

MAINE STATE LEGISLATURE

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STATE OF MAINE

R E P O R T

OF THE

ATTORNEY GENERAL

for the calendar years

1949 - 1950

"In applying for a gasoline tax refund under Section 166-A, Chapter 14 (P. L. 1947, Chapter 349, Section 4-A) are received invoices rendered by Stover Airport to John G. Stover acceptable? i. e., can an individual 'purchase' gasoline from an unincorporated business of which he is proprietor?"

Answer. After my conversation with you this morning and with Mr. Berry, the State Auditor, on the telephone in which he assured me that he would be willing to accept these invoices receipted by Stover Airport to John G. Stover, and inasmuch as you can go back of the record and check on the number of gallons which he used, it is my opinion that these receipted invoices rendered by Stover Airport to John G. Stover might be acceptable by the State Tax Assessor for the purpose of reimbursing Mr. Stover for such tax paid by him, as shown by the original invoices, if the other provisions of Section 166-A are complied with.

RALPH W. FARRIS
Attorney General

March 7, 1949

To Honorable Sanford J. Prince, House of Representatives

I have your message asking if there is any law or decision on riparian rights which would affect the clam bills coming up for hearing. . .

The State holds the rights of common fishery in trust for the public, and as to them, it exercises not only the rights of sovereignty, but also the rights of property. The legislature has full power to regulate and control such fisheries, and may grant exclusive rights therein, when the interest of the public will thereby be promoted. *State v. Leavitt*, 105 Maine, page 76. This right being general and not modified by colonial ordinances extends to shellfish on flats.

Though by the colonial ordinance of 1641, the riparian proprietor acquired title to the flats adjoining, not exceeding 100 rods, between high and low water mark, yet he can acquire no *exclusive* right to the fisheries upon them by such ownership. The general term of fisheries includes all fisheries without regard to their distinctive character, such as shellfish, including the digging of clams, which is embraced in the common right of the people to fish in the sea, creeks and arms thereof. The State, as respecting the people, has the right to regulate the common rights and privileges of fishing. This was laid down in *Moulton v. Libby*, 37 Maine 472, *Matthews v. Treat*, 75 Maine 597, and *State v. Leavitt*, 105 Maine at page 79.

I will say in passing that in non-navigable water, under the common law, fish belonged to the riparian proprietor; but in Massachusetts from the earliest settlement the principle was modified by legislation and general acquiescence, and public rights were recognized as paramount in the case of shad and salmon. *Cottrill v. Myrick*, 12 Maine 229. In the early history of our State it was deemed conducive to the public good to subject salmon, shad and alewives to public control, whenever the legislature thought proper to interpose, and the rights of riparian owners yielded to the paramount claims of the public. The right of the public to regulate the interior fisheries is proved both by legislative acts and by judicial construction.

In *State v. Wallace*, 102 Maine 229, the court referred to the Revised Statutes of 1903, Chapter 41, whereby the power of regulating clam digging within their respective limits was remitted to the towns. Towns were to vote, and the municipal officers were to grant permits; but a preference for the use of the inhabitants of the town is still shown, except when the town fails to take action, in which case there is free fishing for everyone, unless there is another State statute regulating same, or the Commissioner of Sea and Shore Fisheries has been authorized by statute to promulgate a rule and regulation respecting the digging of clams in the flats of navigable waters.

Our courts have held that . . . legislation carrying out a public purpose, though limited in its application, if within the sphere of its operations it affects alike all persons similarly situated, is not within the Fourteenth Amendment of the Constitution, which declares that no State shall deny to any person within its jurisdiction the equal protection of its laws.

RALPH W. FARRIS
Attorney General

March 11, 1949

To Edward L. McMonagle, Director, Schools in Unorganized Territory
Re: School Residence

I have your memo of February 10th which I acknowledged on February 25th. Supplementing said February 25th memo, I will say that I have received a statement of facts from the attorney of the Town of Stockholm on the question of whether Albert L. Anderson is a resident of Township 16, Range 4, or a resident of Stockholm. You stated in your memo that Mr. Anderson moved his family to a farm which he owned in Township 16, Range, 4, W.E.L.S., intending to rebuild his home in Stockholm as soon as possible. However, the facts which the Town of Stockholm submits indicate that he did not own the farm in T. 16, R. 4, at the time of the fire which destroyed his home in Stockholm in 1947. On October 10, 1947, Albert L. Anderson and his wife, Elsie Anderson, purchased the farm in T. 16, (R.) 4, and they are making that their permanent home, regardless of what he intends to do in the future. Having lived there long enough to establish a residence, and inasmuch as that is his domicile and the domicile of his wife and family, and his family consists of children of school age, I am constrained to rule that he is now a resident of T. 16, R. 4, where he resides and owns his home.

The facts relating to his paying a property tax and purchasing hunting and fishing licenses and being a member of the superintending school committee have no bearing upon his residence. A man's residence is based upon what he does and not upon what he intends to do.

Upon this basis I must answer your questions as follows: Albert Anderson cannot claim a residence in Stockholm for school purposes while he and his wife and children are not residing in that town; and, based upon the facts and circumstances that he and his wife are residents of T. 16, R. 4, your department through the Division of Unorganized Territory, is responsible for the schooling of the Anderson children.