MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

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for the calendar years

1943--1944

as a waiving of the rights of the State to object at any time on the ground that the Federal law constitutes an illegal direct taxation against the States or to raise any other objection, with the further suggestion that the Controller should secure the benefit of an order of the Governor and Council before making the deductions.

The present Legislature passed an Act, which is Chapter 224, P. L. 1943, authorizing the withholding of "the federal Victory Tax so-called" from the salaries and wages of all state, county and municipal officials and employees and further authorizing the treasurers of State, the county treasurers, and the treasurers of the several municipalities to act as custodians of such monies and to pay them over to the Collector of Internal Revenue as required by the Federal Law. The Act further stated that its purpose was "to give to the federal government a temporary grant and not to relinquish any rights of the state of Maine."

Since the passage of that Act, which takes effect July 9, 1943, the Congress of the United States has expanded the "Victory Tax" law and has included in the expanded law provision for withholding current income taxes of the people of the country. The "Victory Tax" still continues, but under certain circumstances set out in the Federal Act it is not apparent to the tax-payer.

In my opinion the provisions of P. L. 1943, Chapter 224, were not intended by the Legislature to cover any specific percentage of federal tax, but were intended to protect the treasurers in withholding from wages and salaries and paying over to the proper Federal collecting agency any Federal tax which includes the "Victory Tax" or which follows the same general administrative features as the "Victory Tax." The new withholding tax law not only includes the "Victory Tax," but it is based on the same fundamental ideas and includes all of the essential administrative features of the "Victory Tax." You are therefore, in my opinion, justified in making the deductions provided by the Federal statute, and the treasurers of the State, the counties, and the municipalities have full authority under our statute to act as custodians of moneys so withheld and to pay them over to the Collector of Internal Revenue.

FRANK I. COWAN
Attorney-General

July 7, 1943

To: Governor Sewall, the Secretary of State, the Secretary of the Jointly Contributory Retirement System, and President Hauck, Chairman ex officio of the Board of Trustees of the University of Maine

Subject: Status of the University of Maine

I have three inquiries for opinions as to the attitude which the State should take toward certain activities of the University of Maine and the extent to which certain State Statutes apply to this institution. These questions are as follows:

1. In view of the opinion of the Law Court of the State of Maine in the year 1909, in which appears a declaration that the University of

Maine is a private institution in the same way that Bowdoin, Colby and Bates Colleges are private institutions, must the Secretary of State require that the University of Maine pay for registration of automobiles used in carrying on its functions?

2. Can the professors and instructors employed for the purpose of carrying on the functions of the University of Maine be regarded as eligible for membership in the "Jointly Contributory Retirement System for State Employees except Teachers," which is Chapter 328 of the Public Laws of 1941, approved January 24, 1942?

3. Does the fact that the Governor appoints all the Trustees of the University of Maine mean that that institution is an agency or instrumentality of the State?

Because a question has arisen in the minds of some as to how we should view the decision of the Law Court in the light of acknowledged facts, I will discuss the character of a college with endeavor to show that a recognition of the dignity of its position must enter into any attempt to define its exact status in relation to general government.

A college is not simply the land and buildings which it occupies. A college is also a spirit—an idea—the congregated mentalities of a group of men devoted to the ideal of study and teaching surrounded by a group of immature minds seeking development. A college can exist without buildings to house it—without books, test tubes, or any of the commonly accepted impedimenta of an institution of learning. Aristotle conducted one of the most famous colleges the world has ever known, the School of the Peripatetics, so-called because the teacher walked about, through the parks of Athens, followed by his pupils, to whom he gave instruction as he walked.

Jesus of Nazareth certainly conducted a college, yet neither he nor his pupils were ever sure of having a shelter in which to sleep or regular meals spread for their enjoyment, to say nothing of lack of textbooks.

Mark Hopkins astride a log with a single pupil seated at the other end has been frequently cited as the ideal college.

Why then should we be troubled about the situation of the University of Maine? There should be no difficulty to intelligent minds in looking on that college as a public institution so far as its physical properties are concerned; but in its spiritual aspects as possessing all the integrity of soul that belongs to one unhampered by political considerations.

No college can have a proper existence in this democracy unless its spirit is absolutely free. The subjects that shall be taught may be set down by the lawmakers, but how those subjects shall be taught must be left to the intelligence and the consciences of the operating faculty.

It must have been this idea which Judge Cornish had in mind when he wrote his famous opinion in 1909, declaring that the University of Maine is as much a private institution as is Bowdoin, Colby, or Bates. When he compared the University with the State Normal Schools and

said that the former is apart from the State while the latter are a part of the State, he was not referring to physical properties. He must have known that in 1870 the Corporation had conveyed to the State all its lands. He must have known that the Charter of the College had been amended so that all the Trustees were appointed by the Governor. He certainly knew, for he spoke of it in his opinion, that the College was dependent for its support on two sources, viz: grants from the Federal Government and grants from the State of Maine.

Moreover, it is reasonable to suppose that Judge Cornish, and the other members of the Law Court who concurred in his opinion, were aware that Federal grants were dependent on a recognition by the Congress that the University of Maine was a public institution. What, then, could have inspired this man, recognized by all as one of the wisest of our judges, and himself an alumnus of Colby College, to write an opinion which might seem to jeopardize the financial future of a great institution of learning? Was it a spirit of ill will or of malice? The very suggestion of such small-souled conduct is an insult to the memory of a great judge.

Was it ignorance of the consequences? Those who remember Judge Cornish, and those whose only knowledge of him is derived from a study of his written opinions know that he prepared no decisions for the Law Court without a careful consideration of the state of society for which the decision was made. He laid down the rule of law as he esteemed it to be, but he recognized that he was living in a changing world, and that the law is a set of rules made by man for his own guidance and is not a set of mandatory decrees, promulgated by an autocrat, which man must follow, no matter how inflexible they may be, or how little they are adapted to meet changing conditions.

What, then, did he have in mind?

Simply this, and carefully expressed. That the University of Maine, like any other institution of higher learning, is more than a mere "school." No matter how inadequate some of the students may feel, there are those there who welcome the opportunity for exploration along uncharted lines—who recognize that they are privileged to attend a college where independence of thought and experimentation in new fields is encouraged.

There had been, just prior to the 1909 decision, a renewal in the legislature of the State of the struggle to make the University wholly subservient to politics. A bill had been introduced, and strongly supported, to require that a certain schedule of studies be followed. This was the third time, so a historian has declared, that such an attempt had been made to reduce the dignity of the College to that of a mere public school, dependent for its course of instruction and what textbooks it should use on the whim of a majority in the State Legislature.

It was to protect the soul of this great institution of learning, and to provide for all time a bulwark against the jealousies, ignorance and prejudices of persons hostile to the institution that our Law Court acted. The Court deliberately ignored the question of legal title to

physical properties. So far as the judges were concerned, the land and buildings were mere appendages,—things of convenience but certainly not things of necessity. The college can leave that land, and abandon those buildings, just as Colby College is in process of doing today, but such removal will have no effect on the soul of the institution. That soul is hidden, secret, having its own private rights, uninvadable. It is apart from the field of politics—free from the bondage of patronage. Congresses and Legislatures can make available money and lands for the use of the College, and can lay down rules as to how that money and those lands shall be used, but they cannot say how the soul of the College, the idea to teach, the ideal for the betterment of the human race, shall function. Those things are beyond the ken of the illiterate—the material minded—the mere money-changers of the world. With their gifts of gold or their political power, they can shape the buildings, and create athletic fields, but they cannot compel minds inspired with the ideal of teaching to function along lines which they prescribe.

To prevent a future group of shortsighted persons from evicting these independent minds and putting the College in shackles of ignorance (thus destroying or at least retarding the development of its soul) the judges spoke. Their decision has to do solely with the spiritual, not at all with the physical.

The State, in its attitude toward the University of Maine, must recognize two things. First—the spirit of the College is free—and must function in that pure atmosphere where thought and study are unhampered by material considerations. Second—the physical assets of the College are the property of the State, and as such are to be regarded and treated as public properties.

The faculty, expressive as they are of the spirit of the College, are not public employees. They make such rules, not contrary to law, as they wish for their own guidance or convenience, subject, of course, to the supervision of the Trustees.

The Trustees are liaison officers between the spirit of the College and its body. They perform material functions, but are not themselves charged with the duty of teaching. They have custody of the lands, buildings and equipment set aside by the State for the use of the College in performing its functions of study and teaching.

To the extent necessary to make it the beneficiary of Congressional and State grants of money, the University of Maine may be classed as a State institution. The lands, buildings and other physical assets, title to which is in the State, are instrumentalities of the State.

The College itself, this ideal, is an untrammeled spirit, free to accept or refuse the gifts that governments or others bestow upon it. This free spirit can never be regarded as the instrumentality of any political body, because the moment it becomes such, that moment it starts to decline—to lose its virtue—to become a mere instrument in the hands of politicians.

From such an ignoble end it is hoped a large and rapidly growing alumni body will ever defend it.

It must of necessity follow from the above line of reasoning that inasmuch as physical assets of the University, whether actually standing in the name of the State or standing in the name of the Corporation, are in fact the property of the State; and since the State does not charge taxes against or registration fees for the use of its own properties, any automobiles used by the University of Maine in the performance of its functions are not subject to registration fees. Any opinions heretofore given by this Department seemingly in any way in conflict with this opinion are hereby modified to conform to the conclusion expressed herein.

The question as to whether general employees of the University of Maine shall be considered as eligible for the benefits of the Jointly Contributory Retirement System, must be answered in the affirmative.

The question as to whether professors and instructors in the University of Maine are eligible for the benefits of the Jointly Contributory Retirement System must, at the present time, be answered in the negative. The Legislature has on several occasions used language which recognized "officers and employees of the University of Maine" (see P. L. 1937, Ch. 221, the Personnel Statute) as employees of the State in the unclassified service. We cannot interpret this language as broad enough to include professors and instructors within the provisions of the Jointly Contributory Retirement System without more specific language by the Legislature.

The question as to whether or not the fact that the Governor appoints all the Trustees of the University in itself is the determining factor in making of the University a State instrumentality or agency must be answered in the negative. The Trustees have a dual function, and the method of their selection is simply one of convenience. It is their duty to ensure that the State property entrusted to their care shall be used for the purposes determined by the people of the State speaking through their Legislature, and to that extent they are acting in a departmental capacity. They are then guiding and directing the institution in that part of its functions in which it is making use of State property and is acting by delegation as an agency or instrumentality of the State.

Their second function has to do with protection of the College as a guiding lamp for those who seek knowledge. That function I have discussed above in sufficient detail. Any failure on their part to recognize their dual capacity and that, once they have been appointed as trustees and have qualified as such, they must exercise that latter function in a manner that will keep it absolutely clear of any political interference would be a definite refusal to recognize in full the responsibilities of their position. My answer must, therefore, be that insofar as proper handling of the physical functions of the University is concerned, the State does possess the right of direction and control, and the Trustees should at all times take that into consideration in making their decisions. To a more limited extent, the same thing is true in regard to certain courses in the University, which are definitely set up by legislative enactment, such as the course in agriculture and the course in

home economics. To the extent that the College encourages independent thought and the development of general education, the Trustees are bound to exercise their functions in the same fashion that the governing boards of Bowdoin, Colby and Bates Colleges exercise theirs, with absolute independence of thought and action and with a firm insistence that the ideals of general education shall not be made subservient to any political body, either state or national.

FRANK I. COWAN
Attorney-General

July 27, 1943

Robert B. Dow, Esq.
Attorney at Law
Norway, Maine

Dear Bob:

Your letter of the 26th relative to increase of pay of county employees has been received.

Chapter 103, P. & S. Laws of 1941, approved January 24, 1942, permits a 10% increase for county employees, provided no such increase shall raise the pay to more than $30. per week. Chapter 229, P. L. 1943, provides that the salaries of clerks and county officers in Oxford and Penobscot Counties "shall be increased 15%" for the duration of the war.

The 1943 act assures a 15% raise and was not, in the opinion of this department, supposed to be in addition to the 10% raise permitted by the previous law. The 15% raise should be based on pay as set before raises were allowed under the prior law.

Very truly yours,

FRANK A. FARRINGTON
Deputy Attorney-General

August 3, 1943

Roscoe L. Mitchell, M. D., Director Bureau of Health

You have inquired whether or not the State Department of Health can make a regulation modifying or enlarging the rights of licensed practitioners in the field of osteopathy, chiropractic and medicine, so far as certain health programs, carried on with the assistance of the Federal Government are concerned.

The rights of medical practitioners are all set forth in the Public Laws of the State of Maine. You are familiar with the rights of the licensed physician to administer drugs and to practise surgery.

The law relating to the practice of osteopathy is found in Chapter 21, Section 64 of the Revised Statutes of 1930, which allows the practitioner to use such drugs as are necessary in the practice of surgery and obstetrics, including narcotics, antiseptics and anaesthetics.

Chapter 21, Section 75, provides for the limit of the practice of chiropractics, but it does not authorize its holder to practise obstetrics, so far as the same relates to parturition, nor to administer drugs or