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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1951 - 1954

It is the opinion of this office that the individual has waived any rights he would have otherwise been entitled to, by his action in submitting his resignation.

Being a member of the Retirement System is a condition of employment except in certain instances which are not pertinent to this case. (Section 3, Chapter 60, Revised Statutes.)

A member of the Retirement System remains a member, even though he enters the Armed Forces of the United States, if he does not withdraw his contributions. Section 3, subsection VI, Chapter 60, R. S., reads in part as follows:

> ". . . provided, however, that the membership of any employee entering such classes of military or naval service of the United States as may be approved by resolution of the board of trustees, shall be considered to be continued during such military or naval service *if he does not withdraw his Contributions*. . .

Having resigned from employment in order to obtain a refund of his contributions, the individual is no longer a member of the System, no longer an employee, and as a result no longer eligible to re-employment rights.

In the instant case the resignation and subsequent withdrawal of contributions, in the amount of approximately $375.00, was done in the face of advice as to the result of such action – that it would result in a complete severance from State Service.

It must therefore be concluded that the individual involved, having been an employee of the State of Maine, was assumed to know the laws concerning his employment, and that his voluntary action, amounting to an election and despite the warning given him by his department head, was a waiver of his re-employment rights, and as a result the State cannot be compelled to restore him to employment.

The records disclose no request for re-employment within the 90-day period following discharge, but we assume such request was made and this opinion has been written accordingly.

ALEXANDER A. LaFLEUR
Attorney General

October 6, 1952

To Paul A. MacDonald, Deputy Secretary of State
Re: Accident, Note, and Bankruptcy

. . . On January 27, 1947, Mr. X. was involved in an automobile accident and came within the provisions of the financial responsibility law of this State. As a result of this accident he and his wife signed a promissory note on February 15, 1947, payable to the injured party. Suit was brought on the note within a year and judgment obtained but not satisfied.

On the 10th day of May, 1952, Mr. X. received a discharge in bankruptcy. You state that it is contended by his attorney that in enacting this statute the legislature intended that suit should be in tort and not in contract in order for this law to apply. It is maintained that the delivery to the injured

party by the tort feasor of a promissory note for the amount of damages was a payment of the debt created by the accident. This theory would appear to be one of payment or accord and satisfaction.

You ask whether or not the fact that suit was brought on the note, which was itself given as payment for the damage inflicted, would bring the case outside section 66, paragraph VI, being that provision of the law which refers to a discharge in bankruptcy.

It is the opinion of this office that suit upon the note under the circumstances related above does not place the case outside the provision of law which has reference to a discharge in bankruptcy.

The reasons for our opinion are based upon:

1. Under the facts as presented, it appears that acceptance of the note by the injured party was not an executed accord and satisfaction, nor was it payment of the original debt.
2. This conclusion is substantiated by the general law on the subjects of accord and satisfaction and payment; and
3. The Maine law anticipates and makes provision for such procedure as was here carried out by the parties.

1) The general rule is that a note given by the debtor for a preceding debt will not be held to extinguish the debt, in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgment or memorandum of the amount ascertained to be due. However, in some jurisdictions, the minority, and in Maine, the negotiable note of a debtor given by the debtor to the creditor is *prima facie* satisfaction of a prior simple contract debt. The rule is well stated in *Spitz v. Morse*, 104 Maine 447:

> "It is a well settled rule of law in this State and Massachusetts that a negotiable promissory note, given for a simple contract debt, is prima facie to be deemed a payment or satisfaction of such debt as between the parties thereto, which simply means, that without further evidence of intent than the giving and receiving of such note, it is construed to be payment. Equally well settled is the rule that this presumption of payment, which is a presumption of fact, may be rebutted by evidence showing a contrary intention. These two rules are usually stated together."

Maine cases quite clearly hold that the taking of a note is to be regarded as payment only when the security of creditor is not thereby impaired. *Bunker v. Barrow*, 79 Maine 62.

The fact that such presumption would deprive the party who takes the note of a substantial benefit has a strong tendency to show that it was not so intended. *Curtis v. Hubbard*, 9 Met. 322.

It should be noted in passing that it is stated that such presumption may arise when a note is given for a prior *simple contract debt*, and we can find no case giving rise to the presumption when a note is given for a debt arising from a tortious act.

The intent of the statute under consideration is two-fold: To insure victims of negligence compensation for their loss and damage, and to enforce a public policy that reckless and irresponsible drivers shall not with impunity

be allowed to injure their fellows. Thus, under the law as developed by the Maine Court, where a security held by the injured party would be impaired by the presumption or he would be deprived of a substantial benefit, then no such presumption arises, and in such a case a note given by a debtor for a preceding debt will not be held to extinguish the debt, and, the original debt not being extinguished, it follows that the provisions of the financial responsibility law still apply.

2) The exception of a discharge in bankruptcy, in a statute which provides for the suspension of a driver's license upon the non-payment of a judgment for an injury resulting from the operation of an automobile, unless the judgment is paid or a release obtained, is not invalid as inconsistent with the provisions of the Bankruptcy Act that a discharge in bankruptcy shall release a bankrupt from all his provable debts. *Reitz v. Mealey*, 314 U. S. 33. The court looks behind a note or other instrument, or even a judgment, to ascertain the nature of the debt, for the purpose of determining whether it is dischargeable by a discharge in bankruptcy. Thus, a claim which is not dischargeable under the provisions of the Bankruptcy Act is not rendered dischargeable by reason of the fact that a note or other instrument has been given for the debt by the debtor and accepted by the creditor. 6 Am. Jur. 987, section 752. See 6 Am. Jur., "BANKRUPTCY" heading "E", "Effect of Discharge", subheadings "I. In General" and "IV. Excepted Debts", and the sections therein contained.

3) For further evidence to the effect that the giving of a promissory note for the debt arising from damages due to an accident coming within this law does not take the case outside the scope of the law and does not remove the case from that provision that refers to discharge in bankruptcy, we draw attention to section 71 of Chapter 19, being the limitation and saving clause. Paragraph I reads as follows:

> "I. Limitation. The provisions of sections 64 to 71, inclusive, shall not be construed to prevent the plaintiff in any action at law from relying upon the other processes provided by law."

The last sentence of paragraph VI of section 66 reads as follows:

> "A discharge in bankruptcy shall not relieve the judgment debtor from any of the requirements of sections 64 to 71, inclusive."

As a result of paragraph I of section 71, it appears that a plaintiff may choose a process other than an action for damages, as in the instant case, and sue upon a note; and referring back to paragraph VI of section 66 it further appears that the judgment debtor shall not be relieved by discharge in bankruptcy.

Referring back to paragraph numbered 1), in which we state our conclusion to be that a note given by a person or tort feasor to an injured party is not presumed to be payment or accord and satisfaction where, by accepting the note, the injured party would be deprived of a substantial benefit or security and that until payment is made on the note or execution completed it remains an executory accord and therefore of no effect until paid, we should like to make a further statement.

The rule that the new promise, if not executed, is not a satisfaction is subject to the qualification that when the parties agree that the promise

shall be a satisfaction of the prior debt or duty and it is accepted in satisfaction, then it operates as such and bars action on the old debt or duty. As a result of this rule, our office would presently accept, and has accepted in the past, as complying with the financial responsibility law, a covenant not to sue on the part of the injured party, or other evidence showing intent of the parties to accept the note as satisfaction of the original debt. We believe that this rule, as present in the State of Maine, would require the party claiming to have given satisfaction for the damage to show evidence to that effect and that perhaps the answer to this question should be a hearing before the Secretary of State to determine whether or not the acceptance of the note is deemed to be satisfaction of the debt, in which case the maker of the note would not be embraced within the financial responsibility law.

JAMES G. FROST
Deputy Attorney General

October 16, 1952

To Honorable Frederick G. Payne, Governor of Maine
Re: Elections

Mr. Neil Bishop has in the recent past been in contact with this office, reaffirming his belief that the ballot used in the last general election was illegal in that he, as an independent candidate, was not accorded the same individual square above his name by virtue of which a straight ticket could be voted.

This office, of course, believes that in so far as Mr. Bishop's position on the ballot is concerned, such position was legal.

Mr. Bishop has suggested that questions be propounded to the Supreme Judicial Court, seeking their determination of the validity of the ballot. As I recall, he also conferred with you on this question and we were at a later date to discuss it.

Before answers will be given by the Supreme Judicial Court to questions asked by the Governor, the situation from which the questions arise must be of such a nature that the Supreme Judicial Court will conclude that there is a solemn occasion.

Mr. Bishop was advised before the date of the election of the form of the ballot to be used in that election in sufficient time for him to have taken any legal action which might have been necessary to question the validity of the ballot at that time. He having been so advised, it is doubtful if the Court will consider such a question now to be on a solemn occasion.

It further appears that the Legislature will examine the lists of votes and perhaps at that time Mr. Bishop can present his grievance to the Legislature.

At any rate, being of the firm conviction that Mr. Bishop was accorded all due legal rights on the ballot, this office would recommend that questions not be sent to the Supreme Court.

ALEXANDER A. LaFLEUR
Attorney General