STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1959 - 1960

November 4, 1960

To: Carleton L. Bradbury, Commissioner of Banks and Banking

Re: Qualification of director—Section 109 of Chapter 59

We have your memo of October 10, 1960 in which you inquire as to a plan proposed by the Eastern Trust and Banking Company, which company owns a majority of stock of the Guilford Trust Company, whereby the Eastern Trust and Banking Company contemplates placing ten shares of stock of the Guilford Trust Company in trust in the name of an officer of the Eastern Trust and Banking Company, such transfer being for the purpose of making that officer eligible as a director of the Guilford Trust Company, and to authorize him to vote the stock at the meetings of the stockholders of the Guilford Trust Company.

Question: You ask us to advise you as to whether or not in our opinion, the officer of the Eastern Trust and Banking Company, receiving stock in the manner above proposed, would be eligible to the position of a director of the Guilford Trust Company.

Answer: In our opinion this person would not, under the proposed plan, be eligible to the position of a director of the Guilford Trust Company.

Attached to your request for an opinion is the memo of law submitted to you by the Eastern Trust and Banking Company setting forth the principles that it is not necessary for a person to have the equitable or beneficial interest in the stock in order to render him eligible as an officer; that a stockholder to whom stock has been transferred in trust for the express purpose of qualifying him to be an officer of the corporation, is eligible; that a person who holds the legal title to stock on the books of the company is qualified to hold such position.

Until September 12, 1959 our statutes required, with respect to business corporations organized under the general law, that:

> "Directors must be and remain stockholders, except that a member of another corporation, who owns stock and has a right to vote thereon, may be a director." Revised Statutes 1954 C. 53, sec. 32.

Effective September 12, 1959 this law was amended to read as follows:

> "Directors need not be stockholders if the charter or by-laws of the corporation so provide." Chapter 129, Public Laws of 1959.

With respect to the above-quoted statutes we believe it may be possible for one holding stock in a corporation organized under the general law to be eligible to the position of director, although the stock is held by him in trust for another.

Kardo Co. v. Adams, 231 Fed. 950; *In re St. Lawrence Steamboat Co.,* 44 N.J.L. 529; *In re Leslie,* 58 N.J.L. 609, 33 Atl. 954; *State v. Leete,* 16 Nev. 242; *Casper v. Kalt-Zimmers* Mfg. Co., 159 Wis. 517, 149 N.W. 754, 150 N.W. 1101. See also *Schmidt vs. Mitchell,* 101 Ky. 570, 41 S.W. 929, 72 Am. St. Rep. 427; *Louisville Gas Co. v. Kaufman,* 105 Ky. 131, 48 S.W. 434; *Richards v. Merrimack,* etc. R. Co. 44 N.H. 127.

But this answer cannot apply to the banking law. Revised Statutes Chapter 59, section 109, reads as follows:

> "Qualification of director.—No person shall be eligible to the position of a director of any trust company who is not the actual owner of stock amounting to $1,000 par value, free from encumbrance."

No one of the cases above cited, all of which are contained in the memo of law in support of the proposition that a person holding stock in trust is eligible to be a director of a bank, dealt with a statute such as is present in the banking law.

However, one of the cases cited in the memo of law noted the distinction between a law requiring one merely to be a stockholder and a law requiring both legal and equitable title to be a stockholder.

Thus, in *State of Nevada v. Leete,* (1881) 16 Nev. 242, the court considered two statutes. The first statute provided that:

> "The corporate powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders in the company."

The second statute read as follows:

> "No person shall be a director, unless he shall be a stockholder owning stock absolute in his own right, and qualified to vote for directors at the election at which he may be chosen, . . ."

The court said, page 247, in comparing the second statute relating to railroads, and the first statute relating to business corporations:

> "The fact that in the railroad law the legislature *ex industria,* made absolute ownership the test of eligibility, is strong evidence that in the general law, where that test was excluded, the same rigor was not intended."

The expressly set forth requirement in our banking law that to be a director of a trust company a person must be *actual* owner, *free from encumbrance,* of stock, is a statute of altogether different tenor and effect than that appearing in the general law governing business corporations.

With respect to a banking law statute like ours, Morse on Banks and Banking, 6th Edition, Volume 1, section 138 says:

> "A method frequently resorted to for securing the fidelity of directors in the exercise of their duties is to require them to own in their own right and unencumbered a certain number of the shares of the corporation . . . "

With respect to such a statute the court said in *Molnar v. South Chicago Savings Bank,* (1943) 138 F (2d), 201, 202:

> "It would seem that Mr. Morse has correctly stated the only reason for such requirement. The director's fidelity if he desired to remain a director, would require him to continue to own and retain the legal and equitable title of his stock which he had deposited with the bank."

The statute considered by the court in the Molnar case provided that:

> "Every director of any bank . . . must own in his own right, free of any lien or encumbrance, shares of the capital stock of the bank . . . of which he is a director, the aggregate share value of which shall not be less than One Thousand Dollars ($1,000.00) and

stock certificates evidencing . . . (such shares) issued in his name, shall be filed unendorsed and unassigned by him with the cashier of such bank . . . during his term as director."

The State of New York had a similar statute which was considered in *Tooker v. Inter-County Title Guaranty Co.* (1946) 295 N.Y. 386, 68 N.E. (2d) 179.

That court said (295 N.Y. 386, 389, 390; 68 N.E. (2d) 179, 180.)

"The plan that underlies this text of section 116 — and every other provision of the banking law — has long been known. "The prime object is to protect the public, including depositors, and after that to enable the stockholders to secure a fair return from their investment. Banking institutions are not created for the benefit of the directors." To that end section 116 requires every director of a banking institution to share its business risks to the undiluted ownership of the prescribed amount of its stock."

See generally, Michie Banks and Banking, Chapter 3, section 4.

For the above reasons we are of the opinion that a person holding stock of a trust company in trust for another does not have actual ownership of such stock free from encumbrance, and is not, therefore, eligible to the position of director of a trust company.

JAMES GLYNN FROST
Deputy Attorney General

November 18, 1960

To: Peter W. Bowman, M.D., Superintendent of Pineland Hospital and Training Center

Re: Surgical and/or Medical Treatment Form

We have your request of October 26, 1960 for an opinion as to the duration of the effectiveness of an executed consent for surgical and/or medical treatment signed by a person having custody of an inmate of your institution.

If the responsible party who executed this consent is dead, then the consent is of no value.

The consent would be valid during any one period of commitment providing the executing person remains alive and competent.

We do not believe it is necessary to incorporate the element of "risk" to any given procedure.

There is a thought contained in the last paragraph of your consent which seems to most of us here to be unnecessary and undesirable. Radiation therapy would, of course, be included within the term "treatment" contained in the preceding portion of the consent, and as you know, the requirements which must be pursued in order to perform an operation resulting in sterility are complex and it should not appear that radiation therapy might be just another method of obtaining this result.

JAMES GLYNN FROST
Deputy Attorney General