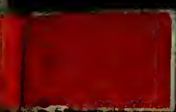

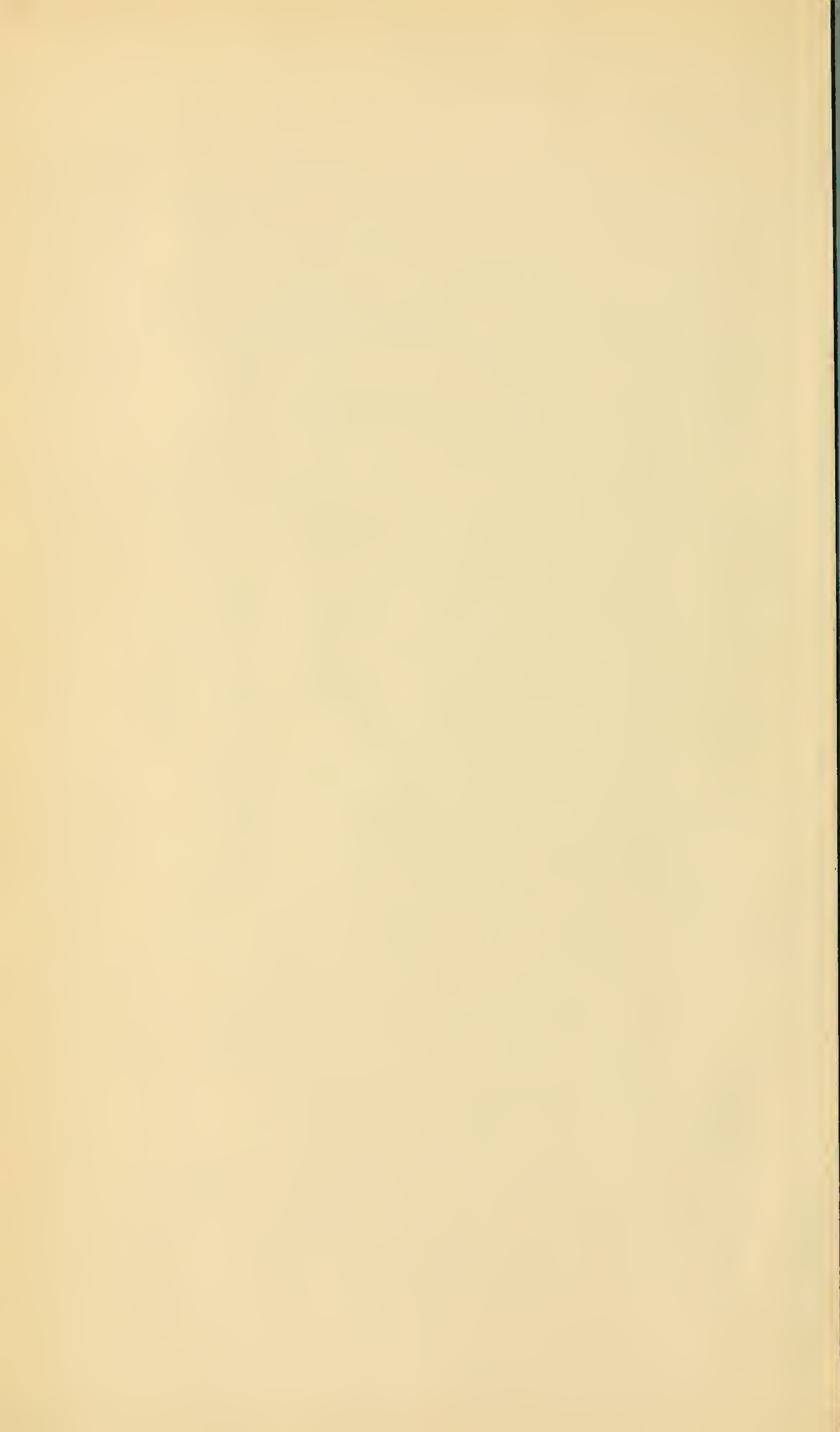

Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1953

Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1953

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

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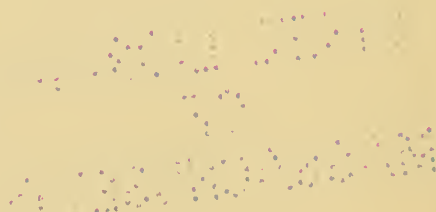

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The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 2, 1953.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending June 30, 1953.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

State House

Attorney General
GEORGE FINGOLD

Assistant Attorneys General

Sidney A. Aisner
Harris J. Booras
Malcolm M. Donahue
Casper T. Dorfman
Joseph H. Elcock, Jr.
Fred Winslow Fisher
Dorice S. Grace
Saul Gurvitz
Alfred E. LoPresti [1]
James F. Mahan
John V. Phelan [2]
Harris J. Reynolds
William J. Robinson
Arnold H. Salisbury [3]
Louis Scerra [4]
Barnet Smola
Norris M. Suprenant
Andrew T. Trodden

Assistant Attorneys General assigned to Department of Public Works
Vincent J. Celia [5]
James C. Gahan, Jr.
Floyd H. Gilbert
David L. Winer

Special Assistant Attorneys General assigned to Department of Public Works
Frank Ramacorti [6]
Max Rosenblatt [6]

Assistant Attorneys General assigned to Division of Employment Security
Stephen F. LoPiano, Jr.
Sydney Zuker

Assistant Attorneys General assigned to State Housing Board
Milton Abelson
Ray W. Guild [7]
Keesler H. Montgomery [5]
Hugh Morton [8]

Assistant Attorney General assigned to Veterans' Division
Fred L. True, Jr.

Assistant Attorney General Assigned to N. Y., N. H. & H. R.R. Investigation
Matthew S. Heaphy

Secretaries to the Attorney General
Norman E. Moore
Eleanor A. Burns

Chief Clerk to the Attorney General
Harold J. Welch

Administrative Legal Consultant to the Attorney General
James J. Kelleher [4]

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[1] Resigned, Feb. 13, 1953.
[2] Appointed, Feb. 16, 1953.
[3] Appointed, Feb. 1, 1953.
[4] On leave of absence.
[5] Appointed, Apr. 1, 1953.
[6] Appointed, Jan. 22, 1953.
[7] Resigned, March 31, 1953.
[8] Appointed, Apr. 6, 1953.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1952, to June 30, 1953.

Appropriations.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	268,313 00
Claims, Damages by State Owned Cars	35,000 00
Small Claims	15,000 00
Investigation of Old Colony Division of New York, New Haven and Hartford Railroad	15,000 00
Veterans' Legal Assistance	20,000 00
Total	$365,313 00

Expenditures.

Attorney General's Salary	$12,000 00
Administration, Personal Services and Expenses	249,896 41
Claims, Damages by State Owned Cars	35,000 00
Small Claims	15,000 00
Investigation of Old Colony Division of New York, New Haven and Hartford Railroad	13,529 23
Veterans' Legal Assistance	19,652 73
Total	$345,078 37

Financial statement verified (under requirements of c. 7, § 19, of the General Laws), December 1, 1953.

By JOSEPH A. PRENNEY,
For the Comptroller.

Approved for publishing.

RALPH E. HOUGHTON,
Acting Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 2, 1953.

To the Honorable Senate and House of Representatives.

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

The cases requiring the attention of this Department during the fiscal year ending June 30, 1953, totaling 16,855, are tabulated as follows:

Extradition and interstate rendition	105
Land Court petitions	115
Land damage cases arising from the taking of land:	
Department of Public Works	977
Metropolitan District Commission	127
Department of Education	2
Department of Mental Health	2
Armory Commission	1
Department of Conservation	1
New Bedford Textile Institute	1
Miscellaneous cases, including suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	5.593
Estates involving application of funds given to public charities	966
Settlement cases for support of persons in state hospitals	63
Pardons:	
Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127 § 152, as amended	143
Workmen's compensation cases, first reports	4,928
Cases in behalf of Division of Employment Security	652
Cases in behalf of Veterans' Division	3,179

The Department of the Attorney General is the legal counsel for a multi-billion dollar business — the Commonwealth of Massachusetts. As such, its duties are manifold and varied, and the already grave and heavy responsibilities of the office of Attorney General are ever increasing.

The duties of the Attorney General fall into the following general categories:

To render legal opinions to the Governor, the Executive Council, the Legislature and the various State departments, officers and commissions.

To represent the Commonwealth and the various State departments, officers and commissions in all judicial proceedings.

To consult with and advise, as chief law enforcement officer of the Commonwealth, all of the District Attorneys.

To examine and approve town by-laws.

To supervise the handling of charitable trusts.

To supervise the rendition or extradition of fugitives from justice.

To bring information to the proper courts when necessary in the public interest.

To make investigations into the conduct of various agencies of the Commonwealth.

To administer the law and vigorously prosecute all violators.

After I assumed office on January 21, 1953, I assembled a group of Assistant Attorneys General and law clerks on whose character, ability, experience and training I could rely, to assist me in the solution of the numerous and intricate legal problems which arise daily during the conduct of the State's business. The work of these Assistants has been divided into no less than 146 different categories — alphabetically, from *abatements* to the *Youth Service Board.* Many separate divisions have been formed within the Attorney General's office, although all are integrated as a whole.

Eminent Domain Division.

One of the most vital problems confronting me at the start of my administration was the highly publicized and controversial issue of disposition of land damage claims. My department was confronted with such an enormous backlog of dormant claims awaiting disposition by trial or otherwise that it was self-evident that an effective and immediate solution had to be found. The solution to this pressing problem was directed toward the following objectives:

(*a*) The restoration of the confidence of the judiciary, the public and the legal profession in the fair, efficient and equitable disposition of land damage claims.

(*b*) The acceleration of payment of damages to the landowner and the prompt termination of interest charges running against the Commonwealth.

To find such a solution and attain the foregoing results, I inaugurated a series of conferences with members of the judiciary and of the legal profession and the following organization and procedure was adopted:

1. The establishment of a separate "Land Damage Division" within the Department of the Attorney General and the staffing of this division with six Assistant Attorneys General whose activities are exclusively devoted to the disposition of land damage litigation.

2. The review of every current land damage claim and the preparation of complete and accurate records of all cases in this division.

3. The creation of a new standardized procedure for the investigation, processing, settlement or trial of these claims, including the filing of 56 carefully prepared interrogatories and conferences with employees and officials of the Department of Public Works and with real estate experts employed by said department.

4. The determination of a settlement figure by a panel of Assistant Attorneys General.

5. The holding of conferences with attorneys for the landowners in an effort to effect settlements.

6. The attendance by members of the division at numerous pre-trial conferences held by judges of the Superior Court in many counties of the Commonwealth, resulting in the disposition of many cases by settlement.

7. The recording in the public records of the Superior Court for each county of the dollar amount of the settlement reached in each case.

8. The recommendation to the Commissioner of the Department of Public Works that his department adopt the procedure authorized by G. L. (Ter. Ed.) c. 79, § 39, in order to accelerate payment of damages to the landowner and to reduce the amount of interest running against the Commonwealth. This section, which had not been previously utilized, provides that Department of Public Works may make a written offer to the landowner before trial, which offer the latter may accept in partial or full satisfaction of his claim or reject. The running of interest on the amount of the offer stops on the date of the offer regardless of the response of the landowner, but the landowner can take the amount offered in order to find a new home or business location and litigate the difference between the amount of the offer and the amount of his claim.

The effectiveness of my entire program is well demonstrated by the fact that the number of land damage cases disposed of during my first five months in office exceeds the total number of cases disposed of in the last two fiscal years of the previous administration. The cases disposed of through June 30, 1953, represent claims by the petitioners in excess of seven million dollars. The land damage division disposed of these cases by trial and settlement at a cost of $3,037,401.00. In addition to this difference of more than four million dollars, the disposition of these cases produced a saving of approximately $465,000 in interest charges.

Another substantial saving has been effected by the elimination of jury trials and expenses by the settlement of cases at the office or judicial pre-trial conferences, and this figure is in excess of one million dollars.

The new approach to the problem of land damage litigation has broken the deadlock on all civil litigation in the Superior Courts of the Commonwealth. By statute, land damage cases may be advanced for speedy trial and thereby take priority over other civil matters. With the large number of unfinished land damage claims clogging the court dockets, many litigants involved in other civil controversies were being unduly delayed in obtaining a judicial determination of their legal rights and obligations. Such a situation gave rise to much criticism of our judicial system. The accelerated program of the Land Damage Division in my office has served to break the deadlock and thus reduce the time lag for all civil litigation.

The foregoing statistics, the expression of confidence on the part of the public and the members of the legal profession, the advice and co-operation of the judiciary, the acceleration of payments to the landowners and the reduction of interest charges against the Commonwealth are the most striking evidence of the progress made in solving the problem of land damage litigation.

Defective Delinquents.

An important function of the Attorney General's Department concerns the continued detention, the release, or the return to confinement of defective delinquents in State institutions. Recently, and in growing numbers, such inmates have been obtaining their freedom on writs of habeas corpus on the ground that they had originally been illegally committed. Some of these petitioners were committed as many as thirty or more years ago, and it has been impossible in many instances to ascertain the true circumstances of their original commitments. Possible witnesses had died. Relatives were non-existent in some cases. And in others, court officials, because of the press of their duties, could not remember the details of any individual case.

As a result, many persons were being released by the courts, upon procedural grounds, whose ability to roam at large constituted such a menace to the people of the Commonwealth — and to their children — that I became greatly disturbed. A change in the law regarding defective delinquents was imperative and, accordingly, after thorough research by my Assistants, I filed three bills with the General Court to remedy this intolerable situation.

The first of these was an emergency law entitled, "An Act relative to the recommitment to a defective delinquent department of certain persons so committed," the first section of which provides that any person held as a defective delinquent whose original commitment shall be found to have been procedurally improper, may be recommitted, at the discretion of the court, for thirty-five days' observation at the State Farm. The second section of this measure provides that the Attorney General or any District Attorney may file an application in the Superior Court for the commitment to a department for defective delinquents of any person heretofore released because of a judicial determination that his original commitment was procedurally improper. This measure was enacted by the Legislature just prior to its prorogation.

The second proposed measure was for a resolve authorizing and directing the Department of Correction to investigate and study the commitment of all persons held as defective delinquents to determine if they were committed illegally and, if so, do they show a tendency to become dangerous to the welfare of the Commonwealth.

The third proposed measure was for a resolve establishing a special commission to investigate and study the laws relating to the commitment, detention, care and discharge of insane and feeble-minded persons, defective delinquents, and other persons who may be confined in institutions for the treatment of mental disorders.

These three measures represented the combined thinking of the Attorney General, his Assistants, the Commissioner of Corrections, the chairman of the Youth Service Board, penal institution chaplains of all faiths, heads of institutions and District Attorneys.

When I took office, there were 379 male and 94 female defective delinquents committed to the State Farm at Bridgewater and other institu-

tions throughout the Commonwealth. Of them, 27 males and one female obtained their releases before the new law went into effect. No petitions for habeas corpus brought by inmates of defective delinquent departments were heard by the courts under its provisions before the end of the past fiscal year, but its value to the people of the Commonwealth has since become apparent.

Criminal Division.

Shortly after I took office, it was found necessary to establish a criminal division within the department because of the complaints and many requests for assistance received from interested citizens all over the Commonwealth. I promptly did so, notwithstanding the fact that I have confidence in the overwhelming majority of our local law enforcement officers, so that this department would be prepared to move and move rapidly in case there might appear to be any disposition on the part of any officials not to enforce the laws.

After consultation with the Assistants assigned by me to this division, I sponsored a bill in the Legislature to outlaw the game known as "skilo", which actually is another form of beano. I recommended that the law be made effective immediately because during the ninety days before it would otherwise become operative under normal procedure, millions of dollars could have passed into the hands of the operators of skilo, who naturally would have stepped up the tempo of their operations. The General Court adopted my suggestion, and the Governor approved the measure as an emergency enactment.

Another matter which concerned this division early in my administration arose out of a petition for habeas corpus which had been filed in the United States District Court by a prisoner in the State Prison, who alleged that the circumstances of his trial, some four years ago, were such that he had been convicted and imprisoned without due process of law. Prior to the filing of his petition in the Federal Court, he had filed a petition for a writ of error in the Supreme Judicial Court, seeking a reversal of his conviction upon the same grounds. A single justice of that court had denied this petition, and another single justice had denied the indigent prisoner's motion that he be allowed to bring the matter before the full court upon the original papers on file, rather than to be required to pay the cost of printing the appellate record. The prisoner had thereupon filed his petition in the Federal court, a hearing was had there, and the Federal judge had ordered his release. These events had all taken place prior to my assuming office as Attorney General, and what confronted the criminal division in January, 1953, was an appeal which had been taken from the Federal judge's decision.

I felt the matter to be of prime importance, for never before had an inferior Federal court ordered the release of a prisoner who had been committed by the criminal law processes of the Commonwealth, and it was my strong conviction that, if any injustice had been done to the petitioner, the full court of the Supreme Judicial Court of the Commonwealth should be the tribunal so to rule. Accordingly, I directed the criminal division

to prosecute the appeal before the United States Court of Appeals with all possible vigor.

As a result, that court, agreeing with my contention, held the matter in abeyance upon its docket, pending a further attempt by the prisoner to obtain a definitive ruling from the full court of the Supreme Judicial Court. See *O'Brien* v. *Lindsey*, 204 F. 2d 359. As suggested by me, that court itself then established a precedent by granting the motion previously denied by the single justice, and the matter is presently under consideration by the full court.

Crime Commission.

The Department of the Attorney General sponsored a bill for the establishment of a Crime Commission, to consist of five members appointed by the Governor, to investigate the relationship between organized crime and any unit of government anywhere in the Commonwealth. The commission, under my bill, was to examine the relationship between the government of the Commonwealth and local criminal law enforcement, and I advocated an appropriation of $100,000 to enable the commission to carry out its work in the most thorough manner possible.

A Crime Commission was established by the General Court to consist of seven members, three members from the House of Representatives, two from the Senate, and two appointed by the Governor. The amount appropriated for their study was $10,000.

Worcester Disaster.

Immediately following the disastrous tornado which struck the Worcester area on June 9, 1953, a special branch of this department was opened in the Worcester County Courthouse Annex, and four Assistant Attorneys General were sent there to assist in the solution of the various problems of the disaster victims.

The need for such an office became apparent after hundreds of persons telephoned or wrote this office asking for advice and assistance of various kinds, and help in establishing it was swiftly given by the Worcester County Commissioners. The office was kept open seven days a week, and all advice and help given was free. It was still operating at the close of the fiscal year.

Veterans' Services.

As required by law, a veterans' division has been established in this office to aid veterans with their problems, and more than three thousand have benefited by its work. In addition, the veterans' division has given advice and assistance to various veterans' organizations as well as to State, county, city and town officials concerned with such problems.

I served as a member of the three-member commission which directed the distribution of the bonus payments to 162,000 Massachusetts veterans of the recent action in Korea.

An appointee of the Attorney General sits with the Veterans' Bonus Appeals Board.

Charitable Trusts.

Under G. L. (Ter. Ed.) c. 13, § 8, the Attorney General is given the duty and responsibility of enforcing the due application of funds given or appropriated to public charities and of preventing breaches of trust in the administration thereof. Approximately one thousand matters were handled during the last ten months. These involved the examination and approval of accounts by executors and trustees and appearances upon petitions for allowance of wills, for instructions, for the application of the *cy pres* doctrine, for the removal of trustees, and for the rendering of accounts.

A preliminary research and survey of charitable trusts and of various pending cases was also commenced during the period, and it was revealed that thousands of matters involving charitable trusts require further careful investigation and enforcement. The establishment of a division of charitable trusts in the office of the Attorney General will be recommended by this department to the General Court.

Metropolitan District Commission.

In March I was asked by His Excellency the Governor to make an investigation of certain charges of payroll padding in the Metropolitan District Commission during the years 1949–1952, inclusive. I reported that my investigation fully supported the charges, and I closed my report with the following statement:

"I have tried to give you a factual report with reference to the charges of payroll padding at the Metropolitan District Commission. I believe these facts do not require me to draw any conclusions since, in my opinion, they speak for themselves. I therefore conclude this report not with any recommendations for further legislation — we need no further legislation — but rather with the simple observation that all we need is a permanent return and adherence to the basic principles of morality, decency and integrity in public life."

Department of Public Utilities.

The New England Telephone & Telegraph Company filed on December 10, 1952, new schedules of rates and charges for telephone service in Massachusetts to become effective January 10, 1953. The company asked for an increase amounting to $10,225,000. Hearings were held beginning February 17, 1953, and were still being continued on June 30, 1953, the end of the fiscal year. The Attorney General's office contended that the increase in rates and charges should not be more than $4,519,540.

The trial of the case was conducted by this office without any outside legal aid and without the expenditure of any funds for such legal services from the $75,000 appropriated by the General Court for the purpose of conducting the case.

The Attorney General's office was instrumental in having enacted a bill which changed the procedure of appealing from the decisions, orders or rulings of the Department of Public Utilities to the Supreme Judicial

Court. Prior to this act, chapter 575 of the Acts of 1953, which amended G. L. (Ter. Ed.) c. 25, § 5, an appeal on a constitutional matter could be tried *de novo*, and the case referred to a master for findings of facts on evidence already introduced before the Department of Public Utilities, and in addition evidence which was not presented to that department. This procedure entailed the expenditure of many thousands of dollars, clogged the docket of the Supreme Judicial Court, and caused delays sometimes as long as two years in the final determination of the issues. Also, said section, prior to the amendment, was indefinite and vague as to the manner of the appeal and put no limit on the time therefor. As amended, the statute now provides that the petition for appeal must be filed with the secretary of the commission within twenty days after the date of the decision, and that within ten days after such filing, the appealing party must enter said appeal in the Supreme Judicial Court. No evidence beyond that contained in the record may be introduced before the court, except that when a constitutional matter is involved the court may order any additional evidence it deems necessary to be taken before the commission, which will conduct hearings and report its findings to the court.

Fire Protection for Sick and Aged confined in Homes and Institutions.

Late in March, 1953, a disastrous fire in Florida took the lives of thirty-three persons confined to a nursing home in that State. The possibility that such a catastrophe might happen in this Commonwealth was one that at once came to mind. Accordingly, I immediately called a conference with responsible State officials to discuss the situation. A few days later a meeting was held in my office attended by some fifty-five fire chiefs from all over the State, and shortly thereafter the matter was further reviewed with those principally charged with the responsibility for safeguarding the sick and aged confined to hospitals, homes and other institutions from the dangers of fire. All of these officials, as well as representatives of the Massachusetts Federation of Nursing Homes, accorded this office their fullest co-operation. In addition, a state-wide survey of conditions in such institutions was made by means of a questionnaire circulated to the chiefs of the fire departments of each city or town.

As a result, and as a first step towards reaching a solution to this problem, I caused to be filed a bill and a resolve for a study. These were heard by the Committee on Public Safety on May seventh, and a special commission was created to carry forward the study. In its investigation, the commission requested the assistance of this office, and I have endeavored to co-operate with them in every respect to the end that our sick and aged, confined to institutions of various sorts, may have the utmost in protection against the terrible dangers inherent in fire in such places.

John Bowen Co., Inc.

As a result of a decision of the Supreme Judicial Court on April 8, 1952, suit has been commenced against John Bowen Co., Inc., to recover for the

Commonwealth a total of $789,712.20 paid to this company under the contract which the Supreme Judicial Court held to be illegal because not awarded in accordance with the bid statute, G. L. (Ter. Ed.) c. 149, §§ 44A–44D, inclusive.

John Bowen Co., Inc., has filed a cross suit seeking to recover a balance of $633,247.23 alleged to be due over and above the $789,712.20 referred to above for the fair value of work.

State Housing Board.

The functions of the Attorney General's office with this board, to which three Assistant Attorneys General were assigned, fall into the following general categories:

1. Rendering written opinions on general legal problems confronting the board.
2. Review for approval of title abstracts and other problems involving purchase or sale of land.
3. Administration of Organization Transcripts of approximately 88 active local authorities.
4. Review for approval of original and refunding note and bond issue.
5. Attendance at hearings involving contract disputes, making findings and writing decisions.
6. Litigation and trial work.

Reviews of approval of note and bond issues were made amounting to $50,993,000. The only bond issues approved this year were those which bore the previous year's date and could not be approved earlier because of defects in the organization of the local authorities which this office corrected. No projects were permanently financed during the first half of 1953 because of the high interest rates prevailing on long-term obligations.

Division of Employment Security.

Two Assistant Attorneys General were assigned to assist this important agency, and they have successfully handled cases against employers who were found to have failed to pay their just tax. In these cases a total of $45,912.42 was collected up to the close of the fiscal year.

In addition, the two Assistants have appeared before the Supreme Judicial Court and the United States Court of Appeals to represent this division.

Insurance and Motor Vehicles Appeal Boards.

An Assistant Attorney General was assigned to attend the hearings of the Insurance Appeal Board and the Motor Vehicles Appeal Board and from January 21 through June 30, 1953, he attended a total of 1,733 such hearings. Normally, however, the number of such hearings increases to a great degree in the final six months of the year.

In the past, Assistant Attorneys General have been assigned to this work for only a few days of each week. This year the load became so heavy that an Assistant was assigned full-time to the job, which also entails considerable traveling throughout the State.

Public Administration.

There are 61 public administrators in the Commonwealth, whose doings and accounts were supervised and passed upon by this department. In addition, accounts of prior public administrators, who had failed to close estates in their hands, were examined. About one thousand matters involving accounts and various petitions have been handled by this department. Numerous consultations, conferences and court appearances were involved.

Town By-Laws.

By virtue of the provisions of G. L. (Ter. Ed.) c. 40, § 32, before a town by-law takes effect it must be approved by the Attorney General. The purpose of this provision is to provide a friendly oversight of local legislation to the end that the inhabitants affected may have some assurance of the validity and propriety of local enactments without waiting for litigation to produce an adjudication. Realizing the uncertainty and embarrassment entailed by any delay in this department in acting upon by-laws sent here for approval, it has been my policy to see that each by-law sent in is studied, acted upon and returned with all possible speed.

Contributory Retirement Appeal Board.

General Laws (Ter. Ed.) c. 32, § 16, provides for an unpaid Contributory Retirement Appeal Board consisting of three members, one of whom is designated by the Attorney General. This board hears appeals from decisions of the various city, town, county and State retirement boards, and its work seems to be increasing steadily. Many public employees, claiming to have been totally and permanently incapacitated by reason of accidents happening in the course of their employment, claim appeals from the decisions of the local boards denying them relief. Much time is consumed in a painstaking hearing and study of each of these appeals.

Conclusion.

In conclusion, I wish to express my appreciation to His Excellency the Governor of the Commonwealth, to the Legislature and to all the other constitutional officers of the State government for their helpful co-operation during the first quarter of my administration.

I also wish to express my appreciation to the District Attorneys and State and local police for their co-operation in continuing the fight against crime and corruption.

I further would like to commend my Assistants who have served faithfully and well and in many instances above and beyond the call of duty.

I am grateful for the support and aid rendered me by the civil service employees and others in the Department of the Attorney General, including the chief clerk and my chief and confidential secretaries.

I am highly conscious of the honor and privilege accorded me in serving the Commonwealth of Massachusetts in the high office of Attorney General, and I submit this annual report with a deep sense of humility and gratitude.

GEORGE FINGOLD,
Attorney General.

OPINIONS.

Property Exempt from Taxation — Meaning of "Household Furniture and Effects."

AUG. 1, 1952.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

The Attorney General respectfully submits the following answers to the questions set forth in an order adopted by the House of Representatives on July 3, 1952. The questions are as follows:

"1. Under the terms of St. 1951, c. 640, what classes of personal property are included in the increase in the amount of exemption provided for in said act?

"2. Under the terms of said act, what exceptions to such classes, if any, are provided in said act?

"3. What classes of household luxuries and necessities, and what classes of other types of personal property, such as trade or occupational goods or tools, or items of luxury or necessity other than household goods, are included in or excluded or excepted from the provisions of said act?

"4. Do television sets come within the exceptions to the provisions of said act?"

Statute 1951, c. 640, provides as follows:

"SECTION 1. Section 5 of chapter 59 of the General Laws is hereby amended by striking out clause Twentieth, as most recently amended by chapter 310 of the acts of 1947, and inserting in place thereof the following: —

"Twentieth, The wearing apparel, farming utensils and cash on hand of every person and the tools of his trade if a mechanic, to any amount; and to an amount not exceeding a total value of five thousand dollars in respect to all the articles hereinafter specified in this clause, his household furniture and effects, including jewelry, plate, works of art, musical instruments, radios and garage or stable accessories, in storage in a public warehouse kept and maintained under chapter one hundred and five or used or commonly kept in or about the dwelling of which he is the owner of record or for the use of which he is obligated to pay rent, and which is the place of his domicile, and boats, fishing gear and nets owned and actually used by him in the prosecution of his business if engaged exclusively in commercial fishing; provided, that in the case of household furniture and effects the combined exemption of husband and wife shall not exceed five thousand dollars; provided, that failure to comply with the provisions of sections twenty-nine and sixty-one relative to the filing of a list of his personal estate with the assessors shall not be a bar to an abatement of the tax, if any, imposed upon such personal estate."

Let us examine the pertinent legislative history of this statute.

Prior to 1931 the exemption covered "the wearing apparel and farming utensils of every person; his household furniture not exceeding one thousand dollars in valuation; and the necessary tools, not exceeding three hundred dollars in value, of a mechanic."

Statute 1931, c. 75, changed the exemption to read:

"The wearing apparel, farming utensils and cash on hand of every person and the tools of his trade if a mechanic, to any amount; and to an amount not exceeding a total value of one thousand dollars in respect to all the articles hereinafter specified in this clause, his household furniture and effects, including jewelry, plate, works of art, musical instruments, radios and garage or stable accessories, used or commonly kept in or about the dwelling which is the place of his domicile, and boats, fishing gear and nets owned and actually used by him in the prosecution of his business if engaged exclusively in commercial fishing."

General Laws (Ter. Ed.) c. 59, § 5, employs the same language appearing in St. 1931, c. 75.

Statute 1937, c. 132, amended said Clause Twentieth by inserting after the words "stable accessories" the following words: "used or commonly kept in or about the dwelling of which he is the owner of record or for the use of which he is obligated to pay rent."

Statute 1941, c. 482, added after the words "stable accessories" the following words: "in storage in a public warehouse kept and maintained under chapter 105, or."

Statute 1947, c. 310, amended said Clause Twentieth by adding at the end thereof the following words: "provided that in the case of household furniture and effects the combined exemption of husband and wife shall not exceed one thousand dollars."

Statute 1951, c. 640 (about which you inquire), amends said Clause Twentieth by increasing the exemption from one thousand dollars to five thousand dollars; and providing that failure to file a list of one's personal estate in compliance with sections 29 and 61 (of chapter 59) shall not be a bar to an abatement.

It results from an examination of the above statutory provisions that the words which are to be construed and which are pertinent to your questions have remained the same ever since their appearance in St. 1931, c. 75.

Said words are "the wearing apparel, farming utensils and cash on hand of every person and the tools of his trade if a mechanic"; "his household furniture and effects, including jewelry, plate, works of art, musical instruments, radios and garage or stable accessories"; and "boats, fishing gear and nets owned and actually used by him in the prosecution of his business if engaged exclusively in commercial fishing."

In *Day* v. *Lawrence*, 167 Mass. 371, the court discussed the statutory exemption existing in 1896. The statute then provided "The following property . . . shall be exempted from taxation . . . . The wearing apparel and farming utensils of every person; his household furniture, not exceeding one thousand dollars in value; and the necessary tools, not exceeding three hundred dollars in value, of a mechanic."

On page 373 the court said:

"The words 'household furniture' have been long in use in our tax acts, in statutes concerning attachments and executions, in testamentary writ-

ings, and in common speech. The only room for construction in arriving at the meaning of the statute is in ascertaining the sense to be given to these words. That as there used they do not mean necessary furniture only, is shown by the provisions of the Public Statutes relating to the collection of taxes by distress, or seizure and sale of goods, and to property exempt from execution . . . In common speech, the words include all the furniture, furnishings, and utensils of the dwelling, and in the construction of a will they have been held to include bronzes, statuary, and pictures used to adorn a home, if in accord with the means and style of living of the householder."

In *Richardson* v. *Hall*, 124 Mass. 228, at page 238, the court cited with approval an old English case which held that household furniture comprised everything that contributed to the use or convenience of the householder or to the ornament of the house.

In *Trull* v. *Lowell*, 245 Mass. 45, at page 46, the court quotes with approval the language in an early case as follows:

"It is not to be supposed, that it was designed to comprehend within the terms *tools* (which are properly small articles used by the hand) complicated machinery or expensive utensils, which may, of themselves, be of great value."

Since 1931 the exemption as to household furniture and effects is more comprehensive in its application than the exemption calling for only household furniture.

In *Winburn's Will*, 247 N. Y. Supp. 584, the court said: "Household effects are universally understood to mean all the furnishings of one's residence."

The case of *In re Mitchell's Estate*, 38 N. Y. Supp. (2d) 673, interpreting the words "household effects," held that the test was whether the articles are or are not used in or by the household or for the benefit or comfort of the family; that it is the use to which a thing is put that is the determining factor.

To the same effect are the cases of *Commonwealth* v. *Glover*, 132 Ky. 588, 116 S. W. 769, and *Foxall* v. *McKenney*, 9 Fed. Cas. 645.

In view of the above I answer your questions as follows:

1. The classes of personal property included in the five thousand dollar exemption are:

(*a*) Household furniture and effects including, but not limited to, jewelry, plate, works of art, musical instruments, radios and garage or stable accessories (greater detail will be found in answer to your third question); and

(*b*) Boats, fishing gear and nets used by one exclusively engaged in commercial fishing.

"Household furniture and effects" includes any personal property which can reasonably be said to be part of a household, whether said household is of low or high estate, whether impoverished or affluent.

2. There are no specific exceptions declared in the act. Those classes of personal property which do not fall within (*a*) and (*b*) referred to in my answer to your first question are not exempted.

3. The classes of personal property which are totally exempt are (*a*) wearing apparel, (*b*) farming utensils, (*c*) cash on hand and (*d*) tools of trade of a mechanic.

Any personal property, whether luxuries or necessities, will fall within the exemption of "household furniture and effects" if it can reasonably be said to be part of a household. If the occupational goods or tools referred to in your third question are distinctly tools of trade of the taxpayer as a mechanic, then they are totally exempt, but if the taxpayer is not a mechanic by trade but possesses as part of his household certain tools (elaborate or otherwise) and employed by him for experiment, personal pleasure or household use, said tools are "household . . . effects," and fall within the five thousand dollar exemption.

4. Television sets are clearly "household . . . effects."

Respectfully yours,

Francis E. Kelly, *Attorney General.*

Massachusetts Public Building Commission — Definition of "Project" — Furnishings, Equipment, etc.

Aug. 21, 1952.

Mr. Joseph P. Gentile, *Second Assistant Commissioner, Department of Mental Health.*

Dear Sir: — You request an interpretation of chapter 92A of the General Laws as inserted by St. 1947, c. 466, and seek a formal opinion on the following questions:

(1) Does the term "project" as defined by G. L. c. 92A, § 1, as most recently amended, include furnishings, equipment and other items of personal property of a moveable nature, which furnishings, equipment, etc., are to be purchased and placed within a newly constructed or altered building or appurtenant structure?

(2) Does the term "project" as defined in question (1) include furnishings, equipment and other items of personal property of a moveable nature which are to be affixed to newly constructed or altered buildings or appurtenant structures?

(3) Is a department, office, board or commission of the Commonwealth, which proposes to furnish or equip a newly constructed or altered building or appurtenant structure, obliged to obtain the approval of the Massachusetts Public Building Commission for the following:

(*a*) Any list of furnishings, equipment or other items of a moveable nature to be placed and used in new buildings or appurtenant structures before requisitions for the same can be submitted to the Purchasing Bureau?

(*b*) Any list of such equipment or furnishings which are to be affixed to as well as placed in such structures?

(*c*) Any bids received by the Purchasing Bureau and relating to 3 (*a*) or (*b*) prior to placing an order for such equipment or furnishings?

(*d*) Processing for payment of invoices covering equipment or furnishings procured in connection with 3 (*a*) or (*b*)?

In its general tenor the Massachusetts Public Building Commission was created in 1947 pursuant to the recommendation to the General Court by the then Governor. He noted that the Emergency Public Works Commission created in 1933 by chapter 365 did not adequately undertake or continue the replacements of new buildings and capital needs for the previous several years, with the result that in excess of 75 million dollars of institutional building had accumulated, and the need for standards of

procedure in long-range planning was essential in meeting the problem. Based upon that recommendation the Massachusetts Public Building Commission was formed by chapter 466.

In view of the recommendation of the Governor and a careful reading of the provisions of chapter 466 in connection with the history leading to the passage of this act, the conclusion is inescapable that the Massachusetts Public Building Commission was charged with the responsibility of preparing and maintaining a long-range program of projects intended to solve the long accumulated needs for capital constructions. In fact, section 1 of chapter 92A specifically refers to the "construction of buildings and appurtenant structures, facilities and utilities," including the alteration and addition to such buildings, etc.

Further on in said section, the commission is required to submit on or before September fifteen of each year a list of all such projects and its recommended long-range program of construction thereof and, for the purpose of enabling an estimated cost to be prepared, to cause preliminary plans and descriptive specifications to be prepared by architects, engineers, contractors and consultants as may be necessary.

In the common understanding of these terms as used and the basic duties of this Commission, it is perfectly clear that the Commission was not to interest itself in such things as furnishings, equipment, machinery, etc., to be purchased and placed within the newly constructed or altered buildings whether the same be fixed or moveable. In view of that, therefore, the Commission is not required to give its approval to the personal property as set forth in your questions or to the processing of payment for such items.

Referring specifically to St. 1951, c. 756, which was "An Act to provide for a special capital outlay program for the Commonwealth," it is set forth in section 1 thereof that said act was to "provide for a special program of construction, reconstruction, alteration and improvement of various state institutions and properties, and for the purchase of certain property . . ."; and in section 3 thereof it is provided that "no payment shall be made or obligation incurred in carrying out any of the aforesaid projects until plans, specifications and contracts therefor, and alterations thereto subsequently proposed, have been approved by the Massachusetts public building commission . . ." The provisions of sections 1 and 3 of said chapter 756 are consistent with the basic responsibilities of the Commission as set forth in chapter 92A in the sense that section 1 provides specifically for the program of construction, reconstruction, alterations and improvement of various State institutions and properties and for the purchase of certain property which in a general way covers not only the capital structures but the moveable or immoveable property of a personal nature required to outfit said properties and consistent with the stated responsibilities of the Commission. Specific reference is made in section 3 of the requirement of approval by the Massachusetts Public Building Commission to the plans, specifications and contracts for the completion of the buildings covered by such plans and specifications without mention of the property for which appropriation was made in section 2 and specifically provided for in section 1.

I answer all your inquiries contained in questions numbered 1, 2, 3 (a), (b), (c) and (d) in the negative.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Veterans' Benefits — Settlement of a Veteran — Prospective Effect of Statute.

AUG. 22, 1952.

Mr. RICHARD F. TOBIN, *Commissioner of Veterans' Services.*

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

You state that one Roberts, a veteran of World War II, was settled in Brockton on January 7, 1946, at which time he went to Taunton to live; that his minor daughter was admitted to the Belchertown State School November 28, 1947, where she is still confined; that Roberts was steadily employed and not in need of assistance until May, 1948; that thereafter, in 1948, 1949 and 1950, he received veterans' benefits; that Brockton alleges Roberts acquired a settlement in Taunton five years after January 7, 1946, on the ground that St. 1950, c. 493, amending G. L. (Ter. Ed.) c. 116, § 4 (effective August, 1950), applied retroactively so that public aid received by Roberts would not prevent him from acquiring a settlement in Taunton; that you have determined said chapter 493 has no retrospective effect; and that under the law existing in November, 1947, when Roberts received aid he was not "eligible" to receive benefits under G. L. (Ter. Ed.) c. 115, and he was therefore still settled in Brockton at the end of January, 1951.

You wish to know whether your opinion is correct.

Prior to August, 1950, G. L. (Ter. Ed.) c. 116, § 4, read: "If a veteran or a dependent of a veteran eligible to receive veterans' benefits under chapter one hundred and fifteen receives benefits or treatment in any hospital or other institution, such benefits or treatment shall not have the effect of preventing or defeating the acquisition of a legal settlement."

It is manifest that if St. 1950, c. 493, has no retroactive effect Roberts' process of acquiring a settlement in Taunton would be interrupted because the aid received by his child in the State school would be aid to him and during the receipt of said aid he was not "eligible" to receive benefits under chapter 115 since he was then steadily employed. G. L. (Ter. Ed.) c. 116, § 2. *Treasurer and Receiver General* v. *Natick*, 320 Mass. 715.

Said St. 1950, c. 493, amends G. L. (Ter. Ed.) c. 116, § 4, to read as follows: "If a veteran or a dependent of a veteran whose service qualified him to receive veterans' benefits under chapter one hundred and fifteen receives benefits or treatment in any hospital or other institution, such benefits or treatment shall not have the effect of preventing or defeating the acquisition of a legal settlement."

Under that statute the veteran would not have to be in need in order to counteract the effect of section 2 of chapter 116 relating to public aid. It was only necessary for his service to qualify him.

On the question of whether statutes relating to settlements are prospective or retrospective the cases are quite definite. In *Lexington* v. *Commonwealth*, 279 Mass. 571, at 574, the court said: "In the recent decision of *Brockton* v. *Conway*, 278 Mass. 219, 223 we said: 'Statutes relating to the settlement and support of paupers are prospective and not retroactive in operation unless a contrary intent is made plain by unequivocal words or necessary implication.'"

The statute in the *Lexington* case as quoted by the court on page 573 provided: "The settlement existing on August twelfth, nineteen hundred and sixteen, or any settlement subsequently acquired, of a person whose service . . . qualifies him to receive aid or relief under the provisions of chapter one hundred and fifteen . . . shall not be defeated, except by failure to reside in the commonwealth for five consecutive years or by the acquisition of a new settlement." The court then said these words do not apply to settlements which had come to an end before the statute took effect and was therefore not retroactive.

In *Pepperell* v. *Somerville*, 321 Mass. 413, in the note at the bottom of pages 414 and 415, the court said this statute was not retrospective in effect.

It is to be noted, however, that the statute reads "a person whose service . . . *qualifies* him to receive aid . . ." (emphasis supplied). The use of the tense "qualifies" negates the past and looks *in futuro*.

Statute 1950, c. 493, might, however, be distinguished. The words are "a veteran . . . whose service *qualified* him to receive veterans' benefits" (emphasis supplied). The tense of the verb "qualified" looks to the past. Furthermore, there is no question here (as in the *Lexington* case) of the revival of a settlement which had already come to an end. The question here is whether the 1950 statute could apply to the process of acquiring a settlement although the process began several years before.

I think a strong argument could be offered for either position taken by the cities involved. Since, however, it is my duty to approve your decision unless it is manifestly in error, I answer your question in the affirmative.

Very truly yours,

Francis E. Kelly, *Attorney General.*

Public Records — Pensions of Former Members of the Legislature.

Sept. 2, 1952.

Hon. Foster Furcolo, *Treasurer and Receiver General.*

Dear Sir: — You have requested my opinion as to whether or not the names and amounts of pensions of former members of the Legislature are a matter of public record.

I answer your inquiry as follows:

It is provided by G. L. (Ter. Ed.) c. 4, § 7, cl. Twenty-sixth, as follows:

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

In your request for my opinion you call my attention to the procedures involved in making monthly pension payments under the retirement laws of the Commonwealth. These procedures are —

1. The State Retirement Board makes out a monthly retirement warrant which bears the name of the pensioners and the respective amount to be paid to each.
2. This warrant is then sent by the State Retirement Board to the Treasurer of the Commonwealth.
3. The Treasurer approves and signs the warrant.
4. The Treasurer then forwards the warrant to the Comptroller's office.
5. The Comptroller then, after his approval, forwards the warrant to the Governor and Council for approval.
6. Following approval by the Governor and Council the warrant is then forwarded to the Treasurer of the Commonwealth, who then causes checks to be mailed to the pensioners for their respective monthly retirement payment.

It is my opinion that when the Treasurer of the Commonwealth makes payment to pensioners under the retirement laws, after the procedures outlined above have been carried out, the pensioners on the warrant and the amount appearing thereon paid to each pensioner constitute public records to which the public have a right of reasonable access.

Therefore, it is clearly within your official province, upon request by a taxpayer or newspaper, to make this information public.

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

Weather Amendment Board — Bond of Licensee — Personal Liability of Public Officer.

Nov. 10, 1952.

Mr. HENRY T. BRODERICK, *Chairman, Massachusetts Weather Amendment Board.*

DEAR SIR: — I have before me your request that I advise you (1) with respect to your "individual and official liabilities in the event authority is granted and losses result by reason of the granting" of a license "to stimulate rainfall"; (2) "whether the imposing of a condition requiring the licensee to provide adequate bond against losses resulting from stimulated rainfall would be a reasonable condition to impose upon the granting of a certificate."

By the provisions of St. 1951, c. 511, —

". . . It shall be the function and duty of the board to authorize and control the alteration or attempted alteration of natural weather phenomena by human or artificial means as hereinafter provided, and such alteration or attempted alteration is hereby declared to be a public function. No person shall use chemical, mechanical or other artificial measures designed to increase or decrease rainfall or snowfall in the commonwealth or over any part thereof without first obtaining from the board a certificate of authority for the purpose. Such a certificate of authority shall be granted only after a public hearing by the board, notice of which shall have been given by newspaper publication not less than forty-eight hours

in advance and on at least two different days in the area in or over which such artificial measures are planned to be used. Such certificate shall be limited as to time, duration and location, and shall contain such other conditions and safeguards of the public interest as the board shall specify. . . ."

It seems apparent that the Weather Amendment Board, hereinafter referred to as the board, acts as public officers in the performance of duties imposed upon it by the Legislature.

It is well settled that public officers, acting in the performance of official duties, are not personally liable for harmful consequences arising out of their acts in thus performing their duties. See *Moynihan* v. *Todd*, 188 Mass. 301; *Barry* v. *Smith*, 191 Mass. 78; *Fulgoni* v. *Johnston*, 302 Mass. 421, 423.

I therefore answer in the negative your first question — whether you would be liable in the event authority was granted by your board and losses resulted therefrom.

Touching your second question — whether it would be a reasonable condition to the granting of a license to require a bond from the licensee, conditioned to indemnify against losses suffered through the exercise by the licensee of his license, if such a bond were required it would necessarily be (1) for the protection of the Commonwealth; or (2) for the protection of the members of the board; or (3) for the protection of any other person, against such losses.

(1) No bond would be needed, nor should one be required, for the benefit of the Commonwealth, since the Commonwealth would not be legally responsible to any one for losses, and no action could be maintained against it, since there is no statutory provision provided therein. It is a long and thoroughly established rule that the State may not be impleaded in its own courts without its express consent. See *McArthur Bros. Co.* v. *Commonwealth*, 197 Mass. 137; *Burroughs* v. *Commonwealth*, 224 Mass. 28; *Benjamin Foster Co.* v. *Commonwealth*, 318 Mass. 190; *Putnam Furniture Bldg. Inc.* v. *Commonwealth*, 323 Mass. 179.

(2) Nor would a bond be needed or required for the protection of the members of the board, who are under no legal responsibility for the consequences of the acts of a licensee who has been licensed in accordance with the provisions of St. 1951, c. 511.

(3) The person who might need or be benefited by a bond would, therefore, necessarily be some third person who had suffered a loss or damage through the exercise of his license by the licensee. But under the law of the Commonwealth, a bond would not afford such a person any protection. The bond could not be entered into, as a matter of contract, between the licensee and any such possible victim of the exercise of the license, not only because such possible victim is not ascertained, and is wholly contingent, but because neither the Commonwealth nor the board has any authority to act for such person. The bond, therefore, must be entered into between the licensee and the Commonwealth or between the licensee and the members of the board, and in either case for the benefit of any person who might suffer loss or damage through the exercise of the license. It is the rule, however, in this Commonwealth, subject to certain seeming or real exceptions not here material, that a person for whose benefit a contract is made has no right of action on such contract. See *Mellen* v. *Whipple*, 1 Gray 317; *Hampson* v. *Larkin*, 318 Mass. 716.

It thus appears that a bond conditioned to indemnify possible victims of the exercise of a license would afford such victims no protection in the absence of a statute giving them a right of action thereon.

Whether it would be advisable or appropriate to suggest the possibility of such legislation to the Governor and Council, under whose supervision the board acts (see c. 511, § 1), is not a matter concerning which my opinion is requested, and I express none thereon.

Very truly yours,

Francis E. Kelly, *Attorney General.*

Electrical Contractor to hold Master's License.

Nov. 10, 1952.

Mr. Michael H. Condron, *Director of Registration.*

Dear Sir: — The State Examiners of Electricians, through you, have recently asked my opinion interpreting the effect of the law under the circumstances hereinafter described.

They wish to know whether G. L. (Ter. Ed.) c. 141, § 8, as inserted by St. 1948, c. 629, authorizes a contractor who is not the holder of a master electrician's license to employ journeymen to perform electrical work on premises or property belonging to the person engaging said contractor.

The legislative intent with respect to this statute must be ascertained by giving the words used their ordinary meaning (unless there is something in the statute indicating otherwise) and by considering the preexisting state of the common and statutory law, contemporary legislation, and the main object sought to be accomplished by the enactment. *McBey* v. *Hartford Accident & Indemnity Co.*, 292 Mass. 105. *Meunier's Case,* 319 Mass. 421.

To this end let us examine some pertinent statutory provisions.

Section 1 of said chapter 141 provides that no person shall work at the business of installing electrical wires or appliances without a license issued in accordance with the provisions of the chapter. The section then defines a master electrician as a person who has a regular place of business for the performance of electrical work by the employment of journeymen, and defines journeymen as persons who perform electrical work for hire.

Section 3 of chapter 141 declares that the master electrician's license shall be known as "Certificate A" and the journeyman's license as "Certificate B."

Subdivision (1) of section 3 provides that "Certificate A" shall be issued to any person engaging in the business of installing electrical wires or appliances; but the possession of a "Certificate A" shall not entitle the holder individually to perform said work, but shall entitle him to conduct business as a master electrician.

Subdivision (2) of section 3 provides that "Certificate B" shall be granted to any person passing the examination before the State Examiners of Electricians.

Section 8 (third paragraph) of chapter 141 declares that electricians regularly employed by persons who do not hold a "Certificate A" may install electrical wires or appliances "only on the premises and property of such persons"; provided such electricians hold journeymen's licenses.

All the aforesaid statutory provisions should be read together so as to produce a consistent and harmonious body of law. *Assessors of Boston* v. *Lamson*, 316 Mass. 166, 171. *School Committee of Gloucester* v. *Gloucester*, 324 Mass. 209.

Applying the above principles, it would appear that the General Court wished to preserve the public safety and welfare by requiring (through examination) a master's license of one engaging in the electrical business and hiring others to do the work; and a journeyman's license of those hired to do said work.

The exception found in section 8 was undoubtedly intended to apply to owners of property requiring frequent electrical installations or repairs; and who maintained or regularly employed a crew of journeymen for this purpose.

A contractor, however, who undertakes to provide electrical work for another must hold a "Certificate A." When a contractor hires men to do electrical work "on the premises and property of" another, said work is not being done on the contractor's premises or property. Such a contractor does not fall within the exception mentioned in section 8.

I therefore answer the question in the negative.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Veteran's Rights — Holding Non-Civil Service Position for Three Years.

DEC. 2, 1952.

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

DEAR SIR: — You have asked me to interpret the effect of the law under the circumstances hereinafter described.

From the facts recited in your request and from the documents attached thereto it appears that in your department there is a position titled "Supervisor in Education"; that this position has been classified by the Division of Personnel and Standardization under G. L. (Ter. Ed.) c. 30, §§ 45 and 46, as follows:

"SUPERVISOR IN EDUCATION

Titles of Typical Classes in Group:
Supervisor in Agricultural Education
Supervisor in Industrial Education
Supervisor in Agriculture Teacher-Training
Supervisor in Teacher-Training for Women and Girls
Supervisor in Vocational Education for Women and Girls
Supervisor in Vocational Rehabilitation

Definition of Class: Duties: Under general direction to exercise advisory supervision over the work of industrial, agricultural, or household arts education in State-aided vocational and continuation schools, or over the training of teachers for these schools; or to have charge of the State program of vocational training or of rehabilitation of persons industrially handicapped.

Salary Grade No. 51
Service Group No. 47

APPROVED IN COUNCIL
JUN 16 1948"

that your department employs at least thirty-one supervisors, who are assigned to special or different branches of education; that under yearly contracts with the United States Veterans' Administration your department received grants for the salaries of those supervisors who were assigned to job-training programs for veterans; that the contract running from July 1, 1951, to June 30, 1952, provided for a reduction in personnel every three months so that five supervisors were assigned to the program for the first quarter, four for the second quarter, three for the third quarter, and two for the fourth quarter; that William J. Butler, Garrett T. Barry and Francis J. McCrehan (all three of whom are veterans) received their original appointments as "Supervisor in Education" on June 18, 1946, January 20, 1947, and January 20, 1947, respectively; that all three were assigned to the job-training program for the first, second and third quarters under the aforesaid contract; that only Butler and Barry were assigned for the fourth quarter; that McCrehan's services as supervisor were declared terminated on the ground of lack of work or funds; and that of the thirty-one supervisors in education seventeen are not veterans, and of those who are veterans seven have less seniority than said McCrehan.

You ask four questions:

"1. Did Mr. McCrehan's employment legally terminate with the end of the employment period for which he was specifically employed, January 1, 1952, to March 31, 1952?

"2. Did the Department of Education comply with the terms of the contract No. V1001V–375 in employing two Supervisors for the final period specified in the agreement, April 1, 1952, to June 30, 1952?

"3. Did the Department of Education legally employ Mr. William J. Butler and Mr. Garrett T. Barry as Supervisors for this final period of the contract?

"4. Have the rights of Mr. Francis J. McCrehan under G. L. c. 30, § 9A, as amended by St. 1947, c. 242, been respected?"

General Laws (Ter. Ed.) c. 30, § 9A, inserted by St. 1947, c. 242, provides:

"A veteran . . . who holds an office or position in the service of the commonwealth not classified under said chapter thirty one, . . . and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in accordance with the provisions of sections forty-three and forty-five of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. If the separation in the case of such unclassified offices or positions results from lack of work or lack of money, such a veteran shall not be separated from his office or position while similar offices or positions in the same group or grade, as defined in section forty-five of this chapter, exist unless all such offices or positions are held by such veterans, in which case such separation shall occur in the inverse order of their respective original appointments."

This statute is specific and contains a definite legislative mandate that if a veteran has held a non-civil service position for at least three years he cannot be separated from the service without the notice and hearing required by G. L. (Ter. Ed.) c. 31, §§ 43 and 45. Furthermore, even if there is lack of work or funds, such a veteran cannot be dismissed if there are other positions similar to his in the department not held by veterans or held by veterans who have less seniority.

Since you have supervisors in the same group or grade with non-veteran status or with less seniority, McCrehan must be retained.

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

This conclusion, however, has no effect upon the status of Butler and Barry and I answer your second and third questions in the affirmative.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Veteran's Retirement — Member of the General Court — Effect of St. 1952, c. 634, § 8.

JAN. 5, 1953.

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

DEAR SIR: — You have recently requested my opinion interpreting the effect of St. 1952, c. 634, under the circumstances hereinafter described.

You state that an employee of the Commonwealth (who entered the service prior to July 1, 1939) has applied to you for retirement under the provisions of G. L. (Ter. Ed.) c. 32, § 56, as amended; that he claims as creditable service four years as a member of the Massachusetts House of Representatives; that in pursuance of an opinion rendered by my predecessor you have allowed as creditable service for a veteran retiring under sections 56, 57 or 58 of said chapter 32 all service performed as an elected official including service as a member of the General Court; that St. 1947, c. 660, amends section 1 of chapter 32 and includes in the definition of "employee" members of the General Court; that section 3 of chapter 660 provides that "he shall be credited with a year of creditable service for each calendar year during which he served as an elected official"; that section 4 of chapter 660 provides the method for depositing the proper amount in the annuity savings fund to establish creditable years of service for any person who on the effective date of that act was a member of a retirement system; and that the employee in question was on said effective date an employee in good standing in a retirement system and has made the required contributions thereto.

You wish to know whether section 8 of St. 1952, c. 634, excludes from the computation of creditable service the time spent in the General Court.

In the case of *Williams* v. *Contributory Retirement Appeal Board*, 304 Mass. 601, the court declared that said chapter 32 ought, if possible, be construed as a whole so as to make it an effectual piece of legislation in harmony with common sense and sound reason. With this in mind let us examine some of its pertinent sections.

In section 1 "employee" is defined (among other things) as any person who is regularly and permanently employed by the Commonwealth.

A "member" is defined as any employee included in the State employee's retirement system, the teachers' retirement system or any county, city or town contributory retirement system established under sections 1 to 28.

"System" is defined as the State employees' retirement system, the teachers' retirement system or any county, city or town contributory retirement system established under sections 1 to 28.

Section 2 describes three systems, namely: the State employees' retirement system, the teachers' retirement system, and county, city or

town contributory retirement systems established under the provisions of chapter 32. It further provides that, subject to sections 1 to 28, an employee of the Commonwealth shall be included in the State employees' retirement system.

Section 3 relates to membership in a system. Subparagraph (1) (*a*) provides that a member in service is any member who is regularly employed in the performance of his duty. Subparagraph (2) (*a*) (*x*) provides that any employee as defined in section 1 is eligible for membership.

Section 25 (3) (*a*) provides:

"Any member in service classified as a veteran referred to in sections fifty-six to sixty A inclusive, who entered employ of any governmental unit prior to July first, nineteen hundred and thirty-nine, shall have full and complete rights either under the system of which he is a member or under the provisions of sections fifty-six to sixty A inclusive. . . . Such rights shall be in the alternative and shall be exercised only at the time of his retirement. If a member is retired under the provisions of sections fifty-six to sixty A inclusive, he shall, upon his written application . . . in which he waives all his rights under sections one to twenty-eight inclusive, be paid the amount of the accumulated total deductions credited to his account in the annuity savings fund of the system on the date of his retirement. Nothing contained in this subdivision shall permit the withdrawal of any such veteran from membership in such system except upon termination of his service. . . ."

Sections 56 and 57 provide that veterans who have served the Commonwealth for at least ten years and are incapacitated may be retired by the retiring authority.

Section 58 provides that a veteran who has been in the service of the Commonwealth for a total of thirty years in the aggregate shall at his own request, with the approval of the retiring authority, be retired from active service.

Section 59 declares that in the case of the Commonwealth the Governor shall be the retiring authority.

Section 60 provides that sections 56 to 59 shall not apply to veterans whose employment first began after June 30, 1939.

Section 28D provides that a member of the General Court and certain other elected officials may be retired after having served at least six years in such office.

Section 28E provides that a member of a retirement system who was later elected to the General Court could receive creditable service for his term in the Legislature, subject to certain different computations if said term was less than six years.

Section 28H provides that an employee of the Commonwealth who has completed twenty years of creditable service may be retired and may receive as credit toward said twenty years the period served in the General Court.

Statute 1952, c. 634, repealed said sections 28D, 28E and 28H, and further provides in section 8:

"No member or former member of the general court or present or former elected constitutional officer shall receive any pension or retirement allowance for his services performed as a member of the general court or for services performed in discharging the duties of the office to

which he was elected; nor shall the term or terms served by such person in the general court or in such state office be computed as creditable service in any retirement system in which such person may be a member."

In construing section 8 one of the primary considerations is to ascertain the main object sought to be accomplished by the enactment. See *McBey* v. *Hartford Accident & Indemnity Co.*, 292 Mass. 105. *Meunier's Case*, 319 Mass. 421.

It appears from the first half of section 8 that the Legislature was aiming at pensions granted under sections 28D, 28E and 28H of chapter 32. In the second half of said section 8 the Legislature was thinking of the creditable service of a member of a retirement system. Statute 1952, c. 634, deals only with rights acquired under sections 1 to 28 of chapter 32. It has nothing to do with pensions granted under sections 56, 57 or 58.

Section 25 (3) (*a*) specifically provides that a veteran whose public employment began prior to July 1, 1939, may elect to retire under sections 1 to 28 as a member of a retirement system, or as a veteran under sections 56, 57 or 58; and if he chooses the latter alternative there will be refunded to him all the accumulated deductions (if any) credited to his account in the annuity savings fund.

It is manifest from the foregoing that a veteran who seeks retirement under sections 56, 57 or 58 is not doing so as a member of any system. On the contrary, he has specifically waived all rights under sections 1 to 28 which relate to a "system." Statute 1952, c. 634, affects only the members of a retirement system who seek retirement by virtue of such membership.

The conclusion is therefore inescapable that the service of said veteran in the General Court is not affected by said statute and it should be computed as creditable service.

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

Salary to Officer performing Official Services at Home.

Jan. 20, 1953.

Mr. Antonio England, *Director, Division of Employment Security.*

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

You state that a former assistant director of the Division of Employment Security became ill and by January 5, 1951, he had used up all his sick and vacation leave credits; that said illness was due to the nature of his duties; that early in 1951 he applied for retirement; that although he has not reported for duty since January 5, 1951, he was frequently consulted on official business at his home; that his salary was paid until June 30, 1951; and that he was kept on the payroll until July 31, 1951, when he was retired.

You ask two questions:

"1. In its exercise of departmental administrative discretion, did this Division have the right to make the payments in question?

"2. Did St. 1947, c. 677, absolve this Assistant Director from reporting for duty during the period involved, even though his salary was paid during that time?".

The statutory provisions pertinent to your inquiry are the following:

General Laws (Ter. Ed.) c. 23, § 9I, as inserted by St. 1939, c. 20, § 1, and amended by St. 1941, c. 709, § 4, provided for the creation of a Division of Employment Security within the Department of Labor and Industries, under the supervision and control of a director, who shall be appointed by the Governor and who shall administer the provisions of chapter 151A; and that said director shall not be subject to chapter 31. The 1939 act also provided that the director could appoint deputies or assistants, not exceeding five, as may be determined by the Governor; and that they could be removed for cause but they were not subject to chapter 31.

Since 1941, G. L. (Ter. Ed.) c. 23, § 9K, provided that the director may appoint assistant directors and other officers, and employ such employees as are necessary for the proper administration of chapter 151A; that all persons so appointed or employed by him shall be selected subject to chapter 31; and that the director shall fix the duties of all persons appointed and employed by him and may authorize such person to perform such duties, functions and powers of the director as may be necessary or suitable for the proper administration and enforcement of chapter 151A.

General Laws (Ter. Ed.) c. 149, § 30A, inserted by St. 1947, c. 677, restricts the work hours of all persons in the service of the Commonwealth to no more than five days nor more than forty hours in any one week, but excludes from the operation of the act "heads of departments and divisions and their deputies and assistants."

General Laws (Ter. Ed.) c. 30, § 45, provides that the Division of Personnel and Standardization in the Department of Administration and Finance shall classify and specify the duties and responsibilities of all appointive offices and positions, with certain exceptions. In accordance with said section 45 the duties of the Assistant Director of Employment Security were specified as follows: "Under administrative supervision, to assist the Director in supervising the activities and operations of an assigned phase of the work of the Division of Employment Security; and to perform related work as required."

The legislative intent with respect to the foregoing must be gathered from the words in which the statutes are couched, giving them their ordinary meaning unless there is something in the statute indicating otherwise; from the pre-existing state of the common and statutory law; and from the main object sought to be accomplished by the enactments. *McBey v. Hartford Accident & Indemnity Co.*, 292 Mass. 105. *Meunier's Case*, 319 Mass. 421.

It appears manifest from the statutory provisions that the Director of the Division of Employment Security is appointed under said chapter 23, section 9I, to administer the provisions of chapter 151A, which relates to employment security.

It is also manifest that the assistant director is an *officer* appointed by the director. The fact that under G. L. (Ter. Ed.) c. 23, § 9K, the assistant directors are subject to chapter 31, whereas prior to 1941 they were not, does not change their status as officers instead of mere employees.

Because an assistant director is such an officer and because he is an assistant to the head of a division, section 30A of chapter 149 does not apply. He is not obliged to work any special number of hours or perform his work in any particular building which houses the offices of the division, or at his home, excepting in so far as he may be ordered by the director. Under said section 9K the director fixes the duties of the assistant director and authorizes the performance thereof in such manner as he may deem suitable for the proper administration and enforcement of chapter 151A.

According to the facts related by you, that is exactly what the Director of Employment Security did. He had the power to impose light or burdensome duties upon his assistants. He could permit his assistant director to do his consulting, thinking and advising at home or elsewhere. The director had plenary powers to determine what was suitable or necessary for the proper administration and enforcement of chapter 151A.

I therefore answer your first question in the affirmative.

In view of my answer to your first question there is no need to answer your second question.

Very truly yours,

FRANCIS E. KELLY, *Attorney General.*

Department of Public Health — Addition of Fluorides to Public Water.

JAN. 20, 1953.

HON. VLADO A. GETTING, *Commissioner of Public Health.*

DEAR SIR: — You have recently asked me for an opinion interpreting the law under the circumstances hereinafter described. You ask two questions:

(1) Do the laws of the Commonwealth relating to public water supplies permit the addition of fluorides as a dental caries prophylactic to the water supplied?

(2) Does the Department of Public Health have authority to approve the application of fluorides to public water supplies if so requested?

The answer to question (1) depends upon the particular enabling statute authorizing any particular city or town to supply water to its inhabitants. The usual form of statute contains the following clauses: "acquire by lease, purchase, gift, devise or otherwise, and hold all lands, rights of way and other easements necessary for collecting, storing, holding, purifying and treating such water and protecting and preserving the purity thereof and for conveying the same to any part of said town" and "said town may construct and maintain on the lands acquired and held under this act proper dams, wells, reservoirs, pumping and filtration plants, buildings, standpipes, tanks, fixtures and other structures, including also purification and treatment works, the construction and maintenance of which shall be subject to the approval of said department of public health, and may make excavations, procure and operate machinery, and provide such other means and appliances and do such other things as may be necessary for the establishment and maintenance of complete and effective water works." Apart from the use of the words "purifying and treating such water" and "including also purification and treatment works" and "do

such other things as may be necessary for the establishment and maintenance of complete and effective water works," a city or town would have the implied right to introduce into its water supply such chemicals or drugs which would remove all deleterious substances and thus purify the water supply. There might be some doubt, however, about the implied authority to introduce chemicals or drugs for the purpose of making the water supply salubrious. It would seem, however, that by using the words "purifying and treating such water" and "including also purification and treatment works" and "maintenance of complete and effective water works," the Legislature had in mind something more than just removing harmful substances. The Legislature contemplates that the water supply shall not only be pure but if possible shall preserve and protect the health of the users thereof. My answer to question (1) is therefore "yes."

As to question (2), G. L. (Ter. Ed.) c. 111, § 5, provides:

"The department . . . shall have oversight of inland waters, sources of water supply and vaccine institutions . . ."

Section 17 of said chapter also provides:

". . . All petitions to the general court for authority to introduce a system of water supply, drainage or sewerage shall be accompanied by a copy of the recommendation, advice and approval of said department thereon. The department may after a public hearing require a city or town or water company to make such improvements relative to any existing treatment works as in its judgment may be necessary for the protection of the public health. . . ."

It would appear from said provisions that the Department of Public Health would have the right in the exercise of its sound judgment to permit the treatment of public water supplies by the application of fluorides.

Very truly yours,

Francis E. Kelly, *Attorney General.*

Public Works — Corporation and Partnership Bidding as Joint Venturers.

Feb. 10, 1953.

Hon. William F. Callahan, *Commissioner of Public Works.*

Dear Sir: — This office has received from your department a letter in which you refer to a situation created by the receipt of bids for a highway and bridge construction project in the city of Gardner submitted by the Hill Construction Company and the Holden Engineering Company, Inc.

The aforementioned letter describes the Hill Construction Company as a partnership and the Holden Engineering Company, Inc. as a corporation. You also forwarded to this office a copy of the proposal page in which the proposal was signed by the officers of the corporation and by individuals comprising the company known as the Hill Construction Company.

You also refer to an opinion of former Attorney General Clarence A. Barnes dated February 26, 1948, which dealt with a similar problem.

Apparently the problem raised by you in connection with the bids of the Hill Construction Company and the Holden Engineering Company, Inc. may be stated as follows: If a corporation and a partnership sign the

proposal form without specifically describing the fact that they are bidding as joint venturers, does such a situation result in an improper bid which can be rejected by your department?

This office is of the opinion that the mere absence of the words "bidding as joint venturers" is not a fatal defect in the bid, particularly where the specifications and the general requirements listed in your volume on standard specifications do not require the insertion of such language. It has long been recognized that a corporation and a partnership are not authorized under the laws of this Commonwealth to become partners in a common enterprise. (*Whittenton Mills* v. *Upton*, 10 Gray, 582, 596.)

It is a well-established principle of contract construction that no inference can be drawn, in the absence of specific language, that the parties thereto have engaged in an agreement which is illegal. There is some authority which holds that although a corporation may not enter a co-partnership with a partnership firm in a common enterprise, it may, nevertheless, enter into a joint venture with that partnership. Thus it becomes apparent that the validity of the bid referred to in your letter depends upon whether the corporation and the partnership have entered into a co-partnership or a joint venture.

We are in receipt of information that a vote of the corporation has been passed which indicates that the corporation was not engaging in a co-partnership enterprise but rather was relying on the fact that it had undertaken a joint venture with the Hill Construction Company. We are also given to understand that a copy of this vote will be forwarded to your department at the time of the awarding of the contract. This vote, coupled with the principle of interpretation which discounts an attempt to participate in an illegal agreement, is the best evidence for determining the question as to whether the corporation and the partnership have engaged in a partnership enterprise or a joint venture. If the vote and the language of the bid satisfy your department that the corporation and the partnership have engaged in a joint venture, then the mere absence of the words "bidding as joint venturers" on the proposal form by itself would not render the bid invalid and provide any basis for an inference that the Hill Construction Company and the Holden Engineering Company, Inc. were engaged in a co-partnership enterprise.

Very truly yours,

George Fingold, *Attorney General.*

Rent Control — Delegation of Authority to Cities and Towns.

Feb. 13, 1953.

His Excellency Christian A. Herter, *Governor of the Commonwealth.*

Sir: — In your recent letter, you refer to the probability that the Federal rent control law, except in defense areas, will expire April 30 and that the question of rent control will then be left to the States. In this connection you have requested my opinion on two questions, namely:

1. Can the cities and towns of their own authority establish rent control regulations?

2. May the Commonwealth delegate to the cities and towns the authority to establish rent control?

I answer your first question in the negative, and your second question in the affirmative subject to the limitations hereinafter discussed.

Cities and towns, being creatures of the Commonwealth, have such powers as are delegated to them by the Legislature; G. L. (Ter. Ed.) c. 40. Section 21 of said chapter authorizes cities and towns, for certain stated purposes, to "make such orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare." The purpose specified in paragraph (1) is "for directing and managing their prudential affairs, preserving peace and good order, and maintaining their internal police." It was held in *Commonwealth* v. *Wolbarst*, 319 Mass. 291, at 293:

"This section does not transfer to a city or town all the police power of the Commonwealth or such portions of it as a municipality might desire to exercise, but the grant is limited to the regulation and prohibition of such matters as are of an inherently local nature, peculiarly affecting the public welfare of the particular community and so closely connected with the administration of local government as to become properly a part of it."

Many examples of those matters, the control and supervision of which have been given to cities and towns by section 21 (1), are set forth in *Commonwealth* v. *Kimball*, 299 Mass. 353, at 356–358. The majority of these instances concern the regulation of the use of the public ways. In the *Kimball* case, at page 357, the court stated that said section 21 (1), did "not enable a city to establish a local policy in important matters of general concern, like the prohibition or regulation of the sale of liquor."

Furthermore, it is my opinion that the above statute was not intended to and does not apply to matters of an emergency nature, such as the regulation and control of rents.

Article XLVII of the Amendments to the Constitution of Massachusetts provides as follows:

"The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine."

Assuming the applicability of this amendment to the question of rent control, it clearly gives no power to cities and towns "to exercise the public functions declared in the first part of the amendment except as is provided in the last part of the amendment; that is, in such manner as the General Court shall determine." V Op. Atty. Gen. 195. At page 198 it is further stated:

"The mere fact that an undertaking can be sustained as a public function does not warrant a city or town in carrying on the undertaking. There are now many public functions that they cannot perform without authority from the General Court. If the General Court fails to prescribe the manner in which the public functions declared in the amendment are to be performed, the cities and towns have no authority to perform them."

Although the city of New York has adopted local rent control laws, it should be noted that the Constitution for the State of New York grants

some police powers directly to cities and towns; see New York Constitution, Home Rule Amendment, art. IX, § 12; and, in addition, there was specific legislation validating the local laws; see, for example, Laws of New York, 1948, c. 699.

The second question deals with the power of the Commonwealth to delegate to the cities and towns the authority to establish rent control. This question is general in nature and can be answered only on the broad general principles involved. Whether a particular bill drafted to accomplish the delegation of authority to cities and towns to establish rent controls would be constitutional would depend on the specific terms and provisions of such bill.

It must now be considered settled that authority to establish rent control legislation lies within the domain of the police power of the Commonwealth, and that such legislation will be upheld where it is of an emergency nature, limited in duration and justified by a proper legislative finding and declaration of emergency conditions and where adequate provision is made for judicial review. *Bowles* v. *Willingham*, 321 U. S. 503; see also *Yakus* v. *United States*, 321 U. S. 414.

The Constitution of Massachusetts grants "full power and authority" to the General Court "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, . . . as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same. . . ." Mass. Const., pt. 2d, c. I, § I, art. IV.

Rent control legislation has been enacted in New York, and several other States, and its constitutionality has been upheld where it was found to be fair and reasonable and contained adequate provisions for procedural due process. In the case of *Twentieth Century Associates* v. *Waldman*, 294 N. Y. 571, the New York Court of Appeals upheld a New York law passed in 1945 to control commercial rents. See also *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, wherein the court stated at page 245:

"The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State."

It is my opinion that the General Court may, by appropriate legislation, delegate to cities and towns the authority to establish rent control. Although the Legislature may not delegate its legislative function completely, it is settled that "where the legislative branch of government has determined the policy to be pursued, it has power to delegate . . . the working out of the details by which that policy is applied to the subject matter." *Schaffer* v. *Leimberg*, 318 Mass. 396, 400, delegation to an administrative officer or board; *Burnham* v. *Mayor and Alderman of Beverly*, 309 Mass. 388, 389, delegation to cities and towns. The grant to the General Court by Article LX of the Amendments to the Constitution of the "power to limit buildings according to their use or construction to specified districts of cities and towns" has been delegated by the General Court to the cities and towns, G. L. (Ter. Ed.) c. 40, §§ 25–30, and such delegation has been held to be within its authority. *Opinion of the Justices*,

234 Mass. 597, 603; *Inspector of Buildings of Lowell* v. *Stoklosa*, 250 Mass. 52; *Spector* v. *Building Inspector of Milton*, 250 Mass. 63.

Reference has already been made to the local rent control laws of the city of New York. In Connecticut, the rent control law provided for a state fair rent commission and a coordinator and for the appointment of local fair rent boards by selectmen of towns and common councils of cities to make adjustments consistent with general state regulations. Connecticut Public Acts of 1947, c. 394. In Maryland, the law authorized the mayor and city council of every city and the county commissioners of every county, by ordinance, to provide for the regulation and control of rent for housing accommodations within their respective jurisdictions. Maryland Acts of 1947, c. 507. No reported decision has been found testing the validity of either the Connecticut or the Maryland law.

Although apparently not designed for this purpose, Article XLVII of the Amendments to the Massachusetts Constitution, already referred to, strengthens the power of the Commonwealth and the cities and towns to impose rent controls "in such manner as the general court shall determine." This amendment must certainly be construed as a direct constitutional declaration of the propriety of using the police power to assure the availability at reasonable prices of necessary food and shelter. If the General Court can authorize the taking of property to provide shelter, it can certainly provide for regulation of such property through rent control.

This opinion is directed solely to the legal questions involved, and no view is expressed as to the wisdom or practicability of the particular manner in which the program of rent control should be put into effect in this Commonwealth.

Very truly yours,
George Fingold, *Attorney General.*

Department of Public Works — Repair of Town Wharf.

Feb. 26, 1953.

Hon. William C. Tuttle, *Acting Commissioner of Public Works.*

Dear Sir: — You have informed me that under date of August 14, 1952, your department requested advice from former Attorney General Francis E. Kelly as to whether it might properly entertain a request from the town of Mattapoisett to reconstruct and repair the town wharf.

Under the provisions of G. L. (Ter. Ed.) c. 91, § 11, as most recently amended by St. 1950, c. 516, your department is given the power, outside of Boston Harbor, to "undertake such work for the improvement, development, maintenance and protection of tidal and nontidal rivers and . . . harbors . . . as it deems reasonable and proper . . . ." Further, under section 31 of chapter 91, to which specific reference is made by said section 11, it is empowered to "make surveys and improvements for the preservation of harbors and may repair damages occasioned by storms or other destructive agencies along the coast line or river banks of the commonwealth . . . ."

It is clear that your department may, under these sections, entertain the request referred to in said letters, and may proceed with the work required if in its judgment "the general public advantage of the proposed

work, the local interest therein . . . , the importance of the . . . interests to be especially served thereby, and any other material considerations affecting the feasibility, necessity or advantage of the proposed work . . ." warrant the completion of the project.

It appears that current appropriations for work under said section 11 have been specifically made by the General Court. See St. 1952, c. 310, Item 2202–05, and c. 604, Item 7622–01.

Your attention is called to the requirement of section 11 that no work shall be begun thereunder until after a public hearing, survey and estimate of cost, and to the provisions of section 31, that no contract made thereunder shall be valid without the written approval of the Governor and Council.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Metropolitan Transit Authority — Eligibility for Appointment as Trustee.

MAR. 10, 1953.

His Excellency CHRISTIAN A. HERTER, *Governor of the Commonwealth.*

SIR: — You have asked my opinion as to whether an officer of a commercial bank is eligible for appointment as a trustee of the Metropolitan Transit Authority in view of the prohibition contained in St. 1947, c. 544, § 3, which provides in part as follows:

". . . They (the trustees) shall not be in the employ of, or own any stock in, or be in any way, directly or indirectly, pecuniarily interested in, any gas or electric company, railroad corporation, bus or street railway company, nor shall they be connected with or in the employ of any person financing any such company. While serving as such trustees thay shall not personally or through a partner or agent render any professional service or make or perform any business contract with or for any such company, nor shall they, directly or indirectly, receive a commission, bonus, discount, present or reward from any such company. As used in this section, 'company' shall include any person or combination of persons, whether or not incorporated."

In the absence of an analysis of the holdings and investments of the individual in question and of the bank in which he is an officer, it is impossible to determine whether the prohibition of section 3, quoted above, is applicable. It is quite possible, for example, that the bank in question may be engaged in financing a gas or electric company, a railroad corporation, or a street railway company, in which event the officer of such bank would not be eligible for appointment as a trustee of the Metropolitan Transit Authority.

Very truly yours,
GEORGE FINGOLD, *Attorney General.*

Department of Mental Health — Sale of Gravel.

MAR. 24, 1953.

JACK R. EWALT, M.D., *Commissioner of Mental Health.*

DEAR SIR: — You have recently asked my opinion as to whether the Department of Mental Health, in the absence of express legislation authorizing the sale of land, may —

"1. Invite bids for the removal and sale of gravel, sand or a knoll or mound of earth, on property of institutions under its jurisdiction.

"2. Invite bids for the removal and sale of earth that has been piled up on property of institutions under its jurisdiction, the pile of earth being the result of excavation necessary for construction activities."

My answer to both questions is in the affirmative.

The removal and sale of gravel or earth as contemplated above will involve the sale of personal property rather than a sale of real estate, provided it is agreed before the sale or under the contract of sale that such sand or gravel be severed promptly.

The definition of "goods" as contained in G. L. (Ter. Ed.) c. 106, § 65, which relates to sales of personal property, is as follows:

"'Goods' include . . . things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

As long as the property involved is under the jurisdiction of the department, steps may be taken as outlined above for the purpose of disposing of such property as personalty. Express legislative authority for the sale is not required, as would be the case if the department were attempting to sell real estate.

It should be noted that in the absence of a proper provision concerning severance, the sale of gravel in a pit may well involve a sale of real estate.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Lease of Land by a State Commission — Approvals Required.

MAR. 25, 1953.

MR. CARL A. SHERIDAN, *Commissioner of Administration.*

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

(1) Would a lease of private premises for the use of a commission of the Commonwealth, executed by the owner of the leased property and by the members of the commission, but not approved by any other State agency, be binding on the Commonwealth?

(2) If a department or commission desired to hire private property for its use on a tenancy-at-will basis, would the provisions of G. L. (Ter. Ed.) c. 8, § 10A, have any application to the proposed agreement?

In my opinion, the answer to your first question is in the negative. General Laws (Ter. Ed.) c. 8, § 10A, as most recently amended by St. 1952, c. 391, provides that "The commonwealth, acting through . . . a state . . . commission, *and with the approval of the superintendent (of buildings) and of the governor and council and of the commission on administration and finance*, may lease for the use of such . . . commission . . . for a term not exceeding five years, premises outside of the state house or other building owned by the commonwealth . . . ." It is only under and by virtue of this statute that the Commonwealth can become a party to a lease of such property, and hence its liability upon such an agreement exists or does not exist according to whether or not the approvals required by the statute have been given. While the statute as it now appears does not specifically provide for the invalidity of leases made without such approvals, this result would follow as matter of law. It is to be noted that in its original form, as appearing in St. 1924, c. 356, said section 10A expressly provided that "no such lease shall be valid until approved by the superintendent of buildings and the governor and council," and while certain of the statutes amendatory of section 10A since its original enactment have rephrased its provisions, it does not appear that there was any legislative intent, in any instance, to change the rule of invalidity.

In answer to your second question, I would say that if a specific department or commission had authority, under a special statute or otherwise, to bind the Commonwealth to an oral agreement establishing a tenancy-at-will, the provisions of said section 10A would, of course, have no application, since that section has to do only with the execution of leases for definite terms.

Very truly yours,

George Fingold, *Attorney General.*

State Airport Management Board — State Auditor as Agent of Board to Audit Accounts of Concessionaires.

Mar. 25, 1953.

Mr. Edward H. McGrath, *Commissioner of Airport Management.*

Dear Sir: — You have recently requested my opinion upon the following questions:

(1) Whether the State Airport Management Board (hereinafter called the board) has the right, under the agreements which it has with concessionaires doing business at State-owned airports, to designate the State Auditor as its agent for the purpose of examining the books of account of such concessionaires.

(2) Whether the State Auditor, in the normal course of his duties, has the authority to examine such books of account in the absence of such a designation by the board.

My answer to your first question is in the affirmative, subject to what is said below.

Under G. L. (Ter. Ed.) c. 90, § 50F, originally enacted by St. 1948, c. 637, § 3, you have the authority, subject to the approval of the board, to "lease for a period not exceeding twenty years, under such covenants,

terms and conditions as . . . (you may prescribe) land areas at any state-owned airport . . . (for certain purposes) and shall also lease and award contracts for . . . concessions . . . ." You state in your letter that the contracts into which you have entered with the several concessionaires at such airports contain the provision that, "the board, or its agents, shall have the right to inspect their books of account . . . ." Such a condition is clearly proper for you to have made, under your wide powers to prescribe terms and conditions of such agreements, and is, of course, binding upon the concessionaires.

I assume from your letter that the condition in question is essentially the same in each contract in which it appears, and that no such contract imposes any restriction upon the board as to the identity of the agents which it may designate to examine the records of the concessionaires. Upon these assumptions, it would follow that if, for one reason or another, the board saw fit to designate the State Auditor to make such an examination, it might properly do so.

The State Auditor, upon his receipt from you of a copy of your said letter to me, sent me a copy of his letter to you dated January 27, 1953, in which he requested that the board designate him, or his department, as its representative to audit a specific concessionaire. I judge from this communication that he has not as yet asserted that he has any inherent authority to make such an audit in the absence of such a designation, and that he will make such an assertion, if at all, only after his said request has been denied. Your second question, therefore, needs no present answer; if and when it becomes of importance, it should be propounded by the State Auditor, since it has to do with his powers and duties rather than with those of the board. I Op. Atty. Gen. 562, 563; II Op. Atty. Gen. 100.

Very truly yours,
George Fingold, *Attorney General.*

Urban Redevelopment Corporation under G. L. c. 121A — Property which can be Acquired.

Mar. 25, 1953.

State Housing Board.

Gentlemen: — You request my formal opinion "on certain questions concerning the operation of chapter 121A of the General Laws."

You have specified that the questions "relate to a development constructed upon vacant land by the city of Lawrence, and completed in 1949, under the provisions of St. 1946, c. 372, § 6, as amended. The development contains 100 single-family houses now occupied by veteran-tenants, all of whom have been given options to purchase."

Your questions are as follows:

"1. Section 10 of chapter 121A reads in part as follows: provided that such excise shall not in any year be less than an amount equal to that which the city or town would receive for taxes, at the rate for such year, upon the average of the assessed values of the real estate held by such corporation for the three years last preceding the acquisition thereof. In the case of the Lawrence development, would the amount of this excise

be based upon the assessed value of the houses which were tax exempt, or on the assessed value of the vacant land upon which they were built?

"2. Section 10 of chapter 121A reads in part as follows: 'The real estate and personal property of any such corporation shall for a period of forty years after its organization be exempt from taxation under chapter fifty-nine.' Does the forty-year provision in this section, and also in section 16, prohibit the establishment of a corporation which requires these special privileges, for only a period of twenty-five years?

"3. Can the Lawrence chapter 372 development be sold to an Urban Redevelopment Corporation, established under the provisions of chapter 121A, prior to five years from the date of the completion of the development?"

Question number three is the key to the entire problem and controls the same. It is therefore considered first.

Section 3 of chapter 121A includes a description of the type of property subject to acquisition by an urban redevelopment corporation, and this constitutes the legislative grant of the charter powers to such a corporation. The pertinent provision is as follows:

". . . Such project shall consist of (*a*) the acquisition of one or more areas wherein dwellings predominate which by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to safety, health or morals, or one or more areas which are decadent to such an extent as to have become a social or economic liability to the community; or one or more areas which by reason of inappropriate subdivision, the removal of means of transportation or a change in business and economic practices or other like cause have become incapable of beneficial use or development by private enterprise under existing law; or one or more areas in which a large number of the buildings have been destroyed by fire, flood, explosion or other calamity: . . ."

Further information, elicited by this department, shows that the houses in question cost about ten thousand dollars to build, are in reasonably good condition and presently have a fair market value of about nine thousand dollars; that said property in no way can be said to fall within the provisions of section 3 (*a*) of chapter 121A or any other section of chapter 121A.

While it is true that St. 1946, c. 372, § 6, cl. (3), requires the eventual sale to private persons of dwelling units constructed under said chapter, it is not true that the sale of such units to an urban redevelopment corporation is necessarily authorized thereby. The propriety of such a sale is to be tested, rather, by the provisions of chapter 121A, defining the power of such corporations to acquire property.

The clear legislative intent leading to the enactment of chapter 121A was to provide for the redevelopment of areas which are unfit for human habitation, detrimental to the public safety, liabilities to the community, or which for other reasons should be reclaimed, restored or rehabilitated. G. L. (Ter. Ed.) c. 121A, § 2. It is clear that the property in the city of Lawrence to which your letter has reference is not such an area, and its acquisition by an "urban redevelopment corporation" would not be in furtherance of any project authorized by section 3 of said chapter.

It is my opinion, therefore, that the property which is the subject of your inquiry is not such property that it could be sold to an urban re-

development corporation. In the light of this opinion the five-year period is of no importance.

The opinion expressed herein makes it unnecessary to deal with questions one and two, the same now being of no force or effect.

Very truly yours,

George Fingold, *Attorney General.*

Construction of Public Works — Substitution of Sub-bidders.

Mar. 30, 1953.

Department of Public Works.

Gentlemen: — In your recent letter you requested that I make a review of the authority of your department to substitute sub-bidders in the awarding of contracts for the construction of public works.

In the matter outlined by you, concerning the Fall River State Pier, it appears that the following pertinent bids were submitted:

	Carlson Const. Corp. (lowest bidder)	Halloran Const. Co. (7th lowest bidder)
Item 1 (Work of Gen. Contractor) . .	$218,849.25	$208,521.50
Item 2 (Work of Subcontractor) . .	356,844.00	401,093.00
	$575,693.25	$609,614.50

Subsequent to the opening of the bids, the Halloran Construction Co. offered to reduce its Item 2 bid involving subcontractors from $401,093.00 to $356,844.00, thus using the lowest sub-bids on file. Carlson Construction Corp. had already submitted this figure in its original bid. Such a substitution of sub-bidders would reduce the total Halloran bid from $609,614.50 to $565,365.50, a figure $10,327.75 lower than the Carlson bid.

It is my opinion that your department is not authorized to allow the substitution of sub-bidders by the Halloran Construction Co. under the foregoing circumstances.

General Laws (Ter. Ed.) c. 149, § 44C, provides:

"Bids from general contractors shall be for the complete project as specified and shall include the names of all principal and such minor subcontractors as are designated in the proposal form, and the general contractor shall be selected on the basis of such bid."

Authority to substitute sub-bids is found in part (D) of said section 44C which provides:

"If after the selection of the general contractor, it be decided to consider sub-contractors other than the ones named by the general contractor in his proposal, the awarding authority, architect and engineer, or any one or more of them, and the selected general contractor shall jointly consider the names of all proposed sub-bidders and their amounts, as given in the general contractor's proposal. . . . If after the substitution of subcontractors under this section or subsection E, the selected general contractor is no longer the lowest responsible and eligible bidder, then a new selection shall be made and the sub-bidders of said newly selected general contractor similarly considered."

The statute contemplates that a general contractor shall first be selected on the basis of his total bid. The bid of the Carlson Construction Corp. appears to justify its selection as such general contractor. Thereafter the sub-bidders of such general contractor may be substituted under the statute. The Carlson Construction Corp. has already used the bids of the lowest responsible sub-bidders so that there is no occasion for the substitution of sub-bidders.

In order to accept the bid of the Halloran Construction Co. it would be necessary for the department to make substitutions of sub-bidders prior to the selection of the general contractor. Such a procedure is not authorized by the statute. The fact that in this particular case it would appear that the Commonwealth might benefit by an award to the Halloran Construction Co. does not of itself justify a departure from the requirements of the statute. *Cf. Gifford* v. *Commissioner of Public Health*, 328 Mass. 608.

Very truly yours,
George Fingold, *Attorney General.*

Hawkers and Pedlers — Installment Sales — Sales on Approval.

Apr. 2, 1953.

Hon. Ernest A. Johnson, *Commissioner of Labor and Industries.*

Dear Sir: — You have requested my opinion as to the applicability of G. L. (Ter. Ed.) c. 101, §§ 13, *et seq.*, to salesmen for installment vendors who go from house to house selling merchandise "on approval." You state that as the result of such "sales," "the purchaser keeps the merchandise for a period . . . and if not satisfied therewith, he has the option of returning . . . [it] . . . . The vendor may have the opportunity also of withdrawing the merchandise from the customer if it is found that he has not a good credit rating."

Chapter 101, section 13, defines a "hawker" or "pedler" who is required to be licensed under said chapter as "any person . . . who goes . . . from place to place . . . selling or . . . carrying for sale . . . any goods, wares or merchandise . . . ." Section 15 of chapter 101 exempts certain persons, who might otherwise be deemed to fall within its purview, from the provisions of said chapter, but none of the exempted classes include such salesmen as you describe unless they can be said to be "persons selling by sample . . . or otherwise *for future delivery.*" Since you state that the practice of these salesmen is to leave the merchandise with the prospective buyer "on approval," it is obvious that the transactions in question are not for the "future delivery" of any merchandise, and hence that the salesmen to whom you have reference are not exempted from the application of said chapter 101 by the provisions of section 15.

A sale "on approval" has long been an established method for the eventual transference of title to property from one person to another; see, for example, G. L. (Ter. Ed.) c. 106, § 21, Rule 3(2), which has to do with the presumed intent of the parties as to when title to merchandise shall pass to the prospective buyer in such cases.

In the transactions which you describe, it is apparent that both the salesman and the person with whom he leaves the merchandise enter into

their agreement with the expectation that the sale will probably be consummated by the passage of title at some future time; it may well be that the original arrangement between them immediately constitutes a "sale" as that word is used in section 13.

But, in any event, it is my opinion that a salesman who can actually deliver goods to a prospective purchaser subject to such an agreement is clearly carrying such goods for sale, and that he is therefore subject to the pertinent provisions of chapter 101.

Very truly yours,
George Fingold, *Attorney General.*

Forest Products — Cutting Plan under G. L. c. 132, § 42.

Apr. 2, 1953.

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

Dear Sir: — You have requested my opinion as to whether or not your department "is justified in seeking to penalize any timber operator who proceeds with cutting operations where the landowner has failed to give notice of his intention (to cut forest products on land devoted to forest purposes) and to secure a cutting plan" under G. L. (Ter. Ed.) c. 132, §§ 42–44, as amended. You state that it is the contention of certain such operators "that while they are required by law to follow a cutting plan proposed by the Division of Forestry, yet they are free to proceed as they see fit if the owner has failed to secure the cutting plans."

Sections 40 to 45, inclusive, of chapter 132, were first enacted by St. 1943, c. 539, "An Act providing for the establishment of forest cutting practices." The only amendments to said sections have been by St. 1952, c. 427, which effected the amendments hereinafter described.

Said section 42, as originally enacted, required "every owner *or operator* who proposes to cut (forest products) on land devoted to forest purposes," with certain exceptions apparently not here material, to notify the director of the Division of Forestry of his intention, so that a cutting plan might be prepared; section 43, as unamended, imposed a penalty upon any person failing to comply with this requirement.

It should be noted that said sections did not specifically provide any penalty for failure of either the owner or the operator to follow the cutting plan prepared pursuant to such notice.

Section 42 was amended by the 1952 statute so as to provide that *the owner* only should be the person to notify the director of his intention to cut; it is presumably because the amendment failed to mention the operator, as the original section did, that the contention of the operators described in your letter is now made.

But the 1952 amendment to section 43 specifically provides for a penalty not only upon the owner who fails to give notice under section 42, as amended, but also against "whoever, . . . either as land or stumpage owner or independent contractor fails to follow *the plan of operations prepared by said director*." It was the obvious intent of the General Court, in its enactment of the 1952 amendments to sections 42 and 43, to penalize a failure to follow cutting plans as well as a failure to give a notice of intentions, thus making these sections a more effective means of furthering

"the rehabilitation and protection of forest lands," the policy of the Commonwealth as declared by section 40 of said chapter.

In my opinion, the new sections, fairly construed, require the owner of lands to procure cutting plans, and the operator to follow them when procured; it is further my opinion that no operator can, without being subject to the penalty provided by section 43, as amended, proceed with a cutting otherwise subject to the provisions of section 42, as amended, unless such cutting plan has been prepared, following the notice prescribed by said section.

Very truly yours,
George Fingold, *Attorney General.*

Land Takings by Massachusetts Turnpike Authority — Authority of Governor and Department of Public Works.

Apr. 13, 1953.

His Excellency Christian A. Herter, *Governor of the Commonwealth.*

Sir: — You have requested my opinion on the following matter: — "What authority does (*a*) the Governor and (*b*) the Commissioner of Public Works have over the proposed land takings of the Massachusetts Turnpike Authority?"

The Massachusetts Turnpike Authority (hereinafter called the Authority) was established, and its powers and duties defined, by St. 1952, c. 354, and the answers to your questions are to be found only in said chapter.

Section 3 of said act contains the only provisions having to do with your relationship with the Authority. They require the Governor, by and with the consent of the Council, to make the original appointments of the three members of the Authority, to designate which of them shall serve as chairman, to fill vacancies in the membership of the Authority, and to administer oaths of office to the members. He has no other functions with relation to the Authority which, by section 3, is constituted as a separate and distinct public instrumentality. My answer to part (*a*) of your question is, therefore: None.

Nowhere in said chapter 354 is mention made of the Commissioner of Public Works, but I interpret part (*b*) of your question to relate to the department headed by him, hereinafter referred to as the department.

Said section 3 specifically provides that the Authority shall not be subject to the supervision and regulation of the department except as otherwise provided by the act. Only in the following instances does chapter 354 refer to the relationship between the Authority and the department:

Section 1. The toll express highway to be constructed, maintained, repaired and operated by the Authority shall be "at such location as may be approved by the . . . department." Under this provision, it would seem that the department, by withholding its approval of locations proposed by the Authority, might have wide powers of control over the legality of land takings.

SECTION 4. The department, with the approval of the Authority, may incur obligations and expenses for traffic surveys, borings, preparation of plans and specifications, and other engineering services in connection with the construction of the turnpike.

SECTION 5 (*k*). The department shall determine the amount and form of the security to be given to the State Treasurer by the Authority for the payment of such damages as may be awarded for land takings.

SECTION 6. The department's approval must be obtained for the incorporation in the turnpike of any existing State highway, or part thereof, or any partially completed State highway or any bridge which the Authority may deem necessary for a proper alignment of the turnpike.

SECTION 7. The department's approval must be obtained for the relocation of any portion of any public highway.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Public Administrator — Service in County in which he does not Reside.

APR. 21, 1953.

The Honorable Governor's Council.

GENTLEMEN: — I am in receipt of a letter requesting my opinion on the following:

"Whether a resident of one county may be appointed and serve as a public administrator in and for another county in which he does not reside."

General Laws (Ter. Ed.) c. 194 covers the appointment, powers and duties of a public administrator and limits the scope of his functions to the administration upon the estates of persons "who die intestate in *his* county or elsewhere, leaving property in *his* county to be administered." Upon the death, resignation or removal of a public administrator the probate court "shall issue a warrant to some other public administrator *in the same county* . . ."

It would seem that the statute contemplated that the estates of persons who die intestate should be administered by persons from the same county and be subject to the jurisdiction of the probate court of that county. Moreover, compensation is paid to a public administrator, not out of the public treasury, but from estates subject to such administration. In certain instances the district attorney of the county may also take appropriate action in connection with matters relating to any estate under the charge of a public administrator. It would seem quite inefficient and impractical, if not totally unsound, to have a public administrator resident in Barnstable County, for instance, administer estates in Essex County.

The statute relating to the appointment of public administrators "as a whole ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason." *Schenck* v. *Buckley*, 307 Mass. 186.

I am of the opinion, therefore, that a public administrator may not be appointed in and for another county in which he does not reside.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Department of Public Utilities — Jurisdiction over Termini in Transportation by Vessel.

Apr. 24, 1953.

Department of Public Utilities.

Gentlemen: — In your recent request for an opinion you ask —

(1) Whether the Department of Public Utilities has jurisdiction to order the Wilson Line of Massachusetts, Inc. to give service to Pemberton, and

(2) Whether the schedule of rates filed in 1952 has expired as the result of a statement on said schedule that said rates expire on September 30, 1952.

(1) My answer to your first question is that your department does not have jurisdiction to order the Wilson Line to give service to Pemberton.

It is stated in G. L. (Ter. Ed.) c. 159, § 10, that the Department of Public Utilities has authority to enforce provisions pertaining to the general supervision and regulation of, and jurisdiction and control over, the transportation or carriage of persons or property, or both, between points within the Commonwealth by ships and vessels in excess of one hundred gross tons using steam or Diesel engine as means of propulsion (§12).

Section 13 of chapter 159, authorizes the department to inquire into the "rates, charges, regulations, practices, equipment and services" of such a carrier in this Commonwealth.

There is no specific provision in the General Laws, however, giving the department jurisdiction over the location of termini for such a carrier, as there is with railroads (G. L. [Ter. Ed.] c. 159, § 16A; c. 160, §§ 85, 128), street railways (G. L. [Ter. Ed.] c. 161, § 71), and carriers of property by motor vehicle (G. L. [Ter. Ed.] c. 159B, § 3).

In the above-stated statutes said carriers were required to obtain from the department a certificate of public convenience and necessity, which certificate specifies the route or routes over which the carrier may operate. No such provision is required as to ships and vessels.

Thus by comparison and analysis we conclude that it was not the intention of the Legislature to give your department jurisdiction over the regulation of routes or termini. *Tilton* v. *City of Haverhill*, 311 Mass. 572. *In re Bergeron*, 220 Mass. 472. *MacBey* v. *Hartford Accident & Indemnity Co.*, 292 Mass. 105.

(2) My answer to your second question is that the schedules of rates filed in 1952 do not expire on September 30, 1952.

Very truly yours,

George Fingold, *Attorney General.*

Public Construction — Authority to build as based upon Appropriation of Money.

Apr. 30, 1953.

His Excellency Christian A. Herter, *Governor of the Commonwealth.*

Sir: — You ask for my opinion "as to whether the mere appropriation of the money by the Legislature is sufficient authority for the Commonwealth to proceed with the construction of the proposed buildings for the

Westfield State Teachers' College upon the property in question without further authorization." It appears that the only statutory reference to the construction of the proposed new college buildings is in Item 7613–05 of section 2 of chapter 604 of the Acts of 1952, the act providing for the special capital outlay program, in these words: "*Service of the Department of Education* . . . State Teachers' College at Westfield: For the construction of a new college building, a dormitory with kitchen and dining facilities, and a heating plant, including the cost of furnishings and equipment, to be in addition to the amount appropriated in item 7713–13 of section two of chapter seven hundred and fifty-six of the acts of nineteen hundred and fifty-one . . . $3,025,000.00."

In my opinion, said item is sufficiently specific to constitute an adequate authorization to the Department of Education to proceed with the construction of the proposed new college, subject to section 3 of chapter 604, which requires the approval of plans, specifications and contracts therefor by the Massachusetts Public Building Commission as a condition precedent to any payment of money or the incurring of any obligation with relation to said item, and "to the provisions of law regulating the disbursement of public funds and the approval thereof," all as provided in section 1 of said chapter.

You ask, further, whether you are correct in assuming "that the separate appropriation for the drawings of the final plans is sufficient authorization to proceed with" such plans. Your reference is, presumably, to Item 7713–13 of section 2 of chapter 756 of the Acts of 1951, which provides: "*Service of the Department of Education* . . . State Teachers' College at Westfield: For the preparation of plans and specifications for a new college building, a dormitory with kitchen and dining facilities, and a heating plant . . . $125,000.00." My answer to you is in the affirmative; your attention, however, is called to section 3 of chapter 756, which would seem to require the prior approval of the Public Building Commission, and to section 1 of said chapter, which makes said appropriation expressly subject to general provisions of law regulating public expenditures.

Very truly yours,

George Fingold, *Attorney General.*

Department of Public Welfare — Responsibility for Neglected Children.

June 4, 1953.

His Excellency Christian A. Herter, *Governor of the Commonwealth.*

Sir: — You have requested my opinion as to whether, under the provisions of G. L. (Ter. Ed.) c. 119, "it is mandatory . . . that the Commonwealth should take over the responsibility" for neglected children resident in the city of Boston. You have enclosed with your letter a copy of a letter dated April 30, 1953, from the Child Welfare Division of said city to the Commissioner of Public Welfare, stating that "If it meets with your approval, the Child Welfare Division . . . on a date set by you, will no longer accept neglected children." You state in your letter that "It is estimated that for the Commonwealth to take on this added responsibility as apparently contemplated under chapter 119 . . . would add to the cost to the Commonwealth approximately $750,000.00 per annum."

Your question concerns a matter of great public interest, and, I assume, relates in one way or another to some official action which you contemplate; for these reasons, I am happy to answer it, notwithstanding the fact that it has to do primarily with the duties of the Department of Public Welfare rather than with those of your office.

Prior to the enactment of St. 1900, c. 397, the law provided that the city or town in which a neglected child had a settlement should make all needful arrangements for his care and maintenance, and that only in a case where such child had no known settlement in the Commonwealth (or where the place of settlement had no facilities for his care) should he be committed to the State Board of Lunacy and Charity. St. 1898, c. 496, § 35 (amended by St. 1898, c. 580, § 2). However, St. 1900, c. 397, § 2 provided explicitly that "Whenever it is made to appear . . . that . . . any child . . . by reason . . . of neglect . . . is dependent upon public charity, the court . . . *shall . . . commit the child, whether he has or has not a settlement, to the custody of* (*the state board of charity*) *. . . and said board shall provide for the care and maintenance of the child without expense to the city or town of his settlement* . . ." (emphasis supplied). Said chapter 397 further provided that the custody of such a child might, at their request, be originally given by the court to the overseers of the poor of the place of his settlement, and that the State Board of Charity should, upon their request, transfer its custody of any such child to such overseers, "and such transfer shall thereafter relieve the Commonwealth from further liability . . ."

This enactment became section 37 of chapter 83 of the Revised Laws (1902), by which, however, it was provided that "the court . . . *may commit* the child . . . to the custody of said board" (emphasis supplied).

In 1903, the Legislature amended the law to provide that commitments of neglected children might be made as well to "some suitable person or charitable corporation" as to the State Board of Charity or to the local overseers of the poor; however, the provisions of the law relative to commitment to such public agencies remained unchanged.

The law is essentially the same today, with the Department of Public Welfare performing the functions of the former State Board of Charity (see St. 1919, c. 350, pt. III, § 87). Thus, it is provided by G. L. (Ter. Ed.) c. 119, § 44, that the court, after an adjudication that a child is neglected, may either allow him "to be placed in the care of some suitable person or charitable corporation" or "commit the child to the department" (of public welfare); and section 45 of said chapter provides for the original commitment of such child to the local board of public welfare of the place of its settlement, *if such board so requests*, and for the transference by the department to such board, *upon the latter's request*, of the custody of a neglected child previously committed to the department, which such transfer "shall thereafter relieve the commonwealth from further liability for his maintenance."

In answer to your question, then, it is my opinion that, if a neglected child has been duly committed to the custody of the Department of Public Welfare under chapter 119, it is the responsibility of that department to maintain him until the object of his commitment has been accomplished (§ 44) or until its custody of him has, at the request of the local board of public welfare of the place of his settlement, been transferred to such board (§ 45).

Very truly yours,

George Fingold, *Attorney General.*

Approval by Governor and Council — Right of Department to act outside of Approval.

June 29, 1953.

His Excellency the Governor and the Honorable Council.

Sirs: — You have asked the following question:

"Assuming that a matter requires the consent of the Governor and Council, what authority does a department, commission, board or similarly constituted body have to revoke, amend, or modify the particular act after the Council has so acted?"

The question is general in terms and does not refer to any particular matter which is to be acted upon by the Governor and Council. Under such circumstances my answer is directed only to the general principles involved and should not be interpreted as applying to any particular factual situation.

Matters which come before the Council may be broken down into two general categories:

First, there are situations in which an act of the Governor is to be performed by and with the advice and consent of the Council. For example, Mass. Const., pt. 2nd, c. II, § I, art. VIII, provides: "The power of pardoning offences . . . shall be in the governor, by and with the advice of the council . . ." Article IX of said section provides: "All judicial officers . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council . . ."

In situations which fall within the foregoing category, the responsibility for the act is that of the Governor. The function of the Council is purely advisory. The Governor must decide in the first instance whether or not it is his duty to act at all. If he decides against taking any action, he need submit nothing to the Council. If, on the other hand, he submits an application for a pardon to the Council for its advice and the Council should unanimously advise him to pardon, it would not be his duty to act unless he himself should think that he ought to exercise his power. *Opinion of the Justices*, 190 Mass. 616.

If the Council fails to give its consent, the act of the Governor will be incomplete and ineffective. *Murphy* v. *Casey*, 300 Mass. 232, 236 (removal of a commissioner of agriculture by the Governor will be ineffective unless accompanied by the consent of the Council).

The second general type of situation to be considered involves matters where the Governor and Council are to act together as an executive board. For example, the Governor and Council shall examine the returned copies of the record of votes for senators and issue summonses to such persons as shall appear to be chosen by the voters. Mass. Const., pt. 2nd, c. I, § II, art. III. Similarly, ". . . . the governor with the said councillors, or five of them at least, shall, and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the Commonwealth, agreeably to the constitution and the laws of the land." Mass. Const. pt. 2nd, c. II, § I, art. IV.

In these cases, the Governor and Council are to act together as an executive body and neither of them can lawfully act alone. *Opinion of the Justices*, 190 Mass. 616, 618.

Their joint act may be in relation to a matter which is to be performed solely by the Governor and Council, such as their duty to examine returns of the votes for senator referred to above. Secondly, their joint act may relate to the supervision of boards and commissions acting under the Governor and Council. Lastly, their joint act may relate to giving approval or consent to matters, acts or documents for which other State officials or departments may be initially responsible.

The question you have presented relates to matters in the two latter categories, and only such problems will here be discussed.

The powers of the Governor and Council over boards, commissions and authorities serving directly under the Governor and Council are extensive. G. L. (Ter. Ed.) c. 6, § 17, provides as follows:

"The armory commission, the art commission, the commission on administration and finance, the commissioner of veterans' services, the commissioners on uniform state laws, the public bequest commission, the state ballot law commission, the board of trustees of the Soldiers' Home in Massachusetts, the board of trustees of the Soldiers' Home in Holyoke, the milk regulation board, the alcoholic beverages control commission, the state planning board, the state housing board, the trustees of the state library, the state racing commission, the Greylock reservation commission, the Port of Boston Authority, the Massachusetts public building commission, the Massachusetts commission against discrimination, the outdoor advertising authority, the commission on alcoholism, the state airport management board, the youth service board, weather amendment board and the Massachusetts aeronautics commission *shall serve under the governor and council, and shall be subject to such supervision as the governor and council deem necessary and proper*" (emphasis supplied).

By exercising the supervisory powers given them by this statute, the Governor and Council probably could, if they deemed it necessary and proper, prevent the later rescission by such a commission or board of any action once taken or proposed by it. In so far as your question relates to such a commission or board, then its answer is fully within your own control.

The powers of the Governor and Council over departments and over boards and commissions incorporated in the various departments are more limited. As an executive board, the Governor and Council order and direct the affairs of the Commonwealth as set out in Mass. Const., pt. 2nd, c. II, § I, art. IV, quoted above. The departments, however, are subject to the supervision and regulation of the General Court. See Mass. Const., Amend. LXVI, which provides as follows:

"On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law."

The General Court has enacted numerous statutes conferring powers on various departments, which powers are to be exercised only with the approval of the Governor and Council. For example, rules and regulations

adopted by the departments are ordinarily made subject to the approval of the Governor and Council. G. L. (Ter. Ed.) c. 25, § 4 (Department of Public Utilities). G. L. (Ter. Ed.) c. 13, § 9A (Department of Civil Service).

Departments may lease premises outside the State House or other public building only "with the approval of the superintendent (of buildings) and of the governor and council and of the commission on administration and finance . . ." G. L. c. 8, § 10A. Contracts for the construction of State highways by the Department of Public Works are to be made with the approval of the Governor and Council. G. L. (Ter. Ed.) c. 81, § 8.

In all these instances, the initial act is that of the department. The functions of the Governor and Council are merely those of approval. If the department fails to act, there is nothing for the Governor and Council to approve.

But where the department has decided to act, its act is not complete until first approved. *Scullin* v. *Cities Service Oil Co.*, 304 Mass. 75 (where a contract of the Department of Public Works for the sale of land was not approved by the Governor and Council as required by law, the purchaser acquired no rights under such contract). After approval has been given, the department may act only in accordance with the approval. Any attempt to alter or amend the act will be improper unless the alteration or amendment is itself approved by the Governor and Council.

Of course, if a contract approved by the Governor and Council contains in it a specific clause allowing the contract to be altered or amended, then an amendment made within the terms of such clause would not necessarily require a subsequent assent by the Governor and Council.

It should be noted that the department may, in effect, nullify an approval of the Governor and Council by failing to act after it has obtained the necessary approval. For example, G. L. (Ter. Ed.) c. 81, § 8, provides that "not more than ten miles of state highway shall be constructed . . . in any one county in any one year, without the previous written approval of the governor and council." An aproval to construct more than ten miles of State highway in one county in one year would not necessarily obligate the Department of Public Works to proceed with such construction.

In some instances, the approval of the Governor and Council constitutes the final act which may create a contract or may otherwise create rights in third parties. Under such circumstances, the department would not be in a position to nullify the approval of the Governor and Council by failing to act. In such cases, a binding contract or other right would have come into being which could be enforced against the department involved. The facts of any particular case would have to be examined to determine whether such a right had been so created. For example, a simple contract may come into being when both parties to the contract express their mutual assent. It may well be that the assent of the Commonwealth is finally indicated by approval of such contract by the Governor and Council. On the other hand, if the contract is a sealed instrument, approval by the Governor and Council may not be the final act which brings the contract into being because a sealed instrument ordinarily must be delivered in order to be effective. *Chandler* v. *Temple*, 4 Cush. 285; see Williston on Contracts, Rev. Ed. Vol. I, sec. 206.

In summary, where acts of departments, commissions, boards or similarly constituted bodies require the consent of the Governor and Council,

such bodies may act only in accordance with the consent granted. If it is desired to alter or amend the act approved, consent of the Governor and Council must be obtained for such amendment.

If the particular body fails to act after consent of the Governor and Council has been granted, ordinarily it cannot be forced to act unless (1) it is a body serving directly under the supervision of the Governor and Council, and the act is of such a nature that whether to perform it or not would be a proper matter for direction by the Governor and Council under its supervisory authority, or unless (2) the approval of the Governor and Council creates a contract or other obligation which may be enforced by a third party against the body involved.

It is hoped that the foregoing information will be helpful to you in the performance of your official duties. I realize that it is general in its nature, but you must appreciate that I can answer your question only on broad principles of law, since no specific question is asked with reference to any particular set of facts or circumstances. The answer to any particular question would depend upon the particular facts and circumstances which give rise to that question.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

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