

MAINE STATE LEGISLATURE

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PUBLIC DOCUMENTS

OF THE

STATE OF MAINE

BEING THE

REPORTS

OF THE VARIOUS

**PUBLIC OFFICERS
DEPARTMENTS AND
INSTITUTIONS**

FOR THE TWO YEARS

JULY 1, 1930 - JUNE 30, 1932

STATE OF MAINE

REPORT

OF THE

Attorney General

for the calendar years

1931-1932

It seems to me, therefore, that the whole question is one distinctly for the Commission to determine on general principles and by the exercise of a reasonable discretion, subject to the approval of the Governor and Council. The definition which appears in another chapter of the statute is persuasive and may properly be given great weight, but in the end the determination is to be made on the basis of all the circumstances of which this statutory definition is but one.

It seems to me also that the federal law has little, if any, applicability. Whether or not federal aid can be obtained in the construction of a state highway is irrelevant to the question of its designation and construction as a state highway under our own statutes.

DEFENSE OF STATE EMPLOYES FROM DAMAGE SUITS

August 14, 1931

To Hon. Wm. Tudor Gardiner
Governor of Maine

You inquire regarding action proper to be taken by the state in the matter of a suit at law which is being brought by a private citizen against a member of the state highway police, claiming damages for an alleged slander uttered by the officer in connection with carrying out his duties. Specifically, the following inquiries arise:

1. What lawyer should defend him?
2. Who should pay the legal expense?
3. Who should pay any judgment that may be recovered against him?
4. If the officer pays this legal expense or such judgment can he get reimbursement from the state?

These inquiries I answer thus: The officer could employ his own lawyer; pay the expenses of the litigation and any judgment that may be recovered; and has no legal right to seek reimbursement from the state.

I do not find that any definite ruling on these points has been made by the courts of this state or by my predecessors in office, but the foregoing answer to the questions put conforms to the rulings of other states and the practice there of Attorneys General and other administrative state officials.

My predecessors have followed this same procedure. In a case which originated a few years ago the then incumbent of the office referred to private counsel a state police officer sued for false arrest. Judgment having been recovered against the officer he was refused reimbursement by the legislative claims committee.

The position thus taken is fundamental, based on a public policy of long duration. One who accepts public office as a state police officer or in any other position, accepts it with all its burdens, and one of the

burdens is that the official is answerable personally to any person injured by an abuse of authority on the part of the official. This carries with it the corollary that the official at his own expense must defend actions brought against him, though they be based on groundless charges.

The leading case on the subject is *Chapman v. New York*, 168 N. Y. 80; 56 L. R. A. 846; 85 A. S. R. 661.

In this case the petitioning police officer of the City of New York brought procedure authorized by a New York statute for the purpose of fixing and collecting from the city his counsel fees for defending charges of official misconduct. The court held the statute unconstitutional and void under the constitutional provision against the expenditure of public funds for other than public purposes. The court held that there was not even a moral obligation on the part of the community to repay these expenses.

In this case, the principle that a public officer must bear the expenses of his own defense was applied in circumstances where the official had a peculiar claim to public sympathy. He had been, as the event showed, unnecessarily brought into court for an examination of his official doings. There would certainly seem to be a very real reason for refunding from the public treasury the expenses which he incurred.

Under such circumstances the practice in this state might be different. The legislature might feel, and in some cases in the past has felt, that the state should furnish a defense to persons accused of official misconduct, in the same way that a defense is furnished to a person accused of a capital crime.

The general principles of which the Chapman case is an extreme example are, however, well established. These and their corollaries applicable to the inquiry before us may be summarized as follows:

First: That the state, of course, cannot without its consent be sued directly or indirectly, and even a municipality cannot be sued for the wrongdoing of its employees in carrying out an essential governmental function such as police duties; nevertheless, it is undisputed that an individual official, such as a police officer charged with ministerial as distinguished from judicial duties, can himself be sued in a private action for any misfeasance on his part which injures a private individual.

Chase v. Cochran, 102 Me. 431. (Selectmen building bridge.)

Ford v. Erskine, 109 Me. 164. (Selectmen building road.)

Wellman v. Dickey, 78 Me. 29. (Highway surveyor destroying private trees.)

Manwaring v. Geisler, 191 Ky. 532; 18 A. L. R. 192, and cases cited in the L. R. A. annotation.

See also 40 A. L. R. 1360 n.; 22 R. C. L. "Public Officers," section 152.

46 C. J., Article "Officers," sections 327, 336.

Secondly: The duties of the Attorney General are confined to cases in which the state has a direct concern. His is the responsibility

to determine whether the rights of the state require his interposition, and only when this is true should he appear officially in private litigation.

See the statutory duties of the Attorney General as defined in R. S. ch. 91, sec. 78, et seq; 8 C. J. Article "Attorney General," sec. 18, 30; 2 R. C. L., Article "Attorney General," sec. 7, 8.

Thirdly: The use of public money is unjustified for carrying on private litigation even when one of the litigants is a public official. This point has, in the nature of things, been commented on by the courts chiefly in connection with municipal corporations, because they and their officials are subject directly to suit, as the state is not.

In the case of municipal corporations the courts have held that an officer cannot be indemnified for a loss or expenditure incurred in the discharge of his duty unless the duty was authorized or imposed by law, or the matter one in which the corporation had an interest.

Gregory v. Bridgeport, 41 Conn. 76.

James v. Seattle, 22 Wash. 654.

This test would hardly apply to the case of an officer committing or accused of committing a private tort such as slander.

A town cannot indemnify selectmen for the expense of resisting criminal prosecution in connection with a check-list of voters.

Gove v. Epping, 41 N. H. 539.

Nor can it reimburse a collector of taxes who has improperly taken an uncollectible note for taxes.

Thorndike v. Camden, 82 Me. 39.

In the case of the state litigation over such a reimbursement if made or attempted, would rarely reach the courts, and in such case the courts give the benefit of every doubt to the legislature. Should the legislature pay such a claim as the one under the circumstances it could hardly be disturbed in court, even though as a matter of law its propriety be doubtful.

The courts have held that the reimbursement of a state employe for an accident arising in his employ is valid since it satisfies a moral obligation resting upon his employer, viz.: the people of the state.

Fairfield v. Huntington, 22 A. L. R. 1438 (Ariz.).

The annotation to this case shows plainly, however, that the courts in sustaining such appropriations when brought in question, require definite indication of a general public policy in favor of the payment.

For instance, in *Lewis v. State*, 189 N. Y. Sup. 560, an act authorizing payments for injuries sustained by a militiaman regardless of his own negligence, and irrespective of a showing that they were incurred while he was engaged in the discharge of his duties, was held unconstitutional. The general feeling on the part of the courts that such matters should be left to the good judgment of the legislature, and the general disinclination to override the legislative judgment, is, however, plain.

See 25 R. C. L., Article "States," sections 31, 32, 34.

In *State v. Carter*, 30 Wyoming 22; 28 A. L. R. 1089, the court lays down the test that one criterion by which to judge whether or not

the obligation is a moral one is whether or not an appropriation should have been made before the act was performed. In this case the legislature appropriated relief to the widow of a public officer killed in the performance of his duties. The court presumed that the legislature investigated the facts and found them to be such as to warrant the making of the appropriation.

Summarizing, therefore, it seems to me that the litigation in this case involves no public interest such that the legal representatives of the state should take part in it in behalf of the officer sued. He should secure his own counsel. It is his privilege to apply to the legislature for a reimbursement of his outlay, and the courts will hardly go behind the legislative determination of such a request. It is not, however, for the Governor and Council, for the department with which he is connected, nor for the legal representatives of the state, to admit any responsibility or incur any expense in behalf of the state in the matter. Anything which they do is personal rather than official, and done as a matter of courtesy rather than right.

ELECTION FRAUDS—AROOSTOOK COUNTY

September 28, 1932

To the Honorable Governor and Council

Immediately after the recent state election I received complaints of irregularities in the voting methods in several of the communities in the northern part of Aroostook county. Details were not given, but it was said that the statutes for the conduct and protection of elections had been flouted.

It is not the duty of this department to investigate the proceedings at an election for the benefit of private citizens who may wish to check the apparent with the true result of the election; although of course the Governor and Council may call on me to aid them in assembling facts on any matter within their jurisdiction on which they are called to act. Nor is it particularly my duty to moralize on conditions generally. It is the duty of this department, in cooperation with local prosecutors and arresting officers to see that the criminal laws of the state are enforced.

On receipt of these complaints, therefore, I made arrangements for a simultaneous one day's investigation of the facts in eleven of these towns by ten investigators under the general oversight and direction of Richard K. Gould, Esq., a Portland attorney. The sheriff of the county on request furnished ten deputies to accompany and introduce these investigators; he himself went with Mr. Gould; and the county attorney, informed of the proceedings, stood ready to cooperate during or subsequent to the investigation. I believed that such an investigation, though necessarily incomplete, would give a trustworthy clue to the general situation. It seems to me that it has.