill deer or other protected wild animals doing damage, as provided in subsection I.

The question you have propounded is whether a person appointed by an owner of crops, not a member of his family or otherwise employed by the owner, comes within the term "keeper".

A "keeper" is one who has the care, custody, or superintendence of anything, or one who has or holds possession of anything. We do not feel that a person, such as you referred to, who would "from time to time" patrol the orchard, should rightfully be designated a keeper.

Another factor which tends to direct us to this conclusion is that the word "keeper" in subsection II of Chapter 342, is not intended to include a part-time patroller, in that the word "keeper" follows the terms cultivator, owner and mortgagee, all of which are such persons who have more than a temporary interest in the welfare of the property.

JAMES G. FROST
Assistant Attorney General

August 15, 1951

To the Honorable Frederick G. Payne, Governor of Maine

Re: Panel of Mediators

It has been requested of this office to submit to his Excellency an opinion relative to the appointment to the Panel of Mediators established by Chapter 353, Public Laws of Maine, 1951, of a person now a member of the Board of Arbitration, if that person resigns from the Board of Arbitration.

With regard to this matter, incompatibility of offices may be present either by virtue of the common law or through express legislation. Chapter 353, Public Laws, 1951, expressly states that a member of the Board of Arbitration and Conciliation may not be eligible to serve as a member of the Panel.

It is our opinion that, as distinct from such a provision as is contained in our Constitution, Article IV, Part Third, Legislative Power, which forbids certain persons from appointment to office for a definite period, incompatibility present by virtue of Chapter 353, Public Laws, 1951, is similar to common law incompatibility, in that appointment to the Panel of Mediators would effect an automatic resignation of the membership on the Board of Arbitration and Conciliation.

It is our opinion, therefore, that upon a member's resigning from the Board of Arbitration and Conciliation, such person would be eligible to appointment as a member of the Panel of Mediators.

JAMES G. FROST
Assistant Attorney General

August 21, 1951

To Fred M. Berry, State Auditor

Re: Fees

In your memo of July 23, 1951, you quote the following paragraph from the charter of the Western Washington Municipal Court:

> "*Fines and penalties to be paid into county treasury.* All fines and forfeitures and fees of the judge and recorder of said court, *imposed and collected* by said court, in all criminal cases, and all fees of said judge and recorder of said court in *civil and criminal* cases *received* by either or both, shall be accounted for and paid over quarterly into the treasury of said County of Washington, for the use of said county; . . ."

and ask: "In this particular court, is the recorder liable for civil fees which have been extended on credit to various attorneys in the county, or is the recorder liable only for such civil fees as actually have been collected?"

Answer. We refer you to the memo of January 9, 1951, submitted to you by John S. S. Fessenden, Deputy Attorney General, and state that we are in concurrence with Mr. Fessenden's opinion that the extension of credit for fees due in civil cases would be at the peril of the court officer so extending credit, unless the charter of the particular court provides otherwise.

The use of the word "received" in the above quoted section of the charter is not an unusual one, and in such instances means more than simply the fees

collected, but should be construed to mean both fees collected and fees with respect to which credit has been extended.

We again suggest, relative to this matter, that if you desire statutory control on this question, the Director of Legislative Research be requested to draft a statute to take care of the problem.

Question 2. When there is a provision in a charter which conflicts with a public law such as is occasioned in this instance, time of payments to County Treasurer, which of the two takes precedence?

Answer. A general public law takes precedence over a provision of a charter when the two provisions are in conflict.

JAMES G. FROST
Assistant Attorney General

August 21, 1951

To Kenneth B. Burns, Accountant Supervisor, Institutional Service
Re: Encumbrance of Funds

Your memo of August 10, 1951, recites a situation where the Department of Institutional Service, having a surplus of funds before the end of the fiscal year, June 30, 1951, submitted to the Governor and Council a Council Order approving the transfer of $3500 to the Central Maine Sanatorium and the Governor and Council approved such transfer and ordered that the funds be encumbered for the purpose of repairing certain portions of the Central Maine Sanatorium.

We are of the opinion that, as no contract or purchase order had been placed prior to June 30th, the funds were not properly encumbered, and as a result lapsed into the General Fund under Section 23 of Chapter 14, R. S. 1944.

Relative to this matter we draw your attention to Section 21, Chapter 14, R. S. 1944, in connection with the construction of buildings, highways, and bridges, and note that even for this important construction funds cannot be carried forward to the next fiscal year unless contracts have been let, actually starting the work, during the year for which the appropriation was made.

JAMES G. FROST
Assistant Attorney General

August 27, 1951

To Philip A. Annas, Associate Deputy Commissioner of Education
Re: Tuition Liability

In your memo of July 19, 1951, you recite a situation of a boy whose parents have died, who is living with his sister in the town of Enfield. The Town of Enfield does not support and maintain a standard secondary school and of necessity the boy must attend school in another town. You ask:

"Is the Town of Enfield required to pay tuition for this boy under the provisions of Section 98, Chapter 37, of the Revised Statutes, 1944, as amended?"

It is our opinion that the Town of Enfield is required to pay tuition for this boy's attendance in an approved secondary school.

The first paragraph of Section 98, Chapter 37, R. S. 1944, contains the qualification necessary for a youth to attend a school in a town other than the town in which he resides, and reads as follows:

> "Any youth who resides with a parent or guardian in any town which does not support and maintain a standard secondary school may attend any approved secondary school. . ."

The boy here lives not with a *parent* or *guardian*, but rather with a person acting *in loco parentis.*

The words "parent or guardian" are used elsewhere throughout the laws relating to education; thus, Section 39, Chapter 37, R. S. 1944, states:

> ". . . every person between the ages of 5 and 21 shall have the right to attend the public schools in the town in which his parent or guardian has a legal residence."

Assuming, for the purpose of resolving our problem, that the question is, "May this boy, residing not with a parent or guardian (probate) but with his sister in the Town of Enfield, attend the public schools in the Town of Enfield?" Here, then, arises a problem parallel with the one presented to this office: "May the boy, under Section 98, Chapter 37, R. S. 1944, residing not with a parent or guardian (probate) but with his sister in the Town of Enfield, attend any approved secondary school?"

It has been held that statutes relating to public schools should receive a liberal construction in aid of their dominant purpose, which is universal elementary education.

Following this principle, the courts of the State of Maine have held that the word "guardian", as used in our statutes relating to education, does not necessarily mean "probate guardian" but such person who has the legal custody of and control over the minor and, as a result of this interpretation, a child living not with a parent or a guardian but with a person who stood *in loco parentis* to the child was considered eligible to attend, tuition free, the schools of the town in which the person having custody resided.

In other words, a person who stands toward a child *in loco parentis* is, under our statutes relating to education, in the same position as a guardian.

In the problem presented to this office, the parents of the boy being deceased, the boy living with a sister, that sister stands *in loco parentis.* She is also in the position of being subject to a penalty under Section 83, Chapter 37, R. S. 1944, if she neglects her duty of causing the boy to attend school.

The court having determined that, for the purpose of these statutes, the word guardian includes the status of one standing *in loco parentis* to a child, it is our opinion that this boy qualifies under Section 98, Chapter 37, R. S. 1944, for attendance in any approved secondary school outside the Town of Enfield and that the Town of Enfield is required to pay the tuition charge.

JAMES G. FROST
Assistant Attorney General

August 29, 1951

To Leo Fox, Finance Department

Re. State Police Salary Scales

An opinion has been requested of this office relative to Chapter 408, Public Laws of 1951, An Act to Increase the Salaries of Members of the State Police.

The Act provides that sergeants, lieutenants, captains and majors shall have respectively certain base pay, which base pay shall be increased annually by a certain amount until a particular maximum salary is reached. Thus, the base pay for a lieutenant is $72 per week and he receives annual increases of $3 per week until a maximum salary of $85 per week is reached; a captain has a base salary of $79 per week, after which he receives an increase of $3 per week each year until a maximum salary of $95 per week is reached; the base pay of a major being $86 per week and the annual increase being $4 per week until a maximum salary of $107 is reached.

It will be noted that, in relation to lieutenants, captains and majors, the specific annual increases will never equal the maximum salary. For instance, the fifth step for a lieutenant, after four annual increases of $3 per week, will bring his salary to $84, or $1 under the maximum salary of $85. A similar problem is presented in the scales of pay relating to captains and majors, and this office has been requested to give an opinion as to how the remaining steps should be handled.

It is our opinion that there should be strict adherence to the specified increases in the weekly salary, annually, in so far as practicable. When a similar increase would exceed the authorized maximum, then that last step should be diminished by as many dollars as necessary to equal the maximum. In the case of a lieutenant, where the fifth step brings the salary to $84, the sixth and last step would be an increase of $1, an amount which would equal the maximum salary. The salaries of captains and majors should be administered similarly.

JAMES G. FROST
Assistant Attorney General

August 30, 1951

To Lester E. Brown, Chief Warden, Inland Fisheries and Game

Re: United Nations Representatives – Fishing Licenses

In your letter of August 27, 1951, you ask if representatives of the United Nations have privileges greater than the American citizen in that they are permitted to fish in our lakes without first securing fishing licenses.

May we say briefly that the answer is, No.

Section 32, subparagraph II, Chapter 33, R. S. 1944, as amended, authorizes the Governor to issue complimentary fishing and hunting licenses to members of the Canadian Immigration and Customs Forces who serve in such capacity on the Maine border; to holders of the Congressional Medal of Honor; and the Commissioner is authorized by Section 32, paragraph IV, Chapter 33, to

issue free licenses to certain groups of patients at the Veterans' Center at Togus.

By virtue of the specifically enumerated classes, other classes are excluded from being extended similar privileges.

JAMES G. FROST
Assistant Attorney General

August 30, 1951

To C. H. Arber, Merit Award Board

In your memo of August 13, 1951, you inquire if Section 21 of Chapter 20, R. S. 1944, which requires that certified checks be submitted when bid proposals are considered, may be amended so that cashiers' checks may be accepted, and this before the next legislature convenes.

It is our opinion that we may not change the statutes without proper procedure through the legislature and that, until such time, certified checks are the only checks that may be accepted.

JAMES G. FROST
Assistant Attorney General

August 30, 1951

To Mrs. Evelyn D. Marshall, Labor and Industry
Re: Sections 22 and 24, Chapter 25, R. S. 1944

You ask if a woman working as a dispatcher for a taxi service comes under the definition of a female employed by a transportation company.

We re-affirm the opinion expressed by this office on May 18, 1949, to the effect that a concern operating a taxi service is a "transportation company". Necessarily, then, for the purposes of Sections 22 and 24 of Chapter 25, R. S. 1944, a woman working as a dispatcher for a taxi service is employed by a "transportation company".

JAMES G. FROST
Assistant Attorney General

August 30, 1951

To Ermo H. Scott, Deputy Commissioner of Education
Re: Section 124, Chapter 37, R. S. 1944

Your memo of August 24, 1951, in which you ask for an interpretation of a paragraph in Section 124 of Chapter 37, R. S. 1944, has been received by this office. Said paragraph reads as follows:

> "The commissioner of education shall further collect all records of educational institutions within the state which are now extinct, or shall

hereafter become extinct, and shall deposit all such records in a place of safety and accessibility for future preservation and use."

It is our opinion, from a reading of this statute, that the collection of such records is mandatory on the part of the Commissioner of Education, in other words that this portion of the statute compels you to collect the records of all institutions within the State which are now out of existence or hereafter go out of existence.

JAMES G. FROST
Assistant Attorney General

September 5, 1951

To S. F. Dorrance, Livestock Specialist, Department of Agriculture
Re: Dogs

Your memo of August 24, 1951, has been received. This relates to Chapter 88, Section 12, R. S. 1944.

Under that statute town officers are directed to seek out, catch and confine all dogs within their territory that are not licensed, collared and tagged. These dogs have to be detained for a period of not more than six days. You ask upon whom the expense falls for feeding, advertising, and attempting to locate the owners, during that six-day period.

It is our opinion that the expense falls:—

1) Upon the owner, and it must be paid by him upon claiming the dog; or
2) By the city or town which orders such animal to be taken, in the event that the owner fails to appear.

JAMES G. FROST
Assistant Attorney General

September 10, 1951

To Fred E. Holt, Supervisor, Forestry
Re: Portable Sawmills

Your letter of September 5, 1951, has been received by this office. You state that the Recorder of a municipal court has rendered a decision that it is not necessary for a mill owner to be licensed under Chapter 423, Section 72, Public Laws of 1949, which requires a license for a primary wood-using sawmill which is "portable" by definition, if that mill is on land owned by the operator. You state that this opinion is subject to change if the Attorney General's office will submit a written opinion that such an operator, even though the mill is on his own land, is subject to license.

Please be advised that the Attorney General's office does not render advisory opinions to municipal courts or other justices. Our duties are strictly limited by law to advising the Governor and Council, the legislature, and the heads of State departments in regard to State business. Although we frequently find it necessary to appear in court to argue, we may not render opinions

which will influence the court in its decisions. However, we may consider this request to be one made by your department and therefore we feel to give you the opinion of this office.

It is well settled that the State may, under its police power, regulate businesses, occupations and trades, and this power includes the right to regulate by license certain businesses. These businesses must be reasonably classified, but we feel that portable sawmills are so classified. That there is a reasonable nexus to this classification is seen when you realize that the regulation is a forest fire prevention regulation.

As to whether certain persons in that classification, such as persons owning the land upon which the mills are situated, are exempt from such a license, the general rule is that, under the police power, a license must be directed against the business or practice, not against one or more of the persons who may be engaged in it.

It is, therefore, our opinion that a mill operator who owns the land upon which such a mill is situated is not exempt from the requirement of a license.

JAMES G. FROST
Assistant Attorney General

September 10, 1951

To Paul A. MacDonald, Deputy Secretary of State
Re: School Bus – Signal Law

Your memo of September 4, 1951, in which you inquire if a school bus is required to give signals in accordance with the requirements of Chapter 301 of the Public Laws of 1951, has been received by this office.

The term "bus" is not defined in our statutes, but the term "school bus" is defined in Section 9, Chapter 37, of the Revised Statutes. Chapter 301, P. L. 1951, definitely excludes buses from the necessity of making such signals as are required by that section; and we feel that "school bus" as defined by our statutes comes within the exclusion. This opinion is further substantiated by Section 9 of Chapter 37 of the Revised Statutes, which requires that such school buses shall be equipped with stop lights of a type approved by the Secretary of State. Such requirement being specifically included in one section, it would appear that the requirements of Chapter 301 are not applicable.

This opinion should not in any way be construed to exempt the driver of a school bus from liability due to negligent acts on his part while operating a school bus.

JAMES G. FROST
Assistant Attorney General

September 10, 1951

To Harland A. Ladd, Commissioner of Education
Re: Employment of Aliens

This office is in receipt of your memo of August 27, 1951, in which you

sought our opinion as to whether it is legal to employ aliens as administrators or teachers in

a) the public schools, or

b) private academies which receive State aid.

Please be advised that it is our opinion that Section 5, Chapter 11, R. S. 1944, as amended, is not a bar to the hiring of aliens as superintendents and teachers in public schools or private academies.

JAMES G. FROST
Assistant Attorney General

September 10, 1951

To W. Earle Bradbury, Deputy Commissioner, Inland Fisheries and Game
Re: Expenditures for Publicity

In your memo of August 16, 1951, you quote paragraph 10, Section 63, and Section 110 of Chapter 33 of the Revised Statutes and ask whether a portion of these funds can legally be expended for promotion and publicity, sportsmen's shows, or educational purposes and such cost be reimbursed in whole or in part by those municipalities for which you have put on such publicity programs.

It is our opinion that there is nothing illegal in receiving reimbursement from those municipalities for which you have put on such shows. However, we do not feel that you should demand reimbursement from these towns or accept sums in excess of the actual cost.

JAMES G. FROST
Assistant Attorney General

September 10, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Vacancy in Office of Register of Probate

The attention of this office has been drawn to the death of Donat J. Levesque of Lewiston, Register of Androscoggin County Probate Court until the time of his death.

The vacancy created by the death of Mr. Levesque may be filled according to the following procedure:

1. Section 27, Chapter 140, Revised Statutes of 1944, provides that in case of the death of the register of a probate court the judge shall appoint a suitable person to act as register until another is qualified in his stead.

2. Article VI, Section 7, Constitution of Maine, provides that vacancies occurring in the office of Register of Probate by death, resignation, or otherwise, shall be filled by election. . . at the September election next after their occurrence; and in the meantime, the Governor, with the advice and consent of the Council, may fill such vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January next after the election aforesaid.

Under these statutory and constitutional provisions, the vacancy created by the death of a Register of Probate may be temporarily filled by the appointment of a suitable person by the Judge of the Probate Court, such person serving until the individual appointed by the Governor and Council qualifies for the position (or until the elected official qualifies, which situation is not here present.)

JAMES G. FROST
Assistant Attorney General

September 14, 1951

To Marion E. Martin, Commissioner of Labor and Industry
Re: Vacation Pay

Your memo of September 11, 1951, in which you ask the question whether vacation pay comes within the phrase, "wages earned by him", contained in Section 38 of Chapter 25, R. S. 1944, has been received by this office.

Please be advised that it is our opinion that in the absence of a contract granting vacations with pay, such vacations are gratuities, not vested rights, and that vacations as such do not come within the meaning of wages earned.

We refer you to Mr. Fessenden's opinion of February 6, 1950, for further information on this point.

JAMES G. FROST
Assistant Attorney General

September 14, 1951

To Norman U. Greenlaw, Commissioner of Institutional Service
Re: Admissions under Chapter 374, Public Laws of 1951

With regard to Chapter 374, Public Laws of 1951, entitled, "An Act Relating to the Commitment to Mental Hospitals," we wish to inform you that a careful consideration of the provisions of that Act shows that there is grave question as to the constitutionality of Sections 104-107, inclusive.

Sections 104 through 107 were apparently intended to be emergency provisions. We, of course, are not declaring these sections unconstitutional, but we feel that the constitutional validity of these sections is open to serious question and therefore advise you that we have given to Drs. Pooler and Sleeper, respectively, our opinion that in the future they should refuse to accept patients whose admission is sought under the procedure set forth therein, until such time as a final determination of the constitutionality of these sections shall have been made by the Law Court.

We believe that those patients already in your custody through procedures followed under Sections 104 through 107 should be detained presently until a decision has been made as to their disposal. As to future admissions we advised Drs. Sleeper and Pooler that it is the opinion of this office that they should accept only those patients duly committed to their institutions by the proper Probate Court procedure under Sections 108 *et seq.*

ALEXANDER A. LaFLEUR
Attorney General

September 17, 1951

To Honorable Frederick G. Payne, Governor of Maine

Re: Salary adjustments – State Police

Your memo of September 5, 1951, and attached correspondence from Representative Bradeen and Raymond C. Mudge, Finance Commissioner, have been received by this office, with the request that, if possible, an interpretation be given that Chapter 408 of the Public Laws of 1951 may have a retrospective effect.

Chapter 408 resulted from L. D. 561, introduced by Representative Lackee, which came out of Committee in new draft L. D. 1386, which in turn was amended by Amendment No. 459. It provides for the scale of salaries beginning at $53.00 per week through the various classifications to $66.00 per week, and for Captain a range from $79.00 per week to $95.00 per week, and adds a classification of Major with a range from $86.00 per week to $107.00 per week.

Relative to the interpretation of such a statute, there exists a strict rule of construction against a retrospective operation, and a presumption that it was the intent of the legislature that statutes or amendments enacted by it operate prospectively and not retroactively. Unless the statute acts retroactively by virtue of express terms or other clear indications leaving no reasonable doubt, then it should be construed to operate prospectively.

There is a complete absence in Chapter 408 of the Public Laws of 1951 of any words that might have the effect of causing the Act to be interpreted as operating retroactively.

While we recognize that in this respect members of the State Police are not accorded the same consideration as was present in the acts relating to other State employees, such a result is compelled by the very words of the respective acts, one of which states specifically that "the provisions of this act shall be retroactive to the week ending March 10, 1951," (Chapter 412, P. L. 1951), while the other, Chapter 408 of the Public Laws of 1951, contains no such provision.

Another bill, affecting the great majority of employees, granting them an increase from March 10, 1951 to June 31, 1951, is seen as Chapter 120, Resolves of 1951, and that Resolve appropriates a sum to cover that particular period of time; and the law under discussion, Chapter 408 of the Public Laws of 1951, which contains *no* provision showing an intent to deal similarly with the officers of the State Police.

We therefore respectfully advise Your Excellency that it would not be proper to construe Chapter 408 of the Public Laws of 1951 as having a retroactive effect.

JAMES G. FROST
Assistant Attorney General

September 25, 1951

To Everett F. Greaton, Executive Director, Maine Development Commission
Re: Release of State's Claim for Old Age Assistance

Last April you consulted George C. West, Assistant Attorney General assigned to the Department of Health and Welfare, concerning the State's claim in the amount of $2256.00 for Old Age assistance granted to a beneficiary now deceased. Your question was whether or not the claim could be waived, as a brother of the deceased would not sell the property for the purpose of resale to an industry wishing to settle in Bridgton unless the State would waive its claim against the beneficiary's share of the property.

R. S. 1944, Chapter 22, Section 272, as amended by P. L. 1947, Chapter 336, provides in substance that upon the death of a beneficiary of Old Age Assistance the State shall have a claim against his estate for all amounts paid to him under the provisions of the Old Age Assistance Law. This same section provides:

> "The attorney general shall collect any claim which the state may have hereunder against such estate."

This provision of the statute is very clear and uses the mandatory word "shall" throughout the section.

The Attorney General, as attorney for the State, has certain rights as an attorney representing a client to handle legal matters in such a way as will be for the best interest of the State, provided he does not in any way act contrary to legislative authority.

In this particular type of situation the legislature has laid the mandatory law that the State *shall* have a claim and that the Attorney General *shall* collect any claim which the State has. It does not seem, in view of the wording of this provision of the statute, that the Attorney General has any authority to waive the claim which the State has. This is a matter that is solely within the discretion of the legislature, and not within the province of the Attorney General's office.

It is therefore my conclusion that the only way the State's claim for Old Age Assistance can be waived is by legislative action. The Attorney General must proceed to collect as much of the claim as he can in view of the value of any particular piece of property which constitutes the estate of a deceased Old Age Assistance beneficiary.

ALEXANDER A. LaFLEUR
Attorney General

September 25, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Appointment of Members of the Maine School Building Authority

This office has been requested to submit to Your Excellency our opinion with regard to Section 215 of Chapter 405, P. L. 1951, relative to the appointment of Members of the Maine School Building Authority.

The portions of said section to be considered read as follows:

". . . and 1 member of the state board of education to be appointed by the governor, to serve during their incumbency in said offices, and 3 members at large appointed by the governor for terms of 3, 4 and 5 years respectively. .

"Appointive members may be removed by the governor and council for cause."

Article I, Part First, of the Constitution of Maine provides:

". . . and he (the Governor) shall also nominate, and with the advice and consent of the council, appoint all other civil and military officers, where appointment is not by this constitution, or shall by law be otherwise provided for, . ."

By the authority of Section 215, Chapter 405, P. L. 1951, the Governor is the appointing power, the removal of such members being subject to the Governor and Council.

Such power is not in contravention of the Constitution, which provides for nomination by the Governor and appointment with the advice and consent of the Council only in particular instances and when appointment is not by law otherwise provided for. In the problem at hand, appointment is provided for by law, and it is therefore our opinion that the Governor, without the advice and consent of the Council, may appoint the members of the Maine School Building Authority.

JAMES G. FROST
Assistant Attorney General

September 26, 1951

To Morris P. Cates, Deputy Commissioner of Education
Re: State Subsidy Payment Rates for Evening School Programs, 1950-51.

Your memo of September 19, 1951, has been received at this office. Relatively to Section 166 of Chapter 37, R. S. 1944, you state that certain local superintending school committees during the school year 1950-51 made provision for evening schools which would be reimbursed under Section 166 of Chapter 37 by a sum equal to 2/3 of the amount paid for instruction in such evening schools.

You also state that at this time the Department of Education is preparing certificates and warrants to distribute State reimbursements for the evening school program 1950-51. You further state that Section 166 of Chapter 37 was amended by Chapter 104, P. L. 1951, which provides that a sum equal to ½ the amount paid for instruction for such evening schools shall be reimbursed by the State. Your question is, then:

"Will state reimbursements for approved evening school programs operated by local superintending school committees during the school year 1950-51 be paid in accord with Chapter 37, Section 166 (2/3 the amount paid for instruction) or Chapter 104 – P. L. 1951, Section 166, amended (½ the amount paid for instruction)?"

It is our opinion that Chapter 104, P. L. 1951, is an ordinary act and not an emergency measure and, therefore, became effective in 90 days after the close of the legislative session, that is, on August 20, 1951, therefore becoming effective on a date later than the completion of those evening school programs, and that, as a result, the sums due these particular schools are 2/3 the amount paid for such instruction, and not ½ the amounts paid for such instruction.

JAMES G. FROST
Assistant Attorney General

September 26, 1951

To Frank S. Carpenter, Treasurer of State
Re: Refunding Highway and Bridge Bonds

By Chapter 209, P&SL 1951, there was enacted An Act to Provide for the Issuance of Bonds of the State to Refund Kennebec Bridge Loan Bonds. It is stated in that Act that the Treasurer of State is authorized to issue refunding bonds of the State with the approval of the Governor and Council. This law went into effect on August 20, 1951.

Going into effect on the same day was Chapter 338, P. L. 1951, An Act Relating to Method of Issuance of State Highway and Bridge Bonds, which provided for an Economic Advisory Board, which board would be consulted by the Governor and Council in relation to the issuance of such highway and bridge bonds.

You state that as of this date the members of the Economic Advisory Board have not been appointed; that you find it necessary to consider the issuance of bonds as provided for in Chapter 209, P&SL 1951. It is your opinion that you should not delay the issuance of such bonds until the Economic Advisory Committee has been appointed, and you ask if it is necessary that you do wait until such board has been appointed.

Refunding bonds merely change the form of the indebtedness, being originally authorized by the Governor and Council. It is the opinion of this office that, being merely a change in the form of indebtedness, refunding bonds may be issued without consultation of the Governor and Council with the Economic Advisory Board. Of course, approval must still be had by the Governor and Council. We do not suggest that this will be the standard procedure, but advise you to inform the Governor of the necessity of appointing this Economic Advisory Board and suggest that in the future all bonds, whether original bonds or refunding bonds be issued only with the approval of the Governor and Council after consultation with the Economic Advisory Board.

JAMES G. FROST
Assistant Attorney General

October 2, 1951

To Col. Francis J. McCabe, Chief, Maine State Police
Re: Salary of Major Young

Chapter 408, Public Laws, 1951, is an Act designed to increase the salaries

of members of the State Police. The fifth paragraph of the Act relates to the salary of majors in the State Police, stating:

> "On appointment as a major, the member shall receive a salary of $86 per week, and thereafter he shall receive an increase in salary of $4 per week at the beginning of each fiscal year until a maximum salary of $107 per week is reached."

The only major in the Maine State Police organization is the Deputy Chief, and in conflict with Chapter 408, Public Laws, 1951, which purports to control the salary of majors is the first paragraph of Section 5, Chapter 13, R. S. 1944, which paragraph states:

> "The governor and council shall determine the salary of the chief and deputy chief."

This paragraph remains unchanged throughout the amendments of 1947, 1949, and 1951, and is effective today.

There arises, then, the question which provision governs the salary of Major Young, Deputy Chief of the Maine State Police: the first paragraph of Section 5, Chapter 13, R. S. 1944, or the fifth paragraph of Chapter 408, Public Laws of 1951.

In considering this problem, attention should first be directed to that Council Order which provided that the Deputy Chief shall hold the rank of major. The Deputy Chief is, then, in effect, *ex officio* a major. To be further considered are the rules and regulations of the Maine State Police, the first paragraph of which contains the provision that there shall be only 1 major in the organization of the State Police.

As a result, the Statutes, Council Orders, and rules and regulations relative to this problem point to the fact that the State Police have only 1 major; that that major is an *ex officio* major by virtue of his being the Deputy Chief; and that the salary of the Deputy Chief is determined by the Governor and Council.

It is our opinion, therefore, that the salary of Major Young, Deputy Chief, is determined by the Governor and Council, and not controlled by Chapter 408, Public Laws, 1951. We therefore recommend that a Council Order be submitted requesting that the salary of Major Young be increased, retroactive to August 20th, in an amount equal to that amount which he would have received had his salary been controlled by Chapter 408.

JAMES G. FROST
Assistant Attorney General

October 3, 1951

To Doris St. Pierre, Secretary, Real Estate Commission
Re: License to Married Woman

You ask our opinion as to whether or not it is legal to issue a license to a married woman in her maiden name.

A married woman's name consists in law of her own Christian name and her husband's surname, marriage conferring on her the surname of her hus-

band. It is our opinion, therefore, that a license may not be issued to a married woman in her maiden name.

JAMES G. FROST
Assistant Attorney General

October 9, 1951

To Fred M. Berry, State Auditor
Re: Disposition of Disclosure Fees

In your memo of October 2d you inquire:

(1) When disclosure cases are heard by a municipal court judge should fees mentioned in section 42, Chapter 107, R. S. 1944, as amended, be retained by the judge or should they be paid over to the county treasurer as provided by Chapter 137, section 5, R. S. 1944?

(2) Should fees taxed by the Disclosure Commissioners be retained by them or paid to the county treasurer?

The pertinent portion of section 42, Chapter 107, R. S. 1944, as amended by Chapter 1, P. L. 1951, reads as follows:

> "The magistrate shall be entitled to 25 cents for each subpoena, $1.00 for entry, 50 cents for capias, 50 cents for certificate, and $3.00 for each day in hearing the disclosure and other testimony, and for entering default, 25 cents."

Section 5, Chapter 137, R. S. 1944, contains the provisions by which the municipal courts should dispose of all fines, costs, and forfeitures, stating that such fines, costs and forfeitures shall be paid into the treasury of the county where the offense is prosecuted on or before the 15th day of the month following the collection of such fines, costs, and forfeitures.

Section 9, Chapter 96, provides for the disposition of fees in criminal cases and costs in civil cases.

In the absence of express statutory direction relative to the disposition of disclosure fees, we must look to the statute authorizing such fees and seek a solution from the wording of the statute, giving to the words used their usual, commonly understood meaning.

Thus we find in section 42, Chapter 107, R. S., as amended, that the magistrate shall be "entitled" to certain fees. The word "entitled" is a strong one and signifies a claim of right. 70 Maine 36, 48. Where a public law required that bonds must be registered and "the . . auditor shall be entitled to a fee of not exceeding fifty cents for each bond so registered in his office," the Kansas Supreme Court held that such fees collected by the . . auditor belonged to him, and he was not required . . to account for or turn them over to the State Treasurer; "entitle" meaning to give a claim, right or title to. 86 Kan. 564.

It is our opinion, therefore, that in the case of disclosure fees, the magistrate may retain as his own such fees as section 42, Chapter 107, R. S. 1944, as amended, says he is entitled to.

As the word "magistrate" as used in section 42 is defined in section 23 of Chapter 107, R. S. 1944 (see also section 24 of said chapter) to be a dis-

closure commissioner, judge of probate, register of probate, judge of a municipal court, etc., we feel that the same rule applies to all persons defined as "magistrate".

JAMES G. FROST
Assistant Attorney General

October 10, 1951

To Marion E. Martin, Commissioner of Labor and Industry
Re: Boilers

Your memo relative to Section 64 of Chapter 25, R. S. 1944, has been received.

Section 64 exempts certain types of boilers from the application of Sections 51 to 65 of Chapter 25, one exemption being

> ". . . or to steam heating boilers which carry pressures not exceeding 15 pounds per square inch, constructed and installed in accordance with the rules adopted by the board of boiler rules; . . ."

You state that since the effective date of this section, 1935, no such rules have been adopted, that your staff is insufficient to inspect the thousands of such boilers if the rules were adopted, and that, similarly, you have insufficient funds to carry out the purpose of the section.

You then ask if you are derelict in your duty in having failed to adopt such rules. Our answer, of necessity, is, "Yes." The problems you pose of lack of personnel and lack of funds to carry out the program are, of course, administrative problems, and do not vary our answer.

You also ask if in low-boiler rules provision can be made that such rules would not apply to private residences and/or other categories.

The statute has already attempted to exempt certain boilers from the application of Sections 51-65, Chapter 25, and with respect to boilers carrying pressures not exceeding 15 pounds per square inch, they too are exempt only if you adopt rules relative to their construction and installation, and the boilers are accordingly installed.

It is our opinion that a further classification of boilers carrying pressures not exceeding 15 pounds is not consistent with the law. Certain classifications having been made, or specifically enumerated exemptions set out, further classification is for that reason precluded.

It is our opinion also that Section 62, Chapter 25, does not permit an inspection charge to be made, in the event rules are adopted, Section 64 exempting such boilers from the application of this section.

JAMES G. FROST
Assistant Attorney General

October 17, 1951

To Marion E. Martin, Commissioner of Labor and Industry
Re: Statistics

Your memorandum of October 15th makes inquiry whether the wording

of Sections 2 and 3 of Chapter 25, R. S. 1944, is broad enough to cover all types of industries within the State, non-manufacturing in general and contract construction in particular.

Section 2 recites:

> "The department shall collect, assort and arrange statistical details relating to all departments of labor and industrial pursuits in the state. . ."

The inclusion of the words "all departments" in this sentence is not a limitation and the wording of the section is broad enough to cover all types of industries.

Your second question is if you may invoke through proper court action the penalties provided in Section 9.

Penalties for non-compliance with this statute may be invoked through proceedings in municipal courts in the localities where the violations occur.

NEAL A. DONAHUE
Assistant Attorney General

October 30, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Tax Collector and Selectmen

. . . As you know, the general conduct of town affairs is not, properly speaking, a matter to be handled by State officials, as there are but few circumstances which will authorize any intervention in town affairs by State officers as such.

Usually in matters of this kind I advise the persons who are seeking information to consult with an attorney of their own choosing or with any attorney usually employed by the town to advise the town as to legal matters or to present their problems to the Maine Municipal Association, particularly if the town is a member of the Association. I have been informed by officials of the Association that, even if a town is not a member, they will not refuse to give such advice as they can.

The law provides that the treasurer and collector of taxes of a town may be one and the same person, but that such officers shall not be selectmen or assessors until they have completed their duties and had a final settlement with the town. This principle is clearly stated on page 88 of Volume 1 of Sullivan's Maine Civil Officer. As a matter of fact, Chapter 4 of the *Maine Civil Officer* is entirely devoted to the collection of taxes and is generally used by town officers as their "Bible", so to speak, with respect to tax collection problems.

. . . I know of no provision of law authorizing action by State officials to investigate town affairs as such. Section 116, the second paragraph thereof, of Chapter 80 of the Revised Statutes provides for an audit by the State Department of Audit upon petition by 10% of the legally qualified voters of any town. . . If there is any question as to the legality of contracts made by the selectmen with the town, here again the law provides for action by the

people of the town rather than by State officials as such, in that such illegal contracts may be attacked by ten or more tax-paying citizens of the town. . .

JOHN S. S. FESSENDEN
Deputy Attorney General

November 2, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Social Security – Housing Authorities

We have your memo of October 23, 1951, and the attached letter from the Bureau of Old Age and Survivors Insurance, in answer to your letter of October 4, 1951 in request of answers to questions raised by Harold L. Arno, Executive Director of the Portland Housing Authority. . .

Mr. Arno's first question is: "Is it mandatory that the Housing & Home Finance Agency, Public Housing Administration and the Portland Housing Authority combined, proceed to enter into an agreement with the Maine Retirement System as Lessees and Lessors of the property that we operate as a political subdivision of the State?"

The answer is, Yes. If the purse strings of a political subdivision of the State are controlled by another agency, then of necessity the contract should be signed by both those bodies.

Question 2. "Will it be within the jurisdiction of the Maine Retirement System to enter into an agreement with the Portland Housing Authority wherein such agreement would contain an 'escape' clause permitting the housing authority to cease making contributions plus the pro rata cost of administration, if and when the Authority shall no longer exist with powers to function as a political subdivision in accordance with Federal and State laws?"

The answer to this question is, No. It appears that under Section 1 of Chapter 395 the State extends the benefits of Social Security to "employees of the political subdivisions of the State of Maine." If a political subdivision ceases to exist, then in that event contributions need not be paid by one who no longer has employees coming within the definition of the Act. Such an "escape clause" would not be needed. If in fact it was desired to cover such a situation and if desired for other purposes, it would not be permissible.

Question 3. "Will it be within the jurisdiction of the Maine Retirement System to enter into an agreement with the Authority wherein it would be specified that the Authority would be granted the right to prove our financial responsibilities annually to cover the necessary amounts for contributions and administrative costs in accordance with the established rates from year to year? The request for an answer to this question is made due to the fact that funds cannot be budgeted by any Federal Municipal Quasi-Organization for a period longer than one fiscal year."

This question poses administrative problems. Section 4, sub-section I, provides that the political subdivision submit a plan to the State agency for approval, and paragraph B contemplates that the political subdivision specify the source or sources from which the funds necessary to make the required

payments are expected to be derived and give reasonable assurance that such sources will be adequate, for such purpose. Whether or not proof of financial responsibility annually is a practicable method of assuring the State agency that such sources will be adequate is an administrative problem. It seems reasonable that the State agency cannot permit a political subdivision, because of an annual financial responsibility proof, to be a member one year, fall out the next year, and be re-admitted the third year, all because of the results of said proof. Perhaps for that reason the answer to Question 3 should be, No. However, paragraph B must be complied with in some manner acceptable to the State agency and with respect to that answer we feel that it is an administrative problem.

Question 4. "If an agreement were to be entered into by the Maine Retirement System and the Portland Housing Authority, which has been operating in Portland, Maine, as a political subdivision of the State, under the provisions of Chapter 260, Public Laws of Maine, approved April 5, 1943 as an emergency act, and the present Authority's powers should cease to exist in accordance with that law, and a new Housing Authority was created by the City of Portland, Maine, in accordance with Maine Public Law H. P. 2089-LD 1561 Chapter 81A—approved 5-7-49, would the agreement entered into now be cancelled and a new agreement be entered into with the new Authority?"

With respect to this question the answer cannot be, Yes, or, No. When the present Authority's powers cease to exist in accordance with Federal and State laws, the then existing contract between the Authority and the State agency would be cancelled. Whether or not a new agreement would be entered into with the new Authority is a question that could be answered only at that time, depending upon whether the new Authority would be then acceptable to the State agency. In great part the answers to Question 4 and Question 2 are the same, Question 4 adding only the question of whether a new agreement would be entered into with the new Authority.

JAMES G. FROST
Assistant Attorney General

November 2, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Wardens

Subsections III and IV of Section 6-A of Chapter 384, Public Laws of 1947, provide special retirement benefits of wardens of the Department of Inland Fisheries and Game and to the deputy warden, the captain of the guard, and any guard of the State Prison.

These sections provide that if such person is a member of this (Retirement) system on July 1, 1947 and has creditable service of at least 25 years in that capacity, or in the case of the prison work, in each or all capacities, he may retire at ½ of his average final compensation, provided such retirement is requested by either the member or the Commissioner.

Subsection VI of said section states that in order to obtain the benefits of subsections III, IV and V of this section, the member must have attained the age of 55, must have served 25 years in one of the above capacities, and

anything to the contrary notwithstanding, retirement is compulsory at attained age 60.

These sections place such individuals in a different status from that of the ordinary State employee who would not be eligible for retirement benefits until attained age 60 and would not be required to retire on a compulsory retirement basis until age 70.

You ask if such individuals, wardens of the Department of Inland Fisheries and Game, or guards at the Maine State Prison, who become members of the System subsequent to July 1, 1947, are accorded the same benefits granted by subsections III, IV and VI of Section 6-A, or receive the regular retirement benefits available to all employees under the general provisions of the law.

This question, with respect to actual problems arising out of the above quoted sections of the Retirement Law, is premature by some 20 years. Your question affects a person coming into the service subsequent to July 1, 1947, relative to whom no problems of retirement will arise until he has been in the service for 25 years, or not earlier than 1972.

For this reason we would hesitate to give an opinion on a statute which is susceptible to different meanings. On its face, it would seem discriminatory. We suggest, therefore, that if you question the functioning of these sections as to one who comes into the service subsequently to July 1, 1947, then the problem be presented to one of the forthcoming Legislatures for clarification.

JAMES G. FROST
Assistant Attorney General

November 7, 1951

To Lieut. John deWinter, Director, Traffic Division, State Police
Re: Railroad Crossings – School Buses

We have your memo of November 1, 1951. You state that in several instances school buses must stop because of Chapter 19, Section 37-A, of the Revised Statutes of 1944, at sidings or spur tracks when some of these crossings are not even marked as such with proper railroad warning signs. You then ask, "Could Chapter 19, Section 27A be interpreted so as not to require stopping for railroad tracks where railroad warning signs are not posted?"

Chapter 235, Public Laws, 1951, amending Chapter 19 of the Revised Statutes of 1944, reads in part:

> "All school buses when carrying children shall come to a full stop before crossing any railroad track or tracks, such stop to be made at a point not more than 50 feet and not less than 10 feet from the nearest rail; . . ."

This statute requires that a school bus stop before crossing any railroad track or tracks and it does not permit an interpretation requiring that such buses stop only for railroad tracks where railroad warning signs are posted.

It is our opinion that the reasonable intent of such Act is to give children such a safeguard as is present only when the buses stop at all tracks.

JOHN S. S. FESSENDEN
Deputy Attorney General

November 7, 1951

To Philip A. Annas, Associate Deputy Commissioner, Education
Re: Inspection of Private Schools

We have your memo of October 11, 1951, relative to Section 3, paragraph XII of Chapter 37 of the Revised Statutes of 1944 which provides that the Commissioner shall

> "cause an inspection to be made and to report to the school committee his findings and recommendations whenever the superintending school committee or the superintendent of schools of any town or any 3 citizens thereof shall petition him to make an inspection of the schools of said town; . ."

You state that three citizens of the Town of Kittery have petitioned the Commissioner of Education to inspect the schools of Kittery, giving special attention to Traip Academy. You further state that there exists a contract between the Town of Kittery and Traip Academy for the schooling of the secondary school students in that town; that the Town of Kittery receives State aid because of this contract, and that Traip Academy receives direct aid from the State. Traip Academy is under the control of a joint board consisting of the trustees of the academy and the school board members. You then inquire if the Commissioner is required to make the inspection as requested in the petition, in accordance with paragraph XII of Section 3.

In so far as the petition addressed to you requests an inspection to be made of the schools of the Town of Kittery, there is no question, of course, that under the provisions of paragraph XII you have authority to inspect all the public schools of the town. With respect to that part of the petition asking for an inspection of Traip Academy you have authority to make such an inspection: 1) in so far as the other provisions of Section 3 as amended impose upon you a duty as to private schools; 2) in our opinion you have the further authority to inspect the academy in so far as you have supervisory control wherein the academy's activities become quasi-public in their nature in that those activities are: a) operated under a contract; b) operated pursuant to a joint board; c) so far as public school funds of the town are concerned; and, d) so far as the operations involve qualifications for State subsidies. In other words, with respect to anything coming within the scope of the authority granted to you by the legislature to control activities of private schools you may inspect; and with respect to anything coming within the scope of legislative authority granted to you to supervise, control or veto arrangements made by a private school whereby it performs quasi-public functions you will have authority to inspect.

JOHN S. S. FESSENDEN
Deputy Attorney General

November 9, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Age Limits with respect to Tenure of Office

You have inquired whether it is legal for the Governor of the State to appoint persons to public office who are over the age of seventy years.

It is not possible for this office to give you a categorical answer to the question, for the reason that we are aware of no provision of the statutes or the Constitution placing an arbitrary limit on the holding of public office.

We should point out, however, that the statutes provide for the compulsory retirement of judges of our Supreme and Superior Courts before they attain the age of seventy-one years if such judges are to qualify for the retirement compensation provided for retired judges.

Also we should point out that the provisions of the State Retirement System provide direct limitations for employment at seventy years of age, employment thereafter to be only upon the express authority of the Governor and Council extending the employment under certain circumstances.

Another provision of law limits membership on the Board of Trustees of the University of Maine to such an extent that when a member reaches the age of seventy years, his tenure of office is automatically vacated. While this provision was originally enacted in 1865, it is interesting to note that when the law with respect to trustees of the University was amended in 1951, the age limitation was retained, indicating a present legislative intent to conform to what appears to have been a policy, at least with respect to the University of Maine, since 1865.

There may be other statutes not coming to mind at the moment; but whether or not there be other statutes, it is believed that the foregoing is sufficient to point out what appears to be a distinct trend in legislative policy to refrain from retaining in the public service persons who have arrived at the age of seventy years.

JOHN S. S. FESSENDEN
Deputy Attorney General

November 9, 1951

To William O. Bailey, Deputy Commissioner of Education
Re: Condemnation of Land for School Purposes

We are sorry that we have delayed so long in answering your oral request of recent date to help you relative to Frank M. Coffin's request with respect to appraising the damages when the city condemns land for school purposes.

Section 10 of Chapter 37, R. S., states that with respect to such a proceeding the damages shall be appraised as if provided for laying out town ways.

Referring to the sections of the statutes pertinent to town ways, we find that Sections 29 et seq. of Chapter 84 seem to provide quite adequately for such a procedure. Section 29 of that chapter states that written notice shall

be given when the city has such an intention, in answer to one of Mr. Coffin's question.

Relative to the appraisal of damages, we feel that he should use customary procedures relative to property to be condemned, and in the event that there are aggrieved parties, Section 33 of Chapter 84 affords relief.

JAMES G. FROST
Assistant Attorney General

November 20, 1951

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Featherfish and Spinning with Rod and Reel

This office has given consideration to your recent request for rulings concerning the so-called "featherfish" and "spinning with rod and reel".

On page 26, Section 44 of your Inland Fish and Game Laws, is found the legislature's ruling upon what may lawfully be used and what is restricted from use as concerns these two items. The statute provides that it is lawful to fish with the use of a single-baited hook and line, artificial flies, artificial minnows, artificial insects, spinhooks and spinners. By legal interpretation the word "artificial" is defined as being in opposition to the word "natural"; in one sense as being artful, subtle, crafty and ingenious. An exact imitation is not necessary to being an article within the meaning of the word "artificial". An imitation close enough to render an article suitable for use in like manner is sufficient. The statute does not define "fly" or "insect" or provide for definition by rule. While the definition on page 5 of your department's so-called "handbook" is proper, it is not exclusive, and an artificial fly or insect such as the sample supplied and called "flyrod size featherfish" is, in the opinion of this office, permissible under the statute for fly-fishing. We believe it is properly termed an artificial fly.

As to the spinning rod and reel, we believe that this instrument is lawful to be used if not left unattended. If left unattended it would be under the prohibition of a set line.

NEAL A. DONAHUE
Assistant Attorney General

November 20, 1951

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Court Cases before Judge Hugh Hastings

With your memorandum relative to the above subject you submitted a copy of a memorandum which you had received from the Governor, together with a copy of a letter which you wrote to the Governor dated October 3, 1951.

In your memorandum you ask for an opinion from this office relative to the law mentioned in the third paragraph of your letter to the Governor, which paragraph reads as follows:

"I have telephoned Judge Hastings and he said that the present law is so vague that he felt it was all right for them to shoot a deer, since there had been crop damage in the field ¼ of a mile distant from the place where the deer was shot. From our point of view, that is completely ridiculous, but that is what the Judge ruled. He also advised me that it does not give permission in the law for a person to hunt deer which have been doing damage, with a light, and no place in the law says definitely that lights cannot be used, and he admitted that he should have held them on that count, but 'did not think of it at the time.'"

The powers of the government are divided between the Executive, Judicial and Legislative. In their proper spheres, each of these basic departments of government is designed to operate so that no one of them encroaches upon the spheres of the others. The legislature has enacted a statutory program for the regulation of hunting and conservation of inland fish and game. The legislature has also created the courts of the State to constitute the judicial tribunals before whom alleged violations of the laws enacted by the legislature shall be tried and guilt or innocence determined.

With respect to your memorandum and the attached correspondence, there appears to be no question raised as to the jurisdiction of Judge Hastings to hear the cases which were brought before him, so that it would appear that his court was the proper place to have the question determined. In cases of this kind the State has no appeal, so that determination of the judge who hears the case is final except in so far as he commits errors of law from which respondents are entitled to appeal.

The Attorney General's office is a part of the Executive branch of government and has no authority whatsoever to act as an appeal agency from any court's decision, and it should go without saying that it has no authority to issue any opinion of any validity in criticism of any action taken by the judicial branch of the government or the legislative branch of the government. It would be decidedly improper for this office to express any opinion as to the decision reached by Judge Hastings in the cases referred to.

JOHN S. S. FESSENDEN
Deputy Attorney General

November 26, 1951

To Ronald W. Green, Chief Warden, Sea and Shore Fisheries
Re: Conservation of Scallops in Penobscot Bay

We have your memo of November 13, 1951, and attached paper petitioning the Commissioner of Sea and Shore Fisheries to declare that an emergency exists in the coastal waters of Penobscot Bay, and to hold a hearing relative to the matter.

The alleged emergency is said to have been created

> "by reason of the operation of certain large scallop draggers in such coastal waters operating 24 hours each day and with two ten (10) foot drags in such a manner that the fishing grounds for scallops are being rapidly destroyed and that by reason thereof the conservation of these

species appears to be endangered; that such large boats fishing in such manner constitute a peril to small boats fishing in such waters; . ."

The petitioners further allege that they

"believe that the fishing of such species in such waters in order to properly effect conservation should be limited to boats equipped with one six (6) foot drag or two (2) three (3) foot drags and with the time for such fishing limited to the period between daylight and darkness."

You then ask three questions:

"(1) May the Commissioner hold a hearing on this petition?

(2) If a hearing is permissible and the results seem to be in favor of the petitioners, will the Commissioner have the authority to limit the size drags to be used?

(3) Will the Commissioner have the authority to limit the time of fishing to daylight time only?"

The answer to Question 1 is, "Yes." Paragraph 6, Section 5, Chapter 34, R. S. 1944, as amended, provides that the Commissioner may declare an emergency and order a hearing held at a time and place to be designated by him "when for any reason the conservation of species appears to be endangered."

With respect to Question 2, grave consideration should be given to the possibility that the answer, "Yes," might be a discriminatory answer against those who have expended considerable money on larger boats and consequently hire larger crews. Ultimately, a larger boat with a larger crew, using ten-foot drags, may benefit no more than a smaller boat with fewer crew members using a six-foot drag. The question is potentially a dangerous one and, though the answer may be legally, "Yes," it might result in needless injury, whereas the problem of depletion of scallops may be rectified by the answer to Question 3.

The answer to Question 3 is, "Yes." Paragraph 6, Section 5, Chapter 34, R. S. 1944, as amended, provides that the Commissioner may promulgate regulations providing for the *TIMES,* number, weight, and manner in which such fish . . . may be taken from such waters or flats. This provision would give to the Commissioner the right to make rules and regulations limiting the time of scallop-fishing to daylight hours.

You will note that this provision also gives to the Commissioner the right to regulate the number and weight of such fish. A proper regulation relative to number and weight of the fish should also furnish the means of conserving such fish.

JAMES G. FROST
Assistant Attorney General

November 27, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: County Extension Associations

We have your memos of recent date relative to County Extension Associa-

tions, more particularly to that with which Mr. Richard C. Dolloff is connected.

You state in your memo that Mr. Richard Dolloff has received an opinion from this office to the effect that such county associations are eligible for benefits under Chapter 395 of the Public Laws of 1951.

I do not recall having given an opinion to this effect. I do remember Mr. Dolloff's visit to the office and our discussion concerning his constitution and by-laws; and if I recall correctly, I told Mr. Dolloff to submit his applications to your office.

In our opinion County Extension Associations are not eligible to participate in the benefits extended by the Social Security Act by virtue of the contract between the State of Maine and the Federal Government as authorized by Chapter 395 of the Public Laws of 1951.

This chapter was enacted in order to extend to employees of the political subdivisions of the State of Maine the benefits of Social Security. The employee need be an employee of a political subdivision, and this term has been defined to include an instrumentality of the State of Maine, of one or more of its political subdivisions . . . or an instrumentality of the State or one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the State or subdivision, and only if its employees are not by virtue of their relation to such juristic entity employees of the State or subdivision.

County Extension Associations are neither political subdivisions nor instrumentalities of the State. They appear to be well-meaning associations wishing to extend education to rural areas of the State, and this they have been permitted to do upon having their constitutions and by-laws approved by the University of Maine, College of Agriculture. They have also been recognized as the official body for this purpose by the legislature, but they have not in any way been designated as an instrumentality of the State or a body politic and corporate. We therefore feel that until such time as the legislature declares them to be instrumentalities of the State, their members are not eligible for the benefits extended by Chapter 395 of the Public Laws of 1951.

JAMES G. FROST
Assistant Attorney General

November 27, 1951

To Doris M. St. Pierre, Secretary, Real Estate Commission
Re: Lectures

We have your memo of November 9, 1951, in which you inquire whether or not the Maine Real Estate Commission may set up a series of lectures and make it mandatory for applicants for real estate licenses to attend a series of these lectures.

Please be informed that it is our opinion that you may not require applicants to attend such a course. The requirements and qualifications necessary in an applicant to apply for a real estate license are set out by statute and

such provisions do not permit the further mandatory requirement to attend lectures given by your Commission.

JAMES G. FROST
Assistant Attorney General

November 27, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Hospital Employees

We have your memo of November 15, 1951, relative to the hospital in the town of Caribou, in which memo you ask if the employees of the hospital are eligible for coverage under the provisions of the Social Security Act.

From the facts contained in your memo we are of the opinion that such employees are not eligible for coverage under the Social Security Law. The hospital is undoubtedly a charitable organization, and the fact that the hospital is subsidized or given financial aid by the town does not make that hospital an instrumentality of the State or a political subdivision of the State. The hospital does not carry on a municipal activity as such, and therefore its employees are not eligible for Social Security.

JAMES G. FROST
Assistant Attorney General

November 27, 1951

To Marion E. Martin, Commissioner of Labor and Industry
Re: Interrogatories *re* Accidents and Injuries.

This office has your memo of November 5, 1951, relative to Sections 3 and 9 of Chapter 25, Revised Statutes, 1944.

Section 3 gives to the Commissioner of the Department of Labor and Industry permission to make certain interrogatories of industries for the purpose of gathering facts and statistics relative to injuries and accidents. This work is done cooperatively by the State and the Federal Government, as you state, to eliminate filing of identical reports with different governmental agencies.

Section 9 provides that whoever refuses to answer any question propounded to him concerning the subject of such examinations, as provided in Section 3, or refuses to answer the printed list of interrogatories shall be punished by a fine of not less than $25, etc. You ask if you may invoke through proper court action the penalties as set forth in Section 9 in those cases were employers fail or refuse to file the requested report.

We are of the opinion that you may properly invoke Section 9 and the remedy contained therein in cases where employers are not cooperating with your department with respect to the requirements of Section 9.

JAMES G. FROST
Assistant Attorney General

November 29, 1951

To Honorable Frederick G. Payne
Re: Running Horse Race Commission

Chapter 289 of the Public Laws of 1949 created the Running Horse Race Commission, consisting of three members appointed by the Governor with the advice and consent of the Council. Section 1 of that chapter provides that one member shall be appointed by the Governor as chairman and one as secretary.

This office has been requested to advise whether a system may be inaugurated whereby the chairmanship will vest in different members of the Commission. In other words, may the Governor appoint another member of the Commission to be chairman?

It is a general rule that when the removal of a public officer is not governed by constitutional or statutory provisions, the power of removal is incident to the power to appoint. Analagously, we are of the opinion that, as the term of the chairmanship of the Running Horse Race Commission is not fixed by law, constitutional or statutory, it is within the power of the appointing power to determine what the term of tenure of that chairmanship shall be. He may therefore by reason of setting up a system whereby the chairmanship shall vest in different members at different times or for other good reason appoint another member of the Commission to be chairman.

JAMES G. FROST
Assistant Attorney General

November 29, 1951

To Harland A. Ladd, Commissioner of Education
Re: Teacher Contract Law

We have your memo of November 13, 1951, relative to Chapter 203 of the Public Laws of 1951, amending Chapter 37, Section 78, subsection V of the Revised Statutes of 1944, in which memo you ask the following questions:

"(1) May each community determine the dates of its school year as related to teacher contracts?"

The answer to this question is, Yes. The matter of contracts between teachers and superintending school committees for employment is a local question, and the communities involved may determine the dates at which the contracts will begin and terminate.

"(2) The law provides for an automatic extension of a term contract '. . unless a duly certified teacher receives written notice to the contrary at least 6 months before the terminal date of the contract.'

"Should this notification be a decree of separation, or may it be properly an advisement nullifying the automatic extension provision of the law pending a later and final decision of the committee on the employment status of the teacher? If the latter situation prevails, am I correct in concluding that a new term contract must be issued?"

Chapter 203 states that after a probationary period subsequent contracts of duly certified teachers shall be for not less than two years, and furthermore that unless a duly certified teacher receives written notice to the contrary at least six months before the terminal date of the contract the contract shall be extended automatically for one year and similarly in subsequent years, with a further condition not pertinent here with respect to a longer extension of time.

It is our opinion that this six-month notification of termination of the contract amounts to a decree of separation and an advisement nullifying the automatic extension provision of the law. The service of a teacher having been dispensed with through this provision does not preclude the rehiring of the teacher at a subsequent date. Thought should be given here to the fact that subsequent rehiring of the teacher would mean that she would receive a two-year contract and that not giving the six-month notice would mean merely that her contract would continue for another year. The choice here is an administrative problem.

"(3) Can teaching service rendered to a community under a sub-standard license be recognized in fulfilling the probationary requirement, should the teacher become duly certified at a later time?"

It is our opinion, strictly, that if one is not presently properly qualified to hold a position, that person cannot be considered to be fulfilling a probationary period on that job. In other words, he cannot be considered to be serving a probationary period in a position to which he cannot ultimately secure permanent appointment under the same qualifications. However, it appears that the probationary period required by this law is a matter of local concern and is present in the law so that communities are given an opportunity to observe the abilities of the teacher concerned. As a result, if a teacher at a later date becomes duly certified, it might be unjust, if that teacher was to continue in the same position, to be held for a further probationary period if the town is perfectly satisfied that he is fully competent to fill the position.

"(3-A) To what extent may teaching service to a municipality be interrupted and still qualify as fulfilling the probationary requirement (i.e. could service be creditable if a duly certified teacher completed 1 year of service in 1930-31, separated for marriage, and returned to complete 2 years of service in 1949-51?)"

It is our opinion that where a probationary period is required as a prerequisite to becoming permanently employed in a position, interruption of that probationary period nullifies any benefits secured prior to the interruption. In other words, if a teacher completes one year of a probationary period, then separates to be married, and returns ten years later, she would then have a full three-year probationary period to serve.

We may add that if you consider the probationary period with a view to its purpose, namely to give the town an opportunity to observe the qualifications of the teacher, you might assume that the probationary period also is a local problem and an administrative one and that local authorities can determine whether or not leave of absence, or absence from teaching service, is of such a length as to vitiate the probationary period.

We have examined the suggested contracts attached to your memo and find that on the whole they are not inconsistent with the law. However, in Exhibit A and Exhibit B the thirty-day written notice and the notice on or before May 1st, respectively, may require some modification to distinguish them from the ninety-day notice requirement contained in Chapter 203.

JAMES G. FROST
Assistant Attorney General

December 3, 1951

To Irving W. Russell, Superintendent of Public Buildings
Re: Formal Contracts

In your memo of October 17th you inquire as to the necessity of obtaining formal contracts in cases where construction or repair of buildings involves a total cost of more than $3000.

The question as propounded is not one which can be explicitly answered without a better knowledge of just what facts gave rise to the question. To the necessity of there being a contract in instances where construction or repair of buildings involves a total cost of more than $3000, the answer is, "Yes." See opinion of the Attorney General dated September 28, 1909. What in fact constitutes a contract is another question.

Section 43, Chapter 14, R. S. 1944, spells out the requirements leading to a valid contract relative to the construction and repair of buildings at the expense of the State involving a total cost of more than $3000, stating that the contract shall be awarded by a system of competitive bids, and in subsequent sections the provisions to be followed with respect to such competitive bids are described.

An unconditional acceptance, by the proper authorities, of a bid submitted pursuant to a proposal or advertisement for bids for such a contract as you inquire about (for public work, etc.) upon the basis of plans, specifications, and terms of such proposal, and offering to do the work in accordance with the specifications, converts the offer into a binding contract. The need for an unconditional acceptance is necessary to meet the requirement of a valid contract that there be mutual consent. See *Howard v. Maine Industrial School for Girls*, 78 Maine 230. Under the above circumstances, there is a binding contract even though a formal bidder's contract has not been executed. Thus, a contractor, his bid having been unconditionally accepted, can enforce the contract, even though a "formal" contract has not been executed. Once these provisions have been complied with and the bidder's offer is accepted, unconditionally, a valid contract results.

If, however, the acceptance is conditional, depending upon whether the bidder must comply with a further requirement, such as a forfeiture bond, fulfilment of a performance bond, or other condition or restriction prescribed by the Governor and Council, then in such case there is not, at that point, a binding contract, until such condition is complied with.

Notwithstanding the legal aspects of the circumstances involving bids and specifications outlined above, we recommend that in all instances involving

repair or construction of buildings the total cost of which exceeds $3000, ultimately formal contracts be executed. We cannot overestimate the solemnity involved when parties undertaking an agreement affix their signatures to an instrument under seal, said instrument crystallizing all that the agreement previously set out, and for that reason we recommend that such formal contracts be made.

JAMES G. FROST
Assistant Attorney General

December 3, 1951

To Irving W. Russell, Superintendent of Public Buildings
Re: Advertising for Bids

Your letter of November 7, 1951, relative to advertising for bids has been received by this office.

Section 44 of Chapter 14, R. S. 1944, states:

> "The trustees, commissioners, or other persons in charge of such construction (involving a total cost of more than $3000) shall advertise for sealed proposals not less than 2 weeks in such papers as the governor and council may direct; . ."

Your question is: "Are we definitely tied down in advertising of newspapers or can we also advertise with the F. W. Dodge Corporation, commonly known as the Dodge Reports, whose services are subscribed to by the contractors throughout the industry?"

It is our opinion that you may extend your advertising to include advertising in the Dodge Reports, with the approval of the Governor and Council. While newspapers are the common medium for such advertising, in the face of the fact that advertising in the Dodge Reports will reach more contractors, we feel that, though you may not limit advertising to such Reports, you may include them, along with your newspaper advertising, as the medium which you will use.

JAMES G. FROST
Assistant Attorney General

December 4, 1951

To Commissioner of Finance and Treasurer of State
Re: Chapter 201, P&SL 1951

We have your memo of November 8, 1951, relative to Chapter 201 of the Private and Special Laws of 1951.

You quote that portion of Article IX, Section 14, Constitution of Maine, which states:

> "The credit of the State shall not be loaned in any case."

You then ask: "The Economic Advisory Committee asks the Attorney General if, after considering the above limitation, in his opinion, the state could legally issue the $27,000,000.00 in bonds authorized by the 95th Legis-

lature (Chapter 201, P.&S. 1951) and approved by referendum of the people on September 10, 1951 before these funds will be needed?"

You state that the reason for your question is to take advantage of favorable interest rates in selling bonds, then to invest the proceeds in other securities until such time as the funds are needed.

Please be advised that it is the opinion of this office that the issuance of bonds an unreasonable length of time before the maturity of indebtedness for the avowed reason you state, to establish an investment fund for gain and profit, will create a new debt or liability on behalf of the State and for that reason would be in violation of Section 14, Article IX, of the Constitution.

To the same effect, see Opinion of the Justices, 139 Maine 416 at 419.

JAMES G. FROST
Assistant Attorney General

December 14, 1951

To Harold J. Rubin, Esquire, County Attorney, Sagadahoc
Re: Salaries of Trial Justices

. . . We have looked into this matter and can find no constitutional or statutory provision prohibiting the diminution in salary of a Trial Justice during his term of office.

Chapter 262, P. L. 1947, gives the power to the County Commissioners to set the salaries of Trial Justices and provides that they shall be paid monthly. That chapter does not restrict their power over salaries in any way.

30 Am. Jur. 28 states: "In the absence of constitutional prohibitions, the legislature may increase or diminish the salary of a judge during his term of office, and its discretion in this respect cannot be inquired into by the courts. However, it has been held that constitutional authority to change the amounts of salaries does not empower the legislature to work a practical abolition of the court by the diminution of the salaries to nominal amounts."

Perhaps the last sentence above is applicable to the situation at hand, but as there is no intimation in your letter to the effect that the County Commissioners are trying to abolish that office, we express no opinion on that point.

It is further stated in 43 Am. Jur. 348 that where the power to fix compensation of public officers has been delegated to a subordinate political division of the state, such as a county board, the compensation of such officers may, in the absence of any constitutional or statutory prohibition, be changed during their term of office.

In conclusion, we will say that the County Commissioners have the right to diminish the salary of a Trial Justice during his term, provided they are not trying to abolish that office by the diminution.

ROGER A. PUTNAM
Assistant Attorney General

December 14, 1951

To Frank S. Carpenter, Treasurer of State
Re: Escheat of Unclaimed Dividends of Closed Banks

. . . Section 69 of Chapter 55, R. S. 1944, provides that when the receivership of a savings bank is ended, the Court may order the receiver to pay into the State treasury such funds as represent liquidating dividends that remain unpaid or unclaimed.

You ask: "Does the court lose control of them (the funds) after 20 years and are they escheated to the state without any direction from the court or should we receive from the court an order instructing us to close the trust and escheat the funds to the state?"

We direct your attention to Section 71 of Chapter 55, R. S. 1944, which section provides that all claims not presented to the commissioners within the time fixed by the court or litigated as aforesaid (as provided under Section 69) are forever barred.

It is our opinion that in view of Section 71 such money would automatically escheat to the State after 20 years, for which period the funds are held in trust for possible claimants. In other words, Section 71 provides that the escheat is a self-executing thing, and the money automatically escheats to the State after 20 years without court action.

JAMES G. FROST
Assistant Attorney General

December 14, 1951

To John H. Maasen, Jr., Biologist, Inland Fisheries and Game
Re: Land Purchases

We have your memo of December 3, 1951, in which you ask if it is possible for the State to purchase land from a municipality and refund to the town a percentage of the net profit derived from the products of the land after the State has purchased it, as is done by the Federal Government under a provision seen in 16 U.S.C., Section 500.

It is our opinion that before the State can purchase land and turn back to the municipal vendor a percentage of the profits derived by the State such recovery back must first be authorized by legislative enactment. Consequently we do not feel that such a matter can properly be requested of the Governor and Council, but feel that is strictly a matter for the legislature.

Primarily, when anyone, individual, corporation or State, purchases land, entire title to that land vests in the purchaser, and other than the contracted purchase price no compensation can be demanded by the vendor. Therefore it would take legislative action to change this fundamental principle of law.

JAMES G. FROST
Assistant Attorney General

December 14, 1951

Ermo H. Scott, Deputy Commissioner of Education

Re: Probationary Periods; Contract Forms and Notice of Termination

We have your memo of November 30, 1951, in which you request that our opinion of recent date with respect to probationary periods of teachers be expanded. You ask:

"To what extent, if any, may teaching service accumulated in one municipality be transferred to a second municipality by which the teacher is employed in fulfilling the probationary period of service in the second municipality, as defined by the Act?"

In answer to this question, with our understanding of the purpose of the probationary period – to permit the employer to observe a particular teacher during the period to determine whether or not her services will be satisfactory– we feel that a part of a probationary period served in one municipality will not serve as part of the probationary period required by another municipality. The requirements of one municipality may not be at all similar to the requirements of another municipality with respect to the ability of a teacher. For instance, a teacher, serving in Eastport, before the fulfilment of her probationary period removes to Portland. It is difficult to assume that her superintendent of schools in Portland will be satisfied that the requirements of such a small place are the same as those of his city. For that reason we do not believe that portions of probationary periods served in different towns can be added to fill the probationary period of the last town by which the teacher is employed.

Your second question is: "What adaptations and changes would you suggest making on the two forms of contracts as submitted with Commissioner Ladd's memorandum, in order that the State Department of Education may prepare a suggested basic form for the use of local school boards in contracting the services of teachers that will be more in keeping with the provisions of the statutory changes as represented by Chapter 203, Public Laws 1951?"

This office has no suggestions or recommendations to make with respect to the suggested form of contract other than with respect to termination of services as contained in Exhibit B. We must assume that that provision of Chapter 203, P. L. 1951, which provides that the contract of a duly certified teacher will be automatically extended for a year unless she receives notice to the contrary six months before the terminal date of her contract, has some effect. Therefore it is difficult to believe that a teacher's contract can be terminated within the six-month period without good cause; that is, with mutual consent, by a mere 30-day or six-weeks notice. For that reason we believe that, legally, giving notice on May 1st preceding the close of the school year, which is in effect approximately six weeks' notice, is without much effect in the face of the six-month provision in Chapter 203. Perhaps a provision that the contract will be terminated under statutory provisions or sooner with mutual consent would be more appropriate.

This discussion of contracts is pertinent to contracts given to duly certified teachers and not to teachers serving under probationary contracts.

JAMES G. FROST
Assistant Attorney General

December 14, 1951

To Fred L. Kenney, Director of Finance, Department of Education

Re: Payments to Superintendents as provided in Section 71, Chapter 37.

. . . Section 71 provides that the Commissioner of Education may pay to superintendents of towns comprising a school union, under certain conditions, a sum not to exceed $350 annually. You state:

"It has been customary for the Commissioner of Education to budget not in excess of 1/5 of the annual appropriation for Superintendents of Towns Comprising School Unions (Appropriation No. 4855) for the equalization of travel within a school union and for assistance in defraying the cost of earning additional professional credits, through the rule of allowing $50 for six hours earned within the State and $100 for six hours earned outside the State, to the point of not exceeding $350 annually per superintendent *per year.*

"We have learned in recent months that some superintendents either were never properly informed or had forgotten their rights under these provisions, with the result that we are currently faced with making the payments to clean up professional credits which were earned in previous fiscal years but which had never been presented for payment until now."

You then ask: "Do you consider it would be proper to make these retroactive payments and bring the status to a current basis even though the amount so paid exceeds $350, so long as the amount involved for travel plus *credits earned during the current fiscal year,* combined, do not exceed $350?"

That section of the law under consideration reads:

> ". . . the amount so paid for the benefit of a single union shall not exceed $350 annually and shall be in addition to other payments made to said superintendent as provided in this section, and provided further, that the amount so available for the equalization of such expenses shall not exceed 1/5 of the appropriation for superintendents of towns having school unions."

By this section we understand that the Commissioner may pay up to $350 annually for expenses incurred by superintendents in pursuing their educational requirements. In the event that, through inadvertence on the part of superintendents in demanding their rights or through their not having been informed of such rights, they have not been reimbursed for expenses incurred by them, it is our opinion that it would be proper to make retroactive payments to bring the status of such superintendents to a current basis.

It is our opinion that such payments may not exceed $350 for any one year, but that such payments may be made for several years in the event a superintendent has not been paid for such time, even though the total amount exceeds $350 over a period of years.

JAMES G. FROST
Assistant Attorney General

December 14, 1951

To Honorable Harold I. Goss, Secretary of State

Re: Burden of proof or proceeding with proof on hearing *re* revocation of operator's license.

Reference: Memo of Paul MacDonald, Deputy Secretary of State, dated November 29, 1951.

Mr. MacDonald's memorandum of November 29, 1951, sets forth at length the procedure which is followed by the office of the Secretary of State when that office is confronted with determining the eligibility of a licensee to retain his operator's license under circumstances within the sound discretion of the Secretary or his Deputy.

The question in answer to which an opinion is sought does not involve any of the circumstances under which a revocation of an operator's license is mandatory. As we understand the problem, it involves circumstances warranting suspension or revocation "for any cause which" the Secretary of State "deems sufficient," which for all practical purposes means, "whenever he has reason to believe that the holder thereof (of an operator's license) is an improper person or incompetent to operate a motor vehicle, or is operating so as to endanger the public." (Quotations are parts of section 6 of Chapter 19, R. S. 1944, as amended through 1951).

The specific question is: When the Secretary has information tending to show that an operator's license should be suspended or revoked for cause within the Secretary's authority, must the Secretary proceed to present information of evidentiary character against the licensee and the licensee then be afforded an opportunity to defend or justify himself, so to speak, or may the Secretary inform the licensee as to the matters indicating cause for suspension or revocation and require the licensee to first present information of evidentiary character showing cause why his license should not be suspended or revoked.

The usual judicial procedure requires one who makes a charge to sustain it by the burden of proof. That such should be the case here is suggested by the fact that the legislature has prescribed in section 6 for hearing before final suspension or revocation for cause. A hearing is of course judicial in nature and contemplates opportunity for confrontation and cross examination of witnesses.

But beside providing for a hearing, the legislature has enacted many more provisions of law relative to operators' licenses. The statutes provide for qualifications before an operator's license may be issued in the first instance. These conditions of eligibility, among others, contemplate physical qualifications as well as demonstrated ability to operate a motor vehicle.

Recognizing the administrative complexities involved in licensing approximately one-third of the population to operate motor vehicles, the legislature has delegated broad powers to the Secretary in an attempt to control the operation of motor vehicles upon the ways of the State by persons qualified to operate the same.

When one seeks an operator's license in the first instance he has the burden of showing affirmatively his qualifications entitling him to be licensed. There would appear to be nothing unreasonable in requiring a licensee at some later

date to again show affirmatively his qualifications to remain a licensee. If such requirements are in any respect unreasonable or burdensome to the people for whose welfare motor vehicle regulatory laws are enacted by the legislature under the police power, the remedy would clearly be through amendatory legislation.

Section 5 of the motor vehicle laws pertains to the public nature of the records of the Secretary and refers specifically to operators' licenses. The last sentence of the section reads;

"Complaints in writing may be regarded as confidential."

Following section 6 authorizing the Secretary after hearing to suspend or revoke an operator's license for any cause deemed sufficient by the Secretary, the legislature has prescribed in section 9 for notice of the hearing, for service of notice, and has stated that the licensee shall be warned "that he may then and there appear, in person or through counsel, *to show cause why his license should not be suspended or revoked* . . . " Assuming a proper notice in which the licensee receives adequate warning as to the respects in which his qualifications to retain an operator's license are challenged, there would appear to be no undue burden upon him to appear and establish affirmatively in order to retain his license no more than he may be required to do when applying for his license in the first instance.

It is significant that the law does not place upon the Secretary the burden of showing why the license should be revoked. Quite the contrary, the burden is placed upon the licensee to show cause why it should not be revoked.

While the widespread and nearly universal holding of operators' licenses and the ease with which the same are procured may tend to a popular belief that they have become a vested property or personal right in the legal sense, the fact remains that the right to an operator's license is still a privilege accorded under the police powers.

Although to one who has held an operator's license for many years it may seem highly arbitrary that he suddenly be called upon to justify his right to retain his license, there are a number of reasons in justification of the legislature's providing for such procedure.

As stated above, the fact that the right to operate a motor vehicle is a privilege is legalistically a sufficient reason. Of more practical consideration it should be recognized that any Secretary who arbitrarily ordered large numbers of citizens willynilly to come in and show cause would not long survive in office; and it should be remembered that in each case each aggrieved person has the right of appeal to the Superior Court. Again, with the large number of operators' licenses outstanding, with limited appropriations and with limited personnel, widespread hearings to show cause become practically an administrative impossibility.

It is believed that the foregoing advisory opinion sufficiently sets forth the views of this office with respect to the principal question propounded. In considering the matter, we carefully studied a copy of the order of notice used in the case giving rise to the question and we also considered a brief submitted by counsel for a licensee summoned to show cause under the provisions of section 9 of the motor vehicle laws.

We should like to add the following: In our opinion the copy of notice

supplied to us does not comply with the statute in that it warns the licensee of nothing except the time and place of hearing. We believe that in order to constitute an adequate warning within the meaning of the statute, the notice should set forth with sufficient particularity all that is necessary to apprise the licensee as to that which he must be prepared to establish in order to retain his license.

Also, while not strictly a matter of law, being more a matter of administration, we would seriously recommend that in all cases where the statutory procedure is predicated upon a confidential complaint, it would be well to make independent inquiry as to the sincerity of the complaint and in so far as administratively possible to secure information not of a confidential nature.

JOHN S. S. FESSENDEN
Deputy Attorney General

December 18, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Licensing of State Agencies under Milk Control Law

Reference: Milk Commission memo to you, dated October 19, 1951. .

The Commission's memo of October 19, 1951, refers to a memo which you presumably addressed to the Commission, inquiring as to the possibility of licensing the Department of Institutional Service as a "Dealer" under the provisions of the Maine Milk Commission Law.

We assume that your memo was prompted by the fact that the Commission has licensed the University of Maine as a dealer. That institution having been licensed, it is reasonable to inquire as to the status of institutions within the jurisdiction of the Department of Institutional Service.

So far as the Attorney General's office is concerned, to my knowledge, there is nothing in writing as to the licensing of the University of Maine. We recall that in the spring of 1951 Mr. Fessenden, Deputy Attorney General, was asked by Mr. Chenevert as to whether the Commission could issue a dealer's license to the University. It was pointed out that the University produced milk in the agricultural department, but that the production was insufficient to meet demands. Therefore a considerable amount of milk had to be purchased for the cafeterias and the campus store. It was also pointed out that the milk used in the University outlets was on a sale basis in that the students bought their meals and bought at the campus store whatever they consumed.

As we remember it, it was stated to Mr. Chenevert that this office was not interested in the problem of licensing the University because as a pure proposition of law we had advised them in 1949 that the State itself, meaning the governmental instrumentalities thereof, were not subject to control under the terms of the Milk Commission Law. It is a fundamental principle of law that the State itself is not bound by regulatory legislation unless specifically included in the terms of the legislation.

The Milk Commission Law defines a dealer as a person. . . A person in the same law is defined:

" 'Person' means any person, firm, corporation, association or other unit." The State is not mentioned. For a clear illustration of the principle involved, see the definition of 'employer' in Chapter 26, R. S. 1944 section 2, subsection I:

" 'Employer' shall include corporations, partnerships, natural persons, *the state*, counties, etc."

In view of this pronounced opinion as to the law which, when given, created considerable furor in the industry, it was stated to Mr. Chenevert that this office did not believe the University needed any license to buy milk at the best price it could get. We believe that the issuance of a license to the University altered in no way its legal status, as it had a legal right to buy competitively anyway. In other words, the whole transaction amounts to doing under the color of a license that which can be done anyway.

We are not familiar with the operations of the various institutions and therefore wonder if there may not be a difference between them and the University of Maine as to milk consumption, in that at the University it is actually dispensed through the cafeterias and the campus store, which may not be the case in the institutions.

We should like to suggest as a matter for practical consideration that the licensing of the Department of Institutional Service might create as much furor in the industry as did our orginal opinion referred to above.

So far as any question of law is concerned, we still hold that the institutions don't need licenses to buy competitively. If they do purchase or receive milk for sale, and the Commission chooses to issue a license, it would be of no concern to the Attorney General's office, since such license neither adds to or alters the legal status of the institution.

JAMES G. FROST
Assistant Attorney General

December 18, 1951

To Honorable Frederick G. Payne, Governor of Maine
Re: Indian Reservations

In response to your memo of November 20, 1951, an attached letter from Mr. Edward E. Chase, directed to Mr. Fessenden, relative to the status of Indian lands, the following information is supplied, attention being primarily directed to the possibility of an Indian's owning land on a reservation, no opinion being expressed relative to the sale or lease of appurtenances to the land.

Under the Treaty of 1794 between the Commonwealth of Massachusetts and the Passamaquoddy Indians and connected tribes, certain lands, including Pleasant Point, were assigned to the Indians and confirmed to the said Indians and their heirs forever.

Thus it would seem that the fee simple title to that land is today in the Indians. However, the State, from time to time, has taken control of these lands to the extent that their alienation has been restricted.

While it appears that with respect to the land of the Penobscots the attributes of ownership are more clearly present in those Indians who possess certificate of title provided for by Chapter 137 of the Public Laws of 1883, nevertheless transfer of such land is limited to conveyances between members of the same tribe and subject to the approval of the Indian Agent. In other instances, where land is assigned to an Indian by an Agent under the provisions of Section 343, Chapter 22, R. S. 1944, such land is the property of the person to whom it is assigned during the pleasure of the legislature.

Again, with respect to the land of Passamaquoddy Indians, it is altogether possible that one family has been in possession of a particular tract of land for such a long period of time that he might feel he has complete legal title. For instance, under Chapter 73 of the Resolves of 1883, any male Indian upon reaching the age of 21 years, who desired to take up any one of the lots purchased by the State under Chapter 73, could do so and he would have received a certificate of permanent occupancy and possession. However, he was required to perform certain acts during his occupancy, or the right to the lot would be forfeited.

Similarly, under Chapter 186, Resolves of 1849, an Indian might have received a conveyance from the Governor, conditioned that it would be his so long as he or his lawful heirs should reside thereon and improve the same.

The whole question of the status of tribal lands is therefore somewhat anomalous. Though the land would appear to be vested in the Indian, legislation has so encompassed his ability to transfer such land, that ultimately the conclusion must be that the land on a reservation is state land, but held for the use of the Indians, at least so long as they remain a tribe, on that reservation.

In answer, then, to Mr. Chase's question relative to ownership of land, it must be said that the land on which an Indian resides is not "owned" by that Indian. Certain of the Penobscots may have such interest in the land on which they reside, by virtue of certificates, that they may convey it to members of the same tribe, with the approval of the Indian Agent.

The leasing of such land is controlled by Chapter 133, Resolves of 1867, amended by Chapter 6, Resolves of 1878, and Section 341, Chapter 22, R. S. 1944.

Indians of the Passamaquoddy Tribe and certain Indians of the Penobscot Tribe not having the above mentioned certificates, may have been assigned and resided on a particular parcel of land for a long period of time, but their tenure would seem to be subject to conditions outlined by the legislature, i.e., keeping the land improved, continuous holding of that land, or at the pleasure of the legislature.

With respect to Mr. Chase's question relative to an original agreement with the Catholic Church or with the Sisters regarding the rights of the church and the school, we have been advised by the Department of Education and the Department of Health and Welfare that there is no contract of such a nature.

Therefore, expenditures for school purposes should be made in compliance with Section 337, Chapter 22, R. S. 1944, under the supervision of the tribe

and subject to the approval of the Department of Health and Welfare.

JAMES G. FROST
Assistant Attorney General

December 21, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Employment of Persons who have attained age 70.

We have your memo of November 1, 1951, in which you make inquiry as to the present policy of the State relative to the employment of persons 70 years of age or older. You state that from time to time it has been the policy of this State to permit the employment of such persons if it was found necessary or desirable because of existing emergencies.

Section 6-A of Chapter 384, P. L. 1947, provides that any member of the Retirement Service who attains the age of 70 shall be retired forthwith, with the possibility that employment may be extended for the further term of one year at the request of the Governor with the approval of the Council.

Compulsory retirement at age 70 with a possible one-year extension at the request of the Governor with the approval of the Council would seem to negative the employing of persons aged 70 years or more. Therefore presently the policy is not to employ persons 70 years of age or older, according to the opinion of John S. S. Fessenden, Deputy Attorney General to Governor Payne, dated November 9, 1951, relative to the appointment of a person over 70 years of age to public office, the pertinent portion of which we here quote:—

"Also we should point out that the provisions of the State Retirement System provide direct limitations for employment at 70 years of age, employment thereafter to be only upon the express authority of the Governor and Council, extending the employment under certain circumstances. . .

"The foregoing is sufficient to point out what appears to be a distinct trend in legislative policy to refrain from retaining in the public service persons who have arrived at the age of 70 years."

It is therefore our opinion that presently there exists no such emergency as would permit of the general policy of employing persons 70 years of age or over.

JAMES G. FROST
Assistant Attorney General

December 27, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Probation Clerk, Cumberland County

In answer to your memo of October 16, 1951, in which you ask if the probation clerk of Cumberland County, appointed by the Judge of the Portland Municipal Court, is actually an appointed official, so that membership in the Retirement System for such clerk is optional, we should like to express

our opinion that such probation clerk is an appointed official and comes within that provision of the law, Section 3, subsection I, of Chapter 384 of the Public Laws of 1947, which states that membership is optional in the case of any class of elected officials or any class of officials appointed for fixed terms.

JAMES G. FROST
Assistant Attorney General

December 28, 1951

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Participating Districts (City of Rockland).

In your memo of December 14, 1951, you state that the City of Rockland became a participating local district under the State Employees' Retirement System by virtue of a Resolve passed by the City Council of that city on January 13, 1947, which Resolve approved "the participation of all employees of said City of Rockland (except school teachers) in the State Employees' Retirement System. . ."

Under date of November 14, 1951, the City Council of the City of Rockland amended the original Resolve by inserting the word "classified" before the word "employees".

It is stated that the intention of this amendment was to permit certain employees of the city, who under their civil service law are set up as unclassified employees, to avail themselves of Social Security coverage as opposed to the State Retirement System.

You present the question whether a local participating district has any right under the law to amend its original action with respect to taking the benefits of the Maine State Retirement System. In other words, Can a city, once having elected to permit all its employees to participate in the Maine State Retirement System, subsequently amend its laws to exclude certain employees from participating who had hitherto been eligible by virtue of the City's original action in authorizing their participation?

It is our opinion that once having elected to participate in the State Retirement System, a City may not by subsequent amendment of its laws eliminate from participating in the System employees who had hitherto been covered.

More and more it is being realized that retirement systems are set up because of the need of the State to care for its aged citizens. For this reason the laws are liberally construed in favor of coverage and are otherwise strictly interpreted. To this effect see 60 Arizona 232, where a city, once having elected to participate in a State plan, could not subsequently revert to a city plan. Analogously, therefore, our opinion is that a city, once having elected to participate completely under the Maine State Retirement System, cannot subsequently by City Council action subdivide those employees to participate in other pension plans. This is not to be construed as preventing a city, where complete coverage is not in effect, from time to time enlarging its coverage to include employees not covered by existing pension plans.

JAMES G. FROST
Assistant Attorney General

January 2, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Stonington Water Company

We have your memo of recent date in which you ask if the Stonington Water Company can be considered a department of the town and its employees therefore covered under a contract between the town and your Retirement System, or is a political subdivision and therefore its employees covered under a contract between the water company and the Retirement System.

Chapter 240 of the Private and Special Laws of 1907 is the Act incorporating the Stonington Water Company. By that Act four individuals, their associates, successors, and assigns were thereby made a corporation to supply water to the town of Stonington. The capital stock of the said company was set at $50,000., said stock to be divided into shares of $25. each.

At this point we can see that, without more, the Stonington Water Company would be a private corporation incorporated by a Special Act of the Legislature, and not a political subdivision of the State of Maine.

However, Chapter 271, P&SL 1909, amended Chapter 240, P&SL 1907, adding two new sections which authorize the Town of Stonington to raise money to purchase and own stock of the Stonington Water Company to an amount not exceeding $10,000. at the market value of said stock at the time when said purchase may be made. Section 16 further provides that the municipal officers of Stonington shall appoint a person to vote the stock so purchased. Thus it is evident that, under our laws, the Town of Stonington owns not more than 1/5 of the stock of the Stonington Water Company. This statement is made with the thought that the price paid for stock purchased by the town is a reflection of the capital stock of the company as set at $50,000.

It is therefore our opinion that your System may not negotiate with the Stonington Water Company as a political subdivision, and that if the employees of the Town of Stonington working with the water company desire coverage, it must be by reason of contract between your agency and the Town of Stonington.

JAMES G. FROST
Assistant Attorney General

January 3, 1952

To Paul A. MacDonald, Deputy Secretary of State
Re: Absent Voting for Members of the Armed Forces

We have your memo of December 5, 1951, relative to Chapter 92, P&SL 1944, An Act to Facilitate Voting by Members of the Armed Forces of the United States.

Section 11 of this Act provides:

"This act shall remain in force until 6 months after the state of war

ceases between the United States and every foreign government. It shall not be printed in the new revision of the statutes."

You state that you need to know upon what date the state of war ceases between the United States and every foreign government, and, more particularly, that it is necessary for you to know whether Chapter 92 will be in effect on June 16, September 8 and November 4, the dates of the 1952 primary, state and presidential elections.

The cessation of hostilities does not necessarily end the war power or state of war. The state of war may be terminated by treaty, legislation, or presidential proclamation. Whatever the mode, its termination is a political act. It is our understanding that a state of war has ceased to exist with respect to Germany. However, there has been no ratification of a peace treaty with Japan, nor has there been a termination by legislation or presidential proclamation of the state of war with Japan.

We also have armies abroad exercising our war power and have made no peace terms with our Allies in that endeavor, not to mention our enemies.

In view of the fact that courts believe that a state of war is terminated only by a particular means and that with respect to Japan no such method has been invoked, and, further, because of the "police" activities in Korea, it is our opinion that a state of war exists and that, as a result, Chapter 92, P&SL 1944, is still in effect.

It seems very unlikely, moreover, that a political decision to the effect that a state of war between the United States and every foreign nation is at an end will come within the time necessary to end the privileges authorized under Chapter 92 before the end of the year 1952.

JAMES G. FROST
Assistant Attorney General

January 3, 1952

To Col. Francis J. McCabe, Chief, Maine State Police
Re: Public Utilities

This memo is in response to yours of November 8, 1951, in which you make inquiry as to legal requirements regarding the leasing of a motor vehicle from one company to another and whether the Public Utility and registration plates and rights can be leased along with the vehicle from one company to another, etc.

The Maine Public Utilities Commission has never attempted to lay down any rules in respect to leased vehicles. It is generally recognized that an authorized carrier may, from time to time, augment his equipment by leasing additional equipment. The problem of knowing when the leased vehicle is used to augment the fleet of an authorized carrier and when it is used for the independent operation of the Lessor is a difficult one and is primarily a question of control.

It is also our understanding that, as a result of the vehicle check made at Kittery in mid-August, two cases are on their way to the Maine Law Court. One of these challenges the authority of the State of Maine to regulate an

interstate carrier and the other raises the whole lease question. If the State has no authority to regulate, an answer to the lease question will not, of course, be obtained. It is hoped, however, that as a result of these test cases, the troublesome problem of regulating leased vehicles can be settled. Meanwhile, it is not thought that there is any fixed rule of thumb that can be applied in all of these cases.

The Public Utilities Commission will issue plates to any authorized carrier to be used on a leased vehicle. The plate permit will designate the vehicle to which it is to be attached and it is to be used on the designated vehicle only when such vehicle is controlled by and in the service of the authorized carrier.

JAMES G. FROST
Assistant Attorney General

January 4, 1952

To W. Atherton Fuller, Jr., County Attorney, Hancock County
Re: Domicile and Residence, under Chapter 34, R. S.

. . . You call our attention to the expression "who has resided in this state" contained in the last paragraph of Section 16 of Chapter 34 of the Revised Statutes and the expression "a legal resident of this state," as used in Section 115. You ask if the word "resident" as used in Section 16 requires the physical presence of the person and feel that it does so require.

You recall that Section 16 states that a person is eligible for a resident license providing such person is domiciled in Maine with the intention to permanently reside and has resided here during the six months next prior to the date an application is filed for the license.

Domicile is composed of two elements, residence and the intent to reside permanently in that particular locality. Domicile differs from residence in that domicile is a broader term and includes the lesser, residence. One need not have a residence for all legal purposes, but one always has a domicile. However, both domicile and residence are still valid if a person leaves the State with the intention to return. In other words, if a person attends a school outside the State with the intent to return to the State after school is completed, then his domicile would be in the State of Maine. Take for example a teacher who has been domiciled and a resident in the State of Maine for a period of years and who attends Boston University during the summer months in fulfilling the requirements of the Department of Education. If this person should immediately return to the State of Maine and apply for a license under this chapter, we feel that he would be eligible, even though he was not continuously physically present during the six-month period immediately prior to the time of application. For this reason we feel that it cannot be said as a rule of thumb in all instances that "resided" as used in Section 16 requires the physical presence of the person.

Domicile and residency are sometimes used synonymously and sometimes have a varied meaning, according to the content of the statute involved. In the use of those words in Section 115 of Chapter 34 we feel that legal residency and domicile are synonymous and that the term "legal resident" as

used in that section means that a person is domiciled in the State of Maine, having a residence here with the intention to reside permanently in this State.

It has been said in this office that the eligibility requirements of a citizen to obtain a license under Chapter 34, with respect to the phrase "who has resided" are the same as those for eligibility to vote here. Such a requirement is also present in the Inland Fish and Game Laws, except that the period for which a person must have resided in this State is three months instead of six.

It is with this background that we feel that continuous physical presence is not necessary, if the interruptions are such as have been considered not to vitiate residence.

We have not issued any opinions directly in point with your questions, but we are attaching a copy of an opinion written by Mr. Fessenden, Deputy Attorney General, to the Governor of the State of Maine, which bears on your problems.

JAMES G. FROST
Assistant Attorney General

January 9, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: Modifications of Agreement between State Agency and the Social Security Administration

We have your memo of January 8, 1952, in which you ask our opinion as to whether or not it is necessary for the Governor to approve modifications to the original agreement between our State agency and the Federal Security Administrator, under which contract benefits are extended to employees of political subdivisions of the State.

We quote the pertinent part of Chapter 395 of the Public Laws of 1951, which is to be considered in reaching our conclusion:

> "Sec. 3. Federal-state agreement. The state agency, with the approval of the governor, is hereby authorized to enter on behalf of the state into an agreement with the federal security administrator, consistent with the terms and provisions of this chapter, for the purpose of extending the benefits of the federal old-age and survivors insurance system to employees of any political subdivision of the state with respect to services specified in such agreement which constitute "employment" as defined in section 2. Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification and termination of the agreement, administration, and other appropriate provisions as the state agency and federal security administrator shall agree upon, but, except as may be otherwise required by or under the Social Security Act as to the services to be covered, such agreement shall provide in effect that:
>
> I. Benefits shall be provided for employees whose services are covered by the agreement, and their dependents and survivors, on the same basis as though such services constituted employment within the meaning of title II of the Social Security Act;

II. The state shall pay to the secretary of the treasury, at such time or times as may be prescribed under the Social Security Act, contributions with respect to wages, as defined in section 2, equal to the sum of the taxes which would be imposed by sections 1400 and 1410 of the Federal Insurance Contributions Act if the services covered by the agreement constituted employment within the meaning of that act;

III. Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein, but in no event may it be effective with respect to any such services performed prior to the 1st day of January, 1951.

IV. All services which constitute employment as defined in section 2, are performed in the employ of a political subdivision of the State, and are covered by a plan which is in conformity with the terms of the agreement and has been approved by the State agency under the provisions of section 5, shall be covered by the agreement."

By the provisions of the above quoted section the state agency is to enter a contract on behalf of the State with the approval of the Governor, which contract may contain provisions relating to the modification of the agreement between the state agency and the federal security administrator.

The original contract signed by the Governor having contained such modification provision, it is our opinion that the Governor, in signing the contract gave prior approval to such subsequent modifications to the original agreement as the state agency should make with political subdivisions of the State consistent with the provisions of the Social Security Act as amended.

JAMES G. FROST
Assistant Attorney General

January 14, 1952

To Harland A. Ladd, Commissioner of Education
Re: Schooling of Displaced Persons

We have your memo of December 26, 1951, in which you state that three displaced children of Grand Falls Plantation are attending school at Burlington and that their failure to grasp the English language has made it difficult for them to derive all the benefits from pursuing their education. You state that the superintending school committee of Grand Falls Plantation proposes a special program of education whereby these children would attend Burlington school during its regular sessions except for a period of 1½ hours each morning when they would receive special instruction in English from a tutor hired by Grand Falls Plantation.

You then ask if such a program is permitted under the provisions of Section 83 of Chapter 37 of the Revised Statutes and if local expenditures for tutorial services may be included in computing general-purpose educational aid provided by Section 201 of Chapter 37, as amended.

Section 83 provides generally that children of certain ages shall attend some public school during the time such school is in session, provided also that such attendance shall not be required if a child obtains equivalent instruction for a

like period of time in a private school in which the course of study and methods of instruction have been approved by the Commissioner, *or in any other manner arranged for by the superintending school committee with the approval of the Commissioner.*

This office has no objection to the Commissioner's approving such a special program of education, as we feel it is authorized by the underlined section above mentioned which we feel may properly be interpreted to include the program planned by Grand Falls Plantation. Consequently, such a program would come within Section 201 of Chapter 37.

JAMES G. FROST
Assistant Attorney General

January 17, 1952

To Senator Foster Tabb

Re: Privilege from Arrest of Senators and Representatives during the Legislative Session

The Maine Constitution, Article IV, Section 8 provides:

> "Senators and representatives shall, in all cases *except* treason, felony or breach of the peace, be privileged from arrest during their attendance at, going to, and returning from each session of the legislature."

The Supreme Judicial Court has spoken on the matter and their decision would seem to be directly in point. In *Chase v. Fish*, 16 Me. 132, a sheriff was ordered to arrest the defendant on an execution. The defendant claimed that he was exempt from arrest because he was a Senator of this State. The Court held that the sheriff was not bound to decide at his peril whether the defendant was a Senator of the State and whether he was on his way to attend a session of the Legislature. If the Senator was entitled to the immunity claimed, then there are legal modes by which his privilege might be vindicated. It might have been done by order of a court of competent jurisdiction, or by a judge on habeas corpus, and possibly under the authority of the body of which he was a member.

Privileges of this character, although founded upon what the public interest is supposed to require, when set up at the instance of the party, are regarded as personal and as such may be waived expressly or by implication when not asserted at the proper time and in the proper manner. It was held that, on the facts presented in this case, the defendant had waived his privilege.

It would thus appear that the privilege extended to Senators and Representatives is quite limited. If a person is arrested on process by an officer, his mere protest of the privilege is of no avail. To claim privilege, he must show that he comes within the privilege. He must, therefore, seek a court order, or by means of habeas corpus, or by order of the House of which he is a member, to show that he is (1) a Senator or Representative of the State of Maine, (2) that he is not charged with treason, felony, or a breach of the peace, and (3) that he is in attendance at, going to, or returning from a session of the Legislature. He must be, at all times, extremely careful that he does no acts and

makes no statements that will constitute a waiver of the privilege that he claims.

ROGER A. PUTNAM
Assistant Attorney General

January 24, 1952

To Harland A. Ladd, Commissioner of Education
Re: School Bands

This opinion will affirm an oral opinion given by John S. S. Fessenden, Deputy Attorney General, to Fred L. Kenney, Director of Finance in your department, some weeks ago with respect to whether or not municipalities may appropriate money to subsidize school bands.

It was the opinion of the Deputy Attorney General that cities and towns may not authorize expenditures for the purpose of supporting school bands. This opinion was based on the fact that if the door were opened to permit towns to support school bands, then a precedent would be set for permitting municipal taxation for the purposes of supporting an endless number of activities which now are termed extra-curricular activities and not a definite part of basic education.

Chapter 80 of the Revised Statutes of 1944 spells out those powers granted to municipalities by the legislature, and the only section in that chapter which pertains to bands is Section 93, which states:

> "Cities and towns may raise money for the maintenance or employment of a band of music for municipal purposes and public celebrations. The provisions of this section shall not be in force in any city or town unless approved by a majority vote of the qualified voters of such city or town at an annual election."

We interpret this section that a town may authorize money to subsidize bands which are commonly used for municipal functions, and we do not believe that it authorizes a town to appropriate money to subsidize a school band.

As we stated at the beginning of this memo, the above is the content of the oral opinion expressed by Mr. Fessenden, which is now affirmed in all respects by this office.

JAMES G. FROST
Assistant Attorney General

January 28, 1952

To Ermo H. Scott, Deputy Commissioner of Education
Re: Equal Pay for Women Teachers

We have your memo of January 18, 1952, in which you ask certain questions relative to Chapter 308 of the Public Laws of 1951.

Chapter 308 reads as follows:

"In assigning salaries to teachers of public schools in the state, no dis-

crimination shall be made between male and female teachers, with the same training and experience, employed in the same grade or performing the same kinds of duties. . . ."

We have carefully studied this chapter and feel that, briefly, the intention of the Act is to say that a woman and a man teaching the same grade, with the same training and experience, other factors being constant, shall receive the same salary.

We feel that the questions you have asked relative to grade, academic load, etc., are administrative problems and that they can be answered more easily by you, giving common, every-day meanings to the words used in the law, and that any attempt by this office to clarify these terms would result only in producing new problems.

JAMES G. FROST
Assistant Attorney General

January 28, 1952

To Honorable Frederick G. Payne, Governor of Maine
Re: Inspection of Children's Homes

With reference to the memo of Joseph A. P. Flynn, Director, State Fire Prevention, dated January 10, 1952, and papers attached thereto, the following is offered:—

Section 243, Chapter 22, Revised Statutes of 1944, as amended, provides that persons maintaining a boarding house or home for children under 16 years of age must obtain a license therefor from the Department of Health and Welfare. A prerequisite for obtaining the license is that such persons must present to the department a written statement from the designated municipal officer or the Insurance Department to the effect that the building and premises comply with the requirements of law.

Mr. Flynn states that the plan whereby municipal officers were to make these necessary inspections turned out to be entirely ineffective, and arrangements were made whereby the Insurance Department was to make such inspections, the Department of Health and Welfare agreeing to reimburse the Insurance Department for expenses incurred in making the inspections.

However, in 1949, Ralph W. Farris, then Attorney General, rendered an opinion relative to the reimbursements by the Department of Health and Welfare to the Insurance Department for the expenses incurred in carrying out the inspections, stating that such reimbursements could not be properly made, and directed the Controller to transfer back to the Department of Health and Welfare all moneys paid to the Insurance Department.

The basis of this opinion was Section 29 of Chapter 85, R. S. 1944, which section provides:

". . . Every fire insurance company or association which does business or collects premiums or assessments in the state shall pay to the insurance department on the 1st day of May, annually, in addition to the taxes now imposed by law to be paid by such companies or associations, ½ of 1% of the gross direct premiums for fire risks written in the state

during the preceding calendar year. . . Said funds shall be used solely to defray the expenses incurred by the insurance commissioner in administering *all* fire preventive and investigative laws, rules and regulations. . ."

At the present time the Insurance Department is unable to keep abreast of the necessary inspections with regard to child boarding homes, because of insufficient funds and personnel, and it has again asked if it may accept funds from the Department of Health and Welfare in order that the Insurance Department may employ two additional inspectors to carry out these inspections.

The answer must be, No.

The amendment to Section 243, Chapter 22, R. S. 1944, is a law designed to prevent a duplication of the Auburn baby-farm fire and in effect will tend to do just that. The inspections contemplated by this section are of such a nature that they should not be neglected. The section provides:

". . . The insurance commissioner *shall*, if requested, direct such inspections to be made. . ."

It must be assumed that it is the intention of the legislature that laws enacted by them be put into effect.

It is, then, mandatory, a duty to be performed by the Insurance Department if alternative inspections are not made and inspections are requested of them.

As stated above, Section 29 of Chapter 85, R. S. 1944, provides a fund to be used solely to defray the expenses incurred by the Insurance Commissioner in administering *all* fire preventive and investigative laws, rules and regulations.

Without a doubt, inspection by the Insurance Department under the provisions of Section 243, Chapter 22, is embraced by the phrase, *all* fire preventive and investigative laws, rules and regulations," in Section 29, Chapter 85.

The legislature has, in effect, by enacting Section 29 of Chapter 85, appropriated a sum of money to be used for a particular purpose, just as money is appropriated by that body for the functioning of the other departments and units of our State government. If that sum is insufficient, it is not contemplated that one department borrow from another; but it is presumed that action will be taken to secure additional funds from the proper source.

JAMES G. FROST
Assistant Attorney General

January 28, 1952

To Robert L. Dow, Commissioner, Sea and Shore Fisheries
Re: Municipal Regulations — Time Limit

We have your memo of January 22, 1952, relative to the length of time that municipal regulations enacted under the provisions of Section 62 of Chapter 34, R. S. 1944, as amended, remain in force.

The statute above mentioned permits a town by vote at an annual or special town meeting to make regulations concerning several matters. With respect to most of these regulations it is our belief that a town need not annually vote on such regulations, but that the usual regulation would remain in force until repealed.

However, with respect to the right granted by Section 62, permitting the town to provide for municipal licenses, it is felt that such licenses must be for a particular period of time. In other words, licenses under this provision should remain valid for a year or another definite period of time.

Of course, all regulations enacted by the town are subject to examination and possible repeal from time to time as conditions require; but quite generally the usual regulation remains in effect until repealed.

JAMES G. FROST
Assistant Attorney General

January 29, 1952

To Honorable Frederick G. Payne, Governor of Maine
Re: Cumberland County Sheriff and State Troopers

With reference to letter from you relative to request of Charles Murphy, foreman of the Grand Jury in Cumberland County, that, as the Governor and Council had seen fit to exonerate Sheriff Dearborn on charges of unfaithfulness and inefficiency in office, it is the feeling of the majority of the Grand Jury that State Troopers James Adams and Stephen Regina should also be absolved from blame, the following is offered:—

For misconduct of a sheriff the Governor and Council have authority to remove him from office. There seems to be no other, minor, disciplinary action that can be taken against a sheriff.

With respect to misbehavior by members of the State Police, there are two courts martial procedures, summary and general, which provide that a person being guilty of misbehavior may be suspended from duty without pay, demoted in rank, or fined; or, under a general court martial, given such other disciplinary measures as seem proper, or dismissed.

With respect to Troopers Adams and Regina, these two men were court martialled for their participation in the slot machine affair, but were not removed from their positions. Apparently, then, some minor disciplinary measure was taken against them, there being insufficient misbehavior, apparently, to warrant removal from their positions.

With respect to Sheriff Dearborn, the Governor and Council found that, in so far as his activities were concerned, there was insufficient evidence to remove him from office. The two cases, then, were similarly handled and arrived at similar conclusions. None of them was guilty of such an offense as was sufficient to remove him from office or position. The fact that the trying body could, in the case of the troopers, impose minor disciplinary action, whereas in the case of the sheriff none was possible, does not ultimately render their decisions different.

To the effect that Sheriff Dearborn was not exonerated, but rather that his activity was not sufficient to warrant removal from office, the following are two quotations from the Governor's decision:—

"The Council wishes me to express the following: That it was their united opinion, together with the Governor's, that the facts as presented were not sufficient to warrant removal of the Sheriff for inefficiency in office."

"There are some things which came out in the testimony I feel require a heart to heart talk with him. While this evidence was not sufficient to warrant his removal, it certainly requires a discussion."

ALEXANDER A. LaFLEUR
Attorney General

January 29, 1952

To General Spaulding Bisbee, Director, Civil Defense and Public Safety
Re: Assessments by Counties against Municipalities

We have your memo of January 23, 1952, in which you ask the opinion of this office as to whether or not a county may assess municipalities for moneys to be used for Civil Defense purposes under the Civil Defense Act of 1949.

Please be advised that under the 1951 amendment to the 1949 Civil Defense Act (Chapter 273 of the Public Laws of 1951), counties have been included within the definition of political subdivision, and it is our opinion that counties may appropriate money for Civil Defense measures, if the same is properly accounted for in their budgets.

We are of the opinion that in the interim period during which the Act is in effect and before counties make provisions for appropriations in their budgets, they may not assess municipalities for funds to be used for Civil Defense purposes.

JAMES G. FROST
Assistant Attorney General

January 29, 1952

To Guy R. Whitten, Deputy Insurance Commissioner
Re: Direct Deductible Fire Insurance Coverage

You have requested this office to advise you:

1) If direct deductible fire insurance coverage may be legally written under the provisions of the Maine standard statutory fire insurance policy: and

2) If the authority extended to the Insurance Commissioner under subsection III of Section 96 is sufficiently broad to modify that insuring clause of the Maine standard policy to provide the writing of direct deductible fire insurance coverage by appending to the policy such a slip or rider as provided in the section above cited.

The Maine standard statutory fire insurance policy provides that the purchaser of the policy insures his property ". . . to the extent of the actual cash value of the property at the time of loss . . . against all DIRECT LOSS BY FIRE, LIGHTNING, ETC."

On its face, then, this standard policy purports to be a contract of indemnity indemnifying the insurer for all direct loss sustained by reason of injury caused by those perils against which he insures.

As opposed to such a contract, a direct deductible policy would provide that the purchaser of such a policy would in effect become a self-insurer, taking the risk for a certain percentage of the possible loss. The purchaser would bear the first loss up to a stipulated amount or percentage of value, and the insurer would bear the balance up to the amount of the policy limit.

In the one contract the insured would receive a sum of money equivalent to the extent of the actual cash value of the property at the time of loss. Under the direct deductible policy the insured may recover nothing under his policy, if the damage is less than the deducted amount.

We do not here consider the advantages or disadvantages of the direct deductible insurance policy. Suffice it to say that the direct deductible insurance policy appears to be such a complete deviation from the provisions of the Maine standard statutory fire insurance policy that it is our opinion that it should not be permitted as a modification of the Maine standard policy. This office feels that such a change must be effected through legislative action.

JAMES G. FROST
Assistant Attorney General

January 30, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Local Participating District – Millinocket

We have your memo of January 22, 1952, relative to the Town of Millinocket. You stated that this town is concerned with almost the identical fact situation which concerned the City of Rockland upon which we submitted a memo to you under date of December 28, 1951.

You recite that the Town of Millinocket in 1943 voted to permit its employees to participate in the State Retirement System, as provided by Section 227 of Chapter 328 of the Public Laws of 1941, and that they did, further, on January 2, 1952, act favorably on an article to authorize the selectmen to sign an agreement with respect to Social Security coverage which would permit those municipal employees not previously included as members of the State plan to participate under Social Security benefits. The question is, then, the same as was presented to this office with respect to Rockland and is whether a local participating district has any right, under the law, to amend its original action with respect to taking the benefits of the Maine State Retirement System, thereby excluding certain employees who had hitherto been eligible, by virtue of the city's original action under the Maine Retirement System plan.

In answering your question we affirm our opinion of December 28, 1951, and state that it is our opinion that once having elected to participate in the State Retirement System a city may not by subsequent amendment of its laws eliminate from participating in the State System employees who had hitherto been covered by that System.

JAMES G. FROST
Assistant Attorney General

January 31, 1952

To Harold I. Goss, Secretary of State
Re: Reprinting of Maine Statutes

With reference to your memo of January 18, 1952, relative to your granting permission to the National Consumer Finance Association to reprint portions of our statutes, it is our opinion that statutes and court rules are not in themselves subject to copyright; hence there is no infringement in copying statutes and court rules even from annotated and copyrighted editions of them.

This might explain the absence of statutory provisions granting you authority to give permission to reprint portions of our statutes. Therefore there would be no objection to your giving permission to the Association to reprint such statutes contained in our compilations of laws as they desire. . .

JAMES G. FROST
Assistant Attorney General

January 31, 1952

To Harland A. Ladd, Commissioner of Education
Re: Eastport Petition

. . . You inquire if paragraph XII, Section 3, Chapter 37, R. S., a statute which grants to the Commissioner of Education the power, under certain conditions, to make an inspection of the schools of a town, gives the right to investigate the relationship between the superintending school committee of the City of Eastport and the superintendent of Union 104.

It is the opinion of this office that paragraph XII, *supra*, is limited in scope. The inspection may be made, on petition, but the findings and reports are limited to the standards of buildings, equipment, organization, and instruction. Thus the scope of the inspection is limited particularly to the areas above mentioned.

The petition presented to you does not ask for an inspection of buildings, equipment, organization, or instruction, but of matters of purely local concern, not falling within your prescribed powers. It is therefore our opinion that you have no power to make an inspection with respect to the conditions set forth in the petition.

ROGER A. PUTNAM
Assistant Attorney General

February 4, 1952

To Harland A. Ladd, Commissioner of Education
Re: Special Projects

We have your memo of January 25, 1952, relative to Section 2 of Chapter 386, Public Laws of 1951.

Section 204 of Chapter 37, R. S. 1944, provided in part that the Commissioner of Education could make special allocations, not exceeding $500 for a plan or project approved by the Commissioner.

This section was repealed by Chapter 386, Section 2, P. L. 1951, which chapter states:

> "The provisions of this section shall become effective for the allocations to be made in the year 1952. It is the intent of the legislature that the 1951 allocations be made under the provisions of law as they existed prior to the effective date of this section."

The question is then asked: "Can the commissioner of education make allocations under this section through the State's 1951 fiscal year (current fiscal year) for projects developed prior to the effective date of the general purpose aid law?"

It is the opinion of this office that the effective date provision of Section 2, Chapter 386, Public Laws 1951, is directed to the calendar year and not to the State's fiscal year.

Quite generally, the word "year", unless otherwise expressed, is always intended to mean the calendar year. Any presumption in favor of its referring to a fiscal year, because it is applied to matters of revenue, is overcome by the wording of the statute and the matters there considered.

The usual meaning of the word "year", in addition to the construction of the repealing statute compels us to state that after December 31, 1951, no allocation can be made under the provision of the now repealed Section 204 of Chapter 37, R. S.

Presumably, allocations are made at a particular time (our understanding is that they are made by your department during the month of December.) It would appear that the effect of Section 2, Chapter 386, P. L. 1951, was to permit allocations made up to December 31, 1951, to be made under the old law and to require subsequent allocations, after December 31, 1951, to be made under the provisions of Section 1, Chapter 386, P. L. 1951.

JAMES G. FROST
Assistant Attorney General

February 4, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Section 56-B — canoes

We have your memo of January 30, 1952 asking an interpretation of Section 56-B of Chapter 33, as amended.

That portion of 56-B in which we are interested reads as follows:

> "Any boat, except a canoe, maintained for hire and boats furnished by the owners or operators of state licensed boys' and girls' camps upon any inland body of water to which the public has right of access shall be properly painted, repaired and fitted with oars. Any canoe maintained for hire upon any inland body of water to which the public has right of access shall be properly painted, repaired and fitted with paddles."

You inquire if the above quoted paragraph, pertaining to boats furnished by owners or operators of state licensed boys' and girls' camps includes canoes as well as other boats.

Actually, the first sentence of the above quoted paragraph is susceptible of two interpretations, one of which borders on the ridiculous: – that is, requiring that oars be furnished to canoes. We are of the opinion that such is not the intent of the law, but that a proper interpretation of that paragraph would exclude canoes from the definition of boats which are required by the owners of state licensed boys' and girls' camps to be properly painted, repaired, and fitted with oars.

JAMES G. FROST
Assistant Attorney General

February 6, 1952

To Honorable Frederick G. Payne, Governor of Maine
Re: Portland Municipal Court

With respect to whether or not the Acts establishing a Municipal Court for the City of Portland demand that the judge should be a resident of the City of Portland, it is our opinion that there is no part of those Acts which can be used to show that the judge must be a resident of Portland.

The Municipal Court of the City of Portland was established by an Act of the Legislature in 1825 (Chapter CCXCIV, Public Laws).

This Municipal Court was abolished in 1855 (Chapter 159) and in its stead there was established a police court in that city. Here again no provision was made with respect to residency of the judge of that court.

In 1856 the Police Court was abolished and a Municipal Court reestablished (Chapter 204, Public Laws 1856).

Under the Revised Statutes of 1841 there was a general provision (Section 1, Chapter 116) to this effect:

> "Every justice of the peace, except those residing in any city or town, within which a municipal or police court now is, or may be established, and the judge of such court is not interested, shall have power to hold a court within his county. . ."

Basically, the jurisdiction of the Justices of the Peace and of the Municipal Courts, at the time in question, was concurrent. The effect of the above quoted section and of Section 14 of Chapter 204, Public Laws 1856, was to prohibit the Justices of the Peace residing in the City of Portland from exercising jurisdiction.

Section 13, Chapter 204, Public Laws 1856, merely provides that, in the event there is a vacancy in the office of the Municipal Court Judgeship, the Justices of the Peace in that city may again exercise their jurisdiction and hear civil and criminal trials.

It is upon consideration of the provisions of the Revised Statutes of 1841 and their relationship to Section 13 of Chapter 204 of the Public Laws of

1856 that we are directed to the conclusion that Section 13 in itself cannot be construed to mean that a judge should be a resident of the City of Portland. . . .

JAMES G. FROST
Assistant Attorney General

February 11, 1952

To W. Earle Bradbury, Deputy Commissioner, Inland Fisheries and Game
Re: Fish Screen at Bear Pond

We have your memo of January 24, 1952, relative to Chapter 85, Resolves of 1951.

That part of the Resolve with respect to which you submit your question reads as follows:

> ". . . Provided, however, that the Waterford Fish and Game Association shall assume all liability for the keeping of said screen at all times free from sticks, leaves and all debris, so that the same will not become clogged and prevent the free running of water through the same; . . ."

You ask: "If the screen is not kept clean and the water in the pond is raised to a level such as to cause damage to land owners adjacent thereto, who is the liable party in case of a civil suit for damages?"

It is the opinion of this office that the State is held free from liability in such a matter and that, properly, the Association or any one or more of its members are the liable parties.

JAMES G. FROST
Assistant Attorney General

February 12, 1952

To Harland A. Ladd, Commissioner of Education
Re: Status of Academies and Institutes

By your memo of February 5, 1952, this office is asked to determine the eligibility of academies and institutes in Maine to participate in the Federal vocational educational program as administered by your department.

You call attention to the fact that subsidization of such a program through funds made available to the State through Federal legislation is available only to public schools and not to those institutions of learning which are private in character, and you state that the United States Office of Education has requested that the status of academies and institutes be resolved with respect to their receiving this aid.

This office has felt for some time that the academies and institutes within the State of Maine cannot arbitrarily be classified as private on the basis of their names or titles. There is always the possibility that a school bearing the title "Academy" is, in fact, for some reason or other — perhaps under the provisions of Section 103, Chapter 37, R. S. 1944 — a public school.

Generally, a public school is distinguishable from a private school in that the former has certain characteristics not present in a private school. A public school is supported by general taxation, open to all free of expense, and under the control and superintendence of agents appointed by the voters.

We feel that generally a school bearing the name of "Academy" or "Institute" is a school sufficiently under public supervision and control to make it eligible for vocational training subsidization if, under the provisions of Section 96, Chapter 37, R. S. 1944, there exist a contract with the town in which the school is located, *and* a joint board or committee supervising those duties set forth in Section 96.

Such a contract and joint committee should provide the public supervision and direction necessary, for the purposes of vocational training, to classify such an educational institution as a public school.

It is our opinion that other academies and institutions having the characteristics of private schools in that they are incorporated by private individuals and do not have a combination of both contract and joint committee, are private schools.

We agree with the legal representative assigned to the Office of Education, Federal Security Agency, that the status of such schools is difficult of determination in some instances, and concur with him in his suggestion that the above mentioned method of determining their eligibility is as practicable a solution as can be found.

JAMES G. FROST
Assistant Attorney General

February 12, 1952

To Harry E. Henderson, Deputy Treasurer of State

Re: Distribution of Income from Trust Fund – Lands Reserved for Public Uses.

Chapters 167 and 260 of the Public Laws of 1951 are amendments governing the distribution of income earned by the trust fund known as "Lands Reserved for Public Uses".

Chapter 167, P. L. 1951, provided that the rate of interest to be distributed to plantations and unorganized townships be changed from 6% for organized plantations and 4% for unorganized townships to a rate which would represent the income actually earned by the investments of the fund in a calendar year.

Chapter 167 becomes effective March 1, 1952.

Chapter 260, P. L. 1951, amending subsection II of Chapter 32, Section 38, R. S., became effective on August 20, 1951. Section 1 of Chapter 260 reads as follows:

> "II. the balance then remaining shall be added to the unorganized territory school fund; the treasurer of state shall file with the commissioner of finance, on or before January 15 of each year, a list of interest earned by the unorganized townships fund during the preceding calendar year; such list shall be arranged to show the principal amount held for each

unorganized township and the interest earned thereon; the commissioner of finance shall thereupon transfer the total amount of such list, less the allocation provided for in subsection I, to the unorganized territory school fund for the fiscal year following the date of such list; a copy of said list shall be transmitted to the commissioner of education by the treasurer of state."

You state with respect to these amendments that it has been the practice in the past to use the balances for all plantations and townships as they appeared on December 31st of each year and to pay 6% and 4%, respectively, on those balances. You then ask two questions concerning the interpretation of these two chapters:—

"Under the provisions of Chapter 260, P. L. 1951 is it proper to continue using the balances of principal for the various plantations and townships as of December 31 as a basis for computing the amount of income to be distributed to each plantation and unorganized township?

"If not, what balances would be proper as a basis for the distribution of this income?"

It is our opinion that you may continue to use December 31 as the date for determining the balances upon which interest shall be paid. It appears, from our point of view, that the selection of a particular day for determining the balances upon which interest is to be paid is a reasonable way of determining the interest, from the standpoint of administration of the funds.

With respect to your second question you state that in December, 1951, the Department of Education submitted a journal entry by which the amount of 4% interest for unorganized townships was transferred to the unorganized territory school fund mentioned in Chapter 260, P. L. 1951, such transfer disposing of the interest earned in the calendar year 1951, plus a portion of the legislative appropriation necessary to make the amount transferred equivalent to 4%.

You then ask if such a transfer is permissible under Chapter 260 or whether it will be necessary to take away from the unorganized townships school fund for the present that amount of interest transferred to it in December, so as to make it available in the fiscal year beginning July 1, 1952, in accordance with the provisions of Chapter 260.

In answer to this question it is our opinion that the fund provided for in Chapter 260 was prematurely transferred by the Department of Education to the unorganized territory school fund. Chapter 260, subsection II, clearly defines a series of steps to be taken with respect to this fund and requires that the Treasurer of State shall file with the Commissioner of Finance by January 15 a list of interest earned by that fund during the preceding calendar year, with a copy to the Commissioner of Education.

It further provides that the Commissioner of Finance shall transfer the total amount of such list, less the allocation provided for in subsection I, to the unorganized territory school fund for the fiscal year following the date of such list. Literally, this statute means that upon January 15, or before, of the year 1952, such list shall be made by the Treasurer of State and submitted to the Commissioner of Finance and that on July 1, 1952, or the beginning of the fiscal year following the date of such list, that fund shall

be transferred to the unorganized territory school fund. It therefore appears that when July 1, 1952 comes, if the present transfer remains unaffected, the Commissioner of Finance will be unable to do an act required of him by our statutes. It follows that of necessity our opinion must be that that fund transferred by journal entry in December, 1951, must be re-transferred back to the Treasurer of State and credited to the funds for Lands Reserved for Public Uses, so that it may, in accordance with Chapter 260, be transferred by the Commissioner of Finance at the beginning of the 1952-1953 fiscal year.

JAMES G. FROST
Assistant Attorney General

February 12, 1952

To Carl T. Russell, Deputy Commissioner of Labor and Industry
Re: Fifty-Four Hour Law

We have before us a letter which asks if stenographers and other clerical office workers are covered by Section 22 of Chapter 25, R. S. 1944, as amended.

Consideration cannot be given to Section 22 alone, but those provisions exempting certain employees from the provisions of Section 22 must also be considered.

Section 24-A states that the provisions of Sections 22-26, inclusive, shall not apply to any female working in an executive, administrative, professional or supervisory capacity or to any female employed as personal office assistant to any person working in an executive, administrative, professional or supervisory capacity, and also provides for other exemptions not here pertinent.

With respect to the interpretation of Section 24-A we refer you to an opinion written on June 7, 1948, by Ralph W. Farris, then Attorney General, which opinion would seem to answer the present question. That portion of Mr. Farris's opinion with which we are interested reads as follows:

"In my opinion this statute does not apply to all office workers, but only to those who are personal office assistants to any person working in an executive, administrative, professional or supervisory capacity. Many file clerks, bookkeepers, stenographers, etc., in mercantile establishments, stores, restaurants, laundries, telegraph offices, etc., may not be personal office assistants to these persons enumerated in Section 24. In my opinion it is a matter of administration in your office, as to whether or not a certain stenographer or file clerk is a personal office assistant to those exempted under the language of the statute. I will admit that the language of the statute is very broad and might cover stenographers and file clerks, if the facts disclosed that they were personal office assistants to those persons enumerated in Section 24."

From a consideration of the above quoted paragraph from Mr. Farris's opinion it would appear that your department has administrative responsibility in ascertaining which particular individuals are exempted by reason of Section 24-A.

JAMES G. FROST
Assistant Attorney General

February 20, 1952

To Ermo H. Scott, Deputy Commissioner of Education

Re: Licenses of Returning Veterans

You ask if it would be possible, administratively, to set up a policy with respect to teachers entering the military service whereby, when they return, they would be guaranteed by the certification division one year of licensing in which they may be able to meet the mandatory six-hour requirement as set out in Section 201 of Chapter 37 of the Revised Statutes of 1944, as amended.

That part of Section 201, with which we are confronted reads as follows:

> "Provided further, that the renewal of each teaching certificate shall be conditional on the completion of at least 6 semester hours of professional study within each period of 5 years.

You suggest further that in instances where the teacher would have remaining certificate time which had not been used in active teaching previous to the terminal date of the document these veterans be assured that upon their return you could revalidate their certificates to the extent of time that had not been used, to cover their employment prior to their induction into military service.

The legislature of the State of Maine, being in sympathy with the Federal law which grants re-employment rights to veterans returning to private employment and Federal employment, has enacted Section 23 of Chapter 59 of the Revised Statutes of 1944, amended in 1951 to include Korean veterans, which statute provides that employees of the State, county, municipality, township or school district shall have re-employment rights. This section further provides that the veteran shall not be deemed or held to have thereby resigned from or abandoned his employment, nor shall he be removed therefrom during the period of his service.

Section 158 of Chapter 37 of the Revised Statutes provides that persons not holding State certificates shall not be employed to teach in any school under the supervision and control of any school board of any city, town or plantation in this State. If the teaching certificate of one who has entered into the service has expired before his return to a civilian status, such expiration would result in his not being qualified as a teacher in any of the above mentioned schools. We feel that in the presence of Section 23 of Chapter 59 such a result is not contemplated and that in compliance with Section 23 the length of service of the veteran should not be included in the 5-year period set forth in Section 201 of Chapter 37. It is therefore our opinion that the policies which you mention in your memo are altogether proper and defensible from a legal standpoint.

JAMES G. FROST
Assistant Attorney General

February 21, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game

Re: Fines Collected under Section 125 of Chapter 33, R. S. 1944

You request an opinion as to whether or not fines collected under section

125 should be paid to the Treasurer of State and credited to the Department of Inland Fisheries and Game.

Section 125 provides that whoever, *while on a hunting trip*, or in pursuit of wild game or game birds, negligently or carelessly shoots and wounds or kills any human being, shall be punished by a fine of not more than $1000 or by imprisonment for not more than 10 years.

Section 110 provides that all fees, fines and penalties recovered under any provision of this chapter, and money received or collected shall be paid to the Treasurer of State and credited to the Department of Inland Fisheries and Game for certain functions of that department. The obvious intent of section 110 is clearly stated in the above sentence. Therefore the fines collected from one who violates the provisions of section 125 shall be handled as provided for in section 110.

It is to be noted that this penalty is to go to the Treasurer of State and be credited to the Department of Inland Fisheries and Game only if the accident happens while on a hunting trip. If the person is not prosecuted under an indictment clearly showing a violation of section 125, that is, while on a hunting trip, then we feel that the money should not be credited to your department.

JAMES G. FROST
Assistant Attorney General

February 21, 1952

To Donald F. Ellis, Secretary, Board of Registration in Optometry
Re: Incorporation

. . . You state that the Social Security Act exempts optometrists and others in certain self-employed fields from being included under the Act so far as their own benefits are concerned. You then ask if it is possible for an optometrist to incorporate his own practice and have the corporation pay him a salary or profit, so that he will come within the Social Security Act.

The Social Security Act is a Federal law and we believe that the Federal Security Agency, through its Social Security Board, would have the right to determine who are eligible or ineligible to participate in the benefits extended through the Social Security Act. If they excluded optometrists, we feel that that is the final answer.

With respect to our Maine laws and the common law, which is held to apply in the State of Maine, while the corporation is in some sense a person and for many purposes is so considered, yet with respect to the learned professions, which can be practised only by persons who have received licenses after having submitted to examination to display their knowledge of their subjects, it is recognized that a corporation cannot be licensed to practise such a profession.

> "For example, there is no judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law."
>
> 13 Am. Jur., page 838.

Thus, the statutes of the State of Maine provide who may practise optometry and require an applicant for a license to pass an examination and to meet certain additional requirements. This would necessarily exclude all but natural persons from the right to obtain licenses. For these reasons a corporation may not engage in the practice of optometry. We would therefore deem it our duty not to approve any corporation whose certificate is submitted to this office, where the avowed purpose would be to engage in the practice of optometry.

JAMES G. FROST
Assistant Attorney General

February 21, 1952

To Harland A. Ladd, Commissioner of Education

Re: Contracts between the Maine School Building Authority and Community School Districts

We have your memo of February 12, 1952, relative to community school districts and the Maine School Building Authority, the provisions pertaining to both of which are contained in Chapter 37 of the Revised Statutes and Chapter 127 of the Resolves of 1951.

You ask the following question: Can the Maine School Building Authority contract with community school districts in excess of the combined valuation of the participating towns?

A community school district may be accepted by the voters of towns and cities as provided by the Enabling Act in the Revised Statutes of 1944, Chapter 37, sections 92-A to K, inclusive. Under the provisions of Section 92-D the limit of indebtedness of the district may be established as a certain amount, but may not exceed 5% of the total of the last preceding valuation of all the participating towns, whichever is the lesser. This 5% limitation is the express mandate of the legislature.

If we are to say that the Authority may contract with a community school district for a sum over this express limitation, then we feel that it must be clearly shown that the 5% limit has been removed. We find no express provision of any statute eliminating the 5% limit.

The importance of the Maine School Building Authority and of the security to which a purchaser of its bonds must look for payment compels us to conclude that the limitation cannot be impliedly removed. If it were the intent of the legislature that the Building Authority could contract with a community school district in an amount in excess of the 5% limitation in the Enabling Act, it is well hidden.

This statutory debt limitation not being expressly removed by the legislature and it not being possible to infer its elimination our conclusion is that the Maine School Building Authority may not contract with community school districts in excess of the combined valuation of the participating towns.

JAMES G. FROST
Assistant Attorney General

March 3, 1952

To Eleanor G. Powers, Director, Special Education for Physically Handicapped Children

Re: Hospital Instruction Costs

We have your memo of February 6, 1952, relative to Sections 180-A through 180-I pertaining to the hospital instruction conducted under those sections for physically handicapped children at the State Sanatoria, the Maine General Hospital, and the Hyde Memorial Home. You outline in some detail the procedure used by the Division of Special Education in determining which of the children hospitalized are eligible for education under this program. You then ask the following questions:

"1. Is there anything contrary to the law establishing Special Education (Sections 180-A to I inclusive, Chapter 37, R. S.) in the above procedure for handling cases of hospital instruction?"

Our answer is in the negative.

"2. Is a child's town of legal school residence responsible for a child's education whether he is in school or having home or hospital instruction under approved programs of the Division of Special Education, at least to the extent of the per capita cost?"

The answer to Question 2 is in the affirmative.

"3. Can a community, by local action of the superintending school committee, deny a child hospital instruction given under an approved program of the Division of Special Education?"

The answer to Question No. 3 is in the negative. With respect to the obligation of a town and its responsibility to handicapped children, we refer you to an opinion by Ralph Farris to the Commissioner of Education dated November 7, 1950, more particularly the last paragraph of that opinion. Though we feel that a town is responsible for the education of its children, when the children are hospitalized the town is responsible only to the extent of the per capita cost of educating normal children in their respective school districts and not the excess above that normal cost that is generally required when a child is not hospitalized.

JAMES G. FROST
Assistant Attorney General

March 3, 1952

To Guy R. Whitten, Deputy Insurance Commissioner

Re: Examination, Certain Agents

You have asked this office to interpret Section 252 of Chapter 56, R. S. 1944, as amended by Chapter 277, Public Laws of 1951, with regard to whether or not agents of domestic life insurance companies which engage in selling casualty insurance must take the examination provided for in Section 252.

That portion of Section 252 with which we are here interested reads as follows:

"Before any person is licensed as hereinbefore provided as a first-time agent of any foreign casualty or foreign fire insurance company, or as a first-time insurance broker, he shall pay to the commissioner a fee of $10, and appear in person at such time and place as the commissioner, his deputy, or any person delegated by the commissioner or his deputy shall designate in writing for that purpose, for a personal written examination as to his qualifications to act as such agent or broker."

Section 2 of Chapter 277, P. L. 1951, amended the above quoted paragraph by deleting the word "foreign" before the word "casualty". Prior to this amendment agents of foreign life insurance companies which sell accident or health insurance were required by law to be examined.

Section 249 provides for the licensing of agents of domestic insurance companies, agents of foreign life insurance companies, or agents of foreign life insurance companies which sell accident and health insurance.

Section 250 provides for the licensing of brokers. Section 251 provides for the licensing of firms and corporations as agents and brokers.

You state that under the existing law, Section 252 as amended, that is, the word "foreign" having been deleted before the word "casualty", the question now arises whether agents of domestic life insurance companies must be examined along casualty insurance lines with other companies engaged in the selling of casualty, accident and health insurance policies.

We think this question can be answered without regard to Section 252 and the amendment thereto. The first sentence of Section 249 would appear to give the Insurance Commissioner the right to require examination of agents selling any class of insurance policies. This sentence reads as follows:

"The commissioner may issue a license to any person to act as an agent of a domestic insurance company. . ."

This sentence then goes on to require the licensing of agents of a foreign life insurance company, or of a foreign life insurance company which sells accident and health insurance. That this sentence contemplates the licensing of agents who sell casualty insurance is seen in Chapter 256 of the Public Laws of 1951, which, in amending Section 249, provides:

"A license shall be refused or a license duly issued shall be suspended or revoked or the renewal thereof refused by the insurance commissioner if he finds that the applicant for or holder of such license has obtained or attempted to obtain such license not for the purpose of holding himself out to the general public as a fire or casualty agent, but primarily for the purpose of soliciting, negotiating or procuring contracts of fire or casualty insurance indemnifying himself or the members of his family or the officers, directors, stockholders, partners, employees of a partnership, association or corporation of which he or a member of his family is an officer, director, stockholder, partner or employee."

This amendment, we think, clearly shows that the licensing provided for under Section 249 embraces the licensing of casualty agents.

This opinion does not attempt to distinguish between life insurance companies and casualty companies as such. We are saying that the Commissioner has the discretion to require examinations for agents of any domestic insurance

company who sell any type of insurance, whether it be a life insurance company selling only life insurance or a life insurance company selling casualty, accident and health policies, or whether it is a casualty company selling casualty insurance.

JAMES G. FROST
Assistant Attorney General

March 17, 1952

To Willis H. Allen, Examination Supervisor, Personnel Department
Re: Korean Veterans

This will acknowledge your letter of March 4, 1952, relative to an interpretation of Chapter 360 of the Public Laws of 1945.

The pertinent portions of Chapter 360 read as follows:

> "For carrying out the provisions of this section, the following dates of active service in the United States armed forces shall be: . . .
>
> "V. World War II, December 7, 1941, and the date of cessation of hostilities as fixed by the United States Government."

On February 20, 1948, Mr. Fred Rowell requested that this office determine the dates marking the beginning and ending of World War II. In answering Mr. Rowell's request, Abraham Breitbard quoted the following proclamation of Harry S. Truman:

". . . Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective at twelve o'clock noon on December 31, 1946."

and declared that it was his opinion that this proclamation was controlling in determining when under our statute the cessation of hostilities was fixed by the United States Government. He then added that a veteran, to be entitled to the preferences provided for in that Act must have been in the active service between December 7, 1941 and December 31, 1946 at 12 o'clock noon.

You now ask this office if veterans of the Korean campaign have a veterans' preference in State employment and what dates have been established for the eligibility period. This question is, no doubt, prompted by the action of the 1951 Legislature, as seen in Chapter 157 of the Public Laws of 1951, in which chapter the legislature attempted to amend laws pertaining to veterans to include those who participated in the Korean campaign. In amending the above quoted section of the law, subparagraph V. was changed to read as follows:

> "World War II, December 7, 1941, and the date of the cessation of hostilities as fixed by the United States Government *for civil service employment purposes.*"

Public Law 359, Section 3, approved January 27, 1944, 58 Stat. 387, Chapter 287, provided for preferences to veterans taking Federal Civil Service examinations. This section, granting preferences to veterans, was repealed by Public Law 239, approved July 25, 1947, 61 Stat. 449, Chapter 327. By these last two mentioned statutes, the United States Government has, for Civil Service

purposes, defined the period of World War II as being from December 7, 1941 to July 25, 1947.

The amendment by our 1951 Legislature of Chapter 360 of the Public Laws of 1945, as seen in Chapter 157 of the Public Laws of 1951, in making the dates during which veterans may be awarded preferences for Maine examination purposes coincide with the dates which the Federal Government has set in which veterans applying for Federal Civil Service positions may be granted preferences, has in effect extended the period in which veterans in the State of Maine will be given preferences for having served in the Armed Forces from December 31, 1946 to July 26, 1947.

This office can find no law amending Chapter 360 which would grant to veterans of the Korean campaign any such preferences as are granted to veterans of World War II. The only amendment to Chapter 360, which is the preference statute, is that above quoted, which added the words, "for civil service employment purposes," to subparagraph V.

In answer to your question, then, it is our opinion that veterans of the Korean War have no preference in State employment.

No doubt this matter should be given attention during the next session of the legislature.

JAMES G. FROST
Assistant Attorney General

March 17, 1952

To Norman U. Greenlaw, Commissioner of Institutional Service
Re: Legality of Commitment Papers signed only by Register

On March 12th you sent to this office a copy of a memo to you from Dr. Pooler, Superintendent of the Bangor State Hospital, inquiring as to the legality of certain commitment papers.

He states that the paper in question is the original and that it is not signed by the Justice of the Probate Court but merely by the Register of Probate. He questions the legality of the paper without the signature of the Judge of Probate.

Dr. Pooler's point is well taken. Section 109 of Chapter 374, P. L. 1951, states that the Probate Judges shall have jurisdiction to commit, after hearing, to certain designated State and Federal institutions. This power is conferred only upon the Judges of Probate. They have no right to delegate this power to their respective Registers, nor can the Registers act in behalf of the Judges of Probate, there being no statute allowing same.

To protect the rights of all parties, and to conform strictly to the statute that governs the commitment of the mentally ill, it is our opinion that the commitment papers, under the above circumstances, should be signed by the Judge of Probate. This will show to any person or court that the Judge was the party who heard the case and ordered the person committed, and that it was not some other person who had no legal right or power to commit the mentally ill.

ROGER PUTNAM
Assistant Attorney General

March 17, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Fort Fairfield Public Library

You inquire if the Fort Fairfield library can be considered a body corporate and politic and therefore eligible for Social Security coverage under the provisions of Chapter 395 of the Public Laws of 1951.

"A body politic and corporate created for the sole purpose of performing one or more municipal functions . . . is a quasi-municipal corporation."

This definition, along with an amendment to Chapter 60, Section 16, subparagraph I, whereby the words, "public library corporation," were inserted in the first sentence of that subparagraph, shows the intent of the legislature to define a public library corporation as a quasi-municipal corporation.

A quasi-municipal corporation is, then, a body politic and corporate.

However, with respect to the Fort Fairfield library we have been unable to find in our reference works any indication as to whether or not it is a corporation. A check with the Secretary of State's office shows that they have no information showing that it is a corporation.

You will recall that the benefits of Chapter 395 are extended to employees of political subdivisions of the State of Maine, and a political subdivision is defined as an instrumentality of the State or one or more of its political subdivisions, but only if such instrumentality is a juristic entity. This term, a juristic entity, really means that it is necessary that the body be a corporation. In the absence of definite proof that the Fort Fairfield library is a corporation, our opinion of necessity must be that its employees are not eligible to participate in the benefits extended by Chapter 395 of the Public Laws of 1951.

JAMES G. FROST
Assistant Attorney General

March 18, 1952

To Col. Francis J. McCabe, Chief, Maine State Police
Re: Overtaking Vehicles – when not to pass.

We have your memo of March 14, 1952, relative to the interpretation of Section 104 of Chapter 19, R. S. You state that you have experienced a disagreement in the interpretation of the second paragraph of Section 104, that it is the contention of some persons that that paragraph applies only when a motor vehicle is overtaking another on a hill or a curve. You have therefore asked this office to express an opinion as to whether or not this section is limited to vehicles moving on hills or curves, or whether it pertains to the passing of motor vehicles on any stretch of road, regardless of contour.

The pertinent paragraph in which we are interested reads as follows:

> "*In every event* the overtaking vehicle must return to the right hand side of the roadway before coming within 100 feet of any vehicle approaching in the opposite direction."

It will be noted that the first paragraph of Section 104 has particular reference to grades or curves, that the third paragraph relates to passing at steam or electric railway grade crossings and at intersections. Similarly the fourth paragraph deals with curves or grades.

Returning to paragraph 2, we find that this provision does not pertain only to hills, curves, grades or grade crossings or intersections, but is preceded by the words, "In every event." It is our opinion that the construction of this section, looking at all four paragraphs and giving consideration to the wording of those paragraphs, particularly the words, "In every event", would lead us to only one conclusion and that is that paragraph 2 relates to the passing of motor vehicles on any stretch of road without regard to its contour or grade.

JAMES G. FROST
Assistant Attorney General

March 25, 1952

To N. S. Kupelian, M. D., Superintendent, Pownal State School
Re: "Nearest Relative or Guardian"

Receipt is acknowledged of your letter of March 20, 1952, in which you state that a sister is interested in the eugenic sterilization of a patient in your institution. You state that the patient has a mother but that her whereabouts are unknown, and you ask if the sister is the proper person to sign the eugenic sterilization paper.

Sections 158 et seq. of Chapter 23 are those sections controlling sterilization and speak of "nearest relative or guardian".

Where the mother is living, we believe that she is the nearest relative; but that if her whereabouts cannot be ascertained, then the sister may be the proper person to sign the papers, if she is the legal guardian of the patient. It is our opinion that in the absence of the mother, the sister should be made a legal guardian and not a natural guardian with respect to authority to sign sterilization papers.

JAMES G. FROST
Assistant Attorney General

March 25, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Employees handling School Lunch Programs

We have your memo of March 11, 1952, in which you inquire about the status of employees in school lunch programs and to which you attached for our information an opinion from the Collector of Internal Revenue.

The effect of the ruling of the Collector of Internal Revenue is that such persons are employees of the town and hence not eligible for Social Security coverage, so far as the Internal Revenue Bureau itself is concerned. He states that such services are excepted from employment by reason of the pro-

visions of Sections 1426 (b) (7) and 1607 (c) (7), of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. They were also excepted under Sections 1426 (b) (8) of the Federal Insurance Contributions Act as amended by the Social Security Act amendments of 1950 and Section 1607 (c) (7) of the Federal Unemployment Tax Act on and after January 1, 1951. As stated, the effect of such exceptions means that these people are employees of the town and therefore may not participate in the Federal Act unless by virtue of our Maine Federal Social Security Act, Chapter 395 of the Public Laws of 1951, which chapter extends to the employees of the political subdivisions of the State of Maine the benefits of Social Security.

Our question is, then, Are these persons employed for the purposes of hot school lunches employees of a political subdivision of the State of Maine and therefore eligible to participate in the above mentioned Act?

At common law there are four elements which are considered on the question of whether the employer-employee or master and servant relationship exists, namely, the selection and engagement of the servant, payment of wages, power of dismissal, and power of control of the servant's conduct. You question whether or not all of these elements are present, because you state that the funds from which these people are paid are apparently derived from various sources, such as the Federal Government, State Department of Education, the town itself, and certain charitable organizations.

In the State of Maine, the hot lunch program and persons employed to handle such program are under the direct control and supervision of the superintending school committee. It is my understanding that this committee has the right to hire and fire, that it pays the wages, and that it at all times has the right to control the employee in the performance of the employee's duties. Primarily, the employee is paid from a fund which is composed in one part of a contribution from the Federal Government and the remainder from sums paid by the student in purchasing the lunch. At any rate the superintending school committee has control of such fund and for all practical purposes it can be said that that committee pays the wages. All four elements comprising the relationship of employer and employee being present, it is our opinion that the persons employed to handle the hot school lunches are employees of the political subdivision in which the school is situated and are there eligible to participate in the benefits extended by Chapter 395 of the Public Laws of 1951.

It may be possible that in a rare case the hot lunch program has been contracted for by an independent contractor, in which case the independent contractor would not be eligible to participate in our Social Security program. We feel that the great majority of such programs are handled by the employees of municipal subdivisions of the State.

If you have any question with respect to the status of these employees, that is, whether or not they are employees or independent contractors, reference to the four elements above mentioned will be helpful to you.

JAMES G. FROST
Assistant Attorney General

March 25, 1952

To Col. Francis J. McCabe, Chief, Maine State Police

Re: Apprehension of Absentees and Deserters from the Armed Forces

This office is in receipt of your memo of March 7, 1952, in which you posed the three following questions:

1. "May members of the Maine State Police lawfully apprehend absentees and deserters from the armed forces?"

Any person authorized under regulations governing the Armed Forces to apprehend persons subject to the Uniform Code of Military Justice may apprehend an absentee or deserter from the Armed Forces and deliver him into the custody of the Armed Forces. Article 8 of the Uniform Code of Military Justice reads as follows:

> "It shall be lawful for any civil officer having authority to apprehend offenders under the laws of the United States or of any State, District, Territory, or possession of the United States summarily to apprehend a deserter from the Armed Forces of the United States and deliver him into the custody of the Armed Forces of the United States."

State Police officers of the State of Maine come within the definition set up in Article 8 above quoted, and it is our opinion, therefore, that such police may lawfully apprehend absentees and deserters from the Armed Forces.

2. "If so, following such apprehension, may members of the Maine State Police lawfully utilize the facilities of local and county jails for the detention of such absentees and deserters pending the arrival of military police?"

It is our understanding that presently members of the Armed Forces have offices in your building and would be immediately or almost immediately available in the event your troopers apprehend a deserter or absentee. We feel that rather than lodge such persons in local or county jails, attempts should be made to deliver them to the closest Army or Navy installation to be held there in custody until picked up by Army personnel. We do not mean to say that you are precluded from lodging these offenders in county or local jails, but suggest that a better answer would be to have them delivered to the Army or Navy installations.

3. "Upon reasonable grounds, such as the admission of a subject that he is an absentee or deserter, may members of the Maine State Police lawfully detain and hold such man for confirmation of his military status?"

Members of the Maine State Police should take into custody only such persons as the police believe there is probable cause for holding. Probable cause would be notifications describing the deserter and, we believe, admissions by the person that he is a deserter or an absentee. A duly authorized officer who has probable cause for arresting a person as a deserter, is generally protected from actions by the person held; but the detaining of a person on admission only should be for not longer than a reasonable period of time.

JAMES G. FROST
Assistant Attorney General

March 27, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Additional Contributions

We have your memo of March 20, 1952, in regard to Section 14, subsection I, paragraph C. of the Retirement Law, which provides that a member of the Retirement System may make additional contributions over and above the normal rate of contribution, by virtue of which he will be provided with a retirement allowance, so far as his annuity is concerned, of more than he would otherwise be granted, provided it does not develop a total retirement allowance in excess of one-half of his average final compensation at age 65.

You ask the following question: "In the event that he should be granted a refund of such additional contributions, is it your opinion that the law requires that he should be paid not less than ¾ of the total accumulated interest on such additional contributions, this being the basic provision of the law with reference to regular contributions?"

Stated in a different way, your question might be: "Are these additional contributions or deposits to be considered and handled in the same manner as the normal rate of contribution?"

This question seems to be answered by the last sentence of paragraph C., which states:

> "Such additional amounts so deposited shall become a part of his accumulated contributions except in the case of disability retirement, when they shall be treated as excess contributions returnable to the member as an annuity of equivalent actuarial value."

It follows that if such redeposited or additional contribution becomes a part of his accumulated contributions, then under Section 9, when a member ceases to be an employee except by death or by retirement, then he should be paid in addition to the amount of his contribution an amount not less than 3/4 of accumulated regular interest on that fund.

JAMES G. FROST
Assistant Attorney General

March 27, 1952

To Roland H. Cobb, Commissioner, Inland Fisheries and Game
Re: Licenses-Families of Servicemen Stationed in Maine

We have your memo of March 24, with attached letter from the Commanding Officer of the U. S. Naval Air Station, Brunswick, Maine.

The question apparently raised by him is whether or not dependents of servicemen are eligible to receive hunting licenses at the resident license fee.

Section 32, paragraph XI, provides that a license to hunt or fish shall be issued at the resident license fee to any member of the Armed Forces of the United States of America who is a citizen of the United States and stationed at some military or naval post, station or base within the State. It is quite clear that this privilege is granted only to a member of the Armed Forces and has not been extended to include members of his family.

As you have suggested to the Commanding Officer, if it be the intent of the legislature to extend this privilege to the members of a serviceman's family, then it would have to be amended by the incoming legislature to that effect.

JAMES G. FROST
Assistant Attorney General

March 31, 1952

To Howell G. Cutter, Supervising Inspector, Labor and Industry
Re: Elevator Inspection and Certificate Fees

In your memo of March 31, 1952, you state that under the provisions of Chapter 374 of the Public Laws of 1949 your department has been inspecting all uninsured State-owned elevators, as required by Section 99-H, and that departments for which inspections had been made were billed. The bill was for the amount of the inspection fee and the certificate fee.

You further state that you are in receipt of a letter dated March 27, 1952, from the Department of Public Buildings, in which it is stated that an opinion by Ralph Farris addressed to David Soule, dated March 25, 1949, relative to the charges for inspection from one department to another prohibits the inspecting department from charging the other department for such inspections. You then ask:

"Are the various state departments exempt from the inspection and certificate fees provided by the law based on the opinion expressed in the letter of March 25th, 1949 from the Attorney General's Department to the Insurance Commissioner?"

The above mentioned opinion dated March 25, 1949, was addressed to the Insurance Commissioner and was directed to an interpretation of the insurance laws, more particularly Section 29 of Chapter 85, R. S., as amended by Section 8 of Chapter 188 of the Public Laws of 1947. This section set up a procedure whereby the various insurance companies doing business or collecting premiums or assessments in the State of Maine should pay to the State Tax Assessor, in addition to taxes, an amount equalling 1/2 of 1% of the gross direct premiums for fire risks written in the State during the preceding calendar year. It was further provided that such funds should be used solely to defray the expenses of investigations and inspections and rules and regulations to be administered by the Insurance Department. These laws, in effect, provided a fund to be used for inspection purposes.

Mr. Farris's opinion merely stated that the cost of inspections provided for under that section, for which a fund had been set up by the legislature, were to be defrayed from said fund and, such cost having been provided for, that it would be improper to demand reimbursement from another department, even though a condition precedent to the issuing of a license by the second department was an inspection by the Insurance Department.

Mr. Farris's opinion cannot be construed to mean that every department shall be free from costs necessitated by investigations by another department,

but must be confined strictly to the sections of the law being considered in that opinion.

Our answer to your question is in the negative.

JAMES G. FROST
Assistant Attorney General

March 31, 1952

To Fred L. Kenney, Director of Finance, Department of Education
Re: Subsidies - Part-time Positions

. . . For the purposes of administering the subsidy sections of Chapter 37, R. S., the definitions contained in Section 197 of that chapter have been pertinent. Among those definitions the term "teaching positions" is defined and states that the term excludes any such position which is filled by a person devoting less than half of the school day to the duties of such position. As a result of this definition it has been the policy of your department not to allocate subsidies authorized by Sections 195 et seq. for teachers who were working in positions that were less than half-time.

The 1951 Legislature repealed Sections 201-204, inclusive, all sections relating to State school funds, and enacted the "general purpose educational aid" section. This section, seen as Section 201 of Chapter 37, R. S., provides that the State shall appropriate to the municipalities a sum which is a certain percentage of the State valuation per resident pupil.

You make the following pertinent remarks relative to the newly enacted Section 201:

"(1) the Legislature did not mention 'less than one-half time teachers' when it enumerated the several exemptions

"(2) the term 'teaching positions' is not specifically referred to

"(3) we have a very similar situation in allowing substitute teachers to work on less than half time basis and permit their salaries to be subsidized

"(4) Chapter 386 permits the State Board of Education to make reasonable regulations for carrying out the provisions of this General Purpose Aid computation, and

"(5) it states specifically that '. . . It is the intent of the legislature that the 1951 allocations be made under the provisions of law as they existed prior to the effective date of this section.' "

It is our opinion that the newly enacted Section 201, entitled "General Purpose Education Aid", revamps completely the manner in which education is to be subsidized. The term "teaching positions" is to be found nowhere in the new section.

One paragraph of the new Act provides that only certified teachers shall be employed and sets a minimum salary to be paid such certified teachers. The concluding sentence of that paragraph reads as follows:

> "Any city, town, plantation or community school district which fails to comply with any of these conditions shall have deducted from its apportionment a sum equal to twice that by which it is delinquent."

You then ask the following question: "Must I apply the penalty of deducting salaries paid to teachers working less than half time in computing the next biennial computation for subsidy payments to municipalities in December 1953 and 1954?"

It is the opinion of this office that this paragraph really sets up the minimum salary for a certified teacher. The sentence quoted penalizes cities and towns which employ teachers who are not properly qualified and pay them less than the minimum salary. The fact that a teacher is employed at half-time or less does not authorize an amount to be deducted from the apportionment. If that teacher is paid in proportion an amount that would comply with the minimum salary, then no such penalty is authorized.

JAMES G. FROST
Assistant Attorney General

April 4, 1952

To Julius Greenstein, Chairman, Boxing Commission
Re: Imposition of Fines

You have requested this office to give an opinion as to whether or not the Commission may, in addition to suspending or revoking a license, or in lieu thereof, impose a penalty in the way of a fine for violation of the rules and regulations of the Commission.

Board and Commissions may exercise only those powers delegated to them by the legislature. The statutes relative to your Commission give no permission to impose fines.

The general rule is that under our Constitutions the power to fine is a judicial power and cannot be reposed in administrative tribunals, with the one exception that where permitted by the Constitution a fine may be imposed for contempt in violation of administrative orders.

It is our opinion, therefore, that your Commission may not impose a fine for violation of your laws, rules, or regulations.

JAMES G. FROST
Assistant Attorney General

April 4, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Participating Local Districts

This office is in receipt of your memo of March 27, 1952, in which you recall to mind our conversation of recent date relative to local participating districts.

Your office has prepared in mimeographed form condensations of the laws passed by the 1951 legislature amending Chapter 60 of the Revised Statutes of 1944. You state in this mimeographed form, which you distributed to participating local districts:

"In the absence of any specific provision to the contrary, we believe it to be the right of any Participating Local District already in the System to elect or reject any or all of the new amendments to the law."

Chapter 60 of the Revised Statutes was revised by Chapter 384 of the Public Laws of 1947. By virtue of the provisions of Chapter 60 it was provided that any county, city or town might participate in the benefits extended by the chapter. The revised law was amended to include other quasi-municipal corporations of the State and stated that any county, city, town, water district, or other quasi-municipal corporation which on July 1, 1947, was a participating local district under the provisions of Section 15 of Chapter 60 of the Revised Statutes of 1944 shall be subject to the provisions of Chapter 384 of the Public Laws of 1947 unless it otherwise chose to remain under the provisions granted by Section 15 of Chapter 60 of the Revised Statutes.

On August 5, 1947, in an opinion addressed to you from Ralph W. Farris it was stated that any local district which was in the System as of July 1, 1947, might continue to operate under the original provisions of Chapter 60 of the Revised Statutes of 1944 or it might elect to take on any or all of the benefits and privileges as indicated in Section 22 of Chapter 384 of the Public Laws of 1947. Doubtless your understanding that participating local districts in the System might elect or reject any or all of the new amendments to the law was based on the above mentioned opinion.

Section 16 of Chapter 384 of the Public Laws of 1947 states that these political subdivisions of the State may participate in the Retirement System, provided the appropriate body of that political subdivision approves such participation and files with the Board of Trustees a certified copy of the resolution of the appropriate body approving such participation *and the extent of the benefits which shall apply.*

The above underlined phrase of Section 16 remains unchanged today and we are of the opinion that any political subdivision eligible to participate in the Maine Retirement System, which did not elect to remain under the provisions of Chapter 60 of the Revised Statutes of 1944 still has the right to elect the benefits which shall apply to it.

It is our opinion that the provisions of the 1951 amendments do not apply to participating local districts in the System on the effective date of said amendment, when those districts have elected to remain under the provisions of Chapter 60 of the Revised Statutes of 1944, as distinguished from the provisions of Chapter 384 of the Public Laws of 1947.

JAMES G. FROST
Assistant Attorney General

April 14, 1952

To Honorable Frederick G. Payne, Governor of Maine
Re: Powers of the Governor *in re* Strikes

Answering your recent request about the provisions of statute having to do with the powers of the Governor in case of strikes, it would appear that the following are pertinent:

"In case of insurrection, invasion, tumult, riot, mob, or body of men acting together by force with intent to commit a felony, or to offer violence to persons or property, or by force and violence to break and resist the laws of this state or the United States, or of imminent danger thereof, or in the event of public disaster resulting from flood, conflagration, or tempests, the governor shall have the power to order into active service of the state or in aid of any civil authority the national guard or other authorized state military or naval forces or any part thereof that he may deem proper." (Ch. 12, § 2, R. S.)

Section 10 of Chapter 123 provides:

"When persons, riotously or unlawfully assembled as described in section 9, neglect or refuse, on command . . to disperse without unnecessary delay, any 2 of the officers (named in section 9) may require the aid of a sufficient number of persons in arms or otherwise, and may proceed in such manner as they judge expedient to suppress such riotous assembly, and to arrest and secure the persons composing it: and when an armed force is thus called out, it shall obey the orders, for suppressing such assembly and arresting and securing the persons composing it, which it receives from the governor. . ."

Section 11 of Chapter 25, R. S., provides:

"Whenever it appears to the mayor of a city or the selectmen of a town or any citizen of the state directly involved. . that a strike is seriously threatened, or a strike actually occurs, he or they shall at once notify the state board of arbitration and conciliation and such notification may also be given by the employer or employees actually concerned in the dispute, strike or lockout. If, when such strike is threatened or actually occurs, it appears that as many as 10 employees are directly concerned therein, the state board of arbitration and conciliation shall, and in any case may, as soon as may be, communicate with such employer and employees and endeavor by mediation to obtain an amicable settlement or endeavor to persuade such employer and employees to submit the matter in controversy lockout, or their proper representatives, agree to abide by the decision of the board to which it is submitted, said board shall investigate such controversy and ascertain which party is mainly responsible or blameworthy for the existence of the same, and the board may make and publish a report finding such cause and assigning such responsibility or blame. The state board shall, upon request of the governor, investigate and report upon any controversy if in his opinion it threatens to affect the public welfare."

These sections of the statutes appear to be the ones which are particularly pertinent to the subject in hand.

NEAL A. DONAHUE
Assistant Attorney General

April 22, 1952

To Ernest H. Johnson, State Tax Assessor
Re: Credit for State Tax in Unorganized Townships

This will acknowledge receipt of your memo of April 14, 1952, relative to Chapter 213 of the Private and Special Laws of 1951. You are concerned with an interpretation of the last paragraph of Section 5 of said chapter:

> "The sum so collected for the year 1952 from each township and each lot or parcel of land not included in any township in the state shall be disbursed by the treasurer of state to each township and each lot or parcel of land not included in any township which are assessed for school or highway purposes in an amount not to exceed 3/4 of the amount assessed for school and highway purposes and shall be credited to such purposes."

You ask: "Can the Bureau of Taxation take into consideration the credit to be applied against road and school taxes in unorganized townships for the current year and bill taxpayers for the net amount of tax due?"

It appears that section 5 contemplates distribution of at least a portion of the state tax to all the cities, towns, plantations and townships in the state.

The possible difficulty entailed in refunding sums to individuals in an unorganized township, combined with the phrase, "and shall be credited to such purposes", contained in the last paragraph of section 5, leads us to the conclusion that your question may be answered in the affirmative.

It would seem to this office that credit to be applied during the current year, billing the taxpayers of an unorganized township for the net amount of the tax due would be consistent with the legislative intent to effect a reduction of real estate taxes (state) upon the passing of the sales and use tax bill.

The method to be used by your office in carrying out the intent of this act appears to present an administrative problem, and in so far as your formula is not inconsistent with the intent of this act it has the approval of this office.

JAMES G. FROST
Deputy Attorney General

April 25, 1952

To Honorable Frederick G. Payne, Governor of Maine
Re: Land Sale

. . . The law appears to be that lands owned by the State not necessary for State purposes can be sold either to a particular person or to the highest bidder for a fixed or minimum price after a legislative Resolve to permit the same, containing the description of the premises, who shall execute the deed, and the application of the consideration to be received. The State Tax Assessor is sometimes designated as the person to execute the conveyance so authorized by Resolve. . .

NEAL A. DONAHUE
Assistant Attorney General

April 29, 1952

To Fred M. Berry, State Auditor

Re: Interpretation of "Properly Avouched"

This office is in receipt of your memo relative to an interpretation of section 25 of Chapter 37 of the Revised Statutes of 1944, which reads as follows:

> "No money appropriated by law for public schools shall be paid from the treasury of any town except upon written order of its municipal officers; and no such order shall be drawn by said officers except upon presentation of a properly avouched bill of items, said bill of items having first been approved by a majority of the members of the superintending school committee and certified by the superintendent of schools."

In answer to your question whether the law permits the selectmen to authorize payment of bills as submitted by the school board on a roll of accounts without substantiating these charges with orginal invoices, it is our opinion that a properly avouched bill of items would be either the original invoices or a certified copy of the original invoices.

JAMES G. FROST
Deputy Attorney General

April 30, 1952

To W. Earle Bradbury, Deputy Commissioner, Inland Fisheries and Game

Re: Certain Expenditures from Dedicated Revenue

This will acknowledge your memo of April 22, 1952, relative to the interpretation of paragraph 10 of Section 63 of Chapter 33 and Section 110 of that chapter of the Revised Statutes of 1944. The latter provides:

> "All fees, fines and penalties recovered and money received or collected shall be paid to the treasurer of state and credited to the department of inland fisheries and game for the operation of fish hatcheries and feeding stations for fish, for the protection of fish, game and birds, and for printing the report of said commissioner and other expenses incident to the administration of said department, and shall be expended by the said commissioner for the purposes for which said department is created."

You ask: "Can a portion of the funds received under the two sections quoted above legally be expended for 'Educational Purposes' so-called or Public Relations and Publicity?"

Consideration of the definition of the term "administration" is necessary in answering your question. The word "administration" means managing or conducting an office or employment; performance of the executive duties of an institution, business or the like. Administration of a department is analagous to administration of statutes, and regardless of desirability, activities which are not reasonably to be classed as a cost of administration are not permissible.

In the case of a department of the State of Maine, "other expenses incident to the administration of said department" means expenses incurred in managing the department in such a way that it will function within the statutes and in a direction leading ultimately to the aims of the statutes relating to that

department. Thus, expenditures by a department for a purpose outside the sphere of its activity, as delineated by the statute would be improper. By our interpretation, the phrase, "and other expenses incident to the administration of said department," might read: "incident to the *managing in a manner not inconsistent with the statutes relating to* said department."

It is our opinion, applying the principles above stated, that any extended educational program including the accompanying public relations and publicity over and beyond the accompanying public contact customarily engaged in by a department of the State must first receive the approval of the legislature.

Our attention has not been directed to, nor have we been able to find, any provision in Chapter 33 which would permit of a full-time educational service.

JAMES G. FROST
Assistant Attorney General

May 2, 1952

To H. B. Peirson, State Entomologist
Re: Tree Surgery Licenses

This office has your memo of April 24, 1952, relative to Sections 51 and 52 of Chapter 32 of the Revised Statutes, especially:

> ". . and may be renewed by the board for succeeding years without further examination, upon payment of the fee hereinafter required, provided any person, firm or corporation receiving such certificate shall be responsible for the acts of all employees in the performance of such work."

You state that if an applicant has dropped his license to go into other work and has applied within a two or three year period for his renewal, your Board feels that it may issue the renewal certificate upon requiring the applicant to pay back fees over the years for which he held no license, without taking another examination. You ask if this is a proper procedure under the law.

The rules and regulations promulgated by your Board provide that if application is made within one month following the expiration date of a certificate, a demit covering a period of two years may be issued without charge, entitling the holder to obtain a renewal certificate for one year upon the payment of the regular $3. fee; and again at the discretion of the Board an applicant whose license has expired may be permitted to pay for the intervening years and thus be granted a renewal certificate without examination.

The authority to make rules and regulations is a delegation of authority from the legislature to particular administrative authorities. This power has never been considered a power to make law, but a power to carry into effect the law of the lawmaker as expressed by statute. Delegation of power cannot be extended to the making of rules which subvert the statute reposing such power or which are contrary to existing laws or which repeal or abrogate statutes.

You will note that the above quoted phrase from Section 52 of Chapter 32 provides that the license may be renewed by the Board for the succeeding years. Applying the general rule with regard to power to promulgate rules and

regulations we must conclude that demits or the granting of renewals on payment of fees for years in which no license has been held is contra to the sentence which reads that the certificate "may be renewed by the board for succeeding years." The term "succeeding" means the next regular or subsequent term, in this case, year. It is therefore our opinion that renewals must be granted for "succeeding" years and that when a person does not hold a license for a period of a year or longer he must be required under your law to submit to another examination.

We recommend that, if you desire to continue the practice of granting renewals in the event an applicant has been without a license for not more than two or three years, this privilege be granted in your law by the next legislature.

JAMES G. FROST
Deputy Attorney General

May 7, 1952

To Harry E. Henderson, Deputy Treasurer of State
Re: Attestation of Signature of Treasurer of State on Certain Bonds

We have your memo of April 29, 1952, in which you state that in so far as registered bonds are concerned the attesting officer is the Finance Commissioner and in which you ask who is the proper person to attest the signature of the Treasurer of State on unregistered bonds.

There is no doubt that the Finance Commissioner is the proper person to attest the signature of the Treasurer of State on registered bonds. With respect to unregistered bonds we have found no statute which provides for signatures on such bonds. There being no statute regulating the signatures on unregistered bonds, we feel that in the Council Order authorizing and empowering the Treasurer of State to issue bonds there should also be a provision authorizing the signatures to be affixed to the bonds. In other words, there should be a paragraph in the Council Order stating that such bonds shall be signed by: 1) The Governor; 2) the Treasurer of State; and 3) attested by either the Auditor or the Finance Commissioner. We feel that there should be some authorization for such signatures, and in the absence of any authorization by statute that it should be by order of the Governor and Council. A choice should be made between the Auditor and the Finance Commissioner, and in view of the statute relative to registered bonds we feel that the Finance Commissioner is a proper person to attest the signature of the Treasurer of State on unregistered bonds.

JAMES G. FROST
Deputy Attorney General

May 7, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Liability – Swan Island

This office has received your communication inquiring as to the State's liability in case of accident to visitors to Swan Island. You state that you have

to ferry them across the river in your boats and take them over the island, using a pickup truck, and you inquire what the State's liability would be in the event an accident occurs during such transportation or during such time as a party happen to be staying there over night.

The general rule is that the State can sustain liability only by reason of a contractual obligation. Otherwise the State is not liable for the tortious acts of its officers, unless the State assumes such liability through statutes. The State is immune from suit by private citizens, as likewise are its agencies and instrumentalities. Briefly, in the absence of a contract and in the absence of a statute by which the State might assume liability, the State has no liability with respect to accidents which might occur en route to or while visitors are on Swan Island. This rule does not, of course, apply to individuals in State employ who may be responsible for such accidents. An individual himself may be liable under the same rules as would a private individual in the same circumstances.

JAMES G. FROST
Deputy Attorney General

May 8, 1952

To Harland A. Ladd, Commissioner of Education

Re: Five-year Limit on Certain Credits

Section 201, as revised, of Chapter 37, R. S. 1944, provides in part that the renewal of each teaching certificate shall be conditional upon the completion of at least six semester hours of professional study within each period of five years. Contained in the same section is a paragraph stating:

> "Subject to the foregoing provisions of this section, the state board of education may make such reasonable regulations as are deemed necessary for carrying out the purposes and provisions of this section."

You ask if the State Board of Education may legally and properly effect a regulation which would give a year of grace by authorizing certification under a special license in hardship cases involving hospitalization, illness, or critical family circumstances which make it virtually impossible for the teacher to attend a summer session or to participate otherwise in formal study for credits.

It is the opinion of this office that such a regulation is not permitted under the wording of the above quoted requirement. The teacher is given a period of five years within which he or she shall acquire six semester hours of professional study; and a reading of this section shows that it is a mandatory condition and the period should not be extended beyond the five years.

Rules and regulations are permitted to be made under the theory that the legislature is delegating that authority; but such rules and regulations must be within the intent of the statute and not inconsistent with it. It may be that consideration will show that this statute is unduly strict, in which case you may believe it necessary to present it to the next legislature for amendment.

However, the intent of this provision is plain and we feel that rules and regulations which would extend the privilege in certain cases to go beyond five years would not be a proper use of the delegated power.

JAMES G. FROST
Deputy Attorney General

May 8, 1952

To Harland A. Ladd, Commissioner of Education
Re: Powers of Superintending School Committee

You ask if either paragraph V of section 50 of Chapter 37 or section 80 of that chapter will permit a superintending school committee, as a matter of policy, legally and properly to exclude from school, at least for the remainder of a school year, those students who marry while less than 21 years of age and who are regularly enrolled in a program of free public education.

It is the opinion of this office that such action is not permitted under either of the above mentioned sections and would, in fact, be repugnant to public policy, in that the courts have always frowned upon any action which might be construed as restraining marriage after the party has reached a legal marriageable age, where no immorality or misconduct is present.

JAMES G. FROST
Deputy Attorney General

May 13, 1952

To Col. Francis J. McCabe, Chief, Maine State Police
Re: State Police Reserve Corps

It is the opinion of this office that members of the Reserve Corps enlisted as volunteers and not on any payroll of the State would not be protected by the Workmen's Compensation Act in such employment.

If a member is disabled or injured during active service and on a payroll, he would be entitled to benefits under the Workmen's Compensation Act in case of injury by accident.

NEAL A. DONAHUE
Assistant Attorney General

May 16, 1952

To Roland H. Cobb, Commissioner, Inland Fisheries and Game
Re: Fencing of Fur Farms

We have your memo of May 1, 1952, relative to the sixth paragraph of section 11 of Chapter 33 of the Revised Statutes.

This paragraph provides that the commissioner may issue permits to any person, firm or corporation to engage in the business of propagating game birds, game or wild animals under such regulations as he shall establish. It further provides that the commissioners may issue to any person, firm or corporation permits to fence in or enclose land for *the above named purpose.*

You ask this office, "Should such a Fur Farm be enclosed by the type of fence which would hold the animals in, and keep other animals out, or would a single wire be considered sufficient for the boundaries of such a Fur Farm?"

Used as a noun, "fence" is an enclosing barrier about a field or other place or about any object, especially an enclosing structure of wood, iron or other

material intended to prevent intrusion from without or straying from within. To fence in or enclose would mean to construct the above mentioned type of fence.

It would seem from a reading of the statute that the fence or enclosure is for the purpose of aiding in the propagating of game birds, game or wild animals, and that the only proper fence for such a purpose would be one designed to keep those game birds, game or wild animals which are being propagated within the enclosure, thereby preventing their escape and possible damage to adjoining properties and also to keep other animals out.

JAMES G. FROST
Deputy Attorney General

May 16, 1952

To Harold A. Pooler, M. D., Superintendent, Bangor State Hospital
Re: Conveyance of property belonging to husband of inmate

This office is in receipt of your letter of May 8, 1952, relative to a deed sent to an inmate of your institution to be signed by her so that her husband can convey certain portions of his property. You ask if this office would be willing to have her sign the deed and return it to his attorney.

Please be advised that by statute she has a right and interest by descent in estates owned by her husband, which right and interest by descent may be barred by her joining in the same or a subsequent deed conveying that property. It is the opinion of this office that you should permit her to sign such a deed only in a strict condition that the value of one-third of the property, which is in her by right and which she would be eligible to on his death, would be put in trust for her support and maintenance under such terms as are agreeable to you. Such a trust should be an irrevocable trust and not capable of being modified by her husband at a later date.

JAMES G. FROST
Deputy Attorney General

May 19, 1952

To Harland A. Ladd, Commissioner of Education
Re: Official Records, Superintending School Committees

We have your memo of May 1, 1952, in which you ask this department two questions:—

1. Are the official minutes of a superintending school committee in the nature of public records?

2. If the answer to this inquiry is in the affirmative, should such records, or certified copies thereof, be available to a citizen or citizens who may have reasonable purposes for wishing to review the recorded actions of the said committee?

The answer to both these questions is in the affirmative.

A public record is one required by law to be kept or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done. Among records generally regarded as public records are the books of record of the transactions of towns, city councils, and other municipal bodies.

In considering whether or not the records of superintending school committees come within the above definition we find that under section 78, paragraph I the superintendent shall be *ex officio* the secretary of the superintending school committee, and under the second paragraph of that section the superintendent shall keep a permanent record of all its votes, orders and proceedings.

The superintending school committee being a public or municipal body and its records being required by law to be kept, it is our opinion, as above stated, that such records are public records and should be open to inspection by citizens for reasonable purposes and during reasonable times.

JAMES G. FROST
Deputy Attorney General

May 26, 1952

To the Acting Judge Advocate, Presque Isle Air Force Base
Re: Georgia Registrations on Automobiles

This office is in receipt of your letter relative to persons of your command who are using Georgia registrations. We have considered your problem very carefully and consulted with the Deputy Secretary of State and the Chief of the Maine State Police. We do find that the personnel attached to several of the Army and Naval Bases in Maine have abused registration privileges both of this State and of the State of Georgia. There are many instances where bona fide residents of the State of Maine, residents by virtue of our laws and residents under the intent of the Soldiers' and Sailors' Relief Act, have been found purchasing Georgia licenses, and these persons, we feel, we would have every legal right to penalize.

In order that you may fully understand our interpretation of the laws, we state: 1) that any bona fide resident of the State of Georgia may use Georgia registrations on his automobile while in the State of Maine until such time as the registration expires. We feel, further, that he has the right and duty to obtain new registration from the State of Georgia. 2) We feel that residents of States other than Georgia, having registrations from their home States, may, if stationed in Georgia as Army or Navy personnel, use such registrations until expiration and if their home registrations expire while they are stationed in Georgia and they at that time secure Georgia registrations, they may use such registrations while later stationed in Maine until the registrations expire. We feel, however, that such a person, being a resident of a State other than Georgia, should upon expiration of the Georgia registration, apply to the State of which he is a bona fide resident for new registration.

These conclusions are concurred in by this department, by the Secretary of State, and by the State Police. We do think that these conclusions are within

the intent of our statutes and within the intent of the Soldiers' and Sailors' Relief Act. This Act, briefly, provides that soldiers do not lose their residence or domicile solely by being absent therefrom in compliance with military or naval orders. A soldier is not deemed to have acquired a residence or domicile in or to have become a resident of another State while and solely by reason of being so absent; but the Act contemplates that, with respect to automobiles the license fee or excise required by the State, Territory, or Possession of which he is a resident or in which he is domiciled, has been paid.

We sincerely hope that these answers have been helpful to you and we should like to hear from you in the event that you disagree with this letter.

JAMES G. FROST
Deputy Attorney General

May 26, 1952

To Harland A. Ladd, Commissioner of Education
Re: Six-hour Credits

This office has been asked if our opinion of May 8, 1952, relative to Section 201 of Chapter 37, R. S. 1944, can be interpreted to mean that teachers who do not acquire six semester hours of study within each period of five years are precluded from teaching in the schools of the State of Maine.

Relative to this question it appears that there are several different permits granted teachers in this State, ranging from a certificate to substandard teaching permits. Our opinion of May 8th merely states that the five-year period required in Section 201 cannot be extended further; that is, a year of grace may not be granted in hardship cases. Such a decision does not preclude teachers from being granted substandard permits until such time as they have fulfilled the requirements of Section 201 relative to obtaining another certificate by virtue of their having completed certain educational requirements.

JAMES G. FROST
Deputy Attorney General

June 3, 1952

To Allan L. Robbins, Warden
Re: Anthony Rockford

You request me to advise you respecting your letter dated May 29, 1952, with regard to a writ of habeas corpus issued by a Federal judge in Massachusetts in order to bring a prisoner from Thomaston to a special grand jury hearing to be held in Boston on June 5th.

The United States Code, Title 28, 2241, gives the power to issue writs of habeas corpus to any Federal judge, Supreme, Circuit, or District. The statute provides that no writ of habeas corpus shall be issued respecting a prisoner except in five enumerated cases. The first four relate to prisoners in Federal courts, those in custody for violating Federal law, those in custody for violating the Federal Constitution or a treaty, and foreign citizens claiming right or authority under the law of foreign states and the law of nations.

The fifth subdivision reads:

"(5) It is necessary to bring him into court to testify or for trial."

I have telephoned the Hon. Edward Harrigan, Assistant District Attorney, who advises me that the writ in question is a habeas corpus ad testificandum. The writ is directed to three persons, according to Mr. Harrigan — the Marshal in Massachusetts, the Marshal in Maine, and the Warden of the Thomaston Prison. The Warden is directed to turn the prisoner over to the Maine Marshal, who is directed to turn him over to the Massachusetts Marshal. The Massachusetts Marshal is directed to produce him before the Grand Jury in order that he may testify. After the testimony is given, the writ directs the Massachusetts Marshal to turn the prisoner over to the Maine Marshal who, in turn, is directed to return the prisoner to the State Prison.

I find no case involving the conflict between Federal and State jurisdictions in the matter of a writ ad testificandum. Having made independent search, I note that the editor of Annotated Cases 1915 D. 1028 also notes no decision regarding the power of a State to decline to obey such a writ.

Initially, the writ is issued as a matter of discretion. *In re Thaw*, 1908, 172 Fed. 288. In this case the judge declined to issue a writ of habeas corpus ad testificandum to the superintendent of the New York State Hospital for the criminal insane to produce the body of Harry K. Thaw in order that Mr. Thaw might testify in a bankruptcy proceeding. The court found it had power to issue the writ but declined to issue it since it appeared that Thaw's deposition would do just as well.

Chief Justice Marshall considered such a writ as early as 1807 in *Ex Parte Bollman v. Swartout*, 4 Cranch 97. He said, *obiter*,

> "This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of congress. . ."

Respecting the responsibility of the marshal having the prisoner in charge, there seems no question to some of the judges that the writ of habeas corpus ad testificandum is for the extremely limited purpose of getting the prisoner into court where he is to testify and that afterward the prisoner is to be returned in accordance with the wording of the writ. *U. S. Ex rel. Marsino v. Anderson*, 1927, 18 Fed. 2d. 133. Here the prisoner was taken from a Federal penitentiary to Illinois in order to testify in a bankruptcy proceeding. While he was there his prison term expired. He had been convicted in Massachusetts and was due there to serve a term under the State law. Being out on the writ of habeas corpus ad testificandum, he sought to have the writ amended so that he would not have to return to the Federal penitentiary. Nevertheless, the court held that he must return to the Federal prison. The court further stated that whether, by good behavior, he was then entitled to be released is a matter for the prison authorities. The court indicated regret that not all the facts had been known when the writ was framed. The court clearly stated that the writ may not be used to prevent justice.

It is my opinion that the Warden of our State Prison should honor the writ of habeas corpus. All he is doing in effect is to permit the taking effect of Federal process. The writ takes the place of an ordinary subpoena. The Federal court via its marshals will have absolute responsibility for the safety and

custody of the prisoner. It is the responsibility of the United States Marshals to return the prisoner.

ALEXANDER A. LaFLEUR
Attorney General

June 9, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Beaver Damage

You have asked this office what action a warden can take to eliminate beaver from those areas in which they are causing damage. You state that their activity floods roads and fields where people raise meadow hay, and ask if it is possible for the wardens to trap or shoot beaver when they are doing such damage.

Section 100 of Chapter 33 is that section relating generally to beaver, and the fifth paragraph of subsection III thereof states that no person shall take beaver anywhere in the state at any time except during such open season as may be declared by the commissioner in accordance with the provisions of this section.

Section 84, subsection II provides that under certain conditions set out in the first paragraph of 84 any protected wild animal *except* beaver, or birds may be killed by the owner or keeper of the property mentioned in subsection I. Subsection I, however, states that such animal may not be killed when the only damage done is to grass.

It is therefore the opinion of this office that special legislation must be enacted before you can move in the direction of eliminating beaver which are causing damage to hay.

JAMES G. FROST
Deputy Attorney General

June 9, 1952

To Fred M. Berry, State Auditor
Re: Extension of Credit

This office is in receipt of your memo requesting the opinion of this office relative to the legality of the extension of credit by State agencies in instances where sales of material or services are involved. You draw our attention to a memo dated November 25, 1949, written by the former Attorney General, Ralph W. Farris, in which he stated that he was of the opinion that the State Prison did not have authority to do a credit business.

It is the opinion of this office that the memo of Mr. Farris in 1949 relates not only to the State Prison, but is the general rule with respect to all State departments. We can find no general law authorizing a State department to extend credit for the sale of materials or for services, and we feel that such extension of credit is in reality an extension of the credit of the person authorizing such credit.

This opinion does not in any way affect the rights of certain institutions to continue functioning under their statutes, which may permit instalment paying for board and room.

JAMES G. FROST
Deputy Attorney General

June 9, 1952

To Clyde N. Manwell, Park Planner
Re: Fire Insurance on Buildings under Construction

This will acknowledge receipt of your memo of May 22, 1952, to which you attached a paragraph from your standard specifications covering the contractor's responsibility for work. You state that it is your opinion that this paragraph protects you with respect to fire coverage while buildings are under construction.

The paragraph referred to reads in part as follows:

"Until final acceptance of the work by the Engineer, it shall be under the charge and care of the Contractor, and he shall take every necessary precaution against injury or damage to the work by the action of the elements, or from any other cause whatsoever. . . The Contractor shall bear all losses resulting to him on account of the amount or character of the work . . . or on account of the weather, elements, or other causes. . ."

"Injury or damage by the action of the elements" is a somewhat uncertain expression. Injuries to buildings by wind, rain, frost and heat are spoken of as injuries by the elements, but courts have stated that unless fire is caused by lightning or other superhuman agency, then the injury is not within the meaning of "element".

It is the opinion of this office that to protect such property properly, the provision should be expressly stated in the specifications. Paragraph 11 does not adequately protect the State, in that there is no positive provision placing the liability upon the contractor in the event the building is consumed by fire resulting from causes other than an "Act of God".

While you are perhaps right in your opinion that you are covered by this paragraph, in that we feel that a court of law would so interpret paragraph 11, we also feel that the burden is upon the State to provide expressly for such fire coverage, because suit should not be necessary in order to interpret the provisions of our contracts.

We would therefore recommend that a provision be inserted in paragraph 11 expressly placing the liability upon the contractor in case fire should consume or damage the building prior to the time it is completed.

JAMES G. FROST
Deputy Attorney General

June 10, 1952

To Marion B. Stubbs, State Librarian
Re: Files of the State Paper

This will acknowledge your memo of May 21, 1952, in which you state

that the law provides that the Kennebec Journal "shall be the state paper," and ask if from a legal point of view you should keep the original printed editions of the state paper when you have microfilmed reproductions.

We can find no express provisions authorizing the destruction of such paper, it not being classified as a record of your department. We are of the opinion that before such paper is destroyed there should be legislative approval.

We draw your attention to Chapter 91 of the Public Laws of 1951, relating to the old records of any State department, which authorizes the destruction of such records, if they are valuable, provided they have been photographed or microfilmed. We feel that similar authority should be granted with respect to the "state paper".

JAMES G. FROST
Deputy Attorney General

June 18, 1952

To Honorable George D. Varney
Re: Turnpike Employees – Retirement

This will acknowledge receipt of your letter of June 17, 1952, in which you inquire as to the eligibility of the Maine Turnpike to join the Maine Retirement System.

In response to your question, please be advised that we are of the opinion that the Maine Turnpike has all the attributes of a "quasi-municipal corporation" and may join the Maine Retirement System.

This opinion is based upon a complete reading of Chapter 69 of the Private and Special Laws of 1941, particularly sections 4 and 18.

ALEXANDER A. LaFLEUR
Attorney General

June 20, 1952

To Robert L. Dow, Commissioner of Sea and Shore Fisheries
Re: Alewife Fishery in Newcastle

This office is in receipt of your memo of June 6, 1952. You state that presently the towns of Newcastle and Nobleboro share exclusive rights to the alewife fishery at Damariscotta Mills on the Damariscotta River. You also state that the Town of Newcastle wishes to construct a fishway at Sherman Lake, which is a part of the Sheepscot River watershed and wholly within the Town of Newcastle, and that the Town of Newcastle wishes to keep to itself the exclusive alewife fishery rights with respect to this new development. The question has been asked if the law with respect to the Damariscotta River is broad enough to permit this proposed development at Sherman Lake.

The answer to this is, No.

So far as this office can ascertain, the Damariscotta River and the Sheepscot River are distinct bodies, and legislation with respect to the Damariscotta

River does not embrace potential activity on the Sheepscot River. It is the opinion of this office that before steps can be taken in this direction legislative approval is necessary.

JAMES G. FROST
Deputy Attorney General

June 20, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Guides

. . . The Rangeley Lakes Guides Association complains that guides, after having lost their licenses to guide, are continuing to function as guides on a $1 motor-boat pilot's license. The Guides Association would like to know if you could get a ruling from this department to prevent this. . .

There seems little that can be said by this department that would prevent this situation. It is obvious that a person having a $1 motor-boat pilot's license is not authorized to be a guide. I would suggest that, in instances where such a practice is known to be carried on, the matter be presented to the County Attorney and action brought under section 119 of Chapter 33 of the Revised Statutes, which is the general penalty statute and would cover such a situation.

JAMES G. FROST
Deputy Attorney General

June 24, 1952

To Frank L. Ames, Esquire, Norridgewock

I have yours of June 12, in which you desire to have me express the reasons for the denial of the application of the Town of Norridgewock to the Maine School Building Authority.

At the outset I would like to point out to you that it was not on the advice of this office alone, that the decision was made. The problem has been discussed many times, not only in this office but with the bond counsel, Mitchell and Pershing of New York, and with counsel for the trustee bank, Judge Carroll Chaplin of Portland. There were such grave doubts as to the answer to the School District problem, that this was one of the four questions that were sent to the Justices of the Supreme Judicial Court by Governor Payne. These questions were not answered because the Justices decided that this was not a "solemn occasion". Thus, the grave doubts were still with us, and because of the serious nature of the problem and the fact that the bond issues for each town were to be "bundled" into different year groups, the Authority, on the advice of this office, as well as bond and trustee counsel, decided upon a policy of excluding from consideration any town which had a school district coterminous with the town, which it had not rejected.

It was definitely felt that to allow any town to be financed under such circumstances might jeopardize a whole issue of bonds and perhaps cast grave doubts upon the validity of the Authority's bonds. The Authority must

at all times stand clear of all possible litigation which would cast any unfavorable light upon the Authority and more specifically upon its bonds. It is one thing to issue bonds and another thing to create a market and sell them. This bond is entirely new to the field and we must go forward with extreme caution.

We are not unmindful of the wording of the Act found on page 484 of the Public Laws of 1951 that the Authority may acquire the properties of a town, a school district or community school district. This is the only reference in the entire Act to school districts. All further references are to towns or community school districts. This reference alone is not enough to allow the Authority to do business with a school district. The Authority may contract only with towns or community school districts. See Section 218, Chapter 405, Public Laws of 1951. Further, we cannot liberally construe the words of the Act to the point of doing a legal injustice to the law as it exists.

You will note that the charter of the Norridgewock School District has been amended to read as follows: "for the purpose of erecting, equipping, and maintaining on said land, school buildings, and for the purpose of maintaining elementary and high schools." See Chapter 130, Private and Special Laws of 1945. These broad general provisions delegating the power to construct and repair buildings for school purposes, raises the question, which underlies our whole theory: Did the Legislature remove the power of constructing new schools from the town itself by giving that power to a school district? The answer to this problem may be, Yes or No, but because we cannot resolve it completely one way or the other, we must, as explained above, by necessity exclude such cases from consideration.

This is not to say that you are without a remedy. The Legislature could clear up this problem with proper legislation. I cannot agree that you would have to wait ninety days after adjournment to get effective legislation, for an emergency amendment would be in order if the need is as great as your letter indicates. Until some remedial legislation is passed to clear up this situation, I feel that this office as well as bond counsel and trustee counsel, is justified in excluding from consideration those towns which have unrejected school districts, coterminous with the town.

I am sorry that this doubt has appeared and caused you and your town this delay in getting its new school. I am sure, as stated above, that this situation can be remedied.

ALEXANDER A. LaFLEUR
Attorney General

July 10, 1952

To General Spaulding Bisbee, Director, Civil Defense and Public Safety
Re: Power of Arrest

This will acknowledge your memo of June 19, 1952, and the attached letter from Martin Watson, First Vice Commander, American Legion, Veazie, Maine, who asks if there is any law that can be enforced, by which auxiliary police have the power to stop people during air raid tests.

Before answering the direct question I should like to comment on Mr. Watson's letter. Originally, the Civil Defense program is based upon a form of hierarchy extending from the Director and his Deputies to the County Director and his Deputies to the local municipalities. If Mr. Watson was attempting to stop automobiles or people under the direction of the County Director or one of his Deputies, then his problem should be presented to you through channels via the County Director. If he was not conducting this activity in conjunction with the county organization, then he should have been doing so and, again, his authority to stop should have been derived through county directions, and his questions concerning such authority should be directed to the county officers. In other words, from the wording of Mr. Watson's letter there appears to be no coordination between the local raids in which he participated and the County Directors. His letter, as a result, points out exactly the problem that would arise if auxiliary police or other people were indiscriminately given the power to arrest or otherwise enforce what they believe to be laws relating to air raids.

In answer to Mr. Watson's letter and for your advice, the problem presented is an extremely important one and should be very carefully considered before an ultimate answer is given.

Examination of the statutes involved reveals that Chapter 273 of the Public Laws of 1951 amended section 7 of the Civil Defense Act to give police sections of Mobile Reserve Battalions the power to arrest. Prior to this amendment the State Civil Defense law contained no provision with respect to powers of arrest. It is my thought that Mobile Reserve Battalions having been specifically granted the power of arrest, such power is not granted to other officers in the Civil Defense set-up. It will be noted that the power of arrest given to these battalions can be exercised only when such battalions have been called to duty upon orders of the Governor, presumably in times of emergency.

Referring to letters of my predecessor, Mr. Fessenden, I find that on May 29, 1951 he expressed his opinion relative to this problem, stating that it was his opinion that in "dry runs" there should be no actual stopping of vehicles, there being no particular purpose for such stopping, and that the placing of individuals at appropriate locations with the assignment of making a count of vehicles passing would give the necessary experience to show what problems would be in an actual emergency.

JAMES G. FROST
Deputy Attorney General

July 22, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Offer of Central Maine Power Company

You ask as to the legality of accepting a gift of money from the Central Maine Power Company to build a rearing station, such gift to be in lieu of your not requiring fishways in the Wyman Dam and also in the new dam which is being built at Indian Pond.

It is our understanding that the Central Maine Power Company is desirous that such gift may forever bar requests for fishways in the main river, across which the dam is being built.

In any event, if this information is incorrect, our answer will be the same with respect to the question as propounded by you.

There is, of course, no prohibition against your department's receiving a gift for the purpose of assisting in building a rearing station. However, a reading of the statutes relative to fishways reveals that your power with respect to requiring the construction of fishways is limited, and the conditions attached to the gift cannot be accepted by the Commissioner of Inland Fisheries and Game. Before such a gift can be accepted with the limitations mentioned in your memo and the further limitation which we understand to be attached to the gift, legislative approval must first be obtained.

JAMES G. FROST
Deputy Attorney General

July 28, 1952

To Harold I. Goss, Secretary of State

Re: "Bank" in name of corporation

You inquire whether the West Bank Oil Terminal, Inc., of New Jersey is eligible for registration as a foreign corporation to do business in this State.

Section 5 of Chapter 55 provides in effect that no company shall use the word "bank" unless duly authorized under the laws of this State or of the United States to conduct the business of a bank or trust company.

Section 5 is actually more inclusive than the preceding sentence would indicate, but this is sufficient for the purpose of this opinion.

The intent of Section 5, Chapter 55, is clearly to prevent a company not duly authorized and registered under the laws from conducting a banking business and from further enhancing its business by the use of the word "bank" or similar words.

The word "Bank" in the name, "West Bank Oil Terminal, Inc., of New Jersey," merely indicates the location of the company's plant on a particular river bank, and it is our opinion that such word cannot be construed as leading people to believe that the company is conducting a banking business.

It is therefore our opinion that the above named corporation is eligible for registration as a foreign corporation to do business in this State, provided, however, that if their purposes are similar to the purposes authorized by the general laws of other States in that they may do a banking business, then a waiver should be filed providing that this corporation shall not conduct a banking business in the State of Maine.

JAMES G. FROST
Deputy Attorney General

July 31, 1952

To Honorable Harold I. Goss, Secretary of State
Re: Members of Board of Education

. . You propound the question: "Do members of the Board of Education as appointed under Chapter 403 of the Public Laws of 1949 hold office during the terms of their respective appointments regardless of the repeal of the section under which they were appointed?"

The decision seems to rest upon a question of legislative intent combined with a reading of the repealing act itself. The first sentence of the repealing act, Chapter 155 of the Public Laws of 1951, is as follows: "The board, as heretofore created by previous enactment, shall consist of ten members." This language, "heretofore created or established", is used throughout our Revised Statutes for the express purpose of *not* vacating any subsisting office when the revision is passed by the Legislature, for, prior to such revision passage, all acts passed prior thereto or inconsistent therewith are repealed by the Legislature. We therefore hold that by the use of this term the Legislature expressed its intention that the incumbent members of the State Board of Education should hold their offices, subject, however, to the changes made in the 1951 Act, which called for a new procedure in appointing their successors. This construction of the 1951 Act also allows the staggered terms set up for the five special appointees on said Board under the original Act of 1949 to be carried over under the new legislation, for otherwise their terms would all end at the same time and there would be no continuity of personnel on the Board of Education. Such construction is nothing more than reading the statutes together, and though the 1949 Act has been repealed, this does not violate the rule of statutory construction known as "*pari materia*". See *Brewer v. Hamor*, 83 Me. 251 at 254.

Then again, assuming that the 1951 Act did vacate the office, these present incumbents still hold their offices, for there have been no successors appointed to succeed them. The law seems to be well settled that though there is no express provision that an officer shall hold over, he will hold over until his successor is elected and qualified, unless there is a legislative intent to the contrary, duly manifest. See *Bath v. Reed*, 83 Me. 276 at 280. There is not one intimation that the Legislature intended to remove the present members from their offices, but all indications are to the contrary.

ROGER A. PUTNAM
Assistant Attorney General

August 5, 1952

To Fred M. Berry, State Auditor
Re: Audit, Town of Dedham

This will acknowledge receipt of your memo relative to the request by qualified voters of the Town of Dedham that your department audit the books of the town.

You ask if your office has a legal right to audit other than the 1951 accounts, inasmuch as that is the last year that has been audited by a public accountant.

Section 116 of Chapter 80 is that section which provides that upon petition of 10% of the legally qualified voters of any city, town, etc., the State Department of Audit shall make *another* audit.

It is the opinion of this office that the second paragraph of section 116 presupposes a prior audit having been taken for the year which the petition seeks to be re-audited. As a result, your department should not audit the books of the town for any year in which a previous audit has not been made.

You quote Chapter 57 of the Private and Special Laws of 1947, amending Chapter 43, section 5, of the Private and Special Laws of 1927:

> "The town of Dedham shall annually pay over to the treasurer of said village corporation out of the taxes collected from the inhabitants and estates within said corporation's territory a sum equal to 45% of all the town taxes, exclusive of the state and county tax, collected from said inhabitants and estates."

You then state that the interpretation which has been placed on this statute is that the town pays over to the Lucerne-in-Maine Village Corporation only 45% of actual moneys collected, and you ask if this is a proper interpretation.

A close reading of Chapter 43, P&SL 1927, as amended, shows that in all instances the word "collected" rather than the word "assessed" is used. This office is of the opinion that the interpretation hitherto given to the above quoted section of Chapter 43 is a correct one and that the Town of Dedham should pay to the Lucerne-in-Maine Village Corporation only a sum equal to 45% of all the town taxes collected.

JAMES G. FROST
Deputy Attorney General

August 6, 1952

To Honorable Frederic H. Bird, Councillor, Fifth District

This office has been asked to ascertain what rights a beneficiary under the Maine State Retirement System plan for State Employees has with respect to receiving income upon the death of a retired member under the following circumstances:

The husband retired on May 16, 1952, and died on July 16, 1952, without having made a selection as to his optional allowances permitted under the law.

Chapter 367 of the Public Laws of 1951, section 8, provides that under just these circumstances, where a member dies after attaining eligibility for retirement but before an election becomes effective (here no election was made), benefits payable on his account shall be the same as though he had elected Option 2.

Option 2, found in Chapter 384, section 10 of the Public Laws of 1947, provides that a reduced retirement allowance shall continue after the death of the retired member for the life of the beneficiary nominated by him by written designation duly acknowledged, etc.

It therefore appears that the law clearly embraces the situation outlined above with respect to your constituent and that she does not have power or right to request a lump sum payment, but will receive a monthly allowance.

ALEXANDER A. LaFLEUR
Attorney General

August 12, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Permits to Hunt and Fish on Property of Dow Air Force Base

Copies of your letter of August 6th to Captain Robert L. DeMunck and his to you have been carefully considered.

His letter suggests opening certain areas owned by the Base to hunting and fishing by permits to be granted at or by the Base.

Hunting and fishing in the State are regulated by the legislature except for certain delegation of regulation to you and your department.

The legislature has provided closed time and, by inference at least, open season and the specified locations where fish and game may or may not be taekn.

It is provided that members of the owner's family may hunt on their owned farm premises without license.

It does not appear that a permit to hunt or fish can be issued by any but your department and then but for the time and place authorized by the legislature.

It may be suggested that, if there is any restriction of hunting or fishing in the areas mentioned which might well be eliminated or relaxed, a change in the direction desired be suggested to the incoming legislature for consideration.

If, however, the present problem is the admission of legally licensed hunters and trappers to this area by the party who has the right to restrict or prevent them from hunting and fishing in that particular spot and it is desired merely to restrict the numbers who may exercise the privilege for reasons which appear to you to be valid, then we think that your cooperation could be given as requested by the official at the Dow Base.

NEAL A. DONAHUE
Assistant Attorney General

August 22, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Fishing Rights on Streams

. . You ask if a man owning property on both sides of a stream running from Pleasant Pond may post the stream, "No Fishing," and prevent people from wading the stream while fishing.

The undisputed general rule is that the public has the *prima facie* right to

fish in all navigable streams, just as it has in other public waters, despite the fact that the beds of the streams are owned by riparian owners.

If the stream is not navigable, then section 53 of Chapter 33 of the Revised Statutes permits the riparian proprietor to enclose the waters of such stream.

JAMES G. FROST
Deputy Attorney General

August 28, 1952

To General Spaulding Bisbee, Director of Civil Defense and Public Safety
Re: Authority in Practice Alerts

The letter you supplied. . . written by Norman A. Wood, Director, Civil Defense, at Auburn, concerns what authority the Civil Defense officials would have in any practice alert.

As indicated in his letter, there appears not to be any authority for taking any action which would be disturbing the peace or compelling civilians to take shelter in the absence of an emergency proclamation by the Governor.

The extent of the practice alert can be measured by the cooperation of the public, as there is no authority to do otherwise.

NEAL A. DONAHUE
Assistant Attorney General

August 28, 1952

To Marion E. Martin, Commissioner, Labor and Industry
Re: "Workshop"

. . . You inquire if the word "workshop" includes restaurants, retail establishments, laundries, and dry-cleaning establishments.

While the term "workshop" is to some extent elastic, it has been held that the term as used in the Factory Act meant a shop where any manufacture or handiwork was carried on, whether for the purpose of repair or of manufacture. It is usually associated with power-driven machinery constituting hazardous employment.

From the definitions I have found of this term, it does not appear that any of the institutions named in your memo would properly be termed a "workshop".

NEAL A. DONAHUE
Assistant Attorney General

August 29, 1952

To Doris St. Pierre, Secretary, Real Estate Commission
Re: Regular Employees of Brokers

. . . "Regular employees," as designated in section 2 of Chapter 75, R. S., who are permitted by exception to make sales of real estate without being

licensed so to do, means employees regularly working for the owner of the land in question at other occupations than the sale of real estate, their sales being incidental to their employment and not their whole employment. The exception is not intended to and does not permit full time engagement in the business of selling real estate such as is contemplated by subdivision of lots and engagement in the real estate business.

A seller of another's lots as an occupation, if not a real estate salesman employed by a real estate broker, is himself acting as a broker and should be so licensed.

NEAL A. DONAHUE
Assistant Attorney General

September 2, 1952

To R. C. Mudge, Finance Commissioner
Re: Contingent Fund – Pier at Bar Harbor

Your inquiry concerns payment from the Contingent Fund for items in connection with construction of a terminal or pier at Bar Harbor to be the Maine terminal of an International Ferry.

This work was authorized to be done by the Directors of the Maine Port Authority, which by section 2 of Chapter 219, P&SL 1951, is a "public agency of the State of Maine".

The said Directors have satisfied the Governor of the need for these funds wherewith to carry out the direction of the Legislature and they have not the money available. The work to be done presently appears in the nature of an emergency. It is therefore the opinion of this office that use of the Contingent Fund is legal for the purpose.

The question of indebtedness issued or liabilities incurred by said Port Authority becoming an obligation of the State of Maine is not here involved.

NEAL A. DONAHUE
Assistant Attorney General

September 3, 1952

To Robert L. Dow, Commissioner, Sea and Shore Fisheries
Re: Cutting up of Lobster Meat for Processing Purposes

Your inquiry, bearing date September 2, 1952, asks: "Is it legal for a person, firm or corporation to cut up the tail meat of lobsters in the preparation of a quick frozen lobster product?"

Aside from the right of hotels and restaurants to cut up such lobster meat immediately prior to and for the purpose of serving it to customers on the premises, the right to cut it up is by R. S. Chapter 34, section 120, restricted to the further and final exception that "any person may cut up such lobster meat (the tail section) immediately prior to and for the purpose of *canning*".

Lobster meat may be sold canned, frozen or fresh, but the tail section may not be cut up for freezing as is permitted for canning. By canning is meant, as used in said section, "processed and hermetically sealed in all metal or metal and glass containers."

With the exceptions here noted, the statute provides:

> "It shall be unlawful to possess, sell, offer for sale, deliver, ship or transport any tail section of lobster meat that is not whole and intact as removed from the shell."

The word "canning" is thus defined in Funk and Wagnall's New Standard Dictionary: "The act, process, or business of preserving fruits, vegetables, or meats by partial cooking, or other process, and hermetically sealing in tin cans, glass jars," etc.

Webster's New International Dictionary (1929) defines "can" as follows: "To put in a can or cans: to preserve by putting in sealed cans; to tin."

In other editions of Webster's Dictionary the verb "can" is defined as signifying: "To preserve by putting in sealed cans. Canned goods, a general name for fruit, vegetables, meat, or fish, preserved in hermetically sealed cans."

NEAL A. DONAHUE
Assistant Attorney General

September 9, 1952

To Earle R. Hayes, Secretary, State Retirement System
Re: Participating District -- rights of employee.

Reference to the law brings out that the system at present is composed of two kinds of membership, which may be adopted by a city for its employees or such groups of its employees as it may decide.

An employee is a member of such group as the city chooses to provide for as regards retirement rights and benefits. His rights accrue only by membership.

The city, as participating district, elects which of the two Acts it will operate under, the 1942 Act, or the 1947 Act as amended. The 1942 Act is without amendment at present; a future legislature may amend it except as to any vested rights.

A participating district is authorized to extend any benefits of the Act extended to State employees.

You inquire whether there is any way for an employee of a participating district, electing to come into the State Retirement Plan, who has had prior service to apply towards his eligibility for benefits, to compel the district to give him full credit for such prior service.

It may be sufficient to say that it is the city and not the employee that decides under which Act the benefits will be derived. The employee is but one member of the participating group. Moreover, during the period when there was an option to join or not to join, the employee was entitled only to such creditable prior service as the local district was willing to match. This covers a period when the Act was not in effect and the employee is

not entitled to dictate that the city shall contribute to match his contribution for that period. After four years of employment under the Act, either Act, that option is lost if it has not been availed of by the employee.

Of course there is no option to employees new in employment since the date of establishment of either Act, as membership is a condition of employment.

NEAL A. DONAHUE
Assistant Attorney General

September 15, 1952

To W. Earle Bradbury, Deputy Commissioner of Inland Fisheries and Game
Re: Seals

This is in response to your recent request for a ruling as to whether or not common seals come within the meaning of "wild animals" as described in section 13 of Chapter 33 of the Revised Statutes.

"Wild animal", as defined in Chapter 33, is a species of animal wild by nature, whether bred or reared in captivity, as distinguished from the common domestic animals.

A seal is an animal wild by nature and comes within the definition of section 13.

The general rule is that wild animals at large within its borders are owned by the State in its sovereign capacity and are not subject to private ownership except in so far as the State may choose to make them so.

JAMES G. FROST
Deputy Attorney General

September 16, 1952

To Governor Frederick G. Payne
Re: Terms of Office of Appointive members of the Maine School Building Authority.

The Maine School Building Authority Act, Chapter 405 of the Public Laws of 1951 Section 215, provides that the Authority shall consist of seven members. Three of these are members by virtue of their office, namely the Governor, the Commissioner of Education, and the Senate Chairman of the Committee on Education, and they hold office on the Authority from the date of their qualification until the expiration of their respective terms in their respective offices.

The remainder of the Authority is made up of members appointed by the Governor. One member of the State Board of Education to be appointed by the Governor, to serve during their incumbency in said office, and three members at large appointed by the Governor for terms of three (3), four (4), and five (5) years respectively to hold office as follows: one until the completion of the third full fiscal year following his appointment, one until the completion of the fourth such full fiscal year, and one until the com-

pletion of the fifth such full fiscal year. Thereafter, all appointments are to be for five years; vacancies are to be filled for the remainder of term of the retiring member.

The present member of the State Board of Education who is serving on the Authority is Mr. Frank Hoy, whose term on the Board runs from August 24, 1952, until August 24, 1957, his term on the Authority should be exactly the same.

On September 20, 1951, the Governor pursuant to the above mentioned statute appointed Mr. John Vose to the three year term, Mrs. Helen C. Frost to the four year term, and Mr. Jasper Stahl to the five year term. The question then arises, when do their respective terms end?

The Act is rather unusual in that it sets up as an initial yardstick the requirement that the three members appointed at large shall, in the first instance, serve terms which shall not terminate until they shall have held office for three, four, and five full fiscal years, respectively, following their appointment.

Chapter 14, Section 5 of the Revised Statutes of 1944 describes the fiscal year as follows:

> "The fiscal year of the state government shall hereafter commence on the 1st day of July and end on the 30th day of June of each year."

As a fiscal year does not start until the 1st day of July of each year, any members at large appointed initially to the Authority after said date would not commence to count their respective terms until the next ensuing fiscal year began. Thus, the respective members at large stand as follows:

Members at Large	Appointed	Term	Expiration
Mr. John Vose*	9/20/51	3	6/30/55
Mrs. Helen C. Frost	9/20/51	4	6/30/56
Mr. Jasper Stahl	9/20/51	5	6/30/57
Mr. Richard B. Sanborn*	3/25/52	3	6/30/55

As Mr. Vose resigned his position on the Authority and Mr. Sanborn was appointed to succeed him, Mr. Sanborn's term will expire on June 30, 1955, as the law provides.

ROGER A. PUTNAM
Assistant Attorney General

September 17, 1952

To General Spaulding Bisbee, Director, Civil Defense and Public Safety
Re: Interstate Compacts

. . . Both the State of Maine and the State of New York recognize the consummation of an Interstate Civil Defense Compact as between the two States. Letters to this effect have been exchanged by the two States and are in the files of the Secretary of State.

It will be noted that because of limitations in the New York State Defense Emergency Act, Laws of 1951, Chapter 784, assistance pursuant to the Compact will be rendered by the State of New York only in the event of attack.

There has been a similar exchange of letters between the State of Maine and the other New England States.

Our Secretary of State sent to the Vice President, Speaker of the House, and the Federal Civil Defense Administrator copies of the letters exchanged between the States and copies of our Compact.

A period of 60 calendar days has expired during which the Congress of the United States in continuous session following acknowledgment of receipts of such ratifications by the Presiding Officers of both Houses of Congress, during which time the Congress did not pass a concurrent Resolution disapproving the Compacts as submitted, and accordingly they must be deemed to have been approved by Congress, and Compacts therefore exist between the above named States.

JAMES G. FROST
Deputy Attorney General

September 19, 1952

To George H. Chick, Chief, Division of Markets, Agriculture

Re: Disposition of Fines, etc.

. . . You ask our opinion relative to the disposition of funds collected by trial justices and municipal and Superior Courts of the State under the provisions of sections 225-237, inclusive, of Chapter 27 of the Revised Statutes of 1944, as amended.

Section 229 in particular is that section with which we are here concerned. It is provided there:

> "He (the Commissioner of Agriculture) may recover penalties imposed for violation of the provisions of said sections in an action of debt brought in his own name and if he prevails in such action shall recover full costs; or he may prosecute for violations thereof by complaint or indictment. . .
>
> "All fees received under the provisions of sections 225 to 231, inclusive, by the commissioner and all money and fines received by him under the provisions of said sections shall be paid by him to the treasurer of state and the same are appropriated for carrying out the provisions of said sections."

While this provision is not so clear-cut as it might be, a complete reading of these statutes shows that it was the intention of the legislature to make the enforcing of these provisions and prosecutions thereunder financially self-supporting.

It is our opinion, therefore, that fines imposed by the courts, and paid, shall be transmitted to the Treasurer of State and be carried by him to the fund appropriated for support of the law.

Likewise, costs, except those portions which may otherwise be provided for elsewhere in the statutes, shall be paid to the Treasurer of State, to be carried by him to the account of the Commissioner of Agriculture in the same manner as fines are carried.

JAMES G. FROST
Deputy Attorney General

September 23, 1952

To Melvin E. Anderson, County Attorney, Aroostook
Re: Labor of Prisoners

. . You ask the opinion of this office as to whether or not county commissioners can place prisoners in the county jail to employment without the consent of the sheriff, under the provisions of either section 20 or section 25 of Chapter 79 of the Revised Statutes.

It will be noted that in both said sections it is stated that the county commissioners "may authorize" the employment of prisoners. A complete reading of the statutes relative to county commissioners and sheriffs would show that the county commissioners, political officers of the State, are primarily the finance officers of the county and that the sheriff has absolute and exclusive custody and charge of all prisoners confined in the jail. The sheriff is the one primarily liable for the safekeeping of the prisoners and it is our opinion that the county commissioners may not order such prisoners to work outside the jail without first receiving the permission of the sheriff.

To this effect we draw your attention to *Sawyer v. County Commissioners*, 116 Maine, 408 at page 412, where the provisions under consideration here have been directly considered. With respect to the words, "may authorize," it is there said:

> "This last provision is significant. The commissioners are not permitted to set the prisoners at work, themselves. They can only authorize the keeper of the jail to do this."

JAMES G. FROST
Deputy Attorney General

September 24, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Options

This will acknowledge receipt of your memo of September 23, 1952.

You state that on the application required by your System, Alga L. Towle designated her stepfather as her beneficiary. You further indicate that Miss Towle attained eligibility for retirement, but died before she elected one of the options provided under section 10 of Chapter 60, R. S., as amended. You then inquire if a stepfather can be considered to conform to the provision of the law above referred to, which names "father" as a beneficiary in such cases.

We do not believe that the problem as to whether or not a stepfather can be considered to be included in the term "father" is involved in this case.

We interpret the effect of section 10 of Chapter 60 to mean:

1) upon the death of a person who has attained eligibility for retirement but has not elected one of the optional forms permitted by section 10, then in such event it is as if Option No. 2 had been elected. Option No. 2 provides for payment after death of the employee "for the life of the beneficiary nominated by him by written designation. . ."

2) In the absence of the designation of the beneficiary, then the law steps in and states to whom payment shall be made: ". . . provided further, that in the absence of the designation of a beneficiary, these benefits shall accrue to his next of kin, who for the purpose of this section shall be defined to be: wife, husband, father, mother."

According to your memo Miss Towle filed an application with you on which she indicated her choice of beneficiary – her stepfather. Under the provisions of Option No. 2, read in conjunction with the first paragraph of section 10, her stepfather, having been duly designated as beneficiary, should receive the payments contemplated under Option No. 2, and the question as to whether a stepfather can be considered to be included in the term "father" is not here present. In other words, under the Act, an employee may name any person as beneficiary, and under the circumstances described above, that beneficiary is entitled to the benefits set out in Option No. 2, notwithstanding relation or kinship or absence of relation or kinship to the employee. See section 1, "Definitions" (Beneficiary). It is only where the employee has failed to designate a beneficiary that the law states that benefits should accrue to the next of kin.

JAMES G. FROST
Deputy Attorney General

September 25, 1952

To Frederick P. O'Connell, Director Dept. Veterans' Affairs
Re: Loss of Re-employment Rights

This office has been requested to give its interpretation of section 23, Chapter 59, R. S. 1944, and section 3, Chapter 60, R. S. 1944, as applied to the following problem.

An individual having been regularly employed for a period exceeding six months, is duly called into the service of the United States. After a period of time in the service the individual writes to his former department head requesting that the sum of money contributed by him into the Retirement System be withdrawn and forwarded to him. In answer to the request the department head informs him:

"It is too bad that you have to take this action as it automatically means cancellation of your leave of absence and your complete severance from State Service. In other words, the only way you can collect this money is through resignation. Upon receipt of the form we will file a Separation Notice."

Upon receipt of this letter the individual submitted his resignation and an amount of money representing his contribution to the Retirement System, plus interest, was returned to him.

Upon being discharged from the Armed Forces, that individual now desires to be re-employed by the State and contends that, being an honorably discharged veteran, he is entitled to re-employment rights.

The question is then: Is an employee, under the factual circumstances as outlined above, entitled to re-employment rights under our laws?

It is the opinion of this office that the individual has waived any rights he would have otherwise been entitled to, by his action in submitting his resignation.

Being a member of the Retirement System is a condition of employment except in certain instances which are not pertinent to this case. (Section 3, Chapter 60, Revised Statutes.)

A member of the Retirement System remains a member, even though he enters the Armed Forces of the United States, if he does not withdraw his contributions. Section 3, subsection VI, Chapter 60, R. S., reads in part as follows:

> ". . . provided, however, that the membership of any employee entering such classes of military or naval service of the United States as may be approved by resolution of the board of trustees, shall be considered to be continued during such military or naval service *if he does not withdraw his Contributions*. . .

Having resigned from employment in order to obtain a refund of his contributions, the individual is no longer a member of the System, no longer an employee, and as a result no longer eligible to re-employment rights.

In the instant case the resignation and subsequent withdrawal of contributions, in the amount of approximately $375.00, was done in the face of advice as to the result of such action – that it would result in a complete severance from State Service.

It must therefore be concluded that the individual involved, having been an employee of the State of Maine, was assumed to know the laws concerning his employment, and that his voluntary action, amounting to an election and despite the warning given him by his department head, was a waiver of his re-employment rights, and as a result the State cannot be compelled to restore him to employment.

The records disclose no request for re-employment within the 90-day period following discharge, but we assume such request was made and this opinion has been written accordingly.

ALEXANDER A. LaFLEUR
Attorney General

October 6, 1952

To Paul A. MacDonald, Deputy Secretary of State
Re: Accident, Note, and Bankruptcy

. . . On January 27, 1947, Mr. X. was involved in an automobile accident and came within the provisions of the financial responsibility law of this State. As a result of this accident he and his wife signed a promissory note on February 15, 1947, payable to the injured party. Suit was brought on the note within a year and judgment obtained but not satisfied.

On the 10th day of May, 1952, Mr. X. received a discharge in bankruptcy. You state that it is contended by his attorney that in enacting this statute the legislature intended that suit should be in tort and not in contract in order for this law to apply. It is maintained that the delivery to the injured

party by the tort feasor of a promissory note for the amount of damages was a payment of the debt created by the accident. This theory would appear to be one of payment or accord and satisfaction.

You ask whether or not the fact that suit was brought on the note, which was itself given as payment for the damage inflicted, would bring the case outside section 66, paragraph VI, being that provision of the law which refers to a discharge in bankruptcy.

It is the opinion of this office that suit upon the note under the circumstances related above does not place the case outside the provision of law which has reference to a discharge in bankruptcy.

The reasons for our opinion are based upon:

1. Under the facts as presented, it appears that acceptance of the note by the injured party was not an executed accord and satisfaction, nor was it payment of the original debt.
2. This conclusion is substantiated by the general law on the subjects of accord and satisfaction and payment; and
3. The Maine law anticipates and makes provision for such procedure as was here carried out by the parties.

1) The general rule is that a note given by the debtor for a preceding debt will not be held to extinguish the debt, in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgment or memorandum of the amount ascertained to be due. However, in some jurisdictions, the minority, and in Maine, the negotiable note of a debtor given by the debtor to the creditor is *prima facie* satisfaction of a prior simple contract debt. The rule is well stated in *Spitz v. Morse*, 104 Maine 447:

> "It is a well settled rule of law in this State and Massachusetts that a negotiable promissory note, given for a simple contract debt, is prima facie to be deemed a payment or satisfaction of such debt as between the parties thereto, which simply means, that without further evidence of intent than the giving and receiving of such note, it is construed to be payment. Equally well settled is the rule that this presumption of payment, which is a presumption of fact, may be rebutted by evidence showing a contrary intention. These two rules are usually stated together."

Maine cases quite clearly hold that the taking of a note is to be regarded as payment only when the security of creditor is not thereby impaired. *Bunker v. Barrow*, 79 Maine 62.

The fact that such presumption would deprive the party who takes the note of a substantial benefit has a strong tendency to show that it was not so intended. *Curtis v. Hubbard*, 9 Met. 322.

It should be noted in passing that it is stated that such presumption may arise when a note is given for a prior *simple contract debt*, and we can find no case giving rise to the presumption when a note is given for a debt arising from a tortious act.

The intent of the statute under consideration is two-fold: To insure victims of negligence compensation for their loss and damage, and to enforce a public policy that reckless and irresponsible drivers shall not with impunity

be allowed to injure their fellows. Thus, under the law as developed by the Maine Court, where a security held by the injured party would be impaired by the presumption or he would be deprived of a substantial benefit, then no such presumption arises, and in such a case a note given by a debtor for a preceding debt will not be held to extinguish the debt, and, the original debt not being extinguished, it follows that the provisions of the financial responsibility law still apply.

2) The exception of a discharge in bankruptcy, in a statute which provides for the suspension of a driver's license upon the non-payment of a judgment for an injury resulting from the operation of an automobile, unless the judgment is paid or a release obtained, is not invalid as inconsistent with the provisions of the Bankruptcy Act that a discharge in bankruptcy shall release a bankrupt from all his provable debts. *Reitz v. Mealey*, 314 U. S. 33. The court looks behind a note or other instrument, or even a judgment, to ascertain the nature of the debt, for the purpose of determining whether it is dischargeable by a discharge in bankruptcy. Thus, a claim which is not dischargeable under the provisions of the Bankruptcy Act is not rendered dischargeable by reason of the fact that a note or other instrument has been given for the debt by the debtor and accepted by the creditor. 6 Am. Jur. 987, section 752. See 6 Am. Jur., "BANKRUPTCY" heading "E", "Effect of Discharge", subheadings "I. In General" and "IV. Excepted Debts", and the sections therein contained.

3) For further evidence to the effect that the giving of a promissory note for the debt arising from damages due to an accident coming within this law does not take the case outside the scope of the law and does not remove the case from that provision that refers to discharge in bankruptcy, we draw attention to section 71 of Chapter 19, being the limitation and saving clause. Paragraph I reads as follows:

> "I. Limitation. The provisions of sections 64 to 71, inclusive, shall not be construed to prevent the plaintiff in any action at law from relying upon the other processes provided by law."

The last sentence of paragraph VI of section 66 reads as follows:

> "A discharge in bankruptcy shall not relieve the judgment debtor from any of the requirements of sections 64 to 71, inclusive."

As a result of paragraph I of section 71, it appears that a plaintiff may choose a process other than an action for damages, as in the instant case, and sue upon a note; and referring back to paragraph VI of section 66 it further appears that the judgment debtor shall not be relieved by discharge in bankruptcy.

Referring back to paragraph numbered 1), in which we state our conclusion to be that a note given by a person or tort feasor to an injured party is not presumed to be payment or accord and satisfaction where, by accepting the note, the injured party would be deprived of a substantial benefit or security and that until payment is made on the note or execution completed it remains an executory accord and therefore of no effect until paid, we should like to make a further statement.

The rule that the new promise, if not executed, is not a satisfaction is subject to the qualification that when the parties agree that the promise

shall be a satisfaction of the prior debt or duty and it is accepted in satisfaction, then it operates as such and bars action on the old debt or duty. As a result of this rule, our office would presently accept, and has accepted in the past, as complying with the financial responsibility law, a covenant not to sue on the part of the injured party, or other evidence showing intent of the parties to accept the note as satisfaction of the original debt. We believe that this rule, as present in the State of Maine, would require the party claiming to have given satisfaction for the damage to show evidence to that effect and that perhaps the answer to this question should be a hearing before the Secretary of State to determine whether or not the acceptance of the note is deemed to be satisfaction of the debt, in which case the maker of the note would not be embraced within the financial responsibility law.

JAMES G. FROST
Deputy Attorney General

October 16, 1952

To Honorable Frederick G. Payne, Governor of Maine
Re: Elections

Mr. Neil Bishop has in the recent past been in contact with this office, reaffirming his belief that the ballot used in the last general election was illegal in that he, as an independent candidate, was not accorded the same individual square above his name by virtue of which a straight ticket could be voted.

This office, of course, believes that in so far as Mr. Bishop's position on the ballot is concerned, such position was legal.

Mr. Bishop has suggested that questions be propounded to the Supreme Judicial Court, seeking their determination of the validity of the ballot. As I recall, he also conferred with you on this question and we were at a later date to discuss it.

Before answers will be given by the Supreme Judicial Court to questions asked by the Governor, the situation from which the questions arise must be of such a nature that the Supreme Judicial Court will conclude that there is a solemn occasion.

Mr. Bishop was advised before the date of the election of the form of the ballot to be used in that election in sufficient time for him to have taken any legal action which might have been necessary to question the validity of the ballot at that time. He having been so advised, it is doubtful if the Court will consider such a question now to be on a solemn occasion.

It further appears that the Legislature will examine the lists of votes and perhaps at that time Mr. Bishop can present his grievance to the Legislature.

At any rate, being of the firm conviction that Mr. Bishop was accorded all due legal rights on the ballot, this office would recommend that questions not be sent to the Supreme Court.

ALEXANDER A. LaFLEUR
Attorney General

October 27, 1952

To Morris P. Cates, Deputy Commissioner of Education

Re: Insurance – Fort Preble

This will acknowledge receipt of your memo in which you desire an interpretation with respect to the following paragraph:

> "In the event that death or injury occurs to any person, or loss, destruction or damage occurs to any property in connection with the maintenance or use of the permitted premises by the State of Maine, State Board of Education, occasioned in whole or in part by the acts or omissions of the State of Maine, State Board of Education, its agents, employees, or servants, the State of Maine, State Board of Education, agrees to indemnify and save harmless the Government from and against any loss, claims or demands to which the Government may be subject as a result of such death, loss, destruction or damage."

The above quoted paragraph is one of the terms and conditions on which right of entry has been granted to the State of Maine by the Department of the Navy for use of the premises as a center for the Maine Vocational-Technical Institute. As a result of this paragraph you are inquiring as to the extent and types of insurance coverage which the State of Maine should carry to fulfill its responsibilities in connection with this condition.

It is agreed by the parties as a result of the aforesaid paragraph that the State of Maine shall indemnify and save harmless the Government from and against any loss, claims or demands to which the Government may be subject as a result of (1) death or injury occurring to any person occasioned in whole or in part by the acts or omissions of the State of Maine, State Board of Education, its agents, employees or servants, and (2) loss, destruction or damage occurring to any property occasioned in whole or in part by acts or omissions of the State of Maine, State Board of Education, its agents, employees or servants.

By virtue of this agreement the State of Maine should carry: (1) fire insurance with extended coverage, and (2) liability insurance.

Although the State of Maine, as a matter of policy, does not generally carry liability insurance there are instances where such insurance is carried, i.e., motor vehicles and elevators. While the State of Maine is generally not liable for the torts of its employees, it is the understanding of this office that the Federal Government is liable for the torts of its employees, and as a result of this contract, the State of Maine will save the Department of the Navy harmless for the torts caused in whole or in part by the State of Maine, its agents, employees or servants. It is suggested, however, because of the general policy above mentioned for the State of Maine not to have liability insurance, that permission to purchase such insurance be granted by the Governor and Council.

ALEXANDER A. LaFLEUR
Attorney General

November 3, 1952

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Shooting at Cars in Attempt to Stop Them

Your memo recites the following factual situation: "Two wardens attempt to stop a car in the night time, after seeing the occupants spot an orchard, using a flashlight. They are in full uniform, in the middle of the road, and signal the driver to stop. Instead of stopping, the driver accelerates his speed and the wardens have to jump, narrowly missing being hit by the automobile," You then ask: "Do the wardens have a right, after the car has gone by, to shoot at a tire?"

The answer is in the negative.

Section 68 of Chapter 33 prohibits hunting by aid or use of any light or lights carried on, in or attached to an automobile. There appears to be no specific penalty section attached to this violation, so it therefore comes within the general penalty section, section 119 of Chapter 33. As a Result, this violation of our laws is a misdemeanor, and no officer has a right to shoot to kill or to perform an act which may well be presumed to result ultimately in the killing of one who has committed a misdemeanor. The action of the driver resulting from an attempt of the wardens to stop him should, of course, be considered, but we remain of the opinion that under such circumstances, arising from the committing of a misdemeanor, firearms should not be used to prevent escape.

JAMES G. FROST
Deputy Attorney General

November 4, 1952

To Allan L. Robbins, Warden, Maine State Prison
Re: Time out on Bail

You state that a present inmate of your institution was admitted to the prison on November 14, 1950, to serve 5 to 10 years, that on July 30, 1951, he was released on bail, having presented an application for habeas corpus, and that the case was referred to the Law Court for determination. Apparently the Law Court ruled adversely to the inmate and he was returned to the prison on November 23, 1951, by court order to serve the remainder of his sentence. You ask whether his time goes on while he was out on bail just the same as though he were within the prison serving his sentence, or whether it would stop when he was released on bail and start anew on his being returned to serve his sentence.

A sentence of imprisonment is satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority.

We are of the opinion that time elapsing while a man is released from prison on bail until re-imprisonment cannot be counted as time in prison. See *State v. McLellan,* 83 Tenn. 52.

JAMES G. FROST
Deputy Attorney General

November 5, 1952

To Honorable George Meloon, Council

Re: Vacancy in Judgeship of a Municipal Court

This office has been asked to determine, in the event a municipal court judgeship is vacant, when term the judge would serve who was appointed by the Governor and Council to fill the vacancy.

The general rule is that, where the manner of filling the vacancy is not specified by the statute but it is specified that the appointment shall be for a number of years certain, then the newly appointed person shall serve a full term.

Judges are entitled to hold for a term certain from the time of their appointment and qualification, although their predecessors may have vacated their offices before the expiration of the full terms for which they were appointed.

See *Opinions of the Justices*, 61 Maine 601, and *French v. Cowan*, 79 Maine 439.

JAMES G. FROST
Deputy Attorney General

November 7, 1952

To General George M. Carter, The Adjutant General

Re: Insurance on former Colby Field House owned by the City of Waterville and leased to the State of Maine

Your letter of July 1, 1952, addressed to George H. Mahoney, has been referred to me for my consideration and reply.

It appears to me that the question which you have in mind is whether there may be incorporated into the State of Maine Fire Insurance Schedule policy a provision by rider or endorsement which will clearly spell out the fact that the State of Maine insurance coverage on the leased property, i. e., the Field House at Colby College, Waterville, does adequately protect the interest of the City of Waterville as lessor.

It is my opinion that a rider or an endorsement may be attached to the State Fire Insurance Schedule policy, which endorsement can clearly and definitely set forth that the City of Waterville does have the interest of a lessor in the so-called Field House. To this end, I have talked with the Insurance Commissioner and he advises me that he will take steps to see that such a rider or endorsement is incorporated into the present State Fire Insurance policy.

It is further my opinion that even at the present time the interest of the City of Waterville is protected by the present insurance coverage, in view of the fact that the present policy contains a provision which would give the City of Waterville, even though they are not specifically named in the policy, the legal right to come forward in case of loss and present a claim with respect to its interest against the carriers of the insurance.

I do believe, however, as I have stated above, that it is perfectly correct and proper that this right of the City of Waterville, which now is not set forth in the insurance policy, should be set forth specifically.

I would suggest that you keep in touch with Mr. Mahoney, and he will be able, undoubtedly, to advise you when the endorsement has been effected, which will bring about the precise words which the City of Waterville is interested in having incorporated into the policy. . . .

DAVID B. SOULE
Assistant Attorney General

November 12, 1952

To Hon. Harold I. Goss, Secretary of State
Re: Meaning of "Member" and "Another Corporation".

You ask for an interpretation of the meaning of section 31 of the general corporation law, which provides:

> "Directors must be and remain stockholders, except that a member of another corporation, which owns stock and has a right to vote thereon, may be a director."

The inquiry is, "Does 'member' mean director or stockholder?

The case of *Curtis v. Harlow*, 53 Mass. 6, is in point, showing that "member" in such case means stockholder, and of course in such case a holder of common stock or a holder of stock permitting him to vote in the corporation which holds the stock to be voted in this corporation.

Then you inquire, "Does 'another corporation' mean another Maine corporation or any duly organized corporation?"

It would appear that section 21 of Chapter 49, R. S., is in point here and that "another corporation" is not restricted in its meaning to "another Maine corporation".

NEAL A. DONAHUE
Assistant Attorney General

November 12, 1952

To Joseph M. Trefethen, State Geologist
Re: Mining Claims

. . . Chapter 36 of the Revised Statutes of Maine, as amended by Chapter 298 of the Public Laws of 1951, is pertinent to the questions you have propounded.

You ask, "Is there any point in the law that governs the orientation of claim boundary lines in staking mineral claims on state lands?"

The answer to this question is, No.

You ask, "Are the dimensions fixed for a single claim, or can a claim of equivalent area with different dimensions be staked?"

The statute provides that a claim may not be more than 600′ wide or 1500′ long, the point of strike to be somewhere within that area. We interpret

that to mean that an area 600′ wide and 1500′ long may be superimposed upon the map of the area where a strike is made, the point of strike to be anywhere within such dimensions, and such land as may be included within that area will or may be included in the claim. The point of strike may be at the center of the area, at one end, at one side, in one corner, or anywhere within the area of the claim.

You ask, "Suppose a peninsula be desired to be staked on state land. The shore line is irregular so that full dimensions of a claim are not included in the land area. Can an axis be established along the center of the peninsula and the claim referenced to that?"

This is permissible, and if the point of strike is included and the peninsula is not of larger area than 600′ by 1500′, all may be included.

You ask, "Or does each stake constitute a corner of a claim?"

The corners are to be shown as near as is practical, but in such case, where the full dimension permitted is not claimed, some of the area permitted being water instead of land, there should be no practical difficulty in establishing the claim by placing stakes on the shore line.

You inquire, "How far into a lake would a claim extend?"

The only provision in the law for the extension of a claim into a lake is found in section 11 of Chapter 36, R. S., where it is provided that whenever it is discovered that a vein or lode in a mine continues from under the land to under water, the owner or owners of the mine shall have the right to follow the vein or lode.

You ask, "If township boundaries coincide with the shoreline can an adjacent claim be staked in the lake bottom, provided it is a great pond?"

The answer is, No. There is no provision in the law for staking any claim or part thereof in a great pond.

You inquire, "What provisions should be made in staking the bed of one of the great ponds?"

The answer is given above.

"How would a claim adjacent to the shoreline be bounded at places where the shore is irregular?"

In such case the maximum of claim may be had by superimposing an area of 600′ x 1500′ upon the map with the point of strike included within the claim. All land included in that area would be in the claim. Water in a great pond would not be included, unless found to continue a vein, which the law permits to be carried beyond the shore line.

You ask, "In unorganized townships, how many claims may be staked by an individual?"

The answer is, Two claims in any one year in any one unorganized township. Of course two other claims could be staked in another township. Since the license is made to expire on December 31st of each year, this is taken to mean each calendar year.

You ask, "How many claims may be staked by an individual in a great pond?"

The answer is, None. There is no provision for staking claims on great ponds.

You ask, "What are the physical characteristics of staking stakes?"

This has not been provided by statute: but the statute provides that a license may be granted by the Bureau under such terms and conditions as it may require, which would indicate that the Bureau might require a certain type of stake to be used for that purpose.

NEAL A. DONAHUE
Assistant Attorney General

November 21, 1952

To Roland H. Cobb, Commissioner, Inland Fisheries and Game
Re: License of Juvenile Delinquent

In answer to your memo of October 30, 1952, in which you ask if a juvenile delinquent's license to hunt should be revoked on conviction of juvenile delinquency on a charge of negligently shooting a human being while hunting for game, it is our opinion that such license may be revoked by the Commissioner under the provisions of section 64 of Chapter 33 of the Revised Statutes. Such a person has been convicted of a violation of the laws as contemplated by the Act.

JAMES G. FROST
Deputy Attorney General

November 24, 1952

To A. D. Nutting, Forest Commissioner
Re: Reimbursement of Costs of Fire Fighting

You have asked this office if under Chapter 356 of the Public Laws of 1949 the State should "reimburse for medical expenses, medical supplies, and compensation for lost time of fire fighters as a result of working on a forest fire."

Paragraph I of Chapter 356 provides a penalty in the event a person refuses or wilfully fails to render assistance when called upon to suppress a forest fire. The second paragraph of VI, after enumerating several specific expenditures which qualify a town for reimbursement, concludes in this manner, "and other costs approved by a forest fire warden in charge". The last above-quoted phrase, in conjunction with that part of the Act which makes it mandatory for a person to serve if called upon, would imply that any injuries suffered by such a person ought to be reimbursed by the town and ultimately the State according to the formula set out in the Act.

It is definitely our opinion that nothing in the Act prevents such reimbursement, but we would say that whether or not a particular individual should be reimbursed would be a question for administrative decision on the part of the Commissioner, proof being given that such injuries were actually sustained and claim having been made as provided for by the statute. Much difficulty would be present in administering reimbursement for lost time of

fire fighters, and this difficulty may cause hesitation on the part of the Commissioner before approving such compensation.

JAMES G. FROST
Deputy Attorney General

November 24, 1952

To Roland H. Cobb, Commissioner, Inland Fisheries and Game
Re: Use of Venison in Thanksgiving Baskets

You have asked this office to rule on the following question:

"Does this Commissioner have the legal right to give deer meat to the Ladies Aid of Kezar Falls for Thanksgiving baskets to the poor? Said meat legally taken by our Warden Service and usually given a State Institution."

Under the provisions of section 84, paragraph IV, of Chapter 33, it would appear that such deer found dead, not having a tag attached thereto identifying the owner, may be disposed of by direction of the Commissioner. Under such a law it would be permissible for the Commissioner to give the deer to such charities as he might deem proper.

I might suggest that the giving should be closely supervised.

JAMES G. FROST
Deputy Attorney General

November 26, 1952

To Hon. Harold I. Goss, Secretary of State
Re: Doing Business in this State

You have asked this office to determine whether or not, under the following fact situation, a concern would be considered as doing business within this State so as to require registration:

"We have a client which is contemplating establishing stocks of merchandise at a central point in your State to permit it to make quicker delivery than it can make by shipping the merchandise to one of our client's dealers in your State under a consignment or trustee agreement. This stock would be in addition to the stock purchased by the dealer to fulfill his ordinary requirements. It would be held by the dealer to meet the requirements of all dealers in his territory, including himself. No withdrawals from the stock would be made excepting on orders issued by our client from Syracuse. On all sales made from this stock the dealer holding same would be paid a percentage of the price to compensate him for warehousing, insurance and handling the stock."

It is the opinion of this office that the activities conducted Within the State of Maine as described in the above paragraph would constitute the doing of such business as is contemplated by section 132 of Chapter 49, R. S. 1944, and hence it would be necessary for that firm to appoint an attorney in this State upon whom service may be made.

JAMES G. FROST
Deputy Attorney General

November 26, 1952

To Robert L. Dow, Commissioner of Sea and Shore Fisheries
Re: Continuous Survey of Closed Clam Areas

This office has been asked for an interpretation relative to Chapter 188 of the Resolves of 1949:

"That the sum of $25,000 be, and hereby is, appropriated from the Maine Post War Public Works Reserve for the purpose of establishing and maintaining a continuous bacteriological and sanitary survey of closed clam areas and for the purpose of a mussel control program for the fiscal years 1949-1950 and 1950-1951, under the direction of the commissioner of sea and shore fisheries; and be it further

"Resolved: That the commissioner of sea and shore fisheries be, and hereby is, directed to obtain adequate personnel and equipment for the survey of closed clam areas with a view to establishing facts whereby such areas may be opened; and be it further

"Resolved: That the data be presented to the commissioner of agriculture for action under the provisions of section 94 of chapter 34 of the revised statutes, as revised; and be it further

"Resolved: That any part of such $25,000 may be used at the discretion of the commissioner of sea and shore fisheries for the purpose of controlling and eliminating the encroachment of mussels on productive clam flats."

You have asked if, under this Resolve, the Commissioner has the legal right to expend a portion of this money for the following purposes:

"1. To assist those communities where a local pollution problem exists by obtaining more exact information on the degree of contamination and the value of the clams in the area.

"2. To obtain more specific information in order that recommendations may be made to the U. S. Public Health Service on the characteristics of clams in relation to pollution."

With respect to Question No. 1, the answer is, Yes. The purpose of the Resolve was to inaugurate a continuous bacteriological and sanitary survey of closed clam areas for the purpose of establishing facts whereby such areas may be opened. The question is within the intent of the Resolve if such a system relates to the closed clam areas.

The answer to Question No. 2 is, Yes. In view of the incorporation in this Resolve of section 94 of Chapter 34, which section has reference to the United States Public Health Service and that department's regulations and standards of purity, it would seem that the objective of your second question is not inconsistent with the intent of the Resolve.

JAMES G. FROST
Deputy Attorney General

November 26, 1952

To C. P. Osgood, Chief, Div. Inspection, Agriculture
Re: Pack of Herring

This office has been asked to determine if it is legal to pack imported herring in 5-oz. cans with the label "herring", the same to be packed between December 1st and the 15th day of the following April.

The answer is, No. By definition in Chapter 27, section 200 of the Revised Statutes the term "sardine" shall be held to include any canned clupeoid fish, being the fish commonly called herring, particularly the clupea harengus. Section 34 of Chapter 34 provides a penalty for canning any herring less than 8" long within the above mentioned period. The fish packed are sardines notwithstanding the word "herring" is stamped upon the label.

JAMES G. FROST
Deputy Attorney General

December 2, 1952

To Ober Vaughan, Director, Dept. Personnel
Re: Rule 12.3 — Violation

You have asked this office for an opinion as to whether or not the Personnel Board has the authority, whenever a violation of Rule 12.3 occurs, to restore employees to the State service without loss of pay or seniority; also whether or not the Board has the authority, under the Personnel Law and Rules, to require departments to expend funds for this purpose whenever a violation occurs.

Paragraph 12.3, referred to above, defines the manner in which appointing authorities may lay off employees.

Section 4, paragraph V, of Chapter 59 of the Revised Statutes, as amended, provides that it is the power and duty of the Personnel Board "to enforce through the director the observance of the provisions of this chapter and the rules and regulations made thereunder."

Rule 13.1, paragraph D, states that the Board, upon receipt and consideration of the protest of an employee or appointing authority, after investigation and hearing, shall indicate to the Director such remedial action as it may deem warranted.

A reading of the statutes and of the Rules and Regulations promulgated under the statutes relating to the Department of Personnel, would indicate that it is the clear intent of the authors of the law and the rules that the various State departments and bureaus abide by these laws and rules. The above quoted section of the law shows the intent of the legislature that the provisions of the chapter be enforced by the Board through its Director and the necessary remedial action indicated to the Director, as the Board warrants.

The Board has every right under these laws and rules and regulations to demand of the appointing authority that employees who have been laid off

in violation of the laws be restored without loss of pay or seniority, and in all equity it can only be said that in such an instance the person be reimbursed from the department funds for that purpose.

JAMES G. FROST
Deputy Attorney General

December 3, 1952

To Honorable Frederick G. Payne, Governor of Maine

Re: Maine Maritime Academy – Request for Temporary Loan from Contingent Fund

By virtue of Chapter 24 of the Private and Special Laws of 1947, the Maine Maritime Academy was declared to be a public agency of the State of Maine for the purposes for which it was established.

We are of the opinion that the Maine Maritime Academy is such a public agency as can make a request upon the Contingent Fund, and if, in the opinion of the Governor and Council, the request is a necessary expense within the provisions of the law setting up the Contingent Fund, then such a transfer would be legal.

JAMES G. FROST
Deputy Attorney General

December 29, 1952

To William O. Bailey, Deputy Commissioner of Education

Re: Reimbursement to Towns for Architects' Fees

The following question has been submitted to us for our consideration and answer:

"Under what conditions, if any, is it legal for us to reimburse towns for architectural plans when such projects are financed by the Maine School Building Authority, and title is held by the Authority until the debt is amortized?"

The right to reimburse towns for architectural plans is given to your department by section 195 of Chapter 37 of the Revised Statutes of 1944, as amended. The law sets up a permanent school fund, and the interest therefrom shall be allocated to towns by the commissioner of education for the purpose of surveying school systems and developing school plans. The allocation shall not in any case exceed one-half of the cost of such survey or plans.

The problem here may arise from a misunderstanding of the true nature of the above-mentioned Authority and its relations with the towns. The Authority is merely a financing agency, and its legal relationship with the various towns is determined by a so-called lease. Under this arrangement the Authority holds legal title; the town pays rent; when the entire obligation is liquidated, the Authority must convey the property to the lessee town.

Is the lease a real lease? Our Law Court has spoken on this subject in passing upon a similar lease, designed to carry out the very purpose for which

the Authority was created. See Opinion of the Justices, 146 Maine 183 (188):

> "The so-called lease is not in legal effect a lease, *it is a contract of purchase*. The so-called rental is not true rental, to wit, payment for the use of property. The total amount of so-called rental is the purchase price. . . for the property."

If, then, this Authority does not hold the property to make a true profit from its rentals, as a landlord would do, it is merely a vehicle for financing new schools and the primary obligation, first, last and always, rests upon the lessee town. Is there, then, any reason to discriminate between towns which use this financial procedure and towns which do not? We perceive none. The intention of the legislature was to assist *all* the towns to plan new school buildings. It has placed no specific restrictions upon the distribution of this fund. We see no reason to place any restrictions upon the fund by legal interpretation.

The argument has been raised that in the lease agreements the Authority agrees to pay for the architectural plans for each project. This is true; but once again we can trace the primary obligation to the town itself, with the added fact that the town, not the Authority, has hired, and does in fact control, the architect.

ROGER A. PUTNAM
Assistant Attorney General

December 29, 1952

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Albert A. Parent

. . You request an opinion as to the eligibility of Albert A. Parent to receive retirement benefits under the provisions of laws pertaining to the Maine State Retirement System. In connection with this matter our office has received a letter from Frank M. Coffin, Esq., Corporation Counsel for the City of Lewiston, from which we gather that Mr. Parent, as a result of a conviction of embezzlement, which embezzlement took place while Mr. Parent was in office, was found guilty of misconduct by his employer, after notice of hearing and opportunity to appear, and is now the "former controller of the City of Lewiston". . .

The question before us is, then: "Is a person who has been discharged from employment by a participating local district because of the commission of a crime, prior to application for retirement, eligible to receive service retirement benefits?"

In our opinion the answer is, No.

Section 6-A, par. I, sub-par. A, and Section 9 are those sections determinative of the problem at hand. Section 6-A reads in part:

> "Any member in service may retire . . . upon written application to the board of trustees . . . provided that such member at the time so specified for his retirement shall have attained age 60 . . ."

"Service" is defined by Section I of Chapter 60 as follows:

" 'Service' shall mean service as an employee, as defined in this section, for which compensation was paid."

Under the above quoted provision of the law it is apparent that in order to qualify for retirement benefits the applicant must be "in service" at the time application for retirement is made.

In the present case the applicant was not in the service of the participating district at the time the application was filed, but had been discharged from the service. He cannot, therefore, qualify for a retirement allowance.

Section 9 of Chapter 60, supporting the view taken above, provides that if a member ceases to be an employee except by death or retirement he shall be paid the amount of his contributions, together with such interest thereon, not less than ¾ of accumulated regular interest, as the Board of Trustees shall allow.

JAMES G. FROST
Deputy Attorney General

December 31, 1952

To Edward L. McMonagle, Department of Education
Re: Schooling of Indian Children in Indian Township

You have inquired whether the State Commissioner of Education acting under Chapter 37, Sections 142 through 146, R. S. 1944, may provide for elementary or secondary school privileges for Indian children living in Indian Township, Washington County, and, further, whether expenditures made by him for any such purposes may be included in computing the statement of school expenditures for Indian Township as required by Section 148, Chapter 37, as amended by Section 3, Chapter 260, P. L. 1951.

These questions arise because the above mentioned sections providing for school privileges in unorganized territories on their face appear to include such Indian children. Such a construction appears to conflict with Section 364 of Chapter 22, R. S. 1944, as amended, which provides that the Department of Health and Welfare shall provide certain school privileges for "the children of the Passamaquoddy tribe living on the reservations".

It is elementary in statutory construction that the fundamental rule is to ascertain legislative intent. *Smith v. Chase*, 71 Me. 165. Statute *in pari materia* must be considered. The whole body of previous and contemporary legislation is to be studied together for the purpose of harmonious construction. *Cummings v. Everett*, 82 Me. 263. It is presumed that some progress along the lines of establishing policy and principle is intended. *Haggett v. Hurley*, 91 Me. 547.

The evolution of school privileges for Passamaquoddy Indian children in Indian Township may be traced by reference to prior legislative enactments. By Chapter 140 of the Resolves of 1865, we find that it is, "Resolved that there be paid . . . to the superintending school committee of Princeton and Perry, $150 to be expended by them, for the purpose of maintaining among the Passamaquoddy Indians a school or schools for their education. . ." For the period 1865 through 1879 further appropriations were made to the superin-

tending school committees of these towns for Indian education. By Chapter 186, Resolves of 1880, the legislature appropriated $400 to be expended under the supervision of the agent of the Passamaquoddy tribes, and the resident priest, for educational purposes. For each subsequent year, until the formation of the Department of Health and Welfare in 1931, we find private resolves appropriating funds for educational purposes for the Indian tribes at Pleasant Point and at Peter Dana Point. In 1921, (see Chap. 176, P. L. 1921) the Indian schools were placed under the care and supervision of the superintendent of schools of the Towns of Princeton and Perry, however, the funds to operate the schools were still appropriated by annual resolve to be expended by the Indian agent.

By Chap. 27, P. L. 1919, the legislature provided for and placed under the State Department of Education, elementary and secondary school privileges for children in unorganized territory. The legislature appropriated funds to the Department of Education for such expenditures. As noted above, however, each legislature still appropriated separate funds by private resolve for Indian schools. It would appear from this that it was not understood that Chap. 27 of P. L. 1919 was to apply to Indian children living on the reservations.

This surmise is buttressed by reference to P. L. 1927, Chapter 56, which provided that Indian children of secondary school age should receive free tuition while attending outside high schools as did other children in unorganized territory. Such a statute would not have been necessary had Chap. 27, P. L. 1919, been applicable to such Indian children. This move by the legislature apparently reflected a change in attitude by state officials in regard to Indian education. It was at this time that the Governor and Council by Council Order of August 11, 1928, authorized the Department of Education to construct an elementary school in Indian Township, as follows:

> "The Commissioner of Education be authorized to advertise for bids for a single teacher school for Indian Township located near Princeton. This comes under the work of *Schools in Unorganized Townships,* bids to be submitted to the Governor and Council before contract is awarded."

Pursuant to this authority the Department of Education constructed the elementary school building in Indian Township near Princeton and operated it for Indian children until 1943. At that time this school was closed and the children transported to the Indian school at Peter Dana Point.

In 1933, the State revised its program for free tuition for secondary schooling of children in unorganized territories, and the Department of Health and Welfare was required to pay the tuition for Indian children entitled to secondary education. See P. L. 1933, Chap. 146. This practice continues until this day.

Section 364 of Chap. 22, Revised Statutes, as amended by Section 43, Chap. 349, P. L. 1949, provides a comprehensive plan for the education of children of the Passamaquoddy tribe living on the reservations. It might be argued that this statute is not applicable to Indian children living in Indian Township near Princeton and that such children come under Sec. 143, Chap. 37. We think such a construction to be inconsistent with overall legislative policy. It would also be inconsistent with that part of Section 364 of Chap. 22, as amended, which provides that the Department of Health and Welfare shall pay the tuition for Indian children who attend elementary or secondary

schools in any city or town. It must be taken as unquestioned that the Indian children living in Indian Township near Princeton are on the Reservation. This office by opinion of July 19, 1948, said:

> "I have checked the Indian Treaties, and I find that in the Maine Resolves of 1843, on page 264, a treaty agreement was signed by a committee appointed by the General Court of the Commonwealth of Massachusetts to treat with and assign lands to the Passamaquoddy Tribe and others connected with them; and in that Treaty they set off Township No. 2 in the First Range surveyed by Mr. Samuel Titcomb in 1794, containing about 23,000 acres more or less, which in my opinion would make this territory a part of the tribal reservation of the Passamaquoddy Tribe."

We think that these considerations can lead to only one conclusion. That is that the legislature has and now does follow a policy of providing for separate education facilities for Indian children living on the Reservations of elementary and secondary school age. This policy appears to have been deviated from in 1928, but to be again reinstated in 1933 and by legislation thereafter to date. These separate facilities are now administered by the Department of Health and Welfare. We conclude that the Department of Education is without authority to expend funds to provide educational privileges for Indian children living in Indian Township.

To more specifically answer your questions,

1 a. The Department of Education may not operate a school for Indian children in Indian Township, the operation of such school being the duty of the Department of Health and Welfare.

b. The Department of Education may not purchase tuition privileges for such Indian children. (See Sec. 364 of Chap. 22, as amended by Chap. 349, Sec. 43, P. L. 1949.)

c. The Department of Education may not provide transportation for Indian children in Indian Township to a school operated at Peter Dana Point by the Department of Health and Welfare. Transportation is such an essential part of education facilities today that the providing of transportation to Indian children in Indian Township to the Peter Dana Point school is within the jurisdiction of the Department of Health and Welfare.

In answer to the second question, it must follow that since the Department of Education is without authority to expend funds for Indian children in Indian Township any expenditures made by the Department should not be included in the computation of the statement of school expenditures for the assessment of a school tax on whites living in Indian Township.

MILES P. FRYE
Assistant Attorney General

January 5, 1953

To Honorable Burton M. Cross, Governor of Maine

Re: Power of Governor respecting Chairman of Liquor Commission

You have inquired whether you may revoke the appointment of the Chairman of the Maine Liquor Commission and appoint someone else as Chair-

man. There is no thought, we understand, of attempting to shorten the Chairman's tenure as *member* of the Commission.

Section 3, Chapter 57, R. S. 1944, amended by P. L. 1947, Chapter 250, provides:

> "The State Liquor Commission, as heretofore established, shall consist of three members to be appointed by the governor, with the advice and consent of the council, to serve for three years and may after notice and hearing be removed for cause by the governor and council. The governor shall designate one of the members to be its chairman and not more than two members thereof shall belong to the same political party. Any vacancy shall be filled by appointment for a like term."

From the foregoing it is evident that while the appointment of a person to the Liquor Commission as a member must be with the advice and consent of the Council, the designation of one of the members to be Chairman is made by the Governor alone.

The general rule is stated in 43 Am. Jur., Public Officers, section 183:

> "When the term or tenure of a public office is not fixed by law, and the removal is not governed by constitutional or statutory provisions, the general rule is that the power of removal is incident to the power to appoint."

Applying the general rule to the present occasion, the power to designate one member as Chairman resides in the Governor. It would, therefore, appear that the power to alter the designation remains in the Governor as an incident to his power to make the original designation.

Section 6, Article IX, of the Maine Constitution provides:

> "The tenure of all officers, which are not or shall not be otherwise provided for, shall be during the pleasure of the Governor and Council."

This language from the Constitution is construed by the Supreme Judicial Court in a manner that leaves no doubt that the same person who appoints may remove, in the absence of statutory or constitutional restrictions. In 72 Me. 549, the Supreme Judicial Court was asked whether the Governor might terminate the tenure of office of the Reporter of Decisions. The Reporter was appointed by the Governor with the consent of the Council. The Court was of opinion that only the Governor and Council could revoke where the Governor and Council had appointed. Referring to the language of the Constitution just quoted, the Court said:

> "The general rule is that appointments are by the Governor with the advice and consent of the Council, and the tenure is during their pleasure. The tenure may be at the pleasure of the Governor alone, when he has the appointing power without advice or consent of his Council. The cases 'otherwise provided for' are those where the appointing power is vested in the Governor alone — and the power of removal being an incident to that of appointment is in his hands, or there is a constitutional limitation upon the conditions and duration of official tenure."

In 125 Me. at 533, the Court refers to a presumption that,

> "even if not expressly provided, the power of removal is vested in the same body which appointed."

We have inspected the commission of the present Chairman and find that he was designated Chairman "for the term of his appointment as member thereof . . . unless sooner removed pursuant to law." It is doubtful if this purports to designate him chairman for the entire duration of his membership. If it does, it is ineffective. 91 A. L. R. 1097. There are many cases in which courts have held that the tenure stated by statute controls and no express language in the appointing words can change that tenure.

It is our conclusion that you may designate someone else in the Liquor Commission as Chairman and that, when you do so, any previous Chairmanship will be at an end.

BOYD L. BAILEY
Assistant Attorney General

January 5, 1953

To W. D. Deering, Treasurer, Augusta State Hospital
Re: Safe Deposit Box of Inmate

. . . It seems that one of your patients has a safe deposit box, rental for which is overdue. You ask if you have the authority to have the keys of this safety deposit box turned over to the bank so that the box can be opened in the presence of some interested party in order to ascertain if there are any valuables in the box.

It is our opinion that section 87 of Chapter 164 of the Revised Statutes, as amended, giving the bank authority to open a safety box under such conditions, should be followed. We do not believe that you should intervene in the private matters of a patient, but that it should be done by a legally appointed guardian or under other provision of law.

JAMES G. FROST
Deputy Attorney General

January 15, 1953

To the President of the Senate, and the Speaker of the House
Re: Legislative Research Committee

A question has arisen concerning the tenure of members of the Legislative Research Committee under Sections 23-33, Ch. 9, R. S. 1944, as repealed and replaced by Chapter 392, P. L. 1947. This is whether members of the 95th Legislature appointed to this Committee who did not stand for re-election or who have returned to the Senate after original appointment from the House continue as members of the Committee on and after January 7, 1953, the date of the convening and organizing of the present Legislature.

At the outset it will be proper to point out that the Legislative Research Committee is a creature of the Legislative Branch of our State Government and not of the Executive Branch. This is clearly shown by the appointive powers, functions and duties required by the statute. Ordinarily a legislative committee has no power to sit after adjournment sine die. However, power may be given to a legislative committee to sit during the interim between

sessions where there is duly enacted legislation. This is the purpose of the statutory provisions in question. Ordinarily, one must be a duly qualified member of the Legislature to function as a member of a legislative committee.

A vacancy in an office may exist for many reasons, one of which is that the tenure of an appointee may terminate because he no longer has the *requisite qualifications* for the office. By Section 23 it is clear that only members of the Legislature *may be appointed to membership* on the committee in the first instance. Under Section 24 any vacancy could only be filled by a member of the respective branch of the Legislature. Further, Section 24 speaks of a vacancy arising "in the membership from the senate" and "in the membership from the house of representatives". A lay person could not be included in the "membership" of either body. It should be noted also that under Section 25, XIV, compensation is provided for members of the committee in attendance at meetings, *except when the Legislature is in session.* This latter provision raises a clear inference that members of the committee will be members of the Legislature.

We think also that the first sentence of Section 24 sets forth the term of office for members of the committee who are otherwise qualified.

For the reasons stated, we are of the opinion that one of the requisite qualifications for membership on the Legislative Research Committee is membership in the present Legislature. Where a person originally appointed did not stand for re-election, his membership on the Committee terminated when the present Legislature convened and organized, and a vacancy exists. Further, where a member of the Committee appointed from the House was elevated to the Senate, his membership on the Committee terminated upon his qualification as a Senator, and a vacancy exists. There could be no legal objection, of course, to the appointment to the Committee of a present member of the Senate who was formerly a House member of the Committee.

MILES P. FRYE
Assistant Attorney General

January 15, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Vacancy in Office of Register of Probate, Sagadahoc County

. . . The vacancy created by the resignation of J. Horace McClure to accept the office of Executive Councilor, or more presently by the acceptance and qualification of Executive Councilor, may be filled according to the following procedure.

By Section 27 of Chapter 140, Revised Statutes of 1944, the Judge of Probate is authorized to appoint a suitable person to act as Register until another is qualified in his stead. Article VI, Section 7 of the Constitution of Maine, provides that vacancies occurring in the office of Register of Probate by death, resignation or otherwise shall be filled by election at the September election next after their occurrence, and in the meantime the Governor with the advice and consent of the Council may fill such vacancies by appointment, and the persons so appointed shall hold their offices until the first day of

January next after election aforesaid. Under these statutory and constitutional provisions, the vacancy in the office of Register of Probate may be temporarily filled by appointment of a suitable person by the Judge of Probate, such person serving until the individual appointed by the Governor and Council qualifies for the position.

In this case Mr. McClure, by accepting and qualifying for the office of Governor's Councilor, thereby vacated his office as Register of Probate. Should he now be appointed and qualify as Register of Probate pro tem., the two offices being incompatible, he would thereby vacate his office as Executive Councilor.

NEAL A. DONAHUE
Assistant Attorney General

January 16, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Eligibility of Councilor for Appointment to Public Office

This office has been requested to advise you as to the legality of appointing a member of the Executive Council to the Board of Commissioners of Pharmacy.

We draw your attention to Article V, Part Second, Section 4, of the Maine Constitution, and to the last sentence of this section, which reads as follows:

> "And no counsellor shall be appointed to any office during the time, for which he shall have been elected."

There is no question but that a member of the Board of Commissioners of Pharmacy is an office, as it has some permanence and continuity and possesses a delegation of a portion of the sovereign power of the government, to be exercised for the benefit of the public.

For the above reasons it is our opinion that a member of the Executive Council may not be appointed to the Board of Commissioners of Pharmacy.

JAMES G. FROST
Deputy Attorney General

January 30, 1953

To Ernest H. Johnson, State Tax Assessor
Re: Property Tax — Indian Township

In reply to your memorandum of January 5, re the State property tax assessment in Indian Township, please be advised that the Attorney General has rendered an opinion to the Department of Education that the transportation of Indian children in Indian Township is properly within the jurisdiction of the Department of Health and Welfare and not the Department of Education. The expenditure for transporting Indian children in Indian Township made by the Department of Education was included in the statement of expenditures for school purposes in Indian Township furnished to your office by the Commissioner of Education. We think this amount was not properly chargeable to the residents of Indian Township. We understand that of some

thirty taxpayers in Indian Township all but two have paid the tax voluntarily. As to these two, your office is required to institute lien proceeding on February 1, 1953, to enforce collection of the tax assessed.

We would note that under Sec. 72 of Chapter 14 "The State Tax Assessor may, subject to the approval of the governor and council . . if justice requires, make an abatement of any state, county or forestry district taxes." Without attempting to limit or define in any way the authority of your office to abate taxes, we think it clear that such power exists in those instances where the courts would be authorized to act.

Upon the facts we would advise the following in answer to your questions. We think the imminence of legal steps to enforce a lien on the property of Mr. McDowell constitutes legal duress and would justify equity action in enjoining the collection of the tax. This being so, we think you would be justified in abating that portion of the tax assessed against him as is excessive. This will leave the way clear for you to carry out your duty to enforce collection of the tax by lien proceedings. In regard to that portion of the tax paid voluntarily by other residents, we are of the opinion there is no remedy at law or in equity available to them and that reimbursement for them would be legally an act of grace better left to the Legislature. We would add that we think the situation would justify a resolve presented to the Legislature on behalf of these taxpayers since the State is morally obligated to refund the excessive amount though not legally so obligated.

We understand that the customary procedure in the case of abatement of such a State tax is to distribute the abatement pro rata against the various levies going to make up the total tax; however, in view of the peculiar facts of this situation, it is our opinion that the entire amount of the abatement in question should be charged against the Unorganized Territory School Fund.

MILES P. FRYE
Assistant Attorney General

February 2, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Two Beneficiaries

We have your memo of January 22, 1953, in which you state that an employee of the State Highway Commission had attained eligibility for retirement, due to the fact that she had attained age 60, but died while still in service. She had designated her two sons as beneficiaries at the time she filed her original application for membership in the System and this designation had never been changed.

Under the provisions of section 10 of Chapter 60 of the Revised Statutes, it is provided that under such circumstances Option 2 becomes effective.

You ask if, in our opinion, two persons can receive a benefit under the provisions of Option 2, or is only one person entitled to a benefit under Option 2.

It is our opinion that the Retirement Board should make payments to both sons of the deceased under the provisions of Option 2.

The legislature has determined that under the above described circumstances it would be as if a member had elected Option 2. It is stated in your memo that the actuary is of the opinion that only one person is eligible for benefits under Option 2 and that if two persons are to be considered beneficiaries, then Option 4 should have been selected. However, as noted in your memo, before the benefits of Option 4 could be available to the beneficiary, it would be necessary for the member to substitute a program under that Option. The member never so specified; and we feel that neither the Board nor this office should substitute its opinion for that of the legislature in determining which option should be available to the member. In view of the fact that the member indicated not one but two beneficiaries at the time she filed her initial application for membership and that such application was accepted by the Board without objection, we are of the opinion that the State is estopped from denying the beneficiaries the benefits of Option 2.

For these reasons this office is of the opinion that the two beneficiaries designated by the member are eligible to receive the benefits provided in Option 2.

You have indicated to us orally that, administratively, it would be difficult to make the benefits of Option 2 available to more than one beneficiary. If the question had been posed to us in the first instance, we should probably have ruled that the statute contemplated only one principal beneficiary. Under the present facts, however, we must rule that there may be two beneficiaries. In view of the practical difficulty involved in administering the benefits to more than one person, it might be advisable in future to have one principal beneficiary designated and perhaps contingent beneficiaries, the latter taking in the event they survived the principal beneficiary.

JAMES G. FROST
Deputy Attorney General

February 3, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Eligibility for Appointment to Dental Board

This office has been asked if a man who has served over nine years but less than ten years on a dental examining board is eligible for re-appointment to the Board of Dental Examiners.

Specifically, it is asked if the following provision quoted from Section 1, Chapter 66, R. S. 1944, would preclude the appointment of such a person.

> "No person shall be eligible to appointment on said board *who shall have served 10 years or more* on a dental examining board in this state."

It is our opinion that, if otherwise qualified, such a person would be eligible to be appointed to the Board.

Attention is directed to the underlined section of the above quoted provision.

The clear intent of such a provision is to make ineligible for appointment such person who has completed 10 or more years of service at the time the necessity for appointment arises. Until a person has completed 10 or more

years of this contemplated service if otherwise qualified, he would not be ineligible because of the fact that during his next term of office he would have served 10 or more years.

ALEXANDER A. LaFLEUR
Attorney General

February 6, 1953

To Ernest H. Johnson, State Tax Assessor
Re: Sales Taxes on Indian Reservations

You inquire whether the Maine sales and use tax applies to sales at retail on Indian reservations.

Literally the act applies. Section 3 imposes the tax on sales at retail "in this state". "In this state" is defined to include everything "within the exterior limits of the State of Maine and includes all territory within these limits owned by or ceded to the United States of America".

The Indian treaties are printed at pages 253, *et seq.*, in the 1843 statute volume. I have read these treaties and do not find anything therein which would indicate that the Indians are to be considered exempt from excise taxes.

As you know, the Indians are exempted from poll and property taxes by Chapter 81, Section 6, Subsection VIII.

It would appear that the sales tax law taxes sales on Indian reservations unless there is something in the Constitution to prevent such taxation.

The only mention of Indians in the Constitution which I have been able to find is Section 1, Article II, where "Indians not taxed" are excepted from the class of persons entitled to exercise suffrage.

Among the few cases involving the status of Indians, *State v. Newell*, 1892, 84 Me. 465, is perhaps the most pertinent here. An Indian was charged with killing a deer contrary to law. The Indian defended himself by asserting an ancient agreement that the Indians should continue to be able to hunt without impediment. The court held that this ancient agreement does not avail because the tribe which made it has ceased to exist in the sense that it did exist when the agreement was made. The tribal organization cannot now make war or peace, make treaties, punish crimes, etc., noted the court. But it could at the time the treaties were made.

> "We do not find that the Federal Government ever by statute or treaty recognized these Indians as being a political community, or an Indian Tribe, within the meaning of the Federal Constitution."

Thus, the court held that Maine Indians are not within the language of the interstate commerce clause which, of course, applies not only to commerce between the states but with "Indian Tribes".

Thus it would appear that Indians are subject to the general law of the State of Maine.

In *Murch v. Tomer*, 1842, 21 Me. 535, there was a civil action against an Indian on a promissory note. The court discussed the Indian's status saying that he is like a ward but is not one.

"Our Constitution seems to contemplate that, under certain circumstances, they may become voters at our elections. It only excludes such from voting as are not taxed."

The court noted that the tribe is in no sense a foreign nation, stating that the State may send in peace officers to maintain law and order on the reservation.

At one time the Supreme Judicial Court was asked whether Indians had a right to vote. They avoided this question. 137 Me. 358-9.

The U.S.C.A., Title 8, Section 3, provides:

"All Indians born within the territorial limits of the United States are declared to be citizens of the United States."

The matter has been before the Attorney General. Mr. Breitbard, on February 18, 1944, wrote Mrs. Mildred Akin that the polls and estates of Indians are not taxable, adding, "However, in case an Indian votes, his estates are taxable."

An Indian has been held to be subject to the Federal income tax and to state income taxes. *Choteau v. Burnet*, 1930, 283 U. S. 691, and *Leahy v. Treasurer*, 1936, 297 U. S. 420. In such cases the Indian had been certified to be competent and the income taxable was derived from the mineral resources of the reservation.

In summary, the laws of the State of Maine apply within the reservation and there is nothing in the law to make for any exemption in the case of sales taxes on sales occurring there. I see no connection, as the Attorney General's office has interpreted the law, between the right of suffrage and the duty to pay sales taxes. Under our Constitution the right of suffrage is tied to the duty of paying poll taxes and taxes on estates. There is no other connection between voting and paying taxes.

There being nothing in the Constitution to prevent, and the law being clear, the sales tax law applies, in my opinion, to sales made on Indian reservations.

BOYD L. BAILEY
Assistant Attorney General

February 6, 1953

To Frank S. Carpenter, Treasurer of State
Re: Deposit of Trust Funds

We have your memo of February 3, 1953, in which you ask:

"Is it legal for the State Treasurer to invest the Public Administrator's Fund and the Receivers Fund for Defunct Banks under the provisions of Chapter 15, Sec. 11?"

The provisions relative to Public Administrator's Fund are found in Section 44 *et seq.* of Chapter 141, R. S. 1944, and there it is stated that the State shall be responsible for the principal for possible claimants for a period of 20 years.

The provisions relative to the Receivers Fund for Defunct Banks are found in Sections 67 *et seq.* of Chapter 55, R. S. 1944, and this Fund is to be held in trust for 20 years pending certain actions by possible claimants after which time no claims may be presented.

It is our opinion that these funds are of such a nature that they may be invested under the provisions of Sec. 11 of Chapter 15, R. S. 1944, relating to the investment of trust funds.

JAMES G. FROST
Deputy Attorney General

February 19, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Appointments by Governor and Council

Section 1 subsection VI, Chapter 13 of the Revised Statutes of 1944 provides that, subject to the approval of the Governor and Council, the Chief (of the Maine State Police) may designate a member of the State Police to act as his deputy.

With respect to the procedure to be followed by the Governor and Council when approving or not approving the deputy designated by the Chief, it has been asked if

1. The Governor and Council act in concert, having one vote each, in the aggregate totaling eight votes; or
2. If the Governor and Council vote as separate bodies, the Governor having one vote and the Council having one vote (the latter vote being determined according to the majority vote of the members of the Council).

It is the opinion of this office that under the above quoted provision the Governor and Council vote as separate bodies, each having one vote.

The Constitution of Maine provides that the supreme executive power of this State shall be vested in a Governor. The Council advises the Governor in the executive part of government and he, with the Councilors, or a majority of them, may from time to time, hold a council for ordering and directing the affairs of State according to law.

It will be noted that with respect to the usual appointment to public office given to the Governor and Council, such appointment is to be effected by the Governor's first nominating the individual and then appointing with the advice and consent of the Council.

Such appointment has generally been understood to be an appointment by the "executive". This definition of "executive", to mean the Governor with the advice and consent of his Council, can be seen in messages of the various Governors;—Governor Kent, 1835; Governor Dunlap, 1837; Governor Smith, 1831, and others. Opinion of Justices, 72 Maine 548.

Though the "executive" in these instances includes both Governor and Council, it is clearly seen that on the part of each there was exercised a particular power, the nomination by the Governor, the supreme executive, and the appointment by the Governor with the advice and consent of the Council.

Now then, by referring back to the first quoted provision of law, it can be seen that the designation of the deputy is subject to the approval of the "executive", the Governor and Council. Logically following the clear-cut

distinction between the Governor and his advisory Council, we conclude that the approval must be secured of both the Governor as supreme executive and the Council his advisory body. NOTA. By constitutional provision in the Commonwealth of Massachusetts, the Governor is President of the Council, but has no vote.

JAMES G. FROST
Deputy Attorney General

February 25, 1953

To H. M. Orr, Purchasing Agent
Re: Leases

We have your memo of February 17, 1953, and attached lease between the Congress Street Corporation and the Maine Employment Security Commission.

This lease, as indicated above, purports to have been executed by the Maine Employment Security Commission and bears the signature of L. C. Fortier, Chairman of that Commission.

The Attorney General and all members of his staff unanimously agree that the time has come when a more correct procedure should be followed in executing leases of grounds and buildings, etc., needed for the proper functioning of the various State departments.

We draw your attention to section 35 of Chapter 14 of the Revised Statutes of 1944, which reads as follows:

> "The department of finance, through the bureau of purchases, shall have authority: . . .
>
> "IV. To lease all grounds, buildings, office or other space required by the state departments or agencies."

It is the intent of this statute to provide that the Purchasing Agent, the head of the Bureau of Purchases, shall execute leases on behalf of the State of Maine. To this effect see memo from this office dated January 28, 1942, from Frank I. Cowan, then Attorney General, to your bureau, in which it was stated that this office could not certify that the Secretary of State was the proper party to execute a lease for quarters to house the Portland office of Motor Vehicle Registration.

We realize that for a long period of time, by custom, such leases have been executed by the department head and approved by you and this office; but the mere fact alone of continued deviation from the law does not in any manner amend the law, and we are requesting that in future leases be executed by the proper party, namely the Purchasing Agent.

We would also recommend that the lease executed by the Maine Employment Security Commission under which it is acquiring new facilities for its Portland office be re-executed.

The first paragraph of leases should indicate the agreement between the lessor and the State of Maine, through the Purchasing Agent, Bureau of Purchases.

Leases of real property should be executed under seal.

JAMES G. FROST
Deputy Attorney General

March 2, 1953

To Herbert G. Espy, Commissioner of Education
Re: Exclusion from School

This office is in receipt of your memo of February 19, 1953, requesting interpretation of section 83 of Chapter 37, R. S. 1944:

> ". . . and provided further, that the superintending school committee may exclude from the public schools any child whose physical or mental condition makes it inexpedient for him to attend. . ."

You ask: "(1) Might 'physical or mental condition' be interpreted to include habitual behavior which disrupts work of the classroom and which prevents the teacher and other pupils from carrying on their proper activities?

"(2) What would be considered sufficient evidence to warrant the superintending school committee excluding such a child from school?"

In answer to Question No. 1, we might say that our interpretation of the above quoted provision of section 83 does not extend to the exclusion of children because of habitual behavior, but rather we would believe that section 59, subsection V would be more appropriate. This section reads as follows:

> "Superintending school committees shall perform the following duties: . . .
>
> "V. Expel any obstinately disobedient and disorderly scholar, after a proper investigation of his behavior, if found necessary for the peace and usefulness of the school; and restore him on satisfactory evidence of his repentance and amendment."

It is the intent of section 83 of Chapter 37 to make it compulsory, with certain exceptions, for children of certain ages to attend school. There are times when for one reason or another, when, for instance, children are bearers of contagious diseases or display a condition of filth, they should of necessity be excluded from school. We believe that the section first above quoted is intended to mean that it will not be compulsory for children having particular physical or mental qualities to attend school, if it is inexpedient for them to do so, and that the superintending school committee may in such conditions exclude such children.

However, with respect to disorderly or disobedient children, we believe that subsection V of section 59 is more appropriate, if it is inexpedient *for the school* to have them attend.

In answer to Question No. 2, we refer you to an opinion written by Ralph Farris, then Attorney General, on June 21, 1946, which opinion, along

with one written by Frank I. Cowan, Attorney General, on May 13, 1941, should in a general way answer your question with respect to the amount of evidence necessary to warrant committees in expelling a child from school.

Each instance where a child is expelled from school will contain its own factual situation, which must be examined to ascertain whether or not there has been sufficient evidence to warrant the action of the superintending school committee.

JAMES G. FROST
Deputy Attorney General

March 2, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Military Leave

You have asked this office for an interpretation of section 3 of Chapter 60 and section 23 of Chapter 59, both of the Revised Statutes, in so far as they affect the manner in which your Retirement System handles credits for military service.

Subsection VI of section 3 of Chapter 60 of the Revised Statutes of 1944, as amended, provides:

> ". . . the membership of any employee in such classes of military or naval service . . . shall be considered to be continued during such military or naval service if he does not withdraw his contributions . . ." (and such person) "shall have all the benefits of section 23 of chapter 59."

Section 23 of Chapter 59 of the Revised Statutes of 1944 provides that any employee regularly employed for at least 6 months by the state, county or municipality within the state, who has attained permanent status and who enters the military service shall not be deemed to have thereby resigned or abandoned his employment.

With respect to these statutes you ask: "Does the six-months limitation in effect provided for in the Personnel Law with respect to military leave and credits have any bearing upon the action the Retirement System should take in such cases with respect to maintaining retirement credits for employees who enter the Armed Forces?"

It is elementary in statutory construction that the fundamental rule is to ascertain legislative intent. *Smith v. Chase*, 71 Me. 165. Statute *in pari materia* must be considered. The whole body of legislation is to be studied together for the purpose of harmonious construction. *Cummings v. Everett*, 82 Me. 263. It is presumed that some progress along the lines of establishing policy and principle is intended. *Haggett v. Hurley*, 91 Me. 547.

A careful reading of both sections shows the legislative intent to be rather clearly defined. In effect, subsection VI of section 3 states that a member of the System entering military service shall have all the benefits of section 23 of Chapter 59.

What are the benefits of section 23 of Chapter 59? As stated above, this section provides that an employee in permanent status who enters the military service shall not be deemed to have thereby resigned or abandoned his employment. The second paragraph of said section states:

"*Such employee* shall be considered as on leave of absence without pay, and *for the purpose of computing time in regard to pension rights and seniority*, shall be considered during the period of his federal service as in the service of the governmental agency by which he was employed at the time of his entry into such federal service."

These two statutes clearly deal with one and the same problem: section 23 of Chapter 59 has reference to employees having a permanent status and their rights, pensions, seniority, etc., when they enter military service; section 3 of Chapter 60 deals with the same problem and states that he (the employee) shall receive the benefits of section 23 of Chapter 59. If we read these statutes and apply the doctrine of *pari materia*, presuming that all statutes relating to the same subject matter were enacted in accord with the same general legislative policy and that together they constitute a harmonious or uniform system of law, it follows of necessity that the six-months limitation provided for in section 23 of Chapter 59 has a definite bearing on the action your System should take with respect to maintaining retirement credits for employees who enter the Armed Forces.

Section 23 of Chapter 59 provides that under certain conditions, employees who enter the Armed Forces are entitled to restoration to a particular position or one of like seniority upon discharge from the Armed Services. Section 3 of Chapter 60 puts a further limitation on such restoration, in that he may not, while in service, withdraw his contributions.

It would be a paradox to state that, while a person might be a member of the Retirement System, he would yet not be entitled to employment with the State. This would in effect be vitiating the first paragraph of section 3 of Chapter 60, which makes it mandatory that an employee be a member of the Retirement System.

JAMES G. FROST
Deputy Attorney General

March 2, 1953

To Morris P. Cates, Deputy Commissioner of Education
Re: Lincoln Academy

You state in a memo to us dated February 24, 1953, that a group of taxpayers in the town of Newcastle desire to appropriate at their next town meeting money to be given to Lincoln Academy to assist in its new school housing construction program. You note that Lincoln Academy has been serving secondary students of Newcastle for 152 years without a contract and you ask, "Is there any other section or sections of the Statutes (than section 90 of Chapter 80) which would make such desired appropriation legal?"

The powers of a town are contained generally in Chapter 80 of the Revised Statutes, and a town has no power except that which is expressly granted by statute or that which by necessity is implied in powers granted. Section 90 in effect provides that towns may raise the necessary money for the support of schools. This word "schools" has reference to public schools. There is further authority for the repairing and construction of buildings of academies, seminaries or institutes with which the town has a contract, as provided in section 96 of Chapter 37.

A town is prohibited from giving its money away. It cannot, therefore, appropriate money for a purpose which is not within the statute, for that would in effect be giving money away.

This office can find no section other than section 90 of Chapter 80 which would permit a town to appropriate money for school purposes and it would seem to be limited to public schools or schools with which the town has a contract.

JAMES G. FROST
Deputy Attorney General

March 10, 1953

Honorable Burton M. Cross, Governor of Maine
Re: Regulations Issued by Sea and Shore Fisheries

This office is in receipt of your request to "check the law as to the constitutionality of the regulations pertaining to Sea and Shore fisheries in certain areas of Washington County, as referred to in enclosed letters."

The letters attached to your memo have reference, we believe, to section 40 of Chapter 34 of the Revised Statutes, the pertinent portion reading as follows:

> "The use of either otter or beam trawls within the territorial waters of Washington County is prohibited."

These letters further complain that such statute is unconstitutional, and although they have not cited that portion of the Constitution which they believe is violated by such statute, we believe they have reference to the Fourteenth Amendment to the Federal Constitution, which states that "No State (shall) deny to any person within its jurisdiction the equal protection of the laws."

It is our opinion that the legislature may enact such a law.

The guaranty of "equal protection of the laws" applies only to State action, and it does not require that State laws shall cover the entire field of proper legislation in a single enactment. It is aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It seeks an equality of treatment of all persons, even though all enjoy the protection of due process. It does *not* prohibit legislation which is limited either in the object to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed. It is not infringed by legislation which applies only to those persons falling within a specified class, if it applies alike to all persons within such class, and reasonable grounds exist for making a distinction between those who fall within such class and those who do not. *Cooley's Constitutional Limitations*, pp. 824, 825.

Briefly, then, there may be constitutional discrimination, if based upon a reasonable ground. It must be reasonable and based upon real differences in the situation, conditions, or tendencies of things. *State v. Leavitt*, 105 Me. 76, 84.

With respect to the question at hand, the legislature of each State, representing the people (for whom the State holds the rights of common fishery in trust) has full power to regulate and control such fisheries by legislation designed to secure the benefits of this public right in property to all its inhabitants. And the equality clause of the Constitution is not necessarily infringed by special legislation, nor by a legislative classification of persons or things. *State v. Leavitt, supra,* p. 83. It is merely required that all persons subject to such legislation shall be treated alike under like circumstances and conditions.

Thus, the State of Maine can limit its fishing rights to residents of the State of Maine. *State v. Tower,* 84 Me. 444.

It can permit only residents of a particular town to remove clams from the beaches of the town for commercial purposes. *State v. Leavitt, supra.*

And it would similarly appear to be within the power and right of the Legislature to prohibit the use of a particular type of vessel in a particular territory. Such a law would apply equally to all persons using a particular kind of property in a certain location, and, *prima facie* at least, would not be a violation of the equality clause of the Constitution.

ALEXANDER A. LaFLEUR
Attorney General

March 12, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Appointment of the Chief Justice

This office has been asked for an opinion as to the method in which the Chief Justice of the Supreme Judicial Court is chosen.

The Supreme Judicial Court is composed, not of six Associates, one of whom shall be Chief, but rather of a Chief Justice and five Associates. This would indicate that the Chief Justice should be nominated by the Governor and appointed with the advice and consent of the Executive Council.

An examination of the records of the Secretary of State shows that this is in fact the method which has been used in the past. The late Harold H. Murchie had not completed his term of Associate Justice when the position of Chief Justice had to be filled because of the vacancy occasioned by the resignation of the late Chief Justice Sturgis. Mr. Murchie was then nominated Chief Justice and appointed as such with the advice and consent of the Council for a seven-year term.

We believe that this is the proper method in selecting a Chief Justice.

JAMES G. FROST
Deputy Attorney General

March 17, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Public Utilities Commissioner – Business Connections

This office has been asked to interpret that portion of Section 2 of Chapter

40 of the Revised Statutes which relates to a Commissioner of the Public Utilities Commission and the right to hold stock. That provision reads as follows:

> "No member or employee of said commission shall have any official or professional connection or relation with or hold any stock or securities in any public utility . . . operating within this state. . ."

"Operating within this state" is the equivalent of "operating under the laws of this state" and, in legal intendment, to the phrase, "existing under the laws of this state".

It would therefore be our opinion that a Commissioner should not hold stock in a public utility company doing business in this State or organized under and subject to the laws of this State.

ALEXANDER A. LaFLEUR
Attorney General

March 20, 1953

To Col. Francis J. McCabe, Chief, Maine State Police
Re: Out-of-State Residents Arrested for Speeding

We have your memo of March 17, 1953, in which you relate the following facts and ask whether or not an arrest for a misdemeanor can legally be made after a lapse of time such as occurred in this instance:—

"One of the officers in this troop stopped a resident of Canada for speeding. His intent was to obtain an immediate trial for this out-of-state resident. He asked the operator to drive a matter of a few miles to the nearest municipal court. Upon arriving in the city he found that both the Judge and the Recorder were out of town. The officer then informed the driver involved that he would have to place him under arrest and have him obtain bail, which was done

"The question has now come up as to whether or not the arrest was legal, since the officer did not inform the person involved until about 20 minutes after the offense occurred even though he was constantly within the officer's sight while driving to the court room."

There is no doubt that legally and morally an arresting officer is bound to act promptly at the time of the offense and would not be justified in permitting any time to intervene between the time of the offense and the time of the arrest which might not be interpreted to be a continued attempt on the part of the officer to make the arrest.

Under the factual situation outlined above, it is our opinion that the arrest could be legally made.

JAMES G. FROST
Deputy Attorney General

March 20, 1953

To Morris P. Cates, Deputy Commissioner, Education Department
Re: Leavitt Institute

We have your memo asking the following question:

"Is Leavitt Institute under legal joint board management, as clearly defined in the statutes, so that it can be classified as a public school for the purposes of participating in the federal vocational education program?"

This office issued under date of February 12, 1952, an opinion concurring with that of the legal staff of the Office of Education, from the office of the General Counsel, Federal Security Agency, in which opinion was set forth the formula, compliance with which on the part of an academy would place that academy under sufficient control of the town for it to be considered a public school for the purpose of vocational training subsidization.

You have set out at length the factual elements relating to the management of Leavitt Institute to assist us in arriving at our conclusion.

Without repeating these elements, it is the opinion of this office that the answer must be in the negative, for the following reasons:

To be in any sense a "public school", there must be some control by the duly elected representatives of the town that will equal, not in practice, but in law, the control as vested in the trustees of the school. In other words, this control must be vested in the representatives of the town in such a manner that it is recognized by the law, as distinguished from control that may currently be present by virtue of the fact that the by-laws of the academy are not enforced.

Thus the provisions of section 96 of Chapter 37 require a joint committee consisting of representatives of the town and an equal number of trustees of the academy, said committee to select and employ teachers, fix salaries, arrange the course of study, etc.

As distinct from this joint committee, the Executive Committee of Leavitt Institute, while composed of the superintending school committee of the Town of Turner, performs its functions subject to the approval of the Board of Trustees. Legally, thus, control of the activities of the Institute rests in the Board of Trustees.

Again, as a condition precedent to there being a joint committee, section 96 provides that the amount paid under the contract existing between the town and academy must equal or exceed the income of the academy for the preceding year. As indicated in your memo, this condition precedent has not been met, and there is no possibility that the town can, by a vote of the people, request that such joint committee be formed.

For these reasons it is our opinion that there is not sufficient control and supervision vested in the town to justify the classification of Leavitt Institute as a "public school".

We should like, also, to state that we are not convinced that the present situation would be helped by a determination by this office that Leavitt Institute was a "public school". On the contrary, it is our opinion that such an interpretation would result in the Town of Turner's bearing an additional expense not justified under our existing laws relating to General-Purpose Educational aid.

JAMES G. FROST
Deputy Attorney General

March 23, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Park Employees – Participating Local Districts

We have your memo stating that a committee elected by the Town of Pittsfield annually receive under the provisions of a will certain moneys to be expended in the care of a public park, in that town, and that the question is raised as to whether or not the employee or employees involved should be considered as town employees for purposes of Social Security coverage.

Section 3 of Chapter 84, R. S., provides that a town may accept such a gift, and the purpose fulfilled by town employees in taking care of the property is a valid municipal purpose.

It is therefore our opinion that the employees would be employees of the town for the purpose of Social Security coverage.

JAMES G. FROST
Deputy Attorney General

March 27, 1953

To Honorable Emery S. Dickey, House of Representatives
Re: Validation Act in Jackson

This decision is based upon the following facts and it should be understood that any material deviation therefrom may change this opinion.

Facts: A certain gentleman was challenged as to his ability to read our Constitution or to write his name, during their last town meeting, all in accordance with Article XXIX of the Constitution of Maine. Failing to comply with the request of the moderator to prove his ability in this respect, he was refused the right to vote at said town meeting and withdrew. There is now some feeling that because this gentleman cast votes in all town proceedings since 1946, all actions taken at those meetings and more especially at the referendum on the school district, are invalid, because an illegal vote was accepted. I am assuming that all decisions registered were by more than a a bare majority of one vote. I have attempted to ascertain the vote on the school district from the Secretary of State, but he has no record of the result, which the town clerk should have forwarded to him some time ago; so once again I will assume that it was accepted by more than a majority of one vote.

On the foregoing facts, it is my opinion that no validation act is necessary. It is generally held that the reception of illegal votes at an election does not affect the validity unless it is shown that their reception affected the result. 18 Am. Jur. 351 §260, Reception of Illegal Votes. The decisions of our courts are in accord with this rule. *Prince v. Skillin,* 73 Me. 361, and I quote therefrom:

> "The mere circumstance that improper votes were received, will not vitiate an election."

One can readily see that if the rule were otherwise, there would be no certainty to any election, to any office, to any tax levy. If my assumptions are not correct, then the true facts should be brought forward so that we can evaluate the situation in its true perspective.

ROGER A. PUTNAM
Assistant Attorney General

April 3, 1953

To W. H. Deering, Treasurer, Augusta State Hospital
Re: Patients' Funds

We have your letter posing the following questions:

1. "Can the hospital retain funds that were in the possession of a mental patient at the time of his commitment, or accumulated by him during the period of his commitment, these funds being in the custody of the hospital, for the payment of reasonable expenses of his support furnished by the Augusta State Hospital?

2. "Is it necessary for the hospital to have the consent and approval of the patient to withhold any part of his funds for the State at the time of his discharge?"

Your first question is answered in the negative, if you mean the retention of funds without the approval of the patient.

The answer to Question 2 is "yes."

We feel that in no instance should you make an agreement with a minor who is being discharged from the hospital, but that such agreement should be made with the guardian of the minor. We do feel that in each case where a patient is being discharged from the hospital, having funds of any substantial amount on deposit, an attempt should be made to reach an agreement that a portion of those funds can be retained by the hospital and credited for the payment of bills for his board and care or support.

We think, further, that each case should be considered on its own merits and that no attempt should be made to retain funds when such retention would create a real hardship on the person being released.

JAMES G. FROST
Deputy Attorney General

April 15, 1953

To Paul A. MacDonald, Deputy Secretary of State
Re: Legal Loads of Trucks

We have your memo requesting answers to questions concerning the interpretation of section 100 of Chapter 19 of the Revised Statutes, as amended, which statute deals with the load in pounds that may be carried by a group of axles on commercial vehicles.

The pertinent portions of the statute which are to be considered read as follows:

". . . No vehicle having 2 axles shall be so operated, or caused to be operated, when the gross weight exceeds 32,000 pounds.

"No group of axles shall carry a load in pounds in excess of the value given in the following table corresponding to the distance in feet between the extreme axles of the group, measured longitudinally to the nearest foot:

"Distance in feet between the extremes of any group of axles	Maximum load in pounds carried on any group of axles
4 to 7, inclusive	32,000*
17	41,160*
27 and over	50,000

provided, however, that no vehicle shall have a gross weight imparted to any road surface of more than 22,000 pounds on any one axle, *and no vehicle having two or more axles less than 10 feet apart shall be operated, or caused to be operated, with more than 16,000 pounds* imparted to the road surface from either axle; provided further, that no vehicle shall be so operated, or caused to be operated, when the load imparted to the road surface is greater than 600 pounds per inch width of tire (manufacturer's rating); . . ."

The definition of the term "group of axles" will be helpful in considering the problems presented to us in your questions.

"Group of Axles" means those axles which are contiguous and segregated by reason of their use. In the instant case, the extreme axles of the group would be the first axle or wheel and the rear axle or wheel of the tandem axles of wheels. These are the extreme axles of the group. See *State v. Balsley*, 48 N. W. 2d, 287.

Question No. 1. "Under Section 100 is the expression 'distance in feet between the extremes of any group of axles' to be interpreted as to the extreme from the front axle to the rear axle or, in a three axle job, as between the front axle and the middle axle or between the middle axle and the rear axle?"

Answer. In the instant case, where a three-axle vehicle is concerned, the expression "distance in feet between the extremes of any group of axles" is to be interpreted as the extreme from the front axle to the rear axle — and not as between the front axle and the middle axle or between the middle axle and the rear axle.

Question No. 2. "If a three axle job is registered for 50,000 pounds, may it carry 22,000 pounds on any one axle so long as the aggregate does not exceed 50,000 pounds, assuming the tire width is sufficient to qualify?"

Answer. If the middle and rear axles are less than 10 feet apart, then the gross weight to be imparted to either of those axles could not exceed 16,000 pounds. See above underlined portion of the law quoted, in which case the front axle only could carry 22,000 pounds, if between that axle and the middle axle there was a distance of 10 feet.

Question No. 3. "If a three axle truck is 17 feet from front axle to rear axle and is registered for, say, 46,000, 48,000 or 50,000 pounds, may it carry a load according to the registration so long as the maximum does not exceed

the 50,000 pounds, no more than 22,000 pounds is on any one axle and the tire width qualifies?"

Answer. Over-registration gives no more right than over-insurance. A three-axle truck having a distance of 17 feet from the front axle to the rear axle, being registered for 46,000, 48,000 or 50,000 pounds, may not carry a load according to the registration, as such truck is limited to carrying a load not to exceed 41,160 pounds. See statute above quoted.

Question No. 4. "If so (perhaps repeating) is there any limit to the weight on any axle or combination of axles except the 22,000 per axle and the 50,000 pounds overall, assuming forward and rear axles are not 'less than 10 feet apart' and the tire width is sufficient to qualify?"

In answer to Question No. 4 we would refer you to the answer given to Question No. 2 and would also refer you to the first sentence of the above quoted section of the law.

JAMES G. FROST
Deputy Attorney General

April 15, 1953

To Ernest H. Johnson, State Tax Assessor

Re: Excise Tax of Servicemen at Limestone

I reply to your inquiry of April 13, 1953. You state that servicemen in quarters at the Limestone Air Base sometimes register motor vehicles in Maine, prior to which they are compelled to obtain an excise tax receipt. You inquire to what town the excise tax should be paid.

Under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A., Section 574, the serviceman is exempt from any such tax in Maine if he has paid his excise tax in the state of his domicile. Otherwise, the exemption does not apply. I assume that in the cases you mention, no excise was paid to the state of domicile.

The next question is whether the registrant is "occasionally or temporarily residing" in a municipality. As you know, the municipality has no functions of government in the Limestone Air Base, the Federal Government having assumed "exclusive jurisdiction" under Section 12 of Chapter 1, R. S. 1944.

As I see the statute, its literal clear meaning calls for a tax but there is no literal clear meaning concerning to what municipality the tax should be paid. We are, therefore, left, in my judgment, to reasonable construction, the duty being clearly based upon the serviceman to pay a tax if he is not going to pay one in his home jurisdiction and if he is going to register the car in Maine.

Essentially, taxes are bills for services rendered by governments. The excise tax is payable to the town of residence because that town affords the government services which the taxpayer ought to pay for. Pursuing the reason for the statute to its logical limit, the excise tax in question ought to be paid to the Town of Limestone. It is that town which affords police protection, street maintenance, and other government benefits.

It is, therefore, my conclusion that the excise taxes should be paid to the treasurer of the Town of Limestone. This memorandum is written, of course, with the understanding that the servicemen in question reside on that part of the air base which used to be within the Town of Limestone.

BOYD L. BAILEY
Assistant Attorney General

April 27, 1953

To Hon. S. W. Collins, State Senator
Re: Excise Tax in Limestone Air Base

You have forwarded to me for comment the letter of Mr. D. E. Chick, Town Manager of Caribou, dated April 23, 1953.

Mr. Chick points out that the Town of Caribou offers certain government services to servicemen at the Limestone Air Base and concludes, therefore, that "there doesn't seem to be any logical argument for payment in any particular town."

The statute in question is Section 40, Chapter 19, R. S. 1944, amended by Chapter 264, P. L. 1951. Non-residents, by this statute, "registering a motor vehicle or aircraft in this state shall pay to the municipality of the state where he is occasionally or temporarily residing, or if there be no such residing place, then to the state the excise tax above provided. . ."

It is apparent from reading this language that there is a legislative intent that the excise tax shall be for local, not state, benefits unless no locality can be determined to be a proper recipient. I have speculated, in my opinion of April 15, that the reason for this legislative policy is that the excise tax is to pay for government benefits such as police protection, street maintenance, etc. That is pure speculation. Mr. Chick disagrees with it. The essential consideration, in my judgment, is that the statute has made the criterion: "The municipality of the state where he is occasionally or temporarily residing." If that place can be found, the excise tax must be paid there. The servicemen are definitely located at the Base; there is no question as to the location of their living quarters. That being the case, I see no reason why the tax should not be paid to that municipality in which those living quarters are. . . .

BOYD L. BAILEY
Assistant Attorney General

April 28, 1953

To Herbert G. Espy, Commissioner of Education
Re: Distribution of Bibles in the Public Schools

We have your memo of April 22, 1953, in which you ask the following questions:

"(1) Is it legally possible for a school committee to authorize an organization, such as the Gideons, to distribute Bibles in the public schools?

"(2) Is it legally possible for a school committee to accept a gift of Bibles, from an organization like the Gideons, with the express understanding that the manner and extent of their distribution and use in the schools will be determined by the school committee?"

We would direct your attention to section 127 of Chapter 37 of the Revised Statutes which in part provides that in order "to make available to the youth of our land the book which has been the inspiration of the greatest masterpieces of literature, art and music and which has been the strength of the great men and women of the Christian era, there shall be, in all the public schools of the State . . . reading from the Scriptures. . ."

It is our opinion that both of your questions can be answered in the affirmative, there being nothing inconsistent with such action with respect to the above quoted provision of our law.

ALEXANDER A. LaFLEUR
Attorney General

May 6, 1953

To Allan L. Robbins, Warden, Maine State Prison
Re: Property of Deceased Prisoners

We have your memo in which you state that you have on hand an accumulation of personal property and cash belonging to deceased prisoners. You seek our advice concerning the disposition of such personal effects and cash.

When a prisoner dies in your institution leaving money on deposit, that money and other property should be disposed of under the provisions of section 47 of Chapter 23 of the Revised Statutes, which section provides that it shall be turned over to the representatives of the deceased. This propery should, then, be turned over to the administrator of the estate of the deceased or to his next to kin or, if a Public Administrator has been appointed, then to him.

JAMES G. FROST
Deputy Attorney General

May 7, 1953

To Herbert G. Espy, Commissioner of Education
Re: Surplus Property

This office has been asked to certify to the Department of Health, Education and Welfare (formerly Federal Security Agency) that the surplus property program now operating in your department meets the standards set by the Federal Security Agency by regulation promulgated January 2, 1953 and found in the Federal Register, page 165, under date of January 8th. The regulation is too long to set out here, but the pertinent points will be discussed separately.

The statutes setting forth the duties of the Commissioner of Education and appropriating money to carry out this program are found in the Resolves of

1951, Chapter 39, amending Resolves of 1949, Chapter 144 . . . It should be noted that the Resolves above mentioned are substantially the same, except that the latter changes the name of the fund and extends the program to institutions not exclusively educational.

The first requirement is that the party or department designated to carry on the program shall have authority "to acquire, allocate, and distribute personal property to tax-supported and to non-profit institutions eligible to acquire same under section 203 (j) of the act". The right to acquire and distribute is clearly set forth in the Resolves. The property to be acquired is federal surplus property and must by implication be construed to mean property on such terms and conditions as the Federal Government shall attach.

The second requirement is that the party or department designated shall have the right "to acquire, warehouse, and distribute as above". We feel that the right to acquire and distribute necessarily implies the right to warehouse same during the interval between acquisition and disbursement. This is substantiated by the fact that there has been a surplus property warehouse for this purpose since 1945.

The third requirement is that the party or department designated shall have the right "to execute the agreements required by the Federal Government". We take this requirement and the term "agreement" to mean that the Commissioner, as the designated party, shall have the right to make such administrative agreements as will expedite the program at hand. By way of example: he is at this moment drawing up an administrative code of procedure that will conform to minimum requirements of this regulation and will become the mode of procedure for disbursing surplus property. We feel that this is purely administrative and allowable by virtue of his office as Commissioner of Education. This action is comparable to his distribution of State duties among his associates and deputies, a matter of sound administrative practice.

With the above constructions in mind, we do not hesitate to certify that the Commissioner's duties, as set out by our Legislature, conform to the Federal standards as of May 6, 1953.

ROGER A. PUTNAM
Assistant Attorney General

May 15, 1953

To Spaulding Bisbee, Director of Civil Defense
Re: Status of State Police Reserve Corps

We have in hand your memo of May 11, 1953, containing the following question:

"Does the State Police Reserve Corps come within the Civil Defense Act so that its members will be entitled to the benefits of the Workmen's Compensation Act, which has been recently extended to cover all civil defense and public safety personnel. (Section 2, Chapter 267, P. L. 1953.)

The State Police Reserve Corps was created by Section 9 of Chapter 273 of the Public Laws of 1951. Its obvious purpose was to supplement our efficient State Police with a highly trained ready reserve to assist our regular police forces during civil defense emergencies. Section 9 (supra) also provides that the

Chief of the State Police can call the Reserve Corps to duty *as State Police, only* after the Governor has issued his proclamation provided for in Section 6 of Chapter 11-A, as amended. When the Corps is thus called to duty the act further provides that its members shall have the same status as regular members of the State Police. Thus at that time they would be considered State employees and so entitled to benefits under our Workmen's Compensation Act.

The question still remains whether the members of the Corps would be covered while in training for their duties in civil defense emergencies. It is the opinion of this writer that it was the intent of the legislature to cover *all* civil defense and public safety workers and that this Corps, as a necessary and important adjunct to the whole civil defense program, which would not exist except for such a program, would be covered while in training as members of that organization.

This opinion relates only to the question of general coverage. Each claim will undoubtedly turn upon its facts, and the claimant must show (1) that he is a civil defense or public safety worker; (2) that he was in training for or on civil defense or public safety duty; and (3) that his injury was directly attributable to that training or duty. Questions such as these are within the exclusive province of the Workmen's Compensation Board and are beyond the scope of any opinion that we might render.

ROGER A. PUTNAM
Assistant Attorney General

May 15, 1953

To Ermo H. Scott, Deputy Commissioner, Education
Re: Teachers' Contracts

We have your memorandum of May 6, 1953, in which you ask, briefly, two questions:

1. In your suggested contract form, to be used by the towns contracting with probationary teachers, should a provision be inserted in such contract that the contract may be terminated by a definite period of written notice given by either party?

Answer. After considerable discussion with your department and with members of our staff, it would appear that such a provision would be of such uncertain meaning with respect to the statutory provision for dismissal that it would unquestionably give rise to misunderstanding. It therefore should not be included in the contract. Along with the statutory provision for removal, as seen in section 50 of Chapter 37, it would seem sufficient if there were provision for termination by mutual consent upon a given days' notice.

2. Would it be legally sound and within the statutory provisions relating to teachers' contracts for a local school committee to extend the provisions of the contract in both suggested forms (probationary and permanent) to include a provision to the effect that after hearing granted under the provisions of section 50 of Chapter 37 the case might then be referred to an arbitration board, the decision of the board being final?

Answer. It is our opinion that such a provision should not be included in the contract. The right of dismissal on the part of the school committee is absolute and is provided for in the above mentioned section 50. Such right to dismiss cannot be barred in any way or limited by contract. The arbitration board would be a further condition which would be repugnant to the principle first mentioned.

JAMES G. FROST
Deputy Attorney General

May 25, 1953

To Raymond C. Mudge, Finance Commissioner

Re: New Law on Bedding and Upholstery

This office has been asked to consider the problem presented by the enactment of Chapter 333, Public Laws of 1953, without an accompanying appropriation to administer and enforce the law.

The Act in question is designed to place appropriate safeguards around the manufacture and sale of bedding and upholstered furniture to insure a healthful product.

Section 129 is that section relating to funds for the administration of the provisions of the Act and reads as follows:

> "Proceeds payable into the general fund. All fees and other moneys collected in the administration of sections 123 to 130, inclusive, shall be credited to the general fund of the state. Provided, however, that there shall always be available for the administration of the provisions of sections 123 to 130, inclusive, state moneys in an amount not less than the revenue derived from the fees collected under the provisions of sections 123 to 130, inclusive, except that any unexpended balance shall remain in the general fund."

As stated, the legislature did not appropriate any money to enforce or administer the Act and the question is now asked:

"How shall the act be enforced and administered in the absence of an appropriation?"

It is our opinion that section 129 is to be interpreted to mean that fees and other moneys collected shall be credited to the general fund of the State if there is available from other sources a fund to administer the provisions of the Act. If such other fund has not been made available for the purpose of administration, then the fees and other moneys collected should not be credited to the general fund, but are to be handled as dedicated moneys and directed to such administration as if contemplated by the Act.

JAMES G. FROST
Deputy Attorney General

May 25, 1953

To Fred J. Nutter, Commissioner of Agriculture

Re: Maine Building Committee, Eastern States Exposition

We are in receipt of your memo of May 18th relative to the membership of the Maine Building Committee, Eastern States Exposition.

Chapter 51 of the Resolves of 1923 established the Maine Building Committee and provided that it should be composed of five members, including the Commissioner of Agriculture, to be appointed by the Governor. Chapter 313 of the Public Laws of 1953 repealed Chapter 51 of the Resolves of 1923 (and Chapter 134 of the Public Laws of 1925, which did not substantially change the earlier law) and enacted a new law relative to the same committee.

The structure of the membership of the committee, however, was changed in that, though there are now still five appointed members, the Commissioner of Agriculture is no longer an appointed member, but a member *ex officio.*

You ask this office the following question: "Will the present members of the Committee continue to serve until the expiration of their terms, or will their duties cease on the effective date of this act?"

The first sentence of Section 8 of Chapter 313, being that part of the Act with which we are here concerned, reads as follows:

> "The State of Maine Building Committee of the Eastern States Agricultural and Industrial Exposition, Inc., as heretofore established, shall consist of 5 members, to be appointed by the governor with the advice and consent of the council."

Unlike some jurisdictions, in Maine, when an Act is repealed, all connection between the old and the new is cut off except what is saved by special provisions. In other words, saving clauses are sometimes included and have the effect of continuing rights and privileges or liabilities under the old act. In the present case, the newly enacted law contains words which have been used in this State for some years as a saving clause, to wit, "as heretofore established".

It is the opinion of this office that the words "as heretofore established" are intended to, and do, have the effect of continuing in existence the earlier Act except as amended either expressly or impliedly by the provisions of the Act. Thus, those persons holding office as members of the Maine Building Committee as of the effective date of the Act continue holding office until the expiration of their respective terms, subject only to the changes contemplated by the new Act, that the Commissioner of Agriculture will no longer be an appointed member of the committee, but an *ex officio* member, and that there will be five members appointed by the Governor and Council, which necessitates the appointment to office of one additional member.

ALEXANDER A. LaFLEUR
Attorney General

May 29, 1953

To Marion Martin, Commissioner of Labor and Industry
Re: Machine Alterations

This office has been asked for an opinion as to whether your department may, under Section 5 of Chapter 25 of the Revised Statutes, as amended, make recommendation for a machine alteration such as changing a square head on a jointer to a round head, the reason for such recommendation being that the opening on a round head is smaller and offers a greater degree of protection to the worker.

Such statutes as mentioned should not be so strictly construed as to deprive them of their effectiveness. However, this office doubts that a court would enforce any recommendation, however wisely given, with respect to the type of machinery used. The statute in question appears to extend only to the use of guards on machinery.

> "If the commissioner . . . shall find upon such inspection that . . . the machinery in such workshops and factories (is) located or (is) in a condition so as to be dangerous to employees and not sufficiently guarded . . . he shall notify the owner, . . ."

JAMES G. FROST
Deputy Attorney General

June 4, 1953

To Gerald Murch, Chief Parole Officer
Re: Good Time Allowance for Prisoners Serving Life Terms

Your question relative to the allowance of good time for prisoners serving life sentences has been received. We understand that you are particularly interested in view of the fact that Chapter 404 of the Public Laws of 1953 provides that certain prisoners serving life sentences may be released on parole after serving thirty (30) years.

Chapter 84, Section 1 of the Public Laws of 1951, amending Section 27 of Chapter 23 of the Revised Statutes of 1944, provides as follows:

> "Each convict, *except those sentenced to imprisonment for life*, whose record of conduct shows that he has faithfully observed all the rules and requirements of the prison, shall be entitled to a deduction of 7 days per month from the minimum term of his sentence, commencing on the first day of his arrival at the prison."

The underlined in the foregoing clearly shows that such credit is not allowable and settles the question without even discussing the legislative intent in Chapter 404 of the Public Laws of 1953, allowing release "*after* serving 30 years' imprisonment."

ROGER A. PUTNAM
Assistant Attorney General

June 8, 1953

To General Spaulding Bisbee, Director of Civil Defense and Public Safety
Re: Auxiliary Policewoman – Compensation for Injury

Receipt is acknowledged of your inquiry of May 21st. You state that the question has come up of coverage under the Workmen's Compensation Law in case an Auxiliary Policewoman who is a housewife and working as a volunteer might suffer a compensable injury and what the basis of compensation would be in that instance.

Section 2 of Chapter 267, Laws of 1953, provides that in computing the average weekly wage of any claimant under the provisions of that section,

the average weekly wage shall be taken to be the working capacity of the person in the occupation in which he is regularly employed.

Your question appears to relate to a person who is not engaged in any occupation which brings in a salary or wages. Such a person, being injured in Civil Defense work, would be entitled to the minimum provided by the law, which at present is $12 per week and after November 30 will be $15 per week. Together with this compensation goes, however, the full payment of all necessary and proper medical expenses.

NEAL A. DONAHUE
Assistant Attorney General

June 8, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Harness Racing Commission

This office has been asked for an interpretation of Chapter 402, P.L. 1953, which Act amends Section 1, Chapter 77 of the Revised Statutes, to provide:

> "One member (of the State Harness Racing Commission) shall, *in some capacity*, be connected with agricultural societies which operate pari mutuel racing."

Frederick A. Howell, presently a member of the State Harness Racing Commission, states that he is a member of the Androscoggin Agricultural Society and a member of the Cumberland Farmers Club, both of which associations operate pari mutuel harness racing meets.

The question is asked if Mr. Howell, as a member of the societies referred to above, has sufficient connection with an agricultural society operating pari mutuel racing, to qualify by virtue of such membership for re-appointment as a member of the Harness Racing Commission.

It is our opinion that Mr. Howell's membership in the agricultural societies mentioned above is sufficient to bring him within the phrase "in some capacity", contained in Chapter 402, P.L. 1953.

We do not believe that the statute should be construed to require that a person, to be eligible for appointment to the Harness Racing Commission, must be an officer in an agricultural society which operates pari mutuel racing, but rather we believe it would be sufficient if the person is an active member of such a society, and displays an interest in the welfare of the society.

It is our opinion, therefore, that Mr. Howell would be eligible under the 1953 amendment (assuming that he meets other requirements) for re-appointment.

ALEXANDER A. LaFLEUR
Attorney General

June 8, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Harness Racing Commission — Membership

This office has been asked for an interpretation of Chapter 402, P. L. 1953, which Act amends Section 1, Chapter 77 of the Revised Statutes, to provide that:

> "One member (of the State Harness Racing Commission) shall, in some capacity, be connected with agricultural societies which operate pari mutuel racing."

Frederick A. Howell, presently a member of the State Harness Racing Commission, states that he is a member of the Androscoggin Agricultural Society and a member of the Cumberland Farmers Club, both of which associations operate pari mutuel harness racing meets.

The question is asked if Mr. Howell, as a member of the societies referred to above, has sufficient connection with an agricultural society operating pari mutuel racing, to qualify by virtue of such membership for re-appointment as a member of the Harness Racing Commission.

It is our opinion that Mr. Howell's membership in the agricultural societies mentioned above is sufficient to bring him within the phrase "in some capacity", contained in Chapter 402, P. L. 1953.

We do not believe that the statute should be construed to require that a person, to be eligible for appointment to the Harness Racing commission, must be an officer in an agricultural society which operates pari mutuel racing, but rather we believe it would be sufficient if the person is an active member of such a society, and displays an interest in the welfare of the society.

It is our opinion, therefore, that Mr. Howell would be eligible under the 1953 amendment (assuming that he meets other requirements) to re-appointment.

ALEXANDER A. LaFLEUR
Attorney General

June 11, 1953

To Harold I. Goss, Secretary of State
Re: Movement of Used Cars. Rules and Regulations

You ask for opinions relative to the sixth paragraph of Section 35 of Chapter 19 of the Revised Statutes and Section 8 of Chapter 19 of the Revised Statutes.

Section 35 of the Revised Statutes deals with the inspection of motor vehicles and the stickers which are placed on the windshields of automobiles as the result of such inspection.

Herewith quoted is the sixth paragraph of Section 35:

> "The secretary of state or authorized agent may issue a permit to owners of motor vehicles which are not inspected to enable them to

move such vehicle from garage or storage place to the nearest inspection station for the purpose of complying with this law."

You ask if your department, under Section 35, has the authority to issue to a dealer in second hand vehicles a permit to drive such vehicles purchased in another State to the dealer's garage or place of business in this State without having an inspection sticker attached thereto or without such dealer's having such cars inspected at the nearest inspection station within this State.

It is our opinion that the answer to this question is, No. Our reason for this answer is the presence of the fourth and fifth paragraphs of Section 35. The fourth paragraph provides that said inspection shall not apply to motor vehicles owned and registered in another state nor to new motor vehicles being driven by a dealer or his authorized representative from the point of distribution to his place of business. By referring specifically to new motor vehicles it is clear that the legislature meant to exclude used motor vehicles. Further evidence of this exclusion is present in the paragraph immediately following that above quoted, which refers to both new and used motor vehicles and which shows that if the legislature had intended that used motor vehicles be included in the paragraph above quoted, then it would have so stated.

Paragraph 6 of Section 35 would appear to be a limitation on the authority of the Secretary of State to issue permits to uninspected motor vehicles.

Having answered this question in the negative, it becomes unnecessary for this office to answer the second question, relating to the general movement of such used vehicles from without the State.

With respect to your question relating to Section 8 of Chapter 19 of the Revised Statutes, which section relates to rules and regulations promulgated by the Secretary of State, it is the general rule that such rules and regulations are valid only when they lead to the achievement of the results set out by the legislature. Any rule or regulation that is inconsistent with the statutes is invalid. It is our opinion, based upon the answer to the foregoing questions, that a rule or regulation which would allow your department to issue permits for the moving of used motor vehicles from without the State to the garage or place of business of the dealer in used cars in this State, without such vehicles having been inspected, would be inconsistent with the statutes relating to the inspection of motor vehicles, and for that reason would be invalid.

JAMES G. FROST
Deputy Attorney General

June 16, 1953

To General Spaulding Bisbee, Director of Civil Defense
Re: Appointments

We have your memo of June 10th and attached letter from James Lassiter, Deputy Director No. 1, Oxford County, in which letter Mr. Lassiter asks if the selectmen of a town can relieve the Civil Defense Director and replace him with another man after a state of emergency has been declared by the Governor.

In answering this question it is assumed that the Director has been appointed by the municipal officers as provided in the Civil Defense Act. The power of appointment is, in the absence of other law to the contrary, accompanied by the power of removal. Therefore the removal of a locally appointed Civil Defense Director should be governed by the manner in which he was appointed. Reference should be made in each instance to the charter of the municipality, which may govern the method of appointment and removal of officers.

JAMES G. FROST
Deputy Attorney General

June 16, 1953

To Kenneth Burns, Accounting Supervisor, Institutional Service

Re: Settlement of Pupils at the Maine School for the Deaf.

We have your memo of May 16, 1953, in which you request an opinion relative to the settlement of children admitted to the Maine School for the Deaf. You ask specifically three questions:

"1. Is the Maine School for the Deaf a state institution in the meaning of R. S. 1944; Chapter 82; Section 3?

"2. If so, does the above apply to a pupil for the entire period of attendance from the date of the original enrollment at the school until the pupil is graduated or officially discharged? Reference: R. S. 1944; Chapter 23, Sections 171 and 172.

"3. Does the above apply only for one school year at a time and is the fall registration, after the summer vacation, to be considered as a new enrollment?"

These questions are asked to determine whether or not the settlement of a child entering the school remains the same throughout his stay at the institution or whether it may change from time to time, thereby coinciding with the changes of settlement of the child's father.

It is the opinion of this office that the Maine School for the Deaf is a State institution within the provisions of Section 3 of Chapter 82 of the Revised Statutes, which provides:

> "The settlement status of a person . . . who is an inmate of any asylum, penitentiary, jail, reformatory or other state institution shall not change during such period of service, confinement or imprisonment, but his settlement shall remain as it was at the time of the beginning of such service, confinement or imprisonment."

In view of the strict limitations set out in Section 171 of Chapter 23 of the Revised Statutes with respect to the withdrawal or discharge of a pupil from the Maine School for the Deaf and because of the requirement in Section 172 of Chapter 23 that certain children shall be compelled to attend the Maine School for the Deaf until discharge by the superintendent, it is our opinion that the answer to Question No. 2 is, Yes.

Having answered Question No. 2 in the affirmative, it is unnecessary for us to answer Question No. 3.

JAMES G. FROST
Deputy Attorney General

June 22, 1953

To Everett F. Greaton, Director, Maine Development Commission
Re: Appropriation for Promotion of Industry and Mineral Research

One provision of Chapter 223 of the Public Laws of 1951 appropriated the sum of $50,000 to the Maine Development Commission for the promotion of industry and mineral research. With respect to this $50,000 appropriation it was provided that "Any unexpended balance shall not lapse but be carried forward to the 1952-1953 fiscal year." You state that there is presently left in the fund, unencumbered, approximately $30,000 and that you had assumed that this was a carrying provision and that the fund did not lapse. You ask if the above quoted provision of the law, in our opinion, means that this fund must lapse unless encumbered or whether we feel that it was the intent of the legislature that this fund could carry on and should not lapse.

It is the opinion of this office that the intent of the legislature is clear and that the fund shall not continue beyond the end of the 1952-53 fiscal year. The above quoted phrase is the usual expression to show legislative intent that funds shall lapse at a particular time.

JAMES G. FROST
Deputy Attorney General

June 23, 1953

To Everett F. Greaton, Executive Director, Maine Development Commission
Re: Encumbrance of Funds for Salary and Expenses

We have your memo of June 23, 1953, in which you state that you have employed a full-time Assistant Geologist at a salary of $4000. a year with traveling and laboratory expenses of another $2000.

The amount of $4000 is to be paid from the special appropriation for industrial and mineral research. This fund, unless properly encumbered, will lapse at the end of the 1952-53 fiscal year, and you ask if you can encumber this fund for the amount of the contract.

We wish to advise that a contract, the terms of which show employment prior to June 30, 1953, is sufficient to encumber the fund for the amount expressed in the contract.

JAMES G. FROST
Deputy Attorney General

June 23, 1953

To L. C. Fortier, Chairman, Maine Employment Security Commission
Re: Amendments to Employment Security Law effective 1953.

This office has been asked for an interpretation of Chapter 327, P. L. 1953, entitled "An Act Relating to Benefits for Total Unemployment under Employment Security Law," amending Section 13, subsection II, of the Revised Statutes of 1944, Chapter 24, as repealed and replaced by Section 1 of Chapter 430, P. L. 1949, which provides a new benefit schedule which increases the "weekly benefit amount" in amounts varying from 50 cents to $2.00 and raises the minimum qualifying annual wage from $300.00 to $400.00. These changes are retroactive to April 1, 1953, whereas the amendment does not become effective until August 8, 1953.

The first question you raise is: "The majority of claimants will be eligible for increased weekly benefit amounts, and consequently, for increased available benefits for the benefit year *"retroactive to April 1, 1953."*

"Could the determinations or redeterminations in such cases possibly be legally made at the earliest possible date, say June 15, 1953, in view of the fact that advancing the date of such determinations or redeterminations from the effective date of the amending statute, August 8, 1953, to such earlier date can in no way affect the final entitlement of such claimants?"

Answer. It is our opinion that it is possible for you to determine or redetermine such cases at any time prior to August 8th, but that it is not possible to pay claims on the basis thereof until the effective date of this chapter, which is August 8, 1953.

The second question you raise is: "The second part of the amendment becoming effective August 8, 1953, as of April 1, 1953, raises the minimum qualifying wage from $300.00 to $400.00, and makes it necessary to redetermine all claimants who have previously been determined eligible on the basis of 1952 wages of from $300.00 to $399.99, finding such claimants not eligible for benefits. The question arises as to whether or not overpayments shall be established against those claimants who were previously determined eligible under Section 13, II, and in effect until August 8, 1953, with qualifying wages of less than $400.00, the amendment (Chapter 327) becoming law on August 8, 1953, even though the amendment reads 'on and after April 1, 1953.' "

This question is partially answered by an opinion of this office dated July 1, 1947, with which we are in accord. The one point not specifically raised nor answered at that time was in regard to overpayments. It is our opinion that it would not be in keeping with the intent and purpose of the Unemployment Compensation Law as a whole to attempt to collect, from employees, overpayments made under the law as it exists now and will remain until August 8, 1953, which are determined to be overpayments due to an amendment passed with a retroactive provision. Furthermore, the following rule has been applied by the courts to various cases similar to this one:

> "Statutes which create new liabilities in connection with past transactions should not be given retroactive operation."

The third question you raise is: "In many cases where a claimant has been disqualified under Section 15 of the law his maximum benefit amount has

been reduced by an amount equivalent to the number of such weeks of disqualification times his weekly benefit amount.

"The Commission's Regulation 9, M, states that the weekly benefit amount to be used in disqualification is the weekly benefit amount in effect for the actual week of disqualification.

"The question arises as to whether we should redetermine the amount of disqualification for all such cases subsequent to April 1, 1953, applying the new benefit schedule which becomes effective August 8, 1953."

In our opinion the answer is, "Yes," for substantially the same reasons as stated in answer to Question 2.

Under Chapter 326, P. L. 1953, approved May 6, 1953, entitled, "An Act Relating to Benefits for Partial Unemployment under Employment Security Law," amending Section 13, subsection III, R. S. 1944, Chapter 24, as repealed and replaced by Section 1 of Chapter 430, P. L. 1949, which provides a new schedule of deductions for partial unemployment, this schedule is effective retroactive to April 1, 1953, whereas the amendment becomes law on August 8, 1953, and you raise the following question.

"Was it the intent of the Legislature that the Commission review all partial claims filed prior to August 8, 1953, the effective date of this legislation — (a) setting up overpayments or by effecting adjustments, as the case may be, or (b) should this schedule be applied after August 8, 1953, only?

"If answer to (a) is yes, a further question arises as to whether or not the Commission would be carrying out the intent of the Legislature by effecting redeterminations involving this schedule of deductions at an earlier date, say June 15, 1953. Would any overpayments resulting therefrom be collectible under any circumstances?"

It is our opinion that the answer to (a) is, "No." The Commission should not attempt to collect payments made under the present law which on August 8, 1953, because of an amendment which is retroactive, are in excess of the then rate of payment. This would violate the intent of the law as referred to in answer to Question 2 above. This new schedule should be applied to the law retroactive to April 1, 1953 but no attempt should be made to collect the overpayments, if any.

ALEXANDER A. LaFLEUR
Attorney General

June 25, 1953

To Ronald W. Green, Chief Warden, Sea and Shore Fisheries
Re: Penalties under Section 131 of Chapter 34, R. S., as revised

We have been asked for a written opinion relative to Section 131, Chapter 34, R. S., as amended. It appears that there are three questions relative to said section which are treated separately as follows:

"If a person is the holder of licenses issued under Sections 111, 113, 114 and 115 and is arrested for having short lobsters and appeals after being found guilty in municipal court, must the Commissioner suspend all licenses?"

The third paragraph of Section 131 says:

> "When an appeal has been taken by any person from a sentence imposed for an alleged violation of the provisions of this chapter, or of any rules and regulations adopted by the commissioner pursuant thereto, the commissioner shall suspend, until final disposition by the court, the license of such person to conduct the particular activity in which he was engaged at the time of the alleged violation, and may suspend for the same period all licenses held by him that have been issued under authority of this chapter."

The answer to your first question is, "No." The Commissioner is directed to suspend only the license to conduct the particular activity in which the alleged violator was engaged at the time of the alleged violation. If the activity is present in all sections, of course the Commissioner would be required to suspend all the licenses you mention. He *may* suspend, if he wishes, all licenses issued under this chapter until final disposition by the court.

"Question 2. If a person is convicted of transporting lobsters without a license, must the Commissioner wait fifteen days before issuing the licenses issued under the following sections – 111, 112, 113, 114 and 115?"

The fourth paragraph of Section 131 says:

> "If, at the time of committing a violation of any of the provisions of this chapter or of any rules and regulations of the commissioner, the offender shall not be the holder of a license to conduct the particular activity in which he was engaged at the time of such violation, the commissioner shall not issue such a license to said person until 15 days have elapsed from the day of final determination of any complaint or legal proceedings instituted as a result of the violation."

This question must be answered, "Yes." All the sections mentioned permit transportation; therefore the Commissioner would have to wait 15 days before issuing any of these licenses, the reason being that these sections all permit the same activity this person was convicted of violating.

"Question 3. If a person is the holder of licenses issued under Sections 110-A, 115, 111 and 120 and had recently been convicted for digging clams in a polluted area (rule and regulation), for having lobsters that were less than 3 ⅛ inches in length (Section 117), and for transporting lobsters beyond the limits of the state without a license (Section 116), must the Commissioner revoke or suspend all the licenses which were issued to this person?"

This question is rather involved and requires more details and facts than are supplied in your question. We will be happy to rule on this particular situation upon receipt of more detailed information. A re-reading of your question will probably reveal to you the deficiencies: i.e., In what activity was respondent involved when found with short lobsters,–retail dealer, fishing, etc.?

JAMES G. FROST
Deputy Attorney General

July 7, 1953

To A. D. Nutting, Forest Commissioner
Re: Contract for Prospecting

Enclosed herewith please find copy of agreement between the Cassidy Estate and the Freeport Sulphur Company, which we are returning to you.

This agreement was presented to this office with a request to ascertain whether or not the Forest Commissioner was authorized under our statutes to enter into a similar agreement with the Freeport Sulphur Company whereby that company might prospect for minerals and whereby, ultimately, under that agreement, the company might proceed with major mineral operations.

We wish to advise that we can find no authority for the Forest Commissioner to enter into such an agreement.

It is the opinion of this office that any negotiations relative to mining must be carried on with the Maine Mining Bureau, the statutes relating to such Bureau apparently authorizing an agreement which ought to be satisfactory to the Freeport Sulphur Company.

We regret the delay in answering this question, but we have been out of town on court cases.

JAMES G. FROST
Deputy Attorney General

July 10, 1953

To Raymond C. Mudge, Commissioner of Finance
Re: Encumbrance

We have at hand your memo of June 30, 1953, in which you ask the following question:

"Does the passage of a Council Order directing the State Controller to carry forward from one fiscal year to the next fiscal year a sum of money for the use of a State department or agency constitute an encumbrance within the meaning of the Appropriation Act as cited above?"

As background to the question your memo contains the following information:

"The General Fund Appropriation Acts in the past and the current Act which is effective tomorrow (Chapter 145 of the Private and Special Laws of 1953) contain language as follows:

> "At the end of each fiscal year of the biennium all unencumbered appropriation balances representing state monies, except those that carry forward as provided by law, shall be lapsed to unappropriated surplus as provided by section 23 of chapter 14 of the revised statutes of 1944. At the end of each fiscal year of the biennium all encumbered appropriation balances shall be carried forward to the next fiscal year, but in no event shall encumbered appropriation balances be carried more than once."

In connection with this language, several years ago considerable discussion was had by the Finance Department with the Department of the Attorney General with respect to what part of the several appropriations shall be carried forward into the ensuing fiscal year and what part shall be lapsed to Unappropriated Surplus. It has been the understanding of the Department of Finance as a result of the discussions with your Department that all unencumbered and unexpended appropriation balances representing State monies, unless otherwise provided by law, shall be lapsed to the General Fund Surplus each June 30, and that only those amounts which are encumbered or carry forward under the provisions of law shall be brought forward and be made available in the next fiscal year.

"It is the further understanding of the Department of Finance that an encumbrance may be represented by a contract requiring payment of a sum of money, an outstanding purchase order requiring payment of a sum of money, or an agreement to pay a sum of money as shown by an exchange of letters or other evidence that there is a definite obligation on the part of some State department or agency to pay a sum of money at a future time. The question has been raised as to whether or not there may be within the meaning of the above Appropriation Act language, a further method of creating an encumbrance; namely, by securing passage of a Council Order directing the State Controller to carry forward from one fiscal year into the next fiscal year a certain sum of money."

In answering your question we must state that we are in complete agreement with the understanding that you already have to the effect that an encumbrance exists in the presence of a contract requiring payment of a sum of money, an outstanding purchase order requiring payment of a sum of money, or an agreement to pay a sum of money as shown by an exchange of letters or other evidence that there is a definite obligation on the part of some State department or agency to pay a sum of money at a future time.

There may be evidences of an encumbrance other than those mentioned above, but such evidence should be consistent with the definition of the term as it is commonly understood.

An encumbrance exists when there is such a charge or liability arising from negotiations, that there results, on the part of the State or one of its departments or agencies, an obligation to pay a sum of money for a particular purpose.

The term "encumbrance" has a particular meaning when used in governmental accounting. See "A Dictionary for Accountants," Kohler, where encumbrance is defined as:

"A proposed expenditure, evidenced by a contract or purchase order, or determined by administrative action."

There must be, as we view the problem, an actual, existing obligation, which is ascertainable upon an examination of the facts surrounding the transaction.

Answering your specific question, it is our opinion, based upon the above discussion, that a Council Order directing the State Controller to carry forward from one fiscal year to the next fiscal year a sum of money for the use of a State department, without additional facts, would not constitute a legal encumbrance within the meaning of the Appropriation Act.

We do not say that a Council Order may not be evidence of an encumbrance. For instance, a Council Order accepting a bid, which bid has been duly and properly received, would be a further step in firmly encumbering a sum of money needed in anticipation of a contract to be executed as a result of the acceptance of the bid.

We are saying that, in the absence of a particular transaction resulting in a legal obligation on the part of the State, a Council Order merely intending to carry forward a sum of money from one fiscal year to the next, would not, in our opinion, constitute a legal encumbrance.

ALEXANDER A. LaFLEUR
Attorney General

July 13, 1953

To Marion Martin, Labor Commissioner
Re: Employment of Minors in Garages and Filling Stations

We have before us a request from your department for an opinion as to whether or not garages and filling stations, either with or without grease lifts, or other mechanical devices, come within the term "mechanical establishment" as used in Section 2 of Chapter 290, P. L. 1949, which prohibits employment of minors under 16 years of age in certain business establishments.

The test for a manufacturing or mechanical establishment is, according to the authorities, whether or not the mechanical element predominates. The mere fact that machinery, mechanical labor or mechanical appliances are used does not necessarily characterize the establishment as a mechanical one.

It therefore appears that a distinction should be made between garages and filling stations. A garage is normally a place where repairing and storing of motor vehicles is carried on. A filling station is a place where the principal business is the sale of gasoline and motor oil.

It is therefore the opinion of this office that garages are within the prohibition of the section referred to and are not suitable places for children to work. Filling stations, however, would not be within the prohibitions of the section and are suitable.

JAMES G. FROST
Deputy Attorney General

July 27, 1953

To General Spaulding Bisbee, Director, Civil Defense
Re: Compensation of Auxiliary Firemen

Your memoradum of July 8th propounds questions relative to Section 20 of Chapter 298 of the Public Laws of 1949, having to do with compensation for injuries received in line of duty.

You say that a question arises as to whether or not auxiliary firemen who are sent out to fight a forest fire and who are members of the Civil Defense would be protected by the fact that the mission was called a training period.

You say that in your judgment the only way to train these auxiliary firemen properly is to give them some such actual practice.

It would appear that such members of Civil Defense as are so used would be protected by either one of the following procedures:—either that, as suggested, the project be designated a training period or that contact be made with the Forestry Department and the members engaged by them, in which case they would be protected as State employees engaged by the department for fire protection.

It is the opinion of this office that your members would be protected in either manner.

NEAL A. DONAHUE
Assistant Attorney General

August 13, 1953

To H. H. Harris, Controller

Re: Automobile Mileage of State Fire Inspectors

This office has in hand a memo dated August 6, 1953, in the following terms:

"Chapter 168, Public Laws of 1953, relates to Automobile Travel by State Fire Inspectors and, in effect, changes the rate of reimbursement for this class of employees from a straight 8 cents per mile to not more than 7 cents per mile for the first 5000 miles actually travelled in any one fiscal year and 6 cents per mile thereafter. The chapter is effective August 8, 1953.

"Question: Is the mileage travelled between July 1, 1953 and August 8, 1953 to be considered as part of the first 5000 miles travelled during the fiscal year or do these employees start their first 5000 on August 8?"

Answer. Under the provisions of Chapter 168 of the Public Laws of 1953, fire inspectors start their first 5000 miles on August 8th. Until August 8th fire inspectors had unlimited mileage at the rate of 8 cents a mile and they only come under a limited mileage basis on August 8th. It would logically follow that they then should start on a 5000-mile basis.

JAMES G. FROST
Deputy Attorney General

August 13, 1953

To Earle R. Hayes, Secretary, Maine Retirement System

Re: Ten-Year Vested Right Amendment

Section 2 of Chapter 412 of the Public Laws of 1953 amends subsection VIII of Section 3 of Chapter 60 of the Revised Statutes so that, as amended, subsection VIII reads as follows:

'VIII. Any employee who is a member of this retirement system may leave state service after 10 years of creditable service and be entitled to a retirement allowance at attained age 60 provided the contributions made

by such member have not been withdrawn, and provided further, that his retirement allowance shall be based upon the total number of years of creditable service, in accordance with the provisions of this chapter. Any benefit provided by this subsection shall be contingent upon the established fact, as evidenced from the records of the retirement system, that any and all contributions ever made to the system by the member involved shall never have been withdrawn during any period of time dating from separation from service to the date on which such individual attains age 60 and/or applies for his retirement benefit.'

With respect to this amendment you ask the following questions:

1) Do the provisions of the new amendment apply to any person who has been a member of the Retirement System and who has never withdrawn his contributions, regardless of when such person separated from active State or teaching service?

2) In the case of a former employee of the State, teacher, or local participating district employee who has already separated from service and has never withdrawn his contributions and who returns to active service subsequent to August 8th, would the provisions of this new amendment apply?

In answer to Question 1, it will be noted that the statute reads, "any employee who is a member of this retirement system," which would appear to indicate that it was the intent of the legislature that after the effective date of the Act any person who is then in the employ of the State and who has then ten years of creditable service may leave State service and be eligible for the benefits provided by this section. It has been held that the establishment by statute of a pension is not to be construed retrospectively so as to confer benefits. Statutes are to be given prospective and not retrospective effect, unless the latter effect is made compulsory by the language of the Act itself. The answer, therefore, to Question No. 1 must depend upon the date of separation from service.

The answer to Question No. 2 is, Yes.

"A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment."

JAMES G. FROST
Deputy Attorney General

August 18, 1953

To Hon. Burton M. Cross, Governor of Maine

Re: Section 10, Article IV, Part Third, of the Maine Constitution

This office has been asked if a member of the Ninety-sixth Legislature can be appointed by the Governor to fill the vacancy created in the judgeship of the Cumberland County Probate Court by the death of Judge Chaplin, the salary of said Judgeship having been increased by act of the Ninety-sixth Legislature.

This question is asked because of the existence of the above-captioned section of the Maine Constitution, which reads:

"No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by elections by the people."

It is the opinion of this office that Section 10 does not prohibit a member of the legislature from being appointed to fill the vacancy above mentioned, even though the emoluments of said office were increased during the term of such legislator. It seems that the clear intent of Section 10 is to prohibit appointment to any civil office of profit except such office as may be filled by election by the people.

"If the section as originally adopted had any other meaning than that the exception removed elective offices from the operation of the prohibitory clause, the inclusion of the exception was meaningless and surplusage, for the section would then mean that legislators were eligible for appointment except when they obtained their offices by election."

Carter v. Commission on Qualifications of J. A.,
93 Pac. 2d 140.

The above quotation is from a case decided by the California Supreme Court, which considered the identical problem with which we are faced and in a well-considered opinion decided that the legislator was eligible for appointment to an elective office to fill a vacancy created by the death of a judge.

It should be noted that the Supreme Court of the State of Maine in an Opinion of the Justices, 95 Maine at 588, 589, in discussing the constitutional provision in question, though not considering our immediate problem, makes the bold and strong statement which follows:

"It may be noted, however, that this prohibition does not include 'such offices as may be filled by elections by the people.' "

Because of the clear wording of the constitutional provision and the cases discussing this point, this office has no hesitation in submitting the above opinion.

JAMES G. FROST
Deputy Attorney General

August 20, 1953

To E. L. Newdick, Secretary to the Seed Potato Board
Re: Balance of Funds

We acknowledge receipt of your letter relative to Chapter 27, Revised Statutes, Sections 127 A-F, in which you ask,

"Assuming that on June 30, 1956, the Board has $50,000 on hand to pay the balance which it now owes the State, what is the future status of the Board? Can it function as it has in the past, or is new legislation needed to continue?"

Payment of any final balance of the $100,000 originally granted by the legislature would not affect the continuing existence of the Board and its functions.

JAMES G. FROST
Deputy Attorney General

September 8, 1953

To Hon. Burton M. Cross, Governor of Maine

Re: Removal of Certain Public Officers for Failure to Perform Duties because of Physical Incapacity.

Highway Commission:

We have searched the statutes relative to the Highway Commission and, strange as it may seem, we fail to find any right granted to the Executive to remove any of the Commissioners for cause. Under Chapter 398, P. L. 1953, where the new chairmanship is set forth, there is a statement that the chairman may be removed for cause, but that Act is not now operative, by its very terms. See Section 2 thereof.

Where the term of an office is fixed and there is no provision for removal, there is no inherent power in the Executive to remove; 43 Am. Jur. 34, sec. 187. Here, by virtue of Section 3 of Chapter 20, R. S. 1944, as amended, the term of office is three (3) years. The rule is otherwise where the term of office is *not* fixed, 43 Am. Jur. 32, sec. 184, and also see Section 6 of Article IX, Constitution of Maine, as follows:

> "The tenure of all offices, which are not or shall not be otherwise provided for, shall be during the pleasure of the Governor and Council."

This is not to say that the Highway Commissioners can hold office during their entire term, regardless of their action or inaction. Their removal, not having been provided for by statute, would be governed by the provisions of Section 5 of Article IX, Constitution of Maine.

> "Every person holding any civil office under the State, may be removed by impeachment, for misdemeanor in office, and every person holding any office, may be removed by the Governor with the advice of the Council, on the address of both branches of the Legislature. But before such address shall pass either house, the causes of removal shall be stated and entered on the journal of the house in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defense."

Harness Racing Commission

By virtue of Section 1 of Chapter 77, R. S. 1944, any member of this commission may be removed for cause by the Governor with the advice and consent of the Council. The issue here presented is whether an absence of some four months due to illness is *per se* sufficient cause for removal from office.

The term "cause", as used in removal statutes, means legal cause, not any cause that might seem to the removing body to be sufficient cause. The research of this writer has failed to bring to light a single case in the United States where the ground for removal for cause was predicated on mere absence from office due to illness. Negative results are sometimes as indicative as positive findings.

This is not to say that physical incapacity is not ground for removal for cause. Note the words of the Florida court in *State v. Coleman,* 115 Fla. 119, 155 So. 129; 92 A.L.R. 988:

"Incompetency has reference to any physical, moral or intellectual quality, the lack of which incapacitates one to perform the duties of his office. It may arise from gross ignorance of official duties, or gross carelessness in their discharge. It may arise from lack of judgment and discretion or from a serious physical or mental defect not present at the time of election, *though we do not imply that all physical or mental defects so arising would give ground for suspension.*" (Emphasis mine.)

It has been held in Massachusetts that insanity is a ground for removal for cause. *Attorney General v. O'Brien*, 280 Mass. 300; 186 N.E. 570. A reading of this case shows that expert testimony was taken to show that the incumbent of the office was hopelessly insane, *intimating* that temporary insanity might not be sufficient ground for removal.

So many of the definitions of "cause" refer to it in the sense that the cause for removal must specifically relate to and affect the administration of the office so that the rights and the interests of the public are not protected that this writer is led to the conclusion that, to remove a man from office due to illness, you must show that it has been such a protracted absence from the office that it has affected the normal functions of that office to the end that it has not been performed as the legislature intended and the public has suffered as a result.

Where the absentee is merely one of a three-man commission, where all members of the commission are bound to perform and enforce the law equally, where they have picked up the burdens of their absentee fellow-commissioner, and where there has been no complaint of inadequate supervision of harness racing, there would seem to be insufficient grounds to sustain any removal from office.

ROGER A. PUTNAM
Assistant Attorney General

September 15, 1953

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Hearings without Petition

In response to your memo of September 10, 1953, we would say that under that provision of Section 5 of Chapter 33 which states that the Commissioner may investigate the conditions adversely affecting the fish in any waters in the State, the Commissioner may have a hearing without being petitioned therefor by the municipal officers or citizens or county commissioners.

JAMES G. FROST
Deputy Attorney General

September 15, 1953

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Correspondence with James Briggs

We have your memo of September 10, 1953, attached correspondence from

Mr. James Briggs, and an intra-departmental memo from Henry S. Carson, Biologist.

It would appear that Sportsmen Incorporated has purchased a portion of land in the Stockholm Game Preserve in Aroostook County. Mr. Briggs, on behalf of Sportsmen Incorporated, has requested the Commissioner of Inland Fisheries and Game to change the boundaries of the Preserve so as to exclude that land purchased by the club.

We wish to advise that the Stockholm Game Preserve is a statutory Preserve, created by the legislature, by Chapter 76 of the Public Laws of 1949. Having so established this game preserve by statute, the legislature alone can amend or repeal the provisions of the act. It cannot delegate to any other party its power to do so.

Section 129 of Chapter 33 grants to the Commissioner power to create temporary game preserves in limited areas and from time to time to release all or any part of such lands whenever he deems it expedient. Thus the provisions of Section 129, while not permitting the Commissioner to amend or repeal the preserves created by the legislature, would permit him to release parts of a temporary preserve established by the Commissioner.

JAMES G. FROST
Deputy Attorney General

September 15, 1953

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Screen at Embden

We have your memo of August 27, 1953, in which you inquire as to the responsibility for the repair of the fish screen at Embden Pond. The sum of $1000 was provided by Chapter 216 of the Resolves of 1927 for the screening of the pond.

It is the opinion of this office that under our present statutes and the provisions of this Resolve, your department is not authorized to repair the screen at Embden Pond. The purposes for which departmental moneys can be spent are particularly limited by statute and such statute should be construed with reasonable strictness.

JAMES G. FROST
Deputy Attorney General

September 18, 1953

To Willard R. Harris, Acting Director of Personnel
Re: Federal Employees in the Department of the Adjutant General

We have your memo of September 8th and attached correspondence relating to the employment of Mrs. Josephine L. Smith by the Federal Government at the Adjutant General's Department. It appears that the position which Mrs. Smith holds will no longer be required as of October 2, 1953, and she has requested the Personnel Board to schedule a hearing at which her case would be considered.

You state that the employees on the Federal payroll at the Adjutant General's office, of whom Mrs. Smith is one, are not considered by the Personnel Department to come within the meaning of classified employees as established by the provisions of Chapter 59, Section 6, Revised Statutes of Maine, for the following reasons:

1) They are not employed from eligible lists prepared upon the basis of examinations;

2) The titles of the positions are those of the Federal Government rather than those of the State classified service;

3) The salaries are those established by the Federal Civil Service and they are paid by Federal checks.

You ask for a ruling from this office as to whether or not Mrs. Smith comes within the provisions of the Personnel Law relative to classified employees.

A reading of the correspondence attached to your memo will show that it has been the understanding of the Maine State Retirement System and of the employees involved that they are State employees to the extent that they can participate in the Retirement System. It is also indicated that he believes they are employees for the purposes of retirement.

It is the present opinion of this office that Mrs. Smith and those persons similarly situated are employees of the State to the extent that they may participate in the Retirement System and not otherwise.

With respect to No. 1) above cited, Section 8 of Chapter 59 requires that personnel in the classified service be selected from eligible registers prepared by the Director of Personnel and that placement be by competitive tests. As stated above, Mrs. Smith has not been employed subject to the provisions of Section 8. Appointments to positions and promotions in the classified service shall be made according to merit and fitness from eligible lists prepared upon the basis of examinations and, so far as practicable, shall be competitive. Section 6 of Chapter 59 of the Revised Statutes.

For the above reasons it is our opinion that such employees on the Federal payroll of the Adjutant General's Department do not come within the meaning of classified employees, as established by the provisions of Chapter 59, Section 6, of the Revised Statutes, as amended.

JAMES G. FROST
Deputy Attorney General

September 23, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Vera A. Gordon

You ask whether the Maine State Retirement System, in computing the additional retirement benefits, under the provisions of Chapter 60, R. S. 1944, granted to Vera A. Gordon under Chapter 171 of the Resolves of 1953, should consider in effect that Miss Gordon has made the contributions for the required period of 35 years, although in fact her basis of actual service approximated six months less that 35 years (exclusive of the additional period

granted her under the Resolve heretofore mentioned) and she did not in fact make any contribution during said additional, granted period.

The answer is, Yes.

The original Resolve introduced in the 96th Legislature, L.D. 339, contained a provision to the effect that said Vera A. Gordon should contribute to the Maine State Retirement System the sum of $66 (the amount, we assume, she would have had to contribute to the System, except for the Resolve of 1953, Chapter 171). The provision for this contribution has been considered and deleted by the Committee considering said Resolve and the Resolve having been enacted without any provision for such additional contribution during the granted six months' additional retirement created, it is my opinion that it was the intent of the Legislature to grant to Vera A. Gordon an additional credit period of six months toward retirement without further contributions by her.

ALEXANDER A. LaFLEUR
Attorney General

September 24, 1953

To Maine Development Commission
Re: Water Improvement Commission

On September 23, 1953, the Maine Development Commission requested an interpretation of the provisions of Chapter 72 of the Revised Statutes of 1944, as amended by Chapter 345 of the Public Laws of 1945, with particular reference to Section 3 of the latter chapter.

A. C. Lawrence Leather Company of Peabody, Massachusetts, a wholly owned subsidiary of Swift and Company of Chicago, is negotiating for the purchase of the physical properties of the Milo Tanning Corporation, located in South Paris, Oxford County, to carry on the tanning of leather and kindred products.

In 1938 the Lord tanning interests of Woburn, Massachusetts, purchased the property and formed the Paris Tanning Company, constructing a series of settling basins along the Little Androscoggin River as a means, initially, of disposing of sewerage, the construction of these settling basins having been then approved by State authorities.

In 1949 this property was sold to the Milo Tanning Corporation, who are its present owners and who conducted a general tanning business of side leather until the summer of 1953, utilizing the same sewerage disposal facilities. During the entire operation of this plant by the Paris Tanning Company and the Milo Tanning Company, it appears that no complaint was ever made.

The A. C. Lawrence Leather Company, if the contemplated purchase is completed, propose to renovate and rebuild some of the buildings, but not all, and contemplate using the same sewerage system that is now in existence, without any change in the existing outlets into the Little Androscoggin River.

It is my opinion from the statement of facts heretofore set forth that this does not constitute a new source of pollution under the provisions of Chapter 345 of the Public Laws of 1945, and that no application for a license should

be required thereunder for the A. C. Lawrence Leather Company for the proposed discharge in the presently existing general location at South Paris on the property now owned by the Milo Tanning Company, if the same business heretofore operated is continued.

ALEXANDER A. LaFLEUR
Attorney General

September 30, 1953

To Norman U. Greenlaw, Commissioner of Institutional Service
Re: Transportation Costs to State Hospital

We have your memo of September 16, 1953, and attached memo from Dr. Harold A. Pooler, Superintendent of the Bangor State Hospital, in which he cites a case where a town charged a patient $180 for the cost of committing the patient and transporting him from the town of his residence to the Bangor State Hospital.

The question is asked if the municipalities should charge for the transportation of patients to and from the hospital.

We quote from Section 139 of Chapter 23, R. S. 1944:

> "A town chargeable for expenses of examination and commitment and paying for the examination of the insane and his commitment to the hospital may recover the amount paid, from the insane."

It does not seem unreasonable to us that the cost of transportation should be a proper charge recoverable from the patient.

JAMES G. FROST
Deputy Attorney General

September 30, 1953

To G. Raymond Nichols, Veterans Affairs
Re: Re-employment Rights – Municipalities

In answer to your memo of September 21, 1953, in which you ask if a former Chief of Police of the Town of Lincoln would have re-employment rights under Chapter 59, Section 23, of the Revised Statutes, we must advise that this office may not give an opinion relative to such a matter. It is, of course, our duty to interpret the statute in question with respect to State employees, but we may not give such opinions when employees of municipalities are concerned.

The presence of the statute would indicate a possibility of re-employment rights in such an instance, and we would suggest that you advise Mr. Brinson to contact one of the attorneys who have accepted assignments by the VA to render assistance to veterans in their particular localities.

JAMES G. FROST
Deputy Attorney General

October 5, 1953

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Bartlett Island

We have your memo of September 30, 1953, with attached letter from Phillips H. Lord and intra-departmental memos concerning Mr. Lord's Bartlett Island.

It appears that Mr. Lord is desirous of selling his island and that, to make it salable, he thought it desirable that legislation be passed, placing in the Commissioner of Inland Fisheries and Game the discretion of removing hunting restrictions placed upon the island. In their anxiety to have limited restrictions, it appears that the legislature completely removed Bartlett Island from that statute which made it a game preserve. Now Mr. Lord wishes the State to take it over until the next legislature for any purpose, to the end that hunting not be permitted on the island.

It is apparent from the intra-departmental memos that proper management would require that the island be opened to deer hunting and that a short-term lease not be negotiated.

That statute which made Bartlett Island a game preserve was amended during the last session of the legislature, to remove any restrictions against Bartlett Island. While this is not strictly a legal question, it would appear to be directly in conflict with legislative intent if, after the legislature removed restrictions from Bartlett Island, the Commissioner of Inland Fisheries and Game were to renew them.

To our knowledge, Section 129 of Chapter 33 of the Revised Statutes appears to be the only section empowering the Commissioner to create game preserves. This statute limits the land which may be created a game preserve to 1000 acres. Such preserve would, therefore, only partially cover the 3000-acre tract comprising Bartlett Island.

Considering all these factors and the recommendations of members of your own department, we feel that Mr. Lord has made a request impossible to comply with.

JAMES G. FROST
Deputy Attorney General

October 13, 1953

To A. D. Nutting, Forest Commissioner
Re: Federal Funds

We have your memo in which you ask that our opinion of July 10, 1953, relative to the encumbrance of State funds be reviewed, to the end that an amendment be made to that opinion so that Federal funds will not lapse.

It appears that your Department receives certain monies from the Federal Government under the provisions of the Clarke-McNary Law, such funds being allocated by the United States Department of Agriculture to the several States under a formula determined primarily upon the amount of money spent by the States. The money must have been spent on projects approved by the

Federal Government, and the Clarke-McNary Law contemplates that the Federal Government shall cooperate with the various States in these endeavors.

We have closely examined the law and have carefully read the Clarke-McNary Forest Fire Control Manual which outlines the policies of administrative procedure, and it appears that, consistent with the intent of the law, the monies paid to the State of Maine under the provisions of the law are paid so that the Federal Government will share in the burden of protecting our forests and water resources, which are of national as well as state-wide concern. In other words, it appears that it is the very intent of the law that the Federal Government "foot" part of the cost the State undertakes in carrying out its Forestry program, always with the proviso that in no case (with certain exceptions) shall the amount expended by the Federal Government in any State during any fiscal year exceed the amount expended by the State for the same purpose during the same fiscal year.

If the Federal Government is going to cooperate with the State of Maine by allocating to the State a sum of money based upon the amount spent by the State in a prior year, but to be spent in the same fiscal year as the State is working in it would seem that such sum is a reimbursement of the cost the State has been put to. And the result which follows is that such funds, in so far as the Federal allocation does not exceed the amount the State spends in that particular year, are State monies and should be dealt with in accordance with our laws.

It is therefore our opinion that the funds being here discussed are not of such a nature as would remove them from our laws relative to encumbrances.

JAMES G. FROST
Deputy Attorney General

October 15, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Greenville Cemetery Corporation

We have previously discussed this matter and, on the furnishing of the certificate of incorporation as per my request, have attempted to determine the status of the Greenville Cemetery Corporation as it fits into our Retirement System.

Our search fails to show that said corporation is a "political subdivision" as the term is used in Section 2, Chapter 395, of the Public Laws of 1951. Our statutes provide that every cemetery shall be owned, maintained or operated by: (1) a municipality or other political subdivision of the State; (2) a church; (3) a religious or charitable society; or (4) by a cemetery association formed under the provisions of Chapter 54, R. S. 1944. We feel that it is clear that in this instance the cemetery itself is owned and maintained by a charitable corporation which is not a political subdivision of the State. It is a body corporate, but it is not a body politic.

By way of suggestion, if the town came into the ownership of the cemetery, then its employees would be town employees; or the corporation might be

incorporated by the legislature, which could make it a body politic and a political subdivision of the State.

ROGER A. PUTNAM
Assistant Attorney General

October 22, 1953

To Harold A. Pooler, M. D., Superintendent, Bangor State Hospital
Re: Transfer of Patients to Veterans' Hospital

This is in answer to your inquiry of yesterday relative to the transfer of patients from your institution to the Veterans Administration hospital at Togus.

A search of the statutes discloses that subparagraph III of Section 18 of Chapter 230 of the Public Laws of 1949, known as The Uniform Veterans' Guardianship Act, provides that under certain conditions a patient at a State institution may be transferred for care and treatment to an agency of the United States or, more specifically the Veterans' Administration. This statute provides that upon effecting any such transfer the committing court or proper officer thereof shall be notified thereof by the transferring agency. The transferring agency in this instance would be the Bangor State Hospital, and this condition must be complied with.

Relative to the question of the original commitment papers, there is no provision in the law specifically covering it; but it would be the opinion of this office that the original papers should always be at the institution where the patient resides. In this case I would suggest that you keep certified or true copies of these papers for your files.

I would also suggest that you get some sort of receipt from the committing court or officer to prove that you have complied with the statute.

The question may be raised that commitment to the Veterans Administration hospital is not commitment under the original papers, in that it is not the hospital designated in the commitment papers. This, again, is covered by the above cited section of Chapter 230, P. L. 1949, in that it provides that any person transferred to an agency of the United States will be deemed to be commited pursuant to the original commitment.

ROGER A. PUTNAM
Assistant Attorney General

October 30, 1953

Hon. Burton M. Cross, Governor of Maine
Re: Commission to Revise Probate Rules

Section 49 of Chapter 140 of the Revised Statutes of 1944 provides in part as follows:

> "The governor may at any time, upon the request in writing of a majority of the judges of the courts of probate and insolvency, appoint a commission composed of 3 judges and 2 registers of probate, who may make new rules and blanks, or amendments to existing rules and blanks,

which new rules and blanks, or amended rules and blanks shall, when approved by the supreme judicial court or a majority of the justices thereof, take effect and be in force in all courts of probate and insolvency.

The expenses of such commission or commissions shall be reported to the governor and upon the approval of the same by the governor and council, they shall be allowed and paid in the same manner as other claims against the state."

The elevation of Judge Randolph Weatherbee to the Superior Court and the death of Judge Carroll Chaplin have created two vacancies in the commission appointed by Frederick Payne, April 11, 1952. The question is now asked as to the procedure in filling the said vacancies.

Appointments to the commission are personal to the Governor, and vacancies occurring due to death or resignation of members may be filled by appointment by the Governor of a person qualified to carry on the duties contemplated by the statute. The only limitation in making the appointment is that contained in the statute, that the commission be composed of 3 judges and 2 registers of probate.

It is the opinion of this office that petition by all probate judges that a commission be appointed would indicate that there is a necessity for new rules and blanks or amendments to existing rules and blanks, the last rules of practice and procedure having been approved in 1916. We would add that the Chief Justice of the Supreme Judicial Court feels that, the request having been made, then the work of the commission should be completed.

JAMES G. FROST
Deputy Attorney General

November 4, 1953

To Hon. Burton M. Cross, Governor of Maine
Re: Contingent Account

Section 24 of Chapter 14, R. S. 1944, as amended, provides:

"The governor, with the advice and consent of the council, may allocate from the state contingent account amounts not to exceed in total the sum of $450,000 in any fiscal year."

From the foregoing it is obvious that the Governor stands above and apart from the Council and without his consent or agreement that an amount of money should be allocated from the contingent account the advice and consent of the Council is not necessary. It therefore appears that if, in his discretion, the Governor does not desire to appropriate money to a certain amount, the Council cannot force him to do so, as they would be transcending their powers.

ROGER A. PUTNAM
Assistant Attorney General

November 9, 1953

To Francis H. Sleeper, M. D., Superintendent, Augusta State Hospital
Re: Trial Visits

You ask if under the provisions of Section 142 of Chapter 23 of the Revised Statutes of 1944, a patient can be "continued on a trial visit from a State of Maine mental hospital longer than one year."

In considering this problem we quote the entire section:

> "The superintendent of either hospital may permit any inmate thereof to leave such institution temporarily, in charge of his guardians, relatives, friends, or by himself *for a period not exceeding 6 months*, and may receive him when returned by any such guardian, relatives, friends, or upon his own application within such period, without any further order for commitment, and the liability of the state, or of any person by bond given for the care, support, and treatment of such insane person as originally committed, shall remain in full force and unimpaired upon the return of such person as if he had remained continuously in such hospital. The superintendent of either hospital with the approval of the department may on receipt of formal application in writing before the date of expiration of such leave of absence grant an extension of time *for another 6 months*."

It is the opinion of this office that the wording of the above quoted section is clear and that a patient on a trial visit may have not more than one six-months' extension of time. It can be seen that the proper application of this leave period would provide that the liability of the State or of any person by bond given for the care, support, and treatment of such insane person as originally committed shall remain in full force. Whatever the contingency might be which would affect the liability of the State or any person giving bond, we cannot know; but to comply with the statute we feel that the leave period should be strictly adhered to.

JAMES G. FROST
Deputy Attorney General

November 9, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Legislative Employees

In response to your memo of October 19th, we would advise that under the provisions of Section 4 of Chapter 9, R. S., the Secretary and Assistant Secretary of the Senate are elected by the Senate. The Secretary of the Senate is elected for a full two-year period, calls the Senators-elect to order, and presides until a President is elected. In the absence of the Secretary of the Senate, the Assistant performs said duties.

Having such duties, these officers have, in our opinion, full-time positions for retirement purposes, and said officers should accordingly be credited for their services.

The above would apply also to the Clerk and Assistant Clerk of the House.

JAMES G. FROST
Deputy Attorney General

November 12, 1953

To Honorable Leon M. Sanborn, Executive Council
Re: Maine Port Authority – Contingent Account

. . . You ask, "Would you please be kind enough to give me a ruling as to whether a proper representative of the Maine Port Authority has authority to sign a council order requesting funds from the contingent fund."

It is the opinion of this office that the Maine Port Authority is such an agency of the State as can properly make a request for funds from the contingent account. It should be noted that under the provisions of the Act creating the Authority it is stated that the Authority is constituted a public agency of the State of Maine and that all property at any time owned in the name of the Port Authority shall be considered as the property of the State of Maine.

The council order should be signed by the chairman of the board of directors and the request should be accompanied by a certified copy of the resolution of the board authorizing the request to be made.

Whether or not the request shall be granted is entirely within the discretion of the Governor and Council, the fact situation making the request necessary being the determining factor. If such facts, in the opinion of the Governor and Council, amount to an emergency or otherwise come within the provisions of Section 24 of Chapter 14, then the request may be made.

JAMES G. FROST
Deputy Attorney General

November 25, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Chapter 400, Public Laws of 1953 – Teachers' Retirement

We have your memo of October 19, 1953, in which you ask our opinion as to the application of the provisions of Chapter 400 of the Public Laws of 1953, which Act amended Section 6, subsections IX, X and XI of Chapter 60, by increasing the retirement benefits of teachers "who have heretofore or shall hereafter retire" under said subsections.

Chapter 400 amended the above Section 6 by adding a new subsection, XII, which reads as follows:

> "The increase in pensions hereinbefore authorized shall apply to all teachers who have heretofore or shall hereafter retire under the provisions of subsections IX, X and XI."

Both from your memo and from conversations had by us relative to this matter, the question would appear to be: Does subsection XII limit the

application of the increase authorized by Chapter 400 to teachers who have retired or who will retire under subsections IX, X and XI without having chosen an option under Section 7 of Chapter 60 of the Revised Statutes or is the increase authorized by Chapter 400 available to teachers who, while complying with the requirements of such subsections, have nevertheless chosen an option under Section 7?

It is the opinion of this office that the increase of pension provided for by Chapter 400 is available to any teacher who has heretofore retired or shall hereafter retire and who has retired either under the provisions of subsections IX, X and XI without having chosen the option or who, being otherwise eligible under subsections IX, X and XI to retire, has chosen an option under Section 7.

JAMES G. FROST
Deputy Attorney General

November 25, 1953

To Spaulding Bisbee, Director, Civil Defense and Public Safety
Re: Workmen's Compensation relative to Age

Replying to yours of November 17th, requesting an opinion on the Workmen's Compensation Act, relative to age:—

In Chapter 267, Laws of 1953, an Act relating to Civil Defense, the statement is made that this law was enacted "so all citizens will participate."

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State of their residence. Citizenship is membership in a political society and imposes a duty of allegiance on the part of a member and a duty of protection on the part of the society. Age is not involved in citizenship.

Of course, enlistment in the Civil Defense Auxiliaries must be confined to those who can understand and subscribe to the oath in Section 14 of Chapter 298 of the Laws of 1949.

This office is of the opinion that there is no prohibition against having such members under the age of eighteen years, if otherwise eligible.

NEAL A. DONAHUE
Assistant Attorney General

November 30, 1953

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Sheepscot Lake Water Level

This office has given consideration to your memorandum of November 5th on the above captioned subject, which has to do with a claim presented by a Mr. Bushey relative to flowage damage claimed to his land on Sheepscot Lake.

It appears that your Palermo dam, situated a short distance from this lake, controls its water level and that Mr. Bushey's land is across the lake from the outlet where the dam is situated. Your department bought two parcels

of land which together included a mill privilege which had formerly been used in that neighborhood, and a new dam was constructed somewhat nearer the lake than the former one had been. As to whether this new dam held the water to a higher level than was formerly the case there appears to be some disagreement; but it is said that all parties in interest were once in agreement that the level as now arranged for the dam was proper.

Mr. Bushey has submitted a claim and requested the legislature for permission to press such claim against the State for his claimed damages. The legislature, giving some consideration to that claim, disallowed it and refused him permission to sue the State.

The water of a great pond, being more than ten acres in extent, is public property, owned and controlled by the State for the benefit of the public. The Colonial Ordinance of 1641-7, reserving to the government full ownership and sovereignty over great ponds, was extended to the territory of Maine with the same force as in Massachusetts. (102 Me. 155.) Under the Colonial Ordinance, except as to grants made prior to the Ordinance, the State has full propriety in and sovereignty over the waters of great ponds. (118 Me. 155.)

Any change from the natural level of the water in a great pond must be with legislative authority. (118 Me. 506.)

As great ponds and lakes are public property, the State may undoubtedly control and regulate their use as it thinks proper. (82 Me. 56.) Land bordering on a great pond extends to the low water mark. The owner is entitled to the full enjoyment of his property in its natural state, that is, to the natural low-water mark. He cannot be deprived of that full enjoyment, except it be taken from him for public uses under the exercise of the right of eminent domain, with the accompanying payment of just compensation. (118 Me. 506.)

If, however, the State itself causes the water of a great pond to be held back and an owner of shorage on the lake claims damage for flowage, he must first obtain consent of the Legislature before maintaining any action for such claimed damage. The Legislature in the State of Maine has like authority as the General Court of Massachusetts. In that sense the legislature is the highest Court in the State. Our courts have only such authority as is granted to them by the Legislature. Our highest Court, the Law Court, is purely a creation of the Legislature. The Legislature made it and could unmake it. In former times many of the matters now handled by the courts, such as divorces, adoptions, etc., were handled by the Legislature and may be so handled today.

The State, being sovereign, can only be sued or made a defendant with its own consent. The Legislature considers in each case whether the State should consent to such suit. After hearing such matter as is presented to it, usually before the Judiciary Committee in Maine, this committee, composed largely of lawyers, recommends to the whole body of the Legislature that the State should or should not submit to such suit. When such right is denied, it may well be presumed that the case presented did not convince the Legislature that justice required that such an action be brought.

When the Legislature has withheld its sanction for bringing such action, it is a rejection of the claim, and such claim cannot be considered any longer as an obligation of the State. Another Legislature may, upon such facts as are presented to it, if it sees fit, entertain such claim and give consent to the State's being made defendant. Unless and until it does so, such a claim should not be entertained as a valid obligation of the State.

In this case the Legislature has rejected the claim and refused the requested permission to bring suit. . Thus, the claim should not be further entertained. To recognize this claim further, by lowering the dam to appease the claimant, would seem to be in disregard of our highest tribunal, the Legislature, which has heard the claim and denied it.

NEAL A. DONAHUE
Assistant Attorney General

December 2, 1953

To Hon. Burton M. Cross, Governor of Maine
Re: Chairmanship, State Highway Commission

This office has been asked for an opinion relative to the phrase, "vacancy . . . in the office of chairman," as seen in Section 2 of Chapter 398 of the Public Laws of 1953. The fact situation which gives rise to the question is as follows:

On July 2, 1952, Mr. Lloyd B. Morton, a member of the State Highway Commission, was elected chairman of that Commission for the ensuing year. Mr. Morton's term of office as a member of the State Highway Commission expired on December 7, 1952, and he was re-appointed for a three-year term ending December 7, 1955. On December 3, 1952, the Highway Commission confirmed its action taken on July 2, 1952, to continue Mr. Morton as chairman of the State Highway Commission until the first meeting of the State Highway Commission to be held in July, 1953, "or until his successor as chairman shall be duly elected."

From the above outline it can be seen that Mr. Morton was elected by the Commission to be chairman on July 2, 1952, until the Commission's first meeting in July of 1953. Subsequent to July, 1953, to the present date no action has been taken by the Commission to elect a new chairman, nor in fact has any action been taken by the Commission with respect to the chairmanship of the Commission since July of 1953.

Chapter 398 of the Public Laws of 1953 revises Section 3 of Chapter 20 of the Revised Statutes and substantially changes the duties of the chairman of the Highway Commission, providing also that such chairman shall be appointed by the Governor.

Section 2 of Chapter 398 reads as follows:

> "Effective date. This act shall become effective either at the expiration of the term of office of whomever may be chairman of the highway commission on the date of approval of this act or upon a vacancy occurring by resignation or otherwise in the office of chairman of the highway commission, whichever is sooner."

Section 3 of Chapter 20 of the Revised Statutes provides in part that

". . . the commission shall choose a chairman from its members every year, and in case of failure to make such choice, the governor shall appoint a chairman."

The following questions have been asked of this office relative to the above statutes with respect to the chairmanship of the Highway Commission:

1. Is there presently a vacancy in the office of chairman of the Highway Commission such as will give effect to Chapter 398 of the Public Laws of 1953?

The answer is, "Yes."

As will be noted in Section 7 of Chapter 20, the law imposes upon the Commission the duty of choosing a chairman from its members every year. Upon failure in that duty, the Governor shall then appoint a chairman.

Mr. Morton's term of office as chairman of the Commission expired in July of 1953. The Commission having failed to make the necessary appointment, there is now a vacancy in that office.

2. If the Governor fails to take steps to appoint a chairman of the Commission, can the Commission now select a new chairman?

The answer is, "No."

There being a vacancy in the office of chairman, then by the provisions of Section 2 of Chapter 398 the entire Act as seen in Chapter 398 of the Public Laws of 1953 goes into effect, and Section 1 of that chapter provides that the chairman shall be appointed by the Governor.

ALEXANDER A. LaFLEUR
Attorney General

December 3, 1953

To Roland H. Cobb, Commissioner, Inland Fisheries and Game

Re: Fairness in Trapping Licensing

We have your memo of November 30, 1953, in which you state that you have a game management area in Chesterville where you have a dam and a marsh for migratory waterfowl, muskrats, and other fur-bearing animals. You further state that in order to limit the number of muskrats taken out of the area you have given a direct concession to one person to trap in that area. You ask the following question:

"Under the law can we control the trapping in the Management Areas so that we may designate the trapper whom we want to take out a limited number of the fur-bearing animals?"

It is a basic principle of our laws that they be exercised uniformly and that one citizen of the State is not to be discriminated against to the favor of another. For this reason we do not feel that concessions should be given by the State to any person to the exclusion of others, to trap fur-bearing animals.

Another of our basic principles is that the animals of the State of Maine are held by the State in trust for the people. We feel also that this principle is violated when one and not another of our citizens is given an exclusive right to trap.

JAMES G. FROST
Deputy Attorney General

December 3, 1953

To E. E. Edgecomb, Chief Inspector, Labor & Industry
Re: Boiler Inspections in Schoolhouses

We have your memo of October 23, 1953, in which you ask for a definition of the word "schoolhouse" as used in Chapter 319 of the Public Laws of 1953. You specifically ask six questions, the first of which is, "What is the interpretation of a schoolhouse?" The remaining questions each set out a specific building and the question if it comes within the definition of a schoolhouse.

Search of the Legislative Record reveals that the principal object of this amendment was the safety of school children and that the measure was actually sponsored by the late Commissioner Ladd. In fact, such inspections had been made for a long time at his request without statutory authority. It would therefore appear that the word "schoolhouse" should receive its common everyday meaning, such as is used in our laws having application to schoolhouses coming within the jurisdiction of the Department of Education. This, of course, would exclude Sunday schools, convents, etc.

JAMES G. FROST
Deputy Attorney General

December 28, 1953

To George Frederick Noel, D. O., Secretary
Board of Osteopathic Registration

Re: We are in receipt of the following question from you: Whether or not a fee of $2 should be charged to members for re-registration who fulfilled their obligation by attending a two-day post-graduate session in June, 1953 previous to the effective date of the new law which raised the fee to $4.

Section 6 of Chapter 54, as amended by Chapter 294 of the Public Laws of 1953, provides in effect that every osteopathic physician shall pay an annual renewal fee for a certificate to practice. It is further provided, in addition to the payment of such fee, that certain annual educational requirements are necessary to comply with the law.

It is our opinion that the $4 provided in this section of the law becomes effective as to all persons at the same time, regardless of the time when they complied with their educational requirements.

JAMES G. FROST
Deputy Attorney General

December 28, 1953

To Col. Harry A. Mapes, Director, Civil Defense & Public Safety
Re: Loyalty Oaths

We are in receipt of your memo of December 10, 1953, in the following tenor:

"A man and his wife who are both Canadian citizens have been and are now members of a Ground Observer Corps Post here in Maine doing a reliable job, both from the standpoint of performance and character — (1) Must these Canadians sign a loyalty oath? If so, in what form so as not to affect their Canadian citizenship? (2) Can they continue as observers without signing the oath?"

Section 14 of Chapter 298 of the Public Laws of 1949 reads as follows:

> "Each person who is appointed (to any capacity in any Civil Defense and Public Safety organization established under the provisions of this chapter) shall, before entering upon his duties, take an oath . . . substantially as follows . . ."

We interpret the above quoted section of the law to make it mandatory upon those who are appointed to such positions to take an oath substantially the same as that set out in Section 14. We cannot conceive how a Canadian can take such an oath or a substantially similar oath without prejudicing or renouncing his Canadian citizenship.

While we appreciate the services of those Canadians who are performing an adequate function in the Civil Defense set-up, we cannot reconcile their remaining in such service without taking an oath. The statute contemplates an oath on the part of every person, and because there is a person who is not a citizen working for your agency, we do not think an exception should be made.

JAMES G. FROST
Deputy Attorney General

December 29, 1953

To Harlan H. Harris, Controller
Re: Electricians Examining Board — Per Diem

Chapter 307 of the Public Laws of 1953 establishes an Electricians Examining Board, the membership of said board being comprised of an executive secretary who shall be either the Insurance Commissioner or a representative from the Insurance Department delegated by the Insurance Commissioner, and four other members to be appointed by the Governor with the advice and consent of the Council.

The last sentence of Section 3 of Chapter 307 states that the members of the board shall each be allowed the sum of $10 per day and their necessary travelling expenses for actual attendance upon examination of candidates and the necessary hearings.

The Personnel Law and Rules provided that no classified employee shall receive additional compensation for added work placed upon him. You have

asked this office if, under the provisions of Section 3 of Chapter 307, the executive secretary of the Electricians Examining Board, being a classified employee, is eligible to receive the $10 per day authorized by said section.

It is our opinion that Section 3 clearly provides that all members of the board shall receive the sum of $10 per day when in attendance upon the business of the board. This statutory provision is subsequent in time to that enacted in the Personnel Law and Rules and therefore governs the question.

JAMES G. FROST
Deputy Attorney General

December 29, 1953

To E. E. Edgecomb, Chief Inspector, Labor and Industry
Re: Hot Water Heating Boilers

We have your memo in which you ask if, under the provisions of Section 59 of Chapter 25, R. S. 1944, as amended by Section 1 of Chapter 319 of the Public Laws of 1953, hot water supply boilers are included in the phrase, "hot water heating boilers located in schoolhouses," and therefore require inspection by your department.

The section of law referred to above is a safety measure designed to protect school children from potentially dangerous instruments. As such, it is our opinion that hot water supply boilers come within the intent of the law.

JAMES G. FROST
Deputy Attorney General

December 31, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Assignment of Accounts Receivable

I am returning enclosed the assignment of accounts receivable signed by Mr. Cedric A. Foster, which you returned to me with your memorandum of December 30, 1953, stating that it had no value so far as you were concerned.

I have read the provisions of Section 18 of Chapter 384 of the Public Laws of 1947, and I had read this section before I made out the assignment. It is a well-founded principle of law in this State that the State is not bound by its own statutes unless expressly named therein. It is my opinion that the legislature did not intend to exclude the State from receiving assignments of retirement funds. On this authority we have four cases:

Cape Elizabeth v. Skillin, 79 Me. 594;
Benton v. Griswold, 95 Me. 450;
Goss Co. v. Greenleaf, 98 Me. 436; and
Whiting v. Lubec, 121 Me. 121.

We would therefore appreciate your accepting this assignment, in view of the law, and accordingly reserve for the State the amount of money stated therein, namely $71.60.

ROGER A. PUTNAM
Assistant Attorney General

December 31, 1953

To Norman U. Greenlaw, Commissioner of Institutional Service
Re: Invoice for Reportorial Service

You have made inquiry of this office whether or not it is proper for an institution of the State to pay a bill rendered by a reporter for a transcription of testimony in a case before the Industrial Accident Commission, where the State institution was a party under the Workmen's Compensation Act and the transcript was called for by the institution's counsel. Counsel for such institution is the Attorney General or his designated Assistant.

Claims by State employees under the Workmen's Compensation Act are by law assigned for settlement to the Attorney General, as are all such claims against the State.

The settlement of these claims may be defended before courts or commissions or may be compromised as agreed to by the Attorney General or, with his authority, by his Assistant.

As is usual, the counsel speaks for his client and the engaging of witnesses and the record of a hearing are usual expenses attendant upon such proceedings.

Hence it is that this office is of opinion that the employing department or institution should make payment of the item referred to.

JAMES G. FROST
Deputy Attorney General

January 5, 1954

To Hon. Burton M. Cross, Governor of Maine
Re: Duties of Chairman, Highway Commission

This office has been asked to interpret Chapter 398 of the Public Laws of 1953 in so far as it affects the duties of the Chairman to be appointed under the provisions of the Act, particularly with reference to Section 4 of Chapter 20 of the Revised Statutes. The last sentence of Chapter 398, which amends Section 3 of Chapter 20, R. S., provides:

> "The chairman shall be the chief administrative officer. having general charge of the office and records, but all policy decisions of the commission must be by a majority of its total membership."

This section, imposing additional duties upon the chairman, removes from the chief engineer the general charge of the office and records, such charge having been granted him by Section 4 of Chapter 20. While the "general charge of the office and records" is directly dealt with by the new Act, and

as a result it indirectly repeals that portion of Section 4 of Chapter 20 which grants that power to the chief engineer, it appears that additional matters have been contemplated by making the chairman the *chief administrative officer.* Normally, it is an administrative function to employ clerical and other assistance, and the right to employ such help, subject to the right and direction or the approval of the commission, have been given to the chief engineer under the provisions of Section 4 of Chapter 20. It is the opinion of this office that there should not be the inconstancy resulting when, on the one hand X by statute is made the chief administrative officer, and on the other hand the chief engineer may select the personnel, subject to the approval or under the direction and control of the commission. The employment of personnel being one of the primary functions of the chief administrator, we believe that Section 4 of Chapter 20 has been further repealed, to the extent that such employment of personnel is now subject to the direction and control of the chairman of the commission — the chief administrative officer.

It should be noted that the chief engineer *shall* have general charge of all construction and maintenance work under the control of the commission and *may,* subject to the direction and control of or with the approval of the chairman, employ personnel. While the chief engineer will continue, under our interpretation of the law, in charge of all construction and maintenance work under the direction and control of the commission, employment is under the supervision of the chairman. That is, the chairman may directly control such employment or he may delegate that power, subject to his supervision, to the chief engineer.

An examination of the first above quoted sentence clearly reveals that the chairman has now been given by the legislature all administrative duties with the exception of policy decisions, which latter decisions remain with the commission as a whole. The commission, in addition to deciding policy matters, will have its other normal quasi-judicial functions and other statutory duties not administrative in nature.

JAMES G. FROST
Deputy Attorney General

L. SMITH DUNNACK
Assistant Attorney General

January 6, 1954

To I. W. Russell, Superintendent of Public Buildings

Re: House and Senate Chambers

In response to your memo dated December 31, 1953, please be advised that under the provisions of Section 7 of Chapter 9 of the Revised Statutes, as amended by Chapter 375 of the Public Laws of 1945, Harvey R. Pease, Clerk of the House, has general oversight of chambers and rooms occupied by the legislature, when the legislature is not in session.

It would appear, therefore, that you have no authority in connection with the giving out of the House and Senate chambers.

JAMES G. FROST
Deputy Attorney General

January 12, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Acceptance of Gift of Land

We have your memo of January 5, 1954, in which you state that you are interested in acquiring as a gift from the Federal Government a plot of land in the unorganized township of Salem, together with the buildings thereon, formerly used as a rearing station, and that in order to make application to the General Services Administration for this property you need a statement from this Office, quoting the statute authorizing you to accept such a gift.

In the event you plan to continue the use of that property as a rearing station, we quote the following section of Chapter 33, R. S. 1944, as being sufficient authorization for you to accept this property by way of gift:

> "Sec. 14. Commissioner may take land for fish hatcheries or game management areas; appeal. The Commissioner for the location, construction, maintenance and convenient operation of a game management area for game, fish hatchery or fish hatcheries and feeding stations for fish may acquire in the name of the state by gift, bequest or otherwise, real and personal property; or he may purchase, lease or take and hold, for and in behalf of the state for public uses, land and all materials in and upon it or any rights necessary for the purpose of establishing, erecting and operating game management areas, fish hatcheries or feeding stations."

In the event it is not intended that such land be used for the purpose mentioned in Section 14 of Chapter 33, then we would direct your attention to Section 15 of Chapter 11 of the Revised Statutes of 1944, which section provides:

> "The governor, with the advice and consent of the council, is hereby authorized to accept in the name of the state any and all gifts, grants, and conveyances to the State of Maine."

JAMES G. FROST
Deputy Attorney General

January 12, 1954

To Col. Francis H. McCabe, Chief, Maine State Police
Re: Verdict of "Not Guilty" in a Municipal Court

We have your memo of December 31, 1953, and attached thereto a copy of correspondence from Camille Carrier, which you have sent to this office for whatever action we may desire to take.

In brief, the gist of Camille Carrier's letter is that the Municipal Court of the City of Auburn found a decision of "Not guilty" in a case in which Camille Carrier prosecuted the defendant for operating a motor vehicle while under the influence of intoxicating liquor, because of which decision Carrier feels that the matter should be presented to a grand jury.

We wish to advise that as a matter of law a finding in a municipal court

of "Not guilty" is a final determination in a criminal matter. The decision is res judicata, and that same case cannot be tried a second time, either by complaint or by indictment of a grand jury.

JAMES G. FROST
Deputy Attorney General

January 13, 1954

To General George M. Carter, The Adjutant General
Re: Directional Lights

This office is in receipt of your memo of December 29, 1953, with attached correspondence relating to Sections 107-A, B and C of Chapter 19 of the Revised Statutes of 1944, as amended.

It is stated in a letter dated May 29, 1953, from your Bureau to the Chief, National Guard Bureau, Washington, D. C., that the effect of these sections was to enact into law a proviso that all motor vehicles, irrespective of purpose, shall be equipped, front and rear, with directional signal lights.

You were advised in response to that letter that standardization of military vehicles would not include such equipment and that authority was not granted for any such installation on your vehicles. You therefore request an opinion from this office to the effect that your department is authorized to operate vehicles in the control of the Maine National Guard, Air and Army, on Maine highways in connection with the training of the Maine National Guard and the necessary use supporting any State interest, without complying with such law.

Personally, we wish to advise that the effect of the above quoted law is not that which was contained in your letter of May 29th above referred to. Signals may be given by means of the hand and arm or by a signal lamp or lamps or mechanical signal device, provided that, when a vehicle is so constructed or loaded that a hand-and-arm signal would not be visible both to the front and to the rear of such vehicle, then said signals must be given by such a lamp or lamps or signal device.

The Secretary of State has issued a memo in which are set out the measurements of a truck which require a lamp or lamps or a mechanical signal device. From the list of vehicles in the control of the Maine National Guard, Air and Army, supplied to this office in your memo of December 29th, it is very probable that not all of your vehicles would require such equipment.

Having reviewed our laws relative to registration, inspection and the application of these laws to federally owned vehicles, this office is of the opinion that federally owned military vehicles being used by the National Guard Bureau need not comply with the requirement of the law with respect to mechanical signaling devices.

ALEXANDER A. LaFLEUR
Attorney General

January 20, 1954

To Frank S. Carpenter, Treasurer of State
Re: Suit to Recover Contractor's payments

John G. Marshall, Esq., of Auburn has made inquiry of you relative to the use of your name in bringing suit against Susi and Sons Co. and the bonding company, Hartford Accident and Indemnity Company, to recover subcontractor's payments that are due Snow's, Inc.

The proper procedure in bringing suit is to have the Treasurer of State as the proper party plaintiff, and we have a case in Maine to that effect.

This office feels that you should cooperate with Mr. Marshall in lending your name, because it is in furtherance of that very purpose that one condition of the bond is that the contractor will always pay his subcontractor. We feel that you should drop a line to Mr. Marshall, authorizing the use of your name, but specifically setting forth two conditions, — 1, that he will guarantee that you will not be liable for any costs that may be incurred in the suit; and, 2, that you will be held harmless from any personal liability or expense...

ROGER A. PUTNAM
Assistant Attorney General

January 22, 1954

To Honorable Burton M. Cross, Governor of Maine
Re: Rent Control

The attached letter was forwarded to this office, so that we could advise you as to the status of rent controls in the State of Maine and the possibility of State action relative to charging high rentals in certain areas.

We call your attention to Section 41 of Chapter 124 of the Revised Statutes of 1944, which deals with profiteering in rentals:

> "Whoever demands or collects an unreasonable or unjust rent or charge, taking into due consideration the actual market value of the property at the time, with a fair return thereon, or imposes an unreasonable or unjust term or condition, for the occupancy of any building or any part thereof, rented or hired for dwelling purposes, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 11 months, or by both such fine and imprisonment."

This is a criminal statute which may be invoked on complaint to the local authorities. The County Attorney would be the proper prosecuting officer.

As to federal rent controls, we have checked the federal law and find that by the provisions of 50 U. S. Code Annotated, section 1894, subsection (1), whenever the Secretary of Defense and the Director of Defense Mobilization, acting jointly, shall determine and certify to the President that any area is a critical defense housing area, the President shall, by regulation or order, establish such maximum rent or rents for any housing accommodation not then subject to rent control in such area or portion thereof as in his judgment will be fair and equitable.

Further provision is found in the same section, subsection (5) (A) (ii), to the effect that the provisions of this Title (dealing with rent control as a whole) shall cease to be in effect at the close of April 30, 1954 in any area which has been or is certified under subsection (1) of this section (1894) as a critical defense housing area.

From the foregoing statutes you will see that acting in concert, the Secretary of Defense and the Director of Mobilization could in their discretion certify the Bangor area as a critical housing area, due to the impact of Dow Field, and the President could order controls until April 30, 1954, unless Congress in the meantime extends the effective date of the Act.

We trust that the foregoing will give you ample ammunition to answer the inquiry. . .

ROGER A. PUTNAM
Assistant Attorney General

January 25, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Game Management Areas – Trapping

You have forwarded to us certain questions asked by W. R. de Garmo, Chief of your Game Division, which arose after an opinion was rendered by the Deputy Attorney General on December 3, 1953.

We feel that Questions 1 and 2 may be considered together. It is the opinion of this office that the third paragraph of Section 12-A of the Latest Biennial Revision of your law provides that the proceeds from the sale of fur-bearing animals caught within a Game Management Area *shall* be used for the maintenance of Game Management Areas. Following the logical sequence, it would seem to us that this trapping should be done by employees of your department rather than by endeavoring to accomplish the same result by bringing in independent fur trappers. We feel that in this manner the State will get the most for its money and we feel that it was the intention when the legislature provided that the proceeds should be so used.

This answer renders an answer to Question 1 unnecessary.

In answer to Question 3, we feel that the Commissioner may establish seasons at variance with general open seasons, when trapping fur-bearing animals, as the provisions of the first paragraph of Section 12-A are very broad and this in effect would carry out the purpose of controlling the game population as the department sees fit. Any seasons at variance with the general open seasons should be closely regulated by proper regulations, as provided by paragraph 4 of Section 12-A.

Question 4 is rather broad; but as we have not held all the practices inquired about to be improper, there would seem to be no necessity for advising that certain legislation is necessary to control harvests in your Game Management Areas. If our decision has thrown too heavy a burden on your personnel and it is not administratively sound, then legislation might be necessary; but that is for your department to decide in the first instance.

I might add in closing that the questions propounded and the answers here given in no way change the ruling of the Deputy Attorney General on December 3, 1953.

ROGER A. PUTNAM
Assistant Attorney General

January 27, 1954

To Department of Labor and Industry
Re: "Hotel"

We have your memo of January 13, 1954, in which you request of this office a legal interpretation of what constitutes a "hotel".

It can be generally stated that a "hotel" is a building held out to the public as a place where transient persons who come will be received and entertained as guests for compensation.

"Hotel" is synonymous with "inn". A hotel does not lose its identity by bestowing upon it a different name, such as "The X House", if in fact such place is used as a hotel.

Indicia or elements helpful in determining whether or not such building is a hotel are: Does it have a lobby, a hotel register, some daily accommodations available, and a place for the safe keeping of guests' valuables?

JAMES G. FROST
Deputy Attorney General

January 27, 1954

To Philip A. Annas, Associate Deputy Commissioner, Education
Re: Classification of High Schools under Section 89 of Chapter 37

We have your memo of January 8, 1954, in which you state the following fact situation and pose the following question:

"One of the functions of our department is to classify the high schools according to the description given in Section 89.

"This section permits a junior high school to be maintained as a part of a Class A high school. When this is done, the school consists of grades 7-12 or grades 8-12.

"Question": May a school of this type be classified as a Class A secondary school if the faculty consists of but two teachers?"

This office is of the opinion that, to be a Class A secondary school, there must be at least two teachers employed solely for the purpose of conducting the courses required of such a school (at least one approved course of study through four years of 36 weeks each and of standard grade, together with approved laboratory equipment.).

It would be our further opinion that a school having such a required course of study and employing two teachers is no longer a Class A school if a junior high school is maintained with or is a part of that high school, thereby

adding more students. Under such conditions two teachers can no longer devote their whole time to the course of study required of a Class A school, but have the additional burden of teaching children not normally embraced in the four-year course.

For these reasons we do not believe that under such conditions such school would be classified as a Class A secondary school.

JAMES G. FROST
Deputy Attorney General

January 27, 1954

To Elmer H. Ingraham, Chief Warden, Inland Fisheries and Game
Re: Confiscated Rifle

We have your memo in which you state that on October 27, 1953, one of your wardens seized . . . a semi-automatic rifle having a magazine capacity of 15 cartridges and that the rifle was libeled and declared confiscate. You ask, if, under the provisions of Section 71 of Chapter 33, R. S., as amended, that rifle should have been libeled or should only firearms equipped with silencers be libeled.

It is the opinion of this office that only rifles, pistols or other firearms fitted with silencers or any device for deadening the sound of explosion should be libeled. It will be noted that the first paragraph of Section 71 was enacted in 1943 and this was the only paragraph of that Act. It reads in part as follows:

> "No person shall sell, offer for sale, use or have in his possession any gun, pistol, or other firearms, fitted or contrived with any device for deadening the sound of explosion. Whoever violates any provision of this section shall forfeit such firearm or firearms *and* the device or silencer, and shall further be subject to the penalties of section 119. . ."

It seems clear from a reading of the above quoted provision of law that such firearm and the device or silencer shall be forfeit.

This section of law was further amended in 1945 to include the paragraphs relating to auto-loading firearms and automatic firearms. With respect to such amendments, it can be seen that the possession of such rifle is not clearly prohibited, but the prohibition runs to the effect that no person shall use for hunting or have in his possession at any time in the fields and forests or on the waters of the State such firearms, unless it shall have had its magazine permanently altered so as to contain not more than 5 cartridges.

For these reasons we believe it was the intent of the legislature not to cause to be libeled any firearms except those which have silencers or similar devices.

JAMES G. FROST
Deputy Attorney General

January 29, 1954

To Honorable Burton M. Cross, Governor of Maine
Re: Appointment and Term of Office of Chairman, Highway Commission

Section 3 of Chapter 20 of the Revised Statutes, as amended by Chapter 398 of the Public Laws of 1953, provides that the term of office of the chairman of the Highway Commission shall be seven years and that the chairman shall be appointed by the Governor. The question has been raised if the Governor must first nominate a person as a member of the Commission and then subsequently appoint him as chairman, after confirmation.

The tenure of office of the members of the Commission, not including the chairman, is for a term of three years. The term of office of the chairman is for seven years. It is therefore the opinion of this office that, consistent with the intent of the Legislature, the Governor can simultaneously nominate a member and designate him as chairman.

JAMES G. FROST
Deputy Attorney General

February 2, 1954

To J. B. Dyer, Purchasing Agent
Re: Bureau of Purchase Law

This is in response to your memo relative to an interpretation of the Bureau of Purchases Law, particularly Sections 36 and 37 of Chapter 14 of the Revised Statutes. Your memo was in the following terms:

"In an effort to improve the purchasing procedure in the Bureau of Purchases regarding certain supplies and materials it appears desirable to place some of our commodities on a requirement contract which will result in the grouping of certain types of commodities required by our institutions, basing our bids on a total quantity of an item to be delivered by the successful vendor to any of our institutions as required. Of immediate interest to this office is a bid on clothing. It is desired to totalize the quantity of each similar piece of clothing instead of listing these items against each institution, awarding the bid to one vendor who would supply to each of our institutions all of our requirements of the same item of clothing. We feel that in doing this we may be able to purchase at the greatest possible economy and benefit to the state due to larger quantities being supplied.

"Section 37 of the R. S., 1944 states: 'The state purchasing agent, in requesting bids for institutional supplies, shall list the articles on which bids are requested under the names of the institutions for which they are desired. Bids shall be made on any or all of the articles listed, each bid being made for the supply of a specific article or articles to the particular institution without reference to those otherwise listed.' This section was enacted into law because up to the time that the administrative code was formulated the Governor and Council were responsible for purchases, supplies and materials for the institutions. Each institution operated as a separate function. At a later date the Institutional Service Department was established and the Bureau of Purchases became the central purchasing agency for all of the institutions.

"Section 26, in part, states: '*Except as provided in this chapter,* any or all supplies, materials, and equipment needed by one or more departments or agencies shall be directly purchased or contracted for by the state purchasing agent, as may be determined from time to time by rules adopted pursuant to this chapter, which rules the department of finance is authorized and empowered to make, it being the intent and purpose of this statute that the state purchasing agent shall purchase collectively all supplies for the state or for any department or agency thereof in the manner that will best secure the greatest possible economy consistent with the grade or quality of supplies best adapted for the purpose for which they are needed.'

"Section 41, II, further states that the state purchasing agent, with the approval of the commissioner of finance, may adopt, modify, or abrogate rules and regulations prescribing the manner in which the supplies, materials, and equipment shall be purchased, delivered, sorted, and distributed."

You have asked this office the following question: "Can the Bureau of Purchases, in purchasing in the best interest of the state, group items required by the several institutions into one item of identical nature without violating the intent of Section 37?"

The answer to your question is in the negative.

Section 36, which provides for collective purchasing of supplies for any department or agency, clearly contemplates that there may be exceptions to such method of purchasing as indicated by the clause above underlined. Section 37, which immediately follows, appears to be one of the exceptions contemplated, and without doubt is a procedure obviously different than the intent expressed in Section 36. However, such difference appears to be the express wish of the Legislature.

This section relating to the purchase of supplies for institutions was enacted by Chapter 124, P. L. 1933, two years after the enactment of the Administrative Code, and is still present some fifteen years after the Department of Institutional Service was established. (Chapter 223, P. L. 1939.)

It is presumed that the procedure outlined in Section 37 has been followed for these twenty-one years and this office could not render an opinion vitiating the clear intent of each statute.

The change should come through proper legislation.

JAMES G. FROST
Deputy Attorney General

February 12, 1954

To Harold J. Dyer, Director, Park Commission
Re: Descriptive Literature

We have your memo of January 25, 1954, in which you state that there has been a need for descriptive literature available to various State parks to provide visitors with information as to the area, its features and facilities. In view of the fact that such material, while informative, is an advertising and promotional medium, you ask if your department can expend money for

such material, in view of the duties of the Maine Development Commission as provided by Chapter 35, Section 2, R. S. 1944.

We have before us a 16-page pamphlet published by the Maine Development Commission, which contains information relative to all State parks. You did not so state, but apparently this publication is too expensive to distribute in the amounts you need to use and perhaps, too, it does not suit your purposes, in that you desire smaller publications for each park area.

This office has conferred with Mr. Greaton, Director of the Maine Development Commission, and it is the consensus that publication by your department of pamphlets of a relatively small size describing particular parks would not be an infringement of the duties of the Development Commission. We are also of the opinion that it would be a proper expenditure of your funds to have such descriptive literature available.

JAMES G. FROST
Deputy Attorney General

February 16, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Re-employment after Withdrawal of Contributions

This is in response to your memo of recent date, attached to which is an opinion of Barnett I. Shur, Corporation Counsel of the City of Portland, . . . relating to restoration of prior service in the case of one Edward Nelson.

From the facts supplied it appears that Mr. Nelson left the employ of the City of Portland in February of 1946, at which time he withdrew his contributions in the Retirement System, such withdrawal terminating his membership in the System. In March of 1948 he returned to employment with the City of Portland. The problem is whether or not he shall be credited with prior service.

The statutes to be considered in determining this question read as follows:

> Sec. 1, Chap. 50, P. L. 1943. ". . Provided further that any person formerly employed by the state at any time during the period of 3 years prior to July 1, 1942 and who is re-employed by the state at any time prior to July 1, 1945, shall, upon becoming a member, be allowed prior service credit."

And Section 227-D, paragraph VI, of Chapter 328, Public Laws of 1943 (Special Session, 1942):

> "When membership ceases a prior service certificate shall become void, and should the employee again become a member he shall enter the system as a member not entitled to prior service credit."

As you noted in your memo, Portland is still operating under the original provisions of the Retirement Act, so we need not concern ourselves with subsequent amendments.

The first section of law above quoted is too clearly worded to be in need of further interpretation and, it being the law with respect to the City of

Portland's participation in the Retirement System, we would concur with Mr. Shur's conclusion that Mr. Nelson's prior service cannot be restored under the provisions of their Act.

JAMES GLYNN FROST
Deputy Attorney General

March 1, 1954

To Phillip Annas, Associate Deputy, Education
Re: Responsibility of Commissioner for Tuition Charges

. . . You ask if the Town of Masardis is responsible for the tuition of one Natalie Cote who attended Lee Academy in 1951-52. You state that if the Town of Masardis is responsible for such tuition, then the Commissioner of Education can act in accordance with Section 99 of Chapter 37, R. S. 1944, and pay the amount owed to Lee Academy, deducting that amount plus interest from the apportioned fund of the Town of Masardis:

> "Provided, however, that when pupils *are sent from one city, town or plantation to an approved secondary school in another*, if any accounts for tuition of such pupils are not paid on or before the 1st day of September of that year, the commissioner shall pay such accounts, or so much thereof as he shall find to be rightly due, to the treasurer of the receiving city, town, plantation, academy, institute or seminary at the next regular annual apportionment, together with interest on such accounts at the rate of 6% annually, computed from said 1st day of September, and the commissioner shall charge any such payment against the apportioned fund of the sending city, town or plantation."

There are too many unanswered questions in the fact situation as presented for us even to attempt to answer your problem. For instance: Is Masardis a town which does not maintain a free high school? If it is, does it contract with another town to educate its children? In the event it is such a town and has a contract with another town to educate its children (and we presume that such a contract would not exist between the towns in question — almost 100 miles apart), then the Town of Masardis would in all probability not be liable for the tuition owed to Lee Academy.

Or again, perhaps the child entered Lee Academy under the belief that such entrance was authorized by Section 98 of Chapter 37. This section contemplates that the youth concerned must reside with a parent or guardian in the town involved. We cannot ascertain from your memo whether or not such requirement has been complied with, except that we know she did not reside with her parents.

In any event, the above quoted section of law relating to the duty of the Commissioner to pay such accounts as are in dispute here, has reference to children *sent* by a town to another town (see underlines above) and in our opinion has no relation to instances where children are *sent* by others than a consenting town.

From the manner in which you present your problem we gather that you consider the final determination of residence to be the answer, and such

might be the case if only Section 39 of Chapter 37 were involved: ". . . every person between the ages of 5 and 21 shall have the right to attend the public schools *in the town* in which his parent or guardian has a legal residence."

However, as you can see from the above consideration of the situation, many more problems enter the picture when a child attends school in a town other than the town in which he has a legal residence.

In view of the over-all situation, Masardis' denial of responsibility, and the other factors present, we feel that the matter is one which should be settled between the town, the academy, and the parents, and we therefore refrain from giving any opinion on the precise question asked.

JAMES GLYNN FROST
Deputy Attorney General

March 2, 1954

To Joseph A. P. Flynn, Secretary, Electricians' Examining Board
Re: Licensing of Electricians under R. S., Chapter 73-B

This office has been requested to consider Chapter 73-B, R. S. 1944, enacted by Chapter 307, Section 1, P. L. 1953, requiring that electricians be licensed, as it applies to oil-burner installation and servicemen.

The precise question may be phrased: May a competent oil-burner serviceman be licensed as an electrician under the "grandfather clause", where his entire electrical experience has been restricted to work on such burners?

The answer, in our opinion, is: Under the "grandfather clause", the Board may grant a license to any person who presents satisfactory evidence that he has engaged in the business of making electrical installations in any or all of the following fields, namely: heating, lighting, and power within the State of Maine for at least 2 years prior to June 30, 1953. As used here, "installations" include installation, repairs, alterations and maintenance, or any of them.

Section 6 of the statute provides that a license may be given without examination "to any applicant therefor who shall present satisfactory evidence that he has the qualifications of such electrician and has engaged in the business or occupation, as the case may be, of making electrical installations within the State for at least 2 years prior to June 30, 1953."

Section 2 of the statute defines an electrician as "any person, firm or corporation that, as a business, hires or employs a person or persons to make electrical installations, or without hiring any person does such work as a principal business or as auxiliary to a principal business for his or its own account. . ."

It would thus appear that any person who has been installing oil burners is acting as electrician "as auxiliary to a principal business," etc. It would seem to follow that if he has been in such business for at least 2 years prior to June 30, he should be given a license without examination.

The subject is annotated in 4 A.L.R. 2d, 667. It is the editorial conclusion that grandfather clauses, generally speaking, are intended to protect those conscientious persons who are earning a living in a certain vocation even though they might not be able to pass the examination. One cannot generalize

so broadly. There is no reason, of course, for admitting everyone who asks admittance. The Board should at all times be satisfied that the person is not pretending to have some skill which in fact he lacks.

We are conscious of altering only one word of the statute and for that there is statutory authority. Subsection I of Section 2 states that "electrical installations" relates to devices "for heating, lighting *and* power purposes". The underlined "and" we have considered to be equivalent to "or". Chapter 9, Section 21, provides:

> "The words 'and' and 'or' are convertible as the sense of a statute may require."

We believe that the two are convertible in this instance for the reason that an electrician is defined as a person who, as a business, makes electrical installations, or makes them "as auxiliary to a principal business". But their business relates to heating and not to lighting and power. Hence it would seem to follow that the "and" should be understood to mean "or".

BOYD L. BAILEY
Assistant Attorney General

March 8, 1954

To Honorable Burton Cross, Governor of Maine

Re: Probation Officer – Incompatibility with Post Office Service

This office has been asked if the position of probation officer is incompatible with employment in the Post Office Department of the Federal Government.

Our Maine Court has said that two officers are incompatible when the holder cannot in every instance discharge the duties of each.

Section 137.24, paragraph (i) of Title 39, Code of Federal Regulations, deals with postal service and outside employment of employees, and reads in part as follows:

> "Postmasters and employees in post offices shall not engage in any business or vocation that will interfere with their official duties. . ."

Section 29 of Chapter 136 of the Revised Statutes of 1944 specifically places upon probation officers the duty of attending the Superior Court during the times when persons convicted of crime are sentenced, of giving advice upon request to the courts, and of attending the sessions of other courts within their respective counties having criminal jurisdiction as often and as continuously as the performance of their duties shall permit.

It would appear to this office that these positions are incompatible and that the probation officer would be unable to perform adequately his services for the State if he were employed in the postal service.

It should be noted also that the tenure of office of a probation officer, under the provisions of Section 28 of Chapter 136, is during the pleasure of the Governor and Council. Under such a statute the Governor and Council may terminate the services of an appointee when evidence would show that such appointee cannot properly perform his statutory duties.

JAMES GLYNN FROST
Deputy Attorney General

March 9, 1954

To Marion Martin, Labor Commissioner

Re: Employment of Women by Two Firms at once.

. . . You ask for a ruling on the following questions which arise under the provisions of Sections 22 and 23 of Chapter 25, R. S. 1944, as amended:

"A woman works eight hours a day in one plant, and then works a six or eight-hour shift for another employer. There are two situations in question –

1. Where the two employing firms are corporations with partially the same ownership and interlocking directorates, but with separate plant management, and

2. Where the two employing firms are in different fields of activity with no known connection between them."

It is the opinion of this office that the statutes in question have reference to work performed in a single establishment and do not embrace employment in two or more different establishments. We therefore answer both questions 1 and 2 by saying that there is no violation of Sections 22 and 23 of Chapter 25 under the fact situation you relate.

JAMES GLYNN FROST
Deputy Attorney General

March 9, 1954

To Kermit Nickerson, Director of Professional Services, Education

Re: Minimum Salary Law

This is in answer to your memo asking with respect to Chapter 371 of the Public Laws of 1953, which chapter enacts a minimum salary for teachers:

"The question has been raised whether or not payments to teachers after July 1, 1954 must be in amounts conforming with the new salary law, even though payments (presumably for July and August) are for services performed in the 1953-54 year ending June 30, 1954."

The answer to your question is in the negative. The effective date of the act above mentioned is July 1, 1954. From that date onward, the salaries of teachers must comply with the law. However, payments made for services rendered prior to the effective date of the act may be made in conformity with the agreement under which the teacher was working prior to July 1, 1954.

JAMES GLYNN FROST
Deputy Attorney General

March 9, 1954

To E. L. Newdick, Deputy Commissioner of Agriculture

Re: Quarantine on New York Potatoes

Under date of June 24, 1948, and pursuant to Chapter 364 of the Public Laws of 1947, a quarantine was imposed against the transportation of diseased potatoes from a portion of New York State into the State of Maine. While the

quarantine was based on a certain condition then existing in the State of New York, by the words of the rule and regulation as enacted quarantines thereafter placed were purportedly embraced and it is stated in paragraph 4 of the rule and regulation that the same shall continue in effect until further order.

It appears that from December 21, 1953, New York State promulgated a golden nematode quarantine, No. 9, which is the same disease in the same area as the prior quarantine upon which the rule and regulation in question was based.

You ask if the quarantine enacted through rule and regulation by the Commissioner of Agriculture of the State of Maine in 1948 still holds, so that potatoes in the newly declared quarantine area in New York can be prohibited from being transported into this State.

This rule and regulation has been promulgated, we presume, under the police power of the State and permits the seizure of property of those who violate the rule and regulation. Such a rule and regulation, permitting the seizure of property, is strictly and narrowly construed by the courts in favor of the person whose property is seized. The quarantine having been originally enacted because of a condition then existing in New York presents a doubt as to whether such rule and regulation would be in effect today, despite the words in the rule and regulation intending to have its effect carried into the future. For these reasons we would strongly recommend that a new rule and regulation be enacted, having as its basis the current quarantine in New York State.

JAMES GLYNN FROST
Deputy Attorney General

March 18, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Swan Island

We have your letter of March 3, 1954, and attached memo from W. R. de Garmo, Chief of the Game Division of your Department.

Section 128 of Chapter 33 of the Revised Statutes, as amended, being that section which sets out the game preserves and sanctuaries in the State of Maine, lists the Swan Island Game Management Area as a preserve and, with one limitation, prohibits hunting activities on the islands. It is pointed out in De Garmo's memo that such provisions are inconsistent with the authority granted by statute to the Commissioner relative to game management areas. Because of this conflict it is asked what the present status of the islands is.

We are of the opinion that the legislature, in imposing such limitations on the Swan Island Management Area, in fact removed from the Commissioner the rights which would ordinarily be his under Section 12-A to regulate game management areas. With respect to that area we feel that Section 128 alone should be considered in relation to the manner in which such area should be treated. There are some rights under Section 128 specifically granted

to the Commissioner for the regulation of certain portions of the Swan Island Area, and these are the only controls which he may exercise.

JAMES GLYNN FROST
Deputy Attorney General

March 22, 1954

To Carl T. Russell, Deputy Commissioner of Labor and Industry
Re: Tagging of Life Preserver Buoyant Cushions

We have before us an inquiry from a law firm in Pittsburgh relative to the application of Chapter 333 of the Public Laws of 1953. More specifically, they question whether a life preserver cushion is an article of bedding or an article of upholstered furniture within the meaning of I and II of Section 123 of said chapter.

After some deliberation this office has come to the conclusion that these buoyant cushions are not articles of furniture or bedding within the meaning of the act. It does not take much discussion to show that they are not articles of bedding within the meaning of the act. There may be some room for argument that they are articles of upholstered furniture, especially where the definition says, "all furniture in which upholstery or so-called filling or stuffing is used whether *attached* or not."

We find in our search of the cases that the term "furniture" generally means all personal chattels which may contribute to the use or convenience of the householder or an ornament of the house. See *Marquam v. Singfelder*, 32 P. 676, 24 Ore. 2; *Rasure v. Hart*, 18 Kan. 340.

It is plain to see that the article in question has no household use, but is manufactured primarily to be used aboard a vessel. We could argue indefinitely as to whether the purpose of this cushion is to use it as a seat or to preserve life, but it would not enhance this opinion to decide this matter. We would, however, point out the general rule of construction that where a statute imposes a tax *or other burden* on a citizen and is fairly susceptible of more than one interpretation, the courts will incline to that most favorable to the citizen. *M.U.C.C. v. Androscoggin Junior, Inc.*, 137 Me. 160; *Portland Terminal Co. v. Hinds*, 141 Me. 72.

ROGER A. PUTNAM
Assistant Attorney General

March 22, 1954

To Major Donald Herron, Deputy Chief, Maine State Police
Re: Overloading Allowance

We have a request from Lt. Mariner of Troop B relative to the following situation:—

A truck is registered for 48,000, with brakes on all three axles, 18 ft between axle extremes, and hauling forest products. The question is, "would this truck receive the benefit of a 5% tolerance?" That is, would an overload under the

provisions of Section 100 have a 5% tolerance given in Section 27, both being parts of Chapter 19 of the Revised Statutes, as amended?

We would answer that the 5% tolerance is not allowable where the truck is charged with a violation of Section 100.

Section 100 is a statute prohibiting certain overloads on axles. Various maximum loads are allowable, which vary directly in relation to the distance in feet between extremes of axles. There are certain exceptions in Section 100, and we are considering one of them, more particularly that relating to the direct weight in certain instances where hauling forest products.

Section 27 deals with loads greater than specified on the registration certificate. This section allows a 5% tolerance on vehicles of gross weight over 15,000 lbs.

One can readily see that there is a distinction between the crimes involved in Section 100 and those involved in Section 27. Violations of Section 100 are punishable by fines that are set out in Section 100-B and they vary directly to the amount of the overload in each case. One should note that there is a tolerance allowed in Section 100-B of 1000 lbs. To buttress our point that Section 27 and Section 100 involve entirely different matters, one should note that at the end of the last paragraph of Section 100-B there is provision that certain penalties in Section 27 shall be applicable to violations of Section 100. If the legislature itself did not believe that there were distinct offenses, why would they have taken the time to set forth that certain penalties in Section 27 should be applicable to breaches of the law in Sections 100 and 100-B?

ROGER A. PUTNAM
Assistant Attorney General

March 22, 1954

To Herbert G. Espy, Commissioner of Education

Re: Status of Superintendents of Schools

We have your memo of March 15, 1954, regarding the status of superintendents of schools in the State of Maine, in which you ask the following questions:

"1. Is there any provision in the law to prevent or bar the position of superintendent of schools from being considered as a teaching position?

"2. Is there any provision in the law to prevent the position of a superintendent of schools from being considered that of a state employee?"

The only law with which we are familiar relative to superintendents of schools and their right to be State employees and their being considered as teachers is contained in Chapter 60, Section 1, of the Revised Statutes of 1944, as amended. Under this section of the law, for the purposes of retirement only, "employees" of the State of Maine participate in the Maine State Retirement System: "employees" include teachers, and teachers are defined to include the superintendent employed in any day school within the State. We know of no other statute which would consider a superintendent of schools as being either a teacher or a State employee.

JAMES GLYNN FROST
Deputy Attorney General

March 24, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game

Re: Licenses for Sale of Frozen Fish

We have your memo of March 22, 1954, in which you ask if under the provisions of Section 41 of Chapter 33 of the Revised Statutes, as amended, each and every one of the retail stores of the Atlantic & Pacific chain would have to have the license required by said section.

This section of law provides that anyone desiring to sell fish which have been either commercially grown within the State or imported from without the State must first obtain a license from the Commissioner, said license to be kept constantly and publicly posted in the office or place of business of the licensee.

It is the opinion of this office that the A&P would be in compliance with the requirements of the statute if they were in possession of one license kept in their office.

We would suggest that, if policing would be more convenient if each retail outlet were to have a license, then that requirement should be enacted by the legislature.

JAMES GLYNN FROST
Deputy Attorney General

March 30, 1954

To William O. Bailey, Deputy Commissioner of Education

Re: Salaries of Substitute Teachers

We have your memo of March 29, 1954, requesting an interpretation of the provisions of the minimum salary law (Section 201, Chapter 37, R. S. 1944, as amended by Chapter 371, P.L. 1953), as relating to pay of substitute teachers. You ask the following three questions:

1. What is the definition of a substitute teacher for administration of the minimum salary law?

2. When does a person cease to be a "substitute" and become a "teacher"?

3. Must each day-to-day substitute be paid per day 1/180 of $1500, $1600, $1700 or $1800, depending upon his training, under Chapter 37, Sec. 201, R. S. 1944, and after July 1, 1954, in accordance with the minimum salary schedule of Chapter 37, Sec. 201, P.L. 1953, as amended?

We are of the opinion that our laws contemplate two classes of teachers, those having a teacher's certificate as required by Section 157 of Chapter 37, and those who are not in possession of such certificate. The law in question reads:

> "Each city, town, plantation and community school district shall employ only certified teachers and shall pay such teachers the minimum salaries as follows:. . ."

Teachers who do not possess the certificate referred to are contemplated in a later paragraph of the same section:

> "If the employment of teachers under permits or other special licenses is authorized by the state board of education, the state board shall have the authority to prescribe minimum salaries and other regulations for this class of teachers."

Reading this entire section as a whole we are of the opinion that all certified teachers, whether regularly employed by the superintending school committee on nomination by the superintendent or working on a substitute basis, but possessing the certificate required by Section 156, are entitled to be paid the minimum salaries as prescribed in Section 201, as amended.

A teacher not having such certificate presumably will have been issued a certificate under that section of law which permits the State Board of Education to grant lesser permits or other special licenses. Such permit or special license holder, presumably including substitutes who have been issued substitute teacher's certificates limited in use to service of not more than 30 days annually, would not be embraced in the minimum salary schedule.

JAMES GLYNN FROST
Deputy Attorney General

April 12, 1954

To William O. Bailey, Deputy Commissioner of Education
Re: Liability

You state that a "situation has arisen in a municipality where the services of a Recreation Director have been offered the school department by a local Recreation Commission free of charge. This person would be assigned as a coach of fall intramural football activities and spring baseball in the eighth grade.

"It is proposed that these activities be carried on as an integral part of the school program with School Committee sponsorship and responsibility. The person whose services have been offered is not eligible to certification as a teacher or physical education instructor.

"The question raised is whether a School Committee can accept this voluntary service with full protection and freedom from liability under present laws with respect to school teaching personnel."

It is the opinion of this office that the voluntary nature of the service to be performed by the Recreation Director will in no way save the school committee from their negligent acts which cause injuries to students. Their responsibilities would remain the same as if the Recreation Director were a paid employee of the school.

JAMES GLYNN FROST
Deputy Attorney General

April 16, 1954

To Milton Bradford, Esq., M. E. S. C.

Re: Assignment of Lease

. . . In our opinion an assignment of a lease should be negotiated with the same formalities as the original lease and therefore the instrument should be impressed with the corporate seal of the corporation executing the lease and their signatures should be witnessed. . .

JAMES GLYNN FROST
Deputy Attorney General

April 20, 1954

To Carl Treworgy, Clerk, Harness Racing Commission

Re: Section 12, Chapter 77, R. S. 1944, as amended

Referring to your request dated March 1, 1954, for an opinion:—

It has been brought to the attention of this department by Governor Burton M. Cross that an objection has been made because of our refusal to answer the question,

"Could an agricultural fair association operate an annual fair, with pari mutuel racing, on the Gorham race track in Gorham, Maine, after Labor Day whether or not Scarborough Downs was conducting running racing at that time?"

The refusal was based on the fact that we were advised that there was no agricultural fair association, duly incorporated, placing the question before you. We have advised Governor Cross that this office does not answer academic questions, but is always pleased to answer actual problems when occasion arises.

If the circumstances concerning your case have been altered to the extent that you now have a current problem with respect to this question, we shall be pleased to answer. Kindly advise.

JAMES GLYNN FROST
Deputy Attorney General

April 23, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: Water Commission of South Paris Village Corporation

This is in response to your request for an opinion relative to the right of the Water Commission of the South Paris Village Corporation to enter into an agreement with your State agency for coverage under the Social Security Act.

An examination of the statutes relating to the South Paris Village Corporation, Chapter 140 of the Private & Special Laws of 1909, as amended by Chapter 236 of the Laws of 1911, reveals a rather clear intent that the water system would be under the jurisdiction of the South Paris Village Corporation. We find nothing to show that the South Paris Water Commission or Water Department is a corporate entity by itself.

It is our opinion, therefore, that employees of the Water Commission would come under the agreement negotiated by the South Paris Village Corporation and that they would not be eligible to enter into a separate agreement for coverage.

JAMES GLYNN FROST
Deputy Attorney General

April 28, 1954

To Peter W. Bowman, M. D., Superintendent, Pownal State School
Re: Subpoena to Inmate

I am returning the subpoena sent to you which commands that a patient at Pownal appear on Tuesday, May 11, 1954, at a time certain to testify for the State in Lincoln County.

I have talked to the County Attorney, who informed me that it is a question relative to whether this girl was raped or not, and therefore she is definitely a material witness to the cause.

The question of her mental deficiency, if she have any, will be primarily for the grand jury. We suggest therefore, as you have technical physical custody of this girl, that you comply with the request of the court and that if further instances of this nature arise, you do the same.

In view of her questionable mental ability I do not think it necessary that she be actually served with the process. Its being sent to you should be sufficient. All members of the State family must cooperate in order to see that justice is done.

ROGER A. PUTNAM
Assistant Attorney General

May 4, 1954

To Paul MacDonald, Deputy Secretary of State
Re: "Convicted"

You have asked this office for an interpretation of the word "convicted" as it appears in Section 121, Chapter 19, R. S. 1944, as amended, and as it relates to the case of P. Edward DeBery. The said section reads as follows:

> "The license or right to operate motor vehicles of any person *convicted* of violating the provisions of this section shall be revoked immediately by the Secretary of State upon receipt of an attested copy of the court records, without further hearing."

Mr. DeBery had been tried in the Superior Court for the County of Sagadahoc on the charge of operating a motor vehicle while under the influence of intoxicating liquor. After verdict of guilty and sentence, Mr. DeBery perfected exceptions previously taken to the refusal of the Court to direct a verdict of not guilty. The Supreme Court overruled the exceptions and entered judgment for the State.

In conformity with other provisions of our statutes, where exceptions are allowed, DeBery had personally recognized for his appearance in the Superior

Court from term to term, and a term has not as yet been held at which he could appear and abide the decision and order of the Superior Court in the county in which he was tried.

Under such a fact situation the question now arises as to whether or not DeBery's license should be revoked. Mr. DeBery is of the opinion that there is no such "conviction" as would permit his license to be revoked under the provisions of Section 121, Chapter 19, until he appears at a term of the Superior Court and final sentence is imposed.

We are of the opinion that in DeBery's case there has been such "conviction" as places upon the Secretary of State the mandatory duty of revoking his license to operate motor vehicles.

We would draw attention to a rescript of another decision recently handed down by our court which also involves Mr. DeBery. Subsequent to the verdict of guilty and sentence imposed in the case already mentioned, and while DeBery's exceptions to the Law Court were pending, the Secretary of State took steps to revoke DeBery's license. DeBery was later found operating a car and was charged with the offense of operating a motor vehicle in Maine after his right to operate motor vehicles had been revoked by the Secretary of State. In holding that DeBery's license had not been legally revoked at that time, our court considered at length the word "convicted", and that decision is clearly determinative of the question presented to this office. We herewith quote a few extracts from the rescript which we feel clearly indicate that there has been a conviction:

> "The meaning of the word 'convicted' or the word 'conviction' when used in a criminal statute varies with the context of the particular statute in which it is used. *Donnell v. Board of Registration,* 128 Me. 523. In a case such as this, (driving under the influence) the defendant is not deemed to have been convicted so that the Secretary of State may summarily revoke his license until the case has reached such a stage that no issue of law or fact determinative of his guilt remains to be decided."

In overruling DeBery's exceptions it is clear that our court has resolved all issues of law or fact determinative of his guilt.

> "It goes without saying that the determination of the Law Court may not end a criminal case which is before it on exceptions. The exceptions may be sustained and a new trial granted . . . The case is unfinished and still pending until finally disposed of by plea, trial, or otherwise. *On the other hand, if the Law Court overrules the exceptions judgment is to be entered of record.* (Underline ours.) . . . However, once the guilt of the defendant has been finally determined, for the purposes of R. S. (1944), c. 19, Sec. 121, he is deemed to have been convicted 'whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file or on a special docket."

JAMES GLYNN FROST
Deputy Attorney General

May 4, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Access to Great Ponds

This is in response to your memo of recent date in which you ask:

"1. When land is posted, 'No Trespassing', or 'No Hunting', is it effective under civil law, or is it something which hunters can disregard?

"2. This question came from the meeting Friday with the Androscoggin Fish and Game Association, when they asked me if a fisherman can cross posted land to get to a great pond, where there is no public right of way? We have one of these situations in York County, and another one at Pleasant Pond, in Androscoggin County, where the entire land around the lake is under private ownership, and the general public is excluded."

In answer to Question No. 1, we are of the opinion that the State of Maine has not as yet deprived its citizens of the rights which accompany the possession of property. Other than the law surrounding great ponds, a citizen has the right not to have his property trespassed upon without his permission. Posting private property does seem in some cases under out statutes to make the trespass more grievous.

In answer to Question No. 2, under the old Colonial Ordinance as interpreted by our court, persons have the right to pass over land which is not cultivated to reach a great pond, for the purposes enumerated in the Ordinance.

JAMES GLYNN FROST
Deputy Attorney General

May 4, 1954

To John C. Burnham, Director of Special Service, Highway
Re: Permits for out-of-state Trailers

You have sent me three applications for overlength trailers and requested my opinion as to your powers in regard to restrictions, etc., in these permits.

Section 89 of chapter 19 of the Revised Statutes grants the Highway Commission power to grant "emergency permits" for the moving of objects of overlength, width, height, or weight. The modest fee from $2.00 to $10.00 is based on the overweight, etc.

The second paragraph in this section reads in part as follows:

> ". . . Said permits shall be issued to cover the emergency or purpose stated in the application and shall be limited as to the particular objects to be moved and the particular ways and bridges which may be used, . . ."

This section qualifies the word "emergency" by adding the words "or purpose". It is obvious that this further defines the meaning of the word "emergency". It has long been the interpretation of the Attorney General's Department that the words "emergency or purpose" mean a particular need on the part of the person requesting the permit. It should be noted that the permits are limited to the particular objects and the particular ways and bridges. This

definitely shows that the legislature had in mind the impossibility of legislating as to what could, or could not, be moved, and granted to the Commission the duty of deciding what objects could be safely moved and where they should go.

Although it can be argued that these permits should cover a definite itinerary it is reasonable to argue that the major purpose of the permit is to allow the moving of the otherwise illegal object in the least hazardous manner possible.

If, in the discretion of the Commission (or its duly qualified agents) it is deemed that the movement of a trailer from A to B on certain specified roads, or types of roads, should be allowed, it would not matter whether the trip was made in one continuous drive or with a dozen stopovers. The important item would be the danger to the road or danger to traffic. It is my opinion that these permits, by the restrictions put therein, could safeguard against the hazards in the particular instance. It would seem that the time element would enter the picture only as a matter of the degree of danger. Obviously some structures may be too dangerous to permit on the highway without police escort. It is probable that some objects should be moved only at specified times (as at such times as traffic is not too dense). Certainly certain weights and widths could not safely be allowed on certain roads.

It is my opinion that these permits should be, and can be, issued for such times and places as would, in the judgment of the Department, minimize the danger. I believe it is proper to consider the relative profit or loss to the State in the individual case presented. It is certainly the intent of the act that the emergent need of the petitioner in the case of a one-trip permit should receive fair consideration.

L. SMITH DUNNACK
Assistant Attorney General

May 7, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Packed Trout

We have your memo stating that the Willard Daggett Fish Company of Portland has received a shipment of Danish trout, the trout coming in packages of 22 fish each. The question is asked if, when on sale at A&P stores, the package can be opened and the fish sold separately.

It would appear that your question is based on the provisions of Section 41 of Chapter 33 of the Revised Statutes, which section reads in part as follows:

> "Such fish, whether commercially grown within the state or imported from without the state, shall be packaged at the original source which said package shall bear the name and address of the source printed on the outside thereof and the fish *shall not be removed from the original package except by the ultimate purchaser.*"

It appears clear from this wording that the ultimate purchaser only can remove the fish from the original package, and therefore packages could not be opened and the fish sold separately.

This office would appreciate it very much if in the future, when opinions are requested concerning particular provisions of our laws, reference be made to the section which gives rise to the problem. It will expedite answers and be very helpful to this office.

JAMES GLYNN FROST
Deputy Attorney General

May 7, 1954

To Nellie French Stevens, Superintendent, State School for Girls
Re: Defective Mittimus

We have your memo and copy of mittimus issuing from the Western Washington Municipal Court.

You inquire as to the legality of the commitment papers, inasmuch as that portion of the commitment which refers to notice being given to the parent or the guardian and to the Department of Health and Welfare has been x'd out.

Notice or lack of notice in such an instance goes to the jurisdiction of the court and may be ground in future for some legal action. However, I do not feel that any action should be taken by you relative to this matter.

It is our opinion that you should continue holding the girl in your custody until such time as the court might release her, otherwise until she is released under your statute. . .

JAMES GLYNN FROST
Deputy Attorney General

May 11, 1954

To A. D. Nutting, Forest Commissioner
Re: Right of Fire Wardens to Require Assistance

We have your memo in which you raise a question regarding the duties of a State District Forest Fire Warden, as outlined in Chapter 355, Section 72-D, of the Public Laws of 1949:

"The part they refer to is 'shall have and enjoy the same rights as a sheriff to require aid in executing the duties of his office.' We have always thought this referred to his rights to appoint deputy fire wardens, as a sheriff has deputies for his work. However, some of our wardens interpreted it to mean that a state district forest fire warden could appoint a person to act as a deputy sheriff or constable while serving on a forest fire.

"I would like an interpretation as to whether the law means he can appoint only deputy forest fire wardens, or can he appoint someone to serve as a constable or deputy sheriff."

In comparing the right of a fire warden to require the same aid as the sheriff may require in executing the duties of his office, consideration should be given to the statute permitting a sheriff to require aid. We therefore quote in full Section 217 of Chapter 79, R. S. 1944:

"Aid may be required by officer; penalty for refusal. Any officer aforesaid, in the execution of the duties of his office in criminal cases, for the preservation of the peace, for apprehending or securing any person for the breach thereof, or in case of the escape or rescue of persons arrested on civil process, may require suitable aid therein; and any person, so required to aid, who neglects or refuses to do so, forfeits to the county not less than $3, nor more than $30; and if he does not forthwith pay such fine, the court may imprison him for not more than 30 days."

We feel that the right of a forest fire warden to require aid is limited by Section 217 and, without determining whether or not the person required to aid is in effect a constable or deputy sheriff, we would state that when so requested he is compelled by law to render the assistance demanded, under pain of penalty if he refuses.

JAMES GLYNN FROST
Deputy Attorney General

May 11, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Moosehorn Refuge

This is in response to your memo of April 8th, to which memo you attached a letter from the Calais Rod and Gun Club complaining that Mr. Radway, Supervisor of the Moosehorn Refuge, has employed trappers to remove muskrat from the Refuge, selling the pelts in the open market.

Initially, it is our understanding that Moosehorn Refuge is land entirely owned by the Federal Government and administered by the Department of the Interior. Where there is an excess of animals on federally owned land, which cause damage or injury to the land, it is within the power of the United States to cause their numbers to be reduced by killing such animals, the game laws or any other statutes of the State to the contrary notwithstanding. See *Hunt v. U. S.*, 278 U. S. 96.

In view of such circumstances and law, we would suggest that the Calais Rod and Gun Club contact Mr. Radway.

JAMES GLYNN FROST
Deputy Attorney General

May 11, 1954

To Donald F. Ellis, Secretary, Board of Registration in Optometry
Re: Delinquents

We have your letter of May 6th, in which you state that your Board would like to revoke the licenses of several persons who have failed to pay their annual renewal fees, required by the provisions of Section 5 of Chapter 69, R. S. 1944, as amended. You further state that your Board will meet May 15th and that you would appreciate our advising you before you then consider this matter.

Section 5 of Chapter 69 reads as follows:

> "Every registered optometrist shall annually, before the 1st day of April, pay to the board the sum of $5. as a license renewal fee for each year; and in case of default in such payment by any person his certificate may be revoked by the board."

In view of the fact that your Board has duly notified on two occasions those persons who are delinquent, it is our opinion that under the above quoted statute you have the discretion to revoke the certificates of such registered optometrists. You should keep complete records of the minutes of the meeting, at which a majority of your Board must be present, in revoking certificates.

We would at this time point out that the revocation of a license carries with it a more severe penalty than the suspension of a license. When a license is suspended for a time certain, it is automatically returned upon the expiration of the suspension period. With respect, however, to revocation, the general rule appears to be that one whose license is revoked loses all rights and must start anew, presumably with an examination.

JAMES GLYNN FROST
Deputy Attorney General

May 11, 1954

To Roland H. Cobb, Commissioner of Inland Fisheries and Game
Re: Sale of Land

This is in response to your memo relative to the letters of Hans M. Hansen, who desires to purchase a small portion of property owned by your department. You ask this office for the procedure to be followed in such sale.

Section 4-A of Chapter 33 of the Revised Statutes, as amended, reads:

> "The governor and council on recommendation of the commissioner may sell and convey on behalf of the state the interests of the state in property taken or acquired by purchase under this chapter and deemed no longer necessary for the purposes hereof."

Your first step should be to have one of your men survey, plot, and describe the area to be sold. Request should then be made to the Governor and Council to sell the land in question, and it is our opinion that such sale should be placed on bid. This office will draw the deed for the sale, incorporating the description to be supplied by your department. . .

JAMES GLYNN FROST
Deputy Attorney General

May 13, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Boothbay Harbor Memorial Library

This is in response to your request for an opinion as to whether the Boothbay Harbor Memorial Library could be covered under your agreement with the Town of Boothbay Harbor (Social Security) or should be covered by the Bureau of Internal Revenue as a non-profit organization.

On the facts submitted in your memorandum, merely that the Town of Boothbay Harbor appropriates annually a sum of money for the library and that its trustees are elected by the town, combined with the fact that our research discloses that the library is a charitable corporation, we are of the opinion that employees of said library should be covered under an agreement with the Bureau of Internal Revenue rather than under the agreement which your System has with the Town.

JAMES GLYNN FROST
Deputy Attorney General

June 2, 1954

To Honorable Harold I. Goss, Secretary of State
Re: Itinerant Vendors' Deposits

This is in response to your memo asking for an interpretation of the provisions of Section 96 of Chapter 88 of the Revised Statutes.

Under the provisions of the Itinerant Vendor's Law, such vendor must make a deposit with the Secretary of State (Section 86) and it is further provided by Section 96 that such deposit

> "shall be subject so long as it remains in his hands, to attachment and execution. . ."

The same section continues in part in the following tenor:

> "and the secretary of state if he has in his hands a sufficient sum deposited by such licensee shall pay the sum so specified. . . ; and if the secretary of state shall not have a sufficient sum so deposited he shall make payment as aforesaid, of so much as he has in his hands."

With respect to these provisions of law you ask if such deposits shall be kept under your control at all times or if they should be deposited with the Treasurer of State.

We are of the opinion that funds deposited by you with the Treasurer of State, which funds have been received under the provisions of the beforementioned law, are at least constructively in your possession and sufficiently within your possession to comply with the requirement that you be able to pay when so ordered by the final judgment of the court. We think that an orderly procedure for conducting the State's business would call for depositing the money with the Treasurer of State.

JAMES GLYNN FROST
Deputy Attorney General

June 2, 1954

To Lillian Brush, PhD, Secretary, Board of Examiners of Psychologists

. . . The Board, under Section 2 of Chapter 243 of the Laws of 1953, is required to hold at least one meeting which will have the purpose of conducting examinations of candidates who desire to be certified. This is a minimum requirement, and the word "shall" is generally construed to be an absolute order

rather than permissive. Irrespective of the fact that you may not have any applicants, I do feel that the Board should advertise this meeting to examine candidates, and if none appear, then the problem will more or less be resolved.

You state that you assume that the term "year" coincides with the fiscal year of the State. I would not necessarily agree with that assumption. The term "year", to my mind, refers to the calendar year, meaning from January 1 to December 31, rather than the fiscal year. If it is the intent of the legislature to put a board on a fiscal year basis, it generally uses that term throughout the statute. Thus, as far as this office is concerned, we feel that we could not permit you to waive the meeting for this year.

ROGER A. PUTNAM
Assistant Attorney General

June 3, 1954

To E. E. Edgecomb, Supervising Inspector, Labor and Industry
Re: Elevator Inspections

This is in response to your memo of some time ago, in which you recite the procedure you have followed in the inspection of elevators and the special certificates and orders for compliance that you have issued following the opinions issued by Neal Donahue, Assistant Attorney General, dated April 3 and April 9, 1951.

With respect to such procedure, and more particularly your action with regard to the Boyd Building in Portland, Maine, you have asked several questions:

1. "Did I use this Order for Compliance as was its intent?"

2. In the case of the Boyd Building "where I received a report of an insurance company inspector which listed conditions that I consider dangerous and even though he stated on this report that the elevator was safe, was it within my powers to inspect the elevator myself or have it inspected by an inspector from this Department, and use my judgment as to whether this elevator was dangerous or not? Also, in your opinion what action should I have taken in this case?"

3. "When and under what circumstances may I condemn an elevator?"

Answer to Question No. 1. Your use of the Order for Compliance was undoubtedly proper in view of the opinion given by Mr. Donahue. Mr. Donahue's opinions were issued to you shortly subsequent to the time of enactment of the laws in question and those opinions considered what result strict adherence to the laws would have on the elevators in the State that had not hitherto been compelled to comply with any laws of the State. For this reason the opinion of this office at that time was lenient in favor of owners of elevators. However, we feel presently and in view of the information supplied in your memo that the time has come when the statute should be complied with and there should no longer be an Order for Compliance as distinguished from the certificates contemplated by Section 99-H of Chapter 374, Public Laws of 1949. Said section authorizes the department to issue an inspection certificate when the examined elevator is found to be in con-

formance with the rules of the Board on payment of the inspection fee and the registration fee. If, upon inspection, an elevator is found to be in reasonably safe condition but not in full compliance with the Rules and Regulations of the Board, then there may be issued a special certificate, such certificate containing the special conditions under which the elevator may be operated. In effect, this special certificate will cover the same circumstances found by you to permit Orders for Compliance, but you will then be following the statute, with the use of the special certificate containing special conditions.

Answer to Question No. 2. The statute provides that the supervising inspector or a State elevator inspector, upon receipt of a report of an inspector who finds that an elevator is unsafe and creates a menace to the public safety, may order the conveyance out of service immediately. With respect, however, to the Boyd Building, you and other members of your department advised this office that the condemning of the Boyd Building elevator was based on the inspection and report of an inspector who worked for the owner's insurer, which inspector you planned to call as a witness at the hearing permitted where such elevator had been condemned. It was also stated to this office that the inspector for the insurer was *the* authority in the State of Maine on elevators and that he would be a valuable witness to this office in the proceeding. We then found that this inspector had, in his reports to you and to his company, stated that the elevator was "safe". The only condition upon which an elevator may be condemned is when such elevator is found to be "unsafe and creates a menace to public safety." This office would not be justified in representing your department in any court of law or equity in any proceeding for the condemnation of an elevator when the very witness upon whom we are relying states that the elevator is in such condition that it cannot be condemned.

In answer to the question as to what action you should have taken on this case, we can only say that all State inspectors should agree as to the definitions of those articles which they are inspecting. Divergence of opinion between you and the inspector for the insurer seemed to be directly as to what was the definition of the term "elevator". Perhaps this question should be solved by action of the legislature in amending the definitions.

Answer to Question No. 3. As stated above, an elevator can be condemned only when it is found to be unsafe and creates a menace to public safety. The determination as to whether an elevator is unsafe and creates a menace to public safety is for the inspector and must be based on the actual condition of the elevator. Its operation must be found in fact to be unsafe and, further, to create a menace to public safety. Under your laws such determination will always be subject to review and only when the court defines a certain situation to make an elevator unsafe and to create a menace to public safety can you be sure that condemning an elevator under such circumstances would be a proper determination. This, however, should not deter you from making such determination when the facts are such as to compel you to believe that the elevator is unsafe and creates a menace to public safety.

JAMES GLYNN FROST
Deputy Attorney General

June 3, 1954

To A. D. Nutting, Forest Commissioner

Re: Baxter State Park – Hunting

. . . You seek an opinion on whether the Baxter State Park Authority can exclude hunting from the areas which were accepted by the Governor and Council, or whether legislation is required to set the areas aside as a game sanctuary.

Governor Baxter has pointed out Section 127 of Chapter 33 and asks if that section would protect his gift without any additional legislation.

It is our opinion that Section 127 would not apply.

However, a reading of Sections 31 and 32 of Chapter 32, R. S. as amended, would indicate that Governor Baxter's latest gift to the State of Maine comes within the jurisdiction and protection of the Baxter State Park Authority. Section 31-A permits the Authority to establish rules and regulations necessary for the protection and preservation of such property and for the proper observance of the conditions and restrictions expressed in the deeds of trust of the Park to the State. It is our opinion that under such a provision the Authority may by rule and regulation enforce any of the restrictions or limitations contained in the deed giving the property to the State.

In this manner hunting can properly be prohibited on the area recently granted to the State by Governor Baxter.

JAMES GLYNN FROST
Deputy Attorney General

June 3, 1954

To Fred L. Kenney, Director of Finance

Re: Chapter 108, Resolves of 1953

The above captioned Resolve appropriated the sum of $10,200 for the construction of a laboratory at the Madawaska Training School. This request had initially been prepared and presented to the Governor's Budget Committee and it is our understanding there deleted. Subsequently it was presented to the Legislature and passed. Initially the request had been for the construction of a laboratory and for other items including furniture. Although in the present Resolve this furniture item does not appear, nevertheless the sum initially requested was granted in the Resolve.

Construction of the laboratory has been completed at a saving of $5,981. and the question is now asked if this remaining sum would be available for the purpose of equipping the laboratory, so that it can be used for the teaching of chemistry, physics and biology.

It is the opinion of this office that it could not have been the intent of the Legislature to appropriate a sum of money to contruct the shell of a building to be used as a laboratory and leave it in that condition without the proper equipment to conduct the courses which were intended to be taught at the laboratory. We believe that it is proper to expend up to the amount of the

appropriation for the purpose of securing a laboratory equipped for the purposes of teaching the classes usually taught in such a laboratory.

JAMES GLYNN FROST
Deputy Attorney General

June 9, 1954

To Joseph A. P. Flynn, Executive Secretary, Electricians Examining Board
Re: Per Diem for Board Members

This is response to your memo of May 26th in which you ask, "Whether or not the Board Members, while engaged in traveling to and from a Board meeting on a day when there is no meeting, would be entitled to their per diem allowance?"

The statute relating to per diem payments for members of the Board reads:

> "The members of the board shall each be allowed the sum of $10 per day and their necessary traveling expenses for actual attendance upon any examination of candidates for license, and for any necessary hearings."
>
> Section 3, Chapter 307, P. L. 1953.

It is the opinion of this office that a member of the Board is entitled to a per diem compensation for that day in which it is necessary for that member to travel to or from the place of meeting of the Board.

A member residing at a distance from the place of meeting "is not engaged in his own private business while traveling to and from the place of meeting, but is then employed in and about the matter of his 'attendance' upon a session" and it is our opinion that the legislature intended to compensate members for time necessarily and actually employed in the service of the State in their capacity as members of the Board.

We are personally aware that distances between cities and towns in this State are in some instances such that it is not possible for a person to leave his home the same day that a meeting is scheduled and negotiate the journey in time to be present for the meeting. So, too, the return trip may be similarly lengthy.

It is for this reason and no other that the present opinion is being given and it is not to be construed as being applicable to a case where a member, regardless of where his home may be, decides to go to the meeting a day early, or leave for home the day after the meeting. In all cases the Controller is vested with the discretion to determine if per diem in such a case would be a reasonable charge and payment.

JAMES GLYNN FROST
Deputy Attorney General

June 17, 1954

To Israel Bernstein, Esquire
Re: Drug Sundries

. . . You state that it is agreed by the Maine Board of Commissioners of Pharmacy and yourself as attorney for The Jayson Company, that the dif-

ference of opinion relative to interpretation of Section 14 of Chapter 62 of the Revised Statutes, as amended, be submitted to this office for an opinion.

You state that The Jayson Company, a Maine corporation, sells at wholesale patent or proprietary medicines in original and unbroken packages. Sales are made both to drug stores and to other types of stores which retail great numbers of these items.

It appears that the Maine Board of Commissioners of Pharmacy believes that your client, The Jayson Company, is in violation of said Section 14 by reason of its wholesale sales of drug sundries without having such items under the personal control and supervision of a registered apothecary. Complaint is also made that the designation of your client in the classified section of the telephone directory, "Druggist Sundries—Whol., Wholesale Distributors, Health Aids, Housewares, Toys, Novelties", is in violation of Section 14, and that likewise the words "Drug Sundries" and the symbol of a mortar and pestle printed on the panel of its trucks constitute a violation of the same section.

It is our opinion that if in fact non-poisonous patent or proprietary medicines, sold in original and unbroken packages, are the materials dealt in by The Jayson Company, then it is not in violation of our statutes in not having a registered apothecary who keeps personal control and supervision of the items in question. We are of the same opinion with respect to the designation of The Jayson Company in the classified section of the telephone directory and with respect to the words and figure used on the company's trucks.

In the second paragraph of Section 14, the provision of law requiring that drugs or medicines, etc., must be under the control of a registered apothecary does not apply to non-poisonous patent or proprietary medicines when sold in original and unbroken packages. The words themselves seem clear to us, and it is therefore our opinion, as stated above, that the activity of The Jayson Company, as described in your letter of May 17th, does not amount to a violation of the provisions of Section 14 of Chapter 62. . .

JAMES GLYNN FROST
Deputy Attorney General

June 17, 1954

To Real Estate Commission

Re: Transaction in another Jurisdiction

This will acknowledge receipt of your memorandum of June 16th in which was enclosed a copy of a letter by Mr. Goldsmith . . . concerning the part that the Neiditz Company took in the sale of the property known as Dryden Terrace Apartments, Orono, Maine. You state that there is no record in the Commission files of any license being issued to this company and Mr. Goldsmith inquires whether, if certain facts be true, the Commission will take action against this concern.

Section 3 of Chapter 75, R. S., provides that it shall be unlawful to act as a real estate broker or salesman without a license. Section 12 provides certain penalties for any violations of this chapter. It would therefore appear that there is no action that the Commission can take relative to this matter, as its

power is limited to the right to issue and revoke licenses. Obviously, where no license has been issued, there is no power of revocation.

The remedy, if there be one, is to report the alleged crime to the County Attorney of the County of Penobscot and he may bring such action as he sees fit after he has investigated the facts and studied the law.

We in no way intimate that there has been a violation of the law, for the reason that it is the primary duty of the County Attorney to determine that fact, and secondly that there are many cases holding that where the entire transaction takes place in another jurisdiction and the land in question is in a second jurisdiction, the licensing of the broker in the first jurisdiction is sufficient to carry him through, and the mere fact that the property is located in another jurisdiction does not require him to be licensed in that particular State, to recover. Our limited research did not disclose any criminal cases on this particular point.

As you may well wish to forward a copy of this memorandum to the County Attorney for his benefit, I will cite the following cases: *Land Co. v. Fetty*, 15 F. 2d 942 (Ga.); *Aronson v. Cardbone*, 222 N.Y.S. 721; *Tillman v. Gibson*, 161 S.E. 630 (Ga.); *Baird v. Hines*, 225 N.Y. App. Div. 65.

ROGER A PUTNAM
Assistant Attorney General

July 13, 1954

To Mildred I. Lenz, R.N., Educational Secretary, Board of Registration of Nurses

This is in response to your letter of June 24th in which you ask, relative to Section 1, paragraphs two and three, of Chapter 63, the following question:

"If a person is appointed by the Governor to fill a vacancy for an unexpired term of one year, would that individual be eligible for appointment for a full term of five years, inasmuch as she completed another's appointment rather than her own. In other words – does the sentence, 'No person shall be eligible for appointment to succeed herself,' apply to only those members who have a full term appointment, or does it also include those who fill a vacancy for an unexpired term?"

This office is of the opinion that under the law in question a person who has been appointed by the Governor to fill a vacancy for an unexpired term would be ineligible for appointment for a full term, as she would then be succeeding herself. . .

JAMES GLYNN FROST
Deputy Attorney General

July 20, 1954

To Dairy Council Committee

Re: Status

A check of the statutes reveals that the Maine Dairy Council Committee was originally formed under the provisions of Section 2 of Chapter 278 of

the Public Laws of 1949 and was then known as the Maine Milk Advisory Committee. The title was changed by the provisions of Section 6 of Chapter 64 of the Public Laws of 1951 to the Maine Dairy Council Committee.

The Committee would, in my opinion, be an agency of the State of Maine, its purpose being to advise as to the expenditure of certain money accruing to a separate and distinct account from the assessment of a tax on the amount per hundredweight sold by dealers within the State. It works in conjunction with another State agency, the Maine Development Commission.

The Committee, carrying on an essential governmental function, is therefore not subject to Federal income tax exemption procedures or anything of that nature . . . It is an agency of the State of Maine, carrying on a governmental purpose. . . .

ROGER A. PUTNAM
Assistant Attorney General

August 2, 1954

To Col. Robert Marx

Re: Salaries for State Police Officers

Your question relative to the jurisdiction of the Personnel Board over the salary range of officers of the Maine State Police has been received this day.

The answer is found in Chapter 372 of the Public Laws of 1953. Section 1 of said Chapter provides as follows:

> "The governor and council shall determine the salary of the chief and deputy chief. The compensation of the other members of the state police shall be determined under the provisions of the personnel law."

This is a clear expression of the legislature's desire to cast the jurisdiction relative to the setting of pay scales for the members of the State Police, other than the Chief and Deputy Chief, upon the Personnel Board. If any doubt be entertained, it can be clearly resolved by comparing L. D. 1546, 1953, a redraft, with L. D. 829, its predecessor. The redraft incorporated Section 1, *supra*, and dropped the grade scales which L. D. 829 enumerated in detail.

ROGER A. PUTNAM
Assistant Attorney General

August 12, 1954

To Norman U. Greenlaw, Commissioner of Institutional Service

Re: Contract Bond.

. . . Subscribing witnesses should be disinterested parties to the contract, at the very least not persons subscribing the contract. . .

JAMES GLYNN FROST
Deputy Attorney General

August 17, 1954

To Hon. Burton M. Cross, Governor of Maine
Re: Request for Moose

This office has been asked if the Governor and Council have the authority to grant to the Museum of Natural History, Springfield, Massachusetts, permission to obtain Maine moose to complete its collection of New England wild life.

Commissioner Cobb has stated that he doubted if such authority rested in him, and the question now arises as to whether or not the Governor and Council have such authority.

The wild life in the State of Maine is held in trust by the State for the people, surrounded by such laws as the legislature has made and the rules and regulations which the legislature has authorized to be made. It is our opinion that the Governor and Council do not have the authority to grant the permission requested.

Section 81 of Chapter 33 of the Revised Statutes provides that no person shall hunt, kill, or have in his possession any moose or parts thereof, the sole exception being moose that have been legally killed outside the State. Those laws which have been enacted for the benefit of the Commissioner, enabling him to use wild life in breeding or for advertising purposes, or for scientific purposes can be found in Section 11 of Chapter 33, none of which contemplates the use of wild life in the manner suggested by the Director of the Museum.

JAMES GLYNN FROST
Deputy Attorney General

August 25, 1954

To Maine Milk Commission
Re: Delinquent Payments by Dealer

This will acknowledge receipt of your memo of August 25, 1954, in which you ask two questions concerning the sale of milk between the producer and the dealer, the dealer having fallen behind on his payments for milk and owing $500 for two months' deliveries:

1. Can the Commission compel the dealer to make full payment to producer on or before a given date each month?

2. Can the Commission compel the dealer to reimburse the producer for an underpayment disclosed by audit of the dealer's accounts?

We are not aware of, nor has our attention been drawn to, any statute which would permit the Commission to intervene in what clearly appears to be a personal problem between the producer and the dealer. A producer has been provided adequate remedies through court action to collect any sums owed him by virtue of a purchase and sale agreement between a dealer and that producer.

JAMES GLYNN FROST
Deputy Attorney General

September 17, 1954

To Albert S. Noyes, Bank Commissioner
Re: New York Thruway Bonds

You have asked this office whether or not "New York Thruway" bonds, guaranteed unconditionally as to principal and interest by the State of New York, could be construed to be legal investments for savings banks under the provisions of the first phrase in subsection II of Section 38 of Chapter 55, R. S. 1944, which reads as follows:

> "In the bonds or other interest-bearing obligations of any state in the United States,".

William S. Webber, Vice President of the investment firm of Coffin & Burr, supplied this office with a prospectus of the bonds in question for our consideration and aid in answering the question propounded.

While we cannot, of course, give an opinion to the effect that all necessary steps have been taken in the State of New York with respect to the Thruway bonds, we are of the opinion that such bonds would not be improper investments under the above quoted section of our law, in the event all conditions precedent to the issuance of such bonds have been complied with.

JAMES GLYNN FROST
Deputy Attorney General

September 22, 1954

To Elmer Ingraham, Chief Warden, Inland Fisheries and Game
Re: Hopkins Pond; Chapter 126, Resolves of 1953

Senator Lloyd Dunham called at the office yesterday making an inquiry relative to the above mentioned Resolve.

It appears that your department has taken the position that the effect of this Resolve is to open only that part of Hopkins Pond which lies in the Town of Clifton and the County of Penobscot.

We feel that as a matter of law the purpose of the Resolve was to open the entire pond to ice fishing irrespective of whether it fell in Hancock or Penobscot County. We feel that the word, "in the town of Clifton, County of Penobscot," were merely descriptive of the general area in which Hopkins Pond was located, rather than being words of limitation.

I trust that you will be able to amend your rule and regulation relative to this pond . . . to be in accordance with this opinion.

ROGER A. PUTNAM
Assistant Attorney General

October 4, 1954

To Honorable Roswell P. Bates
Re: Blood Tests on Minors

. . . You inquire relative to the law concerning the right of a doctor to do a blood test on a minor who is held by a police department.

Ordinarily, the liability of a doctor is predicated on his failure to exercise reasonable skill and care in performing his services. However, a physician may be answerable under some circumstances where he is free from personal negligence, as where he cares for a person beyond the scope of the consent capable of being given.

It has been held that the withdrawing of blood for transfusion purposes is such an act as requires consent. While we can find no law with respect to the rights of a doctor to take a blood test on a minor, it is our opinion that you should take the precaution of obtaining the father's consent before doing such a test.

JAMES GLYNN FROST
Deputy Attorney General

October 5, 1954

To Norman U. Greenlaw, Commissioner of Institutional Service
Re: Gerald T. Strout, Central Maine Sanatorium

The facts appear to be as follows: One Strout was admitted to CMS on September 10, 1953. After that date, a determination was made by your department that those legally liable for his support were unable to pay. On February 11, 1954, the department wrote to the Town of Milo relative to legal settlement. The Town accepted the charge from February 11, 1954 to date of discharge, but refused to accept the charge from the date of admission to the date of notice of request to assume liability under the provisions of Section 167 of Chapter 23 of the Revised Statutes of 1944.

The question presented deals with the right of the State to charge back to the municipality the cost from the date of admission to the date of notice, the liability from the date of notice having been accepted.

It is the opinion of this office that the date of notice to the municipality under Section 167 of Chapter 23, R. S. 1944, fixes the date of liability upon the municipality.

The statute referred to fixes the duty on your department to ascertain the ability of those legally liable to pay support for patients. It then provides that if inability is shown, then liability upon the municipality may be fixed at $2. per week. The statute appears to us to set forth this mode of procedure as a condition precedent to attaching secondary liability.

We would suggest, however, that immediate notice on admission, to municipality, may be in order. The municipality would then perhaps furnish the department with information relative to the capacity of those legally liable to pay. Ability to pay is always a question of fact which must be ascertained as a given time with reference to an existing situation. The giving of immediate notice will also do away with any period of time between admission and the ultimate determination of inability to pay.

ROGER A. PUTNAM
Assistant Attorney General

October 7, 1954

To Max L. Wilder, Bridge Engineer

Re: Calais—St. Stephen Bridge

You request my opinion as to whether restrictions must be made on the use of labor and material from the United States in the reconstruction of the International Bridge. Section 40 of chapter 25 of the Revised Statutes requires that in the employment of laborers for construction of State highways, etc., "preference shall first be given to citizens of the State who are qualified to perform the work to which the employment relates, and if they cannot be obtained in sufficient numbers, then to the citizens of the United States, and every contract for such work shall contain a provision to this effect." The wages paid must also conform to prevailing rates for similar work done by the State.

It would seem that this contract could be considered as two separate contracts for the purpose of conforming with the provisions of this section. Although the contract will be for the entire bridge, the law authorizing its construction speaks of one-half a bridge. The construction of the bridge as a unit comes about by virtue of contract. It seems obvious that the spirit of the law would be carried out if approximately one-half of the labor potentiality was supplied under the provisions of this Act. It would not be reasonable to require an exact counting of the number of employees or to insist that only Maine residents work on the Maine side of the bridge. In other words, since in fact the bridge would be one project, it would be reasonable compliance with the law if approximately one-half of the type of labor covered by the law were Maine, or American citizens. If Custom regulations did not conflict, I can see no violation of this law if Canadians were working on the Maine side, or Maine citizens working on the Canadian side.

I know of no provisions of law that would affect the matter of material except the provisions in regard to Maine granite, which do not seem to be involved in this project.

L. SMITH DUNNACK
Assistant Attorney General

October 7, 1954

To Lucius D. Barrows, Chief Engineer, State Highway Commission

Re: Blanket Power of Attorney

It would seem that under the ruling of the Insurance Department the blanket power of attorney for an agent to sign contract bonds would satisfy legal requirements as long as a copy, duly authenticated, was filed with the Insurance Department, with the proper protections in regard to its revocation. I find no ruling requiring special powers of attorney. It is obvious that an individual claiming power of attorney should substantiate that fact, and under the old system had to do it by furnishing the power of attorney. It could be that the agent could be required to have copies of the blanket power of

attorney made and one of these affixed to the bond, but it would seem to me that it would be sufficient for the one exercising this power to refer to his blanket power which is on file.

L. SMITH DUNNACK
Assistant Attorney General

October 12, 1954

To Paul MacDonald, Deputy Secretary of State
Re: Temporary Numberplates

We have your inquiry relative to the time allowable under the provisions of Section 28 of Chapter 19, R. S. 1944, as amended.

The provision in question is as follows:

> "A manufacturer or dealer may, upon the sale or exchange of a motor vehicle, attach to such motor vehicle a set of temporary number plates, and the purchaser of such motor vehicle may operate the same for a period not to exceed 7 consecutive days thereafter without payment of a regular fee."

The question propounded is whether or not, under this law, the day the temporary plates are attached is excluded from the 7-day period. We must answer this in the affirmative. To do otherwise would be to overlook the true and complete meaning of the word "thereafter", as it is used in Section 28, *supra.* This would again refer one to the day of sale or exchange of the motor vehicle.

ROGER A. PUTNAM
Assistant Attorney General

October 14, 1954

To H. H. Harris, Controller
Re: Fees of Chief Forest Fire Wardens

We have your memo asking if chief forest fire wardens working for the Forestry Department may be paid fees for their services.

With respect to classified employees, this office has held, in harmony with the intent seen in Rule 5 of the Rules and Regulations adopted by the Personnel Board, that such employees may not receive fees in addition to their salaries as authorized under the Plan of Compensation.

Your question, however, relates to unclassified employees. This office has expressed orally to the Forest Commissioner the opinion that chief forest fire wardens may, under the provisions of Section 103 of Chapter 36 of the Revised Statutes of 1954, be allowed fees, this by express provision of law, being unclassified employees governed by provision of law other than that governing classified employees. We are of the opinion that where such chief forest fire wardens are by statute "allowed the same fees as a sheriff or his deputy" we cannot amend that law by denying them that right. Such denial would have to come by legislative act.

We distinguish the present case from that considered by Mr. Niehoff in his opinion dated June 30, 1944, relating to inspectors who are on a salary basis, in regard to whom there was no express authority allowing them fees.

JAMES GLYNN FROST
Deputy Attorney General

October 21, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: University of Maine

We have your memo dated October 20, 1954, in which you ask the following question:

"Acting in our capacity as the State Agency responsible for administering Social Security coverage for political subdivisions of the State of Maine, you are requested to advise us as to whether or not in your opinion the Governor of the State has the authority at this time to direct the proper officials at the University of Maine to conduct a referendum vote among the members of the retirement system which presently covers its teaching staff for the purpose of determining whether or not that particular group desires to avail itself of coverage under the Social Security Act as apparently is provided for in Chapter 395 of the Public Laws of 1951 as amended by Chapter 128 of the Public Laws of 1953, and in view of the amendments to the Federal Social Security Act as enacted at the last session of Congress."

The answer to your question is, YES. With one exception, Chapter 60-A of the Revised Statutes was enacted in 1951 for the purpose of extending to employees of the political subdivisions of the State of Maine who are not members of existing retirement or pension systems the benefits of Social Security provided under the Federal Social Security Act enacted by the Congress of the United States.

The one exception mentioned above is the University of Maine. By virtue of Chapter 128 of the Public Laws of 1953, the provisions of this chapter, 60-A, were made to apply "to employees of the University of Maine who are members of an existing retirement or benefit system."

At the time of the enactment of Chapter 128, the Federal Law did not permit such employees, who were members of an existing retirement or pension system to participate in the benefits of Social Security. The eventuality that would permit employees of the University of Maine to enter the Social Security System would be amendment of the Federal laws authorizing employees of a political subdivision who are members of an existing retirement or pension system to so participate. It is our understanding that such amendment has been made to the Federal Social Security Act by the last Congress. Section 1 of Chapter 60-A provides that it is the policy of the legislature, subject to the limitations of Chapter 60-A that such steps be taken as to provide such protection to employees of the political subdivisions of the State on as broad a basis as is permitted under the Social Security Act. Such declared policy would be sufficient authority in our opinion to authorize the

Governor of this State to take such steps as are necessary to see that employees of political subdivisions are extended the protection of the Act.

JAMES GLYNN FROST
Deputy Attorney General

October 22, 1954

To Honorable Burton M. Cross, Governor of Maine
Re: Refugees

The following is submitted in response to your memo of October 21st, to which you attached a letter addressed to you from the Department of State concerning the appointment of an advisory committee relative to the admission to this State of refugees from foreign countries.

Sections 2-A and 2-A of Chapter 32 of the Revised Statutes of 1944 (as enacted by Chapter 258 of the Public Laws of 1947 and re-allocated by Chapter 349, Section 57 of the Public Laws of 1949) read as follows:

> "Statement of policy. It shall be and is hereby declared to be the policy of the state of Maine to encourage the settlement within its borders of displaced persons of Baltic origin; provided nevertheless that nothing herein contained shall be so construed as to discourage immigrants of other nationalities.
>
> "Maine development commission to arrange for settlement through negotiations with the Department of State, Department of Justice and the United Nations. The Maine development commission is hereby empowered and authorized to negotiate with the U. S. Department of State, with the U. S. Department of Justice and with the United Nations, or with any proper agency or department of the United Nations, to arrange for the settlement in this state of such displaced persons of Baltic origin who are able to buy, or who may have bought for them private property within the state owned by private persons."

It can be seen from the above quoted sections, as read together with the preamble to the Act that emphasis is given to Europeans of Baltic origin, i.e., natives of Estonia, Latvia and Lithuania, provided that nothing should discourage entries of other nationalities.

However, there is no provision relative to the appointment of local advisory committees. Perhaps the Maine Development Commission negotiating with the U. S. Department of State would suffice for the purposes of that department.

JAMES GLYNN FROST
Deputy Attorney General

October 28, 1954

To Col. Harry A. Mapes, Director of Civil Defense and Public Safety
Re: Loyalty Oaths of Minors

I have your memorandum of October 19th. The date of the ruling referred to was November 25, 1953 . . . The oath referred to is in Section 14 of

Chapter 298 of the Laws of 1949, and the restrictions upon membership would appear to depend upon ability to make that oath with understanding.

We find nothing in the law in reference to the age of 18 years. Children in this State are minors until the age of 21 is reached, but their ability to participate in this program is not this limited. It would appear not to be unlikely that a normal boy in his teens would be a proper subject to apply for membership in this organization, and if found satisfactory and capable of understanding the oath, would be eligible.

You enclosed a copy of your memorandum to county and local directors, which I think is very well stated and completely covers the matter.

NEAL A. DONAHUE
Assistant Attorney General

October 29, 1954

To Ronald W. Green, Chief Warden, Sea and Shore Fisheries
Re: Weir in Deorganized Town

This will acknowledge receipt of your memo of October 27th and attached petition to measure and lay out a weir or trap. You ask the procedure to be followed in obtaining a permit to build a weir in the deorganized Town of Edmunds. . .

The Town of Edmunds by a vote in 1937 agreed to accept the surrender of its organization. The town clerk certified to the Secretary of State on November 30, 1937, that the Town had so voted.

The State Tax Assessor, under provisions of our laws, was in control of Edmunds for a period of not more than five years.

Section 7 of Chapter 86, R. S. 1944, being that section pertaining to licenses to construct wharves and weirs, applies only to cities and towns and, in another section, islands. The Tax Assessor being no longer in a position to accept such petition and the provisions of Section 7 not extending to deorganized towns, this office is of the opinion that such license or permit to lay out a weir must be granted by the legislature.

JAMES GLYNN FROST
Deputy Attorney General

October 29, 1954

To Honorable Harvey R. Pease, Register of Probate, Lincoln County
Re: Inheritance Tax when Assets Pass outside of Will

You have requested an opinion on the inheritance tax liability of the executor or administrator when part of the assets pass outside the will, as by gift in contemplation of death, gift made or intended to take effect in possession or enjoyment after death or survivorship in joint tenancy.

Your inquiry relates to the revision of Probate Court Rules and Forms.

Section 20, Chapter 142, R. S. 1944, provides that executors and administrators shall be liable "on their administration bonds" for the inheritance tax. The statute continues:

> "Whenever an administration bond is waived . . . the judge of probate, notwithstanding such waiver, before granting letters testamentary or of administration, may, and if in his judgment the amount of any bequest or distributive share of the estate may be subject to a tax as hereinbefore provided, *shall* require a bond . . . sufficient to secure the payment of all inheritance taxes and interest. . ." (Underlining supplied)

In order for the judge to fix the amount of the bond, he must, of course, inquire what taxes the executor or administrator is liable for.

> "Administrators, executors, trustees, or grantees donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interest shall accrue by survivorship shall be liable for the taxes imposed by the provisions of Sections 1 to 41, inclusive, . . ." (Section 18, Chapter 142)

In connection with Section 18, one should read Section 6:

> "All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

In short, the taxable interests passing to one person by will and outside the will must be aggregated for tax-computation purposes.

While Section 18 is extremely comprehensive, it is elementary that the inheritance tax is upon the right to receive; whence it follows that the Assessor is to tax each recipient for what that recipient receives. Conversely, the Assessor may *not* tax B for what A receives.

In conclusion, it is my opinion that the executor or administrator is liable for the entire inheritance tax on the share of each beneficiary or heir to the extent that the executor or administrator has ability to pay it. By "ability to pay" I do not refer to the total quantum of the estate. The fiduciary has ability to pay the tax on A's share only from money or property which the fiduciary has in his hands as executor or administrator which belongs to A. (Qualification: Real estate passing by devise or inheritance may not be in the hands of the executor or administrator but he is liable for the tax thereon. Sections 17 and 23).

To illustrate: A is beneficiary of a bequest of $1,000 and is a donee in contemplation of death of property worth $40,000. A is a nephew. The Assessor will compute the tax:

Value of share	$41,000	Tax
Less personal exemption	500	
	$40,500	
Taxable at 8%	25,000	$2,000
Taxable at 9%	$15,500	1,395
		$3,395

But the executor's liability is limited to $1,000.

The subject is annotated in 1 A.L.R. 2d at page 980. The editor finds it to be a general rule that if the executor or administrator "has paid or will be required to pay an estate or succession tax levied on or with respect to property which is not subject to administration, and the circumstances are such that the person who receives or is in possession of such property is liable for the tax, the representative has a right to reimbursement from such beneficiary." While this annotation may not seem in point, it seems to me that it is, because I do not think the representative would have a right to reimbursement if he were a mere volunteer.

While a good many cases could be cited, *Re Powell,* Montana, 101 P. 2d, 54, 128 A.L.R. 116, is of particular interest. The court held that an inheritance tax on an annuity policy could not be collected from the executor in a situation where the executor never possessed any property passing to the surviving beneficiary of the policy. The court discusses a previous holding that the executor was liable for the tax on non-testamentary assets, saying that in the former case the executor as such had funds of the beneficiary sufficient to cover the entire tax. . .

BOYD L. BAILEY
Assistant Attorney General

November 10, 1954

To William H. Morrison
Re: Autonomy of Towns

. . . In my capacity as legal counsel for the State Civil Defense and Public Safety Council, I am answering your letter of October 20, 1954, in which you ask, "How much autonomy does a town like Buxton have during period of non emergency under this law?" You have reference to the Civil Defense Law, and apparently your question is raised because of your objection to directives issued by Colonel Harry Mapes, Director of Civil Defense. Your attached letters show that Colonel Mapes has protested because audible alarms were not sounded during test alerts at Bar Mills.

Please be advised that local municipalities, as instrumentalities of the State, have only such autonomy as is expressly granted to them by the legislature or necessarily implied by the wording of the statute in question.

It has been the opinion of this office that Chapter 11-A of the Revised Statutes sets up a plan State-wide in its scope, whereby each political sub-

division establishes its local organization in accordance with the State Civil Defense and Public Safety Plan and Program. See Section 8, Chapter 11-A.

Directives issued by Colonel Mapes are so issued in compliance with an over-all State plan and it is our further opinion that towns have no autonomy but should comply with the essence of the Act, which contemplates a program that will inure to the benefit of all the citizens of the State. Such complete cooperation as will very possibly be necessary one day can never be achieved unless all branches do their part.

JAMES GLYNN FROST
Deputy Attorney General

November 12, 1954

To R. R. Chaney, Secretary, Dealer Registration Board

Re: Principally Engaged, as applied to Partners

I have your letter of November 9th relating to Walter M. Smith and Gordon H. Morris, d/b/a/ Morris Motors, West Parsonsfield, Maine. The question apparently relates to the capacity of one Morris, who appears to be treasurer of said partnership, to spend the principal amount of his time in the business of selling automobiles. The Board is particularly interested in Section 19-F-II, which says that the Board may revoke the dealer registration plates of any registrant who is no longer principally engaged in the business of buying and selling motor vehicles.

The situation here is unusual in that Smith and Morris are partners and it would appear to be the partnership which is asking for the right to have dealer plates. Morris, it appears is a school teacher in Massachusetts, teaching automobile mechanics and registered in that State as a dealer. If Morris were asking for registration alone, I think you might well find that he was not principally engaged in the business of buying and selling motor vehicles; but Morris does not ask for that right, nor does Smith, but a partnership between these two gentlemen asks for registration. I think, therefore, that the question boils down to this: Will the partnership be principally engaged in buying and selling motor vehicles? If you answer that in the affirmative, then the plates must issue, even though Smith and Morris individually are not principally engaged in buying and selling motor vehicles.

We could have, by way of example, a situation where I as an attorney spend most of my time practising law, while I might enter a partnership agreement with X whereby we would go into the business of buying and selling motor vehicles, he doing the work and I putting up the money. I don't think that you could deny that partnership the right to have dealer registration plates on the ground that I am principally engaged practising law, because to do so would be unfair both to myself, with money to invest, and to X., a man who would not normally be able to transact business alone but could do so under a partnership agreement between the two of us.

ROGER A. PUTNAM
Assistant Attorney General

November 12, 1954

To Raymond A. Derbyshire, D.M.D., Secretary, Board of Dental Examiners
Re: Control of Funds

We have your letter of November 5, 1954, in which you inquire as to the authority of the Governor and Council to approve council orders permitting the members of your Board to attend conventions.

As you undoubtedly know, the Governor is the Chief Executive of the State, and the Governor and Council are considered by our court to be the Executive in many instances.

The funds held by your Board are State funds and as such come within some degree of control of the Governor and Council. That body has established certain rules and regulations with respect to the expenditure of State funds for the purpose of travel and it is the opinion of this office that such rules and regulations are proper. These rules and regulations apply to all State departments, bureaux, boards and commissions.

JAMES GLYNN FROST
Deputy Attorney General

November 12, 1954

To Herman J. Weisman, M.D., Medical Examiner, Knox County

In response to your letter of November 9, 1954, in which you ask if the Medical Examiners in Knox County are designated as Senior and Junior, please be advised that we find no such distinction in the statutes.

JAMES GLYNN FROST
Deputy Attorney General

November 12, 1954

To General George M. Carter, The Adjutant General
Re: Leases of Property held by the Military Defense Commission

This will verify our conversation in which you were advised that the Military Defense Commission should not lease its property to private persons or concerns for commercial purposes. Such a lease would be outside the scope of your law.

Joseph B. Campbell, your legal adviser under the statutes, has been consulted in this matter and is in complete agreement with the conclusion herein stated.

JAMES GLYNN FROST
Deputy Attorney General

November 16, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Military Leave

I have your memorandum of October 27th relating to military service, more specifically to subsection VI of Section 3 of Chapter 60, R. S. 1944, where it is provided that an employee who enlists or is inducted into the Armed Forces of the United States in time of war . . . or while the provisions of Public Law 759, 80th Congress (Selective Service Act of 1948) or any amendment thereto or extension thereof shall be in effect . . . and shall have all the benefits thereof.

You ask if the provisions of these two statutes are still operative. In the first instance, I do not believe that we are now in a time of war there being no formal declaration by Congress and no active fighting now going on. Second, the Act referred to in subsection VI, commonly called the Selective Service Act of 1948, is still in effect. That statute is now cited as Sections 451-473, both inclusive, of Title 50, U. S. Code. The name has been changed. It is now the Universal Military Training and Service Act. This statute is in operation.

ROGER A. PUTNAM
Assistant Attorney General

November 19, 1954

To Ernest H. Johnson, State Tax Assessor
Re: Leased Equipment used in Maine by Contractors for Maine Turnpike Authority

You inquire whether the Maine sales and use tax applies to various rental arrangements involving the rental of heavy contracting machinery and, further, you inquire how the law is to be applied.

Taking the cases in the order in which they appear in the memorandum dated November 10, 1954, from Norman P. Ledew, Chief Examiner:

1. You state that Campanella & Cardi have rented 3 bulldozers for $5,400 a month under an arrangement whereby the rental payments are to be credited against the purchase price if the lessee buys the bulldozers, provided, however, he must buy before June 15, 1955.

You do not make clear whether the rentals, if paid on time, would amount to the full purchase price by June 15, 1955.

Installment leases have been construed by the Supreme Judicial Court from a very early date. Our own Maine Sales and Use Tax Law provides:

> "The term 'retail sale' or 'sale at retail' includes conditional sales, *installment lease sales*, and any other transfer of tangible personal property when the title is retained as security for the payment of the purchase price and is intended to be transferred later." (Sec. 2.)

The law also provides:

> " 'Sale' means any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration in the regular course of business

and includes leases and contracts payable by rental or license fees for the right of possession and use, but only when such leases and contracts are deemed to be in lieu of purchase by the State Tax Assessor." (Sec. 2.)

It seems to me quite clear that, irrespective of the State Tax Assessor's deeming a lease to amount to a sale, an "installment lease sale" is a taxable sale.

A very similar arrangement was construed in 1891 by the Supreme Judicial Court of Maine in *Gross vs. Jordan,* 83 Me. 380. This was an agreement to lease a wagon for $15 a month with agreement that if the total rentals paid should equal $165, then the lessor should transfer title. The Court said:

> "This paper, which calls itself a lease, is a conditional sale of property, the title passing when the price shall have been paid."

In 1898 the same Court stated that a similar lease of land was a sale of land in *Reynolds vs. Waterville,* 92 Me. 292. This case involved public policy respecting municipal debt limits and so may not be too much in point. The Court said about the lease:

> "It would not be a misinterpretation to say that the City of Waterville, instead of leasing the property, undertakes to purchase or pay for it on the installment plan, and that what are called rentals for the hall are merely partial payments on its cost." (92 Me. at 304)

In my opinion the agreement in question is an installment lease purchase within the meaning of the statute and a sales tax or use tax is payable in the sum of 2% of $81,868.79.

2. You next refer to the rental of a compressor by Hedge & Matheis to Campanella & Cardi. The facts are meagerly stated but would seem to lead to the same conclusion as the preceding situation.

3. In connection with Frantz Tractor Co. and Edward J. Petrillo, Inc., dealing with Yonkers Construction Co., you inquire about equipment leased to the contracting company under a written lease but with an oral option to buy. The oral option to buy would be binding as between the two parties but would not be binding as to an innocent third party who might trust the apparent estate of the title.

Since it appears that as between the parties there is a contract to sell in event the payments are all made, and since each rental payment is to be credited in full against the purchase price, it would seem to me a situation where title is retained for security only.

4. You next mention a transaction of North Carolina Equipment Company and Marian Shovel Co. with Nello Teer Contracting Co. A shovel is brought into Maine in June, 1954, and leased for $5,000 a month. An accompanying memorandum indicated that the selling price was $120,450. Obviously, rentals would have to be paid for two years to equal the selling price. We understand that Nello Teer has an oral option to buy and may apply the rental in full against the selling price.

Under the facts stated there seems to be installment lease contract.

As in the case just previous we would, in a contested matter, have to prove the oral agreement. If such agreement is not susceptible of proof we should consider the transaction a lease in which case a use tax would be assessable against the owner and the taxable price is the cost to the owner.

5. You next mention a deal by Alban Tractor Co. with Nello Teer Contracting Co. If I understand the statement of facts correctly, Nello Teer took over the equipment on a lease on September 23, 1953. If this lease were an installment purchase lease, something the facts do not clearly show, there would be no tax when the equipment was brought into Maine on June 22, 1954.

Caution. Other facts can be brought out which would change the above result as tentatively reached. For instance, it is very important, and the original memorandum says nothing about it, whether the lessor-vendor sends an operator or serviceman along with the machine. In the State of Rhode Island, if an operator is sent, the transaction is deemed a purchasing of a service and not a sale.

It also seems to me material whether the price charged for rental is a reasonable one as rental. If a lessee pays considerably more than fair rental value, we may well succeed in establishing that he has a purchase in mind. I would honestly recommend that instead of basing final assessment upon this memorandum we inquire of the construction companies concerned what is their side of the case.

BOYD L. BAILEY
Assistant Attorney General

November 30, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Military Leave

We have yours of November 24th relating to whether or not any employee of the State, including teachers, who may be inducted, drafted or enlisted in the Armed Forces of the United States under the provisions of the Universal Military Training and Service Act is entitled to military leave and whether the State is liable to make contributions for these individuals during their period of service.

This question we answer in the affirmative.

Under the provisions of subsection VI of Section 3 of this Act there is a provision that if anyone is enlisted, inducted or drafted into the Armed Forces of the United States, either in time of war or while the provisions of the Selective Service Act of 1948 or any amendment or extension thereof are in effect, that person shall be considered an employee and the State *shall* contribute to the System such amounts as the employee would have been required to contribute if he had been serving the State during his service in the Armed Forces.

ROGER A. PUTNAM
Assistant Attorney General

December 3, 1954

To Dr. Lillian Brush, Secretary, Board of Examiners of Psychologists

Your letter of December 1st, propounding four questions, has been received.

In answer to 1,a): Any public officer carrying on a governmental function is protected from civil suit by the immunity of the State, provided always

that his actions are consistent with the duty which is placed upon him, and he does not misuse his office. This is common law, which would answer question 1,b), so you cannot find it in the statutes.

In answer to question 1,c): I do not think it is necessary for the Board to take any action relating to protection from civil suit, because such a statute would be nothing more than a statement of the common law. In answer to the second question found in 1,c): It is not too late to bring legislation before the 97th Legislature. As a matter of fact, it would be premature until the legislature convenes on the first Wednesday of January. I do not think the Board has a single thing to worry about if it performs it functions in a diligent manner. Legislation would not, to my personal feeling, be necessary. Other boards and commissions do not find it necessary to have such legislation.

Relative to question 2 and "resident", I think that without a definition in the Act of what a resident is, we shall have to take the term in its usual meaning: a person living in this State with the intention of residing here, in other words making his home here, living here, practising law or carrying on his profession, whatever it may be. Give the term its normal everyday meaning. Owning property alone would not be sufficient. If a person is a resident in this State, he will undoubtedly be a registered voter. That is one of the tests that you may apply.

In answer to question 3: This question is for you to answer, being purely administrative. I would advise that you advertise in such a manner as to give appropriate notice to any interested psychologist that the examination will be held at such and such a date in such and such a place.

In answer to question 4: Without affirmative statutory power, it is not within the power of the Board to bestow an honorary certificate on any person. . .

ROGER A. PUTNAM
Assistant Attorney General

December 8, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System
Re: Statutory Increases in Teachers' Pensions, Chapter 428, P.L. 1953

. . . You ask if the increases authorized by Chapter 428 of the Public Laws of 1953 are available to teachers of the "1913" group, so called, who have heretofore retired as well as to those who hereafter retire.

We would draw your attention to Section 6 of that chapter, which reads as follows:

> "Sec. 6. Application. The increase in pensions hereinbefore authorized shall apply to all teachers who have heretofore or shall hereafter retire under the provisions of sections 1, 2 and 3."

The intent of Section 6 is clear and not subject to any interpretation other than that the increases are available to teachers who have heretofore retired under the provisions of Sections 1, 2 and 4 and to teachers who shall hereafter retire under such sections.

JAMES GLYNN FROST
Deputy Attorney General

December 9, 1954

To Colonel Robert Marx, Chief, Maine State Police
Re: Jurisdiction on Federal Property

You ask our opinion on several questions concerning jurisdiction on Federal property. Consideration of such questions requires that we first examine the words of the pertinent statutes and the constitutional provisions relating to jurisdiction.

Article One, Section VIII, clause 17 of the Federal Constitution provides that Congress shall have power to exercise exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

Section 11 of Chapter 1 of the Revised Statutes of 1944 contains the consent of the legislature to the acquisition by the United States of certain lands for the purpose of erecting particular buildings.

Section 12 of Chapter 1 is that section which relates to the question of jurisdiction and we herewith quote it in its entirety:

> "Exclusive jurisdiction in and over any land acquired under the provisions of this chapter by the United States shall be, and the same is ceded to the United States for all purposes except the service upon such sites of all civil and criminal processes of the courts of this state; provided that the jurisdiction ceded shall not vest until the United States of America has acquired title to such land by purchase, condemnation, or otherwise; the United States of America is to retain such jurisdiction so long as such lands shall remain the property of the United States, and no longer; such jurisdiction is granted upon the express condition that the state of Maine shall retain a concurrent jurisdiction with the United States on and over such lands as have been or may hereafter be acquired by the United States so far as that all civil and criminal process which may lawfully issue under the authority of this state may be executed thereon in the same manner and way as if said jurisdiction had not been ceded, except so far as said process may affect the real or personal property of the United States."

It appears, then, that the Federal Government can acquire exclusive jurisdiction over properties in a State if such purchases are with the consent of the legislature for the purposes enumerated in the Federal Constitution. Such exclusive jurisdiction, however, must be assented to by the State.

Referring to Section 12 above quoted makes it apparent that the State of Maine has not granted exclusive jurisdiction to the Federal Government, but has retained concurrent jurisdiction for the purpose of the service of all civil and criminal processes which may lawfully issue under the authority of this State.

Proceeding to your questions:—

"1. Can an officer serve criminal process on property owned by the United States and used for military installations throughout the State when the

offense has been committed off this property and within jurisdiction of a State court?"

Answer. Yes.

"2. Can an officer arrest for criminal violations being committed in Federal Buildings?

(a) Owned by the United States Government,

(b) Leased by the United States Government,

(c) On land adjacent to these buildings?"

Answer to (a): No. *Answer to (b) and (c),* Yes.

"3. Can an officer in direct pursuit arrest and take from these premises a person who has violated the law?"

Answer. No

With respect to this question we would suggest that if pursuit of one believed to have committed a felony takes an officer to a Federal installation owned by the United States Government, the cooperation of the authorities of that installation be sought.

While this opinion sets out what this office believes to be the law relative to jurisdiction on Federal property, it is not meant to be considered as authorization to enter such property, absent the consent of proper Federal authorities.

We are all aware of the precautions taken by the military to prevent the intrusion of unauthorized persons upon Federal property. The personnel upon whom is placed the duty of enforcing security rules may not be familiar with all phases of law, and we should like to emphasize the necessity and importance of mutual understanding between local or State police authorities and the military authorities, with respect to the subject matter covered herein.

JAMES GLYNN FROST
Deputy Attorney General

December 9, 1954

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: Teaching Service at Maine School for the Deaf

I acknowledge receipt of your memo of November 22, 1954, in which you state that you have a teacher who for 24 years taught in the public schools and for one year at the Maine School for the Deaf.

You feel that the year of teaching service at the Maine School for the Deaf ought to be considered as service rendered in the category of "teacher", in which case this particular individual would have completed a minimum of 25 years of teaching service and be eligible for a minimum retirement benefit as provided for teachers. You ask if we concur with your thinking with respect to whether or not the service at the Maine School for the Deaf by a teacher should be considered creditable teaching service.

There is no question but that teaching at the Maine School for the Deaf may, in some instances, be considered creditable service under Sections 221 *et seq.* of Chapter 37 of the Revised Statutes of 1944, as that school was sustained completely or almost completely by the State.

On the question as to whether such teacher could be given creditable service for teaching at the Maine School for the Deaf, it would appear to us that Section 4-VIII of Chapter 60, R. S. 1944, would govern. This section would permit the granting of prior service credit to such a teacher for service rendered prior to the teacher's attaining age 25. In the event such service was performed after having reached the age of 25 years, then creditable service could not be granted.

JAMES GLYNN FROST
Deputy Attorney General

December 14, 1954

To William O. Bailey, Secretary-Treasurer, Maine School Building Authority
Re: Liability Insurance

The question has arisen from time to time relative to the liability of the Maine School Building Authority under the provisions of the Compensation Act.

Initially it was determined that where an independent contractor was not in the picture and the town employed a master builder and hired individuals of various trades to work on the building, these persons were employees of the town rather than of the Authority. After some deliberation and discussion on the part of the insurance carriers, the Industrial Accident Commission and myself, we believed that it would be more plausible to have the Authority in such instances carry the liability insurance. We feel that it is easier to trace the chain of employment to the Authority than to the town itself, though we must never overlook the fact that the town is acting as an agent of the Authority when it erects a building under the provisions of the Act.

If it is easier to trace the employment contract to the Authority, then it is obvious that the Authority should be covered. This will give the ultimate protection to the Authority which is our first endeavor, the second being to give the workman a chance to recover compensation when injured in his employment.

From the minutes of the Authority meeting of April 13th, relating to this problem, it appears that three avenues were discussed. One, of course, is self-evident:— that the independent contractor should carry his own compensation. The other two alternatives were to have the town or the Authority carry the policy and cover themselves, respectively.

It is our opinion that the Authority should carry the insurance in these particular instances, to cover itself as employer until such time as it has been decided in a given case either before the Commission or before the Court that these people are employees of the town.

ROGER A. PUTNAM
Assistant Attorney General

December 14, 1954

To Scott K. Higgins, Director of Aeronautics
Re: State-owned Cars

. . . You ask for an interpretation of Chapter 379 of the Public Laws of 1951. You state that your Commission interprets said Chapter 379 as follows:

"That the Governor and Council are authorized to approve the purchase of State-owned cars by such heads of departments or members of Commissions as the Governor and Council may from time to time designate, in addition to those departments specifically named in the statute.

"Also, the Commission feels that it was the intent of the legislature that the Governor and Council be authorized to approve the purchase of State-owned cars, thereby making it unnecessary for individual commissions or departments to request legislative authorization."

It is our understanding that you are asking us if we concur with your interpretation, and our answer is in the affirmative.

The legislature has, by the enactment of the above mentioned chapter, specifically permitted a few departments to possess automobiles for the travel of employees without having first secured the approval of the Governor and Council. In addition to such named departments, the legislature has indicated its permission for other departments or commissions to have automobiles for travel in the discretion of the Governor and Council.

JAMES GLYNN FROST
Deputy Attorney General

December 15, 1954

To Kenneth B. Burns, Business Manager, Institutional Service
Re: Educational Payments, Northern Maine Sanatorium

This is in answer to your inquiry relating to a family from which three children were admitted to the Sanatorium as tubercular patients and received educational assistance under the physically handicapped program of the Department of Education. Under this law the State pays the additional cost up to certain maxima after the town has paid its per capita cost, the theory being that the town shall bear the cost which it normally would if the child attended the local school, the State to assist if necessary, so that such child will not go uneducated because of unfortunate circumstances.

The complicating factor here is the movement of the family from Fort Fairfield, where they had evidently resided for eight years, to Caribou. This movement, it appears from the facts at hand, took place approximately two weeks before the admittance of the children to the Sanatorium. The children never attended the public schools in Caribou. Fort Fairfield denies liability on the ground that the family had moved to Caribou. Caribou denies liability on the fact that the children never attended school there.

Questions of movement of domicile or residence, whichever term you use, are ofttimes complicated. We are indeed unfortunate in not being able to hold

administratively some sort of hearing so that we could get the more important facts that usually decide such problems. We deal here only with what we have; the information is meager, to say the least.

It appears from what I have that Mr. X. moved his family, lock, stock and barrel, from Fort Fairfield to Caribou. He did it in the middle of the school year. The moment he arrived in Caribou with his family, in my opinion he created a duty on the Town of Caribou to provide facilities for the education of his children. The legal duty was attached. The fact that the children did not go to school is of no consequence, merely showing that Caribou did not properly enforce the truancy law. Legal rights may attach, although they are not exercised. The right of a child to attend our public schools is given by Section 39 of Chapter 37 and that is determined by the town in which his parents or guardian have a legal residence. Legal residence in relation to school purposes has been given a rather broad construction. In a Connecticut case, *Yale vs. School District*, 59 Conn. 489; 22 A. 295, the court in defining legal residence for school purposes gave a very broad definition, saying that if a child is actually dwelling in a school district so that some person there has the care of it and the child is within school age, the child must attend the public schools of that town. This case has been cited with approval by our Supreme Judicial Court in *Shaw v. Small.*

On the facts at hand it is my opinion that the Town of Caribou is liable for three times the per capita cost of pupils in that town during the school year under discussion. There may be some facts that may come out to change this opinion and I will readily do so; but I must state once again that we are definitely limited by our ability to get the facts which are so determinative of these questions. I understand that there is no pauper problem here.

If the Town of Caribou refuses to pay, I call your attention to the fact that moneys are paid by the State to Caribou. There can be a legal set-off, and if Caribou still insists it is not liable, it can always sue Fort Fairfield.

ROGER A. PUTNAM
Assistant Attorney General

December 16, 1954

To Raymond C. Mudge, Finance Commissioner
Re: Maine Maritime Academy

You have presented to this office under date of October 19, 1954, a memo from Earle R. Hayes, Secretary of the Maine State Retirement System, addressed to you, which reads as follows:

"The Board of Trustees of the Retirement System, at a recent meeting, asked me to confer with you in your capacity as Budget Officer, and the Attorney General or one of his Deputies with respect to the advisability or practicability of charging back to the Maine Maritime Academy the pro rata share of the cost of operation of the State Retirement Plan in so far as it applies to that institution in exactly the same manner as is presently being done with certain other so-called revenue accounts.

"The question was also raised by the Board as to whether or not the Maine Maritime Academy might not better be considered as in the category of a

'Local Participating District' rather than as another State department or agency. . ."

As background to this memo it appears that the State Auditor's Report as of June 30, 1951, recommended that the Maine Maritime Academy be charged their pro rata share of normal and approved liability contributions, annual valuation and administrative costs. The Retirement System noted that such recommendation appeared to be in conflict with an opinion of the Attorney General dated June, 1949, in which the Maritime Academy was designated as a State Agency. In return, the State Auditor suggested that the intent of the Attorney General's opinion was merely to the effect that the Academy was a State Agency and there was no prohibition against its being charged for its share of contributions to the Retirement System.

As a result of the above mentioned opinion of the Attorney General, it appears that the Maine Maritime Academy began to participate in the State Retirement System as a State Agency and not as a participating local district. Entrance as a participating local district would have made it mandatory upon the Academy to pay the costs mentioned in Mr. Berry's recommendation.

We do believe that the Academy, receiving substantial sums from the State, as it does, in the way of appropriations, could much more appropriately be considered an Agency of the State than it could a local participating district, which latter classification generally embraces those instrumentalities of the State which receive no appropriation from the General Fund, this from a practical standpoint and in addition to the legislative act which expressly declared the Academy to be an Agency.

However, we do not think at this late date that it is necessary to re-examine the Academy's status as agency or local participating district for the purpose of determining whether or not it might be charged with its share of contributions, valuation, and administrative costs, because such costs may be imposed upon it under the provisions of Section 14-VII of Chapter 60:

> "State contributions. The board of trustees shall submit budget estimates to the state budget in accordance with the provisions of section 10 of chapter 14. These estimates shall show the total requirements for the pension accumulation fund and for the expense fund for the ensuing biennium. These amounts shall be broken down in such a way as to permit the proper allocation of costs among the general fund of the state, the general highway fund and such other funds as it may be found practicable by the state budget officer to charge with their proportionate share of the cost. The amount determined as due from the general fund shall be included in the appropriation bill transmitted to the legislature by the governor with the budget document. Payments to the retirement system of the amounts appropriated for the pension accumulation fund and for the expense fund shall be made in quarterly instalments on the 1st day of July, October, January and April."

This section, then, contemplates that in the discretion of the State Budget Officer, if he finds it practicable, the proper costs may be allocated so as to charge particular funds with their proportionate share of the cost.

We express no opinion as to the advisability or practicability of making such charge, as we believe this is an administrative function.

JAMES GLYNN FROST
Deputy Attorney General

December 21, 1954

To Kenneth B. Burns, Business Manager, Institutional Service
Re: Bath Military and Naval Children's Home

Your memorandum relating to the advisability of striking out the word "gratuitously", as found in Section 174 of Chapter 23, R. S. 1944, received.

The Military and Naval Children's Home, Bath, was declared to be a State institution by the provisions of Section 1 of Chapter 254 of the Public Laws of 1929, at which time the word "gratuitously" appeared in the Public Laws for the first time. It has been in our statutes ever since.

Section 3 of this Act further ordered the trustees to turn the trust fund over to the State Treasurer. I will refer to this fund later.

Section 4 of the Act repealed all inconsistent Acts relating to the school, but is not material here.

It is the opinion of this writer that the legislature has the right to strike out the word "gratuitously" and thus make relatives legally liable to pay, subject to assessments of costs within reasonable limits, for the board, care and education of the inmates of the institution. The legislature has always reserved the right to amend the charters of corporations since 1831. This is, however, not a corporation change in the charter, but more or less a change in what has now become a State institution.

The only problem in striking out the word "gratuitously" arises from the possibility that somebody may have conveyed a gift to this school on the condition that it should always be maintained for the purpose of rearing and educating children gratuitously. Along this line we have attempted to check, first the trust fund involved and second the real estate involved.

In 1931, Frank I. Cowan, Esquire, later Attorney General of the State of Maine, did an exhaustive investigation into the history, background and handling of trust funds held by the State of Maine for its various institutions. This Report is in printed form and I refer to page 18 thereof, section XIII, entitled, "State Military and Naval Children's Home". Mr. Cowan found out funds which cannot now be traced, having a book value of $16,000. The funds which came to the State under the provisions of Chapter 254, Public Laws of 1929, had a value at that time (1931) of $12,261.62. Mr. Cowan states and I quote, "This fund has no known conditions attached, save that it is for the benefit of the Military and Naval Children's Home. It is fully segregated." In view of Mr. Cowan's exhaustive study I do not feel that it is necessary to retread that ground. We will assume, therefore, that this fund is without condition. There any change in the statute would have little, if any, effect.

The question arose in mind whether or not the property where the Bath Military and Naval Children's Home now is situated might have been conveyed

to the trustees or to the State upon a condition which might be important in view of the fact that there is a desire on the part of your department to change the mode of operation.

I took the liberty of checking at the Registry of Deeds, therefore, and I am attaching the abstracts that I made there. I find no conditions attached to the conveyance to the State of Maine, so that the removal of the word "gratuitously", appearing in the statute, will have no adverse effect upon the right of the State to continue to hold this title to the land and buildings in Bath. . .

I am returning herewith the history of the Home which you lent me.

ROGER A. PUTNAM
Assistant Attorney General

December 23, 1954

To H. H. Harris, Controller
Re: Constitutional Law Officers, Age Limit

We have your memo in which you ask the following question:

"Is it legal and permissible for the State Controller to allow salary payments to Constitutional Law Officers, elected by the Legislature, who have passed their seventieth birthday without an extension authorized by Governor and Council action?"

Your question arises as a result of the enactment by the Legislature of the following law: (Sec. 6-A of Chapter 60, R. S. 1944, I-B.)

> "Any member in service who attains age 70 shall be retired forthwith on a service retirement allowance or on the first day of the next calendar month; except that any member who is an elected official of the state or an official appointed for a term of years may remain in service until the end of the term of his office for which he was elected or appointed. Notwithstanding the foregoing, on the request of the governor with the approval of the council, the board of trustees may permit the continuation for periods of 1 year, as the result of each such request, of the service of any employee who has attained the age of 70 and who desires to remain in service."

Subsequent to the enactment of this statute, the Legislature, in joint convention, elected an officer who had attained age 70 to serve for a period of two years in a constitutional office. Such action was, of course, inconsistent with the wording of the law above quoted, and the question propounded raises the legal effect of such election by the Legislature.

In effect, it is asked if the Legislature, after enacting a law, can subsequently take action which is contrary to that law. In other words, can the Legislature amend its laws?

In answering this question we have considered that action taken by the Legislature in accordance with and under the authority contained in the Constitution of Maine, has the same effect as an "Act", so-called, of the Legislature, that is, it has the effect of law, and we are of the opinion that the Legislature, either expressly or by implication, can amend its laws.

Two principles of law involved in considering inconsistent acts of the Legislature compel us to the conclusion that election of such an "over age" official by the Legislature is a legal election. Firstly, special acts of the Legislature generally take precedence over general laws which are inconsistent with the special Act. In the second instance, acts subsequent in time prevail over prior inconsistent acts.

Examining the facts, we find that the Legislature, of its own volition, and acting as authorized by the Constitution, elected a constitutional officer who had attained the age of 70 years, and this in the face of a statute providing that members of the retirement system, upon attaining age 70 shall retire forthwith (with two exceptions not here pertinent).

Applying the aforementioned principles of law, we believe that such election had the effect of amending Section 6-A, I-B, so that that section does not include constitutional officers elected by the Legislature.

To hold that the Legislature acted without full knowledge of the facts, or unwisely, would be for this office to substitute its judgment for that of the Legislature. This we will not do.

The answer, then, to your question, "Is it legal and permissible (to pay such officers)?" is in the affirmative.

Further and more compelling reason for holding that the law quoted above does not apply to constitutional officers can be seen in the Opinion of the Justices, 137 Maine, pages 352, 353. Therein the Court stated that, with respect to the office of Treasurer of State, whose election, tenure of office, etc., are substantially the same as those of the office in question, the constitutional provision is a complete inhibition against the enactment of legislation filling the office by any method of selection not prescribed by the Constitution.

JAMES GLYNN FROST
Deputy Attorney General

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