

# MAINE STATE LEGISLATURE

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August 19, 1942

Hon. William D. Hayes  
State Auditor  
Augusta, Maine

Dear Sir:

At the request of Governor Sewall, Mr. Purinton showed me your facetious letter in regard to the pension of Judge Fogg. I recognize the fact that you are not asking for a reply to your letter but, in view of the points you have raised, it may be well if such a reply is made because, although the problem presents no difficulties to legal minds, it is apparent that certain distinctions may be unapparent to a person who is not well acquainted with constitutional law.

The Jointly Contributory Retirement System Act was so drafted as to cover Judge Fogg's case. However, in studying it it seemed wise to the Governor that we should not use the date July 1, 1945 too freely because we might, unwittingly, open the door wider than the Legislature apparently intended.

There remained, then, the question as to whether or not we would tack on the time that Judge Fogg served in a judicial capacity in the State's Municipal Court at Bath. We approached this question with a great deal of caution. There never was the slightest doubt in our minds but that a State Judge sitting as a Municipal Court is a State employee, but our query was directed toward determining whether or not some other officials not generally rated as State employees may not in fact be such. There certainly are judicial officers who are not State employees as that term is used in the Jointly Contributory Retirement System Act. For instance, in Article VI of the Constitution, we find a Supreme Court provided for and also such other Courts as the Legislature shall from time to time establish for the handling of "the judicial power of this State". The incumbents of such offices need not of necessity be State employees. In the same Article we find, in Section 5, a reference to Justices of the Peace. In Section 7 we find a provision for Judges of Probate. Section 8 provides for Municipal and Police Courts.

A distinction has to be drawn between judicial officers who are State employees and judicial officers who are not State employees. While Justices of the Peace hold judicial office as defined in the Constitution, such definition does not confer on them the judicial power of justices. (20 R.C.L., 328) In other words, a Justice of the Peace is a person to whom a commission is issued giving him authority to do certain things almost entirely ministerial but requiring of him no duties whatsoever. He never occupies the status of employee.

A Trial Justice under the Maine law occupies about the position that the Justice of the Peace did under the English law. On him is conferred the power to hold Court, under certain circumstances, at no particular place, at no certain time and with no salary attached. He does not have to hold Court nor function in any way. It is an authority conferred upon him for the benefit of himself or for the local populace, and if he functions under the powers given him he receives fees from the litigants who come before him, or from the bill of costs which he charges against a respondent. I can find in his office no suggestion of the status of employee of the State.

In the case of officers elected by the people of a municipality or of a county we get a definite status of municipal or county employee established. So, although Judges and Registers of Probate are provided for in the Constitution, since they are elected by the people of a county, and since Section 227-0 of the Jointly Contributory Retirement System puts "the employee of any county, city or town of the State" in an entirely different category from State employees, it is obvious that they must be excepted from the benefits of the Act in so far as it applies to employees of the State.

We now come to consideration of Judges of Municipal and Police Courts.

1. They are judicial officers under the Constitution.
2. They are appointed by the Governor.
3. They must hold Court at definite times in definite places.

These three provisions in our law set them up definitely as State employees. You will note that the Justices of the Peace and Trial Justices and the Judge and Register of

Probate all fail in meeting all three of these provisions and, in the absence of any other reason, failure to meet any one of these three provisions in this particular regard (a discussion of judicial officers) and in connection with the Jointly Contributory Retirement System of the State, excludes them from the benefits of the system.

For your personal benefit I will say that we regret that the fact that you have been a Notary Public for twenty-five years cannot possibly give you any benefits under the Jointly Contributory Retirement System. A Notary Public is not by any stretch of the imagination a judicial officer even though he is mentioned in Article VI, Section 5 of the Constitution. His duties are purely ministerial, and even when a statute has been passed giving him the powers of a Justice of the Peace, and authorizing him to order arrests to prevent a breach of the peace, the Courts have held that such statutory provision does not make him a magistrate. Knowing your interest in such subjects, I suggest that you read the subject "Notary Public" in Kuling Case Law, Volume 20.

Sincerely yours,

Frank I. Cowan  
Attorney General