March 10, 1953

To Alexander LaFleur, Attorney General
Re: Reimbursement of Ex-Senator McKusick

Legislative Document No. 733 provides for the reimbursement of Mr. Carroll L. McKusick of Parkman for his services to the Maine School Building Authority. Mr. McKusick, while Senator, served on this body by virtue of his being the Senate Chairman of the Committee on Education. The legality of the Resolve is questioned and our opinion is solicited.

"Can the Legislature legally reimburse Mr. McKusick for his services on the Maine School Building Authority, from the date of the adjournment of the Ninety-Fifth Legislature till the convening of the Ninety-Sixth Legislature?"

At the outset it seems that the question of reimbursement must turn upon Article IV, Part Third, section 7 of the Constitution of the State of Maine, which reads as follows:

> "No senator or representative shall during the term for which he shall have been elected, be appointed to any civil office of profit under the state, which shall have been created or the emoluments of which increased during such term except such offices as may be filled by election by the people."

It is to be noted that the office which was created by Chapter 405 of the Public Laws of 1951, relative to the Senate Chairman of the Committee on Education, was not a civil office of profit within the meaning of the Constitution. By express stipulation, the Senate Chairman could not receive the $10.00 per diem which was paid to the appointive members of the Authority. Thus there was no constitutional question involved in the first instance. The attack on this Resolve seems to follow the theory that one cannot do by indirection that which he cannot do by direction.

It has been held that membership on the Georgia State School Building Authority is not a civil office within the meaning of their Constitution. This decision rests on the ground that there was no essential governmental function delegated to the Authority for their performance. The court there held that this was simply a plan whereby the Authority provided school buildings, which local authorities, in the performance of a governmental function, could obtain by lease. Sheffield v. State School Building Authority, 68 S. E. 2d 590 (Ga.).

Our court has held, Opinion of the Justices, 3 Me. 481, that the term "office", as used in the Constitution, implies the delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. We might well rest our opinion on the ground that this is not a civil office, but there is perhaps a more substantial ground upon which our decision may be based.

The constitutional prohibition above cited was enacted to cope with a particular situation. That situation has been expressed in various ways, but generally falls within the following:

(1) To prevent any member of the legislature from being appointed to any office which is made available to his appointment by the action of the legislature of which he is a member;

(2) To preserve a pure public policy and to prevent one who has been concerned in creating an office or in increasing its emoluments from aspiring to such office not only while he is an incumbent of the office which created the other office or increased its emoluments, but for a definite period of time;

(3) To take away, as far as possible, any improper bias in the vote of the senator or representative and to secure to the constituents some solemn pledge of his disinterestedness;

(4) To remove the temptation on the part of the legislators to raise the salary of public officers or create publis offices, and get themselves appointed thereto.

See 46 C. J., section 44; 67 C. J. S., section 21.

More concisely, a legislator is expected to legislate for the public good, not for his future private interest.

It is to be noted further that the constitutional prohibition is not a permanent disqualification, for the legislator may be (1) appointed to the office after his term has expired; (2) elected to the office that he voted to create or the emoluments of which he voted to increase. Opinion of the Justices, 95 Me. 589.

The constitutional provision here in question is to be construed in the light of the mischief at which it was aimed. 11 Am. Jur. 675, section 62. Applying this construction to the problem at hand, we can find no legal reason to forbid the payment of the Resolve in question. The reasons that might be raised to substantiate the claim that he could not be paid in the first instance cannot be brought to bear to say that he cannot be paid in this instance. Can it now be said that a subsequent legislature, a legislature in which the gen-

tlemen has no seat and has no vote, cannot appropriabe this sum, or any sum, to reimburse him for the added administrative duties carried on after adjournment of the legislature? Had he hope of remuneration when the office was created? The answer is in the negative by virtue of the bill itself, no salary being attached. An entirely new legislature is now in session. They will sit in unbiased judgment upon this claim. Certainly the people are now protected; there will be no joint ventures in the creation of new offices on this basis. The mattter is now one of legislative discretion:- (a) Shall we appropriate? (b) How much shall we appropriate?

In view of the limited scope of the constitutional prohibition, the foregoing construction, the evil to be prevented, if this be the only question involved, we answer the inquiry in the affirmative.

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