

MAINE STATE LEGISLATURE

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No ✓
October 28, 1966

E. L. Walter, Exec. Secretary

Retirement

George C. West, Deputy

Attorney General

Liability of Retirement Trustees

Your memo of October 21 indicates that the Board of Trustees of the Retirement System are concerned about their liability because of possible errors of judgment. You ask our opinion as to the extent of their liability in this area.

The Maine Reports have many cases stating the duties and responsibilities of trustees of funds. We here give quotes from some cases which seem to well illustrate the extent of a trustee's liability.

" (A common law) trustee makes no engagement, and none is implied by law, beyond that of acting prudently and faithfully in preserving, investing, and restoring the property, or what may not be lost without his fault." Makin v. Savings Institution 23 Me. 350 @ 355.

"A trustee undertakes to act with faithfulness and prudence in preserving and investing property, and to deliver it over, or the proceeds of it, as required. He does not assume to bear the risk of loss." Makin v. Savings Institution, 19 Me. 128 @ 131.

"As already intimated, the responsibility of the county treasurer, in the absence of any statute enlarging it, is measured by the common law rule applicable to bailees for hire other than common carriers and innholders. He is bound, virtute officii, to exercise good faith and reasonable skill and diligence in the discharge of his trust; or, in other words, to bring to its discharge that prudence, caution and attention which careful men usually exercise in the management of their own affairs; and he is not responsible for any loss occurring without any fault on his part. That this substantially is the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private -- such as officers of courts having the custody of the property of

suitors therein; trustees, except when they mix the trust property with their own, whereby the identity of the former is lost; marshals, appointed by courts of admiralty to take care of vessels and cargoes; receivers, etc., etc., -- is amply illustrated by the numerous authorities cited by Bradley, J., in U. S. v. Thomas, 15 Wall. 337, 343, 344. See also 1 Perry on Trusts, § 441, and notes." Cumberland v. Pennell, 69 Me. 357 @ 366.

"Of course, the legislature may at will, by general statute, change this rule of responsibility of public officers, as it can, within certain well known constitutional limits, any other rule of common law. The office being created by the statute, it may be subjected to any reasonable conditions by the statute." Cumberland v. Pennell, 69 Me. 357 @ 367.

"Our conclusion therefore is, that the treasurer's degree of responsibility was simply that which the common law imposed upon him as bailee for hire; that the statute of this state did not extend or enlarge it; that his official bond does not increase his responsibility, but simply affords security for the performance of his legal obligations;" Cumberland v. Pennell, 69 Me. 357 @ 375.

"Public officers should act faithfully, discreetly and prudently, with honest purpose, and without corrupt motive; when they act unreasonably, indiscreetly and without honest purpose, and with intent to oppress and injure, they do not have the protection of law; they are violators of it, and become amenable to its salutary provisions that afford redress to the injured party." Wellman v. Dickey, 78 Me. 29 @ 31.

In view of the statement in Cumberland v. Pennell, supra, as quoted from page 367, we must look at the statutes to see if the statutes have effected a "change (in) this rule of responsibility of public officers."

The duties of the members of the Board are set forth in 5 M.R.S.A. § 1031. This section is composed of 16 subsections. Of these, 15 subsections do not appear in any way to change the

common law rule of liability of public officers. We must, however, examine subsection 3 to see its effect in this area.

This subsection provides that a trustee shall, within 10 days after his appointment or election, take an oath of office,

" . . . that so far as it devolves upon him he will diligently and honestly administer the affairs of the retirement system, and that he will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to the retirement system."

The usual oath taken by an elected or appointed official under this State is set forth in the Constitution Article IX, section 1. In part it reads:

"I _____ do swear, that I will faithfully discharge, to the best of my abilities, the duties incumbent on me as _____ according to the Constitution and laws of the State."

This is the type of oath referred to in Cumberland v. Pennell, supra, to wit, to "faithfully perform the duties which he has assumed." The Trustee, however, takes an oath that he will "diligently and honestly administer" his duties and in addition that he will not "knowingly violate or willingly permit to be violated" any of the provisions of law applicable to the retirement system.

It could be said that "faithfully discharge" and "diligently and honestly administer" are synonymous phrases. When coupled with "knowingly violate or willingly permit to be violated" the trustee would be given greater latitude before he could be charged with dereliction of duty.

One could well say that a trustee could not be charged with dereliction unless he is shown to have wilfully violated the law. A mere imprudent or negligent act would not be a dereliction of duty.

Because this oath gives a trustee of the Retirement System more latitude than that given under the constitutional oath set forth in Article IX, section 1, 5 M.R.S.A. § 1031, subsection 3, may well be an unconstitutional statute. Probably the above-cited subsection should be amended.

In view of the foregoing, the trustees, individually and severally, when acting prudently, faithfully and exercising good faith, reasonable skill and diligence, are not responsible for any losses to the retirement fund or any damages suffered by any individual.

George C. West
Deputy Attorney General

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