STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1949 - 1950

July 15, 1949

To L. C. Fortier, Chairman, Maine Unemployment Compensation Commission

Re: Overpayments

I have your memo of July 13th asking for information relative to a claim on which an overpayment was made in 1938. On June 10, 1949 a payable claim was filed in the amount of $22.50 and a deduction of $13.58 was made to apply against the old debit. This deduction should have been $15.38, but an error was made in entering the figures, so there still remains an outstanding overpayment of $2.

It is my opinion that you should charge this matter off, as it was an error in your office and the claim is over six years old; the statute authorizes an action of assumpsit to be brought, which is a statutory action, and the statutory limitation for actions in assumpsit on account annexed is six years. Therefore, in my opinion, the limitation is six years.

It is my opinion that the Commission should always in the future give notice on overpayments immediately on discovery that such exist, as Section 16(e) of Chapter 24, R. S., provides that if *after due notice* any person refuses to repay amounts erroneously paid to him as unemployment benefits, the amount due from such person may be collected by an action in assumpsit with account annexed, brought in the name of the Commission; or in the discretion of the Commission the amount erroneously paid to such person may be deducted from any future benefits payable to him under this Act. So the Commission is not entitled to bring a suit until after due notice, when a person has refused to pay.

Section 90 of Chapter 99, R. S., which enumerates actions to be commenced within six years, in subsection IV provides actions of account of assumpsit upon the case founded upon any contract or liability, express or implied, must be commenced within six years; and in your case it must be after due notice as provided by the MUCC Law.

However, I will state that it is not for the Commission to raise the question of the statute of limitation. It is incumbent upon the person against whom the claim is made, as the statute of limitation is only a defense statute, and if it is not raised when the action is brought, advantage cannot be taken of it later. To be effective, it must be raised by the defendant. So in case of other overpayments that are over six years old, if the persons make no objection, go ahead and collect them and make the necessary offsets.

RALPH W. FARRIS
Attorney General

July 19, 1949

To Edward L. McMonagle, Director S.C.U.T., Department of Education

Re: Conveyance of Private School Pupils

In your memorandum of July 6, 1949, you state as follows:

"Elementary school pupils living in Argyle Township, Penobscot County, attend the Old Town public schools to which they are conveyed on a bus owned by John T. Cyr and Sons of Old Town and operated under a contract with the Commissioner of Education.

"A family which has recently moved into Argyle Township wishes to send children to a parochial school in Old Town and has asked permission for these children to ride on the bus provided by the state for the conveyance of Argyle children who are attending the Old Town schools."

You asked the following question: "Would the Commissioner of Education or any of his agents act contrary to law in granting the permission requested?"

Section 23 and following of Chapter 37, R. S. 1944, sets forth the duties of towns with respect to raising money for "public schools." Section 3 of the same chapter prescribes some of the duties of the Commissioner and refers to "public schools," to "town officers" and to "superintending school committees." All of which have a public connotation. It is reasonable to assume, therefore, that when used elsewhere in the chapter, the words "elementary schools" or "secondary schools" mean public schools unless otherwise expressly stated. It follows likewise that mention of pupils, students, or scholars refers to those attending public schools unless otherwise expressly stated.

I would recommend that you read the case of *Arch R. Everson v. Board of of the Township of Ewing*, decided by the Supreme Court of the United States in 1946. It is reported in 91 L. Ed. 711. This case involved the validity of a New Jersey statute which made provision for the transportation of school children to and from school, "including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part."

The court upheld the validity of the statute in a 5 to 4 decision. There are two powerful dissenting opinions. Both the majority and minority refer to the historical background for the separation of church and state.

The decision turns on the application of the First Amendment of the Constitution of the United States as made applicable to the States by the Fourteenth Amendment. The case includes as an appendix Madison's "Memorial and Remonstrance against Religious Assessments." This is to refresh the memories of the present day as to the real and important issue involved. Without this background one might easily fail to apprehend the importance of the issue.

Suffice it to say that this country is constitutionally dedicated to the proposition that all use of public funds for religious purposes is prohibited. It is a matter of principle and not a matter of degree or extent.

In the Everson case the majority holds that the New Jersey statute does not use public funds for religious purposes; that it is a statute within the police or welfare powers of the state. The minority holds that the transportation of pupils to religious schools is as essential to education as any other element and that consequently the use of public funds for this purpose constitutes a use for religious purposes.

New Jersey's enabling statute was upheld.

Maine has no enabling statute to permit the transportation involved in your question.

The New Jersey statute was upheld by a seriously divided court.

In the absence of a statute, it is certainly clear that public funds cannot be used for the transportation of pupils to private religious schools.

We do not answer whether it may be done when no additional use of public funds is involved.

JOHN S. S. FESSENDEN
Deputy Attorney General

July 19, 1949

To Ray S. Foster, Sheriff of Washington County
Re: Mittimus Fees

I received your letter of July 11th in regard to collecting mittimus fees. You state that you could never find any authority for you to collect them, so in order to settle the question you are writing me. You state that a man was committed from Lubec to your Machias jail on a mittimus from the Western Washington Municipal Court in default of payment of a fine of $10 and costs of $8.52, a total of $18.52, and that the judge sent you word to collect the mittimus fees before this man was released, plus costs of commitment from Lubec, amounting to $7.20, which would make the total $25.72. You ask whether, if offered the $18.52, you should accept it unless the costs of commitment are also paid.

Under Section 166 of Chapter 79, R. S., subdivision XXIX, the statute provides: "For the service of a warrant, the officer is entitled to $1, and $1 for service of a mittimus to commit a person to jail. . . and usual travel, with reasonable expenses incurred in the conveyance of such prisoner." I think this is sufficient authority for you to charge for the mittimus in addition to the fees. I feel that you should follow this practice, as it means quite a lot to your county. . . The legislature never intended the county to be responsible for transporting prisoners for commitment and I think that the statute which I quoted takes care of the same under "reasonable expenses incurred in conveyance of such prisoner."

RALPH W. FARRIS
Attorney General

July 19, 1949

To Adam P. Leighton, M. D., Secretary,
Board of Registration in Medicine

I received a letter from you dated July 12th, relating to the question of whether the Board should accept graduates of Continental European Medical Schools, with a copy enclosed of the application of Edmund Kahan, M. D., of Hindsboro, Illinois. Dr. Kahan is a graduate of the Vienna Medical School where he received the degree of Doctor of Medicine on February 6, 1937, and was admitted to practice before the Illinois State Board on August 5, 1940. You have a certificate of the Superintendent of Registration of the State of Illinois with his seal thereon.