MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1957 - 1958

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ATTORNEYS GENERAL OF MAINE

1820 - 1958

Erastus Foote, Wiscasset	1820
Jonathan P. Rogers, Bangor	1832
Nathan Clifford, Newfield	1834
Daniel Goodenow, Alfred	1838
Stephen Emery, Paris	1839
Daniel Goodenow, Alfred	1841
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. Abbot, Norridgewock	1855
George Evans, Portland	1856
Nathan D. Appleton, Alfred	1857
George W. Ingersoll, Bangor (died in office)	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	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
Frank F. Harding, Rockland	1955

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
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, Navy	1938-1942
Carl F. Fellows, Augusta	1939-1949
* Frank A. Tirrell, Rockland	1940
Alexander A. LaFleur, Portland (Army)	1941-1942
Harry M. Putnam, Portland (Army)	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, Brunswick	1943-1951
John S. S. Fessenden, Winthrop	1945-1949

Henry Heselton, Gardiner	1946-
Boyd L. Bailey, Bath	1946-1956
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	1951-1958
Miles P. Frye, Calais	1951-1954
Frank W. Davis, Old Orchard Beach	1953-
Milton L. Bradford, Readfield	1954-
Neil L. Dow, Norway	1954-1955
Orville T. Ranger, Fairfield	1955-
George A. Wathen, Easton	1955-
Ralph W. Farris, Portland	1957-
Richard A. Foley, Augusta	1957-

*Temporary appointment.

*1 Limited appointment to handle cases arising under the profiteering law, without cost to the State.

COUNTY ATTORNEYS

County		
Androscoggin	Gaston M. Dumais	Lewiston
Assistant	William D. Hathaway Resigned; successor, Philip M. Isaacson	Lewiston Lewiston
Aroostook	Walter L. Sage	Fort Fairfield
Assistant	Claude L. Cyr	Van Buren
Cumberland	Arthur Chapman, Jr.	Portland
Assistant	Clement F. Richardson	Cumberland Center
Franklin	Joseph F. Holman	Farmington
Hancock	William Fenton	Bar Harbor
Kennebec	Robert A. Marden	Waterville
Assistant	Donald J. Bourassa Resigned; successor, Jon A. Lund	Augusta Augusta
Knox	Curtis M. Payson	Rockland
Lincoln	James Blenn Perkins, Jr.	Boothbay Harbor
Oxford	David R. Hastings	Fryeburg
Penobscot	Orman G. Twitchell	Bangor
Assistant	Ian MacInnes	Bangor
Piscataquis	Stuart E. Hayes	Dover-Foxcroft
Sagadahoc	George M. Carlton, Jr.	Bath
Somerset	W. Philip Hamilton	Madison
Waldo	Hillard H. Buzzell, resigned; successor, Richard W. Glass	Belfast Belfast
Washington	Harold V. Jewett	Calais
York	Marcel R. Viger	Biddeford

STATE OF MAINE

Department of the Attorney General

Augusta

December 1, 1958

To the Governor and Council of the State of Maine:

In conformity to Chapter 20, Section 14 of the Revised Statutes of 1954, I herewith submit a report of the amount and kind of official business done by this department and by the several county attorneys during the preceding two years, stating the number of persons prosecuted, their alleged offenses, and the results.

FRANK F. HARDING

Attorney General

REPORT

HOMICIDE CASES, 1957-1958

STATE vs. RICHARD B. WOOD

This case was pending on the date of the last report. The respondent had been convicted at the June, 1955 term of Superior Court for Sagadahoc County for the murder of Wilfred Blais. Following conviction the case went to the Supreme Judicial Court on exceptions. On July 25, 1958 the Supreme Judicial Court overruled the respondent's exceptions. At the October, 1958 term of Superior Court for Sagadahoc County respondent was sentenced to life imprisonment.

STATE vs. LOUIS THURSBY

This case was pending on the date of the last report. At the January, 1957 term of Superior Court for Somerset County the respondent was indicted for the murder of Clarence A. Towle. He pleaded not guilty by reason of insanity. Upon trial he was convicted of murder and was sentenced to life imprisonment.

STATE vs. MARGARET LLEWELLYN

Respondent and deceased, Archie Arsenault, had been friendly for some period of time. On February 22, 1957 she complained to the Rumford Police Department that Arsenault was annoying her, that she had a gun and would use it if the police didn't help her. Later, Arsenault came to her apartment, there was some disturbance, respondent claiming he tried to force his way into her apartment. She put a .22 rifle through a peephole in her door and shot and killed Arsenault. Indicted by the Grand Jury at the May, 1957 term of Superior Court for Oxford County for murder, respondent was tried at the same term and acquitted.

STATE vs. REGINALD RICHARDS

On March 13, 1957 Pasquale Capano was struck on the head and his filling station at Auburn, Maine, robbed by an unknown assailant. Capano died as a result of this attack. The next day a taxicab driver, Milton A. Tracy of Bangor, was assaulted at Bangor and Reginald Richards was arrested for this latter assault. Richards admitted the assault and robbery of Capano in Auburn. At the June, 1957 term of Superior Court for Androscoggin County Richards was indicted for murder. Upon arraignment he pleaded not guilty and not guilty by reason of insanity. Upon trial he was found guilty and sentenced to life imprisonment.

STATE vs. ISADORE DATZENKOFF

Respondent was one of several Russian woodsmen living in a woods camp in Bucksport, Maine. None of these men spoke English. On July 4, 1957,

respondent shot one of his companions, one Steve Metrick, who bled to death as a result of the shot. At the September, 1957 term of Superior Court for Hancock County respondent was indicted for murder. After considerable difficulty, a competent interpreter was obtained. It was then learned that it was improbable the State could sustain the burden of proof necessary to prove all the elements of murder. At the same term of court a plea of guilty of manslaughter was made by the respondent and accepted by the Court and respondent was sentenced to 10 to 20 years in prison. Deputy Attorney General Frost assisted the County Attorney in this case.

STATE vs. BEATRICE CASTELLUZZO

August 5, 1957, during an altercation in the bedroom of her apartment, Beatrice Castelluzzo shot and killed James R. Speirs, Jr., of Portland. She was indicted for murder at the September, 1957 term of Superior Court for Cumberland County. Trial was started at the same term, on November 4, 1957, she was found guilty of manslaughter and sentenced to 5 to 10 years in prison.

STATE vs. ROBERT LEMIEUX

On October 6, 1957, Robert Lemieux of Biddeford, very early in the morning, took his wife out of an automobile and from the company of another girl and four men and took her into their home. After talking to her for some time he shot and killed her and walked to the Biddeford Police Station where he surrendered his gun and himself. Taken before the Municipal Court in Biddeford he was bound over to the November, 1957 term of Superior Court on a charge of murder. Deputy Attorney General Frost attended the Grand Jury session at the November term of Court to assist the County Attorney. The Grand Jury refused to indict for murder but did return an indictment for manslaughter. The County Attorney continued prosecution of the case and later in the term the respondent pleaded guilty to manslaughter and was sentenced to serve 5 to 10 years in prison.

STATE vs. BERNARD E. DRAKE

October 20, 1957, Bernard E. Drake of West Sumner, Maine, shot and killed his son and shot and wounded his wife and daughter. He was indicted for murder at the February, 1958 term of Superior Court for Oxford County. Upon arraignment he pleaded not guilty and not guilty by reason of insanity. He was found guilty and sentenced to life imprisonment.

STATE vs. HARRISON C. COOMBS

Harrison C. Coombs broke and entered the house of his father, Charles T. Coombs, at Winn, Maine, on November 29, 1957. He beat his father to death with a sledge hammer and made his escape to Manchester, Connecticut. Apprehended in Manchester, Connecticut, he was returned to Bangor, Maine, where, at the January, 1958 term of Superior Court for Penobscot County he was indicted for murder. He pleaded guilty to the indictment and was sentenced to life imprisonment.

STATE vs. WALLACE P. CORSON

On December 9, 1957, Mrs. Phyllis McArthur of Skowhegan went to the home of Wallace P. Corson in Skowhegan, to visit his mother and to get some water. Mrs. Corson was not at home and Wallace Corson was there all alone. While Mrs. McArthur was drawing water at the kitchen sink, Wallace Corson came up behind her, placed a wire around her neck and, by means of the wire around her neck, dragged her from the kitchen into the barn. This did not kill her. He next stabbed her with a screwdriver without killing her. He then seized a sledge hammer and beat her to death. He was indicted for murder at the January, 1958 term of Superior Court for Somerset County. Upon arraignment and trial at the same term of Court he pleaded not guilty and not guilty by reason of insanity, was found guilty and was sentenced to life imprisonment.

STATE vs. ARTHUR HAYWARD

Arthur Hayward came home to Eastport, Maine, from his place of employment in Massachusetts and upon going to his home, early in the morning of December 28, 1957, found there his wife, another young woman, and two young Indian men. He shot and killed one of the young men, one Ambrose Dana. Evidence of circumstances surrounding and antedating the killing was submitted to the Grand Jury at the February, 1958 term of Superior Court and Hayward was indicted for murder. Tried at the same term of Court, he was acquitted.

STATE vs. EDWARD A. LORRAINE and GERALD H. LeBLANC

On March 8, 1958, the two respondents stopped the truck operated by Stanley Grossman at Albion, Maine. They shot, killed and robbed Grossman. They were indicted and tried for murder at the June, 1958 term of Superior Court for Kennebec County. They were both convicted of murder and sentenced to life imprisonment. Deputy Attorney General Frost represented this office in the case.

STATE vs. WARREN E. TYLER

May 11, 1958, Warren E. Tyler, a former mental hospital patient, at his home in Bethel beat his mother, Emma Tyler, to death with his hands and pieces of a broken chair. He was indicted for murder at the May, 1958 term of Superior Court for Oxford County. He was later committed to the Augusta State Hospital for observation. He was arraigned at the October, 1958 term of Superior Court, pleaded not guilty by reason of insanity, was tried and found not guilty by reason of insanity.

STATE vs. EVERETT E. SAVAGE, JR.

Respondent and a Mrs. Patricia Wing went in an automobile and parked in an isolated spot in Oakland. Two days later, Savage came staggering out in a dazed condition. A search, following Savage's directions, led to the finding of the body of Mrs Wing in the automobile in the place where they had parked. Mrs. Wing had received a blow which had blackened her eye and caused a subdural hemorrhage. The cause of death was given, after autopsy, as asphyxia-

tion caused by the inhalation of vomitus and blood. The blood came from the injury inflicted to the nose and eye by the blow to the eye and base of the nose, and nausea had been caused by pressure on the brain from the subdural hemorrhage. According to the State's pathologists, one blow had been responsible for both the injury to the eye and the subdural hemorrhage.

At the September, 1958 term of Superior Court for Somerset County, Savage was indicted and tried for murder. He was found guilty of assault and battery of a high and aggravated nature and was sentenced to serve from two and one-half to five years in prison. Savage appealed and the appeal is pending on the date of this report.

STATE vs. SANDRA KNOWLTON

Sandra Knowlton of Lewiston, 14 years of age, ran away from home on the morning of July 7, 1958, taking with her a .22 calibre rifle. In the early evening of the same day she was found by searching neighbors in a pasture near a road some distance from her home in Lewiston. She shot at the people who found her. Lewiston police officers were called and came to the scene. Sandra Knowlton shot at the police officers. As the officers tried to approach her through the underbrush in the pasture she shot and killed Paul J. Simard, one of the officers. She was indicted and tried for murder at the September, 1958 term of Superior Court for Androscoggin County. She was convicted of manslaughter and sentenced to serve five to ten years in prison.

STATE vs. GEORGE BURBANK
STATE vs. FREDITH BURBANK

At twelve minutes past three in the morning of July 14, 1958, George Burbank, then a stranger, walked into the Police Station at Bath, Maine, and requested help for his eighteen-year-old daughter, Fredith Burbank, who was having hemorrhage from childbirth. Burbank told the night-duty officer at Bath that his daughter was in a housekeeping cabin, where she had been living with him, in Woolwich, just off the end of the Carlton Bridge. Since Woolwich has no police department and because this was an apparent emergency, Bath police officers were sent with Burbank to the scene. There the officers found Fredith Burbank in the physical condition described by her father and they also found a new-born baby, wrapped in a blanket, lying on another bed in the other room of the cabin. The baby was taken to the hospital by the police and they returned to the cabin and carried Fredith Burbank to the hospital. The child died after a very short time in the hospital. Autopsy disclosed that the baby's skull was a mass of fractures. George Burbank told the officers two stories that did not coincide with physical evidence in the possession of the officers, and finally he admitted to the officers that after the baby was born he had wrapped it in a blanket and struck it repeatedly against the post of the bed where it was found. Subsequent questioning disclosed that the baby was the result of an incestuous relationship between George and Fredith Burbank; that father and daughter had been living as husband and wife in various parts of the eastern United States, that they had come to Maine for the specific purpose of having the child born here and of disposing of the child here; that the daughter had had as much influence, if not more, on the father in the plans to dispose of the child, as the father had had on the daughter.

At the October, 1958 term of Superior Court, George Burbank was indicted for murder, and Fredith Burbank was indicted for murder, for being an accessory to murder, and for conspiracy to commit murder. Defense counsel moved for a change of venue in the case of State vs. George Burbank, and moved for continuance in the cases of State vs. Fredith Burbank. All defense motions were granted, the cases against Fredith Burbank were continued to the January, 1959 term of Superior Court for Sagadahoc County, and the case against George Burbank was transferred to Cumberland County, where it will be in order for trial at the January, 1959 term of Superior Court for Cumberland County.

STATE vs. ESTELLE MICHAUD

Mrs. Estelle Michaud of Bangor was at home on August 9, 1958, on a visit from the Bangor State Hospital, where she had been a patient. Without apparent reason, provocation or warning (she later said she heard voices commanding her to do so), she took a butcher knife from the kitchen and stabbed and killed her 3-months old son, Mark. At the September, 1958 term of Superior Court for Penobscot County she was indicted and tried for murder and was found not guilty by reason of insanity.

STATE vs. WILLIAM C. CYR

On August 31, 1958, William C. Cyr of St. Agatha, at St. Agatha, shot and killed his guardian, Armand Lagasse. Indicted and tried for murder at the November, 1958 term of Superior Court for Aroostook County, he was found not guilty by reason of insanity.

STATE vs. DAVID HARLOW

September 20, 1958, David Harlow, an itinerant with a history of treatment in mental hospitals, tried to provoke a quarrel with one Calvin Hodgdon in a beer parlor in Waterville. Unsuccessful in provoking a quarrel, he followed Hodgdon out onto the street and, after Hodgdon was seated in his own automobile, Harlow took a shotgun from a box which he was carrying under his arm, shot and killed Hodgon, replaced the gun in the box and walked casually from the scene. Indicted and tried for murder at the October, 1958 term of Superior Court for Kennebec County, Harlow was found not guilty by reason of insanity.

STATE vs. JOSEPH W. MARIN

October 2, 1958, Joseph W. Marin of Stacyville, with a .22 calibre rifle shot and killed a Mrs. Hedwidge Long, with whom he had been living in the relationship of husband and wife. The shooting occurred in an apartment the couple were occupying in a shed on a farm at Fort Fairfield where they were both employed during potato harvesting. Marin was apprehended in Lincoln, Maine, where, among other things, he told officers he was then on his way to Old Town to kill his wife. He was indicted and tried for murder at the November, 1958 term of Superior Court for Aroostook County, convicted of manslaughter and sentenced to serve 10 to 20 years in prison.

STATE vs. RICHARD A. BRINE

On October 7, 1958 the dead body of Lewis Chandler, Jr., a Portland taxicab driver, was found behind the wheel of his taxicab in Standish, Maine. Chandler had been shot several times in the back with .38 calibre bullets. Richard A. Brine, U. S. Army private stationed at Fort Meyers, Virginia, was apprehended in Baldwin, Maine, on October 11, 1958, and arrested on a charge of murder. He was arraigned in Municipal Court on October 24, 1958 on a charge of murder, probable cause was found, and he was bound over, without bail, to await action by the Grand Jury at the January, 1959 term of Superior Court for Cumberland County.

STATE vs. RUSSELL W. MOSES

In the early morning hours of November 25, 1958, Russell W. Moses of Gorham beat both his wife, Lulu, and his daughter, Frances, to death with a hammer. Later the same day he was arraigned in Municipal Court on a charge of murder and bound over to the January, 1959 term of Superior Court for Cumberland County. Later the same day he was committed to the Augusta State Hospital for observation.

STATE vs. HARLEY R. FRAZIER

On November 21, 1957 Harley R. Frazier was arraigned in Belfast Municipal Court on a warrant charging the murder of his wife, Mary Jane. He was charged with having struck his wife with his fist during the course of a drinking party in the home of his parents, thus causing her death. Probable cause was found and he was held without bail for the January, 1958 term of Superior Court for Waldo County. The Grand Jury, at that term, returned an indictment for manslaughter. The case was prosecuted by the County Attorney. Frazier was tried and found guilty of manslaughter and sentenced to serve 1 to 2 years in prison.

OTHER HOMICIDES

On February 8, 1958, the bodies of Sylvia Pelletier and her husband, Joseph N. Pelletier, were found shot to death in their South Portland home. Investigation disclosed that Joseph Pelletier had shot his wife three times in the head, killing her, and had then shot himself in the head and killed himself.

September 20, 1957, at Reed Plantation in Aroostook County, three Deputy Sheriffs were trying to take one Kempton Palmer into custody to take him to the Bangor State Hospital as a mental patient. He resisted and, in the course of the proceedings, seized a knife and started to attack the Deputies. He was shot and died as a result. This office made an investigation at the request of Aroostook County officials; the matter was presented to the Grand Jury, but no indictment was found.

August 30, 1958, Nelson L. Jones of Brooklyn, N. Y., killed Dennis A. Fischer of Chicago, Illinois, at the Charleston, Maine, Air Base. Both men were members of the United States armed forces and were stationed at the base. Jones was surrendered to Penobscot County officials, but was returned by them to Federal jurisdiction.

On May 26, 1951, Shirley Coolen of Brunswick was found dead, presumably murdered, in the dooryard of a home in Brunswick. At that time one Norman Gagnon was interviewed as a suspect. The case has not been solved nor closed. On July 5, 1958 Norman Gagnon was arrested in El Segundo, California, on two charges of kidnapping, two charges of rape, two charges of assault with intent to murder, and one charge of grand larceny. He was questioned by California officials, at the request of this department, in regard to the Coolen case. This questioning was without results. The officers in California have promised to question him further after their court procedure is concluded.

On July 31, 1954, the dead body of Danny Wood was found in the Little Androscoggin River. He had apparently been murdered. No one has ever been apprehended for the crime. During the past two years several apparent leads were unsuccessfully investigated. One person "confessed" to the commission of this crime. Investigation showed the confession to be without substance. The person who "confessed" is now an inmate of a mental hospital in Massachusetts.

September 20, 1957, the badly decomposed body of Ethel Kelley was found in marshlands near Lake Auburn. Mrs. Kelley was apparently murdered. No one has been apprehended. The matter is still under investigation.

The body of Dennis Down of Falmouth was found on the floor of his bedroom late in the afternoon of June 23, 1958. He had been horribly beaten, stabbed with two butcher knives and manually strangled. He was apparently murdered. No one has been apprehended. The matter is still under investigation.

Several suicides have been investigated to determine if there was any evidence of foul play. There was no such evidence in any case investigated.

Five other deaths have been investigated as suspected homicides.

John Conley of Belfast died in the Eastern Maine General Hospital in Bangor. He was admitted on the afternoon of May 16, 1957 to the accident ward of the hospital and died some ten hours later in the very early morning of May 17th. Because of his condition upon admission to, and during his stay in, the hospital and because of the history he gave, an autopsy was performed. The autopsy revealed multiple injuries. The pathologist, Dr. Richard C. Wadsworth, reported the cause of death to be shock secondary to traumatic laceration of the liver and to peritoneal and retroperitoneal hemorrhage and shock secondary to traumatic dislocation of first cervical vertebra. Investigation appeared to disclose that he had fallen about while intoxicated and so received his injuries. The death was listed as accidental. The case had not been closed. Interest has recently been re-aroused and the matter is under further investigation.

Mrs. Dorothy Reed died April 12, 1957, in the hospital at Bath, Maine. She had undergone an abortion some short time before admission to the hospital. After investigation, her husband, Marvin E. Reed of the Brunswick Naval Air Station, was arrested on a Municipal Court warrant charging him with manslaughter. April 13, 1957 he was bound over to the May, 1957 term of Superior Court for Cumberland County on the manslaughter charge. At the May term of Superior Court no indictment was found against him.

April 4, 1957, Gregory Blomberg, a two-year-old-child, died at Portland, Maine, with such attendant circumstances that an autopsy was performed by Dr. Porter. After the autopsy and a consultation with Dr. Luongo of Harvard's Department of Legal Medicine, it was determined that death was due to natural causes.

Gilbert Eugene Roy, aged 2, died at the Augusta General Hospital on August 22, 1957. An autopsy was performed and death was found to have been due to a fractured skull. Further investigation disclosed that the fracture had occurred when the child had been accidentally dropped.

The badly decomposed body of Thomas Turner was found floating in the Androscoggin River on July 11, 1958. Dr. Charles Branch, under very difficult circumstances, performed an autopsy on the body. After burial, suspicion was voiced that, because Thomas Turner was known to have made statements claiming to have knowledge of facts concerning the death of Ethel Kelley (mentioned above), his death might be murder. His body was exhumed and a second autopsy was performed. Death was due to a severe heart attack.

This office, at the request of county and State officials and department heads, has conducted or participated in investigations of other matters. We have conducted investigations for the Dental Board, the Real Estate Commission, the Insurance Commissioner, and for various State institutions. Some of the other investigations included: one of the disappearance of a person from the eastern part of the State; one non-fatal shooting; three complaints in regard to Municipal Courts; one alleged bribery; routine investigations of applicants for positions with this office; one embezzlement; several lottery complaints; one complaint of molesting a child; a sales tax complaint; one complaint of infringement of the State's rights in a great pond; a complaint against an out-of-State attorney practicing in Maine, a narcotics complaint, a complaint of illegal law enforcement, two confidence-game complaints, one investigation of an extraditon petition, and the investigation of allegations in several writs of error coram nobis.

OTHER CRIMINAL CASES

In the past two years this office has intitiated criminal prosecution in one case not involving homicide. Upon complaint of the Secretary of State that Edmund Hiscock of Damariscotta had filed primary nomination petitions containing forged signatures, and after investigation by the State Police, we presented the matter to the Grand Jury at the May, 1958 term of Superior Court for Lincoln County. Edmund Hiscock was indicted for falsely making a nomination paper. Upon arraignment he pleaded guilty. He paid a fine and received a suspended jail sentence.

During the biennium we have rendered assistance to various County Attorneys at their request. Because of the illness of the County Attorney of Waldo County, and at his request, Mr. Frost, Deputy Attorney General, and Mr. Putnam, Assistant Attorney General, each prosecuted criminal cases at two terms of Superior Court for Waldo County. One of the prosecutions involved embezzlement by an attorney who pleaded guilty to several indictments against him and

was sentenced to prison. Because of our involvement and familiarity with the case we continued with disbarment proceedings and the attorney was disbarred.

The reports of the County Attorneys for the two years ending November 1, 1957, and November 1, 1958, respectively, are as follows, exclusive of homicides:

	1957	1958
Rape	17	21
Arson	9	18
Robbery	44	21
Felonious Assault	43	56
Assault and Battery	125	176
Breaking, Entering and Larceny	488	537
Forgery	133	131
Larceny	415	359
Sex except rape	152	126
Non-Support	35	33
Liquor	54	57
Drunken Driving	687	613
Intoxication	112	121
Motor Vehicle	673	660
Miscellaneous	375	394
Adding homicides–totals	3,390	3,438

Of the crimes listed above, only Breaking, Entering and Larceny has shown a steady increase during the last few years.

Drunken Driving and all other Motor Vehicle offenses, taken together, constitute more than a third of the total number of crimes, but have shown a slight decline in each of the last four years, from 39½ to 37 1-3 per cent of all offenses.

ACTIONS AUTHORIZED BY LEGISLATURE

The 98th Legislature authorized the bringing of three actions against the State of Maine.

Chapter 68 of the Resolves of 1957 authorized Arthur W. Bushey and Alice Bushey, John Tibbetts, Archie Leeman and Oscar Bradstreet to sue the State for flowage damage allegedly caused by the State in 1949 in building a dam for a rearing pool at Sheepscot Pond. Recovery was limited by the Resolve to $5000.00. The action was brought. Neal A. Donahue, Assistant Attorney General, represented the State. The action went to trial, and the trial was discontinued when it was discovered that the legislative act was not so framed that a remedy could be had by plaintiffs.

Chapter 93 of the Resolves of 1957 authorized Franklin T. Kurt to sue the State of Maine in a real action for the recovery of title to an island known as "Harbor Island" in South Brooksville. The action was brought and went to trial. Neal A. Donahue, Assistant Attorney General, represented the State. The Court found title to the island to be in Franklin T. Kurt.

Chapter 168 of the Resolves of 1957 authorized Jim Adams, Inc., to sue the State of Maine for damages allegedly caused by loss of business and business interruption in its automobile agency and maintenance repair shop by the con-

struction of the Bangor-Brewer bridge and the altering, widening and changing of grade of Union Street in Bangor in connection with the bridge construction. The action was brought. L. Smith Dunnack, Assistant Attorney General, and James Gillin of the Penobscot Bar represented the State. Demurrer was filed to the action, and the action was dismissed upon the demurrer. This terminated the action. We anticipate that legislation will be introduced to authorize further action against the State.

ATOMIC ENERGY

Mr. Frost, Deputy Attorney General, has continued a member of the 12-member Advisory Committee of State Officials to consult with the United States Atomic Energy Commission on health and safety regulations relating to atomic work. He has attended several meetings of the Committee with representatives of the Commission.

For the past two years I have served as a member of the Atomic Energy Committee of the National Association of Attorneys General. Mr. Frost and I attended two conferences with representatives of the United States Atomic Energy Commission, members of the Advisory Committee of State Officials, and members of the Atomic Energy Committee of the National Association of Attorneys General, on the requirements of the so-called "Price-Anderson Act," that a licensee of the Atomic Energy Commission, authorized to operate nuclear reactors, shall maintain financial protection, in the form of nuclear energy liability insurance, or other appropriate form, in an amount specified by the Atomic Energy Commission against public liability claims based on a nuclear incident arising out of the licensed activities.

At these meetings it developed that the very great majority of the States of the United States could not legally comply with the financial protection requirements imposed by the Act on governmentally owned reactors. As a result of these meetings, the Act was further amended to establish an exemption from the financial protection requirements with respect to licenses issued for the conduct of educational activities to those found by the Commission to be non-profit educational institutions. This is of particular interest to Maine at this time, because the University of Maine has applied for a license to install and operate a reactor.

BAXTER STATE PARK

By statute, the Attorney General is a member of the Baxter State Park Commission. It has been a pleasure and a privilege to make inspection trips to the Park with the Commission and the donor of the land, former Governor Baxter. The ideal visualized in the conveyance to the State, in trust, of the land comprising the Park, that it be maintained in perpetuity as a wilderness area for the benefit of the people of Maine, is extremely difficult of accomplishment. At the outset, some slight compromise with the idea of a wilderness had to be made in order to allow people to enter and enjoy the Park, and sufficient concession to good forestry practice to insure against the occurrence of disease and disaster which could ravage the entire area and leave it desolate and useless for many years. Because of the concessions and compromises necessary to insure to the greatest possible extent the intended purpose of the Park, it is of extreme impor-

tance to bear in mind the conditions of the trust, which were accepted with the gift of the land. It is necessary, always, to distinguish its administration and its purpose from those of other State Parks and to be mindful of the intent of the donor that the land remain, as nearly as possible, purely a wilderness. Thus, roads are few, winding, and little better than logging roads. Hiking paths are well defined and marked. Camping facilities are small, rustic and few, and their cleanliness is remarkable. Indeed, the natural cleanliness of the entire Park has been but little, if any, impaired by use. To try to describe the beauty of the Park, or its value to the State, is to indulge in understatement; it is necessary to go there to begin to appreciate it.

OTHER MATTERS

The staff of the Attorney General's office now consists of the Deputy Attorney General, nine full-time Assistant Attorneys General, two part-time Assistant Attorneys General, two investigators and three clerks.

The 98th Legislature increased the number and the functions of State bureaus and departments. This increase, in addition to an increase of other business normally handled, has placed a very great burden on this office. Some of the departments and commissions have not received the service to which they have been accustomed. We have more than the usual amount of pending matters and unfinished business. It has been necessary on occasion to authorize the employment of private attorneys. The new duties imposed upon the Maine Port Authority to improve and increase ferry service to the coastal islands, the creation of the Maine School District Commission within the Department of Education under the provisions of the so-called "Sinclair Bill," the creation of the Maine Industrial Building Authority, and the creation of the Bureau of Public Improvements account for the greatest part of the additional new work-load thrust upon us. We have not, however, advocated or requested an increase in the number of Assistants, in the hope that as the new departments become established their operations may become more routine and require less legal assistance. With the advent of a new legislature, however, we are mindful that any increase in the size of activities of State government will almost certainly require an increase in the staff of this office.

Since the last report Mr. Orville T. Ranger has been assigned to the Insurance Department as an Assistant Attorney General on a part-time basis. This does not represent an increase in the size of the staff, as his appointment fills a vacancy created by the death of a former Assistant assigned to the same department on the same basis. He advises the Commissioner and members of his department upon all aspects of the insurance laws, assists in making investigations of complaints of infractions of the insurance laws, assists and advises the Commissioner in departmental hearings and prepares cases and represents the department in the Courts of the State.

Mr. Henry Heselton is assigned to the State Liquor Commission on a part-time basis. He has held this position for more than thirteen years and gained a familiarity with the liquor laws, rules and regulations which enables him to perform the many varied duties of the position on a part-time basis. In his capacity he answers all letters from licensees, vendors of spirituous and vinous liquors, municipal authorities and agencies of other States dealing with liquor problems

of a legal nature. He consults with and advises the Commission upon questions which involve laws, rules and regulations pertaining to liquor. He also prepares cases and represents the Commission in appeals from decisions of municipal officers in connection with liquor licenses and prepares cases and represents the Commission in the various courts of the State. He also attends to the legal aspects of the leasing of buildings for State liquor stores. He consults with and advises the Chief Inspector of the Enforcement Division of the Commission. In addition to the time he is present at the Commission headquarters he is available at his home and his office, a fact which is well known and of which full use is made.

L. Smith Dunnack is the Assistant Attorney General assigned to the State Highway Department and he is employed on a full-time basis. He performs the usual duties of an Assistant Attorney General in advising the Commission, the heads of the various bureaus within the department, and department employees upon legal questions arising in the course of the department's business. He supervises and directs the work of the men who do the title-search work in connection with the acquisition of land for the rights of way needed for highway construction. The federal highway program has resulted in an increasingly greater number of jury trials involving damages for the taking of land by condemnation proceedings. The greater number of jury trials has also resulted in higher awards of damages. For these reasons this Assistant has been authorized to employ local counsel to assist in the trial of these cases. It should be mentioned that the policy of the Federal Government with respect to the settlement of land damage claims is chiefly responsible for the increased jury trials and the resultant greater damage awards. While the detail work of this Assistant, covering normal highway activities, has shown an increase, it is the Federal-State program which is creating the problem of additional work in the many court cases and the other attendant legal problems. As this program has ten more years to go, we can expect no lessening of the legal work of this department.

At the time of the last report Milton L. Bradford was the only Assistant Attorney General assigned to the Maine Employment Security Commission. At that time the court work had become so voluminous that a request had been made for an additional Assistant to aid and relieve him. Since that time Frank A. Farrington has been appointed an Assistant Attorney General and assigned to this Commission. The duties of these two Assistants consist of advising the Commission upon all legal matters pertaining to the Employment Security Law and representing the Commission in court in actions to collect taxes and in prosecuting fraud cases.

Two Assistant Attorneys General are assigned to the Bureau of Taxation. During the biennium Richard A. Foley was appointed an Assistant Attorney General and assigned to this bureau to fill the vacancy created when George A. Wathen was transferred to the main office of the Attorney General. Ralph W. Farris is the senior Assistant assigned to this bureau. He assists the State Tax Assessor in the enforcement of the Inheritance Tax Law, gives advice and renders oral and written opinions to the Assessor and his staff and division heads within the Bureau and attends to a large amount of correspondence with taxpayers and their attorneys in arriving at a satisfactory settlement of disputed taxes and in explaining the technicalities of the law and of procedure. He also prepares and institutes actions at law against delinquent inheritance tax payers and represents

the bureau in appeals taken to the courts from decisions of the State Tax Assessor. In this last category it is interesting to note that six appeals from the decision of the State Tax Assessor, involving the sales tax on poultry, were taken to the Law Court and there argued and that opinions favorable to the State were rendered by the Law Court, so that the taxes involved were determined and collected. The senior Assistant also renders direct assistance to the Attorney General in appearing in court on bills in equity for the dissolution of corporations, and bills in equity for the enforcement of charitable trusts and those for the interpretation of wills where bequests and devises to public charity are involved. The senior Assistant also aids the junior Assistant within the bureau in attending hearings for reconsideration before the State Tax Assessor under the Sales and Use Tax Law and in appearances in Superior Court in the various counties when appeals are taken from the decision of the State Tax Assessor.

Mr. Foley, the junior Assistant, gives written opinions upon request to the State Tax Assessor interpreting the Sales and Use Tax Law and advises the Director of the Sales and Use Tax Division of the Bureau of Taxation with respect to this law. He also attends hearings before the State Tax Assessor for reconsideration of assessments levied under the Sales and Use Tax Law. As will be seen by the following figures, the greater part of his time is occupied by the enforcement of the tax laws and the collection of delinquent taxes, including property, gasoline, use fuel, cigarette, blueberry, fertilizer, milk, potato, sardine, sweet corn, and other miscellaneous taxes in addition to the sales and use tax. During the two fiscal years, 1956-57 and 1957-58, 756 cases valued at $183,120.56 were referred to Mr. Foley for collection. Court action was taken in 515 of these cases. Of the cases referred for collection, 612 have been closed and $163,447.64 collected.

George C. West and Frank W. Davis are the two Assistant Attorneys General assigned to the Department of Health and Welfare. During the fiscal years 1956-57 and 1957-58 they have collected from estates for money paid for Old Age assistance, aid to the blind and aid to the disabled, a total of $286,254.61; they have collected from fathers for aid to dependent children the total of $324,-479.45; from fathers for child welfare the total of $57,346.50, or a grand total of $668,080.56. To this should be added the sum of $1,739.82 recovered in accident cases in the child welfare category. It is apparent from these facts and figures that the greater part of the time of these two Assistants is occupied by the duties necessary to enforce the collection of these various sums of money. The senior Assistant, Mr. West, however, has the further duty of being legal adviser to the department and advises the Commissioner and the many bureau heads of this large department in respect to the various phases of the many laws governing matters with which the department is concerned.

It should be mentioned that, of the total amount collected from fathers in the categories of aid to dependent children and child welfare, the amount of $58,412.82 for the fiscal year 1956-57 and $80,787.78 for the fiscal year 1957-58 was collected under the Uniform Reciprocal Support Act. The amount of money collected under this act has increased each year since it was enacted and it will continue to increase as more States and Territories enact the law, more use is made of it, and greater reciprocity is attained through the cooperation of other States. This State should take advantage of every opportunity to participate in assisting to increase the use of this law.

Neal A. Donahue is an Assistant Attorney General who has his headquarters in the main office of the Attorney General and whose chief duties consist of handling cases arising under the Workmen's Compensation Act. The State is a self-insurer under the act, and Mr. Donahue is thus placed in the unique and difficult position of having to represent both the State and the employee before the Industrial Accident Commission. During the past two years benefits have been increased under the Workmen's Compensation Act, and doctors' and hospital bills have shown a steady increase. The overall expense to the State during this time, however, has not noticeably increased, due in large part to the fact that serious cases of prolonged disability have been fewer and minor cases have increased in number. The greatest number of cases arising under this Act occur among employees of the State Highway Commission, which has a special budget allocation for the payment of claims under the Act. Several other departments have had serious drains upon their budgets for this purpose and would be less embarrassed if they had a provision for such expense.

During the two years, recovery has been made in third-party liability cases, where the State was liable and made payment of compensation and medical expenses, but later recovered from other parties, who caused the injuries, the amount of $11,858.59.

Mr. Donahue also does research work on title to lands which the State wishes to acquire, or in which it has, or is alleged to have, an interest. He has been active in the acquisition of land by the State for the Department of Inland Fisheries and Game, the Department of Education, the Adjutant General's Department, the Bureau of Public Improvements, and others. This work has resulted in the saving of many dollars to the State over the practice of having the work done on a contractual basis by attorneys in private practice.

One Assistant Attorney General is employed on a full-time basis, but is not especially assigned full time to any one department. This position was filled until the early part of 1958 by Roger A. Putnam, who left to engage in private practice. His place was taken by George A. Wathen, who was transferred from the Bureau of Taxation.

The activities of the Assistant in this position are many and varied. It is this position that has borne the brunt of the increased work created by the establishment of the Maine School District Commission and the Maine Industrial Building Authority. This Assistant provides legal services for the Department of Education, providing advice and legal services of a general nature to the Commissioner and the members of the department. Within the same department he furnishes legal services to the Maine School Building Authority, and the recent creation of the Maine School District Commission has tremendously increased the work given to this department, because of the many problems arising from the creation and establishment of the new Commission. The School District Commission is still in the process of becoming established and the work load it has created is not likely to decrease within the foreseeable future.

A vast amount of work was devoted to the establishment of the Maine Industrial Building Authority and, after it was established, further work was created when the legality of loans under the law was challenged and had to be litigated (successfully for the State) before the Supreme Judicial Court.

Because of the greatly increased work created by these new agencies it has not been possible to give to the Maine Real Estate Commission, the Board of Registration of Dentists, the Maine Milk Commission, and the numerous other State boards and commissions to which counsel is not specifically assigned, all the service to which they have in the past been accustomed. It is to be hoped that they may again shortly be able to obtain from this office the service they would like, and to which they are accustomed, without the addition of other members to our staff.

The Assistant in this position has continued to represent this office in post-conviction procedures. This work has also increased in volume. From December 1, 1956 to December 1, 1957, there were filed in State Courts 14 petitions for habeas corpus, 1 writ of certiorari, 8 writs of error and 8 writs of error coram nobis; in the United States District Court 6 petitions for habeas corpus and in the United States Supreme Court 1 request for leave to file a petition for habeas corpus. From December 1, 1957 to December 1, 1958 there were filed in State Courts 23 petitions for habeas corpus, 4 writs of error and 15 writs of error coram nobis; and in the United States District Court 2 petitions for habeas corpus.

The Assistant in this position also represented the State in Court in 4 appeals from decisions of the Secretary of State, 1 disbarment proceeding, 1 action in regard to service of commitment papers, 2 actions for declaratory judgment, 1 petition for discharge from the Augusta State Hospital, and 1 petition for extraordinary relief.

Of these matters, one of the actions for declaratory judgment was the case of the Maine Industrial Building Authority, before mentioned, and the other was an action instituted by United Interchange, Inc. This company is one which solicits advertisements for the sale of real estate by the use of various representations. In the action brought by the company, the State statute requiring such companies to obtain licenses from the Maine Real Estate Commission was held by our Court to be unconstitutional.

Of the post-conviction procedures, that of Paul Dwyer should be mentioned. The hearing occupied two weeks and cost this department more money in that period of time than had been allotted in the so-called "all other" category for operation for an entire quarter. His petition was denied, the decision was appealed, and the Law Court sustained the appeal and sent the petition back for a new hearing. The matter is now pending on the docket of the Superior Court for Oxford County, where it is in order for hearing at the February, 1959 term.

James Glynn Frost is the Deputy Attorney General. He has occupied this position for more than seven years and has inspired the confidence of all those in State government who have required legal services in that time with his competence and ability. In the absence of the Attorney General the Deputy performs all the duties required of the Attorney General and in this respect he has acted as advisor to County Attorneys, law enforcement officers, and all officials of State government to whom counsel is not especially assigned. His duties are so many and of such scope that it is not possible to cover them fully in a report of this nature. However, among the many things done in the ordinary course of office business he has approved 992 certificates of organization of corporations, 19 corporate mergers, and many changes of purposes; issued 338 excuses to corporations; examined for sufficiency extradition papers, including

both cases where Maine was the asylum State (12 cases) and where Maine was the demanding State (20 cases); examined approximately 1573 medical examiner's reports on dead bodies; and approved construction project contracts for the Bureau of Public Improvements, more than 130 of which, involving over twelve million six hundred thousand dollars, are presently wholly or partially completed.

Philip W. Wheeler and Walter C. Ripley are the investigators for the department. Their work is in large part outlined in the report of homicides and investigations set forth earlier in this report.

Helen Cochrane, Olive E. Fessenden and Phyllis A. Matthews are the clerks for the department. During the two years they have rendered the exceptionally competent services we have come to regard as normal. Worthy of special mention is the expansion and improvement by them of our filing system and the collection and compilation of our records in one place made possible by our enlarged office quarters. Also worth noting is the completion by Miss Cochrane of the index to the Private and Special Laws from 1944 to date.

Respectfully submitted,

FRANK F. HARDING
Attorney General

OPINIONS

January 2, 1957

To Labor and Industry

Re: Dairies

This is in response to your memo referring to our opinion relative to whether or not a farm dairy was included within the phrase, "Manufacturing and mechanical establishment" category of Section 23 of Chapter 30, R. S. 1954.

In that memo we advised that we were of the opinion that such dairies were not within the term, "manufacturing establishment," but did not indicate whether or not such dairies were within the term "mechanical establishment." You now inquire if farm dairies are included within the latter term.

Answer. No.

The inclusion of the word "dairy" in Sections 30 and 32 of Chapter 30, in addition to the words, "manufacturing, mechanical or mercantile establishments," is a clear indication that the legislature believed that dairies were not included within the terms, "Manufacturing and mechanical establishments." Such inclusion is an additional reason for believing that dairies are not included within the terms as distinguished in our prior opinions that dairies are not mechanical establishments, because milk is both the orginal product and the final product of the process and no new product results from the treatment of the milk.

JAMES GLYNN FROST
Deputy Attorney General

January 7, 1957

To Gerald M. Rosen, Secretary, Chiropody Association

Re: Prescription of Narcotics

. . . You state that it is the desire of your Association that chiropodists may legally prescribe narcotics.

You ask, if the word "external" were deleted from Section 10 of the present law, whether it would then be legal for chiropodists to prescribe narcotics, provided, of course, that the individual had a federal narcotic license, or whether it would be necessary to include a definite statement in your law to the effect that narcotics could be prescribed.

We are of the opinion that it would be necessary to have an express statement in the law before you could properly prescribe narcotics in carrying on the practice of podiatry.

We would also draw your attention to Section 39 of Chapter 68 of the Revised Statutes of 1954, which section deals with the professional use of narcotic drugs and expressly states those persons who may prescribe and dispense narcotic drugs. We would suggest that this section be considered for amendment along with an express statement in the chapter on podiatrists.

JAMES GLYNN FROST
Deputy Attorney General

February 5, 1957

To Roland H. Cobb, Commissioner of Inland Fisheries and Game

Re: Roads in Areas of Active Lumbering Operations

You state that officers of the Eastern Pulpwood Company and Eastern Corporation have inquired if there is some way that their roads could be marked, where they had active lumbering operations, which would request the public to stay out, and if our wardens could give assistance in keeping the active area closed.

At the same time they would publicize the fact that thousands of acres with no active lumbering operations were being kept open for the benefit of hunters.

You state that the point that bothers you is, "Do we have authority under the present law for Game Wardens to enforce what seems to me the duty of Deputy Sheriffs in civil cases, rather than Fish and Game cases?"

Without inquiring into the legal principles of your problem, we wonder if the situation is not such that we might be able to cooperate with the officers of the above mentioned corporations. It may be that wardens, in their normal duties, could advise the corporations of trespasses and otherwise be helpful to the extent that the corporations reciprocate and keep the inactive portions of their land open for hunting.

JAMES GLYNN FROST
Deputy Attorney General

February 5, 1957

To Kermit S. Nickerson, Deputy Commissioner of Education

Re: Children of Military Personnel

We have your recent memo in which you state that a question has been raised as to whether the State laws would permit sending the children of military personnel, living on Federal property in one town, to schools in another town.

You state that the Federal Government will pay the cost under Public Law 874, but that Federal officials will approve the expense only if State laws permit sending the children to school in another town.

We would direct your attention to Section 163 of Chapter 41, R. S., which reads as follows:

> "Special arrangements may be made to provide elementary school privileges in cooperation with the United States Government for a child or children residing with a parent or legal guardian at any light station, fog warning station, lifesaving station or other place within a United States government reservation under such rules and regulations as may be made by the commissioner and approved by the governor and council."

In view of the above quoted section of law, it is our opinion that there is ample authority to send the children of military personnel living on Federal property to elementary schools when so approved by the Commissioner and the Governor and Council, in conformity with the provisions of Section 163.

It would seem that children attending secondary schools are not provided for in Section 163, or to our knowledge in any other section. With respect to such secondary school children we would suggest that legislation would be appropriate.

JAMES GLYNN FROST
Deputy Attorney General

February 7, 1957

To Doris M. St. Pierre, Secretary of Real Estate Commission

Re: Change of Address

We have your memo of February 4, 1957, with regard to the change of address where licensed resident brokers are returning their licenses with the request to change the address to other States.

As a condition to licensing, Section 7 of your law requires that every *resident* real estate broker shall maintain a place of business in this State. Notice in writing shall be given to the Commission by each licensee of every change of principal business location whereupon the Commission shall issue a new license for the unexpired portion without charge. A change of business location without notification shall automatically cancel the license theretofore issued.

If the resident broker is attempting to change his principal place of business from a point within this state to a point without this state, he has automatically forfeited his right to a resident license for he no longer maintains a place of business in this state.

Section 10 provides that a non-resident of this state may become a real estate broker or salesman by complying with all the conditions of this section and this chapter. It further provides that a non-resident applicant, if a broker, shall maintain an active place of business in the state in which he is located. You will note that this section pre-supposes two classes; one of which would be a non-resident who was a real estate broker in his home state, the other a non-resident who would not be a real estate broker in his home state. If he is a broker in his home state, the Commission may license him as provided in Section 10 under the so-called "comity" clause. If he is not, then he must take the examination as provided in your law and proceed accordingly.

If a resident licensee does not maintain a place of business in this state, his license should be revoked or canceled and the attempted change of address refused. A resident cannot become a non-resident until he leaves this state. Once he becomes a non-resident, he must then act in accordance with Section 10 as a non-resident.

You have stated in your memo that it is the purpose of these applicants to keep their Maine license active with the idea that they could avoid taking another examination if the individual returns to the state.

In view of the presence of the legislature, it might be wise for the Commission to consider whether or not it would be appropriate to ask the legislature to pass a law which would allow a real estate broker or salesman to place his license upon an inactive list or status during which time he could transact no real estate business and such license could be reinstated upon application and payment of

certain fees. This would cover the problem at hand and, as I see it, fairly treat both the Commission and the broker or salesman.

ROGER A. PUTNAM
Assistant Attorney General

February 7, 1957

To Doris M. St. Pierre, Secretary of Real Estate Commission

Re: Status of a Co-partnership

We have your memo of February 6, 1957, with regard to the license issued to a partnership known as the "Maine Camp Service" which consisted of two people at the time of issuance. One of the partners is now deceased. The surviving partner wishes to keep "Maine Camp Service" licensed as a partnership with "only a vague possibility that the wife of the deceased member would be a silent partner".

The law is clear that upon the death of one partner, the partnership is dissolved. *Putnam v. Parker,* 55 Me. 235 at 236. Another partnership made up of the survivors of the old partnership or their heirs or assigns would be a new and distinct partnership. Under such a situation a new license would be required and for an analogous situation with regard to motor vehicle registration and dissolution of partnership, see *Gass v. Robie,* 138 Me. 348, holding that a surviving partner had to re-register the automobiles formerly registered in the name of the partnership even though he had purchased the interest of his former partner and continued the partnership under the same firm name.

ROGER A. PUTNAM
Assistant Attorney General

February 12, 1957

To Edmund S. Muskie, Governor of Maine

Re: Governor's Powers when Local Officials Fail to Act

. . . You state that you have an inquiry from a citizen relative to the failure of the County Commissioners to establish a local organization for Civil Defense and Public Safety and their failure to appoint a director of such organization.

Section 9 of Chapter 12 of the Revised Statutes of 1954 requires:

> "Each political subdivision of this state is authorized to establish and shall establish a local organization for Civil Defense and Public Safety in accordance with the state Civil Defense and Public Safety plan and program. Each local organization for Civil Defense and Public Safety shall have a director who shall be appointed by the executive officer or governing body of the political subdivision."

You ask what provisions are made in the act for enforcement of the foregoing and what authority and responsibility the Governor may have in connection with the same. Section 19-A appears to be the only section relating to the penalty in the event an officer of a political subdivision neglects any duty lawfully required of him under the provisions of Chapter 12. This section provides for a fine of $20 for every such neglect.

Bills were presented to the 1955 Legislature which would have materially strengthened the position of the Governor in the event of neglect on the part of officers in political subdivisions. One law actually contemplated the removal from office of such officer who wilfully failed to fulfil his duties under the statute or under a proper order or regulation. The Legislature, however, refused to enact such legislation and in its place provided for the $20 fine above mentioned.

Under the present state of law relating to Civil Defense and Public Safety, it appears that the Legislature expects all persons to participate voluntarily, and, lacking such voluntary participation, there is little that can be done to strengthen the organization. It is difficult to define the responsibilities of the Governor when so little can be done to remedy the situation where local offenders fail to do their part. The failure of the Legislature to provide teeth by which the provisions of the act could be enforced would seem to indicate that your personal responsibility in the matter is quite limited by legislative intent. Perhaps this legislative session will see some methods enacted whereby the law can be enforced.

JAMES GLYNN FROST
Deputy Attorney General

March 12, 1957

To Scott K. Higgins, Director of Aeronautics

Re: State Registration of Civil Air Patrol Aircraft

We acknowledge receipt of your memo inquring if the Civil Air Patrol is exempt from paying State registration fees for aircraft located in Maine and operated by the Civil Air Patrol.

We have examined the charter of the Civil Air Patrol passed by Congress on July 1, 1946, Public Law 476, and find it to be substantially the type of corporation that would be organized under our own non-stock corporation chapter of laws. It is a non-profit organization.

While the corporation is probably exempt from excise taxes, we do not find that it is exempt from payment of registration fees.

Provisions relating to registration of aircraft are found in Chapter 24, Section 13, R. S. 1954. Subsection I reads in part:

"No civil aircraft shall be flown in the state unless such aircraft and its pilot are properly certificated under federal law, nor unless they have a valid certificate of registration as hereinafter provided. . ."

Subsection IV contains the exemptions:

"A. an aircraft owned by and used exclusively in the service of any government or any political subdivision thereof, including the government of the United States, any state, territory or possession of the United States, any state, territory or possession of the United States, or the District of Columbia, which is not engaged in carrying persons or property for commercial purposes;

"B. an aircraft registered under the laws of a foreign country, and not engaged in air commerce within the state;

"C. an aircraft not engaged in air commerce within the state which is owned by a non-resident and registered in another state, or otherwise qualified there;

"D. an aircraft engaged principally in commercial flying constituting an act of interstate or foreign commerce;"

Paragraph C. of subsection IV appears to be the only provision under which the corporation could possibly be exempt. So far as we can ascertain from the material supplied to us, on which the Civil Air Patrol bases its request for exemption from registration fees, the planes in question are not registered in another State by a non-resident, nor are they otherwise qualified in another State.

We therefore are of the opinion that the Civil Air Patrol does not fall within any provision exempting its planes from paying registration fees.

JAMES GLYNN FROST
Deputy Attorney General

March 18, 1957

To A. S. Noyes, Bank Commissioner

Re: Mortgages on out-of-State Property

We have your memo in which you make the following request:

"Will you kindly rule as to whether or not mortgage companies outside of Maine, selling or offering for sale loans secured by real estate mortgages on property outside of Maine, should be required to register with this department (Banks and Banking) as dealers in securities?"

It appears that some banking institutions and the Maine State Retirement System from time to time purchase out-of-state guaranteed mortgages. Such mortgages are purchased from companies domiciled outside the State of Maine. The payments of principal and interest due to the purchasers are also collected for a fee by the mortgage companies and remitted to the owners of the mortgage loans on an agreed basis.

Such mortgages are securities within the meaning of the Act:

> "The term 'securities' shall include . . . notes secured by mortgages of real estate in this state. . . . The term 'securities' shall further include documents of title to and certificates of interest in real estate, including cemetery lots, and personal estate when the sale and purchase thereof is accompanied by or connected in any manner with any contract, agreement or conditions, other than a policy of title insurance issued by a company authorized to do a title insurance business in this state, under the terms of which the purchaser is insured, guaranteed or agreed to be protected against financial loss, or is promised financial gain."

Section 228 of Chapter 59 defines the manner of solicitation for sale, offer for sale, or invitation for offers which, if carried on in this State, would require registration as a dealer in securities:

> "No dealer in securities shall in this state, by direct solicitation or through agents or salesmen, or by letter, circular or advertising, sell, offer for sale or invite offers for or inquiries about securities, unless registered as a dealer under the provisions of the following sections. No sales-

man or agent shall in this state, in behalf of any dealer, sell, offer for sale or invite offers for or inquiries about securities, unless registered as a salesman or agent of such dealer under the provisions of the following sections."

It is our opinion that such mortgage companies must register with your department as dealers in securities, if such sale or offering for sale is carried on in a manner embraced by the terms of Section 228, next above quoted.

JAMES GLYNN FROST
Deputy Attorney General

March 18, 1957

To David H. Stevens, Chairman, State Highway Commission

Re: Limitation of Access Rights

From time to time the problem of the liability for damages claimed because of loss of or limitation of access rights will arise. The only recognition of such a right in our statutes is in Section 8, Chapter 22:

"When an existing highway has been designated as, or included within, a controlled access highway by said commission, *existing easements* of access may be so extinguished by purchase or by taking . . ."

This language was taken from another State's statute that was the model for our new controlled access law. Note that it says, "existing easements". Obviously this does not create any new easement.

I know of no Maine case that has held that one can obtain a prescriptive right against the State. The right of reasonable access to one's property is, of course, a vested right, but this does not mean the right to any particular access or the right to an unlimited number of places of access.

The overwhelming weight of authority has held that diversion of traffic is not legal damage. The State has the right to divert traffic for highway purposes without any liability to a by-passed abuttor.

Under the police power, which justifies control of traffic for the good of all, certain limitations of access will become necessary frequently. Under the Constitution, there is no compensation due for losses occasioned by the proper use of this power. There are numberless cases where local ordinances have caused heavy damages to individuals, but damages have not been allowed. The individual must suffer for the common good.

It might be argued in the (Frederick) French case that there is damage caused by limited of access. Since neither of the streets abutting this property is part of a controlled access highway, Section 8 is not involved. Since there was no taking of land or change in grade, there is no statutory damage. If it is argued that the use of the ways is such that it damages the property, and, therefore, is a taking of its value, and hence a legal taking, it will raise an issue that has not been decided by our courts. Obviously, the Joint Board should not attempt to resolve this question.

It is my opinion that under the police power vested in the State, there is no liability, and I advise that if this issue is raised, the Joint Board should refuse to take jurisdiction, and let the point of law go forward.

L. SMITH DUNNACK
Assistant Attorney General

March 20, 1957

To Honorable Arthur Charles, Senate Chamber

Re: Business Hours of Barber Shops

This is in response to your oral request for an opinion on L. D. 802. In brief, this bill provides the mechanism whereby the barber shops in municipalities may be regulated as to the days and hours which they may remain open for business.

We herewith quote comment found in Volume 7 of American Jurisprudence, page 617, relating to the fixing of closing hours of barber shops:

> "The majority of the cases which have considered the validity of ordinances containing provisions requiring barber shops to be closed at a certain fixed time on secular days have reached the conclusion that such provisions have no reasonable relation to the admittedly proper exercise of the police power in regulating the profession of barbering. Any such regulations depend for their validity upon the nature of the business sought to be regulated; that is, the nature of the business must be such that the public health, morals, safety, or general welfare is, or might be, affected by such business being permitted to remain open or continue after certain hours. With regard to barber shops, such a regulation bears no reasonable relation to the public health or general welfare; nor can it be supported on the theory that it will aid the enforcement of proper inspection regulations."

It appears to be the essence of the cases cited in the above quoted comment that to pick out barber shops as the one lawful business the closing hours of which are to be regulated is discriminatory. The Legislature may enact discriminatory legislation on particular classes under the police powers if in fact the publc health and welfare, morals, or safety are affected by such class. However, as quoted above, the regulating of the hours of the business of barbering has been found not to affect the public health and welfare, morals, and safety.

It is our opinion that in all probability such a statute would meet with the same objection as similar statutes have met in other States.

JAMES GLYNN FROST
Deputy Attorney General

March 27, 1957

To Ernest H. Johnson, State Tax Assessor

Re: Excise Tax on Foreign Cars

I received your memo of March 25, 1957, together with attached memorandum dated March 1, 1956 and furnished to excise tax collectors in Maine,

which sets forth the position which your office took on the question of the taxing of motor vehicles of foreign manufacture and imported motor vehicles on that date, and which has been followed since. Under that memorandum "the 'maker's list price' of a foreign car for the purpose of motor vehicle excising includes custom duties and transportation to the port of entry," and said memo provides a price list on 1955 and 1956 Volkswagens, supplied by Hanson-MacPhee Engineering Company, New England distributors.

You state that a question has been raised as to whether the excise tax with respect to foreign motor vehicles should be based on the retail price at the port of entry or at the retail price at point of manufacture, which would not include duty or transportation charges to this country.

You wish the advice of the Attorney General as to whether your office is correct in taking the position noted above with respect to excise tax on a foreign motor vehicle.

I have discussed your memo and the attached memo with the Attorney General, and we are of the opinion that the position you have taken on this question is the only practicable one for a uniform "maker's list price" on foreign cars for the guidance of the many excise tax collectors of this State, and we confirm the position your office has taken on this question.

RALPH W. FARRIS
Assistant Attorney General

March 29, 1957

To Allan L. Robbins, Warden, Maine State Prison

Re: Sentence for Escape from County Jail

We have your memo stating that you will appreciate our opinion on whether an inmate's sentence for escape from a county jail should run concurrently with other sentences received, if the mittimus does not specify that it shall be served consecutively.

It is our opinion that a sentence imposed upon one for escape from a county jail does not run concurrently with other sentences received by the same person.

The absence of direction on the mittimus as to the manner of service of sentence, that is, whether such sentence should be consecutive or concurrent with other sentences imposed, has no effect upon the service of a sentence for the escape of one lawfully detained in any jail or other place of confinement (except the State Prison). The sentence imposed for such escape must be served consecutively with relation to sentences for other offenses.

Chapter 135, Section 28, R. S. 1954, reads:

> "Whoever, being lawfully detained in any jail or other place of confinement, except the state prison, breaks or escapes therefrom, or attempts to do so, shall be punished by imprisonment for not more than 7 years; the sentence to such imprisonment shall not be concurrent with any other sentence then being served or thereafter to be imposed upon such escapee."

The provisions of Section 28 are of so direct and positive a nature that the statute must be considered self-executing, with the result that consecutive

service of the sentence is mandatory, even though it is not so stated on the mittimus.

JAMES GLYNN FROST
Deputy Attorney General

April 1, 1957

To Norman H. Nickerson, M. D., Medical Examiner

Re: Death on a Railroad

. . . You inquire if a medical examiner should be called on any case where a man is killed by a train or accidentally killed on a railroad.

Your question arises because of an information bulletin issued by the Bangor and Aroostook Railroad Company, dated November 22, 1946, which bulletin was shown to you at the time you examined the dead body of a person killed by a train.

In brief, the aforesaid bulletin advises employees of the B & A that since 1915 investigation of cases of accidental death on a railroad rests with the Public Utilities Commission and not with medical examiners.

The bulletin states:

"3. Whenever a person is accidentally killed on the railroad, employes should immediately notify the Superintendent and the head of their Department. The body should be suitably cared for by removing it to a suitable building or car, properly covering and placing it in care of a responsible employe, town officer or undertaker, or it may be turned over to relatives or friends. Trains need not be held after proper arrangements for caring for the body have been made and names of all witnesses procured. All of the facts, of course, should be reported to the proper officers."

Our examination of the law relating to dead bodies convinces us that the Bangor and Aroostook bulletin does not accurately express the law as it exists today; and because your question concerns a vital problem in the field of legal medicine we believe an examination of the laws on the subject is required.

Chapter 332, Section 4, Public Laws of 1915, stated:

> "It shall be the duty of anyone finding a body of any person who may be supposed to have come to his death by violence or unlawful act to immediately notify one of the municipal officers . . ."

On September 9, 1915, the then Attorney General advised the Public Utilities Commission that it was not necessary "for a public utility in a case where death is clearly accidental and there is no reason to suppose that the person came to his death by any unlawful act, to leave the body where it is found and call a medical examiner . . ."

An opinon of such substance was consistent with the law of the times when written. See *State v. Bellows*, 62 Ohio 307 (1900), where a death "caused by violence," in a statute substantially the same as ours of 1915, was defined as

> "death caused by unlawful means, such as usually call for the punishment of those who employ them."

The legislative history of amendments to our laws relative to medical examiners reveals, however, a change in the philosophy underlying the purpose of such laws.

In 1917, the law referred to was amended as follows (Chapter 252. Sec. 2, P. L. 1917):

> "Whoever finds the body of any person who may be supposed to have come to his death by violence or unlawful act, *of some person or persons, the committing of which act is punishable in accordance with sections one, two and three of chapter one hundred twenty of the revised statutes,* shall immediately notify one of the municipal officers . . ."

The sections of the Revised Statutes referred to dealt with the crimes of murder, manslaughter, and carelessly shooting a human being while engaged in hunting.

The words above italicized, except as changed to conform with the chapter number of the 1930 revision, were deleted by Chapter 241, Section 2, P. L. 1939, so that the statute again read substantially as it did in 1915.

In 1947, Chapter 190, Section 2, Public Laws, the statute was amended in the following manner (italicized words new):

> "Whoever finds the body of any person who may be supposed to have come to his death by *criminal violence, or by suicide, or in any suspicious or unusual manner,* shall immediately notify one of the municipal officers . . ."

At this point it can be seen that, though the statute had been broadened to include examination of dead bodies not hitherto examined, the word "violence" was limited to criminal violence. The intent, however, was not to limit examination to deaths caused by criminal violence or unlawful act, but also suspicious or unusual deaths.

In 1955, the legislature amended the statute in such a manner that its intent is quite clear. The word "criminal" (defining the type of violence) was eliminated and examination of bodies otherwise extended as follows (Chapter 326, P. R. 1955):

> "Whoever finds the body of any person who is supposed to have come to his death by violence or by the action of chemical, thermal or electrical agents or following abortion, or suddenly when not disabled by recognized disease or who has come to his death unexplained or unattended, shall immediately notify one of the municipal officers . . ."

The deliberate striking by the legislature of the adjective "criminal," defining the type of violence to be investigated, shows a clear intent that a death from violence should be investigated by a medical examiner, even though such death is not supposed to have been caused by a criminal act.

Such amendment reveals a realization on the part of the legislature of the great strides that have been made in the medico-legal field, and a determination that all possible steps should be taken to uncover criminal acts which result in death.

We are of the opinion that a death resulting from a railroad accident is a "violent" death, and, in view of the above discussion, we are of the further opinion that a medical examiner should be notified of such death.

FRANK F. HARDING
Attorney General

April 2, 1957

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: Contributions on salary of position improperly obtained

. . . You state that you are anxious to close your books on the account of one Martin Daniel Godgart.

It appears that Mr. Godgart was a school teacher in North Haven and was charged with false pretenses in obtaining his teacher's certificate. Actually, the person assumed the name of Martin Daniel Godgart, thereby acquiring the certificate from the Department of Education.

Chapter 41, Section 187, of the Revised Statutes provides that whoever teaches in a public school without first obtaining a state teacher's certificate is barred from receiving any pay therefor and shall forfeit to the town in which he so taught such amounts as he shall have received for wages for such teaching.

As the imposter has left the State, leaving no property, with the result that personal jurisdiction cannot be obtained over him for the purpose of obtaining the forfeiture, we would advise that it is proper for you to dispose of the funds in your possession, which were contributed by the imposter, to the Town of North Haven.

JAMES GLYNN FROST
Deputy Attorney General

April 2, 1957

To Kermit S. Nickerson, Deputy Commissioner of Education

Re: Bible Reading in the Public Schools

. . . You state that the State Board of Character Education and Accredited Bible Study is preparing a bulletin of Suggested Bible Readings for Public Schools and with respect to the preparation of this bulletin you ask for an interpretation of Section 145, Chapter 41, R. S. 1954.

That portion of Section 145 pertinent to your question reads as follows:

> ". . . there shall be, in all the public schools of the state, daily or at suitable intervals, readings from the scriptures with special emphasis upon the Ten Commandments, the Psalms of David, the Proverbs of Solomon, the Sermon on the Mount and the Lord's Prayer . . ."

You ask, "Does this section require that in the classrooms of the public schools during the school year there shall be read the Sermon on the Mount and the Lord's Prayer?"

In our opinion the above quoted section of law is almost devoid of the necessity of interpretation, the words requiring not only that the Sermon on the Mount and the Lord's Prayer shall be read in public schools, but that they shall be read more frequently than other portions of the scriptures.

JAMES GLYNN FROST
Deputy Attorney General

April 5, 1957

To Honorable Edmund S. Muskie, Governor of Maine

Re: Penobscot Indians

We are returning herewith the petition of certain members of the Penobscot Tribe of Indians, which petition requests the Governor and Council to make available $4000 from the annual interest of the Penobscot Indian Trust Fund for the purpose of legal counsel for research pertaining to the tribal rights of the Penobscots.

You inquire if either the Department of Health and Welfare or the Governor and Council have the legal authority to make such funds available for the above stated purpose.

We are of the opinion that the purpose for which the funds are requested is not a proper purpose for which to spend such funds from the Indian Trust Funds:

Section 334 of Chapter 25 of the Revised Statutes of 1954 sets forth the procedure under which moneys may be spent from the Indian Trust Funds:

> "The department, subject to the approval of the governor and council, may expend for the benefit of either Indian tribe, any portion of the funds of that tribe; provided, however, that the expenditure will not decrease the principal of the fund to such an extent as to prevent compliance with any existing provisions of statute, and provided further, that the tribe whose funds are to be used shall consent to the expenditure at a meeting duly called for the purpose."

However, we draw your attention to the fact that general supervision over the Indian Tribes is vested in the Department of Health and Welfare and that questions relative to tribal rights come within its jurisdiction. It would, therefore, be the duty of the Attorney General to give opinions and advice to that department concerning such tribal rights.

Inasmuch as the duty upon the Attorney General is a statutory duty, we are of the opinion that the employment of private counsel for the purpose would not be proper.

Nothing herein stated would prevent the Indians from employing private counsel and paying such counsel from their own private funds.

JAMES GLYNN FROST
Deputy Attorney General

April 10, 1957

To Honorable Arthur N. Gosline

Re: Grove Street

It was indicated to us that a portion of Grove Street being discontinued by the City of Augusta so that the new State Office Building might be erected upon it, a new street on land acquired by the State might be allowed to be accepted by the City in its stead.

The question was raised whether Grove Street at that point was owned by the City of Augusta and the City Solicitor engaged to make search to see what form of title the City had.

His search indicated that Grove Street was an old county way, and there was no evidence that it had ever been accepted by the City of Augusta or that the City had purchased any land there.

It not having been accepted, it would seem that its discontinuance was hardly necessary, and the circumstances would indicate that the City had no vested rights there which could be used as a consideration in exchange for the other area.

Under those circumstances it may appear that the State would be under no obligation to allow the new area to become a city street unless that should appear to be desirable.

NEAL A. DONAHUE
Assistant Attorney General

April 18, 1957

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

Re: "Civilian Employees" of the Adjutant General

We have your memo in which you inquire if certain "Federal" employees in the Department of the Adjutant General are eligible to participate in the Maine State Retirement System.

The "Federal" employees concerning whom you make inquiry are the civilian employees of the Maine National Guard who are employed pursuant to Section 90 of the National Defense Act of June 3, 1916 (32 U.S.C., sec. 42).

The Maine State Retirement System was inaugurated primarily for the benefit of State employees, Chapter 63-A, R. S., 1954, as amended. Section 2 of the Act provides:

> "A Retirement System, as herein established, shall be placed under the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this chapter for employees of this State. The Retirement System, so created, shall be considered to have been established July 1, 1947 for employees employed for the first time thereafter and for all employees who were eligible for the provisions of Sections 212 to 241, inclusive, of chapter 37 of the revised statutes of 1944; July 1, 1942 for all employees who were eligible for the provisions of chapter 60 of the revised statutes of 1944; and for all other employees the date on which contributions were first made by them to any retirement system supported in whole or in part by the State. It shall have the powers and privileges of a corporation and shall be known as the 'Maine State Retirement System,' and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held in trust for the purpose for which received."

The word "employee" is defined in Section 1 of Chapter 63-A:

> " 'Employee' shall mean any regular classified or unclassified officer or employee in a department, including teachers in the state teachers' colleges, normal schools and Madawaska training school, and for the purposes of this chapter, teachers in the public schools, but shall not in-

clude any member of the State Legislature or the Council or any Judge of the Superior Court or Supreme Judicial Court who is now or may be later entitled to retirement benefits under the provisions of section 5 of chapter 103 and section 3 of chapter 106, nor shall it include any member of the State Police who is now entitled to retirement benefits under the provisions of sections 22 and 23 of chapter 15. Persons serving during any probationary period required under the Maine State Personnel Law and rules of the State Personnel Board shall be deemed regular employees for the purposes of this definition. In all cases of doubt, the Board of Trustees shall determine whether any person is an employee as defined in this chapter."

By express statutory enactment, coverage under the Act was extended to employees of any county, city, town, water district, public library corporation or any other quasi-municipal corporation of the State, or of the Maine Municipal Association; Section 17, Chapter 63-A.

In order to determine that civilian employees of the National Guard who are employed pursuant to Section 90 of the National Defence Act of June 3, 1916 (hereinafter referred to as "civilian employees") are eligible to participate in the Maine State Retirement System, it is necessary to identify that group as being "employees" within the terms of the Maine State Retirement System Act.

Clearly, "civilian employees" are not employees of the bodies set forth in Section 17, *supra.*

Nor are they embraced within the term "Employee," as defined in Section 1, Chapter 63-A, unless they are included in either of the categories of "regular classified or unclassified officer or employee . . ."

To determine whether "civilian employees" are either regular classified or unclassified employee(s)", we must turn to the Personnel Law, Chapter 63, R. S. 1954.

Section 11 of Chapter 63 sets forth specifically the officers and employees who comprise the unclassified service, and, while officers and enlisted men in the National Guard and Naval Militia are included as unclassified employees, civilian employees are not so included.

Turning to classified employees, we find that group quite clearly defined in Section 6 of Chapter 63-A:

"The classified service shall consist of all persons holding offices and employments now existing or hereafter created in the state service, except persons who are holding or shall hold offices and employments exempted by the provisions of section 11.

"Appointments to and promotions in the classified service shall be made according to merit and fitness, from eligible lists prepared upon the basis of examinations, which so far as practicable shall be competitive. No person shall be appointed, transferred, or reduced as an officer, clerk or employee or laborer in the classified service in any manner or by any means other than those prescribed in this chapter and in the rules of the board made in pursuance to this chapter.

"The classified service shall be separated into the following divisions:

I. Competitive,
II. Noncompetitive,
III. Labor,

in accordance with rules and regulations prescribed by the board."

Examining the statutes further, we find that classified employees are employed as the result of standing on an eligible register, achieved usually by competitive examination given by the Personnel Board (Section 12). Their duties and responsibilities are ascertained by the Director of Personnel (Section 13); compensation is paid according to a compensation plan adopted by the Personnel Board; original appointment, promotion, transfer, reinstatement or demotion is accomplished in pursuance of rules and regulations established by the Board (Section 15); the dismissal and disciplinary action taken in relation to classified employees are also subject to statutory control.

In comparing the State classified employees to "civilian employees," we find that the Adjutants General of the several States, Territories, Puerto Rico, and the District of Columbia have the authority to employ, fix rates of pay, establish duties and work hours, supervise, and discharge "civilian employees," all within the purview of National Guard Regulations. See National Guard Regulations No. 75-16, Department of the Army, Washington 25, D. C., 7 January 1953.

These "civilian employees" are on the Federal payroll and are paid completely from Federal funds.

The above examination of our statutes compels us to the opinion that such "civilian employees" are not eligible to participate in the Maine State Retirement System. The statutes regarding State employees are in no manner complied with in the employment, the continuing employment, the dismissal or other control of these "civilian employees."

In answer to your further question as to whether the "civilian employees," or any of them, were eligible to participate in the Maine State Retirement System as of September 1, 1954, we are of the opinion that they were not so eligible. The laws with respect to participation in the Maine State Retirement System were, in so far as this group is concerned, the same in 1954 as they are today, with complete control of the employees vested in the Adjutant General.

Having determined that "civilian employees" are not eligible to participate in the Maine State Retirement System, we would advise, in terminating the association of such employees with the Retirement System, that each such "civilian employee" who has made contributions to the Retirement System should be refunded the entire amount of such contributions, plus such interest thereon, not less than 3% accumulated interest, as the Board of Trustees shall allow, in conformity with Section 12, Chapter 63-A, R. S. 1954, as amended.

FRANK F. HARDING
Attorney General

April 30, 1957

To David H. Stevens, Chairman, State Highway Commission

Re: Controlled Access Roads

You have requested my opinion as to the meaning of Section 11 of Chapter 23 of the Revised Statutes.

Sections 6 to 12 were enacted in 1949 so that the State would have the authority to build non-access ways when the need and the money available coincided. The language was taken from the statute of another State, and its interpretation was not discussed.

Our Courts have consistently said in their opinions that the statutes relating to the Highway Commission should be liberally construed to achieve the purpose of the creation of a good highway sytem and that the broad discretionary powers of the Commission were fundamental. Therefore, any limitation on such powers should be subject to careful interpretation and should not be extended beyond its obvious intent.

Section 11 limited the controlled access to state highways and further limited this controlled access to ways "in the compact or built-up areas of any city or town as defined in section 113 of chapter 22," when approved by the municipal officers of the town or city where the road was located. This definition reads: territory contiguous to (which means *touching*) a way with structures less than one hundred and fifty feet apart for a distance of at least a quarter of a mile. Municipal officers may designate such compact areas by appropriate signs.

This definition obviously contemplates an existing way with structures built on the abutting land. An overpass that goes over a way but does not change its status is not within the intent of Section 11. That section is intended to prevent the denial of *existing* access to a certain type of way, by changing its status without the town's permission. It cannot apply to a new layout that does not coincide with an existing way. It means that the Commission could not rebuild the way through the business section of a town and deny access to the way without the consent of the town.

In the case of an overpass, the abutters on the old road still have their access to the old road.

The condemnation of the property of an abutter on the old road to provide for necessary abutments would not come within the intent of Section 11.

Section 11 was not intended to prevent the crossing of a way by an overhead structure. Its intent was to limit the power to deprive access to an existing way in a built-up section. Its intent was to limit the danger of wiping out the commercial center of a town. The incidental loss of one or two properties (which loss must be compensated for) in the process of crossing a way is no different in kind than a taking of property in non-built-sections.

It would not be consistent with the established legislative theory of grants of administrative discretion to the Commission, as buttressed by the decisions of the Courts, to so broadly interpret this statute as to require the town's consent to build an overpass.

Since this statute has been in effect several bills have been presented to the Legislature that would have required the assent of towns to certain phases of highway construction. All of these have been rejected.

This statute can only be interpreted to apply to the redesignation of existing ways in built-up sections, and it is very questionable whether it was intended to apply to all of these.

L. SMITH DUNNACK
Assistant Attorney General

May 1, 1957

To: Doris M. St. Pierre, Secretary, Maine Real Estate Commission

Re: Co-brokerage agreement—Failure to pay certain moneys

Richard Griffin v. Marion Freeman

I have your memorandum of April 17, 1957, with enclosed complaint and other papers with regard to the alleged failure of one Marion Freeman to pay certain moneys to one Richard Griffin. From the papers at hand it appears that Richard F. Griffin and Marion Freeman are both licensed real estate brokers in the State of Maine and that at some time they entered into a co-brokerage agreement with regard to certain property which property was sold and a commission accrued. Griffin sued Freeman and recovered judgment in the amount of $465.17. On this judgment $150.00 has been paid by Freeman leaving a balance due of $315.17. The commission evidently feels that a hearing should be held to determine whether or not Marion Freeman is guilty of violating paragraph G of sub-section I of section 8 of Chapter 84 of the Revised Statutes of 1954, as amended, commonly known as the Real Estate License Law.

Paragraph G is as follows:

> "Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others."

This section must be construed in the light of the previous language of sub-section I which in part is as follows:

> "Where the licensee in performing or attempting to perform any of the acts mentioned herein is deemed to be guilty of . . ."

It is our opinion that under the facts of this case as presented by the complaint and the attached papers, the Commission is without jurisdiction to hold a hearing to determine whether or not one real estate broker's license should be revoked or suspended for failure to pay money owed to another licensed real estate broker. The purpose of the Real Estate License Law is to protect the public from the false and fraudulent dealings of real estate brokers and salesmen. It was not passed to settle disputes between licensed real estate brokers. The courts are fully capable of carrying out this phase of business dealing and as this case discloses, the question of the right to part of the commission has been determined in a judicial proceeding. The complainant merely seeks to have the judgment of the court enforced by administrative action by the Commission. We feel that this is improper and outside of the jurisdiction conferred on you by the statutes. In view of the foregoing, we see no reason to comply with your request that we assist the Commission in preparing this case for hearing.

ROGER A. PUTNAM
Assistant Attorney General

May 14, 1957

To: Doris M. St. Pierre, Secretary of Maine Real Estate Commission

Re: Advertising by a licensed broker

We have your memorandum of May 9, 1957, which asks the following question:

"Can a real estate broker licensed with a place of business in Solon advertise in Skowhegan and use a Post Office box number rather than a business address?"

We find no prohibition in the law against the practice above stated. On the contrary it appears to be a common business practice in all fields, including the real estate field, to advertise in places other than where you have a place of business and use post office box numbers in many cities and towns as the occasion arises.

ROGER A. PUTNAM
Assistant Attorney General

May 24, 1957

To William D. Hayes, Chairman

Maine Board of Accountancy

We acknowledge receipt of your letter of May 9, 1957, in which you recall to mind our conversation of some time ago relative to L. D. 644, now Chapter 203 of the Public Laws of 1957.

We affirm the opinion then expressed.

The legislature can, and sometimes does, legislate a person out of an office previously created by statute.

Section 1, Chapter 80, R. S. 1954, provides that the Board of Accountancy shall consist of 3 members, one of whom shall be a practising attorney. Chapter 203 amended Section 1 of Chapter 80, R. S., repealing that portion which relates to the attorney member, and would require that all members of the Board be skilled in the art of accountancy, shall have been actively engaged in the profession of public accountant, and be holders of certificates to practise as public accountants.

The amendment contains no provision showing legislative intent that the attorney, who upon the effective date of the amendment will be lacking the statutory qualifications required of one to be eligible to serve on the Board, should hold office until his term expires.

Under such circumstances we are of the opinion that on the date when Chapter 203 becomes effective as a law, then the term of office of the incumbent attorney members expires by operation of law.

JAMES GLYNN FROST
Deputy Attorney General

June 7, 1957

To Honorable Robert B. Williamson, The Chief Justice

Re: "General Elections"

This is in response to your recent request for advice as to whether or not this office has in the past issued any opinions or given rulings with respect to the meaning of the words, "general election." I understand that your specific inquiry is whether or not primary elections are considered general elections.

We would advise that we have no record of having ever given an opinion on this subject.

While administrative interpretation of the law is not conclusive upon the Court, still if such interpretation has been consistent on a certain point for a period of time, then that interpretation is something that may be considered by the Court in arriving at its decision. In the hope that it will be helpful to you we offer the following examples of the usage of the term, "general election," which tend to the conclusion that "general election" means the biennial election held on the second Monday of September, as mentioned in Article II, Section 4 of the Maine Constitution, as distinguished from the primary election:

1. In referring to the Resolves proposing Amendments to the Constitution and the form of question and date when the Amendment shall be voted upon, we find that the first paragraph of the form of question reads as follows:

"Resolved: That the aldermen of cities, the selectmen of towns and the assessors of the several plantations of this state are hereby empowered and directed to notify the inhabitants of their respective cities, towns and plantations *to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of senators and representatives at the next general or special state-wide election,* to give in their votes upon the amendment proposed in the foregoing resolution, and the question shall be: . . ."

2. Section 27 of Chapter 61 of the Revised Statutes of 1954, as amended, reads in part as follows:

"No liquor shall be sold in this state on Sundays or on the day of holding a general election or state-wide primary . . ."

With respect to the use of the words "general election" in the above quoted portion of our law, without exception such general election has been held to be that election mentioned in the Constitution, to be held on the second Monday of September, biennially.

3. Finally, we would draw your attention to the initiative and referendum provisions of the Constitution, Article IV, Part Third, Sections 18, 19 and 20. It will be noted that the words, "general election," are used in Section 18 and defined in Section 20. The definition contained in Section 20, relating to the use of the term in the three preceding sections, means "the November election for choice of presidential electors or the September election for choice of governor and other state and county officers . . ."

The definition contained in Section 20 seems to justify the usage applied administratively to the words, "general election."

JAMES GLYNN FROST
Deputy Attorney General

June 13, 1957

To: Warren G. Hill, Commissioner of Education
Attn: Maurice C. Varney

Re: Funds for Vocational Education

In response to your request for an opinion as to whether or not the State Board of Education has the statutory authority to receive and expend federal funds for vocational education.

It is our opinion that the State Board of Education has the necessary authority to accept and expend federal funds for vocational education.

The State accepted the Smith-Hughes Act as seen in Section 196 of Chapter 41 of the Revised Statutes of 1954. Drawing your attention to Section 197 of Chapter 41 we note that in addition to designating the Treasurer of State as custodian for moneys received under the provisions of the Smith-Hughes Act, there is also authority for the Treasurer to accept and expend upon the order of the State Board of Education "All moneys received by the State from the federal government for vocational training . . ."

It is our opinion that the above-quoted section of law is adequate authority for the State Board of Education to accept and expend federal funds for vocational education.

It is our understanding that there is no distinction between the meanings of the terms vocational training and vocational education—such terms being used synonymously in the field of education nationwide.

JAMES G. FROST
Deputy Attorney General

June 26, 1957

To Frank A. Farrington, Chairman, Industrial Accident Commission

Re: Logging

Concerning the effect of Chapter 343 of the Public Laws of 1957, which becomes effective August 28th and eliminates the operations of cutting, hauling, rafting or driving logs from an exclusion in Workmen's Compensation Act after that date, it is my opinion that an assent filed prior to August 28, 1957, excluding operations of cutting, hauling, rafting or driving logs from same will have no effect whatsoever, and a new assent should be filed by the employer, and the employer and the insurance carrier should be notified to file.

The view has been taken that the Workmen's Compensation Act does not in any way impair the obligation of contracts, within the meaning of the provision of the Federal Constitution, which inhibits the States from exacting laws that may have this effect. 58 Am. Jur. 586, Sec. 16. In the case of *White v. Insurance Co.*, 120 Me. 69, the court laid down the rule in regard to the construction of the Compensation Act. The court said:

> "We do not lose sight of the well settled rule that the Compensation Act should receive a liberal construction, so that its beneficent purpose may be reasonably accomplished. Its provisions, however, cannot be justly or legally extended to the degree of making the employer an insurer of his workmen against all misfortunes, however received, while they happen to be upon his premises. Such was not the intent of the statute.
>
> "The employer has rights as well as the employed. Their rights stand upon an equality in the eye of the law. Perversion of the law, either to benefit the employee or to protect the employer, has a tendency only to bring the law into contempt. This Compensation Act, therefore, should be administered with great care and caution, judicial discretion and impartial progress, striving only to discover the spirit in the letter of the law, and to apply that without fear or favor."

In harmony with established principles of legislative enactments, in the absence of a clearly expressed intent to the contrary, it would be deemed to be prospective and not retrospective.

> "Workmen's Compensation Acts have been held not to apply to injuries which occurred before the law went into effect and on the same principle an amendment of the statute in respect to the matter of substantial right, does not apply to existing injuries or to claims arising by reason of the prior death of an injured employee."
>
> 58 Am. Jur. 599, Sec. 33.

> "It is ordinarily provided that employers who refuse to accept provisions of the Compensation Act may not interpose a common law defense of assumption of risk, contributory negligence, or the negligence of a fellow servant, in actions by employees for the recovery of damages for personal injuries sustained while engaged in employments included within the provisions of the Act."
>
> 58 Am. Jur. 607, Sec. 46

> "With respect to time, the right to compensation for an injury, under the Workmen's Compensation Act is governed, in the absence of any provision to the contrary by the law in force at the time of the occurrence of such injury,"
>
> *Flickenger v. Industrial Commission,* 181 Cal. 425.

As respects insurance, the form, contents, execution and issuance of contracts and policies are frequently regulated by express provisions of the statute. It is sometimes provided that such policy should contain the usual and customary provisions found in such policies. It is competent for employers holding an employer's liability policy issued by a casualty company to agree, when they elect to come under the Workmen's Compensation Law, that the riders affixed to the policy, which except insurer from claims of compensation under that law, shall be attached by the company, to modify the policy by an agreement that the unearned premium shall stand as insurance for compensation for injuries for the remainder of the insurance year.

In regard to what law governs, that has been determined in *Gauthier's Case,* 120 Me. 76. Rights of claimant are determined by the law that was in force at the time of the accident. In Fournier's case, 120 Me. 91, it was said that the employer may exclude logging operations, as the law so provides. Now that the law has been amended by striking out the operation of cutting, rafting or driving logs, that case no longer applies.

Construction of assent and policy of indemnity is a question of law. *Hutchinson's case,* 126 Me. 104. Unless there is assent, the Commission has no jurisdiction. *Daley v. Furnishing Co.,* 134 Me. 107.

After August 28, 1957, therefore, the assent in policy will not be in proper form. It seems to me that the Commission should require new assents to be filed and should issue the required certificate upon the new assents to cover cutting, rafting and driving logs.

RALPH W. FARRIS
Assistant Attorney General

July 9, 1957

To: Paul A. MacDonald, Deputy Secretary of State

Re: Hilda Paul Accident Case—
Financial Responsibility Law

This is in response to your request for an opinion on the following fact situation:

"On May 19, 1956, a 1947 Ford sedan owned by Hilda Paul of Farmington and driven by her son, Lyle D. Paul of Farmington, was involved in an accident on Route 4 in North Jay. Property damage to the Paul car was estimated at $60 and to the other vehicle involved, driven by Robert Neilson of Bath, at $75. Carl Ames, a passenger in the Paul vehicle, was cut on the forehead and bruised about the chest. Both drivers reported the accident according to law and the Paul boy was subsequently convicted of operating so as to endanger.

The vehicle driven by Lyle Paul was not covered by liability insurance and consequently the provisions of the Financial Responsibility Law were invoked against both him and his mother who was the owner of the car. It subsequently appeared that young Paul, the operator, was on a mission of his own and apparently stood in the position of a gratuitous bailee.

This Department was advised some years ago by the late Abraham Breitbard when he occupied the position of Deputy Attorney General that in such a situation the security provision of the law should not be invoked but that proof of insurance for the future should be required for the gratuitous bailor, as well as the bailee.

When the insurance requirement was invoked against Mrs. Paul, we were informed that the car involved in the accident had been disposed of and another vehicle owned by her which had been insured all along was the only vehicle she intended to operate."

With respect to the above fact situation you ask the following three questions:

"1. Should the Secretary of State require proof of insurance coverage to be furnished by Hilda Paul on a vehicle or vehicles owned by her when said vehicles were not involved in the accident?

2. If your answer to the above question is in the negative, shall the Secretary of State invoke the requirements of the Financial Responsibility Law against an owner with respect to an automobile subsequently acquired following an accident which would otherwise subject the owner to the requirements of the Financial Responsibility Law?

3. If your answer to the first question is in the negative, is an operator who was not an owner, required to give proof of financial responsibility for all his vehicles?"

We answer question No. 1 in the affirmative.

Having answered question No. 1 in the affirmative, questions No. 2 and No. 3 need not be answered.

The following portions of the Financial Responsibility Law relate to the questions presented:

Sec. 77-II-B.

"Upon receipt by him of the report of an accident other than as provided for in paragraph C of this subsection, which has resulted in death, bodily injury or property damage to an apparent extent of $100 or more, the Secretary shall, 30 days following the date of request for compliance with the 2 following requirements, suspend the license or revoke the right to operate of any person operating, *and the registration certificates and registration plates* of any person owning a motor vehicle, trailer or semi-trailer in any manner involved in such accident, unless such operator or owner or both:

1 . . .

2. Shall immediately give and thereafter maintain proof of financial responsibility for 3 years next following the date of filing the proof as provided under the provisions of subsection II of section 81."

Note the use of words in the plural, above italicized, indicating that intent was to consider all registration certificates and plates of a person owning a motor vehicle involved in such accident.

Sec. 77-II-F

"The Secretary, upon any reasonable ground appearing on the records in his office, may suspend or revoke the operator's license of any person and may suspend or revoke any and all of the registration certificates and registration plates for any motor vehicle and may refuse to issue to any such person any license or to register in the name of such person any motor vehicle unless and until such person gives proof of his financial responsibility for such period as the Secretary may require."

Sec. 77-VI

"Suspension; duration. The suspension required in subsection II of this section shall remain in effect, the motor vehicle, trailer or semi-trailer in any manner involved in such accident shall not be registered in the name of the person whose license or registration was so suspended, and no other motor vehicle, trailer or semi-trailer shall be registered in the name of such person; nor any new licenses issued to such person, unless and until he has obtained a release or a judgment . . ."

Sec. 81

". . . Whenever required under the provisions of sections 75 to 82, inclusive, such proof in such amounts shall be furnished for each motor vehicle, trailer or semi-trailer registered by such person."

The clarity of the words used in the above quoted portions of the Law is such that it is not necessary, in our opinion, to search further for legislative intent. Each and every one of the above cited provisions adds to the strength of the proposition, until in our opinion, their combined effect compels the conclusion that cars other than the one involved in the immediate accident are directly affected by the Financial Responsibility Law.

FRANK F. HARDING
Attorney General

July 9, 1957

To Honorable Edmund S. Muskie, Governor of Maine

Re: Memorandum of Understanding between Office of the Governor, State of Maine, and Commander, 32d Air Division (Defense), United States Air Force, East Syracuse, New York

We are returning to you all papers sent to this office relating to the above subject matter.

With respect to same you ask if the instrument is a proper one for your signature.

In our opinion the instrument should not be signed by the Governor of the State of Maine.

The purpose of the Memorandum of Understanding is to make available to the Commander of the 32d Air Division (Defense), for such employment, the Maine Air National Guard prior to actual mobilization, or prior to a Presidential Proclamation of a state of emergency, or prior to a Congressional declaration that a state of war exists, a proviso being that the Commander of the 32d Air Division (Defense) determines that an enemy air attack is in progress.

We have also ascertained that a function of the Memorandum of Understanding is to permit the use of the 132d Fighter Interceptor Squadron of the Maine Air National Guard outside the State of Maine, prior to such time as the necessary Proclamations have been made.

With respect to the right of the Governor, as Commander-in-Chief of the Army and Navy of the State and of the National Guard, to permit troops to go outside the State of Maine, we would draw your attention to Article V, Part First, Section 7 of the Constitution of Maine. That section reads as follows:

> "He shall be commander in chief of the army and navy of the state, and of the militia, except when called into the actual service of the United States; but he shall not march nor convey any of the citizens out of the state without their consent, or that of the legislature, unless it shall become necessary, in order to march or transport them from one part of the state to another for the defence thereof."

This provision of the Constitution is identical with that contained in the Revised Statutes of 1841. It may be that the time has come when such provision should be amended, but in the absence of such amendment we must advise that the Agreement would not be a proper one for your signature.

JAMES GLYNN FROST
Deputy Attorney General

July 9, 1957

To Stanton S. Weed, Director, Motor Vehicles

Re: Registration of Trucks under Chapters 309, 330 and 363, P. L. 1957.

You request an interpretation of Chapter 309, Section 2, P. L. 1957, effective August 28, 1957, providing for a new maximum in gross weight of 60,000 lbs. for trucks having four or more axles; Chapter 330, Section 4, which provides a new schedule of truck fees from the 6,000 lbs. G. W. minimum through the

50,000 lbs. G. W. brackets, effective for the calendar year 1958; and Chapter 363, Section 1, which provides a schedule of truck fees similar to that in Section 4, Chapter 330 and adds two new fees for trucks registered in the two new weight brackets of 50,001 lbs. G. W. to 55,000 lbs., and 55,001 lbs. G. W. to 60,000 lbs., also effective for the calendar year 1958.

Your question is with respect to the apparent conflict in these statutes as to your procedure in issuing registrations to such trucks as fall in the two new brackets (over 500,000 lbs.) from August 28, 1957, to the end of the 1957 registration year.

An examination of the above mentioned laws shows an anomalous situation where, effective August 28, 1957, the maximum gross weight that can be carried by trucks will be increased, but the statute relating to fees in the new classes will not permit registrations for the authorized increase until January 1, 1958.

It is our opinion that any and all trucks properly registered to carry a weight of 50,000 lbs. may, from August 28 until January 1, 1958, carry up to 60,000 lbs. without payment of any additional registration fee, without being in violation of the law. No other interpretation could be sustained from the standpoint of law enforcement. Statutes dealing with the same subject matter must be read together, and those statutes must be administered so as not to discriminate unconstitutionally against any class of individuals.

It can be seen that a foreign truck, legally registered for a weight of 60,000 lbs. in the State in which it is based, could come into the State of Maine after August 28, 1957, with a gross weight of 60,000 lbs., with impunity, and be within the framework of our law and so immune from prosecution despite its weight.

Could it have been the intent of the legislature that a situation might exist where out-of-state vehicles may roll across the highways of our State with a gross weight of 60,000 lbs. while trucks registered in Maine would be limited to 50,000?

We think not. To so hold would be to discriminate unconstitutionally against a class of people who, from any point of view, should be first in the minds of the legislature—the Maine Resident!

While the legislature may, in a given case, discriminate against a class of people, still, the classification must have a reasonable relationship to the distinction between the classes, and to the situation that needs to be controlled. We find no reasonable explanation deriving from the police power which would permit the use of our highways by foreign vehicles but not by Maine vehicles.

For the above reason we believe the laws in question require such administration as will give to all classes an equal right to use our highways. There being no means by which a truck can be registered in Maine for 60,000 lbs. until January 1, 1958, the right of user means that trucks registered for 50,000 lbs. may carry up to 60,000 lbs., if the vehicle is otherwise in compliance with the law with respect to axles, brakes, etc., without payment of registration fees for such extra weight, until December 31, 1957, after which time full compliance with all laws will be expected.

FRANK F. HARDING
Attorney General

July 11, 1957

To: Norman U. Greenlaw, Commissioner of Institutional Service

Re: Section 105, Chapter 27, Revised Statutes of 1954
Commitment-Emergency Certificate

We have your memorandum of July 1, 1957, with regard to the point of time from which the fifteen days mentioned in Section 105, Chapter 27, Revised Statutes of 1954, are to be counted. That section provides as follows:

> "Emergency cases: Pending the issue of such certificate of commitment by the municipal officers, such superintendent may receive into his hospital any person so alleged on complaint to be insane, provided such person be accompanied by a copy of the complaint and physicians' certificate; which certificate shall set forth that in the judgment of the physicians the condition of said person is such that immediate restraint and detention is necessary for his comfort and safety or the safety of others; and provided further, that unless within 15 days thereafter said superintendent shall be furnished with the certificate of commitment hereinbefore provided for, the detention of such person shall cease. Said municipal officers shall keep a record of their doings and furnish a copy to any interested person requesting and paying for it.
>
> In addition to the certificate of commitment, a statement of facts under oath in regard to the financial ability of such patient, or of any of his relatives legally liable to pay for his support, shall be furnished the superintendent of the hospital."

We are of the opinion that the term "within 15 days thereafter" is to be determined from the day of the admission of the patient under the emergency certificate signed by the physicians who have certified that the patient requires immediate restraint and detention for his comfort and safety and for the safety of others.

ROGER A. PUTNAM
Assistant Attorney General

July 15, 1957

To E. L. Newdick, Commissioner of Agriculture

Re: Stipend Fund

We have your memo of June 25, 1957, in which you ask for an opinion relative to L. D. 1062 (now Chapter 391 of the Public Laws of 1957), being an Act relating to pari-mutuel horse racing and the stipend fund.

The section in question is Section 1 of the act and reads as follows:

> "One-half of the amounts contributed under the provisions of section 14 of chapter 86 and section 13 of chapter 87 shall be divided for reimbursements in equal amounts to each recipient of the stipend fund which conducts pari-mutuel racing in conjunction with its annual fair if said recipient has improved its racing facilities and has met the standards for facility improvements set by the Commissioner of Agriculture for said recipients. If a recipient has not complied with the individual standards set by the Commissioner said yearly reimbursements

shall be paid in equal amounts to those recipients which have met such standards."

With respect to this section you ask, "Must this new money be spent to improve racing facilities only, or can the money be spent for facility improvements other than racing?"

It is our opinion that the money should be spent for improvement of both racing facilities and other facilities which are controlled by the Commissioner of Agriculture. The money cannot be spent to improve racing facilities only. It must be spent in both categories, racing facilities and such facilities as come within the control of the Commissioner of Agriculture.

JAMES GLYNN FROST
Deputy Attorney General

July 17, 1957

To Harvey H. Chenevert, Executive Secretary, Milk Commission

Re: Central Dairymen's League Project

We have examined the project of the Central Dairymen's League, Washington County, in order to determine, at your request, whether such project violates the Maine Milk Commission Law.

The Central Dairymen's League has announced a contest from June 24 to July 24 where the contestants having the greatest number of licensed dealers' bottle-caps would be awarded prizes, the first prize being a saddle horse, and the second and third prizes bicycles.

Chapter 33, Section 4-VI reads in part as follows:

> "No method or device shall be lawful whereby milk is bought or sold at prices less than the scheduled minimum applicable to the transaction whether by any discount, rebate, free service, advertising allowance, combination price for milk with any other commodity or for any other consideration."

An examination of the statute leads us to the conclusion that the contest does not violate the above quoted provision of law.

It can be seen that the milk bottle-cap of a licensed dealer would entitle one to participate in the program, not so far as the dealer is concerned; he is not, because of the transaction, selling his milk below the scheduled minimum. He is getting his price, regardless of the value the League may place upon the bottle-cap.

In order that a person be in violation of the statute, it must be proved that that person is buying or selling milk at prices less than the scheduled minimum. The League is not buying or selling milk. It is offering prizes for the greatest number of bottle-caps. The individual licensee is not in violaton because, from the facts supplied us, he is still selling his milk at the regular price.

For the above reasons we are of the opinion that the contest being run by the Central Dairymen's League does not violate Section 4-VI of Chapter 33.

JAMES GLYNN FROST
Deputy Attorney General

July 18, 1957

To David H. Stevens, Chairman, State Highway Commission

Re: Damage from Heavy Rain

You have requested my opinion as to the liability of the State in the matter of damage by water on certain property in Mars Hill.

In the first place, there is considerable doubt that anyone could be held responsible for this particular damage, in that it might be considered such an unusual storm as to constitute "an act of God." In the second, there is no evidence of any negligence or neglect of duty on the part of the State.

It appears that no question had been raised as to the adequacy of our original ditch to care for our drainage problem. It further appears that after the construction of the Soils Conservation ditch by others than the Commission, not only extra water, but accelerated water was turned into the highway drain (which exists to take care of highway drainage, and not for the benefit of the countryside). Further, it seems that the State at its own expense made proper provision to relieve the pressure of this extra water by building a culvert and continuing the flow of water to a brook.

The circumstances attendant on this occasion indicate that a cloudburst caused extraneous material to plug the culvert, and the combination of the plugged culvert with an excessive amount of water caused the damage to property. It would seem obvious that the State could not be held responsible for anticipating that a potato barrel would be cast into the pipe-opening and not having a supervisor on the spot to remove the barrel. Under any interpretation of the "due care" rule, it would seem fantastic to put a duty on the State to have patrolmen appear within the hour at every culvert along the road to fend off possible obstructions.

The only way a court could find liability on the part of the State would be to hold that it was our duty to see that culverts were kept open during all storms. I doubt very much if any court would do this extreme, particularly in the case of a cloudburst. In this case it would appear that the potato barrel was the real culprit. It would be just as sensible to claim that the owner of the barrel should not have permitted it to be where it could float down and lodge in the culvert.

From a causation point of view, it would seem that the creation of the Soils Conservation ditch had much more to do about this act than the installation of the culvert by the State. It was the water accelerated along that ditch which carried the barrel down to the pipe and forced it in.

In the several cases we have had where culverts were plugged during unusual storms, we have successfully denied liability. In two cases in which coarse screening had been placed at the pipe entrance to keep out large objects (like this barrel), we were criticised because the screen caught twigs, branches and leaves, which matted together and caused an overflow. We successfully denied liability in these cases also, though it seems to me that the complainants were more justified than in the others.

L. SMITH DUNNACK
Assistant Attorney General

July 26, 1957

To: Norman U. Greenlaw, Commissioner of Institutional Services

Re: Chapter 387 of the Public Laws of 1957
Probation & Parole Law

We have your memorandum of July 23, 1957, in which you ask for opinions relative to two sections of the newly enacted Chapter 387 of the Public Laws of 1957.

Section 35 of Chapter 387 reads as follows:

"The Parole Board, the probation officers and each county shall transfer all books, papers, records and property connected with the functions, duties and powers exercised by the Probation and Parole Board for the use of the State."

Question—"Do the County Commissioners have authority to turn County property over to the State of Maine and does the section give the right to County Commissioners to supply office space to this division of government without charge?"

Answer—The property contemplated to be transferred under this section is personal property only. Office space is not embraced within the section.

Section 5, VI, spells out in part the powers and duties of the Probation-Parole Officer and provides that he will "collect and disburse money according to the order of the Court having jurisdiction. He shall make a detailed account under oath of all fines received, and shall pay them to the appropriate county treasurer by the 15th day of the month following collection."

Question—"Should these funds be deposited with the State Treasurer and disbursed through the Office of the State Controller to the appropriate person or department?"

Answer—With respect to the last sentence of the paragraph, the duties there to collect fines, etc., do not substantially differ from the duties set forth in Chapter 149, Section 28 of the Revised Statutes of 1954, and we would presume that you would follow the same procedure as has been followed in the past. If under the new law the Court did enlarge the scope of the Probation-Parole Officer with respect to the kinds of moneys he will receive which are not payable to the County Treasurer then such funds should be deposited with the State Treasurer and disbursed in the normal manner.

JAMES G. FROST
Deputy Attorney General

July 29, 1957

To Major General George M. Carter, The Adjutant General

Re: Property Officer's Bond

. . . You ask whether or not the State Property Officer is covered under the comprehensive commercial blanket bond pertaining to State employees in supervisory positions.

Section 11 of Chapter 14 of the Revised Statute of 1954 sets forth the elements of the bond of the State Property Officer, and we herewith quote that section:

> "The property officer shall perform such duties relative to the care, preservation and repair of military property belonging or issued to the state as the adjutant general may from time to time direct and shall receipt and account for all property allotted to his custody and make such returns and reports concerning the same as may be required by the adjutant general. He shall give a good and sufficient bond to the state in an amount to be determined by the governor for the faithful performance of his duties and for the safekeeping and proper distribution of all property entrusted to his care."

You state that the Property Officer does not handle any cash monies as such but does have supervision over the rental of State-owned armories that are rented from time to time to agencies and individuals in and out of the State in accordance with an established rental schedule.

Inasmuch as the statute provides that the amount of the bond of the Property Officer shall be determined by the Governor, it is our opinion that, while the Property Officer may be included in the comprehensive bond, as the coverages of the bond and of the statute are substantially the same, the Governor should expressly approve the amount of the Property Officer's bond. If he approves an amount that can be covered by the comprehensive bond, then it would be our opinion that that officer would be properly included within the blanket bond.

JAMES GLYNN FROST
Deputy Attorney General

July 29, 1957

To Albert S. Noyes, Bank Commissioner

Re: Application for Branch or Agency

. . . You inquire if a bank requesting permission to establish a branch under the provisions of Section 124 of Chapter 59, R. S., which request is refused by the Bank Commissioner, can apply, within a year from the date of the refusal, to establish an agency in the same town for which permission for the branch has been refused.

In our opinion a bank may so apply to establish an agency within a year from the date of the refusal to establish a branch.

Section 124 of Chapter 59, R. S., reads in part as follows:

> "No trust company, now or hereafter organized, shall establish a branch or agency until it shall have received a warrant to do so from the bank commissioner, who shall issue such warrant only when satisfied that public convenience and advantage will be promoted by the establishing of such branch or agency, and that the unimpaired capital stock of the parent institution is sufficient to comply with the conditions of section 103, reckoning the aggregate population of its home city or town and of all cities and towns in which it is authorized by its charter to establish branches or agencies, including the one under consideration."

It is our opinion that both according to your custom and according to a reading of the above quoted section of law, there is a distinction between a branch and an agency. While you may be justified in refusing to recognize a second application to establish a branch within the period of a year from the date of refusal, we believe that with respect to an agency the application should be recognized and acted upon.

JAMES GLYNN FROST
Deputy Attorney General

July 29, 1957

To Albert S. Noyes, Bank Commissioner

Re: Medical Insurance for Savings Bank Trustees

. . . You inquire if the trustees of a savings bank may, under the provisions of Section 19-E-II-G of Chapter 59, R. S. 1954, receive Blue Cross and Blue Shield coverage as compensation.

The said section reads as follows:

"The trustees may receive such compensation for services performed by them in their capacity as may be fixed by the corporation at any legal meeting thereof, or as may be fixed by the board of trustees and approved by the bank commissioner in writing."

Section 19-K-VIII of Chapter 59 provides:

"The trustees may also make such provision for the payment of medical, surgical and hospital expenses of officers and employees, due to accident or illness, as in their judgment is reasonably required."

We also draw your attention to Section 19-E-III-A:

"The board of trustees shall annually elect, from their membership or otherwise, a president, one or more vice presidents, clerk, treasurer, one or more assistant treasurers, and such other officers as they may deem advisable, may determine their respective duties and functions when not fixed by law or by the by-laws of the bank, and may fix their compensation."

A study of the above quoted sections of law convinces us that Blue Cross and Blue Shield coverage is not compensation, and for that reason we advise that you should not approve any act of the trustees in including such coverage as compensation.

You will note in the last above quoted section that compensation of the officers is to be determined by the board of trustees, but that in order to give such officers the insurance coverage in question the legislature found it necessary to enact the above quoted Section 19-K-VIII. It is apparent, therefore, that insurance coverage and compensation are not one and the same thing. This being so, it follows, in our opinion, that in fixing the compensation of the trustees, such compensation cannot include Blue Cross and Blue Shield without special statutory authority.

JAMES GLYNN FROST
Deputy Attorney General

August 9, 1957

To: John S. Foss, Chief Parole Officer—Division of Parole

Re: Status of Parole Violators under new law (c. 387, P. L. of 1957)

We have your request of July 12, 1957, for an opinion with regard to the status of parole violators who have violated their paroles prior to August 28, 1957. Chapter 387 of the Public Laws of 1957 makes several substantive changes in the parole law particularly with regard to loss of good time earned within an institution. The new law provides as follows:

"Sec. 15. Person violating parole. When a parolee violates a condition of his parole or violates the law, a member of the Board may authorize the Director in writing to issue a warrant for his arrest. A Probation-Parole Officer, or any other law enforcement officer within the State authorized to make arrests, may arrest the parolee on the warrant and return him to the institution from which he was paroled. At its next meeting at that institution, the Board shall hold a hearing. The parolee is entitled to appear and be heard. If the Board, after hearing, finds that the parolee has violated his parole or the law, it shall revoke his parole and remand him to the institution from which he was released. He shall serve his sentence according to the following provisions:

I. Sentence to State Prison.

A. If sentenced on a minimum-maximum basis, he is liable to serve the unexpired portion of his maximum sentence, forfeiting any deduction for good behavior during parole.

B. If sentenced to a definite term, he is liable to serve the unexpired portion of his sentence, forfeiting any deduction for good behavior during parole.

C. If sentenced to life imprisonment, he is liable to serve the unexpired portion of his sentence.

II. Sentence to Reformatory or State School.

A. He is liable to serve the unexpired portion of his sentence, forfeiting any deduction for good behavior during parole. This section does "not prevent the deduction for good behavior during the serving of the unexpired portion of the sentence, nor the re-parole of the prisoner or inmate in the discretion of the Board."

The old law provided as follows:

Chapter 149 of the Revised Statutes of 1954, as amended—

"Sec. 20. Prisoner violating parole considered escaped prisoner.— A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the parole board, shall, after the issuance of such warrant, be treated as an escaped prisoner owing service to the state and shall be liable, after arrest, to serve out the unexpired portion of his or her maximum sentence. 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 prison shall forfeit any deduction

made from his or her sentence by reason of faithful observance of the rules and requirements of the prison prior to parole or while on parole. This section shall not be construed to prevent time allowance by reason of faithful observance of the rules and requirements of the prison during the unexpired portion of such maximum sentence, or to prevent the re-parole of such prisoner in the discretion of the parole board."

The major difference between the new law and the old law is that a parole violator on or after the effective date of Chapter 387 of the Public Laws of 1957 will *NOT* lose the good time earned in the institutiton but will only lose the good time earned while on parole.

Your question is:

"Will they (meaning parolees violating their paroles prior to August 28, 1957) automatically have the good time earned in the institution restored to them on August 28, 1957?"

We must answer your inquiry in the negative. A person's rights are to be determined by the law that exists or existed at the happening of the event. A parole violator's rights to good time or his right not to lose good time will have to be determined according to the law in existence upon the issuance of the parole violator's warrant.

We have searched Chapter 387 in vain for any legislative intent that the new act was intended to restore institutional good time lost prior to the effective date of the act. Without such express intent, we are forced to the conclusion that Chapter 387 is prospective in nature and has no retroactive effect. For a similar interpretation when the Legislature imposed the forfeiture of good time upon parole violators, see Opinion of Breitbard, Deputy Attorney General, to Greenleaf, Commissioner, February 21, 1944, Report of the Attorney General of Maine, 1943-44, Page 120.

While we realize that this interpretation will cause some inequality among certain inmates, i. e., compare a parolee who violates parole on August 27, 1957, and who will lose all accumulated good time against a parole violator on August 28, 1957, who loses only his good time earned on parole; this matter is one for the Legislative Branch to consider and not one that is to be remedied by administrative interpretation by an executive officer.

ROGER A. PUTNAM
Assistant Attorney General

August 9, 1957

To Ernest H. Johnson, State Tax Assessor

Re: Franchise Tax on a Cooperative

In answer to your memo relating to taxation of an association organized under Chapter 56, R. S., as a cooperative for the purpose of manufacturing a commodity for the benefit of the patrons of the association as ultimate consumers, I call your attention to the provisions of Section 23 of Chapter 56, that the same provision as under the general law shall apply to fees payable to the State.

Section 21. . . . provides that these corporations shall pay the annual license fee required of other business corporations and, in our opinion, this is

not in lieu of all other corporation and franchise taxes, as provided in Chapter 35 which relates to agricultural cooperatives.

Section 1 subsection II-B provides that the maximum at which any return is paid on share or membership capital is limited to not more than 6%, and Section 10 refers to a limitation on paid-up capital. This capital must be set up in the by-laws of the corporation, if it is not set up in its articles of incorporation, and distributed to member patrons in proportion to their patronage.

Now, this should be deemed a fixed capital regulated by statute and fixed on the basis of membership capital. In answer to your specific question, what tax, if any, is applicable to a corporation created under Chapter 56, which you say has no stated fixed capital, we advise that the tax should be based on the minimum of $10 under Section 106 of Chapter 16, until the corporation has filed an annual report under Section 41 of Chapter 53, showing the amount of capital held under its by-laws, and, if more than $50,000, tax accordingly.

I further call your attention to another reason why corporations organized under Chapter 56 should be treated as other business corporations are, which is that Section 22 of Chapter 56 permits registration as dealers in securities upon the payment of the fees provided in Sections 228 to 238 of Chapter 59, and certificates of membership in a cooperative organized under Chapter 56 shall not be issued until the par thereof has been paid in full under Section 13, and to ascertain the par we must resort to the by-laws, as the capital does not have to be set up in the articles of incorporation.

The sale of these certificates comes within the provisions of the "Blue Sky" law, as the term "securities" under Section 231 of Chapter 57 covers certificates of interest in a profit-sharing agreement.

RALPH W. FARRIS
Assistant Attorney General

August 12, 1957

To Edmund S. Muskie, Governor of Maine

Re: Out-of-State Parolee Supervision

We have your memo requesting advice as to whether or not you may sign documents enabling the State of Maine to participate in the supervision of parolees and probationers to and from Puerto Rico and Hawaii.

We answer in the affirmative.

Chapter 19, Public Laws, 1957, amends the Uniform Act for Out-of-State Parolee Supervision to provide expressly that the word "State" as used in the Act" shall mean any state, territory or possession of the United States and the District of Columbia."

We would advise waiting until August 28, the effective date of the amendment, before executing such compact.

JAMES GLYNN FROST
Deputy Attorney General

August 13, 1957

To Paul A. MacDonald, Deputy Secretary of State

Re: Maine Democrat

. . . You inquire if the Maine Democrat, a corporation organized under the general law of the State of Maine, may accept ads from business houses, to be inserted in their newspaper, and whether such income must be reported under the provisions of Chapter 9 of the Revised Statutes.

It is our opinion that ads may be accepted, but that sums received to pay for such ads must be considered as contributions and reported under the provisions of Chapter 9 of the Revised Statutes of 1954.

Political rights are those which may be exercised in the formation and administration of the government.

Political parties are recognized as such by the government, by virtue of legislative enactment, Chapter 4, Section 1, R. S. 1954.

A "treasurer" is defined as including all persons appointed by any political committee to receive or disburse moneys to aid or promote the success or defeat of any such party, principal, or candidate.

"Political committee" shall include every committee or combination of 3 or more persons to aid or promote the success or defeat of any political party or principal in any such election or to aid or take part in the nomination or election of any candidate for public office.

The activities of parties, their candidates and officers, are carefully governed by statute. For example, no treasurer or political agent shall incur *any* expense for any purpose not authorized in Section 4 of Chapter 9.

Section 4-II authorizes a treasurer or political agent in connection with any election, caucus or primary election to incur expenses for "printing and circulating political newspapers . . ."

Although incorporated, the Maine Democrat is still bound by the laws governing political activities.

While we cannot find a definition of the term "contribution" in the laws relating to elections, we think that the historical use of the term is a proper one —any funds received to further the efforts of a political party, principal or candidate—and that any such moneys received for ads would be considered contributions and reported as such.

FRANK F. HARDING
Attorney General

August 19, 1957

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: Military Leave

In your memo of August 5, 1957, you directed our attention to Chapter 26 of the Public Laws of 1957, which reads as follows:

"No such credits shall be allowed to count toward a state retirement benefit beyond the period of first enlistment or induction into the said

armed forces unless the individual involved is compelled to continue service under some mandatory provision."

Under the general provisions of law regarding credits for retirement, persons who left the employ of the State for service in the Armed Forces of the United States have been granted credits toward retirement. The above quoted section of law was introduced to enact a definite termination point beyond which time services would not be given credit.

You ask our opinion as to whether or not those persons who are presently on so-called military leave shall have their credits toward retirement terminated as of the end of the enlistment or induction period which is in effect at the time the amendment to the law becomes operative, namely on August 28th, or should the termination of such credits be considered to be operative only at the end of the enlistment or induction period which starts subsequent to August 28th next.

It is our opinion that credits toward retirement shall terminate as of the end of the enlistment or induction period which is in effect at the time the amendment to the law becomes effective.

JAMES GLYNN FROST
Deputy Attorney General

August 19, 1957

To Doris St. Pierre, Secretary, Maine Real Estate Commission

Re: Fee for Change of Location

. . . You ask us to clarify a certain apparent contradiction appearing in the Real Estate Law.

Presently paragraph 8 of Section 7, Chapter 84 of the Revised Statutes, provides that if a licensed real estate broker gives notice in writing to the Commission of any change of principal business location, the commission shall issue a new license for the unexpired period without charge.

The paragraph preceding the above mentioned paragraph 8 of Section 7 was amended by Chapter 35 of the Public Laws of 1957 to provide that "a fee of $2. shall be paid for a license for change of business location or branch office."

Thus it appears that paragraphs 7 and 8 of Section 7 are in clear conflict, paragraph 7 providing that a fee of $2. shall be paid for a license for change of business location, and paragraph 8 providing that a new license shall issue without charge on certain conditions.

It is our opinion that the latest enactment of the legislature, being Chapter 35 of the Public Laws of 1957, shall prevail and that a $2. fee shall be due and payable for a change of business location by a licensed real estate broker.

JAMES GLYNN FROST
Deputy Attorney General

August 29, 1957

To W. H. Bradford, Right of Way Engineer

Re: Legal Status of School House on Powers Farms

It appears that a former owner of the whole property conveyed this school house lot, so-called, to the School District of Easton with a reversion to one Israel Dodge, if the property was not used as a school lot.

The Powers Farms purchased the contiguous property in 1952 and the deed exempted the school house lot from the transfer.

Although it was not recorded, it seems that the Powers Farms had obtained a bill of sale from the District of the building on the lot and that it did not remove the building from the lot.

I am informed that the State has taken a portion of the land in front of the building and that Powers Farms claims damages for change of grade.

Obviously, there are no damages. In the first place, Powers Farms is a trespasser on the property of the heirs or assigns of Israel Dodge, this school house lot having reverted to them by the terms of the original deed. The building is personal property by law and is now in no better legal position than a parked automobile on a neighbor's land. Even the subsequent purchase of the property from the Dodge heirs would not make the building realty for the purposes of this condemnation. At the time of the taking the building was personal property and had no lawful right to be where it was! The State cannot pay damages based on an unlawful trespass.

The rule of damages in this case is that the heirs or assigns of Dodge are entitled to the value of the land taken, plus the damages to the remainder, if any, minus any increase in the value of the remainder by virtue of the improved road.

The Joint Board has no authority to pay any damages in regard to the building.

L. SMITH DUNNACK

Assistant Attorney General

September 3, 1957

To W. H. Bradford, Right of Way Engineer

Re: Outdoor Advertising

You have requested my opinion as to whether a sign reading, "For Goodness Sake Eat Chickens and Eggs—Compliments of Wirthmore Feed Company" requires a permit under section 138 of Chapter 23.

In my opinion the sign advertises two things:

1. The eating of chickens and eggs in general, and
2. The Wirthmore Feed Company.

Although part of the sign advertises eating of chickens in general, it might pass under the exception. I would hesitate to rule on the question.

However, the second part of the sign is an obvious advertisement of the

company and has nothing to do with the business transacted on the premises.

It is my opinion that the sign requires a license.

L. SMITH DUNNACK
Assistant Attorney General

September 3, 1957

To Honorable James C. Totman

Re: Change of Residence of Member of the Legislature

. . . You inquire as to your eligibility to serve as State Representative in view of your change of residence.

Your question would seem to be answered by Article IV, Part First, Section 4, of the Maine Constitution, which reads as follows:

> "Qualifications of members.—No person shall be a member of the house of representatives, unless he shall, at the commencement of the period for which he is elected, have been five years a citizen of the United States, have arrived at the age of twenty-one years, have been a resident in this state one year; and for the three months next preceding the time of his election shall have been, and, during the period for which he is elected, shall continue to be a resident in the town or district which he represents."

I understand that it is necessary for you actually to change your residence and that it is not reasonably possible to raise the question of your intention to be a resident of Bangor or a resident of another State.

I believe that under your circumstances, as I understand them to be, this Constitutional provision would preclude you from acting as a Representative from Bangor during any special session of the Legislature. Personally, I very much regret that this is so, but the Constitution seems to be very plain in regard to this.

FRANK F. HARDING
Attorney General

October 10, 1957

To Honorable Edmund S. Muskie, Governor of Maine

Re: Appointment of Members of the Board of Examiners of Podiatrists

Reference is made to your inquiry with regard to Section 9 of Chapter 111 of the Public Laws of 1957, amending Chapter 74 of the Revised Statutes of 1954, and providing for a new Board of Examiners of Podiatrists.

The Board consists of four members: Two members of the Board of Registration of Medicine, i. e., the Chairman and the Secretary-Treasurer of said Board, and two podiatrists to be appointed by the Governor with the advice and consent of the Council. The law specifically states that the term of podiatrists shall be four years. The next sentence provides that appointments shall be so spaced that the term of one of the podiatry members of the Board shall expire every two years. It is obvious that, in order to carry out the intention of the

Legislature, where the appointment of two podiatrists must be made at the same time, the term of one of them must be for two years and the other may be for four years.

This is a situation where the intent of the Legislature must govern over the express words of the statute.

ROGER A. PUTNAM
Assistant Attorney General

October 29, 1957

To David H. Stevens, Chairman, State Highway Commission

Re: Construction Area Permits

You have requested my opinion as to the powers of the Commission to grant the request of Cianchette Bros. to operate overloaded trucks on certain ways in Bangor.

Section 98 of Chapter 22 was amended in 1953 by Chapter 231, which authorizes the State Highway Commission to establish "construction areas." Although this grant of authority was not made in the clearest of language, the intent of the proponents of the original bill is known. They had two objectives:

1. to permit the use of the unusually heavy modern road building machinery on the job, and

2. to provide for the use of Euclids and heavily loaded trucks in hauling materials to the job.

The statute uses the words "within construction areas established by the Commission." No attempt having been made to define "construction area" in the law, it must be construed to mean such areas as are deemed advisable by the Commission.

The paragraph providing for procuring permits from towns and cities indicates that the legislature contemplated that the areas could extend beyond the focus of the construction work for the purpose of hauling materials to the work.

The paragraph that permits the state engineer-in-charge to grant construction permits indicates that one of the major intents of the act was to provide for speedy action. Of course, no engineer-in-charge would issue such a permit without acting under some directive.

The amendment in question provides for a bond, etc., so that the Commission can be assured of the rebuilding of the road, if necessary.

In construing statutes relating to the powers of the Highway Commission we must consider that the primary duty of the State Highway Commission is to provide for and protect the highways.

Although it seems that the legislature presumed that these permits would be freely issued, there are no mandatory words. The statute says "*may* be issued," and the Commission has the power to establish the areas. In fact, there is no set-up for applications for the establishment of these areas.

It is my opinion that the Commission should be assured that the highway can be and will be restored to its previous condition and that the traffic hazards will not be dangerous. It must be noted that the inclusion of federal projects in these areas indicates that the act was intended to aid the contractors, but it

cannot be presumed that this aid should be given at the expense of the condition and usability of the highways.

L. SMITH DUNNACK
Assistant Attorney General

November 5, 1957

To Richard E. Reed, Executive Secretary, Maine Sardine Council

Re: Contract with Massachusetts Institute of Technology

We are returning herewith a copy of agreement from the Massachusetts Institute of Technology executed by your Council and the Institute. The agreement was referred to this office by the Bureau of Accounts and Control for our approval.

There are two points relating to the contract with which we are concerned and which prevent us from approving the contract.

We note that the contract, when considered in conjunction with other correspondence with the Institute, contemplates that 17½% of the contract price involves work to be done by the Institute for the William Underwood Company. The contract as a whole contemplates research and study on sardines, primarily for an analysis of the packed food for protein, fat, carbohydrates, minerals, etc. A portion of the work, approximately 17½%, includes study of William Underwood's fried sardines and the free liquid packing medium.

We gather from your letter to Mr. F. L. Foster, dated May 14, 1957, that the results of the study of the Underwood sardines would be forwarded to your office in a sealed envelope, which envelope would be immediately forwarded to Underwood, unopened.

While apparently the results of the study on the whole will be made available to Maine industry and State agencies of the State of Maine, the work to be done on the Underwood product will not be made available, but will be sent unopened to the Underwood Company.

We do not conceive it to be the function of a State agency to advance the cause of a single private industry. For that reason we do not approve the contract.

We also point out that under the provisions of Chapter 16, Section 267-II-B, the one paragraph in our opinion which would permit such research project, such project is to be under the joint direction of the Commissioner of Sea and Shore Fisheries and the Maine Sardine Tax Committee. Such statutory requirement compels us to the conclusion that the contract should be approved by the Commissioner of Sea and Shore Fisheries. The contract is not so approved and therefore that is a second reason why we have not approved it.

JAMES GLYNN FROST
Deputy Attorney General

November 6, 1957

To Paul A. MacDonald, Deputy Secretary of State

Re: Transit Plates

We have your memo of October 18, 1957, stating that a dealer in heavy machinery, who is an authorized holder of transit plates issued under the pro-

visions of Section 26-A of Chapter 22, R. S. 1954, raises a question concerning Section 29, subsection I, of Chapter 22.

He states that he had taken 50,000 feet of sawn lumber as payment for a piece of machinery and claims that he has a right to haul this lumber on his truck bearing transit plates, not only to his place of business, but to deliver it to any buyer he can find. The dealer also states that he has taken livestock and other commodities in trade for machinery.

You ask if a dealer can haul lumber and livestock under the circumstances outlined above on transit plates under the authority of Section 29-I.

Answer. Yes.

Section 26-A is that section defining in general the types of equipment which may be moved on the highways under transit plates:

> "Finance companies, heavy equipment dealers, farm machinery dealers, trailer dealers, junk dealers and service stations may make application to the motor vehicle dealer registration board upon a blank provided for the purpose for a registration certificate and plate, for the purpose of movement on highways of such vehicles owned or controlled by them."

Section 29-I is that section permitting the moving of trucks for certain purposes:

> "No motor truck, tractor or trailer registered under the provisions of sections 21 to 29 inclusive, shall be used for other than demonstration, service or emergency purposes. Provided, however, that when trucks, tractors or trailers bearing dealer or transit registration plates are used for service purposes, such use shall be limited to the transportation of articles and materials directly connected with the purchase and sale of motor vehicles and the maintenance of the properties connected and used with such business."

We are of the opinion that materials such as lumber taken in payment or part payment in connection with the sale of equipment of the nature set forth in the provisions of Section 26-A (which equipment may be moved on the highways under transit plates) may properly be carried by a vehicle under the "service" portion of Section 29. Such use of a vehicle to transport material taken in trade is a use directly connected with the purchase and sale of the dealer's equipment.

JAMES GLYNN FROST
Deputy Attorney General

November 6, 1957

To the Honorable Eugene Cook, Attorney General of Georgia

Re: Effective Date of Constitutional Amendments

We have your letter of October 29, 1957, in which you set forth the varying manner in which the several States determine the effective date of constitutional amendments and in which you inquire how the problem is dealt with in our State.

Apparently our Constitution is similar to that of most States, no clear date being given upon which an amendment will be effective. We herewith quote

that portion of the constitutional provision which must be considered in determining the effective date:

> "And if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this constitution."

It appears that from time to time the method of determining the effective date has varied in this State. At one time the vote was to be reported by the Secretary of State to the Governor and Council, which body would report the vote to the next incoming legislature. Subsequently, it was the custom that the adopted amendment would become effective 30 days after the Governor proclaimed that the measure was affirmatively voted upon.

Presently, the Resolve setting forth the proposed amendment contains the procedure to be followed, i.e., that the Governor shall proclaim the vote of the people, and the effective date shall be the date of the proclamation. In the Governor's proclamation it is stated that the effective date of the amendment is the date of the proclamation.

We hope that this information will be helpful to you in determining your problem, and it would be most appreciated if you could supply this office with any decision you arrive at.

JAMES GLYNN FROST

Deputy Attorney General

November 15, 1957

To Honorable Edmund S. Muskie

Re: Northeastern Resources Committee

. . . You ask if there is any constitutional or statutory bar to your entering into a charter for a Northeastern Resources Committee in behalf of the State of Maine.

The real question is whether or not you have any authority to enter into such a charter on behalf of the State. The answer to this question is that you have no such authority. Such authority would have to be granted by the Legislature. As an example I call your attention to Chapter 451 of the Public Laws of 1955, which conferred upon the Governor the authority to execute a compact with other States for Interstate Water Pollution Control.

Because of the foregoing it is probably not necessary to call your attention to the fact that the compact contains no provision for financing.

Also because of the foregoing I have made no effort to ascertain whether or not the proposed charter is such an agreement as would require the approval of Congress under Article I, Section 10, of the Constitution of the United States, although on the face of it, it would appear to be.

FRANK F. HARDING

Attorney General

November 21, 1957

To: Fred W. Skinner, Administrator of Veteran Affairs

Re: Section 11, Chap. 26 of the Revised Statutes of 1954, as amended
Assistance to needy wife, etc., of Veteran; Eligibility for

We have your memorandum of November 13, 1957, posing the following question:

"Under the provisions of this Section is the needy wife, child, parent or parents *immediately* eligible for assistance provided they are residing in the State at the time they apply for aid, even though *they* have no previous residence in the State?"

We would answer your question in the affirmative.

As we read the statute, the needy wife, child, parent or parents of an eligible veteran must be residing in the State at the time the aid is sought. The purpose of the statute obviously is to include only those who are within the State and are in necessitous circumstances. This State in this instance is relieving towns and cities from a burden that might otherwise be cast upon them.

The eligibility of the veteran, of course, is determined by other provisions of this same section.

ROGER A. PUTNAM
Assistant Attorney General

November 27, 1957

To: Kermit S. Nickerson, Deputy Comm. of Education

Re: Application of Minimum Salary Law

This is in response to your memorandum in which you ask the following question:

"Will the accumulation of years of working in private parochial schools in this state be allowed as service credit (years of experience) under the minimum salary law, or does this law affect only such services that occur in the public schools of Maine?"

It is our opinion that years of teaching experience provided for under the minimum salary law, Section 1, Chapter 364, Public Laws of 1957 adding Section 237A, are not limited to teaching experience in the public schools of Maine.

Your Certification Division has been acting under the oral opinion of the Attorney General as is evidenced by a letter dated January 25, 1954, from you to Superintendent Akins holding that you are to consider a person as having prior years of experience who has taught at Westbrook Junior College or Portland Junior College and the University of New Hampshire.

Years of experience are to be evaluated without distinction between private and public schools, subject only to the condition that the teaching experience shall be in a school that is accredited.

ROGER A. PUTNAM
Assistant Attorney General

December 5, 1957

To Albert S. Noyes, Banking Commissioner

Re: Mobile Banking

. . . You ask if the provisions of Chapter 59, Section 124, R. S. 1954 (Establishment and closing of branches), would permit you to authorize the establishment of mobile banks.

A "mobile bank" is a bus that goes from place to place, picking up deposits and transacting a general banking business.

We are of the opinion that the present banking laws do not permit mobile banks.

Articles appear in the daily banking newspaper, "American Banker," which indicate that the Federal Deposit Insurance Corporation has recently approved "bank mobile" service where such service was legally authorized in Puerto Rico by legislative Act. As indicated in articles in that newspaper dated November 12 and 14, 1957, bank mobile business was closely regulated either by legislative Act or under rules and regulations in relation to such items as fixed locations, designated dates and times, telephone connections with the home office, return on a regular schedule to home offices, prohibitions against doing any banking business along the road between designated places and from their home offices, etc.

History-wise, the evils that accompanied mobile banks, or "saddle-bag banks," became so well known that as early as 1830 banking legislation precluded mobile banking. See the above publications of the "American Banker."

Our examination of the banking law convinces us that it was the intent of the legislature that banks or branches of banks should be in fixed locations.

Even if this were not in our opinion the clear intent of the legislature, it would seem that experiences of past years would demand that if such mobile banks could be authorized, such authorization would have to be expressed in our legislation, with the right to control the business set forth by statute or by means of rules and regulations. Presently, the Banking Commissioner has no authority to issue rules and regulations affecting banks except in times of banking emergencies.

It is for these reasons that we give our opinion that mobile banking is not presently authorized by the statutes of the State of Maine.

FRANK F. HARDING
Attorney General

December 9, 1957

To: Kermit S. Nickerson, Deputy Commissioner of Education

Re: Teachers' Contracts

We have your memorandum of December 3, 1957, in which you ask for an interpretation of Chapter 41, Section 87, Paragraph V.

This section relating to the employment of teachers states in part:

> "Except that after a probationary period of not to exceed 3 years, subsequent contracts of duly certified teachers shall be for not less than 2 years, and furthermore, that unless a duly certified teacher receives written notice to the contrary at least 6 months before the terminal date of the contract, the contract shall be extended automatically for 1 year and similarly in subsequent years, although the right to an extension for a longer period of time through a new contract is specifically reserved to the contracting parties."

You then ask whether or not the superintending school committee would have the right to make a reduction in the salary paid to a teacher who does not receive notice of termination of contract or a new contract. We answer your question in the negative.

We assume that a teacher's contract of employment expressly sets forth the salary to be paid the teacher. When such a contract is extended by the "self-executing" statute above referred to, the contract in all its essential elements but one (original term of contract) is extended from year to year. Such extension embraces the salary of the teacher. If the contract is so extended, it necessarily calls for the conclusion that the salary in the contract cannot be diminished.

JAMES G. FROST
Deputy Attorney General

December 10, 1957

To: Kermit S. Nickerson, Deputy Commissioner

Re: Town of West Paris

This will acknowledge receipt of your memorandum of December 6, 1957, in which you ask for an interpretation of Section 37, Chapter 364, Public Laws of 1957, with respect to the application of said section to the new town of West Paris.

The Town of West Paris is being organized in January 1958 at which time three members of the superintending school committee will be elected. This town was formerly part of the Town of Paris which was included in Maine School Union No. 26 composed of the towns of Hebron, Paris and Woodstock.

You state that because of the number of teaching positions, it will be necessary to include West Paris in the supervisory union and you inquire as to the procedure for adding a new town to an existing school union.

Our examination of the new law leads us to the conclusion that you can use the same procedure as has been used in the past for adding a new town to an existing union. Section 77 of Chapter 41 of the Revised Statutes of 1954, after stating that it is the duty of the Commissioner and the State Board of Education to regroup all of the towns in the State into unions, provides:

> "Such supervisory unions as have been formed on June 30, 1946, may be dissolved by the Commissioner for the purpose of a more advantageous combination, provided that there has been obtained the approval of the majority vote of the members of the superintending school committees in the towns comprising such supervisory unions . . . Whenever regroupings are made, the Commissioner and the State Board of

Education shall have authority to reallocate any town or towns in the unions affected to unions already organized."

Section 37 of Chapter 364 of the Public Laws of 1957, after stating that it shall be the duty of the Commissioner and the State Board of Education to adjust the grouping of the school administrative units within the State, provides that:

> "I. Existing supervisory unions employing over 35 teachers and paying the superintendent of schools an annual salary of over $4,500 shall not be regrouped unless the proposed regrouping shall have first been approved by a majority of the school committee members in the administrative units involved."

The primary problem will be in obtaining the affirmative vote of the majority of the school committee members in the administrative units.

While the provision that "regrouping shall be made only upon the expiration of the current contract of the superintendent or under conditions which shall safeguard the provisions of such contract," contained in the Revised Statutes of 1954, was eliminated in the new law, such provision should still be complied with. It is a general principle, without legislation, that the State shall not pass any law impairing the obligation of the contract. It is also imperative that State officers take no action under a law that would have the effect of impairing the obligation of the contract. Thus the contract of the superintendent must be handled in a manner that contemplates the new town in a union, or the adjusting of the units should await the termination of the superintendent's current contract.

JAMES G. FROST
Deputy Attorney General

December 10, 1957

To David H. Stevens, Chairman, State Highway Commission

Re: Reimbursement of Public Utilities under Chapter 378, P. L. 1957

You have requested my interpretation of Chapter 378 of the Public Laws of 1957 in regard to how much money is made available in what fiscal years for the purpose of reimbursing public utilities under the act.

The original draft of this act contemplated use of highway funds, and the current problem was not involved. It would appear that the draftors in the hasty redrafting did not fully appreciate the financial problem or were mainly interested in getting some kind of favorable legislation.

The last paragraph of Section 1 provides for the payment of the reimbursable costs from the general fund operation capital and repayment to the fund. This is clear and correct.

Section 2 is a limiting section. It says:

> "The provisions of this act shall apply only to projects in said interstate system for which the contracts are signed prior to June 30, 1959, and at no time during the fiscal year 1957-58 or the fiscal year 1958-59 shall the *amount paid from the general fund* operating capital for the purposes of this act exceed the amount of the 90% federal funds to be

available for projects in said interstate system under the Federal-Aid Highway Act of 1956 to match a State appropriation of $12,500."

This section takes the law out of the statutes and makes it a private and special law in that it is operative and effective *only* as to projects" for which contracts are signed prior to June 30, 1959."

It then further limits the effect of the act by saying:

> "At no time during the fiscal year of 1957-58 *or* the fiscal year 1958-59 shall the amount paid from the general fund operating capital for the purposes of this act exceed the amount of the 90% federal funds . . ."

This limitation refers to *payment.* It is possible to argue that the State is limited to using only $12,500 in any year for matching. However, the act must be read as a whole. Provision is made for the non-lapsing of the 1957-58 money. This would be senseless, if it could not be used.

The use of the phrase, "during the fiscal year 1957-58 or the fiscal year 1958-59," is unfortunate, but its only reasonable intent can be to limit the expenditure to funds available under the total appropriation. If $7,500 is spent the first year and $5,000 can be carried forward to 1958-59 under Section 3, in 1958-59 there would be available in the general fund operating capital in 1958-59 the funds to match the State's appropriations. I repeat, the carryover would have no use or meaning without this interpretation.

Moreover, this is not a criminal statute. In statutes relating to governmental functions, the rule of interpretation is to presume that they were intended to be workable!

The third sentence says:

> "All unexpended balances on June 30, 1959 shall lapse . . ."

Obviously, the statute is contradictory. However, it should be interpreted in the light of its general intent, and under the presumption that it was intended to be a workable law.

The fact that in Section 2 the act was made applicable to project contracts *signed* before June 30, 1959 can be the key. Although the word "only" could indicate that this was a *limiting* phrase only (and in strict interpretation this would be true), it also could have been an attempt to make these appropriations subject to the theory of the provisions of Section 14 of Chapter 340 of the Public Laws of 1957 in reference to contractual obligations.

We know that the original act contemplated the use of highway funds and that it was intended to make the moving of utilities part of the highway project. When the proponents were convinced of the unconstitutionality of this idea, and revamped the act, they must have thought that the language used in the act meant that the signing of a contract obligated the funds.

We also know that the language used in the lapsing provisions is the customary phraseology that follows the intent of the fiscal set-up. Since the fiscal set-up permits the non-lapsing of committed highway funds, it is possible to argue that the final lapsing provisions in the third sentence of Section 3 should be read as being subject to the provisions of Section 14 of Chapter 340.

This would make it possible to interpret the whole act so that it would be workable. For example, if $7,500 of the $12,500 appropriation was used in the

first year, $17,500 would be left, properly allocated to utility costs. If contracts were signed before June 30, 1959, amounts up to this extent of the appropriation would be committed and would not lapse.

It is true that even under this interpretation, the result seems silly. The statute could have said, "Not more than $25,000 shall be obligated during the period ending June 30, 1959 and the amounts obligated shall not lapse." Yet we must remember that the redraft was hastily made near the end of the session after the Supreme Court decision on the first draft.

You have also asked what procedure to follow in case the costs of moving the utilities exceeds the available amounts.

Under Section 13 of Chapter 340 of the Public Laws of 1957, it is a criminal offense to contract for any expenditure in excess of appropriations. Chapter 378 is definite in its limitation of total expenditure. It is true that the amount necessary was unknown, but it is also true that the amount appropriated was definite and that not only the general law, but the special act limited the expenditures to the appropriation. It is also true that one of the most potent arguments used on behalf of this bill was the small cost to the State. This would justify the conclusion that the appropriation was intended to be the limit.

Under established law, the utilities must move their facilities at their own expense, except for such reimbursement as is provided in this special act. It is a moot question as to whether a utility that could qualify for reimbursement except for lack of available funds would be entitled to pro-rating from the previously paid utilities. Obviously, it is not the duty of the Commission to anticipate the exhaustion of the funds and to plan for pro-rating.

To be specific, let us presume that the first three projects used up all but $5,000 of the appropriation and that the fourth project to be put out for bids would require $10,000. The Commission could do nothing more than to notify the utility that only $5,000 was available.

In other words, the exhaustion of the special kitty for the special subsidy would end the special situation and the general law would prevail. It would be necessary for the utility to seek further legislative aid.

Another contingency that might arise would be the letting of contracts during the first year that would require more than the $12,500 appropriation. It is my opinion that the Commission could *pay out* only $12,500 in that year, but could obligate for payment in the next year.

In other words, the payments during the first year are restricted by the amount available.

L. SMITH DUNNACK
Assistant Attorney General

December 17, 1957

To Albert S. Noyes, Commissioner Banks and Banking

Re: Section 160, Chapter 59, Revised Statutes of 1954, Capital Stock

This will acknowledge receipt of your memorandum of November 25, 1957, in which you ask this office for an interpretation of Section 160 of Chapter 59 of the Revised Statutes of 1954.

Your question relates to loan and building associations and particularly the last sentences of Section 160, Chapter 59, which read as follows:

> "In order to enable prospective purchasers of prepaid shares to accumulate savings with which to purchase such shares, associations may accept payments, subject to withdrawals from time to time, to be held in share savings accounts to which there shall be credited, at every regular distribution period, such interest or dividends as the directors may determine. The holders of such share savings account shall be considered as shareholders of the association."

You ask:

> "Is it within the province or within the scope of duty of the Bank Commissioner to make a regulation saying in effect that, after sufficient money ($200) is accumulated in a so-called share savings account, that amount must be converted to a prepaid share?"

We are of the opinion that the sentence quoted above from Section 160 shows the clear intent of the Legislature that the only purpose of a share savings account is to accumulate sufficient funds to purchase a two hundred dollar share and that once such sum has been accumulated, then the account should be converted to a prepaid share.

We are, however, of the opinion that the Bank Commissioner does not have the authority to make a rule and regulation requiring that when a share savings account has reached two hundred dollars, it must be converted to a prepaid share. We find no law authorizing the Commissioner to make such rule and regulation and, absent such authorizing law, such rule and regulation would have no effect.

We would also point out that we can find no penalty provision for failure to convert once the share savings account has reached two hundred dollars.

We would suggest that if, in your opinion, conversion is desirable, the Legislature should be presented with the problem of enacting laws that would enable enforcement of such a provision.

FRANK F. HARDING
Attorney General

December 18, 1957

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

Re: Liability—Public Use of Armories

. . . You inquire as to the responsibility of the National Guard in seeing that liability policies are carried when your buildings are used for public uses such as dances. . . .

While it is doubtful that the State or the National Guard itself would be responsible for accidents which happened in the course of public dances or other public events for which your buildings are used, certainly such accidents place the State in the position of having, possibly, to answer such claims through action taken by the Legislature. Then, too, there is the possibility that some member of the Guard may be personally sued for injuries that may occur to the property under the custody of that person.

For these reasons we are definitely of the opinion that whenever National Guard units are used for other than strict National Guard purposes liability insurance should be obtained by the person using the unit.

JAMES GLYNN FROST

Deputy Attorney General

January 6, 1958

To Roland H. Cobb, Commissioner

Re: Rights of Access

This is in response to your memo of December 31, 1957, in which you ask if it is proper for your department to purchase access areas leading to Merrymeeting Bay, which Bay is not a game management area.

In our opinion it would not be proper for you to purchase access areas to Merrymeeting Bay or other areas governed by the general law with respect to open dates for fishing and hunting, rather than by the commissioner as a game management area.

Section 19 of Chapter 37 does give authority to the Commissioner to acquire by gift, bequest or otherwise real and personal property for the location, construction, maintenance and convenient operation of a game management area, fish hatchery or fish hatcheries and feeding stations for fish.

We are of the opinion that the purchase of access areas to reach locations that are not game management areas is not within the provisions of Section 19. It would be proper to purchase access areas leading to game management areas as an integral part of a larger project. However, that is not the situation presented to us, because it is our understanding that there are several areas in the State, not game management areas, to which the department would like to purchase access areas.

Subsequent to the time your memo was received in this office, our attention was called to Section 144 of Chapter 37 of the Revised Statutes, the same being an assent act to the provisions of the Act of Congress entitled "An Act to Provide that the United States shall Aid the States in Wildlife Restoration Projects and for Other Purposes."

With respect to such section it has been pointed out that in the Federal Aid Manual with regard to restoration it is said that the acquisition of property for access to game populations may be an integral part of an extensive game restoration program. We think we agree, as pointed out above. However, mere assent to a Federal Act wherein the authorization is given to the department to do such acts as may be necessary to the conduct and establishment of cooperative wildlife restoration projects does not permit the State to take acts not authorized by statute.

JAMES GLYNN FROST

Deputy Attorney General

January 6, 1958

To Kermit Nickerson, Deputy Commissioner of Education

Re: Educational Television in Unorganized Territory

. . . You inquire if the Commissioner of Education is authorized under Section 164 of Chapter 41 of the Revised Statutes to expend $1000 in order to obtain music instruction in the schools in the unorganized territories by a television program conducted weekly through a Bangor station.

Section 164 of Chapter 41 reads as follows:

> "Such amounts as are necessary to carry out the provisions of sections 159, 160, 161, 164, 165, 177 and 183 shall be paid out of the unorganized territory school fund heretofore established. The commissioner is authorized to use this fund for any purpose in connection with the schooling of children in the unorganized territory of the state, including: salaries, board and traveling expenses of teachers and supervisors; conferences, training programs and professional improvement of teachers; fuel and janitor service; tuition, board and transportation of elementary and secondary school pupils; text and reference books, school apparatus and supplies; leases of rentals of lots or school buildings; minor repairs to school buildings or equipment; services, expenses and fees of agents, attendance officers and clerical assistance; office expenses; utility service; school medical and dental services; and any other expenses he may deem necessary to carry out the purposes of the above-mentioned sections."

If the Commissioner of Education deems it necessary for the schooling of children in unorganized territory to provide such children with music instruction through a television program, then it is our opinion that expenditures can properly be made for that purpose from the unorganized territory school fund. The amount of money to be taken from the fund would, of course, be an administrative determination.

JAMES GLYNN FROST
Deputy Attorney General

January 6, 1958

To Honorable Edmund S. Muskie, Governor of Maine

Re: Northeastern Resources Committee Agreement

. . . You requested the Attorney General to explore the possibility of rephrasing the agreement relative to the Northeastern Resources Council so as to eliminate the objections which resulted in the opinion of the Attorney General dated November 15, 1957, that the Governor of Maine had no authority to execute such agreement on behalf of the State of Maine.

You call to our attention the solution of a similar problem (Civil Defense Agreement with the Province of New Brunswick) by means of a memorandum of understanding, rather than by a binding agreement.

The memorandum of agreement referred to was a device, used with Federal approval, to achieve the desired end of arriving at an understanding with a neighboring Province of Canada, without the necessity of securing Congressional approval.

Actually, however, express authority is granted to you, as Governor, to enter mutual aid agreements, under the provisions of the Civil Defense law, with foreign countries, along with other States, Chapter 12, Section 6-V, R. S. 1954.

Relative to the Northeastern Resources Committee, we believe that most of the provisions therein contained are of such a nature that they would be complied with, without binding agreement.

Many of our State departments have jurisdiction over matters which might in some way be affected by action of the Federal Government. It would be entirely proper for officials of such departments to confer with appropriate Federal and other State officials, in order to explore the promotion of coordination of activities in so far as such coordination is consistent with the dictates of our laws.

Thus, while we affirm our opinion that you should not enter into a binding agreement recognizing any unauthorized body as being a body through which you will work in order to achieve such ends, we see no bar to your recognizing such committee and, informally, agreeing that such committee will be used by such of our State departments as have interests in matters to be considered by the committee.

Perhaps the following form would suffice to indicate your action, with copies to each agency interested:

"Dear ——————

This letter is written with the combined interests of the State of Maine and her sister New England States uppermost in my mind.

"It is my intention, by this letter, to indicate the desires and willingness on the part of the State of Maine to approve in the following terms informal plans and procedures relating to the Northeastern Resources Agreement:

"WHEREAS, on the 26th day of May, 1954, the President of the United States by letter to the Secretary of the Interior approved the Inter-Agency Agreement on Coordination of Water and Related Land Resources Activities submitted by the Department of the Interior to the Director of the Bureau of the Budget, the purpose of said agreement was to provide improved facilities and procedures for the coordination of the policies, programs and activities of the Departments of the Interior; Commerce; Labor; Agriculture; Health, Education and Welfare; and the Army; and the Federal Power Commission in the field of water and related land resources investigation, planning, construction, operation and maintenance, to provide means by which conflicts may be resolved and to provide procedures for coordination of their interests with those of other Federal agencies in the water and related land resources field. Under this agreement there was created the Inter-Agency Committee on Water Resources, and

"WHEREAS, on June 29, 1956, the said Inter-Agency Committee on Water Resources adopted a charter for a Northeastern Resources Committee as follows:

> "'1. PURPOSE—It is the purpose of this agreement to provide in the Northeastern region improved facilities and procedures for the coordination of the policies, programs, and activities of the States and Federal agencies in the field of water and related land resources investigation, planning, construction, operation and maintenance; to provide means by which conflicts may be resolved; and to provide procedures for

coordination of their interests with those of other Federal, local governmental, and private agencies in the water and related land resources field.

" '2. ESTABLISHMENT—

(a) For this purpose there is established a Northeastern Resources Committee of State and Federal representatives operating on a basis of co-equality. The Committee shall be composed of representatives of any of the following States and Federal agencies which indicate a desire to participate:

The States of Maine, New Hampshire, Vermont, Rhode Island, New York and Connecticut, the Commonwealth of Massachusetts, and the Federal Departments of the Interior; Commerce; Labor; Agriculture; Health, Education and Welfare; and the Army; and the Federal Power Commission.

(b) The Governor of each of the States desiring to participate shall designate the member of the Committee for his State.

(c) The Federal members on the Committee shall be designated by the head of the Federal Agency they are to represent and shall preferably be resident in the area.

(d) Committee members may designate other officials to serve as alternates.

(e) Federal agencies will participate in the work of the Committee in accordance with their respective responsibilities and interests and with the intent of the 'Inter-Agency Agreement on Coordination of Water and Related Land Resources Activities' as approved by the President on May 26, 1954.

(f) When appropriate, other Federal, State, public and private agencies will be asked to participate in Committee meetings and to appoint representatives to specific subcommittees, in order that the work of the Committee may be coordinated with the related work of all agencies.

(g) A Chairman shall be elected annually from and by the State and Federal members, provided that, except by unanimous consent of the members, the Chairman shall not succeed himself.

(h) The Committee may designate a secretary for the committee and provide the necessary administrative support incident to his tenure.

(i) The Committee shall have such additional staff assistants as the members may, upon request, assign to it.

"3. METHOD OF OPERATION—

(a) Meetings will be held as often as required, at times and places appropriate to the agenda and normally at intervals of not more than two months. Meetings normally will be open to the public and the press. Special executive sessions of the Committee may be held at the call of the Chairman.

(b) The Committee shall serve as a means for exploring coordinating activities and achieving accord or agreement, at the regional level, among its member States and agencies on issues or problems which may arise. Staff work necessary to coordinate activities and present

the essence of any issues or problems to the Committee shall be carried on by the Committee staff or by subcommittees as appropriate and as may be appointed by the Chairman and approved by the Committee.

(c) Minutes of meetings will be prepared to record the actions and recommendations of the Committee. The minutes will be primarily for use of the participating agencies, but a wider distribution may be made when considered desirable by the Committee.

(d) The Committee may establish further procedures governing its operations as required.

"4. RESPONSIBILITIES—

(a) It will be the responsibility of the Committee to establish means and procedures to promote coordination of the water and related land resources activities of the States and of the Federal agencies; to promote resolution of problems at the regional level; to suggest to the States or to the Inter-Agency Committee on Water Resources changes in law or policy which would promote coordination, or resolution of problems; and in its discretion to communicate with the Inter-Agency Committee on Water Resources on any matters of mutual interest.

(b) The efforts of the Committee on coordination of work and resolution of conflicts will be directed towards all State and Federal activities involved in their respective water and related land resources development responsibilities and shall include coordination of the following:

(1) Collection and interpretation of basic data.

(2) Investigation and planning of water and related land resources projects.

(3) Programming (including scheduling) of water and related land resources construction and development.

"5. GEOGRAPHICAL JURISDICTION—

"The geographical area to be encompassed within the sphere of Committee influence will include the entire States of Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine and New York, including Passamaquoddy Bay, Long Island Sound, and the Atlantic Ocean contiguous to the Northeastern Region."

"Being cognizant of the mutual benefits to be derived from the objectives of the above terms, it is my intent to adopt the said terms, within such statutory limits as apply to the departments and agencies of the State of Maine, as being the informal plans and procedures relating to the coordination of the policies, programs, and activities of the States and Federal agencies in the fields of water and related land resources.

Upon receipt of a letter from you, indicating the willingness of your (State, agency, etc.) to adopt similarly the terms above set forth, the State of Maine will consider such terms immediately effective."

(To be signed by the Governor)

We hope that the above will answer your question.

FRANK F. HARDING
Attorney General

January 6, 1958

To Roland H. Cobb, Commissioner, Inland Fisheries and Game

Re: Swan Island

This is in response to your memo of December 20, 1957, in which you ask for a ruling as to whether the Governor and Council have authority to dispose of Swan Island to the Federal Government.

We herewith quote Section 8 of Chapter 37, R. S. 1954:

> "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."

Under the above quoted Section 8 it would appear that upon your recommendation the Governor and Council can sell any property taken or acquired by purchase under the provisions of Chapter 37 of the Revised Statutes when such property is no longer necessary for the purposes of the department.

If Swan Island is within the above statute, then it would be our opinion that the Governor and Council could properly sell the property.

In perusing the material which you sent to this office attached to your memo, we find that the Federal Government expects the property to be transferred without consideration. It is our opinion that the words, "sell and convey," indicate an intent that the property shall be transferred for a valuable or cash consideration and that it would be improper to give Swan Island away.

JAMES GLYNN FROST

Deputy Attorney General

January 16, 1958

To Donald F. Ellis, O. D., Secretary, Board of Registration in Optometry

Re: Reinstatement

This is in response to your recent request for an opinion as to the eligibility for reinstatement of registration of an optometrist whose registration was revoked in Maine in 1952 for non-payment of annual renewal license fee.

A board or officer has no power to reinstate a license where the statute merely confers the power to suspend or revoke and the action has been to revoke.

It is our further opinion that such license can be reinstated only where the person involved proceeds by way of application and examination as is set out in the statutes with respect to those originally applying for a license.

JAMES GLYNN FROST

Deputy Attorney General

January 20, 1958

To L. C. Fortier, Chairman, Maine Employment Security Commission

Re: Date of Enactment

You have asked this office for an opinion relative to the "date of enactment" of Chapter 150, Private and Special Laws of Maine, 1957.

Chapter 150, entitled An Act Relating to Construction of a Building for Maine Employment Security Commission, authorizes the Commission to requisition from the unemployment trust fund $600,000, and said sum was appropriated for the purpose of acquiring land and constructing a building to be used by the Commission.

The Federal Department of Labor states that the "date of enactment" of Chapter 150 is important to that Department in carrying out the terms of the Federal Reed Act with respect to expenditures made under their act.

It is our opinion that the "date of enactment" of Chapter 150, Private and Special Laws of 1957, was August 28, 1957.

Prior to January 1, 1909, the Constitution of Maine had no provision relating to initiative and referendum procedures with respect to acts, bills, or resolves passed by the Legislature.

Thus, prior to 1909, the "date of enactment" of such acts, bills, or resolves, having the force of law, would have been the date such acts, bills and resolves were approved by the Governor, at which time the acts went into effect.

At that time our court said:

> "The last legislative act is the approval of the governor. When approved and not till then they become existing acts. . . . The approval of the governor was the last legislative act which breathed the breath of life into these statutes and made them a part of the laws of the State. . . ." *Stuart v. Chapman,* 104 Me. 17

See also the language of the court in Opinion of the Justices, 120 Me. 566, which indicates that a bill, passed as an emergency measure, is enacted upon approval by the Governor.

However, Article XXXI of the Constitution, proposed by Chapter 121, Resolves, 1907, became effective as an Amendment on January 1, 1909. This Article contains the provisions relating to optional referendum and direct initiative by petition.

This Constitutional Amendment made a fundamental change in the existing form of government in so far as legislative power was involved. *Farris v. Goss,* 143 Me. 227.

Before the Amendment the style of acts and laws was:

> "Be it enacted by the Senate and House of Representatives in Legislature assembled."

It thus appears that the Legislature could then enact legislation, the last legislative act being, as stated above, the approval of the legislation by the Governor. The Amendment, however, provided that after its adoption the style of acts and laws should be:

> "Be it enacted by the People of the State of Maine."

By the Amendment, it is clear that the people were reserving to themselves the right to propose laws and to enact or reject laws at the polls, and also to reserve the power to approve or reject any act, bill, resolve or resolution passed by the Legislature.

Article IV, Part First, Section 1, Maine Constitution, reads as follows:

> "The legislative power shall be vested in two distinct branches, a House of Representatives, and a Senate, each to have a negative on the other, and both to be styled the Legislature of Maine, but the people reserve to themselves power to propose laws and to enact or reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act, bill, resolve or resolution passed by the joint action of both branches of the legislature, and the style of their laws and acts shall be, 'Be it enacted by the people of the state of Maine.'"

In order to protect this right, Article IV, Part Third, Section 16, of the Constitution now provides:

> "No act or joint resolution of the legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the legislature passing it, unless in case of emergency, (which with the facts constituting the emergency shall be expressed in the preamble of the act), the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3) provision for the sale or purchase or renting for more than five years of real estate."

From the cases and constitutional provisions considered in the above, it appears that, since the constitutional amendment of 1909, it is not the approval of the Governor that is the final legislative act which "breathes the breath of life into the statutes," but rather the expiration of the ninety days after the recess of the Legislature passing it (except in cases of emergency. For language indicating that a bill passed as an emergency measure is enacted upon approval of the Governor, see Opinion of the Justices, 120 Me. 566.)

As stated in *State v. Gibbons,* 118 Wash. 171, 177.

> "When the people or body possessing such legislative power have completely exercised their power in bringing the law into existence, the enactment of the law has become complete."

Not until the ninety days expire without a referendum being invoked does the act become law. Not until expiration of the ninety days has that final condition been complied with which results in "enactment" of the law.

Chapter 150, Private and Special Laws of 1957, not being an emergency measure, became effective, and was enacted, on August 28, 1957.

JAMES GLYNN FROST
Deputy Attorney General

January 21, 1958

To: G. Carleton Lane, Acting Chairman of Maine Industrial Building Authority

Re: Last Paragraph of Section 4, Chapter 421, Public Laws of 1957
Decision on contract of insurance; Participation in re interests

The Authority has inquired as to the effect of the last paragraph of Section 4 of Chapter 421 of the Public Laws of 1957 and what action the Authority should take if and when this section of the law is applicable. A brief resumé of the law and its passage may be helpful to us in understanding the intent and application of this section. At the outset, Legislative Document 1614, Senate Paper 620, "An Act to Create the Maine Industrial Building Authority," had no such provision as is now found in the last paragraph of Section 4. However, Section 17 of Chapter 135, Revised Statutes of 1954, would have undoubtedly applied as it would be our opinion that the members of the Authority would have been holding a place of trust in a state office within the meaning of that statute which is as follows:

> "No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the state, or any officer of a quasi-municipal corporation shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the state or of the institution or of the quasi-municipal corporation in which he holds such place of trust, and any contract made in violation hereof is void; . . ."

During the legislative session at which time the Industrial Building Authority Act was being considered, the Senator from Androscoggin, Senator Lessard, came to me and asked me to draft for him an amendment which would prohibit the Authority from entering into any contract of insurance where any of its members or its manager had any interest, direct or indirect, in certain prescribed fields. I complied with his request and out of it arose Committee Amendment B to Senate Paper 620, Legislative Document 1614. This amendment reads as follows:

> "The authority shall not enter into any contract of insurance where any of the members of the authority or its manager has any interests, direct or indirect, in any firm, partnership, corporation or association which would be a mortgagee, whose loan to a local development corporation is insured by the authority, or has any interest, direct or indirect, in any firm, partnership, corporation or association which would rent, lease or otherwise occupy any premises constructed by a local development corporation where said corporation's mortgage is guaranteed by the authority, or is a director or officer or otherwise associated with any local development corporation, whose mortgage is guaranteed by the authority."

Later on Senate Amendment A to Committee Amendment B was offered by the same Senator and that amendment was adopted in the Senate, concurred in by the House, and is now what we call the last paragraph of Section 4 which now reads as follows:

> "No member of the authority shall participate in any decision on any contract of insurance if he has any interests, direct or indirect, in any

firm, partnership, corporation or association which would be a mortgagee, whose loan to a local development corporation is insured by the authority, or if he has any interest, direct or indirect, in any firm, partnership, corporation or association which would rent, lease or otherwise occupy any premises constructed by a local development corporation where said corporation's mortgage is guaranteed by the authority, or if he is a director or officer or otherwise associated with any local development corporation, whose mortgage is guaranteed by the authority."

It is obvious from the review of the passage of the act that what started out to be a direct prohibition has now become a very limited one. The limitation is plainly and simply that the member who finds himself interested as described in the last paragraph of Section 4 does not participate in any decision which may have an effect upon his interest.

Section 17 of Chapter 135, in our opinion, does not apply because the Legislature has seen fit to deal with this particular matter in a particular way. In order to protect the Authority and any contract of insurance any member of the Authority who is interested in any of the degrees set forth in the last paragraph of Section 4 of the act should, when a contract of insurance is before the Authority for approval or disapproval, have noted on the minutes of the meeting, if he is one of those indicated to be present, that he abstained from participating in the vote or in any discussion with regard to the contract of insurance for the reason that he was interested within one of the degrees set forth in the act, and his interest should be clearly and concisely set forth.

While a member may not participate in a decision because of the statute, he may, nevertheless, be counted as being present for the purpose of ascertaining whether a quorum is on hand to give the Authority the necessary power to carry on its normal operations.

Whether or not a member is interested within the meaning of the last paragraph of Section 4 in a given instance may be a close question of both fact and law. If doubt should arise in any member's mind with regard to his right to participate, his relationship to any interested party should be immediately referred to this office so that a determination may be made.

The statute is silent as to what the effect might be of a member voting or participating in a vote where he is interested. The contract may be either void or voidable, but the long and the short of it is that no such situation should ever arise; so this question need not be discussed further.

ROGER A. PUTNAM
Assistant Attorney General

January 21, 1958

To Norman U. Greenlaw, Commissioner of Institutional Service

Re: Commitment to State Hospitals

This will advise that it is our opinion that patients at your mental hospitals who were committed under the law which was declared unconstitutional by our court should be re-committed under the provisions of the present statute.

It is our understanding that such proceedings have been followed in the past and that therefore the procedure is a familiar one. However, if this information is wrong and you desire help in the preparation of the proper form of petition, please advise.

JAMES GLYNN FROST
Deputy Attorney General

January 21, 1958

To A. D. Nutting, Forest Commissioner

Re: Removal of Logs from Great Ponds

It is our opinion that authorization from the legislature would be necessary for a person to enter the business of removing logs from great ponds.

It would perhaps be wise for a person desirous of removing such logs to have an authorization from the legislature to the effect that such interest as the State may have in the logs on the bottom of great ponds be conveyed to the person removing such logs.

While this would protect the worker from any claim by the State of Maine for such logs, it should be clearly understood that if such logs did not belong to the State of Maine, such authorization would not protect the taker from action by the owner.

JAMES GLYNN FROST
Deputy Attorney General

January 27, 1958

To Michael A. Napolitano, State Auditor

Re: Qualified Public Accountants

Your memo of January 8, 1958, reads as follows:

"Section 26 of Chapter 90-A, Public Laws of 1957 provides that 'Each municipality and quasi-municipal corporation shall have an annual postaudit made of its accounts covering the last complete fiscal year by the State Department of Audit or by a qualified public accountant elected by ballot or, if not so elected, engaged by its officers. The postaudit shall be conducted on the basis of auditing standards and procedures prescribed by the State Auditor.'

"Will you kindly render your opinion as to the definition of a qualified public accountant within the meaning and intent of this chapter?

"What recourse would the department have in the event that the municipal officials hired a person to conduct an audit who was not qualified?"

We would expect a qualified public accountant to be a person of sound mind and of such capabilities and competence as would cause the town to place trust and confidence in that accountant.

We should not expect that your department would have any recourse if municipal officers hired a person to conduct an audit who was not qualified.

Subsection 1 of Section 26 would seem to be a remedy, in the event the voters of a municipality were dissatisfied with a postaudit made by a public

accountant. Said section provides that in such event, upon a proper petition, then the State Auditor shall order a new postaudit to be made by the department.

JAMES GLYNN FROST
Deputy Attorney General

February 5, 1958

To Roland H. Cobb, Commissioner of Inland Fisheries and Game

Re: Access Areas

In response to your letter of January 27, 1958, supplementing our opinion of January 6, 1958 with respect to the purchase of access areas to land not governed by game management laws, we would advise that it is not proper either for your department to purchase such access areas or for your department with the approval of the Governor and Council to purchase such access areas.

We would expect that with respect to land which you desire to purchase for the purposes of game management you would continue to follow the law as you have in the past.

JAMES GLYNN FROST
Deputy Attorney General

February 5, 1958

To E. L. Newdick, Commissioner of Agriculture

Re: "Meat, Fish and Poultry," Chapter 32A, Section 32, R. S. 1954

We have your memo of January 30, 1958, which reads as follows:

"Sec. 22, Chapter 32A, R. S. 1954 as amended reads as follows:

" '*Meat, Fish and Poultry.*—Except for immediate consumption on the premises where sold, or as one of several elements comprising a meal sold, as a unit, for consumption elsewhere than on the premises where sold, all meat, meat products, fish and poultry, offered or exposed for sale or sold as food, shall be offered or exposed for sale and sold by weight.'

"Since the effective date of this legislation, August 28, 1957, this Department has enforced the provisions of the above section on the assumption that the key words 'meat, meat products, fish and poultry' were used in the law as general terms embracing all types of edible flesh from creatures of the land and sea.

"It is our understanding that this legislation was passed with the specific purpose of protecting the public from trade practices which result in unfair or unequal prices for these foods when they are sold by the unit without weighing.

"The question, then, is this: Are we correct in assuming that the intent of the law is that 'meat, meat products, and poultry' include the carcass or portion thereof from any warm blooded animal or bird used for food purposes; and further, that 'fish' as used in this section includes any cold blooded animal of the sea such as fish, lobster, crab, clam, oyster or mussel used as food for human consumption?"

We agree with you in your interpretation of the meaning of "meat, meat products, fish and poultry".

We understand that you are primarily interested in whether or not the word "fish" embraces shell fish.

In *Moulton v. Libby,* 37 Me. 472, the Court said:

> "In all the treatises respecting that common right (of fishing), the general term 'piscaria' or its equivalent, is used as including all fisheries, without any regard to their distinctive character, or to the method of taking the fish. . ."

The Court held that the taking of oysters and clams is embraced in the common right to fish. In *Caswell v. Johnson,* 58 Me. 164, the Court, concluding that oysters are included in the term "fish", said:

> "The classification which scientific men have made, founded upon the physical structure of the animal, is not of such common notoriety among the dealers in this class of animals, as to lead to the conclusion that a legal instrument was drawn and executed upon their theories, rather than the well-known accepted theory of the legislative and judicial departments of the State, even if such classifications should differ. The term 'shell' prefixed to the word 'fish', thus making a compound word of it, does not exclude them from this class of animals, but is put there to indicate the particular kind of fish, as cod-fish, sword-fish, dog-fish, and the like. It is a shell-fish, that is, a fish covered with a shell."

See also *State v. Peabody,* 103 Me. 327.

JAMES GLYNN FROST
Deputy Attorney General

February 5, 1958

To Colonel Robert Marx, Chief, Maine State Police

Re: Actual Weight of Vehicles

. . . You ask the Attorney General to furnish you with a ruling on the interpretation of Section 20 of Chapter 22, R. S. 1954, as amended, and of that portion of Section 109 of Chapter 22 that reads, "gross weight, actual weight of vehicle and load".

You state that problem as follows:

"During the winter months, and especially during snow or sleet storms, vehicles being weighed carry some accumulation of snow and ice. Some of these units inevitably exceed the statutory tolerances of 2,000 lbs. on road limits, 10% and 5% on registration, and 10% for vehicles carrying certain forest products.

"The owners, a few courts and one county attorney have indicated that in their opinion 'actual weight of vehicle and load' does not include any accumulation of snow, ice, mud, etc. One court has said that the terminology does not include driver, spare tire, tools, etc. not actually a part of the vehicle and load."

It is our opinion that Section 20 of Chapter 22, R. S. 1954, as amended, does *not* include weight resulting from accumulations of ice, snow, etc.

Section 20 defines "gross weight" as follows:

> "'Gross weight' as used in sections 16, 19 and 36 shall mean the actual empty weight in pounds of the vehicle to be registered plus the maximum weight of the load to be carried by such vehicle."

Ordinarily, when a truck is registered it is registered on the basis of the actual weight of the truck according to the manufacturer's specification, or, if additional equipment, not supplied by the manufacturer, is added, such as a body, then the actual weight of the combinations of equipment. The "gross weight" would be the weight of the above-mentioned equipment plus the maximum weight of the load that vehicle will carry. The load mentioned is the material placed upon the vehicle and which is designated for removal from one place to another, and not the vehicle itself. These combined weights, vehicle plus load, comprise the weights to be considered in determining "gross weight", for the purpose of Section 20.

With respect to Section 109 of Chapter 22, our answer is different. In the case of overload under the provisions of Section 109, as distinguished from loads in excess of the weight specified in a registration certificate, the weight caused by accumulations of snow and ice must be included in the "gross weight".

Section 109 provides in part:

> "No motor truck, trailer, tractor, combination of truck trailer and semi-trailer, or other commercial vehicle shall be operated, or caused to be operated on or over any way or bridge, when the gross weight, actual weight of vehicle and load exceeds 60,000."

The section then continues to spell out the maximum pounds of weight that can be imparted per axle or group of axles to the road surface.

Section 109 cannot, however, be considered by itself in order to determine what is meant by "gross weight, actual weight of vehicle and load". All sections relating to the weight with regard to overweight violations must be read together.

Section 111, designating the fines to be imposed in case the provisions of Section 109 are violated, sets forth a tolerance and an intent that must be dealt with in determining whether or not a violation of Section 109 exists.

In establishing a progressive series of fines, commensurate with the amount of overload, the statute says:

> "The following fines and costs shall otherwise be imposed: $20 and costs of court when the gross weight is in excess of the limits prescribed in section 109, provided such excess is intentional and is 1,000 pounds or over but less than 2,000 pounds, *and the above provision as to intent shall apply only to such excess as is less than 2,000 pounds; . . .*"

It can thus be seen that the Legislature has granted a tolerance of 2,000 pounds over the limits established in Section 109, where such excess is unintentional. It is our opinion that this section is intended to give to the person involved the benefit of the doubt whenever the gross weight is unintentionally in excess of the weights specified in Section 109, but under 2,000 pounds, whether the excess is due to mistake or is the work of the elements, such as an accumulation of ice, snow and the like.

The last clause of the above quoted paragraph provides that excesses over 2,000 pounds, whether intentional or otherwise, shall be fined in accordance with the scale of fines that follows that clause.

From these statutes we gather that the Legislature allowed up to 2,000 pounds over the gross weights established to offset the increases in weight, by whatever cause, if unintentional, and did not contemplate that a person should be immune when the weight exceeded the gross weight plus tolerance.

It is difficult for us to give any other interpretation to the words in question, and such an opinion is consistent with the knowledge that heavy loads injure the highways, whether those loads be placed deliberately upon the vehicle, or gather upon the vehicle in transit.

In further substantiation of this position we point out the last sentence of paragraph 5, Section 19:

"But no vehicle shall be operated on ways or bridges, either loaded or without load, that exceeds the limits prescribed in section 109 or is contrary to the provisions of any other section of this chapter, or any other statute pertaining thereto."

The words "either loaded or unloaded" show the clear intent to set maximum weights, regardless of the source of the weight, because of the damage that can be done to our roads and bridges by overweight vehicles.

JAMES GLYNN FROST
Deputy Attorney General

February 6, 1958

To John R. Rand, State Geologist, Economic Development

Re: Necessity for Recording Claims to Acquire Possessory Rights

In regard to your memorandum of January 31, 1958, concerning the necessity for recording claims to acquire possessory rights, the problem presented to us is as follows:

> A case has arisen wherein a locator has staked and recorded a claim in a Great Pond and during the staking noted that another locator had staked the same area previously, but had not recorded his location.

The question then arises—Has the first locator priority rights for thirty days under Section 4 of the Maine Mining Law?

Assuming that the first locator has properly set out the location of his claim, it is my opinion that the first locator has a valid claim for the 30-day period which he is afforded under the statute in which to record his location.

> "Under some statutes the location certificate may be filed at any time before an intervening location. The locator is entitled to the full time allowed by the statute or rule, and, if he files within such time, another cannot gain precedence over him by initiating and completing a location and recording his claim. Even though he does not file his certificate within the prescribed time, unless the statute provides that the claim shall be forfeited, if it is filed before any adverse rights have accrued, or if the delay is excusable."
>
> 58 C.J.S. 109, Sec. 55

In the *Big Three Mining and Milling Co. v. Hamilton,* 107, P. 301 the following dicta is found:

"If a person locates on a mining claim under the law of 1897 (St. 1897, P. 214, C. 159) and erects an initial monument at the place required by such law and posts the required notices thereon and remains in possession, no other person can make a valid entry thereon for the purpose of making another location until the first person locating the claim is in default, and within the 20 days allowed by the law of 1897 for recordation the claim of the locator is valid, and no other entry can be made as the basis for claim of title."

The underlying principle is that the location vests the estate and that the recording is an act which is used to prove the locator's right.

GEORGE A. WATHEN
Assistant Attorney General

February 19, 1958

To: R. W. MacDonald, Chief Engineer of Water Improvement Commission

Re: Powers of the Water Improvement Commission

We have your recent request for opinions on the following questions:

The Water Improvement Commission wishes to know if under the powers given them by Chapter 79, R. S. of 1954, as amended they can:

1. Refuse to issue a license to discharge sewage or industrial waste to an applicant.

2. Refuse to issue a license to discharge sewage or industrial waste to a riparian owner.

3. Refuse to issue a license to discharge sewage or industrial waste to a riparian owner who has a specified right to the use of water, such as the right to water to generate power, when this right does not specifically relate to waste discharge.

4. Does the commission have the right to review licenses once granted and alter conditions thereof in the light of changing circumstances?

Your questions, particularly the third, are so general in nature that no doubt our answer will be as difficult to apply to any single actual situation, as it is difficult to phrase an answer based on the questions presented.

Answers:

1. Yes, a license may be refused where the refusal is based upon statutory grounds.

2. Same as above.

3. The absence of any express right to waste discharge in the authority granting the right to a riparian owner to generate power, should not, in and by such absence, be the sole reason why a license should not be granted.

4. A license once granted does not give to the licensee the right to excessively discharge waste. The rights accompanying the license are subject to diminution or expansion according to the will of the Legislature, and accord-

ingly such changing conditions might call for reevaluation of the licensee's activities.

JAMES GLYNN FROST
Deputy Attorney General

February 19, 1958

To: A. D. Nutting, Commissioner Forest Service

Re: Slash Removal—Reimbursement of Use of Fire Equipment—
Fire Warden's duty to take violator to Court

Recently you left with this office six questions concerning which you desired the opinion of the Attorney General. During a discussion between us, you decided that only three of the questions need be answered.

"1. Chap. 36, Sec. 83, Par. 1

Slash removal is required within '50 feet of the nearer side of the wrought portion of any state highway.' How is the 'wrought portion' determined or of what does it consist?"

The ordinary meaning of "wrought" is worked up, elaborated, worked into shape, labored, managed; not rough or crude. With respect to a highway the wrought portion of the road is that compact section devoted to the travel of motor vehicles and would not include, in our opinion, those portions commonly designated as shoulders.

"3. Chap. 97, Sec. 60

Fire equipment owned by a village corporation is used on a forest fire outside of corporation limits. Can the State reimburse the *town* for costs incurred by use of the *corporation's* equipment?

If the corporation uses its equipment on a forest fire within the corporation limits can the state reimburse the corporation for use of this equipment? Could the corporation bill the town for this equipment use and the state then reimburse the town?"

With respect to this question we understand that the village corporation involved received its legislative charter for the express purpose of being a self-sufficient corporation with respect to fire control. Where the fire equipment of the village corporation is used on a forest fire outside of the corporation limits of the village corporation, the state would not reimburse the *town* for costs incurred by use of the *corporation's* equipment. We believe that in all respects the village corporation incorporated for the purpose of granting fire protection within its confines should be treated by you as if it were a municipality. Thus, if the corporation were to use its equipment on a fire within its own limits, the state would not reimburse for such use of equipment.

"5. Must a fire warden take a violator to a court in the county where the offense was committed?"

The answer is "Yes."

JAMES GLYNN FROST
Deputy Attorney General

February 26, 1958

To: Chairman Liquor Commission

Re: Interpretation of the meaning of Sec. 13 with regard to limitation of purchases of wines and spirits by the State Liquor Commission.

We have your request for an opinion as to whether capital expenditures of the Liquor Commission are properly chargeable to the $3,000,000 "working capital" set forth in Section 13 of Chapter 61, Revised Statutes of 1954, as amended.

It is our opinion that capital expenditures of the Commission should not be charged against the "working capital" set out in Section 13.

We can readily see that, when read by itself, without relation to other portions of the Act, or without scrutiny of the history of the law, the words "working capital" might be construed in a different light. However, reading all parts of the law together relating to the matter, as must be done when construing a statute, reveals that the use of the words "working capital" relates only to a limitation of inventory of wines and spirits.

When the sale of wines and spirits was first authorized in the State of Maine, an appropriation was provided out of the General Fund of the State in the amount of $250,000 "for the purpose of providing operating capital under this Act." This provision went into effect November 10, 1934.

Under the terms of this provision there can be no question but that, initially, the only funds available to the newly created Liquor Commission for the purposes of Chapter 300, the "Act to regulate the sale of intoxicating liquors," was the $250,000 from the General Fund of the State. This was intended to provide an initial fund for the purchase of wines and spirits, and the sale of the same through state stores as provided by the Act.

In the regular session of 1935, Chapter 24 the above-mentioned section was repealed and in place thereof there was a provision for "determination of profits and distribution," which provided that the net profits "shall be used in establishing a working capital for the purposes of carrying on the activities as provided in this Act," and further provided for the repayment of the original $250,000 loan from general state funds at the rate of $50,000 each year for 5 years. This Act became law March 7, 1935, and undoubtedly gave effect to the fact that a new element had entered the picture, namely net profits from the sale of spirituous and vinous liquor. However, the net profits under this Act were to be used for the purpose of carrying on all the activities of the Commission.

There was a further amendment in Public Laws of 1939, Chapter 302 which made no important changes in this provision.

The Public Laws of 1941 in Chapter 90 struck out of the existing Act the reference to creation of a working capital "for the purpose of carrying on the activities" of the Commission and substituted a provision which authorized the Commission to have on hand a stock of wines and spirits for sale, the value of which at the close of any fiscal quarter should not exceed the sum of $700,000.

This provision clearly set a limit for the inventory of wines and spirits to be bought and on hand. At least by clear implication this section indicated that the gross profits of the Commission from sale of wine and spirits were to be a

fund from which the Commission should draw for its general operations, and for purchasing and maintaining a stock of wine and spirits. It could not possibly be presumed that this section intended to limit the general over-all expenditures of the Commission for all of its purposes to a total of $700,000 per quarter. It was clearly a limitation on inventory rather than a fund for "carrying on the activities provided for by the liquor law" as enacted by Public Laws of 1935, Chapter 24 above cited.

The next change occurred in Public Laws of 1943, Chapter 126. This Act refers to "the working capital of the Liquor Commission" and provides that a maximum permanent working capital shall be established by appropriation by the legislature. It specifically authorizes the Commission to keep and have on hand a stock of wines and spirits which at no time could exceed the amount of working capital authorized. It cannot be conceived that this was intended to be all of the money available to the Liquor Commission but was rather an indefinite ceiling placed on the inventory of wines and spirits which the Liquor Commission might at any time maintain. In this Act as in subsequent Acts the provision was made that the net profits of the Commission should be "General Revenue of the State." It is presumed that all of the expenses of the Liquor Commission subject to supervision as provided in the Act would be deducted from the gross profits, and the net profit as so determined become part of the General Fund. As above stated it can only reasonably be interpreted that as to the inventory of wines and spirits the Commission was to be limited at all times by successive maximum figures established by the legislature.

Public Laws of 1945, Chapter 92, Sec. 1 followed closely the provisions of Chapter 126 of the Public Laws of 1943 by establishing a maximum inventory value of wines and spirits which could not exceed what the Act called the "working capital" established at $3,000,000. This Act, like its predecessor, could not have meant that if at any time the Commission saw fit to stock merchandise in the amount of $3,000,000 it would be without funds to operate and maintain stores, warehouses, salaries, wages, etc., incident to the operation of its business. There were minor changes made in 1953 having no bearing on the matter in issue.

The next major legislation enacted in connection with the issue was Chapter 401 of the Public Laws of 1955 when the Commission was placed under the line budget provisions but only in connection with the administrative expense. In fact this Act provided for specific amounts for the fiscal years 1955-1956 and 1956-1957 for "personal services, capital expenditures and all other." This Act in Sec. 1 also provided that expenses for the administration of the Commission should be paid for from such amounts as the legislature might allocate from the revenues derived from the operation of the Commission. It is to be noted that this was not as with all other departments of State, an allocation from the General Fund of the State, but out of the gross revenues of the Commission before a determination of the net revenues which were still payable to the General Fund of the State.

This Act also in Sec. 3 specifically sets out the "legislative intent and directs that the funds allocated in this Act" "shall apply to administrative expenses only of the Liquor Commission" and "is not intended to affect the use of the working capital" provided for by Sec. 13 of Chapter 61 of the Revised Statutes

or other activities required of the State Liquor Commission by Chapter 61 of the Revised Statutes.

An exactly similar Act was passed under Chapter 174 of the Private and Special Laws of 1957 containing allocations the same as in the Act of 1955, and also setting out the legislative intent clearly as the same is cited in relation to the 1955 Act.

It is impossible to conclude from all of the foregoing that the $3,000,000 limitation on stock of merchandise as the same is set forth in Sec. 13 of the Revised Statutes of Maine 1954, as amended, can be anything other than a specified limitation of inventory. To charge against this limitation any items of expenditures by the Liquor Commission whether capital expenditures or other administrative expenditures so as to lower the total available inventory of wines and spirits seems entirely out of line with the intention of the legislature, and particularly with the legislative intent as it is specifically set forth in the Acts of 1955 and 1957 above cited.

FRANK F. HARDING
Attorney General

March 6, 1958

To: Julian W. Davis, Chairman of Harness Racing Commission

Re: Legislative power to grant special privileges to Gorham Raceway and Scarborough Downs

We have your memorandum of February 25, 1958, in which you ask the following questions:

Question No. 1

"Where did the legislature get power to grant special privileges to Gorham Raceway and Scarborough Downs for specific dates?"

Answer:

The tenor of this question is such that we believe you desire more than the academic answer: "The Legislature gets power to grant special privileges to Gorham Raceway and Scarborough Downs for specific dates from the Constitution." Certainly your other questions, read in conjunction with this question, call for us to make the following observations.

Each public officer of this State, before entering upon the performance of his duties, takes an oath of office as set forth in our Constitution. One portion of the oath requires that the officer swear to faithfully discharge, to the best of his abilities, the duties incumbent on him as such officer " . . . according to the Constitution and laws of this State."

Compliance with this oath requires an officer to administer the laws within his jurisdiction according to the word of the law. It is not his duty to question the wisdom of the Legislature in passing the law, nor to avoid the directions contained in the law. Each of such laws is to be considered as a valid law, and administered as such, until that law has been declared invalid by a Court of competent jurisdiction. Following the usual course of procedure, that Court would be the Supreme Court of the State of Maine.

Question No. 2

(a) "Is it possible for the Harness Racing Commission to issue dates to Gorham Raceway after Labor Day, as the law now stands?"

Answer:

Yes, if Scarborough Downs does not race after Labor Day.

Question No. 2

(b) "Can we run on the assumption, in February, that Scarborough Downs will not run after Labor Day?"

Answer:

We do not believe that in February you can assume that Scarborough Downs will not run after Labor Day. This question embraces the question of administration rather than a question of law. Somewhere between February and Labor Day there comes a point when it should be known that Scarborough Downs is not racing after Labor Day. At this time it would be proper to issue a license to Gorham to race after Labor Day. As we have indicated, this determination is to be arrived at by your Commission.

"Notwithstanding anything in this chapter to the contrary, the commission shall issue a license where parimutuel betting is permitted to Gorham Raceways to hold day or night harness races or meets in Gorham each year for a period of 4 weeks, and no more, beginning in June on the Monday of the last full week therein which has 7 calendar days; provided however, that if no running racing is held at Scarborough Downs after Labor Day each year, Gorham Raceways may be permitted to hold harness races or meets at Gorham." (Ch. 86, Sec. 11, par. 7, R. S. 1954, as amended.)

Question No. 3

"Is it a duty of the Harness Racing Commission to solicit consent from an Agricultural Fair, whereby an extended meet may run in an adjoining county at the same time?"

Answer:

No. Such solicitation by the Harness Racing Commission might be misunderstood and tagged as pressure.

". . . and between the dates of the 1st Monday in August and October 20, it may issue a license to an agricultural fair association for a pari-mutuel harness meet in connection with its annual fair, but no other person, association or corporation shall be licensed to operate either a day or night pari-mutuel harness meet, within the same or any adjoining county, when an agricultural fair association is operating a pari-mutuel harness meet at the time of its annual fair, without the consent of said fair association."

Question No. 4

"What is the opinion of the Attorney General's Department regarding the changing of dates of an Agricultural Fair that might impose hardships?"

Answer:

Such a change would be in direct conflict with the law.

"The commission is directed to assign such dates for holding harness horse races or meets for public exhibition, with pari-mutuel pools, as will best serve the interests of the agricultural associations of Maine and may accordingly refuse to issue a permit if the issuance of the permit would in the opinion of the racing commission be detrimental to the interests of said agricultural associations or any of them." (Ch. 86, Sec. 11, par. 4, R. S. 1954, as amended).

Having reference to a letter dated February 28, 1958, from counsel for Gorham Raceway in which letter the question is asked if dates for racing as set by your Commission are legal dates, we believe the answer above will help you in determining the answers posed in the referred-to letter.

Once you administratively determine racing dates in compliance with your laws, giving full consideration to the direction in such laws, then the dates so established will be legal dates.

JAMES GLYNN FROST
Deputy Attorney General

March 6, 1958

To Niran C. Bates, Director, Public Improvements

Re: Contracts in Anticipation of Available Funds

We are returning herewith agreements between the Department of Institutional Service and Bunker & Savage and between the Department of Education and Cooper Milliken, for architectural services, payment for which services is to be made after July 1, 1958, without our approval.

The legality of encumbering in the present fiscal year funds for work, payment for which is to come out of the next fiscal year, has caused us to scrutinize carefully the statutes relating to the administration of such matters. We are of the opinion that it is not proper for us to approve such contracts.

Some question as to the legality of such contracts arises as the result of the statutory provisions relating to the approval of allotments. Funds will be available for expenditure in the next fiscal year only after allotments have been made by the Governor and Council, and the ultimate allotment may be disastrously reduced by the Governor and Council, if circumstances are such as require such reduction. An obligation incurred in the present fiscal year would more or less impose upon the Governor and Council the moral obligation to pay such sum where their consideration at a later date might be to the contrary.

However, Chapter 401 of the Public Laws of 1957 seems to specifically consider such contracts as we are returning to you. Section 34-A, subsection IV, as enacted by said Chapter 401, reads as follows:

"Funds appropriated by the legislature to the construction reserve fund may be allotted by the governor, with the advice and consent of the council, whenever:

"IV. It appears to be in the best interests of the State to acquire real estate or to have estimates, *plans or specifications prepared for a*

project in advance of the date on which funds may be made available therefor by the legislature, . . ."

It thus appears that the legislature contemplated plans or specifications where the appropriation was needed in advance of the date when funds would be made available, and provided that they would be taken from the construction reserve fund.

For the above reasons we do not believe it proper for us to approve the within contracts at this time.

JAMES GLYNN FROST
Deputy Attorney General

March 10, 1958

To Dr. Warren G. Hill, Commissioner Education

Re: Transfer of Funds—Community School District; Terms of School Board Members; Terms of School Director

This memorandum is in answer to the questions submitted by Senator McKusick.

Question No. 1:

"How would trustees of a community school district pay off bonds if district failed to transfer funds? (Town meeting having been held)"

Answer:

Section 111F of Chapter 443 of the Public Laws of 1957 places a duty by law each year on the School Administrative District to transfer funds necessary to amortize outstanding capital outlay indebtedness existing at the time when the operation of the Community School District was suspended. In the event such funds were not turned over to the trustees of the Community School District, appropriate legal action could be taken.

Question No. 2:

"School Board Members in towns—are their terms terminated when a district is formed?"

Answer:

Section IIIR states that on the date that the School Administrative District becomes operative, the school director shall assume the management and control of the operation of all public schools within the district. The entire tenor of the act would indicate that the school board members in the individual school administrative units have no function. Whether their terms expire or not makes no difference since the school board members are non-functional after the School Administrative District becomes operational.

Question No. 3:

"When a town elects a school director at town meeting, will his term of office coincide with the time of the forming of the district (say July 1)?

Answer:

Their terms of office begin on the operational date of the School Administrative District and expire at the end of the length of their respective terms determined by Section IIIF. The operational date of the School Administrative District coincides with the active management and at the beginning of the school director's terms.

GEORGE A. WATHEN
Assistant Attorney General

March 10, 1958

To Andrew E. Watson, Asst. Chief, Agriculture, Division of Inspection

Re: Rules & Regulations—Establishment of grades of sardines in oil, packed in ¼ sized cans; Marking, Branding or Labeling of Sardines

We are returning herewith two proposed sets of rules and regulations—one relating to the establishment of grades for sardines in oil, packed in ¼ sized cans; the other relating to the marking, branding or labeling of sardines and the use of established grades. We have the following comments to make on the rules:

In establishing official grades for sardines in oil, packed in ¼ sized cans, four grades are established ranging from "fancy" to "sub-standard grade."

"Sub-standard grade" is defined as being "The quality of canned Maine sardines in oil that failed to meet the requirements of 'standard grade' ", if they (sardines) comply with the provisions of existing applicable state law and regulations.

It appears to us that such definition embraces all sardines going downward from "standard grade" to the lowest level at which such fish might be sold, including such fish as might be sold as herring under the provisions of Section 263, Chapter 32 of the Revised Statutes of 1954. In other words, "sub-standard grade" embraces all sardines that can be legally sold up to, but not including, the grade established as "standard grade."

In relation to this definition we draw your attention to the contemplated rules and regulations governing the marking, branding or labeling of sardines. These latter rules and regulations provide for the marking of sub-standard grade sardines which must be stamped with the words "BELOW STANDARD IN sardines which must be stamped with the word "BELOW STANDARD IN QUAL- QUALITY, GOOD FOOD—NOT HIGH QUALITY" and products which are otherwise known as sardines but fail to meet sub-standard grade requirements which latter product must be marked "HERRING."

It appears to us that, as "Sub-standard Grade" embraces all sardines that can be sold up to the standard grade, the further breakdown of sardines into a pack that does not make the sub-standard grade presents an ambiguity that should be cleared.

In so far as Section 263 of Chapter 32 provides that products which do not meet standards to be established by the Commissioner may be sold if labeled "HERRING," the requirement in the contemplated rules and regulations that

sub-standard grade sardines shall have the words "BELOW STANDARD IN QUALITY, GOOD FOOD–NOT HIGH QUALITY" is not a proper requirement. A valid rule and regulation cannot be promulgated where such rule and regulation is inconsistent with the statute.

JAMES GLYNN FROST
Deputy Attorney General

March 18, 1958

To David H. Stevens, Chairman, State Highway Commission

Re: Sale of Buildings on Condemned Land

You have requested my opinion as to the power of the Commission to sell at auction buildings on land condemned for highway purposes.

It is true that the legislature has given broad general powers to the Commission and that the statutes should be interpreted to achieve the purpose of creating a connecting highway system. However, the legislature laid down definite rules in regard to purchases and sales. When the Code was enacted under Tudor Gardiner's leadership, a stringent control was set up with the intent to take away from all departments the power to buy and sell and to place this power in the hands of a central bureau of purchases, great emphasis being placed on the system of publicly advertised bids. This theory of a public bid system is similar to that lately promulgated by the Federal Bureau regarding right-of-way cases. It seems that there is a willingness to stick to a graft-proof system and pay more, rather than risk possible collusion.

The only provision in the highway laws relating to sale of property is in Section 24 of Chapter 23:

> "The governor and council on recommendation of the commission *may* sell and convey in 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, . . ."

It will be noted that the Commission can recommend sales, but the Governor and Council "may" sell. Nothing is said about procedure; but, since this provision was enacted in 1913 and the Code in 1931, since the Code was intended to set up a new and complete control of the financial system, and since the Code emphasized the bid system, there can be no question but that the Governor and Council would insist on the bid method. . . . The Attorney General's staff understands that the bidding rule applies to all departments.

When the Commission takes land and buildings and contracts with a bidder for a construction for the clearance of the land, releasing title to the buildings and trees thereon, it is considered as salvage under the clearance part of the contract and therefore outside the rule requiring bids. In other words, the trees, houses, bushes, walls, etc., are considered as obstructions to the work, and it is part of the project to remove them.

I have carefully examined the statutes and can find no provisions for the auction of State property. On the other hand, the statutes definitely provide for sealed bids.

L. SMITH DUNNACK
Assistant Attorney General

March 19, 1958

To John R. Rand, State Geologist

Re: Title to Minerals beneath Tidal Areas

In response to your memo of March 6, 1958, it is our opinion that the Mining Bureau should, at this time, consider that the State of Maine claims title to minerals which lie beneath tidal waters seaward to a line three geographical miles from its coast line. The coast line means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea.

This opinion is not to be construed in any way as limiting such claims as the State may have which are saved by the provisions of Public Law 31, 83rd Congress, 1st Session, C. 65.

JAMES GLYNN FROST
Deputy Attorney General

March 20, 1958

To Ernest H. Johnson, State Tax Assessor

Re: Gasoline Road Tax on Motor Vehicles, R. S., Ch. 16, Secs. 188-199

In answer to your memorandum inquiring as to the liability of motor carriers under the Gasoline Road Tax for gasoline consumed in travel over the private ways within Maine, it is my opinion that motor carriers are liable for gasoline consumed while traveling both private and public ways within the State.

The resolution of the above question is based on the interpretation to be placed on the words in Section 188 of Chapter 16, "on any way in this state."

Webster's Dictionary describes a "way" as " . . . a passage, road, street, track or path of any kind."

Words and Phrases describe a "way" as ". . . generally, the right of one person to travel over the land of another."

The term "way" is derived from the Saxon and means a right of use for passengers. It may be private or public, *Wild v. Deig,* 43 Ind. 455.

No Maine case was found directly in point to include both public ways and private ways within the term "way." However, in *York v. Parker,* 109 Me. 414, the court used the word "way" as a generic term to include both public and private ways.

There is some evidence in Chapter 16 of the Revised Statutes of Maine that the legislature intended to include travel on both public and private ways when it referred to operation of a vehicle "on any way in this state." In Section 170 of the Use Fuel Tax Law, a "user" is described as

> "any person who uses and consumes fuel within the state. . . . to propel vehicles of any kind or character on the public highways of this state . . ."

The legislature then goes on to describe public highways. However, under Sections 188 through 199 of the Gasoline Road Tax, the legislature has deigned not to incorporate the definition of public highways as used under the Use Fuel Tax nor include in the Gasoline Road Tax the words "public highways," but uses the terms "on any way in this state" and "within this state." It would

seem that this was an omission with the intention of giving the broadest meaning to the words, "on any way in this state."

RICHARD A. FOLEY
Assistant Attorney General

March 25, 1958

To Doris M. St. Pierre, Secretary, Real Estate Commission

Re: Change of Designated Broker

You have requested an opinion on the following fact situation: Mr. S. holds a valid license as a real estate broker. A. Corporation has designated W. to hold the broker's license for the corporation. W. has now made an application for an individual license and A. Corporation wishes to designate S. as its representative to hold a broker's license.

Is it necessary for A. Corporation to procure a new license with S. as its designated broker?

Section 7 of Chapter 84 of the Revised Statutes of 1954 provides that a license granted to a corporation entitles the corporation to designate one of its members without any further payment of broker's fees to perform the acts of a real estate broker. It states:

> "If, in any case, the person designated by a real estate broker shall be refused a license by the commission, or in case such person ceases to be connected with such real estate broker, said broker shall have the right to designate another person who shall make application as in the first instance."

Therefore it is my opinion that A. Corporation, if it wishes to designate Mr. W. as its new broker, will have to procure a new license.

GEORGE A. WATHEN
Assistant Attorney General

March 27, 1958

To Kermit S. Nickerson, Deputy Commissioner of Education

Re: Price of School Milk

This is in response to your memorandum of February 7, 1958, in which you ask the following question:

> "Whether or not the minimum price paid to dealers in Maine for school milk comes under the jurisdiction of the Maine Milk Control Board?"
>
> Answer: Yes. Prior to the 1957 Legislature it was the opinion of this office that because of the construction of the Maine Milk Control Law, school milk did not come under the jurisdiction of the Maine Milk Control Board. However, in 1957 Section 1, C. 33, R. S. 1954 (Definitions) was amended as follows:

" 'Person' means any individual, partnership, firm, corporation, association or other unit, and the State and all political subdivisions or agencies thereof, except State owned and operated institutions."

Under Section 4 the Milk Commission has jurisdiction over sales ". . . By any person . . . to another person. . ."

From the above it appears to have been the intent of the Legislature to include political subdivisions or agencies of the State within the provisions of the Maine Milk Control Law.

GEORGE A. WATHEN
Assistant Attorney General

March 31, 1958

To Lloyd K. Allen, Manager, Industrial Building Authority

Re: Maine Industrial Building Authority Advertising

As a general rule a governmental department or agency has only the powers expressly granted by statute. Section 6 of Chapter 38B sets out the powers of the Industrial Building Authority. Section 11 of Chapter 38B states that the Authority "may in its discretion expend out of the fund such moneys as may be necessary for the expenses of the Authority, including administrative, legal, actuarial and other services."

Reference to Chapter 38A, Revised Statutes of 1954, indicates that the Department of Economic Development has been set up to disseminate information to promote industry within the state and advertise the advantages of the state. See Section 4 and Section 6A of Chapter 38A. Therefore, it is my opinion that this department should handle advertising and promotion of the advantages of the Industrial Building Authority.

GEORGE A. WATHEN
Assistant Attorney General

April 1, 1958

To Carleton L. Bradbury, Banking Commissioner

Re: Group Life Insurance

In answer to your memo dated March 3, 1958, containing two questions . . . may I submit the following answer, using the word "bank" to include a mutual savings bank, trust company, and loan and building association:

Question 1. Is it within the authorized corporate powers of a state-chartered mutual savings bank, trust company, or loan and building association to offer group life insurance to certain real estate mortgage borrowers by use of a Group Insurance master policy, provided the form of the policy and its underwriting is in compliance with applicable statutes?

Answer. Section 18 of Chapter 59, R. S. 1954, requires each bank to cause fire insurance to be placed on all real and personal property on which it holds a mortgage. It further states that the bank may require other kinds of insurance to be carried on any interest it may have in its own property or in that of others.

Subsection II of Section 164 of Chapter 60, R. S. 1954, permits the sale of group life insurance to a creditor to insure its debtors who owe money to be repaid in installments. Since there is no exclusion of banks, it is clear they may purchase this insurance.

To say that, having purchased the insurance, the bank may not offer it to those for whose mutual benefit it was purchased offends good reason.

As far as the offering of insurance, as being within the corporate powers of a bank, is concerned, the bank only does so as a banking service. The contract is fixed, and the part of the bank is purely ministerial or clerical. Savings banks, trust companies, and loan and building associations are given general powers with respect to their specific functions established by statute. (See Ch. 59, Sec. 28 on savings banks; Ch. 59, Sec. 90 on trust companies; and Ch. 59, Secs. 158 and 170, and *Smith v. Bath Loan & Building Association* on loan and building associations, all of which provide sufficiently broad coverage for the exercise of the banking service which is the subject of this inquiry).

The usual charter of a bank is broad and general in character with respect to banking powers. The specific powers and duties are set forth and other related powers are permitted in a general statement. The purpose of this is to allow for unforeseen developments in banking methods and changes in financial philosophy which might otherwise necessitate constant revision of the charter of each bank. Therefore, unless the charter specifically forbids the offering of such a service, a bank may offer group life insurance according to the terms of the applicable statute. (Ch. 60, Sec. 164).

Question 2. If dividends are paid to the bank by the insurer, is the mutual savings bank, trust company or loan and building association under obligation to distribute such dividend pro rata to insurance certificate holders or may such dividends be credited to the general funds of the bank?

Answer. On this question, Maine law appears to be silent. As for a bank which requires the certificate holder to pay the premium on the group life policy, there is perhaps a question as to whether a dividend returned to the policyholder ought to be distributed among the certificate holders instead of being credited to the general assets of the bank. Apparently this question has never arisen in Maine. Thus it behooves us to apply whatever logic and principle may be found in determining an answer.

The owners of a corporation are entitled to a pro rata distribution of the earnings of the corporation properly allocated to surplus and declared as dividends. It should be pointed out in conjunction with this statement that we are now being called upon to discuss the rights of borrowers from a bank which would include non-owners as well as owners. As far as the non-owners are concerned, there is no question as to whether they have any right to a pro rata distribution of a dividend declared for the policyholder, which is the bank. This would be a matter for the decision of its directors.

The result of the offering of a group life insurance plan to the mortgagors of real estate is of definite benefit to all the owners. Whether the benefit is direct or indirect is debatable but inconsequential. On the other hand, the costs of accounting, issuing the insurance certificates, and the processing of claims under them, functions usually handled by the bank, are paid from general operating expenses. Thus it would seem reasonable that any dividend paid on

the group life insurance should accrue to the general assets of the bank to offset these expenses.

As a practical matter, the attempt to devise an equitable formula for the pro rata distribution of such a dividend to certificate holders presents a formidable problem. It would be difficult, if not impossible, to determine whether a part of the dividend should go to a mortgagor whose loan was paid prior to declaration of the dividend, to the estate of a mortgagor whose death resulted in a claim by the policyholder, and to a mortgagor who terminated his insurance prior to the declaration of the dividend. Superimposed on this is the problem of determining whether a factor should be used to account for the average amount of the loan outstanding from each mortgagor over the dividend period. Once devised, the distribution formula might well result in the issuance of a multitude of checks or credits for insignificant amounts of money.

Add to this that after the first policy year the group premium rate is subject to adjustment based on the claim experience which usually results in a smaller dividend, or none, the following year, and the substance of the problem disintegrates.

While legislation to remove any doubt is desirable, pending such legislation reason demands we decide that a dividend paid to a bank on a policy of group life insurance covering certain mortgagors of real estate be credited to its general assets.

ORVILLE T. RANGER
Assistant Attorney General

April 9, 1958

To Earle R. Hayes, Exec. Secretary, Maine State Retirement System

Re: Maine Maritime Academy

This is in reply to your request to answer several questions posed by the Federal Department of Health, Education and Welfare in connection with the desire of the Maine Maritime Academy to become "covered" under the Old-Age and Survivors' Insurance.

You advise us that a determination by Federal officers as to the eligibility of employees of the Academy can be made only if the Attorney General answers the following questions:

QUESTIONS

"(1) The Attorney-General rules

(a) the Academy is a political subdivision of the State as described in this letter; (juristic entity, legally separate and distinct from the State)

(b) the Maine Law permits a referendum, and

(c) the Maine law for purposes of this referendum and Old-Age and Survivors' Insurance coverage permits the Maine State Retirement System, as it applies to this political subdivision, i. e., the Academy, to be deemed a separate retirement system; . . ."

ANSWERS

(a) The Academy is not a political subdivision of the State as described in the letter from the Department of Health, Education and Welfare.

Insofar as question (a) is answered in the negative, it becomes unnecessary to answer questions (b) and (c), although answers would be favorable in the case of political subdivision.

"Political subdivision" is defined in Chapter 65, Section 2, of the Revised Statutes of 1954, being the State's Social Security Act, 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."

In 1941, by Chapter 37 of the Private and Special Laws, the "Maine Nautical Training School" was created as a body corporate and politic, having the same rights, privileges and powers as have corporations organized under the general laws.

In 1942 the name of the school was changed to "Maine Maritime Academy," Chapter 102, Private and Special Laws, 1942.

In 1947, the Academy was declared "to be a public agency of the State of Maine for the purposes for which it was established," Chapter 24, Private and Special Laws, 1947.

Thus the Academy is a juristic entity and declared by the Legislature to be a public agency of the State. The result, in our opinion, is that the Academy is an instrumentality of the State.

There is a further condition, however, which must be considered. In order to be a "political subdivision," as defined above, the instrumentality should be "legally separate and distinct from the state. . ."

The legal connection of the Academy with the State, which differs from other instrumentalities, is the participation of the Academy in the Maine State Retirement System, with the State contributing that share of money to the Retirement System which is ordinarily contributed by the political sub-division itself.

This condition of separateness is, in our opinion, the one point upon which our decision turns.

It will be noted that all bodies embraced within the definition "political subdivision" are bodies which do not belong to the Maine State Retirement System, or if they belong, they pay their own way in that System as participating local districts. A participating local district pays to the Retirement System its contribution on account of its employees together with the pro rata share of the cost of the administration of the Retirement System. Chapter 384, Section 16, subsection IV, Public Laws of 1947, now seen as Chapter 63A, Section 17, sub-

section IV, Revised Statutes of 1954, as amended. The State contributes only on behalf of its employees as defined in the Maine State Retirement Law.

It was in its capacity as an agency of the State, rather than as a participating local district, that the Academy entered the System. The result is that the State of Maine pays the bill for contributions and cost of administration to the System on behalf of the Academy. With respect to this matter the Academy advises through its Executive Secretary in a letter dated December 18, 1957, as follows:

> "It was their (Board of Trustees) unanimous opinion that we are entitled to Social Security coverage under recent legislation passed by the 98th Legislature and we do not feel that it was passed contingent on any basis whatsoever. We feel that the State of Maine should continue to pay as it always has done in the past the amount of $6361.00 as stated in your letter. We do not feel that the Academy in any way is liable or responsible for this payment, and do not intend to make the payment."

It appears that the Academy is, then, in the somewhat incongruous position of claiming on the one hand to be an agency of the State to whom the State owes an obligation to make contributions on behalf of Academy employees for retirement purposes, but claiming on the other hand, for the purposes of Social Security, that the Academy is a political sub-division of the State and legally separate from the State.

The question facing us can be posed as follows:

> "Did the Legislature in enacting Chapter 288, Public Laws of 1957, intend that the Maine Maritime Academy be the only instrumentality in the State of Maine whose participation in the Maine Retirement System was to be paid by the State of Maine, and yet still be eligible to participate in Social Security,
>
> "OR, rather, did the Legislature by its 1957 enactment do no more than place Maine Maritime Academy on the same and equal footing with the other state instrumentalities mentioned in the Maine Social Security Act?" (Chapter 288, Public Laws of 1957, amends Section 1 of Chapter 55 of the Revised Statutes to provide that, "The Provisions of this chapter (of the Social Security Act) shall also apply to employees of the University of Maine and Maine Maritime Academy who are members of an existing retirement or pension system)."

We believe the latter portion of the above question more correctly expresses the intent of the Legislature.

It is impelling upon this office to give such interpretations of law as will, lacking express legislative directions to the contrary, give uniformity to the effect of the law, without discriminating against any of the individuals or classes embraced within that law.

We therefore conclude that, under the law as written, and for as long as the State of Maine continues to pay those expenses of the Academy that normally would be paid by the Academy if they were a political subdivision of the State, the Academy does not conform to the definition of political subdivision as set forth in Chapter 65, Section 2, Revised Statutes of 1954.

JAMES GLYNN FROST
Deputy Attorney General

April 10, 1958

To Harold I. Goss, Secretary of State

Re: Use of State Flag.

We have your memo and attached correspondence with the Green Duck Metal Stamping Company relative to the use of the State of Maine Flag.

It appears that the above mentioned company contemplates an advertising program for an unnamed cereal company, whereby eventually a set of 48 flags could be procured by a purchaser of the cereal.

It is our opinion that such use of the Maine Flag violates Sections 27-32, inclusive, of Chapter 1 of the Revised Statutes of 1954, especially Section 28. These sections appear designed to prohibit the use of the flag for any commercial purpose.

It is difficult to draw statutes to embrace all conceivable situations. However, the general intent can be seen in Section 28-III:

> "No person shall . . .
>
> "Expose to public view for sale, manufacture or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance."

JAMES GLYNN FROST

Deputy Attorney General

April 23, 1958

To David H. Stevens, Chairman, Highway Commission

Re: Federal Aid Highway Act of 1958.

You have requested my opinion as to whether the acceptance by the State of the additional apportionment of $919,343 by the federal government under the provisions of the Federal Aid Highway Act of 1958 will be in violation of the State Constitution.

Section 14 of Article IX reads as follows:

> "The credit of the state shall not be directly or indirectly loaned in any case. The legislature shall not create any debt or debts, liability of liabilities, on behalf of the state, which shall singly, or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed two million dollars, except to suppress insurrection, to repel invasion, or for the purpose of war; and excepting also that whenever two-thirds of both houses shall deem it necessary, by proper enactment ratified by a majority of the electors voting thereon at a general or special

election, the legislature may authorize the issuance of bonds on behalf of the state at such times and in such amounts and for such purposes as approved by such action; but this shall not be construed to refer to any money that has been, or may be deposited with this state by the government of the United States, or to any fund which the state shall hold in trust for any Indian tribe. Whenever ratification by the electors is essential to the validity of bonds to be issued on behalf of the state, the question submitted to the electors shall be accompanied by a statement setting forth the total amount of bonds of the state outstanding and unpaid, the total amount of bonds of the state authorized and unissued, and the total amount of bonds of the state contemplated to be issued if the enactment submitted to the electors be ratified."

The question is, "Is acceptance of this apportionment a loaning of the State's credit?" Or in case the legislature accepts this apportionment, "Is this a creation of a debt or liability?"

It is my opinion that the answer is "No" in both cases.

In section 2 (a) of the Federal Act, the Congress appropriated $400,000,000 for federal-aid projects. Section 2 (b) provides for expenditure of this fund in the immediate fiscal year. It is obvious that this act is a pump-priming measure to provide for the expenditure of this money as soon as possible. Its purpose is to combat the recession as well as to build roads. It is aimed to get workers busy building highways at once.

In section 2 (e), an additional appropriation of $115,000,000 is authorized to "*increase the federal share payable* on account of any project provided for by funds made available under the provisions of this section."

This plainly states that the purpose of the additional money is to increase the *federal share* payable for the projects contemplated and provided for in section 2 (a).

Section 2 (f) reads as follows:

"Repayment of Amounts Used to Increase Federal Share.—The total amount of such increases in the Federal share as are made pursuant to subsection (e) above, shall be repaid to the Federal Government by making deductions of sums equal to the amounts so expended for projects on the Federal-aid primary highway system, the Federal-aid secondary highway system and extensions of such systems in urban areas in two equal annual installments from the amounts available to such State for expenditure on such highways under any apportionment of funds herein or hereafter authorized to be appropriated therefor for the fiscal years ending June 30, 1961 and June 30, 1962."

It is true that the word "repaid" is used herein, but it is an obvious drafting error. It is out of context, and has no relation to the procedure clearly set forth in the section. The section does not provide for any repayment by the state. Instead, it plainly charges the 1960-61 and 1961-62 anticipated appropriation for monies previously advanced. If Maine did not take advantage of this plan, it would have the full amount of the 1960-61 and 1961-62 appropriation to expend. If Maine does use this plan, it will have less money in the next biennium. The

State has its choice of two plans. But the State does not borrow any money. The State does not create a debt. It accepts money to expend this year instead of waiting until next year. It does not repay a nickel, nor does it promise to repay a cent. It is crystal clear that the intent of the act is to increase expenditure for roads during this year by advancing funds not otherwise due until the next biennium.

In strictly construing the words used in the Constitution, there definitely is no *loaning* of the State's *credit* involved. The State has no obligation to pay any money. The money involved is an outright grant made in advance of the usual procedure as part of an accelerated program.

It is true that the intent of section 14 of Article IX is to prohibit any future obligation no matter in what manner it is created. But this act creates no such liability. In no way is the State placed under any future financial obligation to raise or pay money. It is merely offered the choice of spending the money now or later.

On the same reasoning the legislature, if it accepted this apportionment, would not be creating a debt or a liability. It would be using future federal funds now instead of later.

You have further requested my opinion whether the State has the power to accept this advance.

Section 15 of Chapter 23 reads as follows:

> "Provisions of Federal Aid Road Act accepted; commission to cooperate with federal government.—The provisions of the Federal Aid Road Act (public number 156) entitled, 'AN Act to Provide that the United States shall aid the states in the construction of Rural Post Roads and for other purposes," approved July 11, 1916, and all other acts amendatory thereof and supplementary thereto, are assented to. The state highway commission is authorized and empowered to accept, for the state, federal funds apportioned under the provisions of the above act as amended and supplemented, to act for the state, in conjunction with the representatives of the federal government, in all matters relating to the location and construction of highways to be built with federal aid pursuant to the provisions of said act, and to make all contracts and do all things necessary to cooperate with the United States government in the construction and maintenance of public highways in accordance with the above act, as amended and supplemented. (1951, c. 321, § 2)"

This is direct authority to accept money under the provisions of the Federal Aid Road Act. It was enacted to obviate the trouble of legislatively accepting each new appropriation. In this case the Federal Government has offered a special appropriation. It is in a *provision of the Federal Aid Road Act.* The State Highway Commission is authorized to accept it.

L. SMITH DUNNACK

Assistant Attorney General

April 25, 1958

To David H. Stevens, Chairman, State Highway Commission

Re: Access for the Purpose of Servicing Billboards

You have requested my opinion as to the power of the Commission to make a regulation relating to restrictions on the use of a controlled access road as a means to servicing billboards erected in fields abutting the right of way.

Section 7, Chapter 23, says:

> "The Commission shall have full power to regulate the use of controlled access highways, etc. . . ."

Section 6 says:

> "A controlled access highway is a highway on which, in the interest of safety and efficiency of operation, abutting property owners have no right of access, . . ."

> To permit an employee of an outdoor advertising company to have access to and from adjacent property and to have the right to climb over a fence (which is erected to keep people out of the right of way) would be contrary to the letter of the law and the spirit of the law. It could be classified as a special commercial privilege.

Except in degree, there is no distinction between granting this right to facilitate a business that is benefiting by the existence of the road, and between granting a gasoline station an entrance. There is no difference in principle, but only in degree of usage.

It is true that the Commission is the sole arbiter of where and when access is to be permitted; but, to grant this type of access would be violating the principle of non-access on the principle of permitting a few concerns to make more money.

L. SMITH DUNNACK
Assistant Attorney General

April 29, 1958

To Kenneth B. Foss, Director, Consumer Credit Division, Banking Department

Re: Out-of-State Sales Finance Company

You request an answer to the following question:

"Can a license be granted to a New Hampshire firm to engage in the business of a sales finance company, when that New Hampshire firm has no place of business in the State?"

As background to be considered in answering the above question, you state that the firm maintains its only offices outside the State of Maine. Its business with Maine dealers is carried on by mail, and no agents or officers are located in the State of Maine.

Answer. In our opinion a license to engage in the business of a sales finance company may not be granted to a foreign firm under the above circumstances.

The statutes relating to the licensing of sales finance companies contain numerous provisions which require us to rule that, in order to obtain such a license, the licensee shall be engaged in the business *in this State* and maintain an office in this State.

"Sales finance company" is defined in Section 249 of Chapter 59 of the Revised Statutes of 1954 to mean:

> "a person engaged, in whole or in part, in the business of purchasing retail installment contracts from one or more retail sellers."

So much of the definition is pertinent for our consideration.

Chapter 59, Section 250, R. S. 1954, reads in part as follows:

> "I. No person shall engage in the business of a sales finance company or retail seller in this State without a license therefor as provided in sections 249 to 259, inclusive . . .
>
> "II. . . . The application shall contain the name of the applicant; date of incorporation, if incorporated; the address where the business is or is to be conducted and similar information as to any branch office of the applicant; the name and resident address of the owners or partners or, if a corporation or association, of the directors, trustees and principal officers, the trade name, if any, under which the applicant proposes to conduct such business, and such other pertinent information as the Bank Commissioner may require.
>
> "III. The license fee for each calendar year or part thereof shall be as follows:
>
> A. . . .
>
> B. For a sales finance company, the sum of $100 for the principal place of business of the licensee within this State, and the sum of $25 for each branch of such licensee maintained in this State. . . .
>
> "IV. Each license shall specify the location of the office or branch and must be conspicuously displayed there. In case such location be changed, the Bank Commissioner shall endorse the change of location on the license without charge."

From the above quoted portions of the law we gather that a sales finance company which conducts its business outside the State of Maine and which has no office in this State may not be licensed as provided in Section 250. We believe that the above provisions of law clearly contemplate that such licensee shall be doing business in the State of Maine and have officers and offices in the State of Maine.

JAMES GLYNN FROST

Deputy Attorney General

May 1, 1958

To Walter H. Kennett, Director, Civil Defense and Public Safety
Re: Proposed Executive Order

We have your request for an opinion as to the legality of the herein quoted Executive Order:

STATE OF MAINE
BY HIS EXCELLENCY
EDMUND S. MUSKIE
GOVERNOR
EXECUTIVE ORDER

Pursuant to the authority vested in me by Section 6, Chapter 12 of the Revised Statutes of 1954, and all other authority vested in me by law, and upon the recommendation of the Government of the United States acting through the Federal Civil Defense Administration, I, Edmund S. Muskie, Governor of the State of Maine, do hereby issue the following Order as a necessary part of the plan and program for the Civil Defense of the State:

Upon receipt by the Government of the State from the Federal Civil Defense Administration or any other authorized agency or official of the Government of the United States of any warning of impending enemy attack other than a practice or test warning, or in the event of an actual enemy attack without warning, and provided an applicable state of emergency is not then in effect, a state of Civil Emergency shall forthwith exist throughout the State of Maine, and such state of Civil Defense Emergency shall continue until terminated by subsequent proclamation of the Governor.

Dated at Augusta, Maine, this ________ day of ________, 1958.

____
GOVERNOR

Filed this ________ day of ________, 1958.

____
SECRETARY OF STATE

It is our opinion that the Order would not be a proper one for the Governor's Signature.

The tenor of this Executive Order is such that a state of emergency would be automatically in effect, State-wide, upon receipt by the State from the proper Federal authority of advice of an impending attack or in the event of an actual enemy attack.

It should be noted that in granting to the Governor the power to declare an emergency, the legislature set forth certain conditions which must be complied with. Initially, the Governor, having found that a disaster or catastrophe exists or appears imminent, must in his proclamation declare such fact and should further state the causes of such disaster or catastrophe, or the reason for its appearing imminent:

> "Chapter 12, R.S. 1954, Sec. 6. Emergency; proclamation; powers of the Governor; . . . Whenever any disaster or catastrophe exists or appears imminent arising from attack, sabotage or other hostile action, or by fire, flood, earthquake or other natural causes, the Governor shall by proclamation declare the fact and that an emergency exists in any or all sections of the State. Such proclamation shall be published in such

newspapers of the State and posted in such places as the Governor deems necessary and a copy of such proclamation shall be filed with the Secretary of State."

It appears to us from the wording of the statute that the Governor has a discretionary duty to perform which would not be properly exercised if the instant Order were to be executed.

We also feel that publication and deposit with the Secretary of State of the proclamation are conditions which a court would probably hold to be precedent to a valid proclamation. This belief is based upon the fact that the court demands meticulous care in complying with statutes which relate to the taking of one's property. So much power rests in the hands of State officers, including the power of eminent domain, once an emergency is declared, that we are of the opinion that the court would most certainly demand strict compliance with all laws that give rise to occasion for exercising their power.

If the aforementioned conditions precedent are not complied with, then it follows that the powers that can be exercised after an emergency is declared cannot be discharged, there being no valid proclamation, or if they are exercised, then they would be improperly exercised.

We would further point out that the proposed order does not even contemplate that the Governor must receive the notice mentioned in the Order. Such an Order could conceivably call for an officer other than the Governor to receive such notice and determine whether or not the notice was such as would put the Order into effect.

For the above reasons we are of the opinion that the proposed Order would not be a proper one for the Governor's signature.

JAMES GLYNN FROST
Deputy Attorney General

May 1, 1958

To Doris St. Pierre, Secretary, Real Estate Commission

Re: Securities Licenses

. . . You state that the Banking Department has drawn to your attention the fact that a securities license must be obtained before a licensed real estate broker or real estate salesman can advertise for sale or negotiate the sale of property outside the State of Maine.

You ask for our opinion as to just how this Blue Sky Law actually affects real estate brokers and real estate salesmen licensed under Chapter 84 of the Revised Statutes of 1954.

Section 228 of Chapter 59 of the Revised Statutes of 1954 sets forth those activities relating to securities which call for a license, and read as follows:

"No dealer in securities shall in this state, by direct solicitaton or through agents or salesmen, or by letter, circular or advertising, sell, offer for sale or invite offers for or inquiries about securities, unless registered as a dealer under the provisions of the following sections. No salesman or agent shall in this state in behalf of any dealer, sell, offer for sale or invite offers for or inquiries about securities, unless registered as a sales-

man or agent of such dealer under the provisions of the following sections."

Section 231 of said chapter defines "dealer" and "securities," and so much of the definition of "securities" as relates to real property is herewith quoted:

> "The term 'securities' shall include . . . all documents of title and certificates of interest . . . in the title to or any profits or earnings from land or other property situated outside of Maine. . . . The term 'securities' shall further include documents of title to and certificates of interest in real estate, including cemetery lots, and personal estate when the sale and purchase thereof is accompanied by or connected in any manner with any contract, agreement or conditions, other than a policy of title insurance issued by a company authorized to do a title insurance business in this state, under the terms of which the purchaser is insured, guaranteed or agreed to be protected against financial loss, or is promised financial gain."

As embraced by the law relating to dealers in securities, it thus appears that documents of title or certificates of interest in real estate are considered "securities" in two instances: 1) When the document or certificate relates to land outside the State; 2) When the document or certificate relates to land in the State and that document or certificate was accompanied by such contract as is mentioned in Section 231.

The above quoted definition of "securities" is clearly worded and embraces a situation where a person sells, offers for sale, or invites offers or inquiries about land situated outside the State of Maine.

To be properly qualified for such an activity, one so engaged should be registered to sell securities.

JAMES GLYNN FROST

Deputy Attorney General

May 7, 1958

To Lloyd K. Allen, Manager Industrial Building Authority

Re: Taxation of Industrial Property

I have your memorandum of April 24, 1958, requesting an opinion on the taxes on industrial properties which the Maine Industrial Building Authority has insured.

Section 10, Chapter 91-A, Revised Statutes of 1954, exempts the property of the State of Maine from taxation. Therefore, property owned by the Maine Industrial Building Authority after default and foreclosure would not be taxable.

Section 3, Chapter 91-A, Revised Statutes of 1954, provides for the taxation of real and personal property within this state. A town has no authority to exempt anyone from taxation, and it is my opinion that the occupant of an industrial project will be required to pay a tax. In your publicity, I would not advise that it be indicated that there will be tax concessions for industries moving into this state.

Please note in Section 8, par. V, Chapter 32-B, Revised Statutes of 1954, that the mortgage must contain such terms with respect to payment of taxes and assessments as the authority may prescribe.

GEORGE A. WATHEN
Assistant Attorney General

May 7, 1958

To Roland H. Cobb, Commissioner of Inland Fisheries and Game

Re: Lease of Seaplane Base

We have your letter of April 28, 1958, and the attached letter from Paul Fichtner, M. D.

Dr. Fichtner would like your department to make its seaplane base at Rangeley Lake available for public use, and you inquire as to how this might be done legally.

There is no general statutory authority for a State department to lease its property for any purpose. There are isolated instances in which a department, such as Forestry, the Park Commission and the Aeronautics Commission, may lease its property, such authority being granted by statute. Lacking such legislative authorization, it would be necessary for the legislature to enact a law authorizing such leasing of State property.

JAMES GLYNN FROST
Deputy Attorney General

May 7, 1958

To Charles P. Bradford, Superintendent, Park Commission

Re: Digging Clams in State Parks

. . . It appears to us that if the Park Commission does not wish local clam diggers to dig within the boundaries of Reid State Park, then such activity could be prohibited by a rule and regulation properly promulgated.

We believe there is sufficient authority in the Park Commission to enact such rule and regulation.

JAMES GLYNN FROST
Deputy Attorney General

May 9, 1958

To Ruth A. Hazelton, State Librarian

Re: Film Cooperative Contract

We have your memo of April 29th, which reads as follows:

"The State Library is considering joining a cooperative film group consisting of the state library agencies of Maine, New Hampshire and Vermont. The enclosed contract has been drawn up by the New Hampshire State Library and has been approved by the Attorney General of New Hampshire.

"Are there any legal grounds which would make it impossible for the Maine State Library to subscribe to this contract?"

We are of the opinion that the contract is proper for your signature.

In brief, the contract contemplates participation by three States, each of which is to contribute one film each year to an Audio-Visual Center to be established in the University of New Hampshire. Such films will be maintained on an exchange basis, each State being eligible to borrow the films in the center, a nominal service charge being made for such use.

Chapter 42, Section 2, of the Revised Statutes, authorizes the State Librarian to conduct a system of exchanges with other libraries and institutions of learning. We think the contract is within Section 2, permitting you to conduct such exchange.

JAMES GLYNN FROST
Deputy Attorney General

May 13, 1958

To Colonel Robert Marx, Chief, Maine State Police

Re: Farm Trucks

We have your memo of April 30, 1958, requesting an interpretation of the second paragraph of Section 19 of Chapter 22, R. S. 1954.

Section 19 deals with the registration of trucks. The paragraph in question reads as follows:

> "The annual fee for registration of farm motor trucks, having 2 axles only, when such trucks are used primarily for transportation of agricultural commodities, supplies or equipment to be used in connection with the operation of a farm or farms owned, operated or occupied by the registrant, shall be as follows: . . ."

Your request concerns the use of the word "primarily," as it appears in the above quoted paragraph. You ask the following questions:

"Could a truck registered as such, occasionally haul a load of household furniture owned by the farmer or another person, to be used in connection with the farm owned, or occupied by the registrant?"

Answer. Yes.

"Can a farm truck be used to work on town road construction for the purpose of working out the town taxes assessed on the farm owned by the registrant?"

Answer. Yes.

The third situation deals with the hauling of peas to a factory, the operation being for hire and the peas not being owned by the registrant of the farm truck. You do not ask for an answer to this question, but merely state that under such circumstances you have been unable to get a warrant from the court. It appears to be the belief of the enforcing officers that the word "primarily" tends to confuse the rest of Section 19 with respect to farm trucks.

We have answered your questions in the above manner and we believe that the court, with respect to the situation of hauling peas, refused to grant the warrant because of what appears to be the clear meaning of the word "primarily."

The interpretation of this section requires that consideration be given to the word "primarily." Such consideration would mean that a truck registered under this section need not be used exclusively in the transportation of agricultural commodities connected with the farm of the registrant. If such truck is used primarily for the purposes set forth in this statute, then we think that the intent of the statute has been accomplished and that the truck may be used for other unrelated purposes, in addition to such primary use.

JAMES GLYNN FROST
Assistant Attorney General

May 16, 1958

To Harvey H. Chenevert, Exec. Sec., Maine Milk Commission

Re: Voting & Quorum

You have requested an opinion on the following fact situation:

The Maine Milk Commission is made up of seven members who are present at a meeting. In voting on a question, three members voted for a proposition, one voted in the negative and three abstained from voting. No required number of votes are necessary to carry an action under Chapter 33, Revised Statutes of 1954.

Would an action carry by the vote of three in the above-mentioned situation?

It is my opinion that the action has been legally carried. Referring to the *Manual of Legislative Procedure* by Paul Mason, Section 510 at page 348, it is stated: "A majority of the legal votes cast, a quorum being present, is sufficient to carry a proposition unless larger vote is required by a constitution, charter, or controlling provision of law, and members present but not voting are disregarded in determining whether an action carried."

Section 516 at page 363 states:

"There has been considerable discussion by the courts as to presumptions concerning the effect of members not voting. There appear to be two distinct situations:

(a) When only a majority of the legal votes cast is required, failure to vote or the casting of a blank ballot reduces the number of affirmative votes necessary to take an action. Under this situation a failure to vote has in part the same effect as a "yes" vote. The members not voting are sometimes said to be presumed to agree to abide by the decision of those voting."

Therefore, in your meetings, a majority of those *present and voting* would carry an action.

GEORGE A. WATHEN
Assistant Attorney General

May 21, 1958

To Ernest H. Johnson, State Tax Assessor

Re: Property Tax Exemptions for Veterans

. . . You inquire whether or not the real estate of a qualified veteran who has claimed an exemption under Paragraph III of Section 10 of Chapter

91-A is taxable by the operation of Section 4 of Chapter 91-A to a person who leases the real estate or has some other "interest by contract or otherwise."

The veteran's exemption appears to be both a meritorious grant and, in some cases, a financial aid to qualified veterans or their widows who have small estates.

The exemption of a qualified veteran's estate up to the value of $3500 does not provide for a distinction between a veteran's home and his business property; either type of property may be exempt in whole or in part. Thus the exemption is not determined by the use which the veteran makes of his property. Compare, however, the test applied to the exemption under Section 10, Paragraphs I and II allowed Federal or state-owned property and charitable organizations. The use made of the property is the determining factor in allowing an exemption. In one case the use is a public use and in the other case a charitable use.

It should not matter whether a qualified veteran derives profit from his own proprietorship of a business situated on his property or derives a profit from the lease of his business property to another. The exemption should apply in either case. To hold that an interest by contract or otherwise is taxable to a person in possession of a qualified veteran's real estate would, to some extent, by operation of Section 14 of Chapter 91-A, operate to defeat the meritorious aspect of the exemption, since one-half of the tax paid by a tenant would be taxable to the landlord.

There are differences between the exemption allowed veterans and the exemptions allowed the Federal and State governments or charitable organizations. The exemptions to government-owned property and charitable organizations exempt the entire value of the property. However, the exemption to the veteran is only a partial exemption when his estate exceeds $3,500. The exemption to government property and charitable organizations vests immediately by operation of Section 10 and may be divested by conditions subsequent, depending upon the use to which the property is put. However, the exemption to veterans does not vest immediately by operation of Section 10 but only upon condition precedent of registration as a qualified veteran for the exemption. Therefore, it would appear that the words, "real estate exempt from taxation," as used in Section 4 of Chapter 91-A, were not intended to include the limited, conditional exemption of a qualified veteran's estate, but refer primarily, yet not exclusively, to the exempt real estate of government or charitable organizations.

For the reasons outlined above, an "interest by contract or otherwise" in the real estate of a qualified veteran who has claimed an exemption with regard to the specific real estate in question should not be taxed to the person in possession except as the value exceeds $3,500 or that portion of the $3,500 claimed by the qualified veteran.

RICHARD A. FOLEY
Assistant Attorney General

May 27, 1958

To Max L. Wilder, Bridge Engineer, State Highway Commission

Re: Need of Permit to Build Tukey Bridge

You have requested my opinion as to the liability of the State of Maine to obtain the permit required under the provisions of Chapter 192 of the Private and Special Laws of 1917, as amended.

The second paragraph of Section 5 therein says:

"The creation or maintenance of any obstruction in any of the navigable waters of said harbor, or in any part of said harbor under the jurisdiction of said board (except by the United States), without first obtaining a written permit from said board, is hereby prohibited; and it shall be unlawful to enlarge, or extend, any wharf heretofore built, or to build, or commence to build, any wharf, pier, dolphin, bulkhead, or other structure, or dump any stones, or other material into any of the waters, or upon any part of the flats, or to excavate any part of said harbor, or to fill in any part thereof, or modify the course, location or condition of the water of said harbor without such permit."

And the first sentence of Section 6 therein says:

"Application for permission to build or extend wharves, etc., how made; procedure. Any person, firm or corporation intending to do any of the acts referred to in the preceding section, shall first make written application to said board, stating the location, limits and boundaries, as nearly as may be, of such intended erections, extensions, obstructions, filling or excavating, and ask a permit therefor."

In the first place, it should be noted that this act combined the two previous Boards of Harbor Commissions of Portland and South Portland into one Board. The Commission is an agency of the State, but definitely of a municipal variety rather than state-wide in its scope.

Nowhere in the act does it say in *definite* language that it intends to give the Board control over bridges built by the State.

In the second paragraph, where the broad powers are given to the Board, the language describes wharves and similar structures, none of which come within the concept of a bridge. It does include the dumping of material and excavation, but again with no reference to bridge building.

In Section 6, "any person, firm or corporation" is required to obtain a permit. It is very doubtful if this classification can be considered broad enough to include the State of Maine.

It is an accepted principle of statutory construction that the State cannot be sued without its express consent (*Brooks Hardware v. Grier,* 111 Me. 78), and that consent must be *clearly* manifested, not implied (127 Mass. 43, 46). Any statutes in derogation of sovereignty must be strictly construed. (82 C.J.S. 936; 49 Am. Jur. 315).

If the legislature intended to give this Board the power to grant, and therefore the power to *deny* a permit to the sovereign State to carry out its governmental duty to build a bridge, it obviously would have limited its sovereignty.

This must be done in clear, unequivocal language! There is no such clarity in this law. In fact, there is every indication that the draftors of the act were thinking of the harbor facilities only, and that, *if* they thought of Tukey Bridge, they considered it a going concern, and not involved in the duties conferred.

I can see no reason to change my opinion of October, 1956, wherein I said that the legislature did not intend to give the Board control over the building of State bridges, and that the State did not need the permit.

L. SMITH DUNNACK
Assistant Attorney General

June 2, 1958

To Robert A. Marden, Esquire, County Attorney, Kennebec

Re: Commitment Fees

Your letter of May 15, 1958 reads as follows:

"Our County Treasurer and County Commissioners do not read in the law as revised and amended any authority to pay State Police officers for committing prisoners. Chapter 436 as passed at the Special Session October and January of this year and last apparently said nothing about State Police Officers but talks only about Constables and local Police Officers. I dislike to bother you with this type of thing but I wonder if you could tell me whether or not you have experienced similar problems in other counties and if so what decision was made.

'The specific question is 'Can the County legally pay State Police officers for commitment?' "

It would be our opinion that there is no necessity or authority to pay State Police Officers for committing prisoners.

Chapter 334 of the Public Laws of 1957 (as amended by Chapter 436 of said Laws) reads in part as follows:

> "The county, except in a case where any part of any fine collected would accrue to the State Highway Commission, shall pay the latter $4 each time a State Police Officer duly signs, as arresting officer, the return of a criminal warrant issued by a trial justice or municipal court which is located within the county. Such $4 fee shall be paid within a reasonable time after the county commissioners have met, examined and corrected the monthly report of the court. Such fee shall be paid regardless of the final disposition of the case. Neither the county nor the court shall be required to pay any fee for the services or expense of any State Police officer, as an aid, a witness or in any other capacity."

Under such a statute we would be inclined to say that the State Police would not receive fees for commitments.

JAMES GLYNN FROST
Deputy Attorney General

June 2, 1958

To Ronald W. Green, Commissioner of Sea and Shore Fisheries

Re: Canadian Lobster Meat—Section 116, Chapter 38, R. S. 1954

We have your memo of May 23, 1958, which reads as follows:

"The A & P Tea Company which handles Canadian lobster meat from their Boston office wishes to place this frozen meat in the Willard-Daggett Cold Storage plant at Portland for the purpose of making deliveries in New Hampshire and Vermont.

"In your opinion, does this Section provide for such an operation?"

We do not see anything in Section 116 which prohibits the above activity.

Lobster meat being shipped from Canada with temporary storage in the State of Maine and then shipped out of State for sale and consumption is in foreign commerce until it reaches its destination outside the State of Maine.

Such lobster meat would be passing through the State under the authority of laws of the United States and would not be subject to those provisions of Section 116 which precede that portion of the section containing the following exception:

> "The foregoing provisions of this section . . . shall not apply to lobster meat passing through the State under authority of laws of the United States . . ."

The foregoing provisions referred to provide generally that lobster meat in the State of Maine shall have been removed from the shell under permit and shall be of certain sizes and that it is to be used for certain purposes, none of which are pertinent because of the referred-to exception.

JAMES GLYNN FROST
Deputy Attorney General

June 3, 1958

To Elmer H. Ingraham, Chief Warden, Inland Fish & Game

Re: Beaver Dam

I have your request for an opinion concerning whether or not your wardens have authority to dynamite beaver dams on private property against the property owner's wishes.

As you have pointed out, sec. 119 of Chapter 37, Revised Statutes of 1954, provides that your department may take nuisance beaver at any time without the consent of the landowner.

It is my opinion that your wardens do not have any authority to dynamite a beaver dam on private property against the landowner's consent. You may take these beavers, and the town will then be left to deal with the landowner regarding the dam which is allegedly causing flooded roads.

GEORGE A. WATHEN
Assistant Attorney General

June 4, 1958

To Vaughan M. Daggett, Chief Engineer, State Highway Commission

Re: Use of Highway Funds for Archeological and Paleontological Salvage

You have requested my opinion as to the authority of the Commission to employ an archeologist on a part-time basis for the purpose of ascertaining the existence of Indian graveyards on proposed new highways in cooperation with the provisions of Section 120 of Title I of the Federal Highway Revenue Act of 1956.

It is obvious that the State of Maine has an interest in the preservation of Indian relics. It follows that these relics are of monetary value as well as of historical and scientific value. It is certain that if the State destroyed any of these relics intentionally, it would be severely condemned, with justification; the act would be wanton.

It appears that under the federal act, a very small expense on the part of the State would aid in ascertaining the location of Indian graveyards on a proposed new construction job and that proper authorities would remove the antiquities.

These relics are property and belong to the people.

When the Commission is planning a way, and a cemetery lies within the proposed line, it is frequently necessary to go to considerable expense to solve the problem. Expending highway funds in this manner is in no way different in kind than to expend funds to avoid destroying Indian relics in an ancient Indian burial ground. In both cases an irreparable damage may be caused.

Section 15 of Chapter 23 says:

> "The provisions of the Federal Aid Road Act (public number 156), entitled 'An Act to Provide that the United States shall aid the states in the construction of Rural Post Roads and for other purposes', approved July 11, 1916, and all other acts amendatory thereof and supplementary thereto, are assented to. The state highway commission is authorized and empowered to accept, for the state, federal funds apportioned under the provisions of the above act as amended and supplemented, to act for the state, in conjunction with the representatives of the federal government, in all matters relating to the location and construction of highways to be built with federal aid pursuant to the provisions of said act, and to make all contracts and do all things necessary to cooperate with the United States government in the construction and maintenance of public highways in accordance with the above act, as amended and supplemented."

The Commission is authorized under this section to do all things necessary to cooperate with the United States Government in the construction and maintenance of public highways *in accordance with the above act,* as amended.

The avoidance of damages to these relics is in accordance with the Act, and it is my opinion that the Commission has the authority to participate in the program.

L. SMITH DUNNACK
Assistant Attorney General

June 20, 1958

To E. L. Newdick, Commissioner of Agriculture

Re: The Bangor Fair

I have found that The Bangor Fair was incorporated under the general law on June 11, 1951.

Mr. Gillin has supplied me with a certificate from the Clerk of the corporation which discloses thirteen stockholders in this corporation.

I have checked the lease to Mr. Mourkas and the assignment of the same to The Bangor Fair.

Section 17, Chapter 32, Revised Statutes of 1954, provides that a society to be entitled to the stipend must meet three requirements of which number three was questioned.

Requirement III states:

"A society which has not less than 10 stockholders or members, *or* the primary purpose of which is not profit to be distributed to its stockholders."

(Emphasis supplied)

The additional stipend under Chapter 391, Public Laws of 1957, states four requisites which must be met before the stipend will be given:

(1) must be a recipient of the stipend fund

(2) must conduct pari mutuel racing in conjunction with its annual fair

(3) improve its racing facilities

(4) and the improvement has met the standards for facility improvements set by the Commissioner of Agriculture.

It appears from the information which I now have that The Bangor Fair meets the first two requisites, and assuming that the latter two are met, the corporation is entitled to the additional stipend.

GEORGE A. WATHEN
Assistant Attorney General

June 23, 1958

To Samuel F. Dorrance, Livestock Specialist, Agriculture

Re: Damages to Minks

We have your request for an opinion on the following question:

"Are mink killed by dogs or wild animals entitled to payment by the state as provided by R. S. 1954, Ch. 100, Sec. 18, as amended?"
Sec. 18 provides:

"Whenever any *livestock*, poultry or domestic rabbits, *properly enclosed*, owned by a resident is killed or injured by dogs or wild animals, the owner, after locating such animal, animals or poultry or a sufficient part of each to identify the same . . ." (emphasis supplied)

The term "livestock" as defined by Webster's Unabridged Dictionary, second edition, is: "Domestic animals used or raised on a farm, esp. those kept for profit."

Sec. 141 of Ch. 32 states:

"Mink that have been propagated in captivity for 2 or more generations shall be considered domesticated animals subject to all the laws of the state with reference to possession, ownership and taxation as are at any time applicable to domesticated animals. . ."

It is my opinion that domestic mink are livestock within the meaning of the statute and the owner may be eligible for the benefit of Section 18 of Chapter 100.

GEORGE A. WATHEN
Assistant Attorney General

July 1, 1958

To Samuel Slosberg, Director of Legislative Research

Re: Voting for Civilians on Federal Property

We have your memorandum of June 16, 1958, which reads as follows:

"The Legislative Research Committee has been ordered to study the privilege of voting for civilians who reside on federally-owned property in Maine.

The Legislative Research Committee would appreciate an answer to the following question:

> In order to permit civilians who reside on federally-owned property in Maine to vote here in Maine, would it be necessary to amend Article II, Section 1, of the Maine Constitution?

For your information, at the last regular legislative session An Act Relating to Right to Vote of Civilian Employees Resident at Togus (L. D. 268), introduced by Senator Martin of Kennebec, was reported by the Judiciary Committee as Ought Not to Pass, which report was accepted by the Legislature. You will note that no effort was made to amend the Constitution."

Article II, Section 1, Constitution of Maine, sets forth the qualifications required before a person is entitled to vote in election for governor, senators and representatives. Paragraph 1 of said section reads as follows:

> "Every citizen of the United States of the age of twenty-one years and upwards, excepting paupers and persons under guardianship, having his or her *residence established in this state* for the term of six months next preceding any election, shall be an elector for governor, senators and representatives in the city, town or plantation where his or her residence has been established for the term of three months next preceding such election, and he or she shall continue to be an elector in such city, town or plantation for the period of three months after his or her removal therefrom, if he or she continues to reside in this state during such period, unless barred by the provisions of the second paragraph of this section; and the elections shall be by written ballot. But persons in the military, naval or marine service of the United States, or this state, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack or military place, in any city, town or plantation; nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the city, town or plantation where such seminary is established. No person, however, shall be deemed to have lost his residence by reason of his absence from the state in the military service of the United States, or of this state."
>
> (Emphasis supplied)

Following the decision of our Court in *State v. Cobaugh,* 78 Me. 401, it is our opinion that Article II, Section 1, Maine Constitution, would have to be amended in order to permit civilians who reside on federally-owned property in Maine to vote in Maine.

By Chapter 66 of the Public Laws of 1867 and Chapter 612 of the Private and Special Laws of 1868, legislative jurisdiction was ceded by the State of Maine over Togus to the United States. The only jurisdiction retained by the

State of Maine over that tract was the right to service of process arising out of activities occurring outside the reservation.

Our Court said, in *State v. Cobaugh*, supra,:

> "The laws of this state do not reach beyond its own territory and liquor sold in the ceded territory (Togus) cannot be considered sold in violation of the laws of this state."

The Court was concerned, in this case, with a law dealing with liquor kept and deposited "in the state intended for unlawful sale *in the state* (emphasis supplied)".

Consistent with the decision in the Cobaugh Case, a proper interpretation of a statute authorizing residents of federally-owned property to vote would be that such statute had no effect, because residents of Togus would not be persons having a residence established "in this state" as required by the Constitution.

The legal situation with respect to any federally-owned property would be similar to that of Togus, either by virtue of special legislation, as in the case of Togus, or by the provisions of Chapter 1, Section 10, Revised Statutes of 1954 as follows:

> "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 ciminal 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."

JAMES GLYNN FROST
Deputy Attorney General

July 2, 1958

To Walter H. Kennett, Director, Civil Defense & Public Safety

Re: Civil Defense in Unorganized Territory

We acknowledge receipt of your memorandum of June 16, 1958, in which you inquire as to the level of the government, state or county, that is responsible for organizing, financing and directing civil defense operations in unorganized towns.

Unorganized towns have no officers such as selectmen or assessors who would be responsible for such organization and operation of civil defense programs.

No doubt a properly organized county program would incorporate within its framework programs in relation to unorganized towns.

JAMES GLYNN FROST
Deputy Attorney General

July 7, 1958

To Frank S. Carpenter, Treasurer of State

Re: Economic Advisory Committee

We have your memo dated July 3, 1958, which reads as follows:

"Is the Economic Advisory Committee to be used only on highway bonds, or are they to be asked for advice on all State bonds?

"Will you please advise me at the earliest possible moment as we are beginning to work on the Penobscot Bay Ferry bonds?

"I refer you to Chapter 23, Section 129 and 130 Revised Statutes of Maine, 1954, Volume I, Pages 389 and 390."

It is our opinion that the Economic Advisory Committee is to be used only on highway and bridge bonds.

Section 129 of Chapter 23 of the Revised Statutes establishes the Economic Advisory Board and sets forth its position and structure. We herewith quote that portion of Section 130 of Chapter 23 which is pertinent to the present question:

> "The state, under proper authorization of the governor and executive council, shall issue all highway and bridge bonds. The governor and executive council shall consult with the said board for its recommendations as to whether conditions are favorable for any such issuance."

Under the provisions of law above referred to it appears that the sole function of the Economic Advisory Board is to give advice concerning the issuance of highway and bridge bonds.

JAMES GLYNN FROST
Deputy Attorney General

July 8, 1958

To Kermit Nickerson, Deputy Commissioner of Education

Re: Admission to Secondary Schools

You request an opinion regarding the authority of superintending school committees to set standards for admission to secondary schools.

(1) Pupils having completed the elementary schools in a unit not maintaining a high school are governed by Sections 105 and 107 of Chapter 41. If the administrative unit contracts with the superintending school committee or school directors of a nearby unit or with the trustees of an academy, there are two possible groups which could set admission standards: 1) the joint committee; 2) the school directors or trustees or the superintending school committee of the town furnishing the education. If the unit sans a high school does not contract for the education, the student may attend such a school elsewhere, where he can gain entrance from those in charge. Section 107 provides that the unit which

offered to contract for education with another unit may authorize students to attend the non-contracting unit. Again, the persons in charge of the non-contracting unit would determine the admission standards.

(2) Pupils having completed the elementary schools in a unit which maintains a secondary school come within the purview of Section 99 of Chapter 41; that is, the unit maintaining a secondary school is not obligated to pay tuition and the student who wishes to enter a secondary school in the unit in which he resides is governed by the admission qualifications of Sections 44 and 102. These sections provide that the superintendent, the superintending school committee, or the school directors shall examine the candidates for reasonable entrance qualifications.

(3) Pupils having completed the elementary schools in a unit not maintaining a secondary school and who wish to enter a community district high school must meet the entrance qualifications set up by the community school committee, since Section 117 provides that the community school committee shall have all the powers and duties with respect to the community school conferred upon superintending school committees under the general statutes and those enumerated in Section 114. This means that the community school committee has the same powers of examination for admission as do the supervisors under Sections 44 and 102. Section 124 provides that the superintending school committee of a town, community school committee, or school directors shall determine the qualifications.

(4) Pupils having completed the elementary schools in a unit which has joined a community school district and wish admission to the district's high school must conform to the qualifications for entrance set by the community school committee.

I have assumed in each of the above cases that a secondary school or free high school qualifies as such under Section 98, Chapter 41.

The standards set by the committees, as outlined above, must be reasonable and the judgment of the group setting entrance qualifications cannot be attacked unless it can be shown that the standards are unreasonable. In each of the specified cases there is statutory authority to set entrance requirements. There is no standard set by statute, therefore the group charged by the statute with this duty may exercise its discretion.

GEORGE A. WATHEN
Assistant Attorney General

July 8, 1958

To Max L. Wilder, Bridge Engineer, State Highway Commission

Re: Fishing from Bridges on Highways

You have requested my opinion as to the legal status of people fishing from the bridges on state or state aid highways.

Obviously, fishing is not a normal highway use. A bridge is a highway and its purpose is to permit travellers to cross the water. Although an abutter can use an easement highway to some extent, there cannot be any abutting land owner to a bridge. I can find nothing to permit the fisherman to fish from a bridge as a matter of right.

Therefore, it is my opinion that the State Highway Commission can forbid fishing from bridges if it interferes with the use of the highway.

Of course, this can be a serious public-relations matter.

L. SMITH DUNNACK
Assistant Attorney General

July 10, 1958

To the Legislative Research Committee

Re: Suggested Amendments of Sales and Use Tax Act as a result of the hearing on June 11, 1958.

Your committee has requested an opinion relating to the suggestions set forth in Attorney Stevenson's letter of June 12, 1958, to Senator Lessard, Chairman of the subcommittee presiding over the hearing on the previous day.

In paragraph 2 of his letter he suggests striking out the sentence beginning on line 9, "retailers . . ." and replacing it with "Retailers, resident and non-resident, who are registered under the provisions of Sections 6 and 8 or who ought to be so registered under these sections, shall collect such tax and make remittance to the Assessor for all years that collections and remittances should have been made." This language inserted into Section 4 might jeopardize the constitutionality of the Sales and Use Tax Act. A Maine statute applying to a non-resident of this State would be deemed unconstitutional by any court of last resort. Section 6 takes care of non-resident sellers in case they come within the constitutional jurisdiction of this State by doing business in this State or having an agent, office, sample room, warehouse, or storage place.

In *California v. West Publishing Company,* 216 P. 441 (1950), the court said, speaking through Justice Spence:

> "The nature and range of appellant's local activities establishes it as a 'retailer maintaining a place of business in this State,' and that such 'presence' in this jurisdiction rendered it liable to the service of process under the terms of the Use Tax Act."

Our use tax provisions in Section 6 take care of this situation without referring specifically to non-residents. Our use tax definition is the same as California's, and out-of-state sellers can come within the jurisdiction of this State by certain acts specified in Section 6 of Chapter 17, R. S.

The suggestion of adding to Section 6-II after "aforesaid": "who solicits directly by sending printed catalogs or other types of order booklets and pamphlets to residents within the state," would create a restraint upon out-of-state persons contrary to the Commerce and Due Process clauses of the Federal Constitution. The present Maine law is quite adequate in the taxing of out-of-state sellers who do business in Maine, as you will note under paragraphs I, II, III and IV of said Section 6.

The use tax is assessed for the storage use or other consumption in this State, and the United States Supreme Court has held that there is no violation of the Commerce Clause involved in the requirement that an out-of-state seller of goods collect a use tax on goods sold for use within the State, but in all of these court

decisions the out-of-state seller was brought within the jurisdiction of the use tax law by the provisions thereof . . .

Mr. Stevenson . . . would add to Section 6, after the first paragraph, the following: "For purposes of this section, delivery shall mean transportation of the tangible personal property by means of vehicles owned, leased, or contracted by the seller, or by means of common carrier." This language is inappropriate for insertion in a section relating to registration of sellers. If included, it should be in Section 2 of the Act, under Definitions. However, everyone knows what transportation means, and, as the provisions now stand, it means delivery by any means of transportation. . .

Mr. Stevenson suggests adding the criminal penalties provided in Section 36 of the Act to Section 6.

It is dangerous to add a penalty statute, even by reference, to a tax statute that is enforceable in a civil action. It might possibly change the burden of proof from a fair preponderance of the evidence to the beyond-a-reasonable doubt rule and would cause confusion in the minds of many attorneys and judges in litigated civil actions to collect a sales or use tax or on an appeal from reconsideration by the Assessor. . .

He suggests amending Section 16 to make non-residents of the State amenable to the jurisdiction of our State courts. We have a comity statute under the provisions of Sections 54 and 55 of Chapter 16, R. S. 1954, and some twenty-three States have similar statutes, so it seems to us that it is not necessary to write it into our Sales and Use Tax Law.

The danger in doing this lies in rendering a good law unconstitutional according to some United States Supreme Court decisions based on similar State statutes. If a non-resident is required to register under Section 6 and does so, or if he registers voluntarily under Section 8, we acquire jurisdiction of the registrant in our Maine courts.

In the case of an out-of-state vendor selling from a vehicle, each vehicle shall constitute "a place of business" for the purpose of Section 6 (see last paragraph thereof), which section gives the State authority to serve on the truck driver. This service brings the non-resident seller and his principal within the jurisdiction of our Maine courts.

In the Miller case in Maryland the truck driver was not selling but delivering goods sold in Delaware when the truck was attached by the State of Maryland. The Court held that the State had jurisdiction, but that the assessment was invalid on the ground that it was assessed against a non-resident. The Supreme Court said:

> "If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition."
>
> (Citing *St. Louis v. Ferry Co.*, 11 Wall. 423, 430.)
>
> "If there is some jurisdictional fact or event to serve as a conductor, the reach of the state's taxing power may be carried to objects of taxation beyond its borders."

It is our opinion that Section 6 of the Act supplies the conductor to reach non-resident sellers and that an amendment using the term "non-resident" in the Act would not improve the enforcement, but would make it subject to constitutional litigation.

RALPH W. FARRIS
Assistant Attorney General

July 16, 1958

To Raymond C. Mudge, Finance Commissioner

Re: Purchase of Automobiles by the Department of Education

At your request I have checked the opinions rendered by this office and I am unable to find any opinion concerning the purchase of vehicles for departmental use. Therefore, Section 43 of Chapter 15-A of the Revised Statutes of 1954 controls.

As stated by said section, the State does not provide automobiles for the travel of State employees, with certain exceptions. The Department of Education is not included in these specific exceptions, and to the best of my knowledge that department has not been designated by the Governor and Council to purchase automobiles.

GEORGE A. WATHEN
Assistant Attorney General

July 16, 1958

To John J. Shea, Director, Probation and Parole

Re: Sentence for Crime Committed by Parolee

This is in response to your memo of June 25, 1958, in which you ask an opinion on Chapter 387, Section 16, Public Laws of 1957, seen on page 455:

> "Section 16. Sentence for crime committed by paroled person. A parolee who commits an offense while on parole and is sentenced to a State penal or correctional institution shall serve the second sentence beginning on the date of termination of the first sentence, whether it is served or commuted."

Question: Can a parolee of the Men's Reformatory, who commits, while on parole, an offense for which he is sentenced to the Maine State Prison, serve time at the prison on the offense for which he was paroled prior to the beginning of the new prison sentence?

Answer: Yes, under conditions as outlined hereafter.

An examination of the history of this section offers little in the way of assistance in arriving at a decision.

The law first appeared in Chapter 60, Section 11, Public Laws of 1913, in the following form:

> "Any prisoner committing a crime while at large upon parole or conditional release and being convicted and sentenced therefor shall serve the second sentence to commence from the date of the termination of the first sentence after the sentence is served or annulled."

The Revised Statutes of 1916 contain substantially the same provision (Chapter 137, Section 37), the last clause having been changed to read:

> ". . . whether such sentence is served or annulled."

This section remained unchanged until 1953, when, by Chapter 404, Section 10, Public Laws of 1953, the section was amended to read as follows:

> "Any prisoner committing a crime while at large on parole or conditional release and being convicted and sentenced therefor to imprisonment at the state prison shall serve the 2nd sentence to commence from the date of the termination of the 1st sentence, whether such sentence is served or annulled."

It is, of course, clear that, before the most recent amendment, such second sentence should have been served after service of the first sentence only in the event the second sentence was to be served in the Maine State Prison. Such limiting clause is not now present. If the second sentence is to be served in any State penal or correctional institution, then it shall be served after the first sentence is either served or commuted.

Thus in this one respect the present statute is much more encompassing, with respect to those prisoners potentially having to serve the contemplated sentences, extending the group to prisoners on parole committing offenses for which they are sentenced either to the State Prison or to any other penal or correctional institution.

Under the circumstances of the present fact situation, such prisoner would be subject to serve the remainder of the sentence on which he was paroled in the State Reformatory.

We believe that a trial court, having knowledge of all such facts, should set the time for the beginning of the new sentence at the expiration of the first sentence, for at the time of the second sentence the prisoner had a liability to the State on the first sentence.

There is, however, nothing the trial court could do to change the effect of Section 16, which section directly, positively, and mandatorily provides for consecutive sentences; *Lewis v. Robbins,* 150 Me. 121.

For the above reasons we are of the opinion that:

1) If the trial court had so directed, the first sentence could be served in the Men's Reformatory and the Prison sentence served at the Prison upon termination of the Reformatory sentence;

2) If the trial court fails to indicate the manner of service of sentence, but sentences only on the offense to the State Prison, then the statute with its immutable provisions takes effect and is self-executing, with the result that both sentences are to be served in the Prison. See *Lewis v. Robbins, supra,* and *Mercer v. Fenton,* 120 Neb. 191, 231 N.W. 807, which latter case our Court approved in principle.

JAMES GLYNN FROST
Assistant Attorney General

July 17, 1958

To Cyril M. Joly, Chairman, Industrial Accident Commission

Re: Vacation Pay

You have requested our opinion "as to the effect, if any, of the amendments to the Labor Law, Chapter 94 of P. L. 1957 on the Workmen's Compensation Law as to the method of determining average weekly wages." You indicate more specifically that Section 2, IX, B, Chapter 31, R. S. 1954, is the section of the Workmen's Compensation Law about which you inquire.

Chapter 94 of the Public Laws of 1957 amends Section 50 of Chapter 30, R. S. 1954. The particular amendment to which you refer provides that,

> "Whenever the terms of employment include provisions for paid vacations, vacation pay on cessation of employment shall have the same status as wages earned."

Section 50, Chapter 30, R. S. 1954, provides for the time of payment of wages. It requires that wages be paid weekly and it requires that any wages due an employee at the termination of his employment be paid to him within a reasonable time after he demands payment. The only effect of the amendment in regard to vacation pay is to require that any such pay due the employee upon termination of his employment shall be paid to him, with any other wages due at the time, within a reasonable time after payment is demanded.

Chapter 30, R. S. 1954, is a chapter of the statutes creating the State Department of Labor and Industry. The chapter legislates, among other things, with respect to employment and conditions of employment. Section 50 of this chapter sets forth the law in regard to the payment of wages. The amendment of Section 50 of Chapter 30, R. S. 1954, does not by inference, imagination, strained interpretation, or in any other reasonably conceivable way affect the provisions of Section 2, IX, B, Chapter 31, R. S. 1954.

Chapter 31, R. S. 1954, is known as "The Workmen's Compensation Act" and provides for compensation of employees for accidental personal injury received in the course of employment. Subsection IX of Section 2 of this Act sets out the methods of computing average weekly wages for the purposes of the Act. This Act, and this section of it, are separate and distinct from Chapter 30, R. S. 1954, and neither one affects or has any effect upon the other. Section 2, IX, B, reads in part as follows:

> "In case such employment or occupation had not so continued for said 200 full working days, the 'average weekly wages, earnings, or salary' shall be determined by dividing the entire amount of wages or salary earning therein by the injured employee during said immediately preceding year, by the total number of weeks, *any part of which the employee worked*, during the same period; . . ."

I have italicized in the above quoted section the phrase which is the real basis of your question. In your request for an opinion you outline your own interpretation of this section and this phrase. In our opinion your interpretation is correct. The italicized phrase should not be so narrowly construed as to require it to mean, as to this section, the actual performance of physical labor, but, rather, a period of time during which the employee was employed. Thus, a person might be absent from his place of employment on vacation, sick leave, or for some other cause, perform no labor, do no work, but still receive a week's wages, be employed

for that period of time and, within the meaning of the section in question, have "worked" for that period of time.

FRANK F. HARDING
Attorney General

July 18, 1958

To Ronald W. Green, Commissioner of Sea and Shore Fisheries (for forwarding by him to Clerk of Courts)

Re: Costs in Short Lobster Cases

You ask, with respect to the trial of a short-lobster case in the Waldo County Municipal Court, who is responsible for the witness fee submitted by a constable who was a witness in the case.

You state that under the new rule costs are not taxed, and the fine, if paid, goes to the Commissioner of Sea and Shore Fisheries, and you also inquire if that bill should be paid by the Commissioner direct to the witness.

The Commissioner does not pay such witnesses.

We would draw to your attention Section 114 of Chapter 38 of the Revised Statutes of 1954, as amended. This section imposes a fine of $5 for each short lobster. Thus, in the present case, the respondent, having had three short lobsters in his possession, would be liable to a fine of $15.

Section 114 also provides that the court may, in its discretion, add to the fines provided a sum not to exceed $10 on each complaint, to be included in any fine imposed to cover said costs, without taxing such costs and without reference to such costs.

Such $10 sum was added to the present case, and plus the amount of the fine made up the $25 imposed. It therefore appears to me that such costs as are due and owing as a result of such a case should come from the $10 assessed.

JAMES GLYNN FROST
Deputy Attorney General

July 18, 1958

To Michael A. Napolitano, State Auditor

Re: Assessment on Patients at Pineland Training Center

We have your memo inquiring as to the legality of Pineland Training Center's charging $1 a week against each gainfully employed patient on trial visit and under the supervision of the Center. No such charge would be made against persons receiving less than $5 per week.

In each such case the individual on trial visit is visited periodically by a member of the psychiatric social service of the Center.

It is our opinion that a charge can properly be made against the patient in such a case. The amount of the charge, however, is not for our determination.

Under both Sections 5 and 144 of Chapter 27, R. S. 1954, authority is granted to make a proper charge against patients of the Center for care, etc.

The last paragraph of Section 5 reads:

"It (the Department) shall also fix rates and collect fees for the support of patients in state hospitals, sanatoriums and other state institutions and provide for the training of nurses in state hospitals and sanatoriums."

Section 144 reads:

"All indigent and destitute persons in this state, who are proper subjects for said school and have no parents, kinsmen or guardian able to provide for them, may be admitted as state charges and all other persons in this state, who are proper subjects for said school, when parents, kinsmen or guardian bound by the law to support such persons are able to pay, shall pay such sum for care, education and maintenance of such persons as the department shall determine, and such persons from other states having no such institution or similar school may be received into such school when there is room for them without excluding state charges, at a cost to such person or those who are legally responsible for their maintenance, of not less than $3.25 per week; and the state may recover from any person admitted to said school, if able, or from persons legally liable for his support, the reasonable expenses of his support in said school."

A patient upon *bona fide* trial visit, still under the care and supervision of the Center, is subject, in our opinion, to be charged, if under the circumstances that patient is able to pay a portion of the expense involved in supplying that care.

JAMES GLYNN FROST
Deputy Attorney General

July 18, 1958

To Earle R. Hayes, Executive Secretary, Maine State Retirement System

Re: Social Security Coverage for Public Library

We have your memo asking our opinion as to the status of the Farmington Public Library.

It appears that you transmitted Modification No. 49 to the Department of Health, Education and Welfare of the Federal Government for the purpose of extending Social Security coverage to the employees of said library.

The Regional Representative of the Bureau of Old-Age and Survivors Insurance requests an opinion as to whether the library is a political subdivision of the State.

It is our opinion that the Farmington Public Library is not a political subdivision of the State for the purposes of Social Security coverage.

The said library was incorporated under the provisions of Chapter 55 of the Revised Statutes of 1883, the counterpart of which statute is seen in Chapter 54 of the Revised Statutes of 1954.

The corporations so incorporated are not political subdivisions of the State. They are private, as distinguished from public, corporations in that they do not exercise any portion of the sovereignty.

While such libraries have been designated as quasi-municipal corporations for the purpose of extending the benefits of the Maine Retirement System to employees of such corporations, that designation cannot be carried over by interpretation to the Social Security Law. . .

JAMES GLYNN FROST
Deputy Attorney General

July 18, 1958

To Earle R. Hayes, Executive Secretary, Maine State Retirement System

Re: Death Benefits

We have your memo requesting an interpretation of Section 9, subsection I-B, subparagraph 1, of Chapter 63-A, R. S. 1954, in so far as that section pertains to eligibility of persons to be entitled to death benefits.

You ask if persons who are employed by the State or as teachers and separated from such service prior to July 1, 1957, can be considered as being protected under the above quoted section of law.

Answer. No.

Such section sets forth the necessary qualifications of one in service as of the effective date of the Act, July 1, 1957:

> "1. General eligibility provision for non-service-connected death. The deceased member must have had at least 18 months of creditable service within the 42 months prior to date of death, or be under 60 years of age and receiving at the time of death an ordinary disability allowance as provided in section 7 and any lump sum due under section 7 shall be paid into the survivors' benefit fund."

The underlying theory of pensions, survivors' benefits, etc., is to induce employees to contribute long and faithful service. In the case of ex-employees who have already performed their service without need of such inducements, the statute enacting such benefits after termination of service would not extend those benefits to such people unless such extension was expressly set forth in the statute.

It is a general principle of interpretation that a law is not retroactive unless it so states expressly or unless, from a reading of the law, it appears clear that the legislature intended the law to be retroactive. Such principle applies to pension acts and other acts extending similar benefits. See 40 Am. Jur. 963.

An examination of the Survivors' Benefit Law fails to reveal any express provision making the law retroactive to persons who severed service with the State prior to July 1, 1957.

For instance, the fund in which shall be accumulated all reserves required for the payment of survivors' benefits is set up in Section 15, subsection VI of Chapter 63-A.

This fund is built upon contributions from the employees (Sec. 15, subsection VI-B) and annual amounts to be paid by the State (Sec. 15, subsection VI-C). It should be noted that the State's share of money to build the account is

> "an amount equal to a certain percentage of *the annual earnable compensation of such member,* to be known as the survivors' contribution."

It can then be seen that the fund for payment of survivors' benefits does not at all contemplate members who are not presently working, but only such members as are contributing and who have an annual earnable compensation.

For these reasons we therefore hold that the law does not protect those persons who severed service prior to July 1, 1957.

JAMES GLYNN FROST
Deputy Attorney General

July 21, 1958

To Roland H. Cobb, Commissioner of Inland Fisheries and Game

Re: Swan Island

This is in reply to your recent memo in which you pointed out that Federal funds under the Pittman-Robertson Act can be expended only in the event such funds accrue to the dedicated revenue of your department, and that because of our opinion that the funds realized by the sale of Swan Island must accrue to the general fund of the State the Federal Government may refuse to follow through on the purchase.

You inquire if legislative action is indicated and, if so, how the bill should be worded.

If the Legislature had desired that the proceeds of sale of land should accrue to the department's account, then it could easily have so stated, as it did in the case of sale of hay, timber and Christmas trees.

In the case of hay, timber, etc., the Legislature provided (Sec. 17, Chapter 37) that the proceeds from their sale shall be used for maintenance of the game management areas.

While it is not proper for us to recommend legislation, we would suggest that if the Department of Inland Fisheries and Game wishes that proceeds from the sale of land under the provisions of Section 8 accrue to the department, then legislation would be necessary. Clear words could be used, as in Section 17, indicating the desired disposition of such funds.

JAMES GLYNN FROST
Deputy Attorney General

July 23, 1958

To David H. Stevens, Chairman, State Highway Commission

Re: Temporary Loans

You have requested my opinion as to whether the State can use the temporary-loan provision to borrow $3,500,000 in September 1958 and repay the loan in May of 1959.

The answer is, "Yes."

Chapter 173 of P&SL, 1957, allocates $6,807,000 to the highway fund for 1957-58 from the sale of bonds for highway construction.

Section 132 of Chapter 28, R. S., provides that the Governor and Council can transfer money from one account in the General Highway Fund to another.

If, in September 1958, the $3,500,000 is deemed necessary by the Governor and Council, then, under the provisions of Section 30 of Chapter 18, as the loan of $3,500,000 does not exceed 1/3 of the highway revenues received during 1956-57, they may negotiate a loan for that amount, provided it must be paid back by June 30, 1959.

This amount is credited to the general highway fund and transferred to the Bond Issue account. On receipt of the Bond Issue funds, *during that fiscal year,* the $3,500,000 is transferred to the General Highway Fund and the loan paid from that fund.

The highway revenues referred to in Section 30 do not have to be revenues allocated to any specific type of expenditure. The intent of the borrowing provision was to give the State Highway Commission the right to anticipate 1/3 of its general revenue in order to expedite work during the year.

L. SMITH DUNNACK
Assistant Attorney General

July 31, 1958

To Dr. Warren G. Hill, Commissioner of Education

Re: Re-consideration of action at a town meeting

I have your request for an opinion concerning the proposition that the Town of Perham plans to insert an article in its warrant at the next town meeting scheduled for the election of school directors. The proposed article will be to re-consider and rescind action taken at a legally called town meeting held on June 21, 1958. At the meeting of June 21, 1958, the Town of Perham voted to join the towns of Castle Hill, Chapman, Mapleton, Wade, and Washburn to form a school administrative district. The Town of Perham at the June 21, 1958, meeting approved of the allocation of school directors to each town comprising the district and to authorize the district to assume full responsibility for amortizing certain school indebtedness outstanding in the municipalities and school district comprising the school administrative district. All of the other towns voted to join said school administrative district. The Maine School District Commission has records of returns of each of the towns comprising the said school administrative district on file and on July 17, 1958, made a finding that all of the steps in the formation of a school administrative district comprising the aforementioned towns were in order. Such finding and order were recorded in the School District Commission records and the official title was assigned to the school administrative district being School Administrative District #2. A certificate of organization was issued on July 17, 1958.

It is my opinion that any action taken at a future meeting by any of the component towns to rescind a vote which created the district would be void. The general rule as stated in *Bullard v. Allen,* 124 Me. 251 at page 26 is that a town ". . . may take action in one direction today and another tomorrow provided it does not impair intervening rights."

Parker v. Titcomb, 82 Me. 180, stating the above-mentioned general rule further states:

> "A town may reconsider its action at the same meeting or at a subsequent meeting if seasonably done. That is if the action of a town

hath not accomplished its purpose. For if the vote of a town once accomplishes its purpose, works out the intended result and hath spent its force, it cannot be reconsidered and taken back.

"A town is free to act within its legal scope as it pleases. It may take one action in one direction today and in another tomorrow, provided it does not impair intervening rights. There is a wide difference, however, between reconsidering action that has once taken effect and worked its result, and, voting action to renew the original state of affairs by original and new proceedings."

I would like to point out *Knapp v. Swift River Community* School District, 152 Me. 350 at 353, which is a comparable fact situation. Chief Justice Williamson stated in the opinion:

". . . If the right of the District to do business depends from day to day upon the votes of town meetings, first granting, then taking away, and perhaps again granting rights, it is apparent that a District, duly organized, would not be worthy of the name of a quasi-municipal corporation with rights and powers, duties and obligations of its own."

In the instant situation all the necessary steps have been taken for the formation. The school administrative district is created by legislature and governed by the statutes. Once the certificate of organization is issued, Section 111-G of Chapter 443, Public Laws of 1957, provides that such issuance shall be *conclusive* evidence of the lawful organization of the School Administrative District. (Italics supplied) Section 111-P of Chapter 443, Public Laws of 1957, provides the means for withdrawal from a district.

To reiterate, any action by the Town of Perham at this time would be ineffective.

GEORGE A. WATHEN
Assistant Attorney General

July 31, 1958

To Robert M. Huse, Administrative Assistant to the Governor

Re: Removal of Humane Agents

. . . You inquire if anything can be done concerning the complaints against a State Humane Agent.

We would suggest three possibilities with respect to the problem:

1) We have a strong feeling that the matter could be taken care of, if the judge himself should instruct the humane agent not to bring any further matters before his court;

2) It is possible that the Governor might write and request that the State humane agent resign;—the Governor might do this in his own pleasant way and obtain results;

3) Such agent could be removed from office by the Governor and Council.

Under the provisions of Chapter 140, Section 23, R. S. 1954, the tenure of office of State humane agents is not set forth.

Article IX, Section 6, Maine Constitution, provides:

> "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."

Tenure of offices "not otherwise provided for" includes those contained in Chapter 11, Section 5, R. S. 1954:

> "All civil officers, appointed by the governor and council, whose tenure of office is not fixed by law or limited by the constitution, otherwise than during the pleasure of the governor and council, except ministers of the gospel appointed to solemnize marriages and persons appointed to qualify civil officers, shall hold their respective offices for 4 years and no longer, unless reappointed, and shall be subject to removal at any time within said term by the governor and council.
>
> "All such officers so appointed and all state employees shall be citizens of the United States of America."

State humane agents, their tenure not being provided for in the appointing act, are embraced by Section 5 of Chapter 11 (State officers appointed by the Governor and Council) and hold office for 4 years, and shall be subject to removal at any time within said term by the Governor and Council.

Removal of such officer must be by the Governor with the advice and consent of the Council (Opinion of the Justices, 72 Me. 542).

We are therefore of the opinion that if the Governor and Council feel that the situation justifies such action, then by their concurrent action the Governor and Council may remove a State humane agent from office.

Notice of the action taken by the Governor and Council should be sent to the State humane agent and recorded in the office of the Secretary of State.

JAMES GLYNN FROST
Deputy Attorney General

August 1, 1958

To Wolcott H. Fraser, Deputy Secretary of State

Re: Voting Status of National Guardsman Receiving Pauper Supplies.

We have your memo of July 21, 1958, which reads as follows:

"Section 2 of Chapter 3 of the Revised Statutes prohibits a pauper from qualifying as a voter.

"Section 10 of Chapter 94 of the Revised Statutes excepts certain soldiers, sailors and marines from being classed as paupers."

"Does a member of the National Guard become a pauper upon receipt of pauper supplies and thus become ineligible to vote?"

Answer. It is our opinion that a member of the National Guard who does not comply with the provisions of Section 10, of Chapter 94, in not having served in the Army, Navy or Marine Corps in the War of 1861, the War with Spain, World Wars I and II, or the Korean campaign and who has not received an honorable discharge from said service, would become a pauper upon receipt of pauper supplies and thus become ineligible to vote.

We would also point out that in addition to Section 2 of Chapter 3 of the Revised Statutes, Article II, Section 1 of the Maine Constitution also excepts paupers from the voting privilege.

JAMES GLYNN FROST
Deputy Attorney General

August 1, 1958

To Madge Ames, Director, Child Labor Division, Labor & Industry

Re: Catering Business

We have your memo, stating that an accident to a 14-year-old boy has brought to your attention the doubtful classification of a catering business under the provisions of the child labor laws. The catering business with which you are concerned is a business establishment where the cooking and baking are done, such products as baked beans, brown bread, pies, etc., being available for retail sale.

When the business caters to banquets and parties, food which has been cooked at the business establishment is transported by trucks to the place where the banquet or party is being held. Minors are not employed otherwise than for the parties and banquet, and then mostly for loading and unloading trucks.

Question: You ask our opinion as to whether such a business comes under the provisions of Section 23 of Chapter 30 of the Revised Statutes of 1954, as amended (bakery), or Section 25 (eating place or mercantile establishment), or whether it is not covered at all by any provisions of the child labor laws.

Answer. It is the opinion of this office that the catering business, as outlined above, comes within the definition of mercantile establishment, as contained in Section 25 of Chapter 30, and that the employment of a 14-year-old boy in the capacity above described would be in violation of said section. Said section reads:

> "No child under 15 years of age shall be employed, permitted or suffered to work in, about or in connection with any eating place, sporting or overnight camp or mercantile establishment. . . The provisions of this section shall not apply to any such child who is employed directly by, with or under the supervision of either or both of its parents."

The word "mercantile" means having to do with, or engaged in trade, the buying or selling of commodities. The word "establishment" means an institution, place, building or location. The expression "mercantile establishment" means an institution or place of mercantile business, where the buying or selling of merchandise is conducted or engaged in.

A business concerned with the cooking and baking at its location or place of business and the sale of such products comes within the term, "mercantile establishment".

We are therefore of the opinion that the catering business in question is a mercantile establishment.

JAMES GLYNN FROST
Deputy Attorney General

August 4, 1958

To Carleton L. Bradbury, Bank Commissioner

Re: Life Tenancy

We have your memo of July 21st, which reads as follows:

"Section 109 of Chapter 59, Revised Statutes of 1954, as amended, 'Qualification of director', reads as follows:

> " 'No person shall be eligible to the position of a director of any trust company who is not the actual owner of stock amounting to $1,000 par value, free from encumbrance.'

"A bank has written recently to inquire if an individual owning a life tenancy as described by the abstract attached would be qualified under Section 109."

It would be our opinion that one whose only interest in stock of a trust company is a life tenancy with remainder to a remainderman would not be eligible to be a director of any trust company, where the condition is that such person must be "an actual owner of stock amounting to $1,000 par value, free from encumbrance".

While there is no question that such life tenant has ownership of such stock for certain purposes, the fact that at the death of the life tenant the stock then goes to the remainderman means that such stock is not "free from encumbrance". It has been said that the possession of the life tenant in such a case is the possession of the remainderman. It has also been said that the possession of the life tenant is similar to that of a trustee and that the action of the remainderman upon the death of the life tenant is similar to that maintained by a beneficiary of a trust when an accounting is sought.

The use, then, by the life tenant of the stock is limited, and for that reason not free from encumbrance, in our opinion.

FRANK F. HARDING
Attorney General

August 6, 1958

To Frank Carpenter, State Treasurer

Re: Penobscot Bay Ferry Service

I have your request for an opinion concerning whether or not the proceeds from the issuance of bonds sold under the authority of Chapter 190 of Private & Special Laws of 1957 can be used to retire other bonds issued under authority of the same act.

In ordinary circumstances any proceeds in excess of those required to complete the purpose for which the bonds are sold are transferred to a fund for retiring the bonds. In this case, based on my understanding of the facts, my opinion is that the answer to your question is negative.

Sec. 14 of Article IX of the Constitution of Maine states: ". . . the legislature may authorize the issuance of bonds on behalf of the state at such times and in such amounts *and for such purposes* as approved by such action . . ." (italics supplied)

Chapter 210, Private & Special Laws of 1957, which amended Chapter 190, Private & Special Laws of 1957, provides in Section 2 that the cost incurred in establishing the ferry line or lines shall be paid by the State Treasurer from the proceeds of the sale of bonds. Section 5 of Chapter 210 restates the purposes for which the proceeds from the sale of bonds can be spent with reference to Section 10 of Chapter 210.

Section 10 under Section 5 provides: "Interest due or accruing upon any bonds issued under the provisions of this act and all sums coming due for payment of bonds at maturity shall be paid by the Treasurer of State."

Section 2 provides that the funds for retiring the bond will come from the toll income of the ferry service.

I am unable to find any authority in the act for the proposition that you cite. It is my opinion that it is not proper to go beyond the purposes set out by the legislature. In support of this statement please refer to the memo of December 4, 1951, from the Attorney General to the State Treasurer and the Opinion of the Justices cited therein.

GEORGE A. WATHEN
Assistant Attorney General

August 14, 1958

To Ober C. Vaughan, Director, Personnel

Re: Ferry Service—Maine Port Authority

We have your memorandum of July 28, 1958, which reads as follows:

"Pursuant to our discussion of this date, may I request your opinion as to whether or not Chapter 210, Section 9, Private and Special Laws of 1957, implies that employees under this operation would be hired under the authority of the Personnel Board."

The employees of the Maine Port Authority to be employed under the provision of Chapter 210, Section 9, Private & Special Laws of 1957, are not subject to the personnel law, but are to be employed in the same manner in which the Authority usually employs its employees.

Chapter 114, Section 2(a), Private & Special, 1929, provides that:

"The board of directors (of the Authority) shall determine and fix the salary of all other officers and employees of the . . . Authority."

Section 4(a) provides that:

"The . . . Authority shall employ such engineers, clerks . . . and other employees as it may deem necessary to carry out the purposes of this act and shall determine their duties and compensation."

Chapter 190, Section 11, Private & Special, 1957, imposes upon the Authority the duty of operating the ferry line.

Employees necessary to carry out the added purpose should be employed in the manner the Act provides, which would preclude their being considered as classified employees.

JAMES GLYNN FROST
Deputy Attorney General

August 20, 1958

To Hayden L. V. Anderson, Director of Professional Services, Education

Re: Hearing on Revocation of Teaching Certificates

We have your memo of August 14, 1958, and the attached copies of correspondence between you and a petitioner, whose teaching certificates were revoked as the result of a conviction and sentence to the Maine State Prison.

Anticipating a request to re-establish those certificates, he asks three questions with respect to the hearing that will be had in such a case:

"1. Where will the hearing be held?

"2. Is there any cost?

"3. Can I be represented or do I have to be present?"

It appears to us that your answer to Question #1, that you assume that the hearing will be held in Augusta, is a proper answer.

The only cost to the petitioner would be his expenses, which might include attorney's fee, if an attorney is employed.

Petitioner himself should be present at the hearing and he may represent himself at that hearing or be represented by counsel.

JAMES GLYNN FROST
Deputy Attorney General

August 20, 1958

To Ober C. Vaughan, Director of Personnel

Re: Bona Fide Resignation

We have your memo of August 11, 1958, which reads in part:

"The Personnel Board has directed me to request a ruling from your department in connection with an appeal case now under consideration. I would refer you to Rule 12.1 of the Personnel Law and Rules. The Personnel Board wishes to know whether or not a resignation given under the following circumstances would be considered to be bona fide.

"It is agreed by the parties that the employee was called into the central office of the department and questioned at some length. Following this, he was asked to submit to a lie detector test, which he refused to do. Whereupon the department head gave the employee a choice to resign or be discharged. The employee at that time elected to resign. A copy of his written resignation has been submitted to this department as required. . ."

Your memo does not state that the employee is subject to the provisions of the Personnel Law, but the following opinion is written upon the assumption that he is.

Answer. It is our opinion that a resignation given under the above circumstances is not a bona fide resignation, but, instead, amounts to a discharge, or dismissal.

It appears that the majority, if not the universal rule, with respect to resignations is that a resignation procured by duress is voidable and may be repudiated;

and the rule is especially correct where the duress is imposed by the authority having the duty of accepting or rejecting the resignation.

The rule has been applied where the resignation was submitted in the face of a demand to either resign or be fired and lose all rights to a pension. *Moreno v. Cairnes,* 127 P. 2d 194; 20 Cal. 2d 531 (1942).

The rule has also been applied where the choice has been to resign or be charged with a criminal offense, or threatened with personal injury. *State ex. rel. Young v. Ladeen* (1908), 104 Minn. 252, 116 N.W. 486; 16 LRA (NS) 1058. See also *Board of Education v. Rose,* 147 S.W. 2d 83; 285 Ky. 217; 132 ALR 969.

The rule enunciated in the above cases appears to be based on the premise that resignation is a voluntary act, and that, if a resignation is submitted under circumstances where the alternative is to be fired, then such resignation is

> ". . . akin to layoffs, suspensions, or discharges by reason of the element of coercion and bears only a formal resemblance to voluntary resignations. Whenever a person is severed from his employment by coercion the severance is effected not by his own will but by the will of a superior. A person who is forced to resign is thus in the position of one who is discharged, not of one who exercises his own will to surrender his employment voluntarily."
>
> *Morena v. Cairnes, supra.*

For the above reasons we conclude that in the instant case the resignation is not a bona fide resignation. . . .

JAMES GLYNN FROST

Deputy Attorney General

August 20, 1958

To Norman P. Ledew, Chief Examiner, Sales Tax Division

Re: Tax on Post Office Employee Uniforms

You inquire as to the taxability under the sales and use tax law of the sale of uniforms for mailmen who are employees of the Federal Government.

This is a sale to an individual employed by the Federal Government, but it is not a sale to the Federal Government or an instrumentality of the Federal Government.

The reimbursement by the Federal Government to the Federal employee for the expense of purchasing those uniforms is in the nature of a reimbursement for the expense incurred in carrying out his contract of employment with the Federal Government. The sale of the uniforms to the individual mailmen is therefore a taxable sale under the Maine Sales and Use Tax Act.

RICHARD A. FOLEY

Assistant Attorney General

August 26, 1958

To Gray H. Curtis, Executive Director, Vocational Rehabilitation

Re: Funds

We have your letter of August 25, 1958, in which you ask for an opinion on our laws relating to Vocational Rehabilitation, Chapter 465, Section 199, Public Laws of 1955.

You state that you are advised that the said act was an enabling act, and if for any reason Federal funds were withheld, or not available, your program would be inoperative, even though State funds were available. You ask if we feel that this is the case.

It is our opinion that the withholding of Federal funds would not make inoperative the laws generally relating to Vocational Rehabilitation. While, no doubt, a great part of the program was founded on Federal funds, withholding of which would seriously handicap activities in this field, we do not believe that such withholding of funds would vitiate the program. Section 200 of Chapter 41, R. S., contemplates legislative appropriation for vocational rehabilitation services and such sums would be available for the purpose stated, even though Federal funds were not available.

It is not stated in your letter which specific provision gave rise to the thought that the program would be inoperative upon the withholding of Federal funds. It may be that Section 202-C would mislead some one into such a belief. However, we would point out that the cost of administering the act in said section refers to 202-A and that fund alone.

JAMES GLYNN FROST
Deputy Attorney General

September 16, 1958

To W. H. Bradford, Right of Way Engineer, Highway Department

Re: "Floating Billboards" off the Shore

I have been requested to give my opinion as to the authority of the Commission to regulate billboards that are attached to floats and anchored off-shore on the coast. It is necessary first to examine the law relating to the Colonial Ordinance of 1641-7, which was the original law affecting off-shore rights.

Whittlesey in his treatise, "Laws of the Seashore, Tidewaters and Great Ponds", says—"As far as tidal bays, coves, rivers and shore waters are concerned, the public rights of navigation, passing and repassing on foot, fishing and fowling, confirmed by the Ordinance, have not been extended by custom, usage or judicial sanction in this commonwealth to include other privileges." (108 Mass. 436; 195 Mass. 79; 202 Mass. 422 and 207 Mass. 174).

In Maine, however, the courts have extended the public privileges on flats and navigable rivers to include (subject to the paramount right of navigation) cutting and removing ice, riding, skating and travelling thereon, walking upon the flats and resting vessels, discharging ferry passengers and unloading cargo thereon. (124 Me. 361; 93 Me. 532; 86 Me. 319; 79 Me. 456; 25 Me. 51, and 18 Me. 433).

"The proprietor of the upland on the sea or salt water owns to low water mark." (129 Me. 407; 124 Me. 361 and 365; 114 Me. 242; 105 Me. 76; 102 Me. 431; 100 Me. 410; 97 Me. 356 and 461 and 96 Me. 458).

It would, therefore, appear that as far as case law is concerned, the common law rights of the public in the use of off-shore waters has not been extended to the use of the waters for advertising purposes.

The State has jurisdiction of the off-shore waters (at least to the extent of three miles) subject to the federal laws on navigation.

The question then is: "Does the language in sections 137 and 138 of Chapter 23 of the Revised Statutes cover these floating billboards?" Technically, it does! Section 137 reads as follows:

> "Sec. 137. License; fee.—No person, firm or corporation shall engage or continue in the business of outdoor advertising or erect, maintain or display any painted bulletins, poster panels or other outdoor advertising devices upon property not their own or not occupied by them as a place for carrying on business other than outdoor advertising until such person, firm or corporation shall have secured from the state highway commission, hereinafter called the 'commission', a license to engage in the business of outdoor advertising. The fee for such license shall be the sum of $100 per year for any person, firm or corporation engaging or continuing in the business of outdoor advertising for direct profit through rentals or compensation for the erection, maintenance or display of painted bulletins, poster panels or other outdoor advertising devices upon real property; $25 per year for any person, firm or corporation erecting or maintaining, not for direct profit through rentals or compensation, displays of painted bulletins, poster panels or other outdoor advertising devices upon property not their own or not occupied by them as a place for carrying on business other than outdoor advertising; except that the license fee for not exceeding 5 signs, none of which is more than 20 square feet in area, shall be $5 per year. All fees for such licenses shall be payable annually in advance."

In the first place, the fact that the structure is anchored only, and, therefore, not affixed to the land, does not change the fact that it is *maintained* upon property not the property of the person, etc., maintaining it! There is land under the water, and it is still real property.

If the sign was anchored inside the low water mark, it would be on property of the abutting owner. Outside the low water mark, it is on property of the State of Maine.

Signs anchored outside of the low water mark are in the same legal status as a sign on the State House lawn. Individual citizens have no common law or statutory right to use State property for advertising private business, unless in the indirect manner permitted by use of directional signs.

L. SMITH DUNNACK
Assistant Attorney General

September 18, 1958

To Kermit S. Nickerson, Deputy Commissioner of Education

Re: Medical and Health Inspections

I have your request for an opinion based on the following questions:

"1. May a parent refuse to have a child examined by a school physician employed by the school committee? If so, what recourse does the school have to protect other children?

"2. With reference to Sec. 62 of Ch. 41, may a parent refuse to have his child submit to a visual or auditory test? Can a parent have these tests made outside the school by competent personnel and report to the school in lieu of the school examination?"

Sec. 58 of Ch. 41 provides that it is the duty of every school physician to make a prompt examination and diagnosis of all children referred to him as provided in Sections 57 to 65. Therefore, in the case of absence on account of sickness or notice of disease, there seems to be nothing in the statutes which requires compulsory complete physical examination of students before entering school. Sections 54, 60, 61 and 62 provide means for the protection of the other children.

In reference to your question, Section 62 states in part:

"The superintending school committee or school directors of administrative units shall cause every child in the public schools to be separately and carefully tested and examined at least once in every school year to ascertain whether he is suffering from defective sight or hearing, or from any other disability. . . . Tests of sight and hearing shall be made by the teachers or the school physicians."

A parent cannot refuse to allow his child to submit to these examinations, but a degree of cooperation from the child is necessary for an adequate exam, so as a practical matter, I would suggest acceptance of a competent physician's report in lieu of the school teacher or physician's examination.

GEORGE A. WATHEN
Assistant Attorney General

September 18, 1958

To Maurice C. Varney, Director of Vocational Education

Re: Liability Coverage of Firemen employed as Instructors

You make inquiry about liability insurance protection for itinerant fire service training instructors. You say that the Department of Education, in its fire service training programs, employs on a contractual basis approximately 35 professional firemen as instructors in regularly organized schools of from 10 to 25 hours, and the question has arisen as to what protection against injury these men have.

It would seem that they are protected, while in your employ, under the terms of the Workmen's Compensation Act. There is an exception in the Act relating to any person "whose employment is not in the usual course of the business, trade or occupation of his employer"; but your business is education

and these employees are engaged with you for educational purposes, as teachers. Their terms of employment are brief but otherwise seem to be regular, and I think that the protection of the Workmen's Compensation Act would apply to them.

NEAL A. DONAHUE
Assistant Attorney General

September 24, 1958

To Roland H. Cobb, Commissioner of Inland Fisheries and Game

Re: Raft or Boat as Stationary Blind

. . . You ask for an interpretation of the third paragraph of Section 89 of Chapter 37 of the Revised Statutes of 1954, which reads as follows:

"No artificial cover which is termed stationary blind, or parts thereof, used for hunting purposes shall be left or allowed to remain in the waters of Merrymeeting bay between one hour after legal shooting time and one hour before legal shooting time."

You ask if a raft or boat fitted as a blind would be prohibited in Merrymeeting Bay between the hours fixed in this paragraph:—one hour after legal shooting time to one hour before legal shooting time.

For the purposes of enforcement of your laws we believe you should consider a raft or boat fitted as a blind to be an "artificial cover which is termed stationary blind", and as such should not be "left or allowed to remain in the waters of Merrymeeting bay between one hour after legal shooting time and one hour before legal shooting time".

JAMES GLYNN FROST
Deputy Attorney General

September 24, 1958

To Perry D. Hayden, Commissioner of Institutional Service

Re: Transfer of Voluntary Patient under Interstate Compact on Mental Health.

We have your memo of September 19, 1958, which reads as follows:

"This Department has recently received a request from the Massachusetts Department of Mental Health to transfer a mental patient from the Northampton State Hospital to a state hospital in Maine. Massachusetts is a member of the Interstate Compact on Mental Health and a transfer can be effected if . . . there are factors based upon clinical determinations indicating that the care and treatment of said patient would be facilitated and improved thereby. . . The factors referred to . . . shall include the patient's full record with due regard for the location of patient's family, character of illness and probable duration thereof, and such other factors as shall be considered appropriate." (Section II of Article III of the Interstate Compact on Mental Health, Chapter (231), Public Laws of 1957).

"The patient involved was not committed to the Northampton State Hospital but is on a voluntary status and has himself requested the transfer so that he may

be near his family. His wife and family now reside in Maine so the only point of law in question is whether or not a voluntary patient can be transferred under the terms of the Compact.

"When a committed patient is transferred from an out-of-state hospital it is necessary to have a certified copy of the commitment papers and case history forwarded with the patient. Our Consultant on Mental Health, Dr. Francis H. Sleeper, has advised this office that in his opinion if a *voluntary* patient were transferred to him he would not have the authority to retain him on the transfer papers alone, but it would be necessary for the patient to complete a voluntary application for admission to his Hospital before he would accept him.

"I would appreciate your advice as to whether or not this Department (1) can authorize the transfer of a voluntary patient under the terms of the Mental Health Compact; (2) should request a certified copy of the voluntary admission papers admitting the patient to the out-of-state hospital; and/or (3) should request that the patient complete voluntary admission papers to the state hospital in this State before the transfer takes place."

The general over-all intent of the Interstate Compact on Mental Health compels us to the belief that all persons institutionalized for mental illness or mental deficiency, as limited by Article IX of the Compact, are embraced within the terms of the Compact, whether they have been committed or are being detained on a voluntary basis.

We are therefore of the opinion that: (1) Your department can authorize the transfer of a voluntary patient under the terms of the Mental Health Compact; (2) A request should be made for a certified copy of the voluntary admission papers admitting the patient to the out-of-state hospital; and (3) The patient should complete voluntary admission papers to the mental hospital in this State before the transfer takes place.

JAMES GLYNN FROST
Deputy Attorney General

September 30, 1958

To Ernest H. Johnson, State Tax Assessor

Re: Gasoline Tax—allowance for losses, R. S., c. 16, s. 163.

Received your memo of September 26, 1958, with attached memo from Mr. Dillon to you, dated September 25, 1958, relating to the above subject matter, where the distributor exceeded his allowance of 1% plus 1% on all transfers in vessels or tank cars to cover losses through shrinkage, evaporation or handling sustained by a distributor in the regular course of business.

The statute provides that the total allowance for such losses shall not exceed 2% of the receipts by such distributor and that no further deduction shall be allowed unless the State Tax Assessor is satisfied on definite proof submitted to him that a further deduction should be allowed by him for a loss sustained through fire, accident or some unavoidable calamity.

You ask if you are correct in taking the position that gallonage actually delivered to customers, but not accounted for in the distributor's reports to your office because of faulty meters on delivery trucks, is taxable and does not represent deductible loss under Section 163 of Chapter 16, R. S.

It is my opinion that you are correct in your interpretation of Section 163, Chapter 16, R. S. According to the memo from Mr. Dillon the loss claimed by the taxpayer was due to malfunctioning meters in the delivery truck, thereby under-reading the actual gallonage that was distributed. This loss does not come within the purview of Section 163 of Chapter 16, R. S., and should not be allowed.

RALPH W. FARRIS
Assistant Attorney General

October 7, 1958

To Asa A. Gordon, Coordinator, Maine School District Commission

Re: 10% Bonus to be paid to School Administrative Districts

I have your request for an opinion concerning the payment of the 10% bonus to school administrative districts.

Sec. 237-E of Ch. 443, P. L. 1957, provides:

"When a School Administrative District has taken over the operation of the public schools within its jurisdiction, the subsidy payment that would normally be paid to the subordinate administrative units which operated the public schools within the confines of the School Administrative District prior to the formation of said district shall be paid directly to the School Administrative District."

Sec. 237-G of Ch. 443, P. L. 1957, provides:

"When administrative units are reorganized by the formation of 'School Administrative Districts' as provided in sections 111-A to 111-U, the state subsidy paid annually to each such district, as determined in section 237-E, shall be supplemented by an additional 10% of the percent to which it is entitled through the computation in section 237-E."

Sec. 107 of Chapter 364 entitled "Appropriation" states:

"There is hereby appropriated from the general fund the sum of $70,000 for the fiscal year ending June 30, 1958 and the sum of $85,000 for the fiscal year ending June 30, 1959 to further encourage the formation of school administrative districts, by paying in December 1957 and in December 1958, directly to such districts, if such districts are established prior to November 1st of that year, the subsidy to which the participating municipalities would have been entitled and an additional 10% of that amount."

Sec. 4 of Ch. 198, P. & S. L. of 1957, provides:

"Such portions of sections 106, 107 and 108 of Chapter 364 of the public laws of 1957 as pertain to appropriations for the fiscal year ending June 30, 1958 are repealed."

It is my opinion that the 10% bonus to be paid school administrative districts this year, if paid out of the appropriations under sec. 107 of Ch. 364, as I assume such bonus payment will be, has a cut-off date of Nov. 1, 1958, for the eligibility for such payments. Normally an appropriation states only the amount and the purposes for which the money is to be used. Section 107 provides that the school administrative districts must be established before November 1. The word "estab-

lished" must, by its use in this section, mean organized and in operation, since this section provides that the subsidy will be paid to the district. A district is not eligible to take money until it is in operation (Sec. 111-R, Ch. 443, P. L. 1957). Sec. 237-E further buttresses this interpretation. This appropriation section (107) will only be operative for this year and the general law will apply hereafter.

GEORGE A. WATHEN
Assistant Attorney General

October 23, 1958

To R. E. Libby, Chairman, Veterinary Examiners

Re: Remuneration from Two Sources

. . . You state that you are employed by the State of Maine as State Veterinarian in the Division of Animal Industry of the Department of Agriculture, and also chairman of the Board of Veterinary Examiners.

The Board of Veterinary Examiners reimburses its officers at the rate of $10 per day for two days of each year for work performed. You ask if, for services performed by you in your capacity as chairman of the board, you may receive the per diem above mentioned, if you were to consider those days as vacation time, from your duties with the Department of Agriculture.

It appears that this question arises because of the rejection of such bills upon the basis that no person should receive pay from two State agencies.

It is our opinion that, consistent with Rule 11.10 promulgated by the Department of Personnel, with the approval of the Commissioner of Agriculture you may receive the per diem paid by the Board of Veterinary Examiners, if you consider the two days worked as vacation time from your duties with the Department of Agriculture.

JAMES GLYNN FROST
Deputy Attorney General

October 23, 1958

To C. Keith Miller, Inland Fisheries and Game

Re: Sale of Fish Cultural Station

We have reviewed the original deed and the correspondence with the General Services Administration relating to the above captioned property.

On examining this material we realized that the transfer to the State of Maine was not accomplished by a taking (eminent domain) or by purchase, but on the consideration that the property be used as a reserve for the conservation of wild life.

It thus appears, consistently with opinion of this office dated September 17, 1956, the property not having been taken or purchased, that a conveyance to the United States cannot be made under the provisions of Section 8 of Chapter 37, R. S. 1954.

We would recommend that a Resolve be prepared for consideration by the legislature. . . .

JAMES GLYNN FROST
Deputy Attorney General

November 5, 1958

To Perry D. Hayden, Commissioner, Institutional Services

Re: Expenses of support and commitment.

I have your request for an opinion from this office concerning the expenses of support of patients in the insane hospitals. Section 135 of Chapter 27 provides, in the case of a person unable to pay for his support, that the town where the patient resided or was found at the time of his arrest shall pay the expenses of *examination* and *commitment;* and the expenses of *support* shall be borne by the state, provided the municipality files the certificate stating that the patient or his relatives are unable to pay for the support.

Section 139 of Chapter 27 provides that the state may recover from the insane person *if he is able,* or from persons legally liable, the reasonable expenses of his support.

The real question raised is, "When is an insane person able to pay for his own support?" If he is unable at the time of commitment and later becomes able to support himself, may the state collect for the period when the insane was unable to support himself?

The answers to these questions are found in *Bangor v. Wiscasset,* 71 Me. 535; *Cape Elizabeth v. Lombard,* 72 Me. 492; *Orono v. Peavey,* 66 Me. 60.

The *Orono v. Peavey* Case concerned a person infected with a contagious disease and removed to a separate house by the municipal officers of Old Town, but since his residence was Orono, the Town of Orono reimbursed Old Town. A suit was brought by Orono against the defendant to recover the expenses paid due to his illness. The Court held that since the defendant was unable to pay the entire amount of the expenses, he was not liable to pay any part thereof. This was based on the statutory language "if able".

We have the same language in the present statute and this language was in the statute when the *Bangor v. Wiscasset* and *Cape Elizabeth v. Lombard* cases were decided. Both of these cases involved persons committed to insane hospitals. Both cases held that there is no debt unless there is an ability to pay. If, due to changed financial circumstances, the insane becomes able to pay, a debt is created from that time.

In my opinion, based on the cases heretofore cited, if a person is unable to pay his entire support at the time of his commitment, there is no debt created, and upon becoming able to pay at a later date, he pays only from the time he is able to pay and does not pay for the period of time when there is no legal debt.

GEORGE A. WATHEN
Assistant Attorney General

November 14, 1958

To Edward Langlois, General Manager, Maine Port Authority

I have your letter of October 30, 1958, requesting an opinion concerning the application of Section 26 of Chapter 15-A, Revised Statutes of 1954, as amended, to the Island Ferry Service. On a previous occasion I had discussed this matter

with Mr. Pressey, Assistant Controller, and agreed that Section 26 did not apply to the Island Ferry Service.

I have also received a letter addressed to James Frost, Deputy Attorney General, requesting an opinion concerning whether or not the Maine Port Authority in its administration of the Island Ferry Service comes under the jurisdiction of the Bureau of Public Improvements for leasing of grounds, buildings and facilities.

The Maine Port Authority as an agency of the State would appear to come within the purview of Chapter 15-A, Revised Statutes of 1954, but historically these quasi-governmental agencies such as normal schools, the University of Maine and the Maine Port Authority have been considered in a different category than our other state agencies. (Chapter 216, P. L. 1931, commonly known as the administrative code, exempts the Maine Port Authority, then known as the Port of Portland Authority from the provisions of the act.) The Maine Port Authority was charged by the Legislature to acquire property, boats and equipment to provide transportation of vehicles, freight and passengers between the islands and the mainland. The legislature specifically laid down the duties and the authority of the Maine Port Authority for organizing and operating the ferry service. The Legislative Record indicates that the Maine Port Authority was given this task because of their special knowledge in such a venture.

In the overall survey of the statutes and the Legislative Record it is, therefore, my opinion that the Maine Port Authority administering the ferry service is not subject to Section 26 or Article XIX of Section 25 of Chapter 15-A, Revised Statutes of 1954.

Very truly yours,

GEORGE A. WATHEN
Assistant Attorney General

December 2, 1958

To Honorable Edmund S. Muskie, Governor of Maine

Re: Vacancy in Office of Sheriff

From time to time this office has given oral opinions to the Governor that the appointing power has the right to make a prospective appointment when a vacancy will occur during the term of office of that appointing power, and that the Governor and Council can thus make such appointments when the vacancy will occur prior to the expiration of the terms of office of the Governor and Council.

We are now asked if the same rule applies to the filling of a vacancy caused by the death of a sheriff.

We are of the opinion that the general rule above stated applies to the office of Sheriff, although the sheriff was originally elected to his office. In the event of vacancy in that office the Constitution vests the power of appointment in the Governor, with the advice and consent of the Council, and, absent further provisions *re* the manner of appointment, the general provisions surrounding that power would apply.

Under the provisions of Article IV, Section 10, Constitution of Maine, a sheriff is elected by the people for a period of two years from the first day of

January next after their election. The term of a sheriff therefore expires at midnight on December 31st.

The same constitutional provision goes on to provide that vacancies in the office of sheriff shall be filled in the same manner as is provided in the case of judges and registers of probate:

> "Vacancies occurring in said office by death, resignation or otherwise, shall be filled by election in manner aforesaid at the (September) election, next after their occurrence; and in the meantime the governor, with the advice and consent of the council, may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January next after the election aforesaid."
>
> Article VI, Section 7, Maine Constitution.

It will be recalled that the above quoted provision was proposed to be amended by Chapter 94, Resolves of 1957, and was in fact amended, upon affirmative referendum vote of the people, in the following manner, with respect to filling the vacancy:

> "Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid at the *November* election, next after their occurrence. . ."

Your question relates particularly to the office of Sheriff of Androscoggin County.

The sheriff-elect, as of the September election of 1958, died two days after the said September election.

The Governor and Council appointed a person to fill the vacancy created by the death of the sheriff, and by the terms of the commission the person so appointed was to hold office until January 1, 1961.

We submit that, in the first instance, the appointment was to fill a vacancy in the present term of office of the deceased sheriff, which term would have expired on January 1, 1959. The commission of such person should then properly run until midnight, December 31, 1958, with a second appointment to follow, to fill the vacancy that will be inevitable in the term of sheriff running from January 1, 1959, to midnight on December 31, 1960. See Opinion of Justices, 137 Me. 347.

With respect to the second such appointment, we are of the opinion that the Governor and Council can properly anticipate the certain vacancy in that office and appoint a person to fill that vacancy before the vacancy actually occurs, such vacancy occurring before the expiration of the terms of office of the Governor and Council.

JAMES GLYNN FROST
Deputy Attorney General

December 3, 1958

To George F. Mahoney, Commissioner, Insurance Department

Re: Sale of Used-Car Warranties

The question, "Is the conduct of the sale of used-car warranties in this state the carrying-on of insurance business?" has been submitted to me.

In answering this question, we shall define insurance, warranty, and guaranty; explain their relationship; outline the operation of the used-car warranty business; and determine whether it fits any of the definitions.

Insurance

The 1954 Revised Statutes of Maine, Chapter 60, Section 1, define a contract of insurance as follows:

> "A contract of insurance, life excepted, is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest."

This section of the statute is decisive of the definition of insurance in the State of Maine. The only reason for pursuing the question of this definition any further is to see whether there are any interpretive cases or texts.

In *Getchell v. The Mercantile and Manufacturer's Mutual Fire Insurance Company* 109 Me. 274, it is stated at page 277, "A contract of insurance is a contract of *indemnity*, the object being to reimburse the insured for his actual loss not exceeding an agreed sum." The statutory definition of insurance quoted above was in effect in 1912 when this case was handed down.

In *Carleton v. Patrons Androscoggin Mutual Fire Insurance Company* 109 Me. 79 at page 83, the Court said, "A policy of insurance is a *contract* between the parties, and like all other contracts founded upon a proposal on one side and acceptance on the other, it does not become operative as a complete and valid contract until the application for it is accepted."

According to *Hutchins v. Ford* 82 Me. 363 at page 369, "It is familiar law, that insurance becomes payable upon loss from *a peril insured.*"

In *Rumford Falls Paper Company v. The Fidelity and Casualty Company* 92 Me. 574 at page 576, this quotation appears, "It must be remembered, in the first place, that this policy of insurance is a contract of indemnity in which the parties have a legal right to insert any conditions and stipulations which they deem reasonable or necessary, provided no principle of public policy is thereby contravened. *Like all other contracts it is to be construed in accordance with its general scope and design and the real intention of the parties as disclosed by an examination of the whole instrument.*"

Thus Maine law tells us that an insurance policy is a contract of indemnity payable upon loss from a specified peril. We are reminded that a contract is to be construed according to its general scope and design from an examination of the whole instrument.

Vance on Insurance (3rd ed.) at page 2 says the contract of insurance is distinguished by the presence of five elements:

> "(1) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
>
> (2) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.
>
> (3) The insurer assumes that risk of loss.
>
> (4) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks.

(5) As consideration for the insurer's promise, the insured makes a ratable contribution, called a premium, to a general insurance fund."

Vance comments further: "A contract possessing only the three elements first named is a risk-shifting device, but not a contract of insurance, which is a risk-distributing device; but if it possesses the other two as well, it is a contract of insurance, whatever be its name or its form."

Warranty

An express warranty is defined in the *Uniform Sales Act* in the 1954 Revised Statutes of Maine, Chapter 185, Section 12, as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

According to *Black's Law Dictionary* (2nd ed.), "A warranty is a statement made by the seller of goods contemporaneously with, and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods by which he promises or undertakes to insure that certain facts are or shall be as he then represents them." This, or a similar definition, has been accepted by a majority of the states prior to enactment of the Uniform Sales Act. See 55 C. J. 652.

In some jurisdictions it is held that a contract of sale acts exclusively for transfer of property in a described or designated chattel and a warranty is collateral to it. *Barton v. Dowis* (Mo.) 285 SW 988, 989. In others, the contract of sale is regarded as one in which the seller undertakes a double obligation to transfer the property in the goods and to assume a duty to answer for them in certain particulars to the buyer. *Battles v. Whitley* (Ala.) 82 So. 573. See 77 C.J.S. 1118-1119. These cases are not necessarily inconsistent in result, and they all regard the sale of the property as the primary object of the contract of sale. *It is nowhere stated or implied that there is a separate charge or an additional charge for any warranty included in the contract or additional to it.*

Guaranty

"A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who, in the first instance, is liable to such payment or performance." *Black's Law Dictionary* (2nd ed.)

"A guaranty, in its legal and commercial sense, is an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty by another person, who himself remains liable to pay or perform the same." *Story on Promissory Notes*, Section 457.

A review of Maine cases does not reveal a definition of "guaranty", but the treatment of the guaranty cases indicates acceptance of the above definitions.

Relationship among Insurance, Warranty, and Guaranty

Vance on Insurance (3rd ed.) at pages 4 and 5 expresses concisely the relationship among insurance, warranty, and guaranty:

> "In every contract of risk-shifting, three elements are conspicuously present: First, one party possesses an interest susceptible of pecuniary estimation; secondly, that interest is subject to some well-defined peril or perils, the happening of which will destroy or impair it, thereby causing loss to the risk-bearer; thirdly, there is an assumption of this risk of loss by the other party to the contract. Thus, in a contract of guaranty, or indorsement, or of warranty on a sale of goods, an interest possessed by the creditor, the note holder, or the vendee, is exposed to impairment by the happening of contingent events, and the risk of the interest owner is assumed by the guarantor, indorser, or warranting vendor. But these are not contracts of insurance, which are more than risk-shifting devices. For the insurance contract, additional elements are required; that is, the contract for assuming the risk must be an integral part of a general scheme for distributing a loss that may be suffered by any individual interest owner among a considerable group of persons exposed to similar perils, and the insured must make a ratable contribution, called a premium, to the general insurance fund. The same idea is expressed when we say that an indemnitor becomes an insurer only when he goes into the business of indemnifying. While a policy under seal for no premium paid would at common law be enforceable as an indemnity bond, it could scarcely be considered a proper insurance contract."

It has been stated that a warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself. *State ex rel Duffy v. Western Auto Supply Co.* (Ohio) 16 NE 2d 256, 259. We reject this idea as being inaccurate. Indeed, the Ohio Court in *State ex rel Herbert v. Standard Oil Co.* 35 NE 2d 437, while refusing to overrule the Duffy case, stated its doctrine was not to be extended beyond the facts of that case.

According to *Patterson on Essentials of Insurance Law* (2nd ed.) at page 10, "A warranty (commonly called a *guaranty*) of the qualities of goods or services is distinguished from an insurance contract by the *degree of control* that the promisor has over the happening of the contingent event." We reject this idea as unsound and impossible to apply. Control does not appear in the usual definition of warranty or insurance. A dealer who has absolutely no control over the manufacture of a tire can warrant its life or performance. On the other hand, the tire manufacturer having complete control of his tire production could purchase insurance on the life or performance of his tires, if such coverage were written.

Patterson's statement is a misapplication of the New York law which defines an insurance contract as an agreement by which one party is obligated to confer a benefit of pecuniary value on the other party upon the happening of a fortuitous event. Fortuitous event is defined as an occurrence which is, *or is assumed by the parties to be,* substantially beyond the control of either. The theory is that if substantial control is in the hands of either party, a contract of indemnity is not insurance. The difficulty then arises of determining the meaning of substantial control.

New York has said that a proper inspection of the "warranted" parts of a motor vehicle eliminates the happening of the fortuitous event resulting in their impairment or destruction. This is like saying that a medical examination of a person eliminates the fortuitous event of his physical impairment or death.

The inaccuracy of this idea is shown patently by the claims which have resulted from used-car "warranty" contracts all over the country. To say that the buying public could be induced to lay out substantial sums to protect itself from events which could not occur because of control in another is to overlook the economic facts of life.

The New York definition must be applied with great rigidity if it is to have any practical value. That is, emphasis must be placed with equal force on that part of the definition stating that assumption by the parties that control is to a substantial extent beyond them is sufficient to permit the fortuitous event thus constituting insurance.

Used-car Warranty Business

A typical used-car warranty business operates in this way:

> A corporation enters into a contract with a dealer. The dealer agrees to sell warranty certificates on certain cars reconditioned by him. He agrees to send a certain amount to the corporation for each certificate he sells. Part of this amount is retained by the corporation to cover its expenses and the balance is retained by the corporation as a reserve fund to cover claims under the warranty. The corporation agrees to make necessary repairs on the warranted parts of each car which are impaired or destroyed within the warranty period. It agrees to return to the dealer a percentage of the reserve fund remaining after claims have been paid. There are certain provisions for making up losses in excess of the reserve fund and for cancellation of the contract.
>
> The dealer then sells warranty certificates to the purchasers of certain reconditioned cars for a certain fee. The certificate states that the car has been reconditioned by the dealer and that the corporation will indemnify the purchaser for the cost of repairs on specified parts which become impaired within the warranty period.
>
> The corporation reserves the right to determine the necessity for repair or replacement. Cars used for commercial purposes are excluded by the terms of the warranty. Liability for personal injury or property damage caused by defective parts of the car; the cost of tune-ups or adjustments; repairs arising out of or revealed by collision; and repairs resulting from neglect, misuse, acts of God, or major alteration not recommended by the manufacturer are also excluded.
>
> The certificate is neither transferable nor assignable. It contains a statement that it is not an insurance policy and is not to be construed as such.

Applying the Maine statute (R. S. 1954, Chapter 60, Section 1), which admittedly is very broad, to the operation of the used-car warranty business we find as follows:

1. There is an *agreement* between the company issuing the "warranty" and the purchaser of it.

2. The purchaser pays a *consideration* for the agreement. The fact that the payment may be made indirectly is of no consequence, since the money for the "warranty" comes from the purchaser of the car in the final analysis.

3. The company *promises to pay money or to do some act of value to the insured.*

4. The company promises to pay the money or perform the act *upon the destruction or injury of something in which the purchaser has an interest.*

It could be argued that under this statute even a warranty would be considered insurance. To eliminate this possibility, let us apply the more stringent five-point definition outlined by Vance to the used-car warranty business:

(1) Does the insured possess an insurable interest?

Yes. He owns an equity in the car which is the subject of the "warranty" contract.

(2) Is the insured subject to a risk of loss through the destruction or impairment of that interest by the happening of a designated peril?

Yes. The "warranted" parts of the car may be injured or destroyed through normal use of the car.

(3) Does the insurer assume that risk of loss?

Yes. He promises to indemnify the purchaser for all or part of the cost of repairs.

(4) Is this assumption part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks?

Yes. The company seeks to issue these "warranties" to the purchasers of all cars which meet age and inspection requirements.

(5) Does the insured make a ratable contribution, called a premium, to a general insurance fund?

Yes. He pays a fee either directly or indirectly to the company which retains a certain part of it to cover losses and expenses.

Several types of "used-car warranties" have been called to our attention. Though their details differ, their patterns fit the definition of insurance.

For the reason stated, it is our unqualified opinion that the conduct of the sale of used-car warranties in this state is the carrying on of insurance business.

ORVILLE T. RANGER
Assistant Attorney General

December 5, 1958

To Kenneth B. Burns, Business Manager, Institutional Services

Re: Gift to State

We have your memorandum of November 19, 1958, relative to the bequest of cash and other properties to the Maine School for the Deaf and the Maine Institution for the Blind from the Estate of Nellie E. Fuller. Your share of the bequest amounts to $7,119.37 and is on deposit with the State Treasurer.

You state that it is the desire of the department to establish a permanent trust fund from the proceeds of this estate from which the income only will be made available for the benefit of the students of the Governor Baxter State School for the Deaf.

Normally such gifts would be accepted by the state under the provisions of Chapter 11, Section 16 of the Revised Statutes of 1954. The gift itself not being in the form of a trust rather an unconditional gift, we are of the opinion that the fund may not be accepted in this manner as a trust but only as an unconditional gift.

We would suggest that the only way in which this fund can be impressed with the trust is for the Legislature to accept the gift and establish the trust.

JAMES GLYNN FROST
Deputy Attorney General

December 12, 1958

To Governor Edmund S. Muskie

Re: Maine Port Authority

Under the provisions of Chapter 5, Section 1 (d) of the Private and Special Laws of 1941:

"With the consent of the governor and council, first obtained, it (Maine Port Authority) may, by vote of its directors: . . .

2: Convey, sell, lease, demise or rent any of its property not required in the discharge or performance of its duties:"

By Section 1 (b) the Authority may buy or otherwise acquire property to be used for its general purposes of operating piers and terminal facilities at Portland.

It is our opinion that the request of the Maine Port Authority for authority to convey a right of way to the Canadian National Railways in exchange for a grant of land by the Canadian National Railways to the Port Authority, is a proper matter for consideration by the Governor and Council.

GEORGE A. WATHEN
Assistant Attorney General

December 29, 1958

To Earle R. Hayes, Executive Secretary, Maine State Retirement System

Re: Division into Two Systems for Social Security Coverage

We have your memo of November 14, 1958, and attached copy of a letter from the Department of Health, Education and Welfare, indicating the need for an opinion of the Attorney General on the following question:

Question: May the Maine State Retirement System, under our present law, be divided for referendum and coverage purposes into two deemed retirement systems in the manner permitted by the Federal law (P. L. c. 85-840, section 316), i.e., into one system composed of the positions of teacher, as the then "teacher" is defined in section 316 of the Federal law, and the other composed of the positions of all employees than teacher as so defined?

Answer. The Maine Retirement System may be divided for referendum and coverage purposes into two deemed retirement systems, one composed of the

positions of teachers, policemen, and firemen, and the other of the positions of all employees other than teachers, policemen and firemen.

The Maine Social Security Act (Chapter 65, R. S. 1954) was originally enacted to enable employees of political subdivisions of the State to participate in the benefits of Social Security in cases where such employees were not members of an existing retirement or pension system.

Subsequently, this Act was amended to permit participation by such employees whether they were members of existing retirement or pension plans or not. Teachers, policemen and firemen, however, were expressly excluded from participation in Social Security.

It is our opinion, inasmuch as such legislation was enacted with full knowledge that certain local subdivisions were members of the Maine Retirement System, that the Maine Retirement System may be deemed to be separate systems with respect to any one or more of the local subdivisions and to all other positions covered by the Maine Retirement System.

Because of the provision that the chapter shall not apply to teachers, policemen or firemen, who are under a state or local government pension or retirement plan, we are compelled to conclude that our system may be deemed to be a separate system as to teachers, as defined in section 316 of the Federal Law, policemen and firemen, and a separate system as to other employees of a local subdivision.

In enacting our Social Security Act, the Legislature said:

> ". . . It is declared to be the policy of the Legislature, subject to the limitations of this chapter, that such steps be taken as to provide such protection to such employees on as broad a basis as is permitted under the Social Security Act."
>
> Chapter 65, Section 1, R. S. 1954.

We have been (Opinion of Attorney General, October 21, 1954) and are now of the opinion that such statement is adequate authority for the Governor to direct the proper officials to conduct the necessary referendum required by Federal law.

JAMES GLYNN FROST
Deputy Attorney General

December 29, 1958

To R. W. MacDonald, Chief Engineer, Water Improvement Commission

Re: Chapter 79, Revised Statutes of 1954, as amended

We have your memorandum of December 2, 1958, in which you ask this office for an opinion on two questions.

Question No. 1:

> "1. Interpretation of "grandfather clause" contained in Section 8.
>
> a. Does an industry moving onto a site formerly occupied by another industry acquire an automatic and unrestricted license if the manufacturing process, and consequently the waste, is (1) entirely different as is the case between a plating

process and a cannery; (2) in the same general category as in the case of two wastes which are oxygen demanding; or (3) in the case of industries have approximately identical wastes as in the case of one paper mill replacing another."

Question No. 2:

"2. Can the Water Improvement Commission issue a conditional license; that is, a license, the validity of which, depends upon modification of the ordinary waste to meet certain conditions

a. If not, can a license be issued upon proposals made by the applicant in his application which the Commission is willing to accept.

b. Is the procedure now used by the Commission of withholding final licensing until necessary treatment facilities are in place in accordance with statute."

We consider the second question first. The answer to this question may be more clearly seen if one considers what action the Commission might take against a licensee who, in the opinion of the Commission, is in violation of the Water Improvement Commssion law.

Initially, we would note that, though any license granted by the Legislature could be revoked, if so provided, no authority rests in the Commission to revoke or suspend a license, no matter what the provocation might be.

General Principles re licenses and Administrative bodies

A licensee takes his license subject to such conditions as are imposed by the Legislature.

State v. Cote, 122 Me. 450

State v. Pulsifer, 129 Me. 423

Bornstein, Appellant, 126 Me. 532

See generally—33 Am. Jur. 371

While the Legislature may not delegate strictly Legislative duties to an Administrative body, it may require such a body to perform the ministerial acts necessary to the performance of its duties. *McKenney v. Farnsworth,* 121 Me. 450.

Statutes to be considered in determining whether the Water Improvement Commission has the right to impose conditions, either precedent or subsequent

Section 1.

". . . It shall be the duty of the Commission to study, investigate, and from time to time recommend to the persons responsible for the conditions, ways and means, so far as practicable and consistent with the public interest, of controlling the pollution of the rivers, waters and coastal flats of the state by the deposit therein or thereon of municipal sewage, industrial waste and other substances and materials insofar as the same are detrimental to the public health or to animal, fish or aquatic life, or to the practicable and beneficial use of said rivers, waters and coastal flats. The Commission shall make recommendations to each subsequent legislature with respect to the classification of the rivers, waters and coastal flats and sections thereof within the state, based upon reasonable standards of quality and use.

"The Commission shall make recommendations to each legislature with respect to abatement of pollution of the rivers, waters and coastal flats and sections thereof within the State for the purpose of raising the classifications thereof to the highest possible classification so far as economically feasible; such recommendations to relate to methods, costs and the setting of time limits for compliance.

"The Commission shall consult with and advise the authorities of municipalities, persons and businesses having, or about to have, systems of drainage or sewerage except purely storm water systems, as to the best methods of disposing of the drainage or sewage with reference to the existing and future needs of the municipality, other municipalities, persons or businesses which may be affected thereby. It may also consult with and advise with persons or corporations engaged or intending to engage in any manufacturing or other business whose drainage or sewage may tend to pollute any waters under the jurisdiction of the Commission, as to the best methods of preventing such pollution, and it may conduct experiments to determine the best methods of the purification or disposal of drainage or sewage. Municipalities and sewer districts shall submit to said Commission for its advice the plans and specifications for any proposed new system of drainage, sewage disposal or sewage treatment, except purely storm water systems and any alterations in existing facilities. The Commission shall establish standards for the operation of municipal treatment facilities."

Section 2.

"Standards of classification. 1953, c. 403, § 2. 1955, c. 425, § 5. The Commission shall have 4 standards for the classification of surface waters and tidal flats.

"Class A shall be the highest classification and shall be of such quality that it can be used for bathing and for public water supplies after disinfection, and the dissolved oxygen content of such waters shall not be less than 75% saturation and contain not more than 100 coliform bacteria per 100 milliliters.

"There shall be no discharge of sewage or other wastes into water of this classification and no deposits of such material on the banks of such waters in such a manner that transfer of the material into the waters is likely. Such waters may be used for log driving or other commercial purposes which will not lower its classification.

"Class B, the second highest classification, shall be divided into two designated groups as B-1 and B-2.

"B-1. Waters of this class shall be considered the higher quality of the Class B group and shall be acceptable for recreational purposes and after adequate treatment for use as a potable water supply. The dissolved oxygen of such waters shall be not less than 75% of saturation and contain no more than 300 coliform bacteria per 100 milliliters.

"There shall be no disposal of sewage or industrial wastes in such waters except those which have received adequate treatment to prevent lowering of the standards for this classification, nor shall such disposal of

sewage or waste be injurious to aquatic life or render such dangerous for human consumption.

"B-2. Waters of this class shall be acceptable for recreational boating, fishing, industrial and potable water supplies after adequate treatment. The dissolved oxygen of such waters shall not be less than 60% of saturation and contain no more than 1,000 coliform bacteria per 100 milliliters.

"There shall be no disposal of sewage or industrial waste in such waters to lower its classification nor shall such disposal of sewage or waste be injurious to aquatic life or dangerous for human consumption.

"Class C, the third highest classification, shall be of such a quality as to be satisfactory for recreational boating, fishing and other uses except potable water supplies and swimming, unless adequately treated to meet standards.

"Waters of this classification shall be free from scums, slicks, odors and objectionable floating solids, and shall be free from chemicals and other conditions inimical to aquatic life. The dissolved oxygen content of such waters shall not be less than 5 parts per million for trout and salmon waters and not less than 4 parts per million for non-trout and non-salmon waters.

"The Commission may take such action as may be appropriate for the best interests of the public when it finds that a "C" classification is temporarily lowered due to abnormal conditions of temperature and stream flow for that season involved.

"Class D waters, the lowest classification, shall be considered as primarily devoted to the transportation of sewage and industrial wastes without the creation of a nuisance condition and such waters shall contain dissolved oxygen at all times. During a period of temporary reduction in the dissolved oxygen content in this class water, due to abnormal conditions of temperature or stream flow for the particular season involved, the Commission, provided a nuisance condition has not then been created in such water and in the opinion of the Commission is not likely to be created during such season, shall take no action to reduce the amount of pollution from any source which is allowed in such class water under normal conditions."

Section 4.

"Enforcement. 1953, c. 403, § 2. *After adoption of any classification, by the legislature,* for surface waters or tidal flats, or sections thereof, it shall be unlawful for any person, corporation, municipality or other legal entity to dispose of any sewage, industrial or other waste, either alone or in conjunction with another or others, in such manner *as will lower the quality of the said waters, tidal flats, or section thereof, below the minimum requirements of such classification,* and notwithstanding any licenses which may have been granted or issued under sections 8, 9, and 10 hereof.

"The Commission shall enforce the provisions of this section by appropriate orders, and in the event such orders are not complied with within such time as the Commission shall stipulate, appropriate legal

action shall be instituted by the Commission to enforce compliance or to punish violators. . . ."

Section 6 sets forth a penalty for violation of sections 2, 3, 4 and 5 or of an order of the Commission.

Section 6.

"Penalties. 1953, c. 403, § 2. Any person, corporation or other legal entity who shall violate any of the provisions of the four preceding sections or who shall fail, neglect or refuse to obey any order of the Commission lawfully issued pursuant hereto, shall be punished by a fine of not less than $25, nor more than $200, for each day of such violation, failure, neglect or refusal after the expiration of any time limit set by the Commission."

Sections 8, 9 and 10 relate to licenses—those persons who must obtain a license, the manner of obtaining the license, and appeals from decision of the Commission relating to licenses. We herewith quote Section 8:

"Pollution restricted. 1945, c. 345, § 2. 1951, c. 383, § 2. 1953, c. 403, § 3. No person, firm, corporation or municipality or agency thereof shall hereafter discharge into any stream, river, pond, lake or other body of water, or watercourse, or any tidal waters any waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment or any sewage so as to constitute a new source of pollution to said waters without first obtaining a license therefor from the Water Improvement Commission; provided, however, that no application for a license shall be required hereunder for any manufacturing, processing or industrial plant or establishment, now or heretofore operated, for any such discharge at its present general location, such license being hereby granted."

Section 12 permits the Attorney General to institute injunction proceedings to enjoin violation of these statutes or orders of the Commission.

Section 15 contains the many Legislative classifications of waters of the state, which waters are to be administered by the Commission in accordance with the Standards set down in Section 2.

Only classified waters are within the jurisdiction of the Water Improvement Commission.

Examination of the above-quoted statutes reveal the following facts with respect to the Commission and its powers and duties:

The only waters within the jurisdiction of the Commission are those waters classified by the Legislature in Section 15, Chapter 48, standards for which, to guide the Commission, have been established in Section 2 of Chapter 49.

This conclusion is based upon the following reasons:

Section 2, establishing the standards of classification of waters is prefaced by these words:

"The Commission shall have 4 standards for the classification of surface waters and tidal flats."

Section 4, an enforcement section, provides that the Commission can enforce by appropriate orders, the disposal of wastes in those waters

which have been classified. And such enforcement runs only to waste that lowers the quality of such classified waters. See italics in quoted section.

The only other powers of the Commission which relate to the question at hand, appear in Section 1, and confer upon the Commission the duty in one case, and the power in another, to consult with, advise, and make recommendations to those disposing or intending to dispose of drainage or sewage which tend to pollute any waters under the jurisdiction of the Commission.

In summary the only "teeth" in the law available for enforcement purposes relate to those waters which the Legislature has classified.

The license issued by the Commission is issued subject to the conditions imposed by the Legislature.

As stated above, a licensee takes his license subject to such conditions as are imposed by the Legislature.

The primary conditions imposed by the Legislature upon licensees disposing of waste in Maine waters are seen in Section 2, Standards for Classification, and Section 15, the Classification Section.

Examples of other conditions can be seen in Section 4—no disposal of waste as to lower the quality of said (classified) waters; Section 6—the imposition of a penalty upon those who violate certain provisions of the Water Improvement Commission law or an order of the Commission.

The Legislature has not vested in the Commission the power to impose conditions upon licensees—the Legislature itself has imposed conditions, some of which we have mentioned above.

With respect to licenses to dispose of wastes in classified waters, the Legislature itself has classified the waters (Section 15), established the standard for classification of such waters (Section 2), and has vested in the Commission the power to determine those facts which, if conformed with, would permit the disposal of waste in such manner as not to lower the quality of classified waters.

The determination by the Commission of such facts as procedures of disposal, are ministerial acts performed in fulfillment of their duty to see that the classification of waters remain unchanged.

Thus, if a licensee were to be charged criminally, or enjoined, for violating the Act with respect to classification, such charge would not be for violating a condition imposed by the Commission but because it would be a violation of a Legislative condition, to wit: lowering the quality of water below the standard authorized by the Legislature.

So, if the Commission demands that a licensee do certain acts before he can dispose of waste material, those acts are required because, in the Commission's best judgment, such a procedure is demanded in order that the legislative standard not be violated. If the licensee fails to perform the required acts, punishment, if any, would be due, not for his failure to perform the act, but because such failure resulted in violation of a legislative standard.

Summary—The Commission may demand that certain procedures or methods of disposal be used before one can dispose of waste into classified waters.

Such requirements are not legislative conditions, but merely ministerial conclusions of fact, required of the Commission under the Water Improvement Com-

mission Act. It seems to us that such requirements may be demanded before or after a license issues. The effect is the same.

Disposal of wastes by Saco Tannery not within jurisdiction of Water Improvement Commission.

It is our understanding that these questions have been sent to this office in connection with the Saco Tannery matter.

It is also our understanding, through conversation with representatives of the Commission, that any wastes to be disposed of by the Saco Tannery will be discharged into that part of the Saco River which lies in tide-water, and which area is unclassified.

The above discussion reveals, we believe, that the Water Improvement Commission has no jurisdiction over unclassified waters.

While Section 8 appears in general terms to require all persons, with an exception not here pertinent, to possess a license in order to discharge waste into Maine waters, the Act considered in its entirety will not permit such interpretation. It would be a vain act to require the Saco Tannery to procure a license to discharge waste into waters which do not come within the enforcement powers of the Water Improvement Commission.

We are, therefore, of the opinion that the Water Improvement Commission is without authority to license the Saco Tannery to discharge waste into that portion of the Saco River which is in tide-water.

The answers above given make it unnecessary to answer Question No. 1.

JAMES GLYNN FROST
Deputy Attorney General

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