

MAINE STATE LEGISLATURE

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August 7, 1930

To Elmer W. Campbell, Department of Health
Re: Rules and Regulations

You inquire regarding the general legal effect of the decision in State v. Prescott on the powers of the Health Department in making and enforcing plumbing regulations.

Prescott objected particularly to the regulation which required the use of extra heavy pipe. As a fact, lighter weight pipe was adequate for his particular house. The Court order a nol pros against him, thus necessarily ruling that this regulation was ineffective in Prescott's case.

The Court's reasoning was that your power to make regulations under the Act of 1919 was subject to the then existing general statutes, one of which in 1911 had vested cities and towns having water or sewerage systems with the authority to adopt plumbing regulations. The Court said that in a city or town having a water or sewerage system you have no legal power to establish plumbing regulations. The Court, however, did also say this:

"However, since the legislation of 1919, the plans to which the earlier statute refers must have the approval of the State Department of Health."

The significant paragraph of the Court's decision is its concluding words, which are as follows:

"In localities having either water or sewerage systems, it is for local ordinance to prescribe plumbing regulations, office of the State Department of Health, in such cases, being to approve plans. Only in localities other than those with water or sewerage systems, can rules and regulations of the State Department of Health have force and effect. According to the terms of the report, the mandate will be: Nolle prosequi to be entered."

My deduction from the Court's opinion is this:

1. You have full power and authority to make and enforce by criminal process plumbing regulations in communities having neither water nor sewerage systems.
2. In communities having either a water or sewerage system, your regulations, as such, are ineffective. In these communities it is the duty of the town (in town meeting) or of the city government to adopt a set of regulations.

3. If such a town or city fails to adopt such regulations, I doubt if it could be legally forced to do so.
4. In all communities you have the right to require that plumbing plans for buildings should be submitted to you for approval. In making this flat statement, it seems to me that the Law Court goes further than the wording of the statute itself. The statute says that plans should be approved "by the inspector of plumbing or by the board of health". This would seem to validate plans approved by the inspector even if they were not approved by your Board. The Law Court, however, as the above quotations show, states flatly that the plans "must" have your approval. The Law Court evidently interprets the word "or" to mean "and".
5. The neglect of a city or town having a water or sewerage system to adopt regulations, apparently does not allow unapproved plumbing plans to be adopted in such community. The statute says that the community shall adopt regulations "and shall provide" that plumbing shall only be placed in accordance with approved plans. The neglect of the community to make such regulations so providing may apparently be disregarded. The legislature has flatly provided that the plans must be approved. This provision cannot be evaded by the neglect of a community to formally make a regulation embodying this flat provision. The Law Court, as stated above, definitely said that your Board must approve such plans and does not condition this on the adoption by the community of ordinances.
6. As a practical matter, your department can, apparently, set up a standard on the basis of which you will approve plumbing plans in those communities which have a water or sewerage system. Plans not conforming to your standard, if disapproved by your Board in any given case, would put on the local plumber or householder the risk of criminal prosecution in case, notwithstanding your disapproval, the plans were carried out. The question then before the Court would be whether your disapproval was reasonable under the circumstances.

Clement F. Robinson
Attorney General