Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1956

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

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The Commonwealth of Massachusetts

BOSTON, December 5, 1956.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1956.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
GEORGE FINGOLD

First Assistant Attorney General
FRED WINSLOW FISHER

Assistant Attorneys General

SAMUEL H. COHEN
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HARRIS A. REYNOLDS[4]
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BARNET SMOLA
NORRIS M. SUPRENANT
ANDREW T. TRODDEN

Assistant Attorney General; Director, Division of Public Charities
HUGH MORTON

Assistant Attorneys General assigned to Department of Public Works

VINCENT J. CELIA
FLOYD H. GILBERT
MAX ROSENBLATT
CHARLES V. STATUTI
DAVID L. WINER

Special Assistant Attorney General assigned to Department of Public Works
FRANK RAMACORTI

Assistant Attorneys General assigned to Metropolitan District Commission

JOHN V. PHELAN[5]
WILLIAM J. ROBINSON
JOSEPH H. SHARRILLO

Assistant Attorneys General assigned to Division of Employment Security

LAZARUS A. AARONSON
STEPHEN F. LOPIANO, JR.

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MILTON I. ABELSON
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Assistant Attorney General assigned to Veterans' Division
FRED L. TRUE, JR.

Chief Clerk to the Attorney General
HAROLD J. WELCH

Assistant Chief Clerk
RUSSELL F. LANDRIGAN

Administrative Legal Consultant to the Attorney General
JAMES J. KELLEHER

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[1] Appointed, Dec. 14, 1955.
[2] Resigned, Nov. 30, 1955.
[3] Appointed, Mar. 1, 1956.
[4] Resigned, Jan. 31, 1956.
[5] Resigned, Apr. 30, 1956.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1955, to June 30, 1956

Appropriations.

Attorney General's Salary	$15,000 00
Administration, Personal Services and Expenses	298,150 00
Claims, Damages by State Owned Cars	50,000 00
Small Claims	15,000 00
Veterans' Legal Assistance	18,940 00
Total	$397,090 00

Expenditures.

Attorney General's Salary	$15,000 00
Administration, Personal Services and Expenses	293,756 03
Claims, Damages by State Owned Cars	50,000 00
Small Claims	15,000 00
Veterans' Legal Assistance	18,792 94
Total	$392,548 97

Approved for publishing.

FRED A. MONCEWICZ,
Comptroller.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, December 5, 1956.

To the Honorable Senate and House of Representatives.

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

The cases requiring the attention of this department during the fiscal year ending June 30, 1956, totaling 17,444, are tabulated as follows:

Extradition and interstate rendition	137
Land Court petitions	212
Land damage cases arising from the taking of land:	
Department of Public Works	1,084
Metropolitan District Commission	215
Department of Mental Health	3
Department of Natural Resources	9
Department of Public Utilities	1
Massachusetts Turnpike Authority	2
Miscellaneous cases, including suits for the collection of money due the Commonwealth	4,560
Estates involving application of funds given to public charities	1,312
Settlement cases for support of persons in State institutions	30
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	155
Small claims against the Commonwealth	967
Workmen's compensation cases, first reports	5,382
Cases in behalf of Division of Employment Security	362
Cases in behalf of Veterans' Division	3,013

Introduction.

As the complexity of the administration of the public affairs of the people of the Commonwealth increases, there is necessarily a corresponding increase in the number of legal matters annually referred to the Department of the Attorney General. Each succeeding report to the Legislature shows an increase in the number of cases handled for, and opinions given to, the various agencies, commissions and other sub-divisions of the State government. The steadily rising arc of the administration of law in Massachusetts is readily evident in a comparison between 1946, when the department handled 10,976 items, and 1956, when the total was 17,384. The fact that this increased load has been disposed of expeditiously, and with no instance of complaint by anyone involved, can be traced directly to the energy and devotion to duty of the members of my staff, including the administrative and professional personnel attached to this department

as well as to the several Assistant Attorneys General, all of whom have performed their duties in a manner which merits the attention and commendation of the people of the Commonwealth.

Essentially, and in practical terms, the government of the Commonwealth comprises a large number of elected and appointed officials charged with the honest and prudent administration of a multi-billion dollar business. As its legal advisor, the responsibility of my department to this huge public enterprise falls into roughly 150 separate but integrated categories, including every conceivable field of the law. Obviously, it would be impractical to cover in detail in this report the many hundreds of routine matters which have passed through this department during the past fiscal year. However, as has been my custom in previous reports, there follows a brief discussion of certain matters of general public interest with which this department has concerned itself during the twelve-month period since my last report.

Criminal Division.

While it continues to be true that the vast majority of the problems with which the department must deal fall on the "civil" side of the law, it likewise has continued to be necessary to devote time, and qualified personnel to prevent Massachusetts from being threatened with the rising crime rate now confronting most of the Nation. Even since my last report to you, the national crime rate has shown an alarming rise of 18 per cent.

Our part in the continuing campaign to rid Massachusetts of crime has largely been in the form of frequent communication, formally or informally, individually and collectively, with all law-enforcement agencies, to exchange information and ideas.

I am happy to report that this practice has resulted in mutual confidence and assistance and an integration of crime-prevention programs. It is presently rare indeed when this office has occasion to assert its authority over any other law-enforcement agency.

The following are some of the highlights in the activities of the Criminal Division during the period of this report. Of necessity, they do not reflect all phases of the operation because many cases are still under investigation or in a stage where it is not in the public interest to include them in this report.

Armed Invasion of Homes. — The protection of the home and family is the primary concern of us all. As a result of the flagrant invasion by armed men, intent upon robbery, of a peaceful family group, and the brutal pistol whipping and slaying of a fine young man who attempted to protect his loved ones, I asked for emergency legislation increasing the maximum penalty for crimes of this type from 20 years to life. The General Court approved this measure and on May 28, 1956, it was signed into law. I anticipate a marked drop in crimes of this nature as the result of the increased penalty now in effect.

The "Brinks Case". — During the period covered by this report, eleven men who allegedly committed the multi-million dollar robbery of the Brinks counting house in Boston on January 17, 1951, were captured.

Prior to their apprehension, the Federal statute of limitations had expired, and the Massachusetts statute was due to run out a comparatively short time afterward. In anticipation of the eventual arrest of persons suspected of this crime, I initiated legislation extending the Massachusetts statute from 6 to 10 years. This law, by virtue of an emergency preamble, became effective in September of 1955, the same month in which it was introduced. Due to exemplary diligence on the part of cooperating law-enforcement agencies, the chief suspects in the Brinks case were rounded up shortly before the old statute expired. Nevertheless, the new law will remain on the books to serve in future cases involving holdups of banks or armored vehicles.

Forfeiture of Lottery Prize. — Following the conviction for perjury for a person who had won a prize in an illegal lottery, this office successfully invoked a long-forgotten statute (G. L. c. 271, § 14), on September 31, 1955, to accomplish the forfeiture of $6,000 of his illegal winnings. This money was turned over to the Treasurer and Receiver General of the Commonwealth.

Springfield Gaming Raids. — As a result of numerous complaints by citizens of Springfield, on April 5, 1956, following a long, painstaking investigation, simultaneous raids were conducted at a large number of locations where gambling activities were reported to exist. Fifty-nine persons were arrested, and 125 criminal complaints secured.

Public Health. — The widening illicit use of barbiturates, so called "tranquilizers" and "goof balls," may in the near future constitute a serious menace to public health and safety, especially when used in conjunction with alcohol, which is the case with increasing frequency. Our study of the situation shows that many highway deaths can be traced to the use of barbiturates.

In an effort to minimize the hazard, and in cooperation with police officers, I supported legislation to add four inspectors, a laboratory technician and a radio car to the Department of Public Health in order that they might cope more effectively with illegal activities in this sphere.

On the brighter side of this problem, I am happy to report that very recent advices from Federal agencies make it clear that the narcotics problem as it presently exists in this Commonwealth is minimal; our concern should be to keep it under continuing control.

Communism and Subversion. — Although seemingly dormant and impotent, international Communism continues to remain a major threat to the future of the Nation and the Commonwealth.

A United States Supreme Court decision of May 11, 1956 (*Pennsylvania* v. *Nelson*, 350 U. S. 497), effectively ended any prosecutions by the several States of persons accused of subversive activities, by its holding that the Smith Act, and similar legislation, had resulted in a Federal preemption of this field of law enforcement. This decision required the quashing of indictments pending in our Courts. *Commonwealth* v. *Gilbert*, 334 Mass. 71 and *Commonwealth* v. *Hood*, 334 Mass. 76.

Acting not only as Attorney General of Massachusetts, but also as Chairman of the Committee on Subversion of the National Association of

Attorneys General, I went to Washington to plead for legislation which would restore to Massachusetts and her sister States the fundamental right of self-protection against those who would overthrow established government by force and violence. The outcome of our efforts is conjectural at this writing. But, while our local Communist sympathizers are presently immune from prosecution in our own State courts, they will not be free from the searching spotlight of investigation and the referral of evidence so obtained to appropriate Federal authorities.

Censorship of Moving Pictures. — In the cases of *Brattle Films, Inc.* v. *Commissioner of Public Safety*, 333 Mass. 58, and *Times Film Corporation* v. *Commissioner of Public Safety*, 333 Mass. 62, the Supreme Judicial Court declared that the Commissioner of Public Safety could no longer withhold his approval of the Sunday showing of motion pictures, holding that G. L. c. 136, § 4, purportedly allowing such censorship, was void on its face as a prior restraint on the freedom of speech and the press, guaranteed by the First and Fourteenth Amendments of the United States Constitution.

Wiretap Bill. — In the interest of effective law enforcement at all levels of our State government, I caused my opposition to be recorded in the matter of proposed legislation which would curb the discretionary powers of the Attorney General and of the district attorneys to "tap" telephone wires in the course of criminal investigations. This perennial attempt to hamstring prosecuting officers in the performance of their duties has not yet been successful.

Public Defenders. — A basic tenet of the American code of justice is that every person accused of crime must have a fair trial; in many instances, in order for his trial to be completely fair, he must have competent legal counsel. Under our present Massachusetts statutes the courts are required to appoint counsel only in capital cases, G. L. c. 277, §§ 47, 55, and the Federal and State Constitutions require such appointment only in extraordinary circumstances. See *Allen* v. *Commonwealth*, 324 Mass. 558.

In order to close this gap, where justified and feasible, I sponsored proposed legislation calling for the appointment of public defenders in each county.

Extraordinary Writs and Similar Matters: Renditions; Pardon Recommendations. — A major part of the duties of the Criminal Division falls into the fields suggested above. Following is a brief statistical table showing its activities in such matters:

Defective delinquent cases	24
(This figure includes habeas corpus proceedings in Superior Court and petitions for discharge in the Probate Court.)	
Petitions for adjudication of sanity	5
Writs of mandamus	17
Writs of error	21
Writs of habeas corpus	23
(In addition to cases involving defective delinquents.)	
Writ of certiorari	1

Appeals (U. S.)	2
Extradition cases	137
(This figure includes demands from other States and requisitions by the Governor's office upon other States.)	
Recommendations on pardon petitions	155
Forms for charitable solicitations	71

Eminent Domain.

The duties of the Eminent Domain (or Land Damage) Division of this department have continued to expand enormously.

When I first assumed office, a tremendous backlog of cases had been built up — to the detriment of the prestige of the Commonwealth and of the harmonious relationship which should exist between the Commonwealth and its citizens, many of whom were incurring financial loss and material discomforts as a result of dilatory practices.

Shortly after I assumed office and following consultation with affected and interested groups, I initiated an immediate overhaul of the staff and procedures, which, I am pleased to report, broke the log jam. However, the increased tempo of both State and Federal highway programs makes it mandatory that there be no let-up in the division's effort to effect the quickest, most efficient settlements or judicial dispositions of land damage claims which may be most consistent with the best interests of the Commonwealth and its taxpayers.

As a guide to future planning, it might be well to point out that while the average dollar figure for pre-trial settlements has not risen unduly, there has been a sharp increase in awards to plaintiffs by juries.

This department has since January 23, 1953, to date processed, either through trial or settlement, 1,600 cases throughout the Commonwealth. The petitioners in these cases had claimed a total of $25,965,384.29. Awards to them totalled $13,560,544.88. The difference of $12,404,839.41 reflects the substantial savings effected; and for a truer picture there should be added to this amount an additional sum of $1,138,383.29, which represents interest payable if these cases had all gone to trial.

In full compliance with our responsibilities in this field of law, the Division of Eminent Domain follows the following procedures, enlarging upon them when necessary:

1. Investigation, processing, settlement or trial of these claims, including the filing of carefully prepared interrogatories, and conferences with employees and officials of the Department of Public Works and with real estate experts.

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

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

4. 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.

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

The most gratifying result of the more expeditious handling of land damage claims has been the renewal of the confidence of our citizens in our laws, our Legislature, our courts and our executive departments.

Youth Division.

The special Youth Division created by me in 1954 because of the problems of juvenile delinquency continues to be one of the most important activities of this office.

During the past year we have continued our policy of calling frequent meetings with district attorneys, police chiefs and juvenile authorities in an attempt to better understand the many factors which contribute to and complicate the lives of our future citizens.

A special meeting was held with the safety committee concerning the part that automobiles play in teen-age "gang wars" which occasionally flare up in Massachusetts. This committee consisted of Public Safety Commissioner Otis Whitney, Public Works Commissioner John Volpe, Registrar of Motor Vehicles Rudolph King, and the members of the Police Chiefs Executive Committee — together with members of the staff of this department. Plans were formulated which, it is hoped, will effect a marked reduction in such occurrences.

This year the division also aided in compiling a special report written by the special legislative commission studying the relationship between juvenile delinquency and the distribution and sales of publications portraying crime, obscenity and horror.

This year's annual Youth Conference, held in Springfield, brought together superintendents of schools, headmasters and principals and scores of teachers from all sections of the Commonwealth. It was known as the Educators Conference on Juvenile Delinquency. Renowned authorities on youth guidance from all parts of the nation were speakers and expressed their views on the youth problem.

Mr. James Bobo, chief counsel for the U. S. Senate Sub-Committee on Juvenile Delinquency, conferred with me on the problem as it relates to Massachusetts.

Also during the period of this report members of the District Court Judges Administrative Committee and various police chiefs met with me to study the problem of handling juveniles who are brought into court. As a result of this meeting, and with the full approval of all concerned, I have prepared and will sponsor legislation permitting judges to have a wider scope in handling the youthful offenders who are brought into court on minor charges.

Veterans' Division.

Although the memories of recent conflicts — World War II and the Korean action — are receding, there is no less need for this department's Veterans' Division which was as active this year as in any other since the peace was achieved.

During the fiscal year the Veterans' Division handled a total of 3,013 matters. This involved advice to veterans, their dependents, or survivors in matters relating to retirement, civil service, tax exemptions, pensions, education, and loans.

In addition, where appropriate and within our jurisdiction, assistance also was given to various veterans' organizations and State and local officials relative to their mutual problems.

An Assistant Attorney General also regularly sits with the Veterans' Bonus Appeal Board.

Division of Public Charities.

The proper and intended application of funds or property given or appropriated to public charities and the prevention of breaches of trust in their administration is a traditional function of the Attorney General, as well as being one of his duties under G. L. c. 12, § 8. Under the Division of Public Charities created by the General Court in 1954 (St. 1954, c. 529) on the basis of proposals made by me, this important function has been coordinated and centralized so that it may be handled in a modern, efficient and orderly manner.

The volume of the work is extremely large, and is increasing, due to the more exacting supervision made possible by this division. During the year the number of probate accounts filed by estates and trusts in which public charities were interested parties, and hence represented by the Attorney General, amounted to somewhat in excess of 2,200. In addition, there were petitions for appointment of trustees, for license to sell land, for instructions, for compromise, allowance of wills, the application of *cy pres* and other matters relating to the judicial process to which public charities were parties.

While the majority of these were matters of routine, many important cases involving large interests were carried through the courts.

A problem of bringing charitable funds forward from the past to the present was represented by a petition for *cy pres* in the trust created by Samuel A. Hitchcock of Brimfield, who died more than 100 years ago. The school founded by Mr. Hitchcock, due to changed conditions, had for some time been unable to function, but under a judicial decree dated January 3, 1956, a sum in excess of $400,000 will be put to work to help educate present-day boys and girls.

A case carried to the Supreme Judicial Court and decided December 1, 1955, was that of *Peakes* v. *Blakely*, 333 Mass. 281, in which this department, cooperating with counsel for the testator, was successful in persuading the court to sustain as a public charity a bequest of more than $250,000 to be used in trust to purchase and preserve wooded areas in the Charles River Watershed.

The department was likewise successful, in the matter of the estate of Mary L. Kirkman, who died a resident of New York State, in assuring that the town of Barnstable would receive the residue of that estate, estimated in excess of $1,500,000.

No small part of the usefulness of this division lies in the assistance and advice that it can offer to members of the bar in dealing with the problems presented to them in the handling of public charities. An indication of this is the increase in application for *cy pres,* to the end that idle funds are put to productive use.

Once again, I wish to express my very deep appreciation to the members of the bench and bar and those who handle public charities for their outstanding cooperation. Their aid and assistance has been invaluable.

Civil Defense.

Civil defense, even though no immediate threat to us exists, looms large. We still have powerful international enemies who view with envious eyes the peace and prosperity which prevails among us. This office acts expeditiously upon the requests of the Director of Civil Defense and his staff, functioning under St. 1950, c. 639, for the advice and assistance and upon the various executive and administrative orders relating to civil defense referred to us for approval.

Motor Tort Cases.

Under G. L. c. 12, § 3B, where any officer or employee of the Commonwealth, or of the Metropolitan District Commission, makes a written request that he be defended in an action for damages for bodily injuries or property damage arising out of his operation of a State-owned motor vehicle, this department takes over the management and defence of such suit.

During the past fiscal year 145 motor tort cases were disposed of either by settlement or trial.

Under the statute, a claim for personal injuries can be settled for a sum no greater than $5,000 per person for injuries or death, and a sum no greater than $1,000 for property damage. Of course, if there is no liability, the case goes to trial, as it also must where the demands of plaintiffs' counsel exceed the statutory limits.

Natural Disasters.

During recent years, Massachusetts has been struck with a series of brutal natural disasters in the form of hurricanes, tornadoes and floods. Usually, the waters had not started receding nor the wind to die down before the stricken area was subjected to another type of "flood" — that of swindlers out to exploit human misery and tragedy.

A striking example of this occurred during the floods of August, 1955. Hampering the superhuman and often heroic work of legitimate public and private relief agencies were spurious "rescuers" whose main objective was their personal enrichment. This department cooperated to the fullest possible extent with the local police in clearing them out of the disaster areas. We rapidly eliminated one operator before he even got

started. His scheme was found to be rounding up skid row derelicts, providing them with a bath, shave and clean clothes and then sending them around the streets and into offices with canisters to collect "flood relief" donations. Later it was conservatively estimated that the people of Connecticut and of other New England States lost over $1,000,000 through this technique.

Another racket was practiced by human vultures who descended on stricken communities to "repair" flood damage to chimneys and roofs at inflated prices which, in some cases, were 800 per cent over normal rates.

The lessons learned in dealing with this type of racketeer during the Worcester tornado were applied during the floods. To more effectively thwart the swindlers, and also to advise and assist wherever possible in such matters as evictions, sudden rent hikes, the moving of condemned structures, and the loss of mortgaged dwelling places, Assistant Attorneys General were dispatched to stricken areas with orders to remain as long as they were needed to protect the rights and property of citizens.

In addition, working with the Governor's office, the Civil Defense Agency and the Flood Relief Board, this department helped in the preparation of the necessary proclamations, legislation and regulations for prompt relief to the stricken municipalities.

Port of Boston.

This office drafted and helped negotiate a long-term lease with the United States of America for the wharves and piers of the Boston Army Base whereby $11,000,000 will be spent modernizing the facility, 90 per cent of which cost is to be financed by the Federal Government. When the renovations are completed, Boston will have one more major facility to help re-establish its prominence as a great world port.

Mental Health.

Under G. L. c. 123, § 96, suits for care, maintenance and support of patients in the State mental health institutions are commenced by the Attorney General and brought in the name of the Treasurer and Receiver General. During the last fiscal year, a total of 24 cases (most of which were suits that had been started) were settled and tried and the sum of $44,974.73 was collected in behalf of the Commonwealth. Numerous other similar cases are in the process of being settled or tried.

Workmen's Compensation.

This department, through an Assistant Attorney General, appeared before the Industrial Accident Board in approximately 350 cases during the past fiscal year. In addition to appearances on claims made by employees, this department pressed, where necessary for contributions under sections 65 and 65N of the Workmen's Compensation Act. This procedure has resulted in carrying out the intent of the Legislature in enacting these

sections, so that on June 30, 1956, there were balances of $86,396.73, in the "Second Injury Fund" (established by said § 65), and of $291,910.75 in the "Veterans' Second Injury Fund" (§ 65N).

The department also processed the following: Employer's First Reports of Injury, 5,832; Agreements for Compensation, 567.

In the payment of workmen's compensation benefits to injured State employees, there was expended under the provisions of G. L. c. 152, $557,882.57; payments to hospitals, $114,911.85; payments to doctors and nurses, $86,185.07.

Insurance and Motor Vehicle Appeal Board.

An Assistant Attorney General was assigned to attend all hearings of the Insurance Appeal Board and the Board of Appeal on Motor Vehicles Liability Policies and Bonds.

During the last fiscal year a total of 5,594 cases came before the boards. Types of appeals included cancellations and refusals, 5,118; registrar's decisions, 171; points, 305.

Actions against Justices of the Supreme Judicial, Superior and District Courts.

One of the duties of this department is that of acting as legal counsel for justices of the various State courts when so requested.

The unquestioned excellence of our courts makes such occasions extremely rare. When they do occur, and suits are brought on the civil side against one or more of the justices, reasons for the suits are usually ill-founded and intemperate.

During the period covered by this report, and for the first time in many years, a number of extraordinary actions, stemming out of a single basic factual situation and all handled by one lawyer, were brought against various justices, either in higher State courts or in the Federal courts. Two Assistant Attorneys General were assigned to these suits.

At the end of the fiscal year, most of these cases had been initially adjudicated favorably to the respondents. A few still remain to be disposed of.

Inland Marine Insurance.

During the past year two insurance companies incorporated in Pennsylvania, but licensed to write inland marine insurance here, attempted to issue, as such insurance, new policies insuring only certain dealers against risks.

The Commissioner of Insurance ordered that the policies be not issued, and the companies took the matter to the Supreme Judicial Court. An Assistant Attorney General was assigned to defend the commissioner and his order.

Because of statutory limitations placed upon each of the different charter types of insurance companies doing business in Massachusetts, the

effect of the policies which the two companies sought to issue would have been to give them an unfair competitive advantage over fire and casualty companies in the broad area of overlapping statutory authorization. The original order of the commissioner was affirmed by the Court. *Insurance Company of North America and another* v. *Commissioner of Insurance,* 334 Mass. 108.

The Highway Safety Act.

G. L. c. 90A provides for the assessment of "points" against the motor vehicle owners and operators found to be at fault in the operation of such vehicles on public ways. As originally enacted, it also provided for the application of "appropriate" premium surcharges based on points assessed against motor vehicles within the "private passenger" or "motorcycles, skoot-mo-biles and other similar vehicles" classifications.

Under the statute the Registrar of Motor Vehicles established a point system and the Commissioner of Insurance set a premium surcharge of $6 per point. The effect of the surcharge premium was the reduction on an average of $0.50 of the 1956 compulsory insurance rates.

The legislation proved unpopular although it had been designed to place the burden of the ever-increasing cost of compulsory insurance more appropriately upon the careless operator and/or owner and to give the prudent operator and/or owner some deserved relief. Several suits were brought against the registrar and the commissioner, some against only one or the other and some joining both.

An Assistant Attorney General was assigned to defend these suits. The main basis for these actions was the alleged unconstitutionality of the statute and the alleged abuse of discretion by the registrar and/or the commissioner.

Finally, two of these actions reached the full bench of the Supreme Judicial Court. *Winch* v. *Registrar of Motor Vehicles and Commissioner of Insurance,* 334 Mass. 271; *Gilmore* v. *Registrar of Motor Vehicles,* 334 Mass. 275.

Prior to the handing down of these decisions, the General Court had repealed those portions of the statute concerning surcharge premiums, leaving open in the cases only the allegations directed against the registrar. In each case, the court ruled in favor of the statute and of the actions of the registrar.

Judicial Survey Commission.

The report of the Judicial Survey Commission recommending sweeping modernization of our court system and its practices bids well rapidly to free the Commonwealth from the quicksand of an enormous backlog of untried cases — some of them going back over a period of four years.

I heartily endorsed and supported the court reform bill recommended by the commission — especially the proviso for the appointment of an

Executive Secretary to relieve the justices of the Supreme Court from administrative detail, and permitting them, for the first time in history, to devote the major portion of their time, energy and talent to clearing crowded dockets.

Discussion of this matter cannot be closed without expressing my belief that Massachusetts citizens now have a finer judicial system as a result of the wisdom and hard work of former Supreme Court Justice Louis S. Cox and those who served with him on the Judicial Survey Commission.

Contributory Retirement Appeal Board.

This board as provided by G. L. c. 32, § 16 (4), has continued the hearing and adjudication during the year of the appeals from decisions of the various retirement boards coming before it. These very often involve difficult questions both of law and fact, some of which eventually find their way into the courts which have, almost without exception, supported the action of the board.

State Contracts.

Pursuant to the provisions of G. L. c. 12, § 3, this department has scrutinized and approved, as to form, when proper, innumerable contracts for the construction of public works and otherwise for the various departments. This work is most vital, inasmuch as the contracts often involve the expenditure of millions of dollars and requires the patience and professional skill of more than one Assistant.

Springfield Branch Office, Department of Attorney General.

This office was officially opened on November 15, 1955, to serve the general public, attorneys, law enforcement officers and public officials of Western Massachusetts.

There have been permanently assigned to the office, two Assistant Attorneys General, one civil investigator, one State trooper for criminal investigations, and a secretary.

This office has served as a headquarters for Assistant Attorneys General from the Boston office who are in charge of specialized work. One of its most important functions involves the settling and trying of eminent domain cases in the geographical area which it serves.

The Assistant Attorneys General assigned in Springfield are members of the Motor Vehicle Insurance Appeal Board in Springfield and Worcester.

Town By-laws.

Under G. L. c. 40, § 32, before a town by-law takes effect it must be approved by the Attorney General. By this provision, which has been on the statute books for more than two centuries in one form or another, the benefit of trained, expert assistance is given the towns of the Common-

wealth to the end that unwise and unsound local legislation shall not become law.

It is my constant endeavor to see that prompt action is taken on proposed by-laws received by this office, in order that the townspeople may, without undue delay, conduct their municipal business.

An Assistant Attorney General is assigned to this work and during the year ending June 30, 1956, a total of 279 town by-laws were processed, representing a substantial increase over the previous fiscal year.

State Housing Board.

The functions of the Assistant Attorneys General assigned to the State Housing Board fall under seven 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 92 active authorities.
4. Review for approval of original and refunding note and bond issues.
5. Attendance at or conducting hearings involving contract disputes, making findings and writing decisions.
6. Litigation and trial work.
7. Review for approval of contracts for financial assistance.

During the last fiscal year, 26 opinions on general legal problems confronting it were submitted in writing to the State Housing Board; in addition, some 45 "legal advice memoranda" were so submitted.

In connection with various questions involving the purchase or sale of land, 64 memoranda were prepared, and 57 note issues, both original and refunding, involving borrowing of a cumulative total of $92,521,000, were reviewed and approved.

More than 300 hearings were attended or conducted involving contract disputes and otherwise, and in many, if not most, of these instances assistance was given in making findings in behalf of the board and writing decisions in conformity therewith. Some 18 contracts for financial assistance under St. 1954, c. 667, were reviewed and approved.

Employment Security.

This year the Assistant Attorneys General assigned to the Division of Employment Security, in addition to their regular duties, were called upon to handle all of the fraud cases in the legal department — these fraud cases stem from individuals who were drawing benefit checks while gainfully employed.

The Assistant Attorneys General reviewed all of the cases with a view toward establishing a fraudulent intent. After having established such intent, the violators were summoned, interviewed and given an oppor-

tunity to make restitution to the Division of Employment Security. As to those violators who refused to cooperate with this office, their files were prepared for criminal prosecution. Six such cases were so prepared and, of this number, three were in Middlesex County and the remaining three were in Worcester County.

The cases brought in Middlesex County were presented to the grand jury in June of 1955 and true bills were returned against all three defendants. They were arraigned on November 7, 1955, and all pleaded guilty. The court placed them on probation for one year and ordered them to make restitution. One of the defendants has paid his indebtedness in full, the remaining two are making payments to the probation officer of Middlesex County.

As to the cases brought in Worcester County, complaints were sought and obtained from the District Court of Worcester on October 14, 1955, and all three defendants pleaded guilty. They were sentenced to one month in the house of correction, suspended, and placed on probation and ordered to make full restitution on or before April 23, 1956.

The Assistant Attorneys General are now in the process of completing their investigation concerning the remaining violators in Worcester County and are commencing to interview violators from Essex County. When this work is completed, it is their intention to proceed as we have done in the cases above mentioned.

I and my staff have held many conferences with the various State officers, department heads and employees as occasion required and furnished advice where necessary.

As usual, I have, upon request of His Excellency the Governor, examined as to form and substance the various proposed legislative acts coming before him for action and have rendered my opinions relating to the same. This work is important and of necessity is given the most careful attention by me and my staff.

Conclusion.

As before stated, I have not attempted in this report to set forth in detail many of the activities of the department. It is sufficient to say that I have personally and with the help of my Assistants acted as the people's attorney throughout my administration. It is my sincere belief that the Assistant Attorneys General and the other members of the department have carried out their duties with dignity, ability and loyalty, not only to myself, but to the Commonwealth of Massachusetts.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

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OPINIONS.

Employment Security — Effect of Guaranteed Annual Wage Plan upon Right to Unemployment Benefits.

Aug. 1, 1955.

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

Sir: — You have requested an opinion regarding the so-called guaranteed wage plan of the kind recently adopted by the Ford Motor Company and the effect of such a plan upon our own unemployment compensation law. Your first question is:

"1. Does the receipt of benefits under the so-called Guaranteed Annual Wage Plan, of the kind recently adopted by the Ford Motor Company for payment of supplemental unemployment benefits to certain of its employees, prevent the receipt by such employees, while unemployed, of benefits under Massachusetts Employment Security provisions in G. L. c. 151A?"

In my opinion, and for the reasons set forth in detail below, the answer to the above question is in the negative.

The Ford Plan, commonly called a "guaranteed annual wage" plan, is entitled "Supplemental Unemployment Benefit Plan." This is an accurate title because the Plan provides for payment of benefits only if the applicant had theretofore "received a state system unemployment benefit." Art. V, § 2 (*b*) (3). The supplemental payments under the Plan are made by two trusts established under the Plan for such purpose. Art. II. The funds in the trusts come from contributions by the company at the rate of five cents per hour for which the company has paid its employees. Art. IV. The trust funds can be paid only to persons eligible under the Plan (Art. V), or for expenses of administration of the Plan (Art. XII), and can in no event revert to the company. Art. XI, § 8 (*b*). Although the company's contributions to the trusts are figured upon five cents per hour for all paid time, the employees whose hours of pay have been counted will not receive benefits in proportion to their pay, and in fact may never receive any benefits at all. The Plan gives them a right in the future to receive certain possible benefits, in varying amounts, and in exchange for certain "credit units" they have accumulated (Art. VI), but only if they meet the rigid standards of eligibility set forth in Art. V. The "Status of Person Receiving Benefits" is set forth in Art. XI, § 9, as follows:

"Neither the Company's contributions nor any Benefit paid under the Plan shall be considered a part of any employee's wages for any purpose. No person who receives any Benefit shall for that reason be deemed an employee of the Company during such period, and he shall not thereby accrue any greater right to participate in, accrue credits or receive benefits under any other employee benefit plan to which the Company contributes than he would if he were not receiving such Benefit."

Your question presents the problem whether a person otherwise eligible for unemployment benefits under the Massachusetts Employment Se-

curity law, G. L. c. 151A, loses such entitlement because of his right to the supplemental unemployment benefits under the Plan described above.

The Massachusetts law provides for payment of benefits to eligible persons who are "in total unemployment." § 29 (*a*). Section 1 (*r*) (2) states that a person —

"shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration. . . ."

It is clear, since the Ford supplemental benefit is paid only during unemployment, that the individual "performs no wage-earning services" for that period.

Nor can it be said that the week of unemployment is a week "for which" the individual receives "remuneration." It is true that he is entitled to a supplemental benefit during that week under the Plan, but there is considerable doubt as to whether such benefit is "remuneration" or "consideration" as defined in our statute; and even if it were so included it was "remuneration" or "consideration" earned at some earlier period during which the individual was working. The statute covers this situation by the definition in § 1 (*r*) (3):

"For the purpose of this subsection, 'Remuneration', any consideration . . . received by an individual . . . for services rendered. . . . Remuneration shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks, including any fractions thereof, to which it can reasonably be considered to apply. . . ."

The second alternative, that the "remuneration shall be deemed to have been received . . . for such week or weeks . . . to which it can reasonably be considered to apply," is not an alternative to be used, in the discretion of an administrative officer, if the week or weeks in which such remuneration was earned is in fact known. *Kerr* v. *Director of the Division of Employment Security,* 332 Mass. 78. *In re Public Ledger, Inc.,* 161 F. 2d 762, 773, and note. Our court stated in the *Kerr* case (p. 81):

"If the sum paid was 'consideration' received from his employing unit at all it would seem that it must have been 'earned' during the many weeks while Kerr was at work for the company and not after he ceased work, and must be 'deemed to have been received' in the 'weeks in which it was earned.'"

By definition in § 1 (*r*) (3) ,"remuneration" also includes "any consideration . . . received . . . as severance payments, dismissal pay, or vacation allowances." In my opinion, the supplemental unemployment benefits provided under the Plan do not come within any of these three terms. There is no "severance," no "dismissal," no "vacation." The Plan itself uses the phrase "on layoff," and this is one of the requirements for eligibility. Art. V. The benefit provided for is called an "unemployment" benefit. Such a payment is not one covered by the above-quoted provision in § 1 (*r*) (3).

Accordingly, the right of a person otherwise eligible for Massachusetts benefits to receive supplemental unemployment benefits under the Ford Plan does not establish that such person is not "in total unemployment."

Another reason why entitlement to such supplemental benefits does not prevent payment under our Massachusetts Employment Security Act

is that such benefits are payment to the unemployed person "of his money to which he was entitled as a beneficiary of the trust." *Kerr* case, p. 81. The payments under the Ford Plan are from trusts. The funds in the trusts are contributed in the first instance by the company. The employees are the beneficiaries of such trust. The company is not a beneficiary. The company can receive no benefit in any way from such funds. An unemployed person's claim to payment from the trusts is a claim as a beneficiary, not as an employee. At no time was the money which is now in the trusts in the hands of the employee, nor was he ever entitled to such money. The money was never payment to him as wages, nor can the money be considered to be wages even though based upon an amount of five cents per hour of work. The description in the *Kerr* case, p. 81, of the trust passed upon there, is equally applicable to the trust in the present case. The conclusion in the present case is similar, that the payment of supplemental unemployment benefits to an unemployed person is merely the payment to him "of his money to which he was entitled as a beneficiary of the trust." And, again, "The case is not so greatly different from one in which an employee through a series of years makes regular deposits out of his wages in a savings bank and then withdraws the sum deposited when his employment ceases."

For the above reasons, the right to receive supplemental unemployment benefits under the Ford Plan, during a week in which an individual is in fact unemployed and while he is otherwise eligible for Massachusetts benefits, does not prevent the receipt by such person of the benefits provided by G. L. c. 151A. Your first question is therefore answered in the negative.

The above answer is based upon the exact language appearing in our Massachusetts statute. Similar conclusions, that the Plan does not prevent payment of State unemployment benefits, have been reached in Michigan and in Connecticut by rulings of their Attorneys General. See full opinions in 36 Labor Relations Reporter, July 18, 1955, pages 439–452. Those rulings, of course, were based upon statutes which differ in language and coverage from the Massachusetts law, and the reasons assigned for those two conclusions cannot be used to support the similar conclusion which I have set forth above. Other rulings in the same general field are collected in the Benefit Series Service published by the U. S. Bureau of Employment Security; but in each instance the decision is based upon language not identical with the language in the Massachusetts statute.

You also request an opinion upon two other questions, as follows:

"2. What effect, if any, do the provisions for payment of supplemental unemployment benefits under the so-called Guaranteed Annual Wage Plan have upon the payment of benefits under G. L. c. 151A?"

"3. Is new legislation necessary in Massachusetts in connection with such Guaranteed Annual Wage Plan?"

As to your second question, I answer "None." I cannot see, upon the facts which have been made known to me, how the Ford Plan, or any similar plan, can affect the payment of benefits under G. L. c. 151A. One situation is covered by your first question, which I have answered at length above. If questions presenting radically different situations should arise, I will be pleased to rule on them at such time.

My answer to your third question is "No." New legislation certainly is not "necessary." However, such legislation would not be inappropriate, and even would fit in logically with the present scheme of our statute. For example, see § 1 (*s*) (4) which excludes from "wages" payments to employees as beneficiaries under certain stock bonus trusts. But as to possible new legislation I would suggest the matter be further studied by the persons who are responsible for the direct administration of our own statute. Payments under the Ford Plan will not begin until July, 1956. Prior to such date new legislation, if advisable, could be considered and framed to meet all necessary situations, including similar plans by other companies, without limiting it to the one matter which you have presented to me.

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

Tidewater Lands — Right of Department of Public Works to license Construction where Title to Land is in Question.

AUG. 10, 1955.

Hon. JOHN A. VOLPE, *Commissioner of Public Works.*

DEAR SIR: — You have recently asked my opinion as to the power of your department, acting under G. L. c. 91, to grant a license to an individual in Nantucket to dredge and construct certain structures in tidewater on land as to which the ownership "is in question."

General Laws, c. 91, § 14, provides:

"The department of public works may license and prescribe the terms for the construction or extension of a wharf, pier, dam, sea wall, road, bridge or other structure, or for the filling of land or flats, or the driving of piles in or over tide water below high water mark, but not, except as to a structure authorized by law, beyond any established harbor line, nor, unless with the approval of the governor and council, beyond the line of riparian ownership. . . ."

The right of the department to issue a license under § 14 is based upon the implied assumption that the land either is owned by the Commonwealth, *i.e.*, it is "beyond the line of riparian ownership," in which event the statute requires "the approval of the governor and council," or it is owned by the applicant or at least the applicant has a right, if a license is granted, to place the structure on such land. Two conclusions follow from this interpretation. First, the section does not give the department power to license one person to place a structure on land of another person. Such a license would necessarily lead to friction, trespass and litigation. The issuance of a license under such circumstances would be unreasonable. If such a structure is essential, the result could be reached lawfully by purchase, or by a public taking. Secondly, the section does not forbid the issuance of a license merely because the applicant has not had his land registered, or because he has not presented a conveyancer's certificate of perfect title, or because there is some frivolous claim to the land made by another person. In other words, the assumption that the applicant is the owner or has a right to use the land does not require the department to "adjudicate" title, nor does it mean that the issuance of a license

is in effect an adjudication or guarantee of good title. See *Chelsea Yacht Club* v. *Mystic River Bridge Authority*, 330 Mass. 566.

The above two conclusions or interpretations cover the two extremes, and are required as a matter of common sense. But a whole array of situations exists between these extremes. Section 14 gives the department discretion whether or not to issue a license. The department "may license" the work which the applicant desires to do. The exercise of this discretionary power should be based, among other things, upon the nature of the applicant's title or right. If the applicant's title or right turns out to be good, the exercise of discretion by issuing a license would be confirmed. If the applicant's title or right turns out not to be sufficient, the adverse claimant has his remedy in a petition to enjoin trespass. See *Scullin* v. *Cities Service Oil Co.*, 304 Mass. 75.

Under the circumstances of the present case, and for the reasons above set forth, it is my opinion that your department has discretionary power to issue the license in question to the applicant. Whether or not you should exercise your discretionary power to issue such license is an administrative decision which you must render. No question of law is presented. The matter calls for an administrative decision, based upon your experience and judgment and upon your evaluation of all the circumstances, including the question of the title or right of the applicant.

Furthermore, a license could properly be issued by the department under § 14, notwithstanding a dispute in title, if all persons claiming a possible interest consented. As pointed out above, the existence of some other claim to the land is not an absolute bar to the issuance of a license, it merely presents a question whether or not your discretionary power should be exercised. If the consent of all claimants is given it would seem that there would be no basis upon which the department, solely from the point of view of disputed ownership of the land, could exercise its discretion against the applicant.

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

Public Building Construction — Bid Statute — Notice of Intention — Unit Prices — "Extra Work" or "Alteration."

AUG. 12, 1955.

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

DEAR SIR: — You have requested my opinion on questions relating to proposed payments to V. Barletta Co. for certain work on the John F. Fitzgerald Expressway as follows:

"1. If a contract contains unit prices, may the department which executed the contract using such unit prices authorize additional work not included in the original contract without filing a Notice of Intention as required by G. L. c. 29, § 20A, provided the additional work is based on the same unit prices?"

"2. Does the extension of the substructures and surface roads by V. Barletta Co. come within the provisions of extra work as set forth in G. L. c. 29, § 20A?"

"3. May payment be made to V. Barletta Co. for work done between High Street and Oliver Street when the Department of Public Works has not filed a Notice of Intention as set forth in G. L. c. 29, § 20A?"

From information contained in your letter and from other sources, including an examination of Contract No. 5071, Alteration Order No. 2, Extra Work Order No. 14 and related plans and specifications, it appears that in the opinion of the Department of Public Works it became necessary and expedient to redesign the southerly end of this project. The change involved eliminating a portion of the work as originally planned and substituting therefor a ramp and related structures not called for at this location under the original plans. The change was made necessary by a change in the proposed layout further to the south where the Expressway was to be placed under ground rather than continued as an overhead structure. The final structure extended a relatively short distance beyond the original southerly end of the project as originally planned. The contract price for the entire project was $3,647,577.45. The work involved in the change is covered by Alteration Order No. 2 in the sum of $318,459.85 and by Extra Work Order No. 14 in the sum of $24,552.50, both dated December 6, 1954.

It is my understanding that Notice of Intention as required by G. L. c. 29, § 20A, was duly filed by the Department of Public Works on Extra Work Order No. 14, but that no Notice of Intention was filed as to Alteration Order No. 2, it being the contention of the department that all of the items of work covered by Alteration Order No. 2, being covered by unit price items in the basic contract, constitute alterations as to which a Notice of Intention is not required.

As the question has not been expressly raised in your request, it is assumed but not decided, that the work here in question either fell within the scope of the contract, or was necessary for the proper completion of the project as originally planned, and was not a change so complete in nature and so substantial in amount that it amounted to a new contract which would require advertising and bids under the Fair Bid Statute. See *Morse* v. *City of Boston*, 253 Mass. 247, 254.

If the work here in question is within the general scope of the contract, it must be either an "alteration" or "extra work." As between the Commonwealth and V. Barletta Co., this question should be determined by reference to the contract which is found to contain the following general definitions in Article 1 of the "Standard Specifications for Highways and Bridges, 1941 Ed." incorporated in this contract by reference.

"Alteration" — "Change in the form or character of any of the work done or to be done."

"Extra Work" — "Work or materials for which no price agreement is contained in the contract and which is deemed necessary for the proper completion of the improvement."

The definition of "alteration" quoted above must be taken to refer to "any of the work done or to be done" as described and limited by the special provisions, plans and detailed specifications. Broadly, this would restrict "alterations" to those things which lie within the original scope of the work "done or to be done" as defined in the particular contract under consideration.

By contrast, the definition of "extra work" carries the implication that

the work in question was not anticipated and was not called for by the plans and specifications, but was deemed necessary to complete the project.

Articles 22, 23 and 80 of the Standard Specifications also refer to alterations and extra work but relate to the general subject of payment therefor and not to the definition or classification of the work involved.

However, it has been held that parties to a contract may not by provisions such as Article 22 avoid the consequences of statutory provisions designed to limit and control the authority of public officers to enlarge contracts without complying with statutory requirements. *Morse* v. *City of Boston*, 253 Mass. 247, 254.

Consequently, recourse must be had to general definitions of the words "alteration" and "extra work." In a case involving a statute dealing with "alterations" as distinguished from "repairs," the word "alteration" was defined by the Massachusetts Supreme Judicial Court in *Boston & Albany R.R.* v. *Department of Public Utilities*, 314 Mass. 634, at page 637, as follows:

"An alteration when used in reference to a structure usually denotes a change or substitution made in a particular part of a structure of such a substantial nature as to make the structure itself or an important part thereof materially different from what it formerly was."

Cases from other jurisdictions agree in the general definition of an "alteration" as a modification in some details, leaving the general purpose and effect of the original contract unchanged.

On the other hand, an "extra" is generally defined as work not contemplated or required by the original contract and which the Commonwealth could not require the contractor to perform without additional compensation, as in *Russo* v. *Charles I. Hosmer, Inc.* 312 Mass. 231, 234, or *United States* v. *Matthew Cummings Co.* 27 F. Supp. 405 (U. S. Dist. Ct., Mass.). And further, such "extra work" must be necessary to the satisfactory completion of the basic contract, but cannot amount to new work not awarded under the bid statute. See *Morse* v. *City of Boston*, 253 Mass. 247, 254.

Question No. 1, because of its broad assumptions, is here treated as a general question not limited to the facts of Contract 5071 with V. Barletta Co. The words "additional work not included in the original contract" are here understood to relate to work beyond the scope of the original contract and not to mere changes in detail in accomplishing work to be done as limited by the contract. In that sense, "additional work not included in the original contract" is "extra work," provided also that it was in fact necessary to the completion of the original project in a satisfactory form. For such work, a Notice of Intention would be necessary. However, the fact that the contract contains unit prices, and that the "additional work" is based on the same unit prices is not controlling in determining whether "additional work" is an "alteration" or "extra work," and in some instances may not even be material, as where the "additional work" constitutes such a change in the contract as to be beyond the scope of the contract as originally written. See *Morse* v. *Boston*, 253 Mass. 247, 254. As so construed, the answer to Question No. 1 is "No."

Question No. 2 is construed as asking whether in my opinion "the ex-

tension of the substructures and surface roads by V. Barletta Co." under Contract No. 5071 was "extra work" so that Notice of Intention would be required under G. L. c. 29, § 20A. In the first place, I am of the opinion that the work here in question must be treated as a whole and is not properly divisible into separate parts depending solely upon whether the various items of work were or were not, by chance, covered by unit price items in the contract. Each single item was but a part of a single major change in the design of the southerly end of the project. Consequently, the entire change must be treated either as an "alteration" or as an "extra" for the purposes of G. L. c. 29, § 20A. If the change was merely one of detail in performing the work, within the scope of the contract, then it is an "alteration;" but if the work amounts to something which the contractor could not have been required to do under the terms of the contract as originally written, but was necessary to the satisfactory completion of the project, then it is "extra work."

However, whether the "extension" here involved, treated as a whole, is an "alteration" or "extra work", remains a technical question of fact to be determined by the department having administrative jurisdiction over performance of the contract, although such determination should be made within the bounds of the legal principles hereinbefore set forth. The function of this department is to advise on questions of law and not to make findings of fact on matters of an administrative nature lying within the jurisdiction of another department.

Consequently, the answer to Question No. 2 is that Notice of Intention under G. L. c. 29 § 20A, must be given if the Department of Public Works determines that the entire change here involved was "extra work," but need not be given if that department finds that such change was an "alteration" as defined above.

Question No. 3 relates to the validity of making payment to V. Barletta Co. for work done on the "extension" here involved. Whether a Notice of Intention must be filed depends on the answer to Question No. 2. As indicated therein, a Notice of Intention would be required only if the work is found to be an "extra." The fact that part of the work was between High Street and Oliver Street, beyond the original southerly terminal point specified in the contract, is not controlling, but is merely one of the facts to be considered in making the ultimate finding of fact.

It also appears to be established that, in the absence of specific statutory authority giving the Comptroller the right of review on questions of fact, he has no power to review or reverse findings of fact within the jurisdiction of another administrative department. See *Lenox* v. *Medford*, 330 Mass. 593, where the court said at page 595:

"But we think that the powers of a city auditor do not extend to revising the findings of fact of other administrative officers on the ground that they were not warranted by the evidence."

The duties of the Comptroller in regard to the payment here involved are defined in G. L. c. 7, § 13, so far as here material, as follows:

"The comptroller shall examine all accounts and demands against the commonwealth. . . . He may require affidavits that articles have been furnished, services rendered and obligations incurred, as claimed. Such affidavit for any office, department, commission and institution shall be made by the person authorized to incur such obligation. . . . if it appears

to him that there are improper charges in said accounts or demands he shall report the same to the governor and council, with a separate certificate therefor. . . ."

It would appear from said § 13, that, in the event the Comptroller does not concur in the finding which may be made by the department, and believes that the charges are improper in any regard, he must report that fact to the Governor and Council, presumably for their final scrutiny and determination.

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

Debt Pooling Plans — Legislative Declaration of what constitutes "Practice of Law."

AUG. 18, 1955.

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

SIR: — You have submitted to me for examination and report enacted bill numbered House 2717, as amended, entitled "An Act relative to Debt Pooling Plans."[1]

The present bill is an amended form of this same numbered bill as to which I advised you, under date of June 1, 1955, that the bill was unconstitutional. The bill now appears in an entirely new form. In my opinion, the change in form has cured the objections which I pointed out in my former letter.

The new bill amends that portion of G. L. c. 221 which relates to attorneys at law. The amendment is made by adding a new section numbered § 46C after the present § 46B. The present bill relates to "debt pooling plans," so called, whereby a debtor deposits funds with another person under an agreement with the other person that the latter will arrange payments or other distributions to the creditors, to the end that the debtor will not continue to be subject to suits, demands, attachments and the like. The bill which has been presented to you for signature states that "the furnishing of advice or services for and in behalf of a debtor" in connection with such a debt pooling plan "shall be deemed to be the practice of law." The section then provides that any person other than a lawyer who "furnishes or offers to furnish any such advice or services" shall be punished by a fine or imprisonment or both.

The statement of the Legislature that the furnishing of such advice or services "shall be deemed to be the practice of law" does not establish this as a fact if such a declaration is itself contrary to fact. However, such declaration by the Legislature that the furnishing of such advice or services constitutes the practice of law is a reasonable one. It is my opinion, having in mind the exact nature of the services which are necessary to a debtor who is pursued by creditors and their lawyers, and who desires to have such claimants call off their legal actions and accept pro rata payments, that furnishing such services and advice probably does constitute the practice of law both as a matter of fact and as a matter of law. Furthermore, this conclusion is the one which has been adopted and acted

[1] Approved by the Governor on August 22, 1955, to become chapter 697 of the Acts of 1955. The act was declared constitutional in *Home Budget Service, Inc.* v. *Boston Bar Association*, Mass. Adv. Sh. (1957) 23.

upon for some years by bar association committees which have studied into the matter, and is supported by the positive opinion of numerous leaders of the bar. Although the Legislature cannot make something a fact if it is not so, the members of the Legislature must always base their new statutes upon an assumption that certain facts exist, and I believe that the assumption made in this proposed bill is a reasonable one. Certainly, it is not within the province of the executive branch of the government to deny this statement of fact.

"The judicial department is necessarily the sole arbiter of what constitutes the practice of law." *Lowell Bar Assn.* v. *Loeb*, 315 Mass. 176, 180, citing *Opinion of the Justices*, 289 Mass. 607, 614. Nevertheless, the Legislature, while it may not permit non-lawyers to practice law, may enact laws convenient "to enable the judicial department properly to perform" its duty. *Opinion of the Justices*, 279 Mass. 607, 611. Such assistance is rendered by this proposed law in that it will enable the Attorney General and others to call to the court's attention debt pooling arrangements that may be found to involve the practice of law.

The bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

*Lord's Day — Licensing by Commissioner of Public Safety of Motion Pictures and Entertainments.**

AUG. 22, 1955.

Hon. Otis M. Whitney, Commissioner of Public Safety.

DEAR SIR: — You have requested an opinion as to the effect upon certain sections of G. L. c. 136 of the recent decision of the Supreme Judicial Court in *Brattle Films, Inc.* v. *Commissioner of Public Safety*, 333 Mass. 58.

That decision establishes only the two following basic propositions:

1. That motion pictures fall within the protection of the free-speech, free-press guaranties of the First and Fourteenth Amendments to the Federal Constitution.

2. That, therefore, G. L. c. 136, § 4, is unconstitutional and void "as applied to the plaintiff in the circumstances set forth in the bill of complaint," since it purports to require "advance scrutiny by governmental authority" as a prerequisite to the effectiveness of a license for a public Sunday showing of a motion picture.

It does not definitively decide that said § 4 is invalid for any reason other than because its provisions constitute a "prior restraint on the freedom of speech and of the press"; indeed, the court expressly refuses to make any determination as to "whether § 4 is also void for indefiniteness." While, at one point in the opinion, the court says that the statute is "void on its face" (p. 811), the rescript declares explicitly that it is unconstitutional only "as applied to the plaintiff in the circumstances set forth in the bill

* See related opinion, on page 94 of this report.

of complaint." Moreover, in *Times Film Corporation* v. *Commissioner of Public Safety*, 333 Mass. 62, the same justice who wrote the *Brattle* decision refers to it as determining only that "§ 4 is unconstitutional *as applied to the facts in that case*."

Hence, in my opinion, the *Brattle* case invalidates said § 4 only as it makes "advance scrutiny by governmental authority" a prerequisite to the exhibition on Sunday of motion pictures and, by necessary implication, of such other forms of entertainment as may also fall within the free-speech, free-press area protected by our Constitutions. The statute has to no extent been challenged in its applicability to entertainments which cannot be seriously thought of as entitled to that protection; it remains upon our books, and still has full effect, for example, as to musical entertainments required to be licensed under its terms, and there is no question that you still have the duty of approving or disapproving such entertainments thereunder.

However, I am of the opinion that you now have no duties to perform under said § 4 as to motion pictures and the like. The court has clearly stated that you may not constitutionally withhold your approval and so prevent the showing of motion pictures on Sundays, and it would seem necessarily to follow that, whatever other procedures exhibitors must follow in order legally to make such showings, they need no longer make any application to you.

The foregoing sufficiently answers your first two questions.

You inquire also whether the *Brattle* decision in any way affects § 4A of said c. 136. That section provides for the granting of licenses by municipal authorities for certain Sunday activities at amusement parks or beach resorts, and contains the proviso that such licenses shall not be effective without your written approval "as provided in the case of public entertainments under section four." Since none of the activities required to be licensed and approved by § 4A can be considered as falling within the area of free-speech or free-press, my answer to this question is in the negative. As above stated, the *Brattle* decision does not purport to invalidate said § 4 for any purpose other than to protect First Amendment rights.

Your final question is as follows:

"4. If §§ 3 and 5 of c. 136 are still in effect, does the decision of the Supreme Court in the case of *Brattle Films, Inc.* v. *Commissioner of Public Safety* mean that at the present time it is illegal to hold on the Lord's day any of the entertainments which were provided for in § 4?"

In my opinion, § 5 of said c. 136 does not prohibit the Sunday entertainments regulated by §§ 2 through 4B, inclusive, of said chapter; therefore, so far as said § 5 is concerned, I advise you that none of "the entertainments which were provided for in section 4" is prohibited thereby.

Section 3 of said chapter provides that "Whoever . . . maintains . . . any public entertainment on the Lord's day . . . unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance *and duly licensed as provided in the following section* . . . shall be punished. . . ." Even if it be assumed that the effect of the *Brattle* decision, invalidating § 4 as to motion pictures, is to strike down, also, the words of said § 3 which are italicized, what would then be left of the statute would exempt from any prosecution thereunder a person who exhibits a motion picture which is "in keeping with the

character of the day and not inconsistent with its due observance." Most motion pictures would, of course, meet this test, and, if they did, could "legally" be shown. If local licenses are still required for Sunday motion pictures, said § 3 would, of course, not bar their exhibition under such a license.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Public Health — Standards of Purity of Foods — Administrative Decision made Five Years after Public Hearing.

AUG. 24, 1955.

SAMUEL B. KIRKWOOD, M.D., *Commissioner of Public Health.*

DEAR SIR: — You have requested an opinion in connection with the issuance of rules and regulations under G. L. c. 94, § 192.

It is provided in said § 192 that your department

". . . after public hearing . . . may adopt standards, tolerances and definitions of purity or quality or identity."

You inform me that a public hearing was held on November 8, 1950, with regard to standards, tolerances and definitions of purity, quality and identity for so-called still juices, such as nectars, fruit drinks, fruit ades and imitation fruit drinks as opposed to carbonated drinks. You also advise me that "the definitions for nectars, fruit drinks, fruit ades and imitation fruit drinks were quite controversial," and you further state that such problems are "as yet unsolvable."

Upon the above facts you request an opinion on the following question:

"The question is whether or not the department, that is the Commissioner and Public Health Council, may at this date, take final action of adoption based on those hearings held on November 8, 1950."

In my opinion the answer to the above question is in the negative. The statute makes it clear that the adoption of such standards, tolerances and definitions would be unauthorized if there were no public hearing. I think it is equally clear that the adoption of such standards, tolerances and definitions, based upon a public hearing duly held, say, some thirty years ago, would also be unauthorized. After such an undue lapse of time it could not be said that the regulations adopted had any reasonable relation to the earlier public hearing. The question presented in your case is a more difficult one, that is, whether a delay of five years between the public hearing and the adoption of regulations would make the regulations unlawful. I am inclined to think that such a delay is too much. From the information contained in your letter and enclosed material I understand that the definitions in this field are controversial, that various new juice mixtures are being brought into the Commonwealth, and that the parties now interested in these standards, tolerances and definitions would be entirely different parties from those who had an opportunity to attend your hearing five years ago.

It is possible, if you now adopt regulations based upon the 1950 hearings, and if you succeeded in establishing in probable future litigation attacking the validity of such regulations that the circumstances existing today are the same as those which existed at the time of your 1950 hearing, that such regulations would be upheld. On the other hand, and based upon the information contained in your letter and enclosures, it seems to me unlikely that you could establish that the present situation is the same as it was five years ago. Certainly you could not establish that the parties interested in the matter today are the same as the parties who could have attended your hearing five years ago.

The requirement of a "public hearing" is basic. What constitutes a public hearing is a matter of interpretation, and the question of a long delay between the hearing and the regulations flowing therefrom would be an element for consideration. Upon the facts as you have presented them to me, it is my opinion that regulations in this field issued five years after a public hearing, would be held, in case of attack in the courts, to be invalid because of the unreasonable lapse of time between the hearing and the regulations.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Municipality — Right to appropriate Money for Land for Armory.

SEPT. 8, 1955.

MR. HERMAN B. DINE, *Director, Division of Accounts.*

DEAR SIR: — In your recent letter you pose the following question:

"Do Massachusetts municipalities have authority to appropriate money for the acquisition of land for an armory?"

I answer your question in the affirmative.

It is true, as you state, that in G. L. c. 33, § 28, aldermen or selectmen shall provide in certain instances an armory. It is further provided in § 30 of said chapter that the aldermen or selectmen shall provide, under certain conditions, suitable grounds for parade, drill and small arms practice. Later in § 30, it is stated that cities or towns where headquarters, command or detachments of the organized militia are permanently stationed may raise money by taxation or otherwise for the acquisition of land for drill and parade grounds or ranges for small arms practice and for complying with that section and § 28. These provisions were repealed by St. 1954, c. 590, entitled "an act revising the military laws of the commonwealth."

Section 1 provides as follows: "The general laws are hereby amended by striking out chapter 33 and inserting in place thereof the following chapter: —"

It is a well established rule of statutory construction that where there is a general revision of the laws relating to a given subject the provisions of the new act will be construed as continuations of the previous legisla-

tion so far as consistent therewith. *See* v. *Building Com'r. of Springfield*, 246 Mass. 340. *Carter* v. *Burgess*, 323 Mass. 295.

Chapter 590 inserts 135 sections in c. 33 in place of the earlier provisions, 12 of which deal with the subject of "armories, air installations and armory commissions."

The new § 117 provides that "cities and towns *shall* provide for units of the armed forces of the commonwealth not provided with a state armory or air installation and permanently stationed within their limits, adequate *facilities* including a suitable hall for the purpose of drill and suitable rooms properly equipped . . . for administrative work and for the safe keeping of military property. They shall provide for such facilities necessary fuel, lights, water, janitor service and necessary repairs . . ."

Section 117 further provides for a forfeiture to the Commonwealth of a sum not exceeding $5,000 for each year of failure to comply with this section.

Section 118 provides for the payment by the Commonwealth of an agreed rental for each armory maintained by the city or town.

Section 119 provides for the presentation by the municipal authorities of a city or town to the State Quartermaster of an annual bill for the rent of an armory, air installation or adequate facilities furnished. Section 119 also provides that such bills shall give the designation and location of each armory.

Section 120 provides that when any armory is furnished by the Commonwealth in any city or town the adjutant general shall notify such city or town where such armory lies "and thereupon all obligations of said city or town as to said armory . . . shall cease . . ."

Section 121 requires cities and towns to provide suitable outdoor ranges for small arms practice under penalty of a heavy annual forfeiture to the Commonwealth. Said section authorizes the acquisition by cities and towns of land for ranges by purchase for eminent domain and the raising of money for this purpose by taxation and otherwise.

Section 122 (*a*) contains innumerable provisions regulating the use of armories provided for the armed forces of the Commonwealth.

Sections 123 and 124 also deal with the subject of the use of armories.

Section 127 authorizes the Armory Commission to acquire from the municipality by purchase a municipally owned armory.

It is readily seen from the foregoing that there is a serious responsibility upon the municipalities of the Commonwealth in certain cases to provide armories for the use of the armed forces of the Commonwealth. There is no other conclusion possible from a scrutiny of the provisions above referred to.

It is clear to me that implied, at least, in the obligation of the municipalities to provide armories is the power to acquire the land upon which the armory must of necessity rest. It is familiar law that municipalities have not only the powers expressly granted to them but also such implied powers as may be necessary to perform their statutory duties. *Berube* v. *Selectmen of Edgartown*, 331 Mass. 72, 74.

While I have no doubt that the municipalities of the Commonwealth have the implied power to acquire and pay for land necessary to perform their mandatory duty to provide armories, § 14 of G. L. c. 40 removes any doubt of the existence of such power. Further reference may be made to G. L. c. 40, § 5, providing that "a town may at any town meeting ap-

propriate money for the exercise of *any* of its corporate powers, including the following purposes: . . ." As you are aware, of course, the word "town" when applied to the towns or officers or employees thereof shall include city. G. L. c. 4, § 7, cl. thirty-fourth. It is unfortunate, of course, that specific reference to the acquisition of, and payment for, land for municipally owned armories is omitted in c. 590. However, in view of the heavy obligation directly placed upon the shoulders of the municipalities by virtue of the foregoing provisions, it is not to be supposed that the General Court intended to deprive the municipalities of the right to acquire and pay for land for armories which it by direct mandate under heavy penalty has required them to construct and maintain. It is more reasonable to assume that the General Court intended and expected that municipalities by virtue of their implied powers resulting from the new legislation and their expressed general powers found in c. 40 were already adequately equipped to deal with the situation you refer to without further specific authority.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Commissioner of Insurance — Right to review Decisions of Local Retirement Boards upon Applications for Retirement.

SEPT. 19, 1955.

Hon. JOSEPH A. HUMPHREYS, *Commissioner of Insurance.*

DEAR SIR: — Your letter of recent date poses the following three questions:

"(1) In connection with retirement allowances to be granted under G. L. c. 32, has the Insurance Commissioner the authority to review or overrule a decision of a local retirement board on the merits of a case?

"(2) Has the Insurance Department any duties to perform in connection with specific applications for retirement allowances other than to check the arithmetical computation of the same?

"(3) Has the Insurance Department any authority or any obligation to make any comments or recommendations to a local retirement board or to disapprove an action of a local retirement board if the supporting documents in connection with a retirement allowance are obviously in error or have not been fully filled out?"

At the outset I should call your attention to the fact that, as stated in the opinion of former Attorney General Dever (Attorney General's Report, 1935, p. 31):

"The long-continued practice of this department and the precedents set by my predecessors in office indicate, what is undoubtedly the correct rule of law, that it is not within the province of the Attorney General to determine hypothetical questions which may arise, as distinguished from questions relative to actual states of fact set before the Attorney General,

upon which states of fact public officials are presently required to act; nor is it the duty of the Attorney General to attempt to make general interpretations of statutes or of the duties of officials thereunder, except as such interpretations may be necessary to guide them in the performance of some immediate duty."

You can, of course, readily see that in the total absence of any knowledge of the facts relative to the questions you have in mind, it would not only be unwise but dangerous for this office to attempt to state the law relative to probably numerous different causes involving different facts and incidentally perhaps involving serious questions of law based on the facts involved.

However, it is obvious that something must be done to clarify the general situation about which you write. As you know, since your request was made three petitions for writs of certiorari against you have been brought because of the rulings of your department relative to the matters in question. With this word of caution I proceed to discuss, so far as it seems safe to do, the broad aspects of the three questions you pose, doing no more at the present time than to point out the difference between the adjudication by you of questions of fact and questions of law.

As you of course are aware, in 1945 the General Court attempted to harmonize as far as possible the provisions of law applicable to the municipal, county and the State and teachers' contributory retirement systems. St. 1945, c. 658. As you also are well aware, there are several different types of retirement allowances: section 5 of G. L. c. 32 providing for superannuation retirements; § 6 for ordinary disability retirements; § 7 for accidental disability retirements; § 9 providing for accidental death benefits. As to each, it is apparent from an examination of those sections that the General Court intended to set up the standards and conditions under which such retirements might be allowed. This it had a right to do because, as stated in the case of *Attorney General* v. *Brissenden*, 271 Mass. 179: "The just administration of any pension system directly affects also the public treasury. . . ."

Passing to the subject of disability retirement allowances, it is seen, as stated in § 6 (3) (*a*) of c. 32 that no member "shall be retired for disability under the provisions of this section or of section seven unless he has first been examined by a medical panel and unless a majority of the physicians on such medical panel shall, after such examination and after a review of all the pertinent facts in the case, certify to the board in writing that such member is mentally or physically incapacitated for further duty and that such incapacity is likely to be permanent . . ." The Supreme Court in the recent case of *Hunt* v. *Contributory Retirement Appeal Board*, 332 Mass. 625, 627, said:

"These provisions make it abundantly clear that there can be no retirement for accidental disability unless the local board finds that the disability is both total and permanent. And before this finding can be made the board must have before them as evidence a certification 'of such incapacity' by the medical panel provided for in section 6 (3). Such certification, it is true, is not binding on the local board . . . but without it the board cannot make a finding that the applicant is 'totally and permanently incapacitated'; it is, in other words, a condition precedent to an accidental disability retirement allowance."

Under the provisions of c. 32, § 7 —

"Any member in service classified in either Group A or Group B . . . who becomes totally and permanently incapacitated for further duty . . . by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time . . . No such retirement shall be allowed unless the board, after such proof as *it* may require . . . shall find that such member is mentally or physically incapacitated for further duty to the extent and under the circumstances set forth in this section, that such incapacity is likely to be permanent, and that he should be so retired."

Section 9, dealing with accidental death benefits, provides that:

"If the *board*, upon receipt of proper proof, *finds* that any member in service died as a natural and proximate result of a personal injury sustained or a hazard undergone . . . the payments and allowances hereinafter referred to in this section shall be granted to his beneficiary or beneficiaries, in the sum or sums, and upon the terms and conditions, specified in this section. . . ."

The General Court apparently envisioned the fact that those applying for retirement allowances might from time to time be dissatisfied with the decisions of the retirement boards. Having this in mind, it provided in § 16 (4) for a contributory retirement appeal board consisting of responsible officials from the fiscal, actuarial and legal departments of the government to which

". . . any person aggrieved by any action taken or decision of a board rendered, or by the failure of a board to act, may appeal . . . The contributory retirement appeal board, after giving due notice, shall hold a hearing not less than ten nor more than sixty days after the filing of any such claim of appeal. The contributory retirement appeal board shall pass upon the appeal, and its decision shall be final and binding upon the board involved and upon all other parties in interest, and shall be complied with by such board and by such parties."

It seems clear from a reading of the foregoing provisions that the proper adjudication of applications for accidental disability and death retirement allowances was reposed by the General Court in the various retirement boards, subject to rights of appeal by aggrieved persons to the Contributory Retirement Appeal Board under § 16 of c. 32, and that the decision of the Contributory Retirement Appeal Board "shall be final and binding upon the board involved *and upon all other parties in interest*, and shall be complied with by such board and by such parties." Both the retirement boards and the applicants have a right to review the decisions of the Contributory Retirement Appeal Board for errors of law by a petition for a writ of certiorari. *Hough* v. *Contributory Retirement Appeal Board*, 309 Mass. 534.

It is readily seen from an examination of the provisions of G. L. c. 32, particularly §§ 1 to 28, inclusive, that many intricate and detailed computations requiring expert actuarial experience are involved in the computation of the various retirement allowances and death benefits. Accordingly, the General Court has incorporated a number of provisions contemplating a general supervision over the operations of the various retire-

ment systems covered by §§ 1 to 28. For example, § 21 (1) (*a*) provides for the supervision of methods of accounting and for regular examinations of the affairs of each system " . . . to ascertain its financial condition, its ability to fulfill its obligations, whether all parties in interest have complied with the laws applicable thereto, and whether the transactions of the board have been in accordance with the rights and equities of those in interest." Subsection (*b*) covers the subject of the supervision of investments, and subsection (*c*) provides the Commissioner of Insurance with the right of access to the securities, books and papers of each system and the right to summon and administer oath to, and examine any person relative to, the financial affairs, transactions and conditions of the system. Subsection (*c*) further provides for preservation by the commissioner in a permanent form of a full record of the proceedings of his examinations and for a report in writing of his findings to the board and to the Governor, State Treasurer, the county commissioners, the mayor or the board of selectmen, as the case may be.

Section 21 (4) provides that the commissioner shall promulgate such rules and regulations as may be necessary from time to time to effectuate the purposes of §§ 1 to 28, inclusive, and he, or the actuary with his approval, may approve any by-laws, rules, regulations, prescribed forms or determinations of any board in order to effectuate such purposes.

Section 21 (3) (*a*), (*b*), (*c*) and (*d*) refer to and define the responsibilities of the actuary. In subdivision (3) (*a*) it is provided that: "The actuary shall check the calculation and amount of each annuity, pension or retirement allowance granted under the provisions of sections one to twenty-eight, inclusive, and all such calculations and amounts shall be subject to his approval."

Section 24 of c. 32 provides:

"If the commissioner of insurance is of the opinion that any governmental unit or any officer or employee thereof, or the state board of retirement, the teachers' retirement board or any other retirement board subject to the provisions of sections one to twenty-eight, inclusive, or any member or employee of any such board, has violated or neglected to comply with any provision of such sections, or the rules and regulations established thereunder, he shall give notice thereof to the governor, county commissioners, the mayor or the board of selectmen, as the case may be, and to the retirement board, and thereafter, if such violation or neglect continues, shall forthwith present the facts to the attorney general who shall take appropriate action."

Section 24 also provides the Superior Court with jurisdiction in equity on the petition of the commissioner or any interested party to compel the observance and restrain the violations of any of the provisions of §§ 1 to 28, inclusive. Subsection (2) of § 24 provides for a fine of not more than one thousand dollars or imprisonment for not more than one year, or both, for any person who wilfully refuses or neglects to comply with any of the provisions of such sections.

Your three questions point out what might be considered as conflicting provisions in the sections of c. 32 dealing with retirement allowances and death benefits, and the sections vesting in the Commissioner of Insurance and the actuary more or less general supervisory control of some features

of the retirement laws. It should be noted in passing that a complete right of appeal from adjudication on the merits in these matters is provided as to questions of fact by § 16 (4) creating a Contributory Retirement Appeal Board, from whence a further right of appeal by any aggrieved party to the courts for errors of law is provided by a writ of certiorari. It is also obvious that no right of appeal, so far at least as the General Court was concerned, was provided from any decision of either the actuary or the Commissioner of Insurance. It does not seem to me a proper construction of the sections to which I have referred to say that the General Court intended to provide for the adjudication on the merits of applications for accidental disability retirement allowances and accidental disability death benefits by the local boards with a complete right of appeal and a hearing *de novo* before the State Contributory Retirement Appeal Board, one of the members of which is an assistant to the Commissioner of Insurance, and at the same time say that it was the intention of the General Court to vest the commissioner or the actuary with power to prevent, by a disapproval of the decision of the local board, these matters from ever reaching the Contributory Retirement Appeal Board for adjudication. The provisions of § 24 relative to violations of the contributory retirement laws may also be borne in mind. The General Court has apparently laid down a uniform course of action for the commissioner to pursue in the event of improprieties in the administration by local boards of §§ 1 to 28. It should be further noticed that § 24 contains heavy penalties for violations of the provisions of §§ 1 to 28.

In view of the foregoing, and reserving all rights to rule upon individual cases as, if and when they may be referred to this office for rulings of law, I answer your question 1 in the negative, limiting this answer with the further statement that neither the Insurance Commissioner nor the actuary has the authority to refuse to approve a decision of the local retirement board if the calculations and amounts are accurate and if on the information furnished by the local board it appears that the applicable provisions of law relative thereto have been complied with. Except as to calculations and amounts, neither the commissioner nor the actuary has a right to withhold his approval if the local board has found the applicant entitled to accidental disability or death benefits unless from the information furnished it is apparent that as a matter of law the local board was in error.

Your questions 2 and 3 are the type of questions which Attorney General Dever doubtless had in mind in the opinion to which I have heretofore referred. It would be unwise and dangerous, I think, to attempt to make any general statement relative to these two general questions. It is clear to me that, reading the sections hereinbefore referred to as an harmonious whole, favorable action by the local boards on applications for accidental disability retirement allowances under § 7 and accidental death benefits under § 9, with proper calculations and amounts, is entitled to be respected by you and the actuary, provided the information supplied you does not show as a matter of law that the local board was in error. It is not your duty, obviously, nor that of your department, to become a party by approval to illegal retirements. Nor is it your duty, as I view it, to withhold your approval to retirement allowances duly approved by a local board because you do not agree with the conclusions to which the local board

has come. If you feel that improprieties occur from time to time in the administration of §§ 1 to 28, the General Court has outlined a course of action for you to pursue.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

State Employee — Right to Salary, when also Otherwise Publicly Employed.

SEPT. 21, 1955.

Hon. RALPH LERCHE, *Chairman, Legislative Research Council.*

DEAR SIR: — In a recent letter you state that the legislative research bureau established by St. 1954, c. 607, § 2 (G. L. c. 3, §§ 56–61) may from time to time find it necessary to employ "on a paid basis," persons regularly employed by the Commonwealth, or by one of its political subdivisions, who have specialized knowledge not elsewhere available to the bureau. You inquire whether this may be done "without any conflict with the statutory prohibition against individuals drawing two or more salaries from the State's treasury."

I can advise you at once that G. L. c. 30, § 21, to which you refer, would not stand in the way of employment by the bureau of a person regularly receiving a salary from some political subdivision of the Commonwealth, and not from the Commonwealth itself; its prohibition, as your question correctly indicates, is against the payment to one person of "more than one salary *from the treasury of the Commonwealth.*" (Emphasis supplied.) *Cf.* Attorney General's Report, 1942, p. 65.

If the person whom the bureau wishes to employ is already receiving compensation of some kind from the Commonwealth itself, the first matter for determination is whether or not he is presently receiving a "salary." For this purpose, it would be proper to test his compensation against the definition to be found in V Op. Atty. Gen. 699, 700 (1920):

"[Salary] is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called 'piece work' basis, and are more frequently subject to deductions for loss of time."

If, as so tested, his compensation is a "salary," G. L. c. 30, § 21, would prohibit the bureau's payment of a second "salary" to him, VIII Op. Atty. Gen. 604 (1929), "even though the work of the second office might be done outside of the usual working hours of employment of the first office." VII Op. Atty. Gen. 326, 330 (1924). I assume from your letter that the compensation to be paid by the bureau to such a person would not be in the nature of a salary, but would be in the nature of "wages" for special services from time to time performed. In such event, said § 21

would not prevent such casual employment of a salaried State employee; a series of opinions from this department has established that principle. II Op. Atty. Gen. 21 (1899); II Op. Atty. Gen. 309 (1902); VII Op. Atty. Gen. 437, 439 (1924); *cf.* Attorney General's Report, 1937, p. 120.

However, G. L. c. 29, § 31, which provides that salaries paid by the Commonwealth "shall be in full for all services rendered," would prohibit such a person "from receiving compensation for any other services rendered during the usual hours of employment in the salaried position which he occupies." V Op. Atty. Gen. 699, 701, *supra;* Attorney General's Report, 1936, pp. 66, 67–68. He may only "receive from the Commonwealth additional compensation for special services performed *outside of the usual working hours of his position and not required in the performance of the duties* of his position." (Emphasis supplied.) VII Op. Atty. Gen. 326, 330, *supra.*

Of course, if the person whose employment is contemplated already received compensation *other than a "salary"* from the Commonwealth, neither said c. 29, § 31, nor c. 30, § 21, has any application.

Employment by the bureau of members of the General Court would, of course, be governed by the foregoing principles. The compensation of a member of the House of Representatives is a "salary", so that he cannot be paid another "salary" by the Commonwealth, VII Op. Atty. Gen. 448 (1924), at least while the Legislature is in session, VI Op. Atty. Gen. 220 (1921); he must elect, in such circumstances, to waive one of the two salaries. Attorney General's Report, 1936, p. 20; *cf. ibid.* p. 48. However, even while the Legislature is sitting, a member of the General Court could properly be paid for special services performed for the Commonwealth, but only if they were "in the nature of overtime work." VII Op. Atty. Gen. 448, 449, *supra.*

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Administrative Procedure Act — Applicability to Proceedings in Division of Civil Service.

SEPT. 22, 1955.

Mr. JAMES E. O'BRIEN, *Chairman, Civil Service Commission.*

DEAR SIR: — Your recent letter inquires as to the applicability of St. 1954, c. 681, to "the procedure of the Civil Service Commission under the provisions of G. L. c. 31."

Said c. 681, which adds a new chapter (c. 30A) to the General Laws, took effect on July 1, 1955. It deals with "State Administrative Procedure" in the matter of (1) the adoption and promulgation of certain regulations by State agencies, and (2) the conduct and review of certain "adjudicatory proceedings" before State agencies.

Section 1 of the new chapter defines a State "agency" as "any department, board, commission, division or authority of the state government, or subdivision of any of the foregoing, or official of the state government,

authorized by law to make regulations or to conduct adjudicatory proceedings." Certain State authorities are expressly excluded from the operation of the statute, but your commission is not. Hence, since it is authorized to make regulations (G. L. c. 31, §§ 3 *ff.*) and also to conduct proceedings which determine the rights of specifically named persons (G. L. c. 31, §§ 43 *ff.*), I must advise you that its procedures must hereafter conform to the applicable provisions of the new chapter.

As to the adoption and promulgation of rules and regulations, your attention is called generally to the provisions of §§ 2 through 6, inclusive, of said c. 30A, which deal with the requirements of notice of public hearings on the proposed adoption or amendment of regulations "as to which a hearing is required by any law," and with the filing and compilation of all currently effective regulations by each agency. You should have an interest, also, in §§ 8 and 9 of the new chapter, which authorize agencies to give "advisory rulings" interpretive of the statutes and regulations administered by them, and which require each agency to "adopt regulations governing the procedures prescribed by this chapter."

As to the conduct of "adjudicatory proceedings," your attention is called to §§ 10 through 13, inclusive, of c. 30A, which outline the powers and duties of your commission during such proceedings. Hearings presently conducted by your commission under G. L. c. 31, § 43, are "adjudicatory" within the meaning of these new sections, and are not excluded from the operation of c. 30A by § 1 (1) thereof. In so far as your present procedures differ from those required by c. 30A, therefore, they must be changed.

You specifically inquire as to the necessity of transcribing hearings before your commission. Section 11 (6) of the new chapter governs this matter, and provides that an agency "need not arrange to transcribe shorthand notes or sound recordings unless requested by a party," and may then "require the party to pay the reasonable costs of the transcript."

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALIBURY,
Assistant Attorney General.

Public Contract — Right of Contractor to permit Use of Foreign Steel.

SEPT. 22, 1955.

Hon. CHARLES W. GREENOUGH, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have requested an opinion relating to the use of foreign steel sheet piling. You state that a contractor has asked permission to use such foreign steel sheet piling on a contract awarded to it by the commission for construction of the South Charles Relief Sewer.

General Laws, c. 7, § 23A, provides in part as follows:

"Rules, regulations and orders adopted under clause (17) of section twenty-two shall, so far as may be approved by the governor and council, apply to the purchase by contractors of supplies and materials in the execution of any contract to which the commonwealth is a party for the con-

struction, reconstruction or repair of any public work; and there shall be inserted in any such contract a stipulation to such effect . . ."

It appears that such a clause was inserted in the contract. Rule 16 of the rules and regulations referred to by the statute contains the following pertinent language:

"The Purchasing Bureau shall give preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies and materials manufactured and sold within the Commonwealth, and, second, of supplies and materials manufactured and sold elsewhere within the United States."

The rule clearly creates a preference in favor of domestic steel in the event that other considerations are equal. There is, however, no prohibition against the use of foreign steel provided you determine as a question of fact that other considerations are not equal and that use of such foreign steel would be more beneficial to the Commonwealth. In reaching this conclusion it should be determined first of all, as an engineering question, whether the foreign steel is at least the equivalent of domestic steel.

Secondly, it should be determined that the use of such foreign steel would be more beneficial to the Commonwealth than domestic steel. Since the cost of steel to the Commonwealth has already been determined by the award of the contract, and since it does not appear that the original bid was made on the basis of using foreign steel, price differentials to the contractor in purchasing foreign steel are not necessarily an element to be considered by your commission.

On the other hand, if the scarcity of domestic steel would delay the performance of the contract to the detriment of the Commonwealth, or if the scarcity of domestic steel would impose any undue hardship on the contractor, then your commission would undoubtedly be justified in reaching the conclusion that "other considerations were not equal."

The letter from the contractor requesting permission to use foreign steel does not appear to answer these questions. Before assenting to the use of such foreign steel, it is suggested that you obtain additional information on which you can make a proper determination as to "other considerations being equal."

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, JR.,
Assistant Attorney General.

Motor Vehicles — Compulsory Liability Insurance — Demerit Points — Surcharges as "Premiums" rather than as "Penalties."

SEPT. 23, 1955.

HON. JOSEPH A. HUMPHREYS, *Commissioner of Insurance, Department of Banking and Insurance.*

DEAR SIR: — You have recently requested my opinion with reference to the "premium surcharges or penalties" which must be paid for compulsory motor vehicle liability insurance by car owners who have been

charged with demerit points under G. L. c. 90A, added to our laws by St. 1953, c. 570.

No motor vehicle can be registered in this Commonwealth unless it is insured under the provisions of our compulsory motor vehicle liability statute. G. L. c. 90, § 1A and §§ 34A–34J. Under this law "fair and reasonable classification of risks" and "adequate, just, reasonable and non-discriminatory premium charges" for such compulsory insurance coverage are to be fixed and established by you annually. G. L. c. 175, § 113B. The Legislature in 1953 made an important change in this compulsory liability coverage by providing a so-called system of "merit rating" which would increase the cost of compulsory insurance for owners of motor vehicles charged with demerit points. G. L. c. 90A, added by St. 1953, c. 570. Your letter states:

"In promulgating rates for the year 1956, the Commissioner is required under the provisions of St. 1953, c. 570, § 15, to 'fix and establish a schedule of premium surcharges' or penalties to be applied to premium charges for compulsory automobile liability insurance. The last sentence of said § 15 provides 'The commissioner of insurance in fixing and establishing premium charges' in accordance with § 113B of c. 175 'shall give consideration to the additional premiums developed by the application of such premium surcharges or penalties in each zone.'

"In giving consideration to the additional amounts collected by the application of surcharges, a question arises as to whether such additional amount is an insurance premium or a penalty. The words 'premium surcharge' or 'penalties' seem to be used synonymously in this statute.

"As a practical matter, however, if the additional amounts which are to be collected are considered to be insurance premiums, said amounts are subject to taxes, commissions, dividend declarations and other expenses of the insurance industry. If the amounts to be collected are considered to be 'penalties,' no allowance would be made in rate calculations for the items specified above which amount in the aggregate to approximately one-third of the premium dollar.

"Therefore, I ask your advice on the following question: —

"Are the amounts which are proposed to be collected under the provisions of St. 1953, c. 570, to be considered additional insurance premiums or penalties?"

The law to be interpreted is section 15 of new chapter 90A. This section provides that, in fixing "premium charges" under § 113B of c. 175, you must "give consideration to the points charged . . . against the operating records of the owners of motor vehicles," and that you must establish a schedule of "premium surcharges or penalties" to be applied to ordinary premium charges for compulsory insurance, which schedule shall be "graduated according to the point accumulation records of the owners." The section further provides that, in fixing premium charges under said § 113B, you must consider "the additional premiums developed by the application of such premium surcharges or penalties."

In my opinion, the additional amounts collected from owners of motor vehicles by virtue of the above statute must be considered to be and must be treated as insurance premiums.

An insurance "premium" is the consideration paid for a contract of insurance. Under our compulsory liability statutes this premium includes

not only an amount equal to incurred and covered losses, but it also includes something additional to pay the insurance companies' expenses and reasonable profits. *American Employers' Insurance Co.* v. *Commissioner of Insurance*, 298 Mass. 161, 164–165. *Massachusetts Bonding & Insurance Co.* v. *Commissioner of Insurance*, 329 Mass. 265, 279. Under the merit rating plan the consideration which must be paid by the owner of a motor vehicle in order to obtain the compulsory liability insurance includes the additional surcharge provided for by section 15. From an insurance company's point of view the consideration received by it for the risk assumed likewise includes the required additional surcharge. Considered practically, this additional payment or surcharge can only be construed to be a premium.

This interpretation is confirmed by the technical language of § 15. You are required by G. L. c. 175, § 113 B, to fix "premium charges" for compulsory liability insurance. The merit rating surcharges provided by § 15 are "to be applied to premium charges" under § 113B. In establishing the full premium under § 113B, you must consider "the additional premiums" developed through the merit rating plan and § 15.

The use of the word "penalties" in § 15 does not indicate that the added surcharge is something other than or different from an insurance premium. In § 6 of the same chapter the word "penalties" is used in its technical sense of a punishment by the Commonwealth for a crime or offense. But this penal meaning of the word is not the one used in § 15. That technical sense of the word could not correctly be used to describe an additional payment by an insured based upon an evaluation of an added element in the risk covered, especially where such additional payment is retained and used by the insurer as a source of funds to meet its expenses and insured losses. In § 15 the word "penalties" is used only in its lay or non-legal sense of a "disadvantage" resulting from the accumulation of demerit points.

Accordingly, you are advised that the surcharges to be collected under the provisions of G. L. c. 90A, § 15, are to be considered to be additional insurance premiums.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Statutes — Effective Date of Act relative to Mentally Ill — Act subject to Referendum.

SEPT. 29, 1955.

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

DEAR SIR: — In a recent letter you state that "because of mechanical problems and administrative problems which arise under the new provisions," you must be advised as to the effective date of St. 1955, c. 637.

That statute, approved last August 4, effects amendments to §§ 1, 10, 11, 13A, 20, 45, 50, 51, 52, 53, 54, 55, 77 and 86 of c. 123 of the General Laws, and repeals §§ 57, 58, 59, 60 and 61 of said chapter. It imposes new duties upon and grants new powers to your department relative to "the procedures for the hospitalization and commitment of the mentally ill, and relating to the care of such persons." I assume from your letter that you

have no present difficulty in the interpretation of the new provisions as they apply to your department, and, accordingly, I shall not attempt any analysis of them in this communication.

The Constitution of the Commonwealth provides that no law shall take effect earlier than 90 days after it has become a law, "excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition. . . ." Mass. Const. Amend. XLVIII, The Referendum, I. Said c. 637 does not contain any emergency preamble. Therefore, since it "became a law" on August 4, 1955, the date of its approval (Mass. Const., pt. 2d, c. I, § I, art. II), it will become effective on November 2, 1955, unless it may not be made the subject of a referendum petition, in which event, no different time for its effectiveness having been specified by the Legislature, it took effect on September 3, 1955. G. L. c. 4, § 1.

In my opinion, the statute is a referable law. It is true that one of the matters expressly excluded from the referendum is any law "that relates to . . . the powers . . . of courts" (Mass. Const. Amend. XLVIII, The Referendum, III, § 2), but this provision concerns only laws the sole or principal substance of which has to do with increasing or decreasing the powers of the judicial department. See, for example, St. 1922, c. 508, declared non-referable in *Commonwealth* v. *Sacco*, 255 Mass. 369, 410–411. The fact that said c. 637 incidentally includes provisions having to do with court procedures does not place it in the excluded category.

I therefore advise you that c. 637 will take effect on November 2, 1955.

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

State Treasurer — Right to remove Third Deputy Treasurer.

Oct. 10, 1955.

Hon. John F. Kennedy, *State Treasurer.*

Dear Sir: — I have your letter of October 7, 1955, requesting "a legal opinion on this letter from the Council"; you have attached to your letter the original communication of which the following is a copy:

"The Commonwealth of Massachusetts,
Council Chamber,
State House, Boston.

October 6, 1955.

"Hon. John F. Kennedy, *Treasurer and Receiver General, State House.*

"Dear Sir: — At a meeting of the Governor and Council held Thursday, October 6, 1955, consideration was given to your request for approval of your action in removing John F. Lawler as Third Deputy Treasurer and Receiver General, and it was voted that your request be denied, and the same was denied accordingly.

Very truly yours,
(Signed) Clarence R. Elam,
Executive Secretary."

General Laws, c. 10, § 5, as most recently amended by St. 1945, c. 489, provides that "the state treasurer, with the consent of the governor and council, may appoint, and, *with such consent, may for cause remove*, a first, second and third deputy treasurer and shall prescribe their respective duties" (emphasis supplied).

I take it from the letter to you from the Executive Secretary that you desire to remove from office the present Third Deputy Treasurer, and that the Governor and Council have voted not to consent thereto. In these circumstances, since such consent is specifically required by the statute, I advise you that the Third Deputy Treasurer has not been removed from his office.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

State Treasurer — Right to suspend Third Deputy Treasurer.

OCT. 10, 1955.

Hon. JOHN F. KENNEDY, *State Treasurer.*

DEAR SIR: — You have inquired whether you have "the legal right to suspend John F. Lawler, without pay for the balance of his appointment."

I have today advised you, in answer to another inquiry made by you, that Mr. Lawler has not been removed from his office as Third Deputy Treasurer. I pointed out to you that G. L. c. 10, § 5, as amended, does not permit you to remove him from office without the consent of the Governor and Council.

I answer your present question in the negative. Your suspension of a man for whose removal from office no cause has been found to exist by the Governor and Executive Council would, in my opinion, be a legally improper attempt to circumvent the intent of the statute, which is to leave the deputy treasurers undisturbed in office unless the Governor and Council consent to their removal *for cause.*

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

State Purchasing Agent — Right to supervise Printing of State Bonds.

OCT. 17, 1955.

Hon. JOHN F. KENNEDY, *State Treasurer.*

DEAR SIR: — You request an opinion "as to whether contracts for the printing of State bonds must be channeled through the State printing office or whether the Treasurer may handle the matter directly with the bidders."

General Laws, c. 5, § 1, provides that the State Purchasing Agent "*shall supervise the state printing*" except for certain maps, legislative printing, and certain publications issued by the State Secretary. There is no question that the printing of State bonds falls within his supervision under the provisions quoted, and I so advise you.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Effect of Resignation of State Employee on Military Leave of Absence.

Oct. 17, 1955.

Jack R. Ewalt, M.D., *Commissioner of Mental Health.*

Dear Sir: — In your recent communication you enclose a copy of a letter of resignation from an employee of the Taunton State Hospital now on military leave of absence under St. 1941, c. 708, as amended. Said letter is as follows:

"Dr. W. Everett Glass, M.D., *Superintendent, Taunton State Hospital, Taunton, Mass.*

"Dear Dr. Glass: — I hereby tender my resignation as Poultryman, effective immediately upon your acceptance. My reason is that I do not desire to return to my present office or position or to any other office or position in the service of the Commonwealth, or any of its political subdivisions in the future.

"I am not resigning for the purpose of serving in the Armed Forces of the United States during the period of time that Statute 1941, Chapter 708 remained in effect. I understand that by resigning I waive all rights of Statute 1941, Chapter 708 as amended, and as it might be amended in the future and I specifically waive the right to reinstatement in my office or position or any similar office or position in the future.

"I agree that my office or position is herewith made vacant and may be filled by a permanent appointment of some other person.

Very truly yours,

(Signed) Kermit F. Gaines.

Posted Sept. 23, 1955, Denver, Colorado."

You inquire as to the legal effect of this letter.

Section 1 of c. 708, as amended, now provides that "any person, who, on or after January first, nineteen hundred and forty, shall have tendered his resignation from . . . the service of the commonwealth . . ., or otherwise terminated such service, *for the purpose of serving in the military or naval forces of the United States* . . . shall . . . be deemed to be . . . on leave of absence; and no such person shall be deemed to have resigned from . . . the service of the commonwealth . . . or to have terminated such service, until the expiration of two years from the termination of said military or naval service by him. When a person . . . in the service of the commonwealth . . . enters the military or naval service . . . *and files a resignation in writing stating his reason for such resignation, the resignation shall be considered a final determination of the reason for leaving the service of the commonwealth.* . . . If no written resignation is filed, entrance into the military or naval service of the United States by a person . . . in the service of the commonwealth . . . shall be prima facie evidence that his service to the commonwealth . . . is terminated for the purpose of entering said military or naval service . . ." (emphasis supplied).

It is only when the employee's reason for resigning is for the purpose of entering the armed forces that he falls within the protection of said c. 708. If he fails to give any reason for leaving the service, but there-

after enters the armed forces, the statute creates the presumption that his reason for terminating his service was for such a purpose; but, as you can see, it also clearly provides that if he resigns in writing and gives his reason for resigning, his statement of his reason shall be conclusive.

In two opinions interpreting c. 708, Attorney General Bushnell ruled that "if some reason other than entering the military or naval service of the United States is advanced in writing for the resignation, such explanation shall be conclusive and, as to such person, the provisions of chapter 708, as amended, shall have no application" (Attorney General's Report, 1942–1944, p. 65), and that "one who files a resignation from the service of the Commonwealth . . . stating therein a reason for the same other than a purpose to enter the military or naval forces of the United States, is not to be deemed to be on leave of absence from the service of the Commonwealth. . . ." Attorney General's Report, 1942–1944, pp. 109, 111. These rulings were, and are, clearly right. Under them, the written resignation filed by Mr. Gaines may properly be accepted forthwith without conflict with any provision of c. 708. The fact that it follows, rather than precedes, his entry into the armed forces is of no moment; while, prior to the filing of his resignation, the statute required the presumption that his reason for terminating his service was for the purpose of such entry, his true reason is now a matter of record, and the statutory presumption no longer exists.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Hurricane Relief Board — Use of Public Funds — Right to approve Overtime Pay for Municipal Policemen and Firemen.

OCT. 26, 1955.

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

DEAR SIR: — You have asked for an opinion concerning the constitutionality of St. 1955, c. 752, which authorizes and directs the Hurricane Relief Board to approve overtime pay rather than time off for police and fire fighters who performed overtime duties during the emergency periods caused by the hurricanes of 1954.

I cannot undertake to answer the question of constitutionality in reference to every conceivable application of it.

Statutes of the type here involved have on occasion been challenged on the ground that they violate the State Constitution by providing for the expenditure of public funds for the benefit of private individuals. It is inferred that you desire my opinion on this question. Our court has stated consistently that such statutes are valid provided that the purpose of the expenditure is a public purpose even though individuals, as such, may receive a direct benefit therefrom.

In the present case the Legislature has not specifically set forth the purpose of the proposed payments. It is a matter of general knowledge, however, that the police and fire fighters rendered meritorious and outstanding

services during the hurricane disasters. It may be inferred that such considerations actuated the Legislature. *Opinion of the Justices*, 240 Mass. 616.

In a case relating to bounties for Civil War veterans, the court said:

"The power to reward distinguished public service, with a view to the promotion of loyalty and patriotism, has long been regarded as one of the attributes of organized government."

Opinion of the Justices, 190 Mass. 611, 615. Payments or other preferences to those who have served in the armed services in recognition of such services have been recognized as payments for a public purpose in that thereby the spirit of loyalty and patriotism is encouraged and the military service is made more honorable and attractive. *Opinions of the Justices*, 211 Mass. 608, 611; 320 Mass. 773, 781; 322 Mass. 745, 749–750. At page 781 of the opinion appearing in 320 Mass. the court said:

"That the expenditure of public money in recognition of military services, even long after such services have been rendered, though such expenditure of money is directly for the private benefit of the persons rendering such services, is a public purpose has been held or stated in decisions of this court or in opinions of its Justices."

Such payments are by no means limited to the military. In *Opinion of the Justices*, 175 Mass. 599, the court recognized the power of the Legislature to make, or to authorize municipalities to make, payments of unearned salaries of deceased public officials to the widows of such officials, stating at page 602:

"The power to give rewards after the event for conspicuous public service, if it exists at all, cannot be limited to military service. If a man has deserved greatly of the Commonwealth by civil services, the public advantage of recognizing his merit may stand on ground as strong as that for rewarding a general. We cannot foresee the possibilities of genius or distinguished worth and settle in advance the tariff at which its action shall be paid."

Such payments promote the public good by inducing persons of ability, character and lofty aspirations to enter public service and by stimulating an unselfish devotion to public service. *Opinion of the Justices*, 240 Mass. 616 (payment of an unearned salary to the widow of a deceased clerk of the Senate).

Similarly, a statute imposing an obligation on a municipality to reinstate a police officer and to pay him an unearned back salary was justified on the ground that it helped strengthen the civil service laws which have the public purpose of selecting employees by merit. *Horrigan* v. *Mayor of Pittsfield*, 298 Mass. 492.

In the case of *Allydonn Realty Corporation* v. *Holyoke Housing Authority*, 304 Mass. 288, the court analyzed the various considerations which determine whether a public purpose is involved and stated at page 293 that, among other factors, it may be considered "whether a special emergency exists, such as may be brought about by war or public calamity."

The present enactment which you question is not the first time that the Legislature has recognized services of the type here involved. As the result of the severe tornado which devastated areas in Worcester and vicinity on June 9, 1953, payments to police for overtime services then per-

formed were authorized by St. 1954, c. 430. Said c. 430 is substantially similar to the enactment here in question.

In view of the foregoing discussion it is my opinion that the payments to police and fire fighters for overtime work performed during the hurricanes of 1954, as authorized by St. 1955, c. 752, are payments for a public purpose and are not prohibited by the Constitution of Massachusetts. In reaching this conclusion, I have in mind the familiar principles of law that every rational presumption will be made in favor of the constitutionality of a legislative enactment; *Mansfield Beauty Academy, Inc.* v. *Board of Registration of Hairdressers*, 326 Mass. 624, 627, and that "one assailing a statute on constitutional grounds has the burden of proving the absence of any conceivable grounds upon which the statute may be supported," *Wright* v. *Peabody*, 331 Mass. 161, 164.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Massachusetts Turnpike Authority — As a "Political Subdivision" of the Commonwealth — Exemption from G. L. c. 159B of Truck Owners hired by the Authority.

OCT. 31, 1955.

Hon. DAVID M. BRACKMAN, *Chairman, Department of Public Utilities.*

DEAR SIR: — You have requested my opinion whether "the owner of a single dump truck who is carrying property for hire for the Massachusetts Turnpike Authority (is) exempted from the requirements of G. L. c. 159B by . . . § 13 thereof."

Said § 13, most recently amended by St. 1951, c. 262, provides that any vehicle owned by a person having no interest in any other motor vehicle shall, while transporting property for (1) the Commonwealth or (2) for any of the political subdivisions of the Commonwealth, be exempt from all of the provisions of said c. 159B except § 18 thereof.

It is obvious that the answer to your question must turn upon whether or not the Massachusetts Turnpike Authority is a "political subdivision" of the Commonwealth.

Section 3 of St. 1952, c. 354, creates said authority as a "body politic and corporate" and constitutes it a "public instrumentality." These phrases are in no way synonymous with the term "political subdivision," the meaning of which is to some extent clarified by its use in § 15 of said c. 354, where certain authority is specifically given to "all counties, cities, towns *and other political subdivisions.*" A "political subdivision" usually embraces a defined territory and its inhabitants, organized for the public advantage and exercising some governmental functions. *State* v. *Corker*, 67 N. J. L. 596. Counties and municipalities are obvious examples. Fire, water, light, improvement and regional school districts come immediately to mind as perhaps falling within the meaning of the term. The Massachusetts Turnpike Authority, which embraces no inhabited territorial area and exercises no true governmental functions, is analogous to none of these.

That the Legislature did not regard the Authority as a "political subdivision" is clear for another reason. Under said c. 354, the Authority is

empowered to issue bonds, upon which it is, of course, liable in accordance with their terms. However, § 2 of c. 354 specifically provides that "turnpike revenue bonds . . . shall not constitute a debt of the commonwealth *or of any political subdivision thereof.*"

Accordingly, I answer your inquiry in the negative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY.
Assistant Attorney General.

Floods — Expenditure by Commonwealth for Repair of Flood Damage to Dams now Municipally Owned but formerly Privately Owned.

OCT. 31, 1955.

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

DEAR SIR: — In your recent letter you inquire whether the special four-man board established by § 4 of c. 699 of the acts of the current year may properly approve the expenditure of funds made available by § 1 of said chapter "for the repair or reconstruction of dams damaged or destroyed by the floods (of August, 1955), which dams were privately owned prior to the effective date of c. 699 but which have subsequently become the property of political subdivisions of the Commonwealth."

No question of *reimbursing* political subdivisions for sums borrowed or expended by them for *emergency* repairs appears to be raised by your inquiry. Accordingly, the only provisions of § 4 with which you need concern yourself are: "the commonwealth may expend amounts [subject to the approval of said board] . . . for purposes of . . . repair of flood damage, *for the benefit of the political subdivisions* . . ." (emphasis supplied).

It is clear that the repair of a dam presently owned by a political subdivision would be "for the benefit of" the subdivision regardless of the time when it acquired title to the dam. While, when the damage was actually occasioned, the dam may have been privately owned, it is now public property, and it is its present and not its former owner which will be benefited by its repairs at this time. General Laws, c. 253, §§ 33–38, inclusive, to which you specifically call my attention, and which impose certain obligations upon the private owner of a dam who requests the alteration, change of grade or other changes in a public way so that he may maintain his dam at a higher level, have no bearing whatever upon the problem concerning which you have inquired.

Accordingly, I answer the narrow question presented by your letter in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Retirement — Veterans — Creditable Service for Members of the General Court in the Armed Forces.

Nov. 1, 1955.

Hon. John F. Kennedy, *Chairman, State Board of Retirement.*

Dear Sir: — You have requested an opinion relative to creditable service of members of the General Court in the armed forces. Your letter proceeds as follows:

"The question before the Board is whether or not the period of time spent in the Armed Forces by an elected official, whose service is subject to re-election at certain intervals, is such as may be considered Military Leave and creditable for retirement purposes. Your opinion on this question is respectfully requested."

In my opinion the answer to your question must be in the affirmative. General Laws, c. 32, § 4 (1) (*h*), contains the following paragraphs:

"The period or periods during which any member who is a veteran as defined in section one was on leave of absence from the governmental unit to which the system of which he is a member pertains, for the purpose of serving in such campaign and until he was discharged or released from such service in the armed forces, shall be allowed as creditable service.

"Any such period of leave of absence which is subsequent to his becoming a member of such system shall be counted as membership service, and any such period prior thereto shall be counted as prior service; provided, that he would have been entitled to such credit in the event he had continued in the active service of such governmental unit during the period of time covered by such leave of absence.

"Any member who served in the armed forces between January first, nineteen hundred and forty and July first, nineteen hundred and fifty-five, shall have such actual service credited to him as creditable service when reinstated or re-employed in his former position or in a similar position within two years of his discharge or release from such service. The provisions of sections nine and nine A of chapter seven hundred and eight of the acts of nineteen hundred and forty-one, as amended, and as may be further amended, shall be applicable to any such veteran referred to therein."

This section obviously was designed to protect members of the State Retirement System while serving in the armed forces. "Member" is defined by G. L. c. 32, § 1, as any employee included in the State Employees' Retirement System. "Employee" is defined as applying to persons whose regular compensation is paid by the Commonwealth to include "members of the General Court or other persons elected by popular vote."

Returning to the third paragraph of § 4 (1) (*h*) inserted by St. 1954, c. 627, § 8, it will be noticed that "*any* member who served in the armed forces . . ." is covered. The word "any" is often construed to mean "all," "each" or "every." Such a construction is imperative, in my opinion, in order to effectuate the beneficent and humane purpose of this legislation.

While it may be said that the words ". . . when reinstated or re-employed in his former position or in a similar position . . ." are inapt

to describe members of the General Court who have been re-elected, yet that is the only way they may be "reinstated" or "re-employed" unless their military service consisted of less than the length of their term existing at the time of their entry into the military service. To give creditable service to members of the General Court who returned from military service before the expiration of their term, while denying it to senators and representatives who served longer in the military service, is to impute an intention to the General Court that should not be lightly assumed.

This opinion is confined to the cases of members of the General Court re-elected within two years of their discharge from military service.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Legislators — Retirement — Amount of Make-up Payments of Members of the General Court under St. 1955, c. 554.

DEC. 14, 1955.

Hon. JOHN F. KENNEDY, *Chairman, State Board of Retirement.*

DEAR SIR: — You request an interpretation of the provisions of St. 1955, c. 554, which restore certain pension rights to the members of the General Court.

Certain pension and retirement rights were given to members of the General Court by St. 1947, c. 660. Section 7 of that chapter had reference to membership in the State Employees' Retirement System, and provided for credit for service prior to July 1, 1947, upon payment of a maximum sum of $1000. Said § 7 was repealed by St. 1952, c. 634. This latter statute, by § 8, also provided that no member of the General Court should receive any pension or retirement allowance. During the recent legislative session, certain pension rights were restored to members of the General Court by St. 1955, c. 554. By this act, § 8 of St. 1952, c. 634, is repealed. By § 2 of the 1955 act provision is made that members of the General Court shall be credited for services rendered prior to July 1, 1947, upon the payment of a specified sum of money.

You request an opinion as to whether or not the amount to be paid under the 1955 act is the maximum of $1000 specified in the 1947 act, and also whether the amount to be paid is to be paid with or without interest.

The provision to be construed, in order to answer your question, is the first sentence of § 2 of c. 554 of the acts of the current year. This sentence contains three clauses: The first clause relates to credit for services rendered prior to July 1, 1947; the second clause relates to credit for services rendered subsequent to July 1, 1947; and the third clause relates to the amount of retirement allowance upon retirement. Your question, which relates to the amount of money to be paid to obtain credit for service prior to July 1, 1947, involves an interpretation of the first clause of this sentence.

The credit for services rendered by a member of the General Court prior to July 1, 1947, as provided by § 2 of the chapter above referred to, may

be obtained upon payment of money as set forth in said section. Three amounts are referred to, as follows:

1. A member of the General Court "who became a member of the state employees' retirement system under the provisions of" St. 1947, c. 660, and "who has paid . . . the full amount specified in said chapter," shall be credited with such prior service.

2. Such a member of the General Court (i.e., one "who became a member of the state employees' retirement system under the provisions of" St. 1947, c. 660), who pays, on or before January 1, 1956, "an amount equal to the amount required when he became a member for service rendered by him . . . prior to the time he became eligible for membership in said system or entitled to credit for such service," is entitled to be credited for such prior service.

3. "Any present member of the general court" who, prior to January 1, 1956, "pays in full for such service," shall be credited with such prior service.

Your questions relate to the payments required under items 2 and 3 above. The first item is not involved because that relates only to the members of the State Employees' Retirement System who have already paid "the full amount specified" in St. 1947, c. 660. The 1955 act restores to such persons credit for services prior to July 1, 1947.

The second item above, which permits payment on or before January 1, 1956, applies only to a member of the General Court "who became a member of the state employees' retirement system under the provisions of" St. 1947, c. 660. As to such a person, the payment specified is "the amount required when he became a member for service rendered by him . . . prior to the time he became eligible for membership in said system or entitled to credit for such service." You inquire how much is this "amount required when he became a member. . . ."

The payment specified by item 2 above is the amount required under St. 1947, c. 660. Item 2 relates only to a member of the General Court who became a member of the retirement system under the provisions of c. 660. The payment required by the 1955 act is "an amount equal to the amount required when he became a member." Since he became a member under c. 660, the payment to be made is limited by the provisions of that statute. Such statute provides, in § 7, that the payment required of a member of the General Court "shall not exceed one thousand dollars in the aggregate." No provision for interest is made if that interest would increase the aggregate payment to an amount larger than the $1000 maximum.

Accordingly, it is my opinion that the 1955 statute, with reference to the persons included in item 2 above, calls for payment of the amount specified in St. 1947, c. 660, which, by § 7, provides a maximum of $1000, which maximum is not to be increased by interest.

Your questions also relate to item 3 above. That item applies to "any present member of the general court," but excluding, impliedly, a present member who had become a member of the retirement system under the 1947 statute and who is included in item 2. As to such a person the 1955 statute provides that he shall be credited with service prior to July 1, 1947, if he "pays in full for such service" prior to January 1, 1956. The payment by such a person is not payment of the "amount specified" in c. 660, nor

payment equal to "the amount required when he became a member" under c. 660. Such person did not become a member of the retirement system under c. 660, and the 1955 act does not purport to give him the preferential rights provided for in St. 1947, c. 660.

In my opinion, the maximum specified in the 1947 act does not apply to present members of the General Court who did not become members of the State Employees' Retirement System under the provisions of that act. Note, in this connection, that this item 3 in the 1955 act, which calls for payment "in full," applies not only to "any present member of the general court" but also to any "present constitutional officer," and that the maximum in c. 660, § 7, is restricted specifically to "a member of the general court" and does not apply to a constitutional officer although all other provisions in § 7 apply to constitutional officers. The 1955 provision that "any present member of the general court or present constitutional officer" must pay "in full" cannot be interpreted to provide a maximum of $1000 for a member of the General Court but no maximum for a constitutional officer.

Accordingly, it is my opinion that, as to the persons included in item 3, and who are not covered by item 2, the payment "in full" required by the 1955 act is the payment calculated under all of the provisions of G. L. c. 32, without the benefit of the maximum specified in St. 1947, c. 660, § 7.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Retirement — Workmen's Compensation Benefits — Setoff against Veteran's Non-contributory Pension.

DEC. 16, 1955.

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

DEAR SIR: — In your recent letter you pose the following question:

"Your formal opinion is therefore respectfully requested as to whether an employee, to be retired under G. L. c. 32, §§ 56 to 60 as a veteran, shall have his lump sum workmen's compensation settlement, allocable to the period following his retirement, offset against his pension allowance granted under these sections."

To begin with, the pensions referred to in those sections are permissive and not mandatory, as you are doubtless aware. Moreover, the pensions referred to in §§ 56 and 57 may be granted if the applicant "has a total income from all sources . . . not exceeding one thousand dollars." While § 14, it is true, provides for setoff against the benefits provided by §§ 6, 7 and 9 of c. 32, which deal with benefits deriving from the contributory retirement system law, any doubt about the subject is removed by the first sentence of § 73 of c. 152 in its present form. This section reads as follows:

"Any person entitled under section sixty-nine to receive compensation from the commonwealth or from such county, city, town or district, and who is also entitled to a pension by reason of the same injury, shall *elect*

whether he will receive such compensation or such pension, *and shall not receive both,* except in the manner and to the extent provided by section fourteen of chapter thirty-two."

It will be noted that this language does not limit the offset of workmen's compensation benefits to contributory retirement system pensions under the provisions of §§ 6, 7 and 9 of c. 32. I find a general legislative intent not to have public servants benefit from workmen's compensation payments for injuries under G. L. c. 152 and at the same time receive pensions for disabilities originating from the same source. This intent is evinced again in § 3 (7) (*g*) of c. 32 which provides that "any person retired under the provisions of this chapter or under corresponding provisions of earlier laws or any other general or special law shall receive *only such benefits* as are allowed or granted by the particular provisions of the law under which he is retired."

This purpose is further evidenced in § 25 (3) (*a*) of c. 32 providing that veterans who are members of the contributory retirement systems who were employed prior to July 1, 1939 "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, whether or not he may have signed a waiver of his rights under such sections upon becoming a member of such system, anything to the contrary in the provisions of this chapter or in similar provisions of earlier laws notwithstanding. *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 on a prescribed form filed with the board 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. . . ."

Accordingly, it is my opinion that a veteran receiving a pension under the sections you refer to is subject to the provisions of § 73 of c. 152 hereinbefore referred to.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Retirement — Veteran — Right to Return of Accumulated Deductions upon Retirement under Non-contributory Provisions.

DEC. 30, 1955.

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

DEAR SIR: — You have requested my opinion concerning the retirement of a veteran under the provisions of G. L. c. 32, §§ 56–60A, inclusive.

Your problem relates to a veteran who is an official of the Commonwealth, is a member of the State Employees' Retirement System and is classified in Group A under § 3 (2) (*g*). You inform me that the official in question is a veteran as that word is used in § 58, that he has more than thirty years of creditable service as is required by said section, and that he is asking for retirement under the provisions of that section. You also advise me that the official will attain age seventy in the middle of

January, 1956, that he will be kept on the regular payroll until the end of that month and that he has requested that his rights under § 58 become effective at the end of said month.

Upon this set of facts you present the following inquiry:

"If the veteran continues on the payroll beyond his seventieth birthday and up to the end of January, will he then be eligible to retire under section 58 of chapter 32 allowing him to be paid his total accumulated deductions in accordance with the provisions of c. 32, § 25 (3)?"

The above inquiry presents two questions. Both are answered in the affirmative. Upon the facts as you have stated them in your letter, the official in question, in my opinion, will be eligible to retire under § 58 at the end of January, with the approval of the retiring authority. Furthermore, it is my opinion that such official will also be entitled to be paid the amount of the accumulated total deductions credited to his account in the annuity savings fund of the State Employees' Retirement System as of the date of his retirement. G. L. c. 32, § 25 (3) (*a*).

Although the official in question is subject to the provisions of § 3 (2) (*e*), which forbid him to "remain in service after attaining the maximum age for his group," which "maximum age" is seventy years and will be effective for him on the last day of next January, these questions of maximum age and its effective date are immaterial in so far as concerns his retirement under § 58. The facts stated in your letter indicate his eligibility under § 58, and also that he is complying with the mandatory provisions of § 3 (2) (*e*) by not remaining in service after attaining the maximum age. The alternative date for leaving the service does not change the situation since "the date any retirement allowance becomes effective for him" is also the end of the month of January.

I have examined the other provisions of c. 32 to which you make reference, and I find nothing which in any way deprives this official of his right to retire under § 58, if he obtains the approval of the retiring authority, nor of his right to be paid his accumulated deductions under § 3.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Administrative Procedure Act — Board of Elevator Regulations — Effective Date of Regulations.

JAN. 10, 1956.

Mr. EDWARD L. SCHWARTZ, *Clerk, Board of Elevator Regulations, Department of Public Safety.*

DEAR SIR: — You have requested an opinion with reference to the effective date of a new set of Elevator and Escalator Regulations, under G. L. c. 143, § 69.

You state that your board has revised the Elevator and Escalator Regulations, and you inquire as to the date such revised regulations may be made effective. This matter is now governed by the new chapter on State Administrative Procedure, G. L. c. 30A, adopted by St. 1954, c. 681, and effective on July 1, 1955. Your board is controlled by this new statute in

the adoption of regulations. G. L. c. 30A, § 1 (2) (5). The effective date of new regulations is governed by § 5 of that chapter, which provides as follows:

"Regulations made in accordance with the provisions of this chapter shall be filed with the state secretary under the requirements of section thirty-seven of chapter thirty. Regulations shall become effective upon filing, unless a later date is required by any law or is specified by the agency in the regulation."

The above provision makes it clear that your revised regulations may be made effective (i.e., operative or applicable) as of any date "specified by the agency in the regulation," if that date is later than the date of filing the regulations with the State Secretary.

The above statute is not inconsistent with G. L. c. 143, § 69, in which it is provided that your regulations must be deposited with the State Secretary and that they "shall become effective when so deposited." This does not mean that the regulations must become operative and applicable at the exact time of deposit, if the regulations themselves provide a later effective or operative date. The policy of making a statute or an administrative regulation operative at some specified date subsequent to the date it becomes a valid law or regulation is a policy frequently adopted in this Commonwealth. An interpretation that a set of regulations, and all parts of it, must become fully operative and applicable immediately upon deposit with the State Secretary, notwithstanding a contrary provision in the regulations themselves, is unnecessary and would be unreasonable.

Accordingly, in my opinion, it is possible for your board to provide in the revised regulations that they shall become effective and operative on some specified date, which date, of course, must be subsequent to the date of filing with the State Secretary.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Mentally Ill Person — Effect of Escape of Patient upon Term of Commitment.

JAN. 10, 1956.

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

DEAR SIR: — You have requested an opinion of this department relative to the discharge of a patient who has been committed to one of your institutions and who has escaped and has not been returned to you for more than one year. You present two questions:

"1. If a patient escapes from an institution, does his commitment lapse at the end of twelve months if he is not apprehended and returned in the interval, provided that his commitment has not been under one of the statutes for commitment of those faced with some type of criminal charge?

"2. If the answer to the above is 'no' is there any statutory limit on the time after escape at which the commitment would no longer be valid?"

In my opinion, the answer to each of the above questions is in the negative. This matter was covered by the opinion of this department dated January 27, 1900 (II Op. Atty. Gen. 122), by the first two questions answered in that opinion. The last sentence of G. L. c. 123, § 88, to which you refer, covers only temporary absence on leave, and does not apply to escapees from an institution.

You further state that "institutions routinely discharge patients on escape after one year" and that your predecessor "had made a regulation that at the expiration of twelve months escapees not returned should be discharged and any subsequent admission made as though it were a readmission of a patient regularly discharged." It seems to me that the above regulation covers the situation which you present in your letter, and I see no reason to consider such regulation to be invalid if its application is limited to cases in which it is found that the patient "will be sufficiently provided for by himself, his guardian, relatives or friends, or that his detention in such institution is no longer necessary for his own welfare or the safety of the public." G. L. c. 123, § 89. A discharge can be given under this statute even though the patient is not in actual custody but has escaped. II Op. Atty. Gen. 122, 123. Relying upon P. S. c. 87, § 40, the Attorney General there stated "that, if the facts required by the statute are found to be true, the person who has been committed may be discharged, whether at the time he is actually in custody or has escaped." This statute is now found in G. L. c. 123, § 89, in substantially the same phraseology as it existed in the Public Statutes. This interpretation of the statute relating to discharge of an escapee has been a matter of public record for 55 years and, notwithstanding that the Legislature has examined and amended this section many times, no change has been made in the words upon which the 1900 opinion was based. See also I Op. Atty. Gen. 487.

However, in my opinion, said § 89, in its present form, does not permit the discharge of an escapee as to whom the facts required by the statute do not apply.

Very truly yours,

George Fingold, *Attorney General,*

By Lowell S. Nicholson,
Assistant Attorney General.

State Employee — Right to Pay, during Military Training Duties.

Jan. 10, 1956.

Jack R. Ewalt, M.D., *Commissioner of Mental Health.*

Dear Sir: — You have inquired concerning the continuance of State pay to an employee who has been ordered to Fort Benning, Georgia, for training duty.

This matter is now covered by G. L. c. 33, § 59, adopted in 1954 as an entire rewriting of c. 33 on militia. St. 1954, c. 590. Under the provisions of § 59 an employee of the Commonwealth shall suffer no loss of pay "during the time of his service in the armed forces of the commonwealth, under" §§ 38, 40, 41, 42 or 60. In my opinion, the service of your employee, as

covered specifically by the copy of the "special orders" attached to your letter, is not service under any of the sections enumerated in § 59. Accordingly, the provision that there shall be no loss of his ordinary pay is not applicable to this particular person for his present training duty.

The statutes relating to this matter, prior to the new legislation in 1954, have been carried forward in substance to the new statute, although with different section numbers. The three opinions of this department which construe these earlier provisions are not controlling because the nature of the service covered by the special orders under which your employee is now absent is different in kind. Attorney General's Report, 1939, p. 124; Attorney General's Report, 1940, p. 33; Attorney General's Report, 1951, p. 14. You will notice from the orders that the authority for this particular service is § 99 of the National Defense Act. See U. S. Code, Title 32, § 65.

Accordingly, since the present service is not under any of the sections enumerated in G. L. c. 33, § 59, the provision in that section that there shall be no loss of ordinary remuneration is not applicable.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Food — Right of Local Boards of Health to regulate Keeping and Serving of Food.

JAN. 19, 1956.

SAMUEL B. KIRKWOOD, M.D., *Commissioner of Public Health.*

DEAR SIR: — In your recent letter you inquire as to the powers of local boards of health to make regulations "controlling the handling, storing, keeping and serving of food, especially in restaurants" under G. L. c. 111, § 31, and G. L. c. 94, § 146.

Under the latter statute, local boards of health, *subject to the approval of your department,* are empowered to make and enforce "reasonable rules and regulations" governing the conditions under which foodstuffs are *kept or exposed for sale.* The authority thereby conferred has been held to be narrowly limited to the "exhibition and exposure of food," which it was the object of the legislation to control for the protection of the public health. *Commonwealth* v. *Rivkin,* 329 Mass. 586, 588–589. Accordingly, while restaurant owners, like other sellers of food, may be controlled in their *keeping* and *exposing* of foodstuffs by regulations under this statute, in my opinion local boards of health cannot properly attempt to control, by such regulations, the method used by such sellers in "handling" or "serving" food.

However, such control can be exercised by local boards under the broad authority which is theirs under G. L. c. 111, § 31, which empowers them to "make reasonable health regulations." This grant of power is very broad, *Brielman* v. *Commissioner of Public Health,* 301 Mass. 407, 409, and permits the making of regulations governing matters other than the keeping

and exposing of foodstuffs. *Commonwealth* v. *Rivkin*, 329 Mass. 586, 589. Of course, such regulations must have some reasonable relation to the public health, and must be duly published under the provisions of the statute.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Employer — Employee's Right to Weekly Payment of Wages — Inclusion of Sunday in Six-Day Period.

JAN. 19, 1956.

ERNEST A. JOHNSON, *Commissioner of Labor and Industries.*

DEAR SIR: — In your recent letter you call the attention of the Attorney General to the fact that G. L. c. 149, § 148, as most recently amended by St. 1955, c. 506, requires employers to "pay weekly . . . the wages earned by (an employee) to within six days of the date of said payment if employed for five . . . days in the week." You state that certain employers "are paying wages to their employees on Friday for the payroll week ending on the previous Friday, the employees being employed five days a week."

You inquire whether or not a Sunday is to be counted in the six-day period prescribed by the statute; if so, as you point out, such employers are not complying with the legislative mandate.

As a general rule, "in computing the time within which an act may be done, if the period is less than one week, a Sunday is excluded." *Daley* v. *District Court of Western Hampden*, 304 Mass. 86, 94. However, where it appears that the Legislature did not intend that Sundays should be excluded from such computation, this rule does not apply. *Iannelle* v. *Fire Commissioner of Boston*, 331 Mass. 250, 252. In my opinion, it does not apply here.

Said § 148, as amended, provides for a six-day wage-payment period for persons employed for five or six days a week, and a seven-day period for seven-day employees. If Sundays were to be excluded from the computation of the six-day period, the practical effect would be to extend that period, as to five- and six-day employees, to seven days.

It was the clear and obvious intent of the Legislature to differentiate between seven-day employees and those regularly employed for a lesser period, and the exclusion of Sundays from the computation of the six-day period specified in § 148 would frustrate that purpose.

Accordingly, I advise you that a Sunday is to be counted in computing the six-day period prescribed by § 148.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Legislative Commission — Appropriation — Right of State Office Building Commission to Balance of Appropriation.

JAN. 31, 1956.

Hon. RALPH LERCHE, *Chairman, State Office Building Commission.*

DEAR SIR: — Your recent letter to the Attorney General requests an opinion as to whether a balance of $9,200 left from the preceding year may be used by your commission during the present fiscal year.

I have examined chapter 94 of the Resolves of 1955, to which you refer, which on July 18, 1955, revived and continued the State Office Building Commission. I note the direction in that resolve that "the balance available in Item 0270–00" of St. 1953, c. 675, § 2, may be expended by your revived commission.

Two matters occurred before Resolve 94 became effective, and it appears to me that these two matters will prevent the carrying out of the intention expressed by the General Court to make the sum of about $9200 available to the revived commission. One of these occurrences is that there was no "State Office Building Commission" in existence after January 12, 1955, and prior to July 18, 1955. Under the 1954 resolve (c. 111) your commission was to file its final report not later than January 12, 1955. The Supreme Judicial Court has ruled that a commission such as yours "is dead when the time fixed for its report has expired." *Cabot* v. *Corcoran,* 332 Mass. 44–47.

The second occurrence is that the balance of the appropriation made for your commission on July 4, 1953, by St. 1953, c. 675, § 2, Item 0270–00, and "reappropriated" by the 1954 Resolve, automatically reverted to the general unappropriated funds of the Commonwealth at the end of June 30, 1955. This takes place automatically under G. L. c. 29, §§ 12 and 13. Section 13 states specifically as follows:

". . . . The unencumbered balance of an appropriation for ordinary maintenance shall revert to the commonwealth at the close of the designated fiscal year."

The appropriation for your commission was for "ordinary maintenance" and was for the fiscal year which ended on June 30, 1955. G. L. c. 29, § 12.

The intent clearly expressed in the 1955 Resolve, that this balance of about $9200 would remain available to your commission, was not reflected in St. 1955, cc. 496 and 497. In those two chapters the General Court on June 28, 1955, specifically identified appropriations which were not to revert. The appropriation for your commission, inadvertently, was omitted from these acts.

Unfortunately, the only conclusion which can be drawn from these various statutes is that the expressed intent of the General Court to have this amount of money remain available to you was not carried out. Because of the failure of the General Court to prevent reversion, this balance automatically went into the unappropriated funds by reason of the specific direction of the General Court in § 13 of c. 29.

Under these circumstances, I would assume that the General Court would make a new appropriation for the work of your commission.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

City of Quincy — Right of School Committee to grant Use of Veterans Memorial Field to Charitable, Historical or Veterans Organizations.

FEB. 2, 1956.

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

SIR: — You have submitted to me for examination and report enacted bill numbered House 115, entitled "AN ACT AUTHORIZING THE SCHOOL COMMITTEE OF THE CITY OF QUINCY TO GRANT THE USE OF VETERANS MEMORIAL FIELD TO CHARITABLE, HISTORICAL AND VETERANS ORGANIZATIONS AND PERMIT THE CHARGING OF CERTAIN FEES." [1]

Veterans Memorial Field, in Quincy, was acquired under St. 1936, c. 266, for "educational, recreational and public playground purposes." The school committee has "full and exclusive control and direction thereof." Under the 1936 statute the school committee can permit certain athletic contests or other exhibitions on such land and can charge an admission fee. The power of the school committee was extended by St. 1953, c. 182, to permit the school committee to provide and to charge for "programs, light refreshments and other customary conveniences." The bill which has been presented to you for signature again increases the power of the school committee, this time to enable the school committee to "grant to any charitable, historical or veterans organization the use of such land" and to authorize such organization "to charge reasonable fees and such other charges for programs, refreshments and other conveniences as the committee may approve."

The present bill gives to the school committee power similar in kind to the power given school committees for the use of "public school property" under G. L. c. 71, § 71, and also similar in kind to the power given to certain school committees in control of buildings on playgrounds under G. L. c. 45, § 14. There may be some doubts whether or not Veterans Memorial Field in Quincy is "public school property" under c. 71, § 71, and also whether the power under c. 45, § 14, extends beyond buildings on playgrounds. Because of these doubts the present special act has been presented to the Legislature.

The power given to the school committee by the bill now before you to "grant to any charitable, historical or veterans organization the use of such land" is phrased in very broad language. If given a broad and literal interpretation it might be in conflict with Amendment 46 of the Massachusetts Constitution which forbids, among other things, the "grant . . . or use of public . . . property" for the purpose of aiding private

[1] Approved by the Governor on February 2, 1956, to become chapter 42 of the Acts of 1956.

organizations. Such a broad interpretation might also bring the proposed statute in conflict with the rule that public property should continue to be used for public purposes and should not be withdrawn from free public access to make the property a source of pecuniary profit. This latter objection was the one advanced by a former Attorney General (opinion to the Chairman of the Joint Committee on Education, dated February 13, 1936, Attorney General's Report, 1936, p. 38) against the original petition to the 1936 Legislature, following which such proposed bill was amended to the form now appearing in St. 1936, c. 266. But I believe that the correct interpretation of the authority to the school committee to "grant . . . the use of such land" does not bring this proposed act in conflict with the Constitution, nor is it subject to the objection advanced by the opinion of the Attorney General above cited. The statutes of 1936 and 1953 relating to Veterans Memorial Field, and the whole of the amendment which is now proposed, make it clear that what is intended is occasional permission to a proper charitable or historical or veterans organization for temporary use of the land, in a way not to conflict with the public purposes for which the land was taken and has been developed. This restricted interpretation will not make the proposed act unconstitutional. "Where a statute is fairly open to either of two constructions, one of which will make it constitutional and the other unconstitutional, that construction will be adopted which will reconcile the statute with the Constitution." McCaffrey, Statutory Construction, p. 130. Nor does the fact that there might be particular instances in the future of unconstitutional applications of this proposed act render the act itself unconstitutional. *Opinion of the Justices*, 333 Mass. 773, 781.

This bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Wire Tapping — Right of General Court to prohibit Wire Tapping of Juries or Jury Rooms.

FEB. 3, 1956.

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

SIR: — You have submitted to me for examination and report enacted bill numbered Senate 30, entitled "AN ACT PROHIBITING WIRE TAPPING OF JURIES OR JURY ROOMS." [1]

Senate Bill No. 30, now pending before you for approval, makes it a felony for any person secretly to overhear the deliberations of a jury by means of a dictaphone or similar device. This change in the General Laws is made by adding a new section in c. 272, which chapter covers "Crimes against Chastity, Morality, Decency and Good Order," such new section to read as follows:

"*Section 99A.* Whoever secretly overhears or attempts secretly to overhear or to have any other person overhear the deliberations of a jury by

[1] Approved by the Governor on February 6, 1956, to become chapter 48 of the Acts of 1956.

use of a device commonly known as a dictograph or dictaphone, or however otherwise described, or by any similar device or arrangement with intent to procure any information relative to the conduct of such jury or any of its members, shall be punished by imprisonment for not more than five years or by a fine of not more than five thousand dollars, or both."

The bill also makes technical corrections of numbering in the three following sections.

The right to trial by jury, centuries old even when our American colonies were first settled, is one of the sacred cornerstones which protect our personal rights, civil liberties, and even the worth and dignity of mankind; and secrecy of the deliberations of the jury is woven into the very fabric of the jury system itself. For more than five hundred years the basic idea that jurors should be protected from all outside influences, both during the trial and in the course of their deliberations until they reach a verdict, runs through the history of trial by jury. This freedom from outside disturbances has always accompanied the willingness of the American people to entrust their private disputes and even their lives and liberties to the decision of twelve of their neighbors and fellow citizens. The mere suspicion that a dictaphone may be in the jury room and that their deliberations may be observed and studied by persons critical of the jury system, who desire to "procure any information relative to the conduct of such jury or any of its members," is enough to destroy the calmness of the average jurors and render impossible the exercise of patient consideration and honest judgment. If prospective jurors understand that they may be made guinea pigs for experimentation by "reformers" they will either avoid the burdens of jury service or perform it with uneasiness. Trial by capable jurors might become an impossibility.

The evil effects of tapping jury deliberations have been clearly stated by United States Attorney General Brownell:

"Such practices, however well intentioned, obviously and inevitably stifle the discussion and free exchange of ideas between jurors. They tend to destroy the very basis for common judgment among the jurors, upon which the institution of trial by jury is based. . ."

The practice of tapping jury deliberations, if permitted, would effectively nullify our Massachusetts constitutional guarantee that trial by jury shall be preserved.

Massachusetts has always protected the complete right to trial by jury; and it could not be expected that danger to that constitutional right existed within the Commonwealth. But the "Wichita incidents" of last year, with the tapping of five civil trials in the Federal court, in pursuance of a plan to do the same in five hundred to a thousand jury trials all over the United States, make clear the danger from so-called "reformers" of our jury system. Senate Bill No. 30 protects us in our traditional rights, and I urge that it be approved.

This bill appears to be in proper form, and if enacted into law would, in my opinion, be constitutional.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Physician — Right of Registered Physician to extract Teeth.

Feb. 16, 1956.

Robert C. Cochrane, M.D., *Secretary, Board of Registration in Medicine.*

Dear Sir: — Your recent letter poses the following question:

"Does the extraction of teeth by a registered physician violate the law?"

The answer to your query may be found in the provisions of G. L. c. 112, §§ 52 and 53.

Section 52 of c. 112 provides that "any person . . . who, except as permitted by section fifty-three, directly or indirectly practices or attempts to practice dentistry or dental hygiene without being registered under sections forty-five to fifty-one, inclusive, or corresponding provisions of earlier laws . . . shall . . . be punished . . ."

Practicing dentistry is defined in § 50 of c. 112 as follows: "A person shall be deemed to be practicing dentistry . . . if he either offers or undertakes by any method to diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or other condition of . . ." human teeth.

As has been stated, the penalty section (§ 52) exempts from its operation activities permitted by § 53.

Section 53 provides that "nothing in sections forty-three to fifty-two, inclusive, shall apply to treatment by a registered physician not practicing dentistry, in cases where he deems treatment necessary for the *relief of his patients.* . . ."

So it will be seen that the penalty provisions for practicing dentistry by unregistered persons do not apply to cases of "treatment by a registered physician not practicing dentistry, in cases where he deems treatment necessary for the relief of his patients. . . ." The penalty provisions apply except as above stated.

Very truly yours,

George Fingold, *Attorney General,*

By Fred W. Fisher,
Assistant Attorney General.

Old Age Assistance — Right of Local Boards of Welfare to furnish Information relative to Statutory Liens for Assistance granted.

Feb. 21, 1956.

Hon. Patrick A. Tompkins, *Commissioner of Public Welfare.*

Dear Sir: — Your recent letter requests an opinion in connection with including old age assistance liens on the revised form for the certificate of municipal liens.

You request my opinion on three questions:

"1. May this information on liens for Old Age Assistance granted, recorded in accordance with the provisions of G. L. c. 118A, § 4, be furnished by local boards of welfare to collectors without violation of law as contained in c. 66, § 17A, c. 121, § 4A, and c. 271, § 43?

"2. May such information be furnished by collectors to persons requesting certificate of lien under G. L. c. 60, § 23, without violation of law as contained in c. 66, § 17A, c. 121, § 4A, and c. 271, § 43?

"3. Is a lien for Old Age Assistance granted, recorded in accordance with the provisions of G. L. c. 118A, § 4, of such a nature as to be included in the provisions of G. L. c. 60, § 23?"

It is the general policy that information as to the recipients of old age assistance shall not be made public. G. L. c. 66, § 17A; c. 121, § 4A; c. 271, § 43. In fact, the last cited statute provides, in substance, that any one who discloses information concerning the recipients of old age assistance shall be punished by a fine.

But the above policy of withholding information seems to come in conflict with the provision in c. 118A, § 4, that a person who owns certain real estate can obtain old age assistance only if the city or town granting such assistance "shall take a lien on such property as a condition of granting old age assistance," and the specific requirement in that same section that the city or town "shall place on record in the proper registry of deeds . . . an instrument in writing . . . creating a lien upon such real estate." This requirement that a lien must be obtained and recorded is a condition of granting old age assistance to certain persons and is a part of the administration of c. 118A which covers assistance to aged citizens. This provision in c. 118A, § 4, requiring the creation of a recorded lien on real estate, must be construed in connection with G. L. c. 60, § 23, which requires that the collector of taxes in a city or town shall furnish, upon written application, a certificate of all taxes and charges "which at the time constitute liens on the parcel of real estate specified in such application," and especially the further provision in said section that the omission of a lien from such tax certificate "shall operate to discharge the parcel of real estate specified from the liens . . . which do not appear."

The two provisions, that information as to old age assistance is confidential and that a recorded lien must be obtained on real estate in connection with the giving of old age assistance, must both be given effect if that is possible. In my opinion the reasonable interpretation requires the recording of the lien upon real estate even if such record, to that extent, gives publicity to the identity of a recipient of old age assistance. There are two grounds upon which this interpretation appears to be the one which should be adopted. In the first place, the requirement that the city or town shall record a lien first appeared in St. 1951, c. 801, § 4, which was several years after the initial appearance (St. 1945, c. 240) of the policy making such old age assistance records confidential. Furthermore, the provision in c. 271, § 43, providing for punishment by a fine of a person disclosing such old age assistance information specifically excludes such disclosure "for purposes directly connected with the administration of . . . old age assistance." I think it is clear that the requirement to record a lien for certain old age assistance is part of the administration of the granting of old age assistance, and accordingly it is not forbidden by the last cited statute. For the same reason, it is my opinion that it is not forbidden by the other statutes (c. 66, § 17A; c. 121, § 4A) which were adopted at the same time.

Each of your questions is answered in the affirmative.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Mentally Ill Person — Commitment for Observation — Right to hold Committed Escapee.

Feb. 23, 1956.

Jack R. Ewalt, M.D., *Commissioner of Mental Health.*

Dear Sir: — In your recent letter you request an opinion regarding the escape of an inmate committed under G. L. c. 123, § 77.

You advise us that the patient in question was committed under said § 77 for forty days' observation and treatment, that within said forty-day period it was duly determined that the inmate was in need of further treatment and accordingly an application was made for prolonged judicial commitment under § 51. After such application was made but before notice under § 51 was given to the inmate he escaped and went into another State. A few days after the forty days had elapsed the inmate was apprehended in the other State, and his return has been requested.

Under this state of facts you present two questions upon which you would like the opinion of this office.

"1. Is the fact that an application for commitment under § 51 had been submitted sufficient to consider that the hospital had a right to hold the patient even when he had escaped and was apprehended in another State after the expiration of the forty days, and would the Department of Mental Health have a right to authorize his return as an escaped patient?

"2. Should the request for his return be considered as a new commitment?"

Your first question is answered in the affirmative, and your second question in the negative.

For the purposes of the present question, commitment under § 77 is similar to commitment under § 51. *Mezullo* v. *Maletz*, 331 Mass. 233, 234. During a commitment under § 77 the inmate is in the custody of the superintendent or manager of the institution, and his unauthorized escape from the institution subjects him to the arrest after escape provided by § 95, and also to the provisions for extradition set forth in § 106. Even after the forty-day period has elapsed, § 77 authorizes his detention in your institution if there has been filed an application for prolonged commitment under § 51. Under such circumstances "the person may be detained at the institution." § 77.

The request for the return of the escaped inmate should not be considered as a new commitment. He was originally committed under § 77 for a forty-day period and, in view of the application for prolonged commitment, said section gives authority for continued detention under the original commitment.

Very truly yours,

George Fingold, *Attorney General,*

By Lowell S. Nicholson,
Assistant Attorney General.

Highways — Right of Department of Public Works to transfer Unneeded Highway Land to Another State Department.

Feb. 23, 1956.

Hon. John A. Volpe, *Commissioner of Public Works.*

Dear Sir: — In your recent letter you state that your department presently holds certain land originally acquired, but no longer needed, for State highway purposes, and that the Department of Public Safety would like to acquire control of the parcel as a site for a State police substation.

You inquire whether your department "has the authority to transfer title or control of this parcel of land to the Department of Public Safety without a special act of the Legislature."

I answer your question in the negative. The provisions of G. L. c. 81, § 7E, afford the only means whereby your department can rid itself of responsibility for such land: it may *sell* such a parcel and, with the approval of the Governor and Council, may *execute a deed thereof.* Obviously, such a transfer of control as that concerning which you inquire would not involve any actual change of ownership, since the Commonwealth would remain the record owner of the area; it therefore could not be accomplished by the execution of a deed under said § 7E. The provisions of G. L. c. 30, § 44A, under which your department may "transfer (certain lands of the commonwealth) to the control of another state department" have no application here, of course, since the proposed transfer is not "for the laying out or relocation of any highway."

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

Highways — Duty of Department of Public Works to compensate for Public Land taken for State Highways — Prohibition of Such Payment in Bond Issue Act.

Feb. 29, 1956.

Hon. John A. Volpe, *Commissioner of Public Works.*

Dear Sir: — In your recent letter you request an opinion regarding the payment for public lands taken by you for highway purposes. The facts and questions which you present are as follows:

"At the present time the department is operating, for the most part, with funds set up by the so-called bond issues, the latest one of which was established by St. 1954, c. 403. Section 6 of this act authorizes the department to take land by eminent domain and the first paragraph of § 6 contains the following phrase: 'Provided, that no damages shall be paid for public lands or parks, parkways, or reservations.' We have up to now not made payments for such lands.

"On August 18, 1955, St. 1955, c. 693, was approved. This act states

that 'Notwithstanding any provisions of law . . . authorizing the taking by eminent domain or otherwise of certain public lands . . . without the payment of damages therefor, the state department of public works . . . is hereby authorized and directed to pay to the city, town, department, authority or agency in possession of lands so taken, transferred or used an amount to be mutually agreed upon.' This act does not specify out of what funds such amounts are to be paid.

"In order to determine in what manner our allotments should be prepared, it is requested that the Attorney General advise this department on the following questions:

"1. Do the provisions of St. 1955, c. 693, supersede the provisions of St. 1954, c. 403, and thereby require the department to pay money out of the bond issue for public lands, parks, parkways or reservations?

"2. On the assumption that a new bond issue will be authorized by the current Legislature, will the provisions of St. 1955, c. 693, be applicable to such new bond issue, if such new bond issue contains language similar to that in St. 1954, c. 403, § 6?

"3. Is there established procedure for arbitration in the event that the amount required to be paid by c. 693 cannot be mutually agreed upon?"

Answer to Question 1. — The provisions of the special 1955 act supersede the provisions of the 1954 bond issue to the extent that you are now required to pay for public lands taken, contrary to the provisions in § 6 of the 1954 bond issue. But the 1955 provision does not permit use of the proceeds of the 1954 bond issue for the payment for such public land. Such proceeds were obtained under the provisions of the 1954 act, and such proceeds, under our Massachusetts Constitution, "shall not be expended for any other purpose." Mass. Const. Amend. 62.

Answer to Question 2. — If there is a new bond issue enacted by the 1956 Legislature its provisions will be controlling even though they may be inconsistent with the 1955 act cited above. That is, a later provision of the Legislature controls. If the 1956 provision directs that no damages be paid for public lands, such requirement must be followed until changed. In any event, money obtained by a new 1956 bond issue must, of course, be spent only in accordance with the provisions of such issue. An official opinion on this matter cannot be given until the terms of the 1956 act are examined.

Answer to Question 3. — I know of no procedure for arbitration in the event that the amount you are authorized and directed to pay for public property cannot be mutually agreed upon. The 1955 act gives you authority only to pay "an amount to be mutually agreed upon." If there is no such agreement, then there is no authority for payment.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Probation — Effect of Conviction and Probation for Attempted Escape of Confined Prisoner — Meaning of "Sentence."

Feb. 29, 1956.

Mr. Frederick J. Bradlee, *Chairman, Parole Board.*

Dear Sir: — In your recent request for an opinion you state that a certain prisoner was duly sentenced on January 15, 1951, to the Massachusetts Reformatory for a term of five years, that he attempted to escape therefrom on May 12, 1951, and that he pleaded guilty to an indictment charging him with that attempt, as a consequence of which he was placed on probation on September 17, 1951, the "probation [to] begin from and after his release from the Reformatory."

You inquire whether this probation "should be considered a sentence" under the provisions of G. L. c. 127, § 129, as they existed on said September 17, 1951 (see, now, St. 1955, c. 770, § 66).

The provisions to which you make reference are as follows:

"If, during the term of imprisonment of a prisoner confined in a state . . . institution, such prisoner shall commit any offence of which he shall be convicted *and sentenced*, all deductions [for good conduct and for satisfactory work] . . . from the former sentence . . . shall be thereby forfeited" (emphasis supplied).

A sentence, which inflicts some form of direct punishment upon a convict, is only one method of disposing of a criminal prosecution. See, for example, G. L. c. 279, § 4A, which speaks of disposition "by sentence *or* placing on file *or* probation." Neither of the latter two dispositions has the same finality as does the imposition of a sentence or the dismissal of the indictment or complaint. *Marks* v. *Wentworth*, 199 Mass. 44. It is perfectly clear that probation may or may not be accompanied by a sentence. See G. L. c. 279, § 3. In the case which you put, it appears that no sentence was imposed at the time the convict was placed on probation, and that none has since been imposed.

Accordingly, I advise you that the provision of said c. 127, § 129, to which you refer has no application to the specific case concerning which you inquire. This would seem to afford an answer, also, to your second inquiry, which is "whether or not the subject should forfeit all deductions . . . on his original sentences."

Your third and final question is "what would be the effect of (said provision of c. 127, § 129) . . . when the case was disposed of by placing the conviction on file." Since nothing indicates that you have any present problem involving such an actual state of facts, the long and well-established policy of this department prohibits any direct answer to this question; perhaps, however, an answer has already inferentially been given by what is said above.

Very truly yours,

George Fingold, *Attorney General,*

By Arnold H. Salisbury,
Assistant Attorney General.

State Board of Examiners of Electricians — Right to requisition and appoint Civil Service Employees.

March 9, 1956.

Mrs. Hazel G. Oliver, *Director of Registration.*

Dear Madam: — In your recent request for an opinion you pose the following question:

"Whether the Board of State Examiners of Electricians has appointing or requisitioning power in connection with employment or promotion of civil service employees in the Division of Registration, assigned to the Board of State Examiners of Electricians, with the exception of the Executive Secretary."

The Board of State Examiners of Electricians is created by G. L. c. 13, § 32. In this section it is provided that "the board shall appoint an executive secretary. . . ." I am unaware of any other or further appointing authority in this board. The sentence at the end of § 32 reading "The board may expend for the salaries of the appointive members and of the secretary and other employees and for necessary traveling and other expenses for themselves and their employees such sums as are annually appropriated therefor" does not, in view of the legislative pattern covering the Division of Registration and the various boards therein, extend or amplify the appointive power of this board. Section 9 of c. 13 makes it clear that the various boards of registration referred to in c. 13 serve in the Division of Registration.

Moreover, G. L. c. 112, § 1, provides that the Director of Registration shall supervise the work of the several boards of registration and examination included in the Division of Registration of the Department of Civil Service and Registration. Furthermore, by the provisions of § 8 of c. 13, "the division of registration shall be under the supervision of a director, to be known as the director of registration. . . ." Whenever the General Court has intended to provide general appointing authority in the various boards, that intention has been made clear.

In § 3 of c. 13 it is provided that the Director of Civil Service may appoint and remove in accordance with c. 31, such officers and employees as the work of the Division of Civil Service may require.

Board of Registration in Pharmacy: § 25 of c. 13 provides that the board shall appoint not more than four agents who shall be allowed necessary traveling expenses.

Board of Registration in Embalming and Funeral Directing: § 85 of c. 112 provides that "the board is authorized . . . to employ inspectors who shall investigate and report to the board the results of their investigations; to employ such other employees as the work of the board may require. . . ."

Section 40 of c. 13, dealing with the powers of the Board of Registration of Barbers, provides that "the board may appoint investigators. . . ."

Section 43 of c. 13, in setting up the Board of Registration of Hairdressers, provides that "the board may appoint such agents and employees as the work of the board may require. . . ."

Section 44D of c. 13, in defining the powers of the Board of Registration of Architects, provides that "the board may appoint such clerks as may be necessary. . . ."

Board of Registration of Professional Engineers and Land Surveyors: § 81G of c. 112 provides that "the board may employ such clerical and other assistance as may be necessary for the proper performance of its work. . . ."

In view of the foregoing, the Legislature appears to have expressed itself plainly whenever it intended to confer upon one of the various groups which is a part of the Division of Registration the power to appoint employees for itself. Omission of any such provision in § 32 of c. 13 dealing with the appointing power of the Board of State Examiners of Electricians is significant.

I am of the opinion, therefore, that the appointing power you refer to is in the Director of Registration. I see no reason for overruling the opinion relative to this subject matter of Attorney General Dever given to the then Director of Registration. Attorney General's Report, 1940, p. 49.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By FRED W. FISHER,
Assistant Attorney General.

Interest — Obligation of City to pay Interest on Debt due State Commission.

MARCH 12, 1956.

HON. CHARLES W. GREENOUGH, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — Your recent letter requests an opinion relative to the liability of the city of Fitchburg for interest upon moneys paid to the metropolitan water district under § 11A of St. 1951, c. 732.

Said c. 732 authorized Fitchburg to acquire certain properties for the purpose of increasing its water supply; under § 11A, it was required to pay to the district, as full reimbursement for loss of property, water and water rights, "the sum of one hundred thousand dollars . . . full payment to be made before commencement of actual construction work." You state that actual construction work was commenced on June 15, 1954, but that the city did not make the payment required by § 11A until May 20, 1955. You inquire, upon the basis of these facts, "whether or not the commission is entitled to interest on the $100,000 payment from June 15, 1954 . . . to May 20, 1955. . . ."

The usual rules relative to the liability of a debtor for interest have long been well settled. "If . . . one should promise in writing to pay money to another on a day certain, and fail to do so, interest would be added to the amount of damages, notwithstanding the writing did not express it. It would be added as a compensation for the non-performance of the contract. . . . The great inquiry is, whether the party has done all that the law required of him in the particular case . . . If he has, he is not accountable for interest; if he has not, he is accountable for it . . . [because] where the law requires the party to pay over money . . . without waiting for any demand . . . the promise which the law implies, extends as well to the interest as to the principal sum . . ." *Dodge* v. *Perkins*, 9 Pick. 368, 384–386. "By the law as settled in this Commonwealth, interest is to be

allowed in all cases where either by express contract or by implication it is the duty of a party to pay over money due without any previous demand by the creditor. When a definite time is fixed for the payment of a sum of money, the law raises a promise to pay damages, by way of interest at the legal rate, for the detention of the money after the breach of contract for its payment." *Foote* v. *Blanchard*, 6 Allen 221, 222. Where, as here, the principal sum has already been paid, these general principles require the debtor to make an additional payment representing interest during the period beginning when the money should have been paid and ending at the date of actual payment. *Vaughan* v. *Lemoine*, 330 Mass. 83, 86–87.

However, the decisions above cited are not conclusive upon your precise question, which is one of *municipal* liability. The authorities in other jurisdictions are divided as to whether or not municipal corporations should, with reference to their liability for interest, be treated like any other debtor, or be free of such responsibility except where a specific undertaking to pay interest charges has been made. See 38 Am. Jur. 380. In this Commonwealth, the law apparently does not accord to municipalities any special right to escape liability for interest upon moneys justly due. *Jackson* v. *Brockton*, 182 Mass. 26; *Goldman* v. *Worcester*, 236 Mass. 319. When the debt arises out of the "business of supplying water," of which the city of Fitchburg is "the owner and proprietor," it seems clear that the rights of the city should be no more nor less than those of a private water company. *Commonwealth* v. *Hudson*, 315 Mass. 335, 339.

On the other hand, it is well settled that, even where municipalities may be held responsible for interest, a demand for the payment of the principal claim must be made before interest starts to run. This rule is based "on the consideration that it would be inconvenient and burdensome for the officials of a municipality to seek its creditors and tender payment of their claims, and also that it would be oppressive and unjust to permit creditors of a municipality with good credit to turn claims into investments through omitting to present them and then collecting interest thereon." *Smith* v. *Board of Education*, 208 N. Y. 84, 86. I assume from your letter that the commission made no such demand prior to its receipt of the $100,000 from the city of Fitchburg. In these circumstances, I advise you that the city is not responsible for interest thereon during the period in question.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Retirement — Legislators — Duty of State Retirement Board to supply Names of Retired Members of General Court — Public Records.

MARCH 15, 1956.

Hon. JOHN F. KENNEDY, *Chairman, State Board of Retirement.*

DEAR SIR: — In your recent letter you state that your office has been requested by the Massachusetts Federation of Taxpayers Associations, Inc., to "furnish . . . the names of former members of the General Court who are currently receiving retirement allowances . . . and also the amounts

of such retirement allowances." You further state that your "monthly pension warrant" lists the names of all recipients of retirement allowances, together with the amounts of their pensions, but does not indicate which of them are former legislators.

You inquire, first, whether you are under any obligation to prepare a separate list of the names concerning which the Federation has requested information.

I answer your question in the negative. There is no doubt that the pension warrant is a "public record" within the definition found in G. L. c. 4, § 7, Twenty-sixth. Attorney General's Report, 1953, p. 23. Accordingly, it may be inspected, at any reasonable time, by any person. G. L. c. 66, § 10. Since the right of inspection would otherwise be of little value, copies may be made. *Direct Mail Service* v. *Registrar of Motor Vehicles*, 296 Mass. 353, 356–357. However, no person can require you to rearrange your official records or to compile data from them for his convenience alone. In other words, while he may inspect and copy such official records as you now have, he cannot demand that you prepare other records, unnecessary to the proper functioning of your board, so that he may inspect and copy them as well.

You inquire, further, whether the "detailed records which are assembled in the act of retiring former members of the General Court," constitute "public records" which may be inspected and copied under said c. 66, § 10.

I answer this question in the affirmative, but only in so far as it relates to papers filed with your board pursuant to law and to papers or other materials upon which are recorded your official determinations relative to the amounts of retirement allowances. Such records, essential to the proper performance of the duties of your board, are required to be kept by G. L. c. 66, § 6, and may therefore be inspected under § 10 of the same chapter. See, also, G. L. c. 32, § 20 (5) (*a*).

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Veterans' Hospitals — Cession by State to United States — Right of State Court to commit Mentally Ill Veteran to Federal Hospital — Jurisdiction over Person in Federal Hospital.

MARCH 29, 1956.

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

DEAR SIR: — You have requested an opinion in connection with the court commitment of certain veterans who are mentally ill and who are now in the Federal veterans' hospitals in Massachusetts.

By the provisions of G. L. c. 123, you are charged with many responsibilities for the care of the mentally ill in Massachusetts. These responsibilities include the duties to prescribe forms for court commitments, to "secure compliance with the laws" relative to the commitment of the mentally ill and their admission to institutions, and to "investigate the propriety of any commitment or admission." G. L. c. 123, § 24. These

responsibilities include court commitments of persons to veterans' hospitals maintained by the United States in Massachusetts. G. L. c. 123, §§ 10, 20A, 34A, 77.

You state that each year hundreds of patients in Federal veterans' hospitals in Massachusetts are committed by our State courts, and you request an opinion with respect to the "compliance with the laws" and the "propriety" of these commitments. You particularly ask concerning the provision in G. L. c. 123, § 51, as amended by St. 1955, c. 637, § 8, that the court may hold a "private hearing" in these cases "at a place convenient" for the patient, and concerning the practice that such hearings, as a matter of convenience, are held at the Federal hospitals.

Your inquiry raises serious problems of jurisdiction. A preliminary problem concerns the jurisdiction of the Massachusetts courts under our own statutes. More difficult problems are presented by the fact that, for many purposes, the jurisdiction over the Federal hospitals is in the United States, to the exclusion of Massachusetts, and the corollary rule of law, stated by some courts, that the land or reservation on which such a hospital is located is not a part of the State within which the land lies.

Considering the situation, first, only from the point of view of our Massachusetts statutes, it is clear that the courts designated in G. L. c. 123, § 50, have power to make such commitments, and that such a court also has statutory power to hold a "private hearing" upon premises of a Federal hospital, if that is a place convenient for the patient. The procedure for commitment of a person mentally ill, outlined in § 51, requires that a written notice be personally served upon such person, and provides for a hearing if requested by such person. The statute then provides: "The court may at its discretion hold a private hearing at a place convenient for the person served." This 1955 version is slightly different in language from earlier forms of this section, but for many years a substantially similar provision has been in our statutes. Since 1879, the statutes have provided: "The hearing, except when a jury is summoned, shall be at such place as the judge or justice shall appoint." St. 1879, c. 195, § 2. For the purpose of commitment of persons mentally ill each court exercises its jurisdiction within its own county. G. L. c. 123, § 50. There is nothing in the Massachusetts statutes or Constitution which forbids a court from holding such a private hearing at a Federal hospital within its county.

But apart from the Massachusetts statutes, difficult questions are presented because of the cession of jurisdiction by Massachusetts to the United States. The acquisition by the United States of lands in Massachusetts for the construction of veterans' hospitals is authorized by the Federal Constitution. Art. 1, § 8, cl. 17. The first part of this clause contains the authority under which the United States acquired and now controls the District of Columbia. The second part of the clause permits the acquisition of other land in the States for purposes which include hospitals. As to the land acquired to become "the Seat of the Government," the United States is given power "To exercise exclusive Legislation in all Cases whatsoever." As to the property acquired under the second part of this clause, the United States is given power "to exercise like Authority." The word "legislation" in this clause means both "legislation" and "jurisdiction." In its acquisition of the properties on which the four veterans' hospitals in Massachusetts have been built, the United States obtained the consent of Massachusetts, and also obtained a cession of jurisdiction. This

consent and cession were obtained, in each instance, by the enactment of a statute by the General Court which provided that "jurisdiction over said area shall be granted and ceded to the said United States," except for the specific retention of concurrent jurisdiction for the service of all civil and some criminal processes. Northampton, St. 1926, c. 386, § 2. Bedford, St. 1937, c. 361, § 2. Brockton, St. 1949, c. 497, § 4. Boston, St. 1952, c. 564, § 2.

The above situation poses three questions of jurisdiction in connection with the commitment by Massachusetts courts of patients in such Federal hospitals: (1) a question of the jurisdiction of the Massachusetts court over the person of the patient alleged to be mentally ill; (2) a question of the court's jurisdiction to alter the status (as competent or incompetent) of such a person; and (3) a question of the jurisdictional effect of holding a "private hearing" on such Federal property. These questions require an analysis of the nature of the rights of the United States over such ceded territory.

In an early Massachusetts case it was stated, in connection with a similar cession of jurisdiction to the United States, that "the government of the United States have the sole and exclusive jurisdiction over such territory, for all purposes of legislation and jurisprudence, with the single exception expressed." *Opinion of the Justices*, 1 Metc. 580, 583. The exception mentioned was the service of process. In *Employers' Liability Assurance Corp., Ltd.* v. *DiLeo*, 298 Mass. 401, the court applied this principle to the veterans' hospital in Rutland, as to which there had been a similar cession of jurisdiction (St. 1922, c. 409). The court stated, at page 404, as follows:

"It results that, for the purposes of this case [i.e., the application of the Massachusetts workmen's compensation act of 1932 to the Federal reservation], the land on which the Veterans' Hospital was located was not a part of this Commonwealth, and neither our administrative officers and boards nor our courts had any jurisdiction over it. . . . The exclusive power of legislation granted by the Constitution carries with it exclusive jurisdiction."

But such cession does not mean that there is a vacuum within such territory as to municipal laws relating to health and the like. In the last cited case, at the same page, our court stated:

"It is true that after a cession of jurisdiction over territory from one sovereign to another the existing municipal laws, including statutes, relating to the title to property or intended for the protection of private rights, continue in force until changed by the new sovereign."

This continuation in force of municipal laws [1] which are needed to preserve good order and to promote health and safety, to the extent that they are not inconsistent with existing Federal laws or with the purposes of Federal acquisition of the property, is stated in many Federal cases. The Supreme Court of the United States, in *Chicago & Pacific Railway Co.* v. *McGlinn*, 114 U. S. 542, at 546–47, stated as follows:

[1] In this connection, the term "municipal laws" means the internal law of the State, and is used in contradistinction to "international law." The term is not confined to the law of a city only. See Words and Phrases, Vol. 27, and cases there cited.

"But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

A recent statement of the Supreme Court of the United States on this subject, in *Howard* v. *Commissioners*, 344 U. S. 624, at 627, is as follows:

"The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed."

In *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94 at 99, the court said:

"The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights."

As a practical matter, such Federal reservation must be treated, at least geographically, as within the boundaries of the Commonwealth. This is especially so because of the many powers over Federal land recently returned to the individual States by Congress. Workmen's compensation laws (40 USCA § 290), State unemployment insurance acts (26 USCA § 3305d [1954 Code]), taxes on motor fuel (4 USCA § 104), local sales taxes (4 USCA § 105), and income tax requirements (4 USCA § 106) are some of the examples of recession of jurisdiction in substantial particulars. These matters were considered in *Arapajolu* v. *McMenamin*, 113 Cal. App. 2d 824, 249 P2d 318, 34 ALR2d 1185, in which the California court determined that residence upon Federal land was sufficient to meet the California statutory requirements for voting. The California court stated, at pages 1191–92 (in 34 ALR2d), as follows:

"The jurisdiction over these lands is no longer full or complete or exclusive. A substantial portion of such jurisdiction now resides in the States and such territory can no longer be said with any support in logic to be foreign to California or outside of California or without the jurisdiction of California or within the exclusive jurisdiction of the United States. It is our conclusion that since the State of California now has jurisdiction over the areas in question in the substantial particulars above noted residence in such areas is residence within the State of California entitling such residents to the right to vote given by sec. 1, Art. II of our Constitution."

Many other cases on the above points are contained in the lengthy annotation in USCA covering the second part of cl. 17 of Art. 1, § 8, of the Constitution of the United States. See also: States, 12 U. S. Sup. Ct. Digest, § 30; United States, 54 Am. Jur. § 84; United States, 91 C. J. S. § 7; Anno., 34 ALR2d 1193.

Necessity requires that the local law relating to insane persons continue in force in the ceded territory. The United States has covered this field only in regard to Federal prisoners (18 USCA §§ 4241–4248), and in certain other minor particulars (24 USCA § 161 and § 191 *et seq.*). The United States does not have any legislation providing for the commitment of insane persons who are inmates of its veterans' hospitals. The Federal courts have stated that this field is within the general power of the States. In *Wells* v. *Attorney General of the United States*, 201 F2d 556 (C. A. 10th), the court stated, at page 559, as follows:

"The several states in their character as parens patriæ have general power and are under the general duty of caring for insane persons. The prerogative is a segment of police power. In the exercise of such power, insane persons may be restrained and confined both for the welfare of themselves and for the protection of the public. And if the exactions of due process are met, such restraint and confinement do not violate any constitutional right of the individual."

The application of Massachusetts law and procedure to the Federal hospitals in Massachusetts, in this field of the care of the mentally ill, would not be inconsistent with any Federal statutes or regulations or practices. In fact, since there is no Federal statute under which a commitment can be made, the practical needs of the Federal administrators require the cooperation of the Commonwealth in the matter of commitment of persons mentally ill.

Considering the status of Federal property within the Commonwealth of Massachusetts as explained in many cases, some of which are mentioned above, it is my opinion that the mere holding of a "private hearing" on such Federal property does not render void the order of commitment entered by a Massachusetts court in a proceeding in which such a private hearing was held. The private hearing, itself, is not a commitment. It is only one part in the procedure required by the statute. Section 51 calls for (1) application for commitment, (2) notice to the person named and copy of notice to the nearest relative or guardian, (3) certificate by two physicians, (4) a hearing, if requested, (5) a recital of jurisdictional findings in the order itself, and (6) the official and final order of commitment. The hearing, which is optional with the person alleged to be mentally ill, is only one of the steps leading to the final order of commitment. The holding of a "private hearing" on the premises where the patient resides, for his convenience, as authorized by § 51, does not affect the validity of the final order of commitment which is entered by the court at its usual place of sitting.

The situation here is entirely different from that in *Commonwealth* v. *Handren*, 261 Mass. 294, where the outside hearings were determined to be "null and void" on the ground that they went beyond the statutory authority given to the trial court.

It is also my opinion that, in the absence of Federal legislation, the Massachusetts courts have undoubted jurisdiction to commit persons mentally ill who are patients at veterans' hospitals in this Commonwealth. In Massachusetts, the entire commitment proceeding from original application to final order is "a judicial proceeding." *Mezullo* v. *Maletz*, 331 Mass. 233, 234. All of the essential elements of jurisdiction are present for the commitment of veterans who are held as patients in Federal hos-

pitals. The courts mentioned in G. L. c. 123, § 50, have statutory jurisdiction of a proceeding of that nature. Jurisdiction of the person of the patient in question is properly acquired by service in hand of the notice or process required by § 51. See Courts, 14 Am. Jur. § 183. This service of process on the patient at the Federal hospital is specifically authorized by the provision in the usual act of cession to the United States that such cession is made upon the express condition "that all civil processes [and also all criminal processes against persons charged with crimes committed outside the area] may be executed thereon in the same manner as though this cession had not been made." See St. 1952, c. 564, § 2. (If no cession had been made, all of the problems existing in the present case would be answered, without question or argument, in favor of the validity of the commitment.) Accordingly, in my opinion, all jurisdictional requirements are met.

Furthermore, since the care and commitment of the mentally ill are duties of each State under its police power, such power and regulation, even in the absence of any express reservation of jurisdiction, continue in force in the ceded territory.

"Even in the absence of such reservations in the State's consent, however, state laws in effect at the time of Federal acquisition not inconsistent with federal law, and not detrimental to the purposes for which the enclave was established, have been held to remain in effect on the enclave until abrogated by Congress." (*Hughes Transp.* v. *United States*, 121 F. Supp. 212, at 218–19.)

In fact, commitment under State law is and for many years has been the administrative practice in all of our States in connection with insane patients in Federal hospitals. The impropriety of the only other possible alternative — of carrying the patient out of the hospital and off the reservation, in order to obtain a legal commitment — indicates that no conclusion other than that of full State jurisdiction should be reached.

Although there are no Federal statutes expressly authorizing such commitments by State courts, the existing practice is essential for the proper care of veterans, and it is needed and desired by the administrators of the Veterans' Administration. Furthermore, this practice is recognized and adopted by the Regulations of the United States Veterans' Administration (VA Regulations, §§ 14.223 to 14.277, Code of Federal Regulations, Title 38, 1949 Edition; and Vet. Reg. No. 10 (XIV), 38 USCA, chap. 12A), which regulations have been accepted by our court as having the force of law. *Keating* v. *Director of U. S. Veterans' Bureau*, 272 Mass. 212, 215.

In conclusion, for the reasons set forth above, it is my opinion that our State courts have full jurisdiction in the matter of the commitment of mentally ill veterans in Federal hospitals, and that you are acting properly in arranging for "private hearings" on such reservations. Such proceedings and procedure are authorized by State legislation, and they do not violate any Federal rights.

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

Cuttyhunk Harbor — Liability of Commonwealth to pay for Extra Dredging — "Extra Work" or "Alteration."

April 2, 1956.

Mr. Rodolphe G. Bessette, *Director, Division of Waterways, Department of Public Works.*

Dear Sir: — Your recent letter concerns the claim of New England Dredge and Dock Company for payment for work in excess of that contemplated under Contract 1415, covering dredging in Cuttyhunk Harbor, and you request an opinion as to whether the department may pay the additional sum of $34,779.69 representing work in excess of the original contract price.

The voucher dated December 21, 1955, indicates that on Item 1 for "material dredged and disposed of" estimated at 40,000 cubic yards, the ultimate quantity came to 66,961 cubic yards. The Comptroller has declined to approve payment of the excess listed in the voucher as "Alteration No. 1."

The amount of the excess (26,961 cu. yds.) over the contract quantity (40,000 cu. yds.) is so great that there can be no doubt that payment could not be justified as an overrun of a unit price item, even though involving work of the same nature as that contemplated by the contract. Similarly, the excess was so great that it could not be justified either as an alteration or as extra work. See *Morse* v. *City of Boston*, 253 Mass. 247. Being beyond the scope of the original contract, your department would have no power to undertake or approve the work, and make payment therefor, without prior compliance with the bid statute.

Even if it is assumed that the Federal engineer, who was present in connection with that portion of the work being done under a Federal contract, had been orally designated by your department as the person to whom the contractor should look for directions, that fact does not aid the contractor for the basic reason that the department itself did not have, and hence could not delegate, the power to approve the additional work.

While the fact that the Commonwealth had the benefit of the work provides some moral justification for payment of this claim, it does not provide any legal justification. It has been settled that no recovery can be had against the Commonwealth on a *quantum meruit* basis. *Lewis* v. *Commonwealth*, 332 Mass. 4.

It also is my understanding that the contractor was fully aware when he undertook the additional work that he had no departmental approval therefor and that he undertook it at a real risk it might not be approved.

Consequently, I am of the opinion that there is no basis upon which payment of this claim could be legally justified. It is possible, of course, that the courts, on a petition brought by the contractor under G. L. c. 258 might reach a contrary conclusion or that the Legislature might approve a special bill for payment of this claim.

Very truly yours,

George Fingold, *Attorney General,*

By John V. Phelan,
Assistant Attorney General.

Land Court — Jurisdiction of Division of Personnel and Standardization over Employees of Land Court — Separation of Three Branches of Government.

April 24, 1956.

Hon Carl A. Sheridan, *Commissioner of Administration.*

Dear Sir: — You have recently asked my opinion regarding the responsibilities of the Division of Personnel and Standardization in connection with the employees of the Land Court.

You present four questions, as follows:

(1) "Do the provisions of G. L. c. 30, §§ 45 and 46 as amended by St. 1954, c. 680 and St. 1955, c. 643, which exempt offices and positions in the judicial branch, include the offices and positions of the Land Court?

(2) "Does the Division of Personnel and Standardization have any obligation to classify such positions in the Land Court?

(3) "Do the officers and employees of the Land Court come under the provisions of the rules and regulations of the Division of Personnel and Standardization authorized by G. L. c. 7, § 28, as amended by St. 1954, c. 680 and St. 1955, c. 643?

(4) "Do the officers and employees of the Land Court come under the provisions of c. 149, § 30A, as amended by St. 1955, c. 643, and any rules pertaining to overtime pay?"

The answer to each question is in the negative.

Your questions all relate to the personnel system of the Commonwealth. References to this system, and to the responsibilities of the Division of Personnel and Standardization, are found in many sections of the General Laws, including c. 7, §§ 28, 28A; c. 30, §§ 38, 45, 46; c. 149, § 30A; and, with particular reference to the Land Court, in c. 185, §§ 1, 7, 12 and 14. The general matter of personnel administration in the Commonwealth was covered in detail by the Fourteenth Report of the Special Commission on the Structure of the State Government, filed in December, 1953, numbered House 2352 of 1954. Numerous and comprehensive changes were made by the Legislature during 1954, as a result of the recommendations of the Special Commission, and these are set forth in St. 1954, c. 680. Further changes with reference to the personnel system of the Commonwealth were made by St. 1955, c. 643.

Your first question relates to G. L. c. 30, §§ 45 and 46, as amended. You inquire whether these sections "include the offices and positions of the Land Court." It is specifically stated in subdivision (1) of § 45 that "offices and positions in the judicial and legislative branches" are excepted. This exclusion, in my opinion, carries through all of the subdivisions of § 45, and also carries through all of the provisions of § 46. Although there is no express exclusion set forth in § 46, the rules and regulations of salary grades under § 46 are based upon the classifications of positions under § 45. These two sections stand together. Because of the specific exclusion in § 45 of judicial offices, and because of the interrelationship of these two sections, this exclusion must be interpreted to apply to both sections in full. Accordingly, the provisions of these two sections do not include the offices and positions of the Land Court.

Your second question is answered in the negative for the reasons set

forth above. The duty of the Division of Personnel and Standardization to classify positions is a duty under G. L. c. 30, § 45. Since judicial offices and positions are excluded from § 45, it is my opinion that the Division of Personnel and Standardization has no obligation to classify positions in the Land Court.

In your third question you inquire whether or not the rules and regulations of the Division of Personnel and Standardization, issued under the authority of the second paragraph of G. L. c. 7, § 28, apply to the officers and employees of the Land Court. In my opinion, such rules and regulations do not apply to the officers and employees of the Land Court. Although there is no express exclusion of judicial officers in § 28, I believe that such an exclusion must be implied. The first paragraph of § 28 makes reference to "departmental research." This particular phrase is not appropriate to the judicial branch. In the third paragraph of this section, reference is made to a "determination of the hours of work of any class" of employees. However, the Land Court is specifically given the power to fix the hours during which court is open, to make its own rules, to employ necessary assistants, to assign duties to title examiners, and the compensation for all such employees is to be fixed by the Governor and Council, rather than the Division of Personnel and Standardization. G. L. c. 185, §§ 1, 7, 12, 14. Rule 1 of the Land Court, approved by the Supreme Judicial Court on April 30, 1935. Furthermore, said third paragraph of § 28 makes reference to a "class" of employees, thereby incorporating the provisions of c. 30, § 45, relating to classification, which section expressly excludes the judicial branch. This third paragraph of § 28 also makes reference to action by the Division of Personnel and Standardization "under authority of" c. 149, § 30A. This section also excludes offices and positions in the judicial branch, as is explained in the following paragraph. For these various reasons, and also because of the general content of the rules and regulations issued under the authority of § 28, it is my opinion that the officers and employees of the Land Court do not come under the rules and regulations of the Division of Personnel and Standardization issued under the authority of G. L. c. 7, § 28.

In your fourth question you inquire whether or not the officers and employees of the Land Court come under the provisions of G. L. c. 149, § 30A. This section, added in 1947, was rewritten in 1955. It now states that "the service of all persons employed by the commonwealth" is restricted "to five tours of duty in any one work week," and to "not less than thirty-seven and one half hours . . . nor more than forty hours" in any one week. Although the first two lines of § 30A start with the phrase "notwithstanding any other provision of this chapter or other general or special law," reference is made to determinations "by the director of personnel and standardization, in accordance with section forty-five of chapter thirty." I have stated above, in answer to your first question, that in my opinion c. 30, § 45, does not apply to officers and employees of the Land Court. Furthermore, this § 30A does not apply to almost two score groups of employees, all in the executive branch of the Commonwealth's service, who are expressly named and excepted. It is not reasonable to believe, if this section were intended to be applied fully to "all persons employed by the commonwealth," including the legislative and the judicial branches, that no exceptions would have been made in either of these branches of service. For these reasons, I do not believe that the provisions of c. 149, § 30A, apply to such officers and employees.

The fourth question contains another inquiry, at the very end, relating to "rules pertaining to overtime pay." The answer to this question is also in the negative, for the reasons set forth more fully above.

The requirement of negative answers to all of your questions is confirmed by other considerations. The separation of governmental powers into three branches is a fundamental principle (Mass. Const., pt. 1st, art. XXX), and detailed employee regulations enacted by the Legislature and enforced by the executive branch should not be applied to the judicial branch if there is any doubt as to such application. The facts that the Legislature has given to the Land Court specific powers to fix hours, to hold sessions on six days of the week, and to provide in other details for the work of the court, all indicate a probability that the Legislature does not intend that a general regulation regarding State employees shall interfere with the freedom and decision of the judges of the Land Court. Another important consideration is that the Legislature has clearly provided in c. 30, § 38, that the duty of the Division of Personnel and Standardization to maintain a central personnel register for all employees of the Commonwealth shall include the legislative and the judicial branches; thus indicating clearly that the Legislature can show its intention to include the judicial branch if that is its actual intention. A matter somewhat similar to the present inquiries was considered by the Attorney General in an opinion to one of your predecessors (VI Op. Atty. Gen. 360), and in that opinion the then Attorney General stated that the words "every state officer, department or head thereof" are clearly limited to the executive branch of the government and do not include the judicial branch. Furthermore, there is no suggestion of any kind in the Fourteenth Report of the Special Commission on the Structure of the State Government, referred to above, to indicate that the recommendations therein contained, which were used as a basis of the substantial revisions in 1954 and 1955, covered employees in the judicial branch.

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

Retirement — Accidental Disability Retirement — Effect of remaining on Sick Leave.

APRIL 25, 1956.

HON. JOHN F. KENNEDY, *Chairman, State Board of Retirement.*

DEAR SIR: — You request an opinion regarding the rights of a State employee to accidental disability retirement, under the circumstances referred to below.

You present the following facts:

"An employee of the Commonwealth, and a member of the State Employees' Retirement System, made application for Accidental Disability retirement, under § 7, on September 16, 1954. In his application, he requested that his retirement become effective on September 26, 1954, at which time, he would attain age sixty-eight. His application was filed in this office on September 20, 1954. He was examined by the required Medical Panel on November 12, 1954, and the report of the Medical Panel was forwarded to this office on November 29, 1954.

"The Medical Panel was of the opinion that the employee is physically incapacitated for further duty in his present position; that such disability is likely to be permanent; and it was the unanimous opinion of the members of the Panel that the disability was the natural and proximate result of an accident or hazard undergone by the employee [in June, 1950] during the course of his employment.

"On December 30, 1954, the State Board of Retirement considered the application and, after consideration, voted to approve the application. On December 31, 1954, the Department of Public Works was notified that the employee's application had been approved and the department was instructed to remove his name from the payroll and also furnish the Board of Retirement with certain necessary information as to the date on which the employee's name last appeared on the payroll and information as to the rates of compensation which were being paid to this employee. For some unknown reason this employee was retained on the payroll on a sick leave basis until October 31, 1955."

Upon the above facts you request an opinion as follows:

"May I respectfully request your opinion as to whether or not an employee who remains on the payroll on a sick leave basis is entitled to Accidental Disability retirement within two years of attaining the maximum age for his position, or whether or not the effective date as stipulated in his application for retirement is to be the effective date of retirement, or if such effective date is to be retarded to the extent of the sick leave granted to him after attaining age sixty-eight?"

Your inquiry presents two questions, both involving an interpretation of the requirements of G. L. c. 32, § 7, subdivisions (1) and (2), in connection with accidental disability retirement. Except for these two questions, which are covered in detail below, I understand from you that the employee in question meets all of the requirements of § 7. Accordingly, the only matters which are being considered in the present letter are these two specific problems.

It appears from the facts above set forth that the employee will attain his maximum age on September 26, 1956. It is provided by G. L. c. 32, § 7 (1), that "no such retirement [for accidental disability] shall be allowed within any period of two years prior to attaining the maximum age. . . ." This requirement is applicable to the present case because the accident upon which the application is based occurred prior to three years of attaining the maximum age. But, upon the facts which you have presented, the retirement in this case took place on September 26, 1954, which was exactly two years prior to the date on which the maximum age was reached. Although the approval of this application was voted by the State Board of Retirement on December 30, 1954, after favorable action by the medical panel, under the provisions of § 7 (1) the retirement itself is considered to be "as of a date which shall be specified in such application." The application specified the date of September 26, 1954. Accordingly, in my opinion, the retirement took place on that date, and upon this interpretation there is no violation of the prohibition of a retirement within a period of two years prior to attaining the maximum age.

The other problem arises because of the fact that the employee was retained on the payroll on a sick leave basis until October 31, 1955, which is less than one year from the date of attaining maximum age. You inquire

whether this fact prevents allowance of retirement under the provisions of § 7. In my opinion, this fact does not bar the State employee from accidental disability retirement benefits under § 7. The date of the retirement itself and the date when a retirement allowance is to be paid are entirely distinct. The date of the retirement is covered by subdivision (1) of § 7. The date when the allowance is to become effective is governed by subdivision (2) of the same section. In subdivision (2) it is provided that the accidental disability retirement allowance shall become effective "on the date the injury was sustained . . . or on the date six months prior to the filing of the written application . . . or on the date for which he last received regular compensation . . . whichever date last occurred." An analysis of this quoted provision makes it clear that the date of the retirement and the date when payment is to begin are different. The prohibition of retirement "within any period of two years prior to attaining the maximum age" appears in subdivision (1) and relates to the retirement itself, not to the date when retirement allowance is to begin. The date when payment is to begin is covered in subdivision (2) and there is no prohibition in this subdivision to having payment commence within such two-year period. Accordingly, in my opinion, the fact that the employee was retained on a sick leave basis to a date within the two-year period does not bar him from benefits under § 7.

I have answered the two questions presented by you in favor of the applicant for accidental disability retirement. These are the only two matters which I have considered. If the applicant has complied with all other provisions pertinent to his case, as you have indicated, then he is entitled to the benefits of § 7.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Parole Board — Power to issue Certificate of Termination of Sentence — Pardoned Prisoner — Defective Delinquent.

MAY 16, 1956.

Mr. FREDERICK J. BRADLEE, *Chairman, Parole Board.*

DEAR SIR: — You request the advice of the Attorney General upon the two following questions, both relating to the power of your board, under the provisions of c. 127, § 130, as amended by § 68 of St. 1955, c. 770, to issue certificates of termination of sentence.

That statute provides for the issuance of such a certificate, by the unanimous vote of the members of the Parole Board, under certain specified conditions, to "*a parolee under its supervision.*"

Your first question is whether such a certificate can be issued to one who has been conditionally pardoned by the Governor and Council, and who has been supervised "by the parole board as provided in c. 127, § 132, as amended." Said section, as it existed prior to its repeal by c. 770, § 122, vested your board with the responsibility of "supervising all prisoners pardoned on parole conditions"; the same responsibility, since its repeal, has

rested upon your board by virtue of G. L. c. 27, § 5, as amended by c. 770, § 1. I assume that the pardoned prisoner to whom your letter refers has been subject to supervision only under this continuing provision of law.

Reduced to its simplest form, then, your question is whether a prisoner pardoned on parole conditions, and thereafter supervised by your board under said G. L. c. 27, § 5, is a "parolee" within the meaning of that word as used in said G. L. c. 127, § 130A. So stated, it must be answered in the negative.

The pardoning power is solely vested in the Governor, by and with the consent of the Council. Mass. Const., pt. 2d, c. II, § I, art. VIII. It includes the right to grant conditional pardons, *Kennedy's Case*, 135 Mass. 48, 51, and the only right of the General Court to legislate in the field "is to enact laws to render the exercise of the constitutional power efficient and convenient," *Opinion of the Justices*, 210 Mass. 609. See, *e.g.*, G. L. c. 127, § 152. While, as has been pointed out above, your board must supervise prisoners "pardoned on parole conditions," the statute further provides that any violations of the conditions of the pardon must be reported to the Governor for his consideration. G. L. c. 27, § 5. The issuance of a certificate of termination of sentence by your board under said § 130A at some time prior to the date upon which the "parole conditions" would otherwise terminate would be inconsistent with your continuing responsibility to supervise the prisoner during the entire period contemplated by the terms of the pardon, and would therefore infringe upon the constitutional right of the Governor alone to define the limits of his clemency. As used in § 130A, the words "parolee under its supervision" must be taken to mean only a prisoner released on a parole permit; such persons are, of course, also subject to the supervision of your board under G. L. c. 27, § 5.

Your second question is whether a certificate of termination of sentence can be issued to a defective delinquent released on parole by your board under G. L. c. 123, § 118A. The answer to this question must likewise be in the negative. Commitment under the provisions of G. L. c. 123, § 113, "is not in the nature of punishment," *Dubois, petitioner*, 331 Mass. 575, 578, and does not result in the defective delinquent's being "sentenced" for any defined term. The statutes dealing specifically with defective delinquents provide the only ways in which such persons may be "discharged" from commitment. See G. L. c. 123, §§ 89A, 118. It is clear that the Legislature intended to surround any release from custody of a defective delinquent with safeguards which include psychiatric advice and approval; even your board's power to *parole* such a person under said § 118A has such a step as a prerequisite. Obviously it could not have been the intent of the General Court to permit your board, without such advice and approval, to terminate the period of custody of a defective delinquent.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Elevators — Administrative Procedure Act — Regulations relating to Automatic Parking Garages — Incorporation of Regulations by Reference.

May 29, 1956.

Edward L. Schwartz, Esq., *Clerk, Board of Elevator Regulations.*

Dear Sir: — You have asked this department for an opinion in connection with a proposed set of regulations relating to elevators in automatic parking garages. You present the following situation:

"The Board of Elevator Regulations of the Commonwealth has been urgently requested by the city of Boston and other parties to frame immediately a new set of regulations relating to elevators in automatic parking garages. The present regulations of the Board of Elevator Regulations are applicable to conventional types of elevators and are so stringent as to prevent completely the operation of any automatic parking garage.

"In the interest of speed, it was our thought that we would frame a set of regulations which would refer to the American Standard Safety Code for Elevators, Dumbwaiters and Escalators, printed in 1955 and numbered A 17.1. This would not be the usual type of incorporation by reference since it would be our intention to deposit this American Standard Safety Code with the Secretary of the Commonwealth, where it could be readily available for public inspection.

"The reader will be previously informed that Part 1, Section III, Rule 111.8 refers to that rule in the ASME code which he can find in the office of the Secretary of the Commonwealth or which, of course, can be obtained by purchase from the American Society of Mechanical Engineers. It is not our intention to incorporate by reference changes which may be made from time to time in the ASME code. All we are doing is simply, for convenience, cross-referencing to an existing private code. If there should be any changes in this private code which we should later wish to incorporate in our own regulations, we would amend the regulations."

Your first question is whether or not the provisions of the State Administrative Procedure Act, G. L. c. 30A, added by St. 1954, c. 681, are applicable to the situation you present. In my opinion, the answer to this question must be in the affirmative. This is the conclusion reached in the opinion of this office sent to you on January 10, 1956. But in addition to the requirements of the State Administrative Procedure Act, there may be administrative requirements in c. 22 or c. 143 of the General Laws which must be observed.

Your second question deals with the establishment of regulations under G. L. c. 143, § 69, and under G. L. c. 30A, § 2, by means of a short regulation making reference to and incorporating the detailed provisions of the American Society of Mechanical Engineers' code dealing with the matter. This adoption by reference is not objectionable if the regulations so adopted are within the power of your board, and are consistent with the laws of the Commonwealth, and if such regulations are incorporated in your own regulations and are deposited with the Secretary of State. But such incorporation by reference is valid only as to existing provisions of the ASME code, and would not be valid as to future changes in such regulations. *Opinion of the Justices*, 239 Mass. 606.

Your third question relates to the immediate adoption of these regulations as an emergency under the provisions of G. L. c. 30A, § 2 (3). In my opinion the provisions of this new statute are available to you if your board makes the necessary finding of facts as required by such provisions. Of course, the adoption of such regulations under this emergency provision is limited to no longer than three months, unless during that time there is full compliance with all requirements for notice and hearing specified in § 2.

It will, of course, be necessary for your board to comply with the requirements of c. 30A, § 6, in regard to publication, availability and distribution of your regulations.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Mentally Ill Persons — Requirements of Hearing prior to Commitments under G. L. c. 123, § 100, in Criminal Cases.

MAY 31, 1956.

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

DEAR SIR: — You have asked this department for an opinion relative to the application of the hearing and notice provisions, now required by G. L. c. 123, § 51, to the situations covered by § 100 of that chapter.

Last year the Legislature, by St. 1955, c. 637, § 8, inserted detailed provisions into G. L. c. 123, § 51, regarding notice to a person alleged to be mentally ill and in need of commitment to a State institution and his right to a hearing. This new procedure as to notice and hearing is made applicable, by specific reference to the procedure under § 51, to commitments for observation under § 77, and to voluntary commitments under § 86.

You inquire whether or not this new procedure is also applicable to commitments under § 100 of the same chapter. Your question is —

" . . . whether or not after commitments for observation are made under G. L. c. 123, § 100, commitments could be made on report of the hospital superintendent without a hearing as required by G. L. c. 123, § 51, as amended by St. 1955, c. 637."

Section 100 relates to commitment of a person held under complaint or indictment for a crime who is found to be in need of commitment because of his mental condition. The first sentence of § 100 provides as follows:

"If a person under complaint or indictment for any crime is, at the time appointed for trial or sentence, or at any time prior thereto, found by the court to be insane or in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation pending the determination of his insanity, the court may commit him to a

state hospital or to the Bridgewater state hospital under such limitations, subject to the provisions of section one hundred and five as it may order."

So far as is pertinent to the present question, § 105 provides as follows:

"If a prisoner, committed or removed under section one hundred . . . for his proper care or observation as aforesaid, is found by the superintendent . . . to be insane, the finding shall be certified upon the warrant or commitment, and the superintendent of the institution . . . shall report the prisoner's mental condition to the court or judge issuing the warrant or commitment, . . . with the recommendation that the prisoner be committed as an insane person. The court, judge or justice may thereupon commit the prisoner to an institution for the insane, if, in the opinion of the court, judge or justice, such commitment is necessary."

Commitments under § 100 are entirely different from commitments under §§ 51, 77 or 86. There are some requirements of § 51 which are inconsistent with § 100; and many requirements which seem inappropriate to criminal cases. The procedure for commitment under § 100 should not be construed to include the new notice and hearing provisions added to § 51 unless there is some statute which makes such requirement. I find no such statute. The reference in the last sentence of § 51 to a commitment by a court under §§ 100 or 101, which has appeared in such statute since the enactment of our General Laws in 1921, does not make such requirement.

The 1955 change in the laws relating to the commitment of mentally ill persons was based upon the report of the Special Commission on Commitment, Care and Treatment of Mental Health Hospital Patients, May 2, 1955, Senate No. 735. On page 9 of such report the commission states that the new provisions as to notice and hearing are "under the regular judicial commitment procedure." On the same page the commission recommends that such change also be applied to voluntary and temporary care patients under § 77 and § 86. There is no mention made of court commitments in criminal cases under §§ 100, 101 and 103. (See comment on distinction between a commitment "under orders of a court" similar to those issued for the commitment of an insane person charged with a felony, and a commitment by "order of a judge" under § 77, in *Acting Commissioner of Mental Health* v. *Williamson*, 330 Mass. 52.) In fact, except for one suggestion of a change in § 100, which did not relate to notice or hearing (Senate Document No. 366, of 1954, § 7, pages 21–22), and which was not mentioned by the commission in its report nor adopted by the Legislature, it seems clear that nothing in the commission's work, and certainly nothing in the commission's report, nor in St. 1955, c. 637, as adopted by the Legislature, relates in any way to commitments in criminal cases.

Since there is no statute which directly or indirectly applies the notice and hearing provisions of § 51 to § 100, and since the commission restricted its recommendation to "the regular judicial commitment procedure," and made no reference to commitments by the court of criminal defendants held upon complaint or indictment, it is my opinion that the notice and hearing requirements of G. L. c. 123, § 51, as added by St. 1955, c. 637, are not applicable to court commitments under § 100 of that chapter.

This opinion deals only with the question asked, that is, the application

of the new hearing and notice provisions of § 51 to § 100. No opinion is expressed as to what hearing or notice, if any, apart from § 51, may be required for commitments under § 100.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Lord's Day — Duty of Commissioner of Public Safety to license Stage Plays on Sunday under G. L. c. 136, § 4.

JUNE 27, 1956.

Hon. OTIS M. WHITNEY, *Commissioner of Public Safety.*

DEAR SIR: — In your recent letter you call the attention of the Attorney General to the amendment of G. L. c. 136, § 4, effected by St. 1955, c. 742, and inquire whether "in view of the decision in *Brattle Films, Inc.* v. *Commissioner of Public Safety,* 333 Mass. 58, and in view of c. 742 . . . the Department of Public Safety should continue previewing 'live' stage plays . . . for the purpose of deciding whether or not to approve Sunday licenses."

I answer your question in the affirmative. The *Brattle* decision holds only that *motion pictures* cannot legally be subjected to "advance scrutiny by governmental authority"; its effect is to be narrowly confined to the actual facts of the case. It does not, nor do the Federal decisions upon which it rests, determine that "live" stage plays fall within the free-speech, free-press area constitutionally protected against such "advance scrutiny." It is difficult to justify such governmental regulation of a "live" performance when we must say that the showing of motion pictures of the same performance could not constitutionally be so regulated. However, it is even more difficult to classify as either "free-speech" or "free-press" such "live" entertainment as musical comedies, prize fights, burlesque shows or band concerts, and until the United States Supreme Court definitively rules that all, or some, "live" shows fall within the protected area, it is my belief that our own courts will not do so.

I refer you to my letter to you dated August 22, 1955,[1] relative to the effect of the *Brattle* decision on said c. 136. The provisions of St. 1955, c. 742 are entirely consistent with what I said therein, and in no way relieve your department of any responsibilities imposed upon it by said c. 136 except as to *motion pictures, radio* and *televison.*

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

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[1] *Supra,* page 32 of this report.

Foreign Medical Schools — Right of Approving Authority under G. L. c. 112, § 2, to approve Foreign Medical Schools retroactively.

June 27, 1956.

Mrs. Hazel G. Oliver, *Director of Registration, Department of Civil Service and Registration.*

Dear Madam: — You have recently asked this department, in behalf of the Board of Registration in Medicine, for an opinion relative to the approval of foreign medical schools under G. L. c. 112, § 2.

The provisions that an applicant for examination and registration as a qualified physician must have completed his premedical work in an approved college or university and must have received his degree of doctor of medicine from an approved medical school were first added to our statutes by St. 1936, c. 247. See now G. L. c. 112, § 2, as last amended by St. 1952, c. 585, § 21. By such provisions an "approving authority" was established, and it was empowered, upon written request and after hearing and by written decision, to approve any college, university or medical school for the purposes of said section. Such requirements for approval became effective on January 1, 1941, but did not apply to applicants who had matriculated in a medical school prior to that date. St. 1938, c. 259.

You advise me that on April 9, 1956, the approving authority "approved several foreign and European medical schools as of January 1, 1941." You further advise me that these medical schools had not requested approval until recently, that such approval had never been refused, that the procedures relative to application for approval, hearing and decision have been followed, that the character and quality of the instruction of each school since January 1, 1941, have been investigated, that consideration was given to the unusual situations during the war years of 1939–1946, and that the members of the approving authority have unanimously found, upon the merits, that the qualifications of such schools since January 1, 1941, have been comparable to those of approved medical schools in the United States and Canada.

Upon the above facts, you request the opinion of this department as to whether the approving authority under G. L. c. 112, § 2, has power to approve currently such foreign medical schools and to make the effective date of such approval retroactive to January 1, 1941.

In my opinion, the answer to your inquiry is in the affirmative.

Your inquiry is not answered by the express provisions of § 2; but certainly there is no prohibition of a retroactive approval. The requirement that an applicant for examination "has received" his medical degree from a school "approved by the approving authority" is met, literally, by the approval of a medical school prior to the state examination although subsequent to the applicant's graduation from the school. Furthermore, it clearly would be proper to give the approval some retroactive effect because it would necessarily be based upon past rather than future performance of the school, and approval retroactive for the period covered by the study made by the approving authority would be reasonable. In fact, I understand that many approvals by accrediting authorities are given retroactive effect for such period of examination. Finally, since it could

not be expected that the approving authority would have passed upon every medical school in the world prior to an application for examination and registration from a graduate of such a school, a rule barring retroactive approval would mean that in numerous instances the first applicant from many schools would have to be refused.

The statute requiring approval must be given a reasonable interpretation. Such an interpretation does not forbid retroactive approval. The power given to the approving authority is not thus restricted. But such power is a great one, and it will be presumed that the approving authority has given careful and conscientious consideration to the records and qualifications of a college, university, or medical school, covering the full period of retroactive effect, prior to rendering a judgment that the approval should be made retroactive. The present opinion of this department is founded upon such presumption.

For the reasons set forth above, it is the opinion of this department that it is within the power of the approving authority under G. L. c. 112, § 2, to give current approval to certain foreign or European medical schools and to make the date of approval retroactive to January 1, 1941.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Interstate Commerce — Power of Division of Marine Fisheries to inspect Offshore Fresh Fish — No Pre-emption of Field by United States.

JUNE 28, 1956.

HOWARD S. WILLARD, Esq., *Director of Law Enforcement, Department of Natural Resources.*

DEAR SIR: — You have recently asked this department for an opinion relative to whether or not the United States has pre-empted the field of fish inspection.

You present the following situation:

"For a considerable length of time the fish inspectors of this division have been inspecting fish from the various offshore banks as it comes out of the boats at dockside here. The boats are owned by citizens, resident in this Commonwealth, and are manned by Massachusetts residents. Inspections of the fish have followed from dockside, through the processing, freezing, warehousing and on into the retail outlet operations. The inspectors have also required compliance with the sanitary standards promulgated by the Division of Marine Fisheries relative to the production of fish. (G. L. c. 130, §§ 84 to 92; c. 130, § 1, last paragraph.) Until now, as between the U. S. Food and Drug Division and this division, the assumption that fresh fish from offshore banks landed here as above indicated was neither in interstate nor foreign commerce, and the further assumption that the duty of inspecting such fish was the paramount concern of the Commonwealth of Massachusetts, has not been questioned."

You further state that the Food and Drug Division of the United States Department of Health, Education and Welfare has now declared that, by the Food, Drug and Cosmetic Act, fresh fish from offshore banks is in interstate commerce and that this field has been pre-empted by the United States to the exclusion of any State regulations. You request an opinion on this matter of Federal pre-emption in this field.

The provisions in the Massachusetts statutes for the inspection of fish are contained in G. L. c. 130, §§ 84–92. There is nothing in these sections which appears to deal with commodities in interstate commerce. In the last paragraph of § 1 of c. 130 it is stated that these statutes shall apply to fish within the jurisdiction of the Commonwealth of Massachusetts, and shall not apply to "fish being transported through the commonwealth under authority of the laws of the United States." Since the authority of your division is restricted to commodities which appear to be in intrastate commerce, the provisions of the statute are constitutional and are not repugnant to the Constitution or the laws of the United States. *Manchester* v. *Massachusetts*, 139 U. S. 240, 265.

Even if the statutes under which your fish inspectors exercise their authority could be construed to affect commodities in interstate commerce, such statutes are still constitutional. The police power reserved to the Commonwealth to protect the health, life and safety of our citizens authorizes inspection of food under the circumstances contemplated in G. L. c. 130. *Plumley* v. *Massachusetts*, 155 U. S. 461, 472–473. *Crossman* v. *Lurman*, 192 U. S. 189, 196. *Savage* v. *Jones*, 225 U. S. 501. It was held in *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422, that a California regulation concerning the processing of sardines, some of which came into the State through interstate commerce, was a proper regulation under the state police power, both for the preservation of health and to conserve the State's fish supply, that its effect upon interstate commerce was purely incidental, and that the regulation was not unconstitutional because of any activities of the United States in this field. To this same effect see *Commonwealth* v. *Trott*, 331 Mass. 491, 496.

It does not appear that the statutes and regulations of Massachusetts are in any way inconsistent with Federal laws covering the inspection of fish. Our laws can operate concurrently with all existing Federal statutes and regulations. It cannot be assumed that, in the field of the inspection of food for the prevention of the spread of disease and for the protection of the State's inhabitants, Congress intends to supersede or exclude State action. *Mintz* v. *Baldwin*, 289 U. S. 346, 350. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 353. The criteria or tests to determine whether Congress has pre-empted a specified field are set forth in *Pennsylvania* v. *Nelson*, 350 U. S. 497, 502. Some of these tests are as follows: that Federal regulations are so pervasive as to make reasonable the inference that Congress left no room for the States to supplement such regulations; that the field in question is one in which the Federal interest is so dominant that the Federal statutes must be assumed to preclude enforcement of State laws on the same subject; that enforcement of the State acts would present a serious danger of conflict with the administration of the Federal program. A consideration of these tests, and of the other criteria listed on page 502 of the *Pennsylvania* v. *Nelson* decision, requires the conclusion that the Federal acts and regulations in the field of the local inspection of offshore fish brought into the Commonwealth for processing and sale do not pre-

empt the field and do not prevent enforcement of State laws in the same field.

An examination of the recent Federal statutes in the field of fish and fisheries indicates that such statutes, rather than seeking exclusive occupancy of the entire field, are directed toward cooperation with the States in their own efforts along this line. See USC, Title 16, §§ 760a, 777, 987. The same conclusion is indicated in *Commonwealth* v. *Trott*, 331 Mass. 491, 497, in connection with the International Convention for the Northwest Atlantic Fisheries, which became operative on July 3, 1950.

As indicated above, my conclusion is that the Federal Government has not pre-empted this field of the inspection of fish. However, you make reference to a contention of the Food and Drug Division of the United States Department of Health, Education and Welfare that, by operation of the Food, Drug and Cosmetic Act, there has been Federal pre-emption in this field. I have no knowledge of such contention by the Food and Drug Division. I have no knowledge of any statute or regulation upon which such a contention can be based. There is now pending in Congress a proposal to establish a comprehensive national policy relating to fisheries. Senate Bill No. 3275. In its present form this bill provides (§ 6): "Nothing in this Act shall be construed . . . to supersede any regulatory authority over fisheries exercised by the states. . . ." This bill was passed by the Senate on May 24, 1956, and is now with the House of Representatives Committee on Merchant Marine and Fisheries.[1] Although doubtful, it is theoretically possible that this bill may be amended so as to exclude State participation in this field. But until there is some unequivocal act by Congress excluding the States from concurrent activities in this field, it is my opinion that your authority under G. L. c. 130 continues and is valid.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

[1] This Act, with the sentence quoted in the above opinion unchanged, but now appearing in § 10, became law on August 8, 1956. Fish and Wild Life Act of 1956, chapter 1036, Public Law 1024.

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