STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

flashing light having 4-inch sealed beams and showing amber beams of light over a 360° range,"

Between 1945 and 1963 there were amendments in 1949, 1955 and 1961. These are not set forth as they do not add any special emphasis or language relating to this matter.

The fundamental rule in construing legislation is to ascertain intention of the Legislature and to give effect thereto. *Camp Walden vs. Johnson,* 156 Me. 160; *Emple Knitting Mills vs. City of Bangor* 155 Me. 270, and many others too numerous to mention.

This provision of the statute came into being in 1945 and the title then used: "Public Safety with Snow Removal or Sanding Equipment Promoted", comes the closest to defining the intent of the statute when compared with all other language used in the evolution of the present statute.

The history of the present act is indicative of a continuing attempt to determine what standards are required to meet the demand for public safety. Color, size, blinking, range, etc. have been the principal concern in the development of a statute which would create a minimum standard to meet that demand. The reason for lights on plows and sanding vehicles is to give adequate warning to operators of other vehicles that a large and bulky object is on the highway.

We are ruling, as a matter of law, that the so-called "Whelen Light" is legal under 29 M.R.S.A. § 1462, provided it equals or exceeds the minimum standards of 4-inch sealed beams or two lights 6 inches in diameter. Whether or not the "Whelen Light" equals or exceeds the minimum standards should be determined by the Secretary of State. 29 M.R.S.A. § 1361.

GEORGE C. WEST
Deputy Attorney General

April 5, 1968
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Imposition of Motor Vehicle Excise Tax on Motor Vehicles Owned by Non-resident Servicemen.

SYLLABUS:

A PERSON SERVING IN THE ARMED FORCES OF THE UNITED STATES, WHO IS NOT PRESENT IN MAINE IN COMPLIANCE WITH MILITARY ORDERS, WHO IS NOT A DOMICILIARY OR RESIDENT OF MAINE, BUT WHOSE MOTOR VEHICLE IS IN MAINE, MAY REGISTER HIS MOTOR VEHICLE IN MAINE WITHOUT BEING REQUIRED TO PAY THE MOTOR VEHICLE EXCISE TAX LEVIED BY TITLE 36 M.R.S.A. § 1482 ET SEQ.

FACTS:

The Maine Supreme Judicial Court on February 27, 1968, in the case of *Stephenson et al vs. Curtis, Secretary of State,* determined that a person serving in the Armed Forces of the United States and present in the State of Maine solely in compliance with military orders, but who is a resident of or is domiciled in a state other than the State of Maine, should be allowed to register his motor vehicle in Maine free of payment of the Maine

motor vehicle excise tax imposed by Title 36 M.R.S.A. §1482 et seq.

The decision of the Supreme Court clearly applies to those situations where the personal property – the motor vehicle – was present in Maine and where the serviceman was present in Maine. A later injunction issued by a Single Justice of the Supreme Judicial Court sitting as a Court of Equity has the same application.

However, a question has now arisen as to whether, because of the substance and basis of the decision of the Court, the motor vehicle excise tax can be exacted on a motor vehicle owned by a non-resident serviceman who is not present in Maine in compliance with military orders and who is not a resident or domiciliary of Maine but whose motor vehicle is in Maine. Encompassed within this fact situation are servicemen who have previously been stationed in Maine; who have left their families here when transferred to a new station and who have left their motor vehicles here. Also included are motor vehicles owned by servicemen who have never been present in the State of Maine but whose families are here and whose motor vehicles are in this State.

ISSUE:

Whether a person serving in the Armed Forces of the United States, who is not present in the State of Maine in compliance with military orders who is not a domiciliary or resident of Maine but whose motor vehicle is in Maine, may register his motor vehicle in Maine without being required to pay the Maine motor vehicle excise tax levied by Title 36 M.R.S.A. §1482 et seq.

ANSWER:

Yes.

LAW:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. *Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders:* Provided, That nothing contained in this

section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession or District of Columbia of which the person is a resident or in which he is domiciled has been paid." 50 App. U.S.C. § 574. (Emphasis supplied).

REASONS:

The motor vehicles of the servicemen in question may be registered free of payment of the excise tax.

It is important to note that the Supreme Judicial Court of Maine determined that the Maine motor vehicle excise tax was the type of tax prohibited to be levied by the Soldiers and Sailors Civil Relief Act by other than the domiciliary state. (See *Stephenson et al vs. Curtis, Secretary of State,* February 27, 1968, Rescript p. 4.)

The Court based its decision on two cases the case of *Dameron vs. Brodhead,* (1953) 345 U.S. 322, *California vs. Buzard* (1966) 382 U.S. 386.

The Court stated the purpose of the Soldiers and Sailors Civil Relief Act provision cited above, quoting from Buzard and Dameron as follows:

> " 'Section 514 of the Soldiers and Sailors Civil Relief Act of 1940, 56 Stat. 7777, as amended, provides a non-resident serviceman present in a State in compliance with military orders with a broad immunity from that State's personal property and income taxation. Section 514 (2) (b) of the Act further provides that the term 'taxation' shall include but not be limited to ***, excises imposed in respect to motor vehicles or the use thereof:
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> ****
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> As we said in *Dameron vs. Brodhead,* 345 U.S. 322, 326, 73 S. Ct. 721, 724, 97 L. Ed. 1041, '*** though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen a broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any State by virtue of their presence there as the result of military orders. It saved the sole right of taxation to the State of original residence *whether or not that State exercises the right.*' Motor vehicles were included as personal property covered by the statute." ' *Stephenson et al vs. Curtis,* supra at pages 2-3. (Emphasis supplied.)

Therefore, after the decision in Dameron there was no question that a serviceman, present in a state solely in compliance with military orders, who was not a domiciliary of that state could not be required to pay the *taxes prohibited by the Soldiers and Sailors Civil Relief Act.* However, subsequent to the decision in Dameron the question arose as to whether a serviceman who was absent from his residence or domicile solely by reason of compliance with military orders was protected by the tax immunity provision of the Soldiers and Sailors Civil Relief Act from taxation with respect to his personal property within *any tax jurisdiction* other than the state of his residence or domicile regardless of

where the serviceman was located in compliance with military orders. The situation contemplated was one where the serviceman was a resident or domiciliary of State A, his property was in State B, and he was serving or stationed in State C.

As a result of this question two things happened. The United States Court of Appeals of the Fourth Circuit in the case of *United States of America and Bottomley vs. Arlington County, Commonwealth of Virginia,* 326 F. 2d 929, (1964) decided the question and the Congress of the United States amended the Soldiers and Sailors Civil Relief Act to clarify the tax immunity provision.

In the case of *United States of America vs. Arlington County,* supra, the Court of Appeals determined that a naval officer who was domiciled in New Jersey and who, while living with his family in Virginia, was assigned to sea duty outside of Virginia and New Jersey and who left his family and personal property in Virginia was not subject to personal property tax on personalty physically present in Virginia.

The Court relied upon the case of *Dameron vs. Brodhead,* supra and indicated that it was making its decision on the basis of the Dameron case and not on the basis of the Legislation since it felt that even without the legislation the tax was prohibited.

The Court said in this regard:

> "On October 9, 1962, while this case was pending, the Congress ammended the Act to provide that regardless of where the owner may be serving, his personal property may not be taxed except in his home state. Legislative history states that the change was made in order to clarify the original intent of the Act that only the 'home' state should have the right to tax. We do not need a change to read the Act as prohibiting the tax in question." *U.S. vs. Arlington,* supra.

Therefore, on the basis of the Arlington County case a tax may not be imposed against the property of a serviceman by other than his domiciliary or resident state.

In addition, the legislative history of the provision which was added is interesting. In 1962 the following sentence was added to section 514 (50 App. U.S.C. 574):

> *"Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile regardless of where the owner may be serving in compliance with such orders . . . ."* (Emphasis supplied.)

The report of the Senate of the United States concerning this legislative change is found in U.S.C. Congressional and Administrative News, 1962, Vol. 2 at pages 2841-2844, and provides a clear indication of the intent of the Congress in enacting the legislation.

The report says:

> "More specifically, the bill provides that when a serviceman is absent from his residence or domicile solely by reason of compliance with military or naval orders, the tax immunity provision of existing law shall apply with respect to his personal property, or the use thereof, within any tax jurisdiction other than his State of residence or domicile, regardless of where such serviceman may be located in compliance with such orders. **** This legislation provides an equitable clarification of the situation: It assures that transfers of servicemen essential to their military duty shall not prejudice basic rights established by the Congress in recognition of the peculiar and special circumstances of military service."

Attached to the Senate Report are letters from the Veterans Administration, Bureau of the Budget and Department of Defense which concur in the view of the Senate Report.

We therefore conclude on the authority of *U.S. of America and Bottomley vs. Arlington County, Commonwealth of Virginia,* supra and section 514 of the Soldiers and Sailors Civil Relief Act that a person serving in the Armed Forces of the United States, who is not present in Maine in compliance with military orders, who is not a domiciliary or resident of Maine, but whose motor vehicle is in Maine, may register his motor vehicle in Maine without being required to pay the Maine motor vehicle excise tax levied by Title 36 M.R.S.A. §1482 et seq.

JON R. DOYLE
Assistant Attorney General

April 10, 1968
Education

Kermit S. Nickerson, Deputy Comm.

Condemnation of Flowage Rights at Lake Auburn

SYLLABUS:

A Water District may not obtain flowage rights to State lands by eminent domain.

FACTS:

In your memorandum of April 1 you state that the Auburn Water District has filed with the Androscoggin County Commissioners and Registry of Deeds a taking of certain flowage rights on land of the State of Maine occupied by Central Maine Vocational Technical Institute at Lake Auburn.

QUESTION:

You have asked for our opinion as to the legality of this taking.

OPINION:

As sovereign power, the right of eminent domain belongs to the State alone, 29 A C.J.S. "Eminent Domain" § 2, and this right cannot be surrendered, alienated or contracted away; 29 A C.J.S. "Eminent Domain" §4. By P. & S.L. 1923, Ch. 60, §§7, 8 and 9, the Legislature conferred upon the Auburn Water District the power of eminent domain for certain purposes. However, it did not, and could not, confer that power as against the State. In our opinion subject taking was invalid.

RECOMMENDATION:

The proper way for the Water District to obtain these flowage rights is by grant of the Legislature. You should return the check to the Water District with an appropriate explanation.

LEON V. WALKER, JR.
Assistant Attorney General