

# MAINE STATE LEGISLATURE

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STATE OF MAINE

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REPORT

OF THE

ATTORNEY GENERAL

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for the calendar years

1943--1944

I question the propriety of asking a department head to list on his deposit slip as actually transmitted to you any funds except those which he has transmitted. Whether or not he should report back to you at all in regard to funds received directly by you and concerning which you have reported to him is an administrative matter. Here again I see no reason why he should, because it makes for extra and unnecessary clerical expense; but the bookkeeping system is handled by yourself and the gentlemen in the Finance Department and what safeguards you will put on your handling of accounts is for you to decide.

FRANK I. COWAN  
Attorney-General

March 29, 1944

Francis K. Purinton, Executive Secretary

In answer to your inquiry received by this office on March 27th, 1944, relative to the status of Judge Alton Lessard, Judge of Probate of Androscoggin County, who has joined the naval forces of the United States and your question as to whether his enlistment or induction into the Navy vacated the office he holds:

Section 7 of Article VI of the Constitution relative to judges of probate who are elected by the people of their respective counties provides:

"Vacancies occurring in said office (judges and registers of probate) by death, resignation or otherwise, shall be filled by election in manner aforesaid, at the September election next after their occurrence; and in the meantime, the Governor, with the advice and consent of the Council, may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January thereafter."

The courts have recently had occasion to pass upon this question and wherever the statute or the Constitution of the State used words similar to that provision in our Constitution, it was held that enlistment or induction into the armed forces does not result in a vacation of the office, since the words "or otherwise" following the word "vacancies" import finality or permanency, the usually accepted meaning of "vacate" being to yield up possession and not merely to leave temporarily. The courts have further held that the words "or otherwise" do not include such acts as voluntary or involuntary service by a public officer in the military forces in time of war.

It would thus appear that there is no vacancy in the office of judge of probate merely by the induction of the judge into the naval forces.

If it be thought that his entry into the naval forces would constitute an abandonment of the office, so as to create a vacancy, I find that our own court has said that

"To establish such abandonment . . . the proof must show a voluntary and intentional relinquishment of the office by the incumbent, for there can be no abandonment of an office or any other right without an intention, actual or imputed, to abandon it. Such intention is a question of fact, and may be inferred from the party's

acts. If his conduct is such as to clearly indicate that he had relinquished the office, an intention to do so may be imputed to him."

*State of Maine vs. Harmon*, 115 Maine 262 at 272.

That Judge Lessard intended such a result is refuted by the fact that it is stated that he has no intention of submitting his resignation, and further, that it is his contention that he is not vacating the office. His intention would be of no moment, if the duties that devolved upon him could not be performed by any one else and thus the public interest would be jeopardized if the court was left without a judge.

Our statutes, however, on that subject are very broad. They provide that

"During the sickness, absence from the state, or inability of any judge of probate to hold the regular terms of his court, such terms, at his request or that of the register of the county, may be held by the judge of any other county; the judges may interchange service or perform each other's duties when they find it necessary or convenient. . . ."

#### Chapter 75, Section 8

It would thus appear that during his absence the work of the court may be carried on, perhaps with some little inconvenience to those having business before the court, but our courts have recognized that during a war some inconvenience must be submitted to because of the draft that is made upon those holding public office.

In view of these considerations it is my opinion that the judge of this court has not abandoned his office within the meaning of the law; nor is there a vacancy in that office by reason of his joining the naval forces.

ABRAHAM BREITBARD

Deputy Attorney-General

April 3, 1944

Harrison C. Greenleaf, Commissioner of Institutional Service

P. L. 1943, c. 201, §2.

You have requested an interpretation of Section 2 of Chapter 201, P. L. 1943, which reads as follows:

"Warden shall keep a record of each convict's conduct, and recommend a deduction of sentence. He shall keep a record of the conduct of each convict, and for every month, during which it thereby appears that such convict has faithfully observed all the rules and requirements of the prison, the warden may make, with the approval of the commissioner, a deduction of 7 days from the minimum term of said convict's sentence, except those sentenced to imprisonment for life. The provisions of this section shall apply to the sentences of all convicts now or hereafter confined within the prison. The provisions of this section shall not be construed to prevent the allowance of good time from maximum sentences or definite sentences other than life sentences."

Particularly do you want to be advised whether the credit for good behavior is to be made monthly, in which case the prisoner, for such