STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

REASONS:

29 M.R.S.A. § 832 expressly required that a dealer, loaner or transporter of certain specified vehicles must obtain an insurance policy which insures *"against any legal liability . . . for personal injury or death . . . and against property damage . . . which injury, death or damage may result from or have been caused by the operation of any vehicle bearing such registration plates."* (Emphasis supplied.)

Such language clearly encompasses operation by a customer of a vehicle bearing the dealer, loaner or transporter's plates. The internal language sounds in all-inclusive terms, i.e., "against any legal liability." The sole limitation is that the "injury, death or damage" must "result from or have been caused by the *operation of any vehicle bearing such registration plates."* Thus, it is compulsory liability insurance to protect the public from injury or damage from the operation of one of the specified vehicles belonging to a dealer, loaner or transporter while the vehicle bears the registration plates of the dealer, loaner or transporter.

Furthermore, the essential nature of this statute demonstrates that the basic purpose of this statute was to provide broad public protection and not merely dealer protection. This statute contemplates the licensing of specified vehicles of a person engaged in the business of selling, loaning or transporting such vehicles with the obvious main purpose of making them available for operation by their customers. Since the purpose of such licensing is to facilitate *general business public* use, and not merely a private individual's use, is clear beyond cavil that the Legislature was not concerned with *dealer operation* protection but with *public protection.*

Accordingly, both the obvious and dominant legislative purpose and the sweeping language of the statute establish that a policy which fails to provide insurance protection while the vehicle of a dealer, loaner or transporter is being operated by a customer with the vehicle bearing the registration plates of the dealer, loaner or transporter does *not* meet the requirements of 29 M.R.S.A. § 832.

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Assistant Attorney General

June 1, 1972
Education

Carroll R. McGary, Commissioner

Non-Eligibility of Theological Seminary to Receive Moneys from a State Tuition Equalization Fund.

SYLLABUS:

The Council on Higher Education for Maine is not legally authorized to approve grants to seminary students under the Act Establishing an Equalization Fund for Maine Students Entering Maine Private Colleges, which Act has as its purpose the preservation of private colleges, when such seminary: (1) issues degrees in theology, divinity or religious education; and (2) has as its corporate charter purpose the promotion of religion; and (3) which states that its primary purpose is to provide professional training

for the pastoral ministry. Such findings, when based on a placement procedure giving priority to institutions demonstrating a reduced enrollment, results in advancement of the seminary's purpose, viz, religion; and is in violation of decisional law.

FACTS:

In special legislative session, the 105th Legislature enacted a provision entitled: "AN ACT Establishing an Equalization Fund for Maine Students Entering Maine Private Colleges", containing the following language:

"Tuition Equalization Fund. There is appropriated from the Unappropriated Surplus of the General Fund to the Department of Education the sum of $150,000 to establish a Tuition Equalization Fund to be distributed to Maine students entering accredited Maine private colleges. The allocation of these places to private colleges will have the following priority: The greatest number of places shall be in those institutions which can demonstrate a reduced enrollment against the base year 1969-70. Students eligible for grants are those whose family income, as measured by taxable income for federal income tax purposes, is below $10,000. Individual grants shall be no more than $800. The selection of the grant recipients shall be made by the Council of Higher Education for Maine. The sum appropriated shall be expended for school grants for the school year 1972-1973." *P. & S.L. 1971, c. 181* (L.D. No. 2032)

The reference Act contained the following statement of fact:

"The University of Maine was unable to accept a great number of Maine applicants while Maine's accredited private colleges have a total of 1,000 unfilled places.

"It is necessary that the private colleges in Maine be preserved by providing space and choice for Maine students who desire to attend college in Maine and to provide such service at the lowest possible cost to the taxpayers." *Legislative Document No. 2032.*

No limiting language appears in the Act, nor in the statement of fact attached to the Legislative Document, respecting use of grant funds for students enrolled in a course of study leading to a degree in theology, divinity or religions education. At the regular session of the 105th Legislature, Legislative Document No. 836 entitled: "AN ACT Appropriating Funds for Educational Costs for Maine Students in Private Schools of Higher Education", was indefinitely postponed. The purpose of that measure was like the purpose of the Act passed in special session. Legislative Document No. 836 had a statement of fact somewhat similar to that in L.D. 2032, but contained a provision precluding the payment of grants to a student enrolled in a course of study leading to a degree in theology, divinity or religious education:

"* * * .

"1. Religious study. No grant shall be made under this Chapter to any student who is enrolled in a course of study leading to a degree in theology, divinity or religious education or who is a religious aspirant. * * * ." *L.D. No. 836, § 1.*

The Council on Higher Education for Maine has selected grant recipients under the provisions of the Act (P. & S.L., 1971, c. 181). At an April 27, 1972 meeting, the Council voted that the Bangor Theological Seminary, which is an accredited institution, was eligible for funding under the provisions of the Act. Bangor Theological Seminary is organized for the purpose of training Protestant clergymen. The Commissioner of Education seeks an opinion of the validity of the Council's action.

QUESTION:

Is Bangor Theological Seminary an eligible institution for student assistance under the Act Establishing a Tuition Equalization Fund for Maine Students Entering Maine Private Colleges?

ANSWER:

No.

REASONS:

The question is not whether the Act is constitutional, but whether the Council may legally grant State funds to eligible students, attending Bangor Theological Seminary, under the purposes for which the Act was passed. Clearly, the Legislature intended that the Act serve the purpose of preserving the private colleges in Maine through a placement procedure allocating grants to eligible students, giving priority to those institutions demonstrating a reduced enrollment against the base year 1969-1970. It is fact that the Bangor Theological Seminary possesses the power to confer a degree in divinity. *P. & S.L., 1905, c. 192.*

The test formulated by the Supreme Court of the United States to determine whether a legislative enactment violates the Establishment Clause of the First Amendment is binding on the Maine Supreme Judicial Court. *Opinion of the Justices* (Me., 1970), 261 A.2d 58. That test, set forth in *School District of Abington Township, Pennsylvania, et al v. Schempp* (1963). 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, is as follows:

> "What are the purpose and the primary effect of the amendment? If either is the advancement or inhibition or religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

In *Opinion of the Justices,* supra, the Maine House of Representatives sought advice of the Maine Law Court respecting the constitutionality of a proposed non-public elementary education assistance act. That act intended to authorize administrative units of the state to contract for secular education service in non-public elementary schools. Four of the Justices were of the opinion that the proposed act was unconstitutional; two of the Justices were of the opinion the act was constitutional. Although the act which is the subject of this opinion relates to institutions of learning beyond the public secondary level, the ruling by the Law Court in *Opinion of the Justices,* supra, is significant. The Court noted that that purpose of the proposed legislation on the subject of non-public elementary education assistance was to subsidize those sectarian schools, the closing of which would cast an increased student burden on the public school system. *Such subsidization constituted an assurance of continuance of the school for the purpose for which the school existed, viz, advancement of the faith it represented.* The net result, said our Law Court, was that the State invaded the sectarian school system in a manner which violated the independence to which it was constitutionally entitled. That, said the Court, worked a result of non-neutrality. An examination of the provisions of the Act establishing a tuition equalization fund for Maine students entering Maine private colleges evidences a legislative intention *to assist and preserve private educational institutions of higher learning in the State.* The legislation gives priority to those private

colleges showing a reduced enrollment. Thus, the determination of eligibility of grants made by the Council on Higher Education in Maine is not rested solely upon a basis of student need, although that is an important condition in the Act, but is also based upon demonstrated reduced enrollment of the private college. To that extent, the situation is distinguishable from the federal "G.I. Bill" grants, so-called.

While we may accept as fact that Bangor Theological Seminary offers a two-year program in the liberal arts and sciences, such courses qualify the student "for admission to the Theological Department" of the Seminary. *1971-72 Bangor Theological Seminary Catalog,* p. 65. In addition, the reference two-year course of studies make up the "Pre-Theological Department" of the Seminary; which curriculum is based upon subjects recommended by the American Association of Theological Schools. *Ibid.* Because the purpose for which Bangor Theological Seminary exists is the advancement of religion, the language in *Opinion of the Justices,* supra, seems material.

> "Applying the Schempp test, the purpose and primary effect of L.D. 1751 is to subsidize those sectarian schools, the closing of which would cast an increased student burden on the public school system as measured under section 3804. Such subsidization by its assuring the continuance of the school assures the continuance of the purpose for which the school exists, – advancement of the faith it represents. The net result of all of this is for the State to invade the sectarian school system in a manner which violates the independence to which it is constitutionally entitled. The result is not the neutrality required by the Constitution." *261 A.2d at 67.*

Note the similarity between the purpose present in the legislation reviewed in *Opinion of the Justices* (assurance of the continuance of sectarian schools) and the purpose of the present Act (preserve private colleges demonstrating reduced enrollments).

In the recent case of *Tilton v. Richardson* (1971), 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790, the Supreme Court of the United States determined that the Higher Education Facilities Act of 1963 providing federal construction grants for college and university facilities, excluding "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity", was constitutional because the Act had neither the purpose nor the effect of promoting religion. The Act benefited colleges and universities, though possessing religious affiliations, but excluded any facility used or to be used for sectarian instruction primarily connected with any part of the program of a school or department of divinity. *Tilton v. Richardson,* supra, lists the three main concerns against which the Establishment Clause sought to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity", quoting *Wallz v. Tax Commissioner* (1970), 397 U.S. 664.

The crucial question in this instance is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion. *Tilton v. Richardson,* supra, at 403 U.S. 679. On the factual basis that Bangor Theological Seminary has for its stated purpose the training of protestant clergymen, it seems clear that any interpretation of the Act by the Council on Higher Education for Maine resulting in grants to that Seminary based upon demonstrated reduced enrollment results in an advancement of religion.

Although it is fact that the Legislature did not specifically exclude grants to a student enrolled in a course of study leading to a degree in theology, divinity or religious education, it is also fact that the Legislature did not specifically authorize the Council of Higher Education for Maine to consider such grants; and in the absence of such statutory

authorization, it could be placing an unconstitutional interpretation upon the Act for the Council to include grants to students enrolled in courses of study leading to degrees in theology, divinity or religions education. Especially is this so in light of the decision of the Maine Law Court in *Opinion of the Justices,* supra, and in view of the decision by the Supreme Court of the United States in *Tilton v. Richardson,* supra.

In writing this opinion, attention has been given to the following additional factors:

1. The charter of the Bangor Theological Seminary is found in the Laws of Massachusetts, Volume 6 (1812-1815). At the time of incorporation, the Bangor Theological Seminary was known by the name "The Maine Charity School".* The corporate charter established the entity for the following purpose:

> " * * * .
>
> "for the purpose of *promoting religion* and morality, and for the education of youth in such languages and in such of the liberal arts and sciences, as the trustees thereof shall, from time to time, judge the most useful and expedient for the purposes of said Seminary, and as they may accordingly order and direct." *Laws of Massachusetts,* Volume 6, p. 421. (Emphasis supplied.)

Although the charter of the corporation was amended in 1891, 1905 and 1931, the purposes quoted above were not altered except to the extent that the Private and Special Laws of 1905 authorized the corporation to confer the Degree in Divinity. *P. & S.L., 1905, C. 192.*

2. The excellent "History of Bangor Theological Seminary", authorized by Calvin M. Clark (the Pilgrim Press, copyright 1916), reports that although the word "theological" nowhere appears in the charter of the Seminary, the chief purpose of the institution was to fit students for the ministry. *Id.,* p. 25.

3. The 1971-1972 Bangor Theological Seminary catalog states that: "The Seminary's *primary purpose* is to provide professional training for the pastoral ministry." *Catalog,* p. 15. (Emphasis mine.) The Seminary's proud history is reported between pages 23 and 24 of the Catalog. There, it is reported that the purpose for creation of the Seminary "was primarily the preparation of men for the gospel ministry in what was then the Province of Maine." *Id.,* p. 23.

It appears from all the facts that the main purpose of the Bangor Theological Seminary is religious; and that the principles of law existing in *Tilton v. Richardson* and in *Opinion of the Justices* bar the Council from approving grants under the reference Act to students attending the Seminary. Also see *Canisius College of Buffalo v. Nyquist* (1971), 36 A.D.2d 340, 320 N.Y.S.2d 652. In that case, it was fact that *no degrees* were awarded in the field of religion. (No denominational tenet or doctrine was taught in the manner or dogmatism or indoctrination. Although the college had been founded by priests of the Catholic Church, the college was never operated as an agency of the Catholic Church or its hierarchy, or of any other church or denomination, nor had it ever received any financial support from any church.) By comparison, Bangor Theological Seminary possesses degree-granting authority in the field of religion.*

The best evidence showing the intention of the early trustees respecting the corporate purpose ("religious"), and of the desire for independence by the Seminary, viz, to be left alone by the Legislature, is found in Calvin M. Clark's work noted earlier.

* In 1887, the Maine Legislature authorized the corporation to use the name "Bangor Theological Seminary." *P. & S.L., 1887, c. 19.*

* The Seminary offers the following degrees: (1) Master of Divinity (M. Div.), and (2) Bachelor of Religious Education. *Seminary Catalog,* p. 15, 40, 63.

" 'Let any man, acquainted with the subject of charters, look at this [one], and then say, whether it would be wise in us to surrender it. It secures to us all the privileges and immunities which can be desired – and *it is free from legislative embarrassments;* a circumstance of unspeakable moment, in these days of asperity and opposition to the truth. Ask the legislature of Maine, or of Massachusetts, at the present time, for an Instrument like the one before us, and what would be their reply? The religious institutions of the present day are looked upon with a jealous eye. In some of the States they are unable to obtain charters of any description. In others, they are obtained only with extreme difficulty, and, after all, are so entangled with legislative interference and restrictions, as to be little better than useless.' " *Id.*, at p. 25-26.

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June 7, 1972
Indian Affairs

S. Glenn Starbird, Jr. DEPUTY COMMISSIONER

Easements on Indian Island

SYLLABUS:

Utility easement across Indian Reservation can be granted only by State Legislature. Contracts signed by individual Indians resident upon the reservation are void.

FACTS:

Individual members of the Penobscot Indian Tribe signed "easement contracts" in 1931 with the Bangor Hydro-Electric Co. Electric power transmission lines and towers have been constructed across Indian Island along a course specified in the several "easement contracts".

The contracts in question all bear the statement "the easements herein granted being subject to the approval of the Agent for the Penobscot Indians". Although the contracts provide a space for signing by the Indian agent, beneath the word "approved", none bear his signature.

QUESTION NO. 1:

Is it legally effective for a Penobscot Indian to grant an easement across his land on the Penobscot Reservation?

QUESTION NO. 2:

If the easements are invalid, how can they be made valid?