MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

FACTS:

Me. Public Laws 1969, c. 494 amended 12 M.R.S.A. by adding new sections 681-689. These sections comprise what is popularly called the "Wildlands Zoning Act", and create a new state agency, designated the Maine Land Use Regulation Commission. Section 685 states:

> "The commission is authorized to hire an executive director who shall be the principal administrative, operational and executive employee of the commission."

QUESTION:

Does the position of Executive Director of the Maine Land Use Regulation Commission fall within the classified or unclassified service?

ANSWER:

The classified service.

REASON:

5 M.R.S.A. § 671 provides:

> "The classified service shall consist of all persons holding offices and employments now existing or hereafter created in the State service, except persons who are holding or shall hold offices and employments exempted by Section 711."

The position of executive director of the Maine Land Use Regulation Commission does not fall within any of the exemptions listed in 5 M.R.S.A. § 711. It is a position in the State service created after the effective date of 5 M.R.S.A. § 671. Accordingly, it is a position in the classified service.

ROBERT G. FULLER, JR.
Assistant Attorney General

February 6, 1970
State

Joseph T. Edgar, Secretary of State

Voting Status of Persons Residing on Federal Property Within the State

SYLLABUS:

Civilians residing on Federal property within the boundaries of this State may acquire a legal voting residence in accordance with the Maine Constitution, Article II, Section 1, and if otherwise qualified under State law, may register and vote in the municipality within the physical boundaries of which they so reside.

FACTS:

On September 7, 1956, this office rendered an opinion that "a person residing on government property, over which the State of Maine has ceded jurisdiction to the federal

government, is not residing on Maine property and for this reason cannot acquire a residence in the State of Maine," and consequently such a person could not acquire a legal voting residence in Maine.

Because of certain questions which recently have arisen in connection with the above ruling, you have asked the following questions:

QUESTIONS:

1. Can a person acquire a legal voting residence in Maine in accordance with Section 1 of Article II of the Maine Constitution while residing on federally owned property located within the State of Maine?
2. If voting residence can be established in this manner, in what city or town would such person be eligible to register to vote?

ANSWERS:

1. Yes, except for military personnel and students of any seminary.
2. See Reason.

REASON:

M.R.S.A. Const. Art. II, Sec. 1, sets forth the qualifications required before a person is entitled to vote in elections for governor, senators and representatives. It provides that a citizen of the age of 21 or above, having his residence established in this State for 6 months next preceding any such election, shall be an elector in the municipality where his residence has been established for the 3 months next preceding such election. There are certain exceptions such as "persons in the military, naval or marine service of the United States, or this state [who] shall not be considered as having obtained such established residence by being stationed in any garrison, barrack or military place, in any city, town or plantation," which are not considered germane to this opinion.

Further requirements for eligibility to vote in the municipality in which residence is established are contained in 21 M.R.S.A.§241, which provides, inter alia, that the person must have established a residence in this State for at least 6 months, and in the municipality in which he resides for 3 months next prior to election day, and that he must be registered to vote in the municipality, and must be enrolled in order to vote in a primary election.

There are four recognized classifications of Federal jurisdiction over areas within a State which the United States has acquired. These are:

1. Exclusive legislative jurisdiction.
2. Concurrent legislative jurisdiction.
3. Partial legislative jurisdiction.
4. Proprietal interest only.

Provided he meets the constitutional and statutory voting qualifications recited above, there is no problem as to any but the first of these classifications, since there is no question in the others but what the State has retained jurisdiction at least to the extent that a resident thereof is under the legislative authority of the State.

The difficult problem concerns the eligibility of a resident of an area falling within the first classification.

It has been consistently held that property acquired by the United States under U.S. Const., Art. I, § 8, cl. 17, which gives Congress exclusive power to exercise authority

therein, ceases in legal contemplation to be a part of the territory of the State. Hence, under this theory, residence thereon is not the "residence established in this state" required by Const., Art. II, supra, for eligibility as an elector.

See 25 Am. Jur. 2d "Elections" § 76.

In *State v. Cobaugh,* 78 Me. 401, the Court followed this theory, saying:

> "The laws of this state do not reach beyond its own territory and liquor sold in the ceded territory [Togus] cannot be considered sold in violation of the laws of this State."

It is noted that in the Act of cession of Togus (P. L., 1867, C. 66) the State "granted and ceded to the United States" jurisdiction over said lands, retaining a concurrent jurisdiction only for service of civil and criminal process. Under the above theory, the reservation of only the power to serve process was held not to be inconsistent with the granting of exclusive legislative jurisdiction.

At the time of the Cobaugh decision, there was no situation existing which showed exercise by the state of any further jurisdiction over Togus which might lead to a decision that the Federal jurisdiction was not still exclusive. This is not true today.

The State has asserted over Federal areas the same jurisdiction to tax private persons, private transactions and private property as it has generally within the State (1 M.R.S.A. § 9, subsection 2); and it has in fact exercised this right to tax over all Federal areas in the State. This indicates that Federal jurisdiction should no longer be considered exclusive to the extent that the area not be land within the State for residence purposes.

It seems logical to say that where States are exercising the right to tax residents of such areas, the residents are entitled to the rights and privileges of residents of the State on the theory that the State should not acknowledge them on the one hand as State residents for tax purposes, and on the other hand deny them the right to vote.

The right to vote depends on whether the individual has met the requirements of the Constitution and State statutes. If the State exercises jurisdiction over a Federal area sufficient to justify a holding that it remains a part of the State for certain purposes, then a person residing therein is entitled to vote in the State by virtue of this constitutional right.

Arapajolu v. McMenamin (Calif.) 249 P. 2d 318

Adams v. Londeree (W. Va.) 83 S.E. 2d 127

In *Rothfels v. Southworth* (Utah) 356 P. 2d 612, the court stated that it was not impressed with the fiction that a Federal reservation is, in effect, an "island" and not within the State, and that although that idea may have some validity for some purposes, the purpose of preventing citizens from voting is not one of them. It resolved any doubt in favor of the right to vote and held that civilian employees on Federal bases were entitled to vote in the State if they satisfy length of residence requirements.

Since residents of Federal areas within the State are obliged to pay the State income tax and other State taxes, as provided by State law (the right to levy State sales, use and income taxes being specifically granted by the "Buck Act" 4 U.S.C.A.§§ 105-110, and to levy a State tax on gasoline and motor fuels by the Lea Act, 14 U.S.C.A.§104) it would seem that the denial of the right to vote is a violation of the United States and State Constitutions.

See *Cornman v. Dawson,* 295 F. Supp. 654, holding that where plaintiffs (residents of a federal enclave) were treated by the State as residents for payment of State sales, gasoline and income taxes, it was a violation of the Fourteenth Amendment for the State to deny them the right to vote.

Both the Maine Constitution (Art. II,§1) and statutes (21 M.R.S.A.§242) provide that members of the armed forces may not establish a voting residence by being

stationed in any "garrison, barracks or military place" in a municipality. It is significant that civilians living thereon are not so excluded, and we conclude that it has never been the intention of the people of this State to deprive these individuals of the right to vote, in either local or State elections.

The opinions of this office dated September 7, 1956 and July 1, 1958, are no longer applicable to the present situation with respect to Federal reservations within this State; and civilian residents thereof who are otherwise qualified under State law for registration and enrollment to vote may establish their voting residence thereon and be registered and enrolled in the municipality within whose physical boundaries they so reside.

JAMES S. ERWIN
Attorney General

February 6, 1970
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Taxability of Distribution of Capital Assets of Corporation Under Real Estate Transfers Law – 36 M.R.S.A.§§4651-4654

SYLLABUS:

A DISTRIBUTION OF CAPITAL ASSETS IN THE FORM OF REAL PROPERTY REPRESENTED BY DEEDS FROM THE CORPORATION TO THE STOCKHOLDERS IS NOT SUBJECT TO THE TAX ON REAL ESTATE TRANSFERS. (36 M.R.S.A.§§ 4651-4654).

FACTS:

A corporation distributes to its 5 shareholders capital assets in the form of real property represented by deeds from the corporation to the individual shareholders. The value of the real property distributed was appraised by competent appraisers and the distributees either paid or received in cash the difference between the distributive share of the capital assets and the appraised value of the property deeded to them as capital distributions. In some instances there was no difference between the distributive share and the appraised value of the property deeded. In one instance the real property received by a distributee was appraised at $2,000 more than the distributive share. The distributee paid the corporation $2,000 to offset this additional value.

QUESTION:

Are any of these transactions taxable under the Real Estate Transfers Law (36 M.R.S.A.§§4651-4654)?

ANSWER:

No.